STATE OF MICHIGAN

COURT OF APPEALS

46TH CIRCUIT TRIAL COURT,

Plaintiff/Counter-Defendant/Third-Party-Plaintiff-Appellee,

v

CRAWFORD COUNTY and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants/Counter-Plaintiffs/Third-Party-Plaintiffs-Appellants,

KALKASKA COUNTY,

Third-Party-Plaintiff/Counter-Defendant-Appellant,

and

OTSEGO COUNTY,

Third-Party-Defendant-Appellee.

FOR PUBLICATION
May 3, 2005
9:05 a.m.

No. 254179
Crawford Circuit Court
LC No. 02-005951-CZ

CRAWFORD COUNTY and KALKASKA COUNTY,

Plaintiffs-Appellants,

v

OTSEGO COUNTY,

Defendant-Appellee.

No. 254180
Otsego Circuit Court
LC No. 02-010014-CZ

46TH CIRCUIT TRIAL COURT,

Plaintiff/Counter-Defendant/Third-Party-Plaintiff-Appellee,

v

No. 254181
Crawford Circuit Court
LC No. 02-005951-CZ

CRAWFORD COUNTY and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants/Counter-Plaintiffs/Third-Party-Plaintiffs,

KALKASKA COUNTY,

Third-Party-Plaintiff/Counter-Defendant,

OTSEGO COUNTY,

Third-Party-Defendant-Appellee,

and

COHL STOKER TOSKEY & MCGLINCHEY PC,

Appellant.

CRAWFORD COUNTY and KALKASKA COUNTY,

Plaintiffs,

v

No. 254182
Otsego Circuit Court
LC No. 02-010014-CZ

OTSEGO COUNTY,

Defendant-Appellee,

and

CHOL STOKER TOSKEY & MCGLINCHEY PC,

Appellants.

46TH CIRCUIT TRIAL COURT,

Plaintiff-Appellee,

v

CRAWFORD COUNTY,

Defendant-Appellant,

CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendant/Counter-Plaintiff/Third-Party-Plaintiff-Appellant,

KALKASKA COUNTY,

Third-Party-Plaintiff/Counter-Defendant-Appellant,

and

OTSEGO COUNTY,

Third-Party-Defendant-Appellee.

Nos. 256129; 257234
Crawford Circuit Court
LC No. 02-005951-CZ

Official Reported Version

Before: Zahra, P.J., and Neff and Cooper, JJ.

COOPER, J.

Kalkaska County, Crawford County, and the Crawford County Board of Commissioners (the Counties) appeal as of right in these consolidated appeals from various orders and the judgment entered by Judge Dennis Kolenda (the lower court) in the litigation pursued by the 46th Circuit Trial Court (the Trial Court) seeking adequate funding. The Counties also appeal from various orders entered in the related suit filed by the Counties against Otsego County, the control unit for the Trial Court. We affirm.

I. Facts and Procedural Background

These consolidated cases arise out of a funding dispute between the Trial Court and two of its funding units—the Counties. A detailed narrative of much of the history of this case is

provided in *46th Circuit Trial Court v Crawford Co*,[1] an opinion issued by this Court following an interlocutory appeal. In that appeal, this Court affirmed the lower court's award of attorney fees to the Trial Court based the Trial Court's inherent power to seek adequate funding. While that appeal was pending, however, this case proceeded in the lower court.

The 46th Circuit Trial Court was created by order of the Michigan Supreme Court as an experiment in consolidating the various levels of trial courts into one, unified trial court system.[2] The 46th Circuit Trial Court was the only multi-county experimental court created and included Otsego, Crawford, and Kalkaska counties. During the early stages of unification, the Trial Court concluded that all employees, regardless of the county in which they physically worked, should earn equal pay and receive equal benefits. Wages needed to be redetermined, as many positions had been eradicated and others had taken on consolidated functions. Consequently, in the summer of 2000, Chief Judge Alton Davis asked the employees to make cost-saving concessions to serve as a bargaining chip in securing the funding units' approval of a retiree healthcare plan and an improved pension plan. The employees agreed to phase out longevity pay and dedicate a portion of all future wage increases to fund the retiree benefits package. Employees also agreed to accept a cost-saving health care insurance plan that offered less coverage and had a higher prescription co-pay. Following the funding units' passage of resolutions approving these plans, the Trial Court implemented the employee concessions at substantial savings to the Trial Court and its funding units.

During the August 29, 2000 meeting, at which the Crawford County Board of Commissioners passed resolutions approving the plans, the commissioners voiced their concerns about becoming financially responsible for potential future unfunded liability and over the low figure represented as the annual retiree payment cap.[3] Judge Davis promised to put a "failsafe" provision in writing to outline the method of handling any unfunded liabilities. Despite these concerns, the Board passed the following resolutions at the conclusion of the meeting:

> MOTION by Hanson, seconded by Beardslee, to authorize the County [to] pay 24% of $50,000 ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be capped at [sic] the year 2000 at $4,087.00 [and] would increase at 4% per year until 2017 for an employee to be eligible for $7,654.00 per year.

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[1] *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477; 682 NW2d 519 (2004), lv held in abeyance 687 NW2d 297 (2004) (pending the resolution of these consolidated appeals).

[2] As will be discussed in further detail later, the "demonstration project" status of the Trial Court ended in 2004; however, the Trial Court continues to function as a unified court system.

[3] Judge Davis told the Board that each retiree would be entitled to $4,087 per year; however, the Board was aware that the correct figure was over $1,000 more.

> MOTION by Wieland, seconded by Hanson, to request the [Trial] Court [to] not implement the MERS B-4 upgrade at this time, but recognize the change in the 2001/2002 budget cycle.

Later that day, Judge Davis learned that the correct figure for the annual retiree payment was over $5,000, and immediately informed the Crawford County Board of Commissioners of his error.[4]

Following this meeting, the Trial Court created a comprehensive contract outlining the retiree benefits package to serve as an informative guide for the Trial Court and its employees. The contract also included the promised memorialization of the "failsafe" provision. Kalkaska and Otsego counties immediately signed the contract, but Crawford County refused. The Crawford County Board of Commissioners consulted with its auditor and labor counsel after approving the retiree benefits package and was advised that its approval was unwise. Crawford County was in the middle of a budget crisis and had been forced to cut many county services. As a result, the Board claimed that it had not approved the pension plan and was induced to approve the retiree healthcare plan by the Trial Court's misrepresentation of cost. This led to Crawford County's refusal in FY 2001, 2002, and 2003 to appropriate the full amount of their 24% of the Trial Court's requested operating budget.[5] Although Kalkaska County initially approved of the retiree benefits package and fully funded the Trial Court, it soon followed suit by rescinding its earlier resolutions and cutting appropriations.

Following lengthy negotiations with its funding units, the Trial Court filed suit against the Counties, seeking the enforcement of the contract to implement the retiree benefits package and adequate funding based on the constitutional theory of inherent powers. The Counties filed a counterclaim for declaratory judgment regarding their duty to fund the Trial Court and defended against the contract claims based on fraud. Otsego County was brought into the litigation by the Counties, which also filed a separate suit against it. The Counties asserted that Otsego County, as the Trial Court's control unit, had violated the Uniform Budgeting and Accounting Act (UBAA)[6] by disbursing funds to the Trial Court in excess of appropriations. The Counties also raised a fraud claim against Otsego County. The Counties' fraud defense and all claims against Otsego County were dismissed before a trial on the merits began. Following a six-day trial in the summer of 2003, the lower court ruled in favor of the Trial Court on both its contract and constitutional theories in pursuit of funding.[7]

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[4] This incorrect figure was never presented to Kalkaska County.

[5] Crawford County only fully funded the Trial Court in FY 2004, in exchange for the Trial Court's voluntarily dismissal of an additional funding claim for that year. Crawford County has fully funded the Trial Court in FY 2005.

[6] MCL 141.421 *et seq.*

[7] Further facts necessary to this appeal will be discussed throughout this opinion where appropriate.

II. Contract Claims

The lower court determined that the resolutions passed by the funding units created an explicit contract with the Trial Court to implement the retiree benefits package. Even if the parties had not formed a contract, the lower court determined that one could be implied. On appeal, the Counties contend that the lower court improperly interpreted the Crawford Board's resolution regarding the retiree healthcare plan as a valid acceptance, rather than a counteroffer. The Counties also contend that the Crawford Board's resolution regarding the pension plan was not an approval of the plan, but showed the Board's intent to table all discussion until the following year. We disagree.

The lower court correctly determined that Crawford County approved the retiree benefits package and formed a valid contract with the Trial Court for its implementation. Issues of contract interpretation are questions of law that we review de novo.[8] Issues regarding the formation of a valid contract are all questions of fact,[9] which we review for clear error.[10] The interpretation of a county resolution, like the interpretation of a statute, is a question of law, which we review de novo.[11]

We reject the Counties' contention that the resolutions passed by the Crawford County Board of Commissioners did not amount to a valid acceptance of an offer to implement the retiree benefits package. "'Decisions regarding the legitimacy of an offer and acceptance revolve around the particular facts pertaining to a specific transaction . . . .'"[12] "'[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, . . . through voluntarily undertaking some unequivocal act sufficient for that purpose.'"[13] The acceptance must be unambiguous and strictly conform to the essential terms of the offer.[14] The Trial Court correctly asserts that the essential term of the offer

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[8] *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

[9] See *In re Costs & Attorney Fees*, 250 Mich App 89, 97; 645 NW2d 697 (2002) (*Costs I*) (regarding whether a legitimate offer has been made and accepted forming a valid contract); *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992) (regarding whether a promise was consideration for a contract).

[10] MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[11] *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

[12] *Costs I, supra* at 97, quoting *Patrick v US Tangible Investment Corp*, 234 Mich App 541, 549; 595 NW2d 162 (1999).

[13] *Id.*, quoting *Kraus v Gerrish Twp*, 205 Mich App 25, 45; 517 NW2d 756 (1994).

[14] *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997); *Giannetti v Cornillie*, 204 Mich App 234, 237; 514 NW2d 221 (1994), rev'd on other grounds 447 Mich 998 (1994) (only a material departure from the terms of the offer invalidates an acceptance).

to implement the retiree healthcare plan is the required annual appropriation, which would be 24% of $50,000 for Crawford County. The Crawford County Board of Commissioners clearly agreed to this term in the resolution. The annual payment cap was not an essential term. The change in amount did not affect the overall appropriation of the funding units. Therefore, this error was not a material deviation from an essential term and Crawford County's resolution was a valid acceptance.

Furthermore, the initial error in the representation of this figure did not negate the mutual assent of the parties. Fraud in the inducement is a defense to the formation of a contract. However, the claimant must prove that it actually relied upon a material misrepresentation.[15] The alleged "misrepresentation" was not material. Additionally, as will be discussed in great detail later, the lower court properly dismissed the Counties' fraud defense before trial due to a lack of actual reliance.

We also disagree with the Counties' contention that the second Crawford County resolution did not approve of the pension plan. The only evidence supporting the Counties' claim is a series of affidavits by the individual commissioners stating their actual intent in passing the resolution. A county board speaks only through its official minutes and resolutions and their import may not be altered or supplemented by parol evidence regarding the intention of the individual members.[16] The clear language of the second resolution shows the Board's intent to approve of the plan, but delay its implementation until the following cycle.

We also reject the Counties' contention that Crawford County's failure to sign the written contract outlining the retiree benefits package vitiated the existence of a contract. The official minutes and resolutions of the August 29, 2000 meeting memorialize the agreement of the parties. They officially voted to approve the retiree benefits package and the Trial Court relied on those resolutions to the detriment of its employees. While Judge Davis created a formal written contract regarding the retiree benefits package, Crawford County's signature on this extraneous writing was not required as evidence of the agreement.[17]

The Counties also argue that any continued duty to perform under the contract ended when they passed resolutions rescinding their prior approval of the retiree benefits package.

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[15] *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

[16] *Tavener v Elk Rapids Rural Agricultural School Dist*, 341 Mich 244, 251; 67 NW2d 136 (1954), quoting *Stevenson v Bay City*, 26 Mich 44, 45 (1872).

[17] We reject the dissent's assertion that the contract between the Counties and the Trial Court to implement the retiree benefits package lacked consideration as counties have a preexisting statutory duty to fund the courts. The Trial Court's employees supplied the consideration for this contract by giving up rights to which they were otherwise entitled in order to secure the Counties' agreement to the benefits package.

However, a party to a contract may not unilaterally modify or waive a contract.[18] Finally, we reject the Counties' contention that the contract was invalid because its term exceeded the term of the current Board. There are many administrative functions that must be handled on a day-to-day basis that may require contracts lasting longer than the normal term of office.[19] If a successor board had the power to repudiate these types of contracts at will, a government entity's ability to do business would be compromised.[20] Accordingly, the lower court properly determined that the Trial Court had formed a valid contract with its funding units to implement the retiree benefits package.

III. Right to Seek Adequate Funding Based on Inherent Powers

The lower court also determined that the Trial Court had the inherent power to file suit seeking adequate funding from the Counties. Whether the Trial Court has the inherent power to compel the Counties to fund its retiree benefits package is a constitutional question, which we review de novo.[21] In discussing a court's inherent power to seek adequate funding, this Court reasoned as follows in the previous appeal:

> The principles the lower court relied on in this regard have been accepted in Michigan for at least the last thirty-five years. In *Wayne Circuit Judges v Wayne Co*, 383 Mich 10, 33; 172 NW2d 436 (1969) (*Wayne I*), Justice Black, with Justice Dethmers concurring, noted the "unanimous" authority that a court charged with the responsibility for judicial service "receives and accepts with that responsibility the inherent power and duty to take such action as is reasonably necessary to fulfil the constitutional obligation thus undertaken." On rehearing two years later, the Supreme Court adopted the Black-Dethmers opinion as the opinion of the Court, noting that it had been "authenticated" by decisions handed down by the supreme courts of Missouri and Pennsylvania:

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[18] *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003); *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 564-565; 595 NW2d 176 (1999).

[19] See *Harbor Land Co v Grosse Ile Twp*, 22 Mich App 192; 177 NW2d 176 (1970) (finding that a township board had the power to enter into a long-term contract for the construction and operation of a waste treatment plant).

[20] As we affirm the lower court's determination that an express contract existed to implement the retiree benefits package, we need not reach the lower court's alternate determination that an implied contract existed. However, we note that, if necessary, a contract could be implied under the circumstances to prevent the Counties' unjust enrichment as the Trial Court's employee concessions had already been implemented. See *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

[21] *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

"In view of the developing strength of the principle of inherent power and duty of the judiciary, called into play as it was by the opinion of Justices Dethmers and Black aforesaid, this Court is constrained on rehearing to adopt that opinion; adding only that the judiciary . . . *must* stand foursquare in support of the constitutional doctrines which, most recently in the [*Commonwealth, ex rel Carroll v Tate*, 442 Pa 45; 274 A2d 193 (1971)] case, were declared. 'Must' we have accented, just as the *Tate* Court stressed 'must possess' in this terse and pointed summary of constitutional necessity . . . :

'Expressed in other words, the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized not only in this Commonwealth but also throughout our Nation.'" [*Wayne Circuit Judges v Wayne Co*, 386 Mich 1, 8-9; 190 NW2d 228(1971) (*Wayne II*), quoting *Tate*, *supra* at 52.]

A more recent and oft-cited discussion of the inherent power doctrine is found in *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705; 378 NW2d 744 (1985) [*Hillsdale*]. The opinion of the majority agreed with the dissenting justices that "an inherent power analysis is implicated when judicial functions are in jeopardy" and reiterated that the "Court has stood 'foursquare' in support of the constitutional doctrine of inherent power" while concluding that the doctrine was not implicated under the facts of the case at hand. *Id.* at 724.

In a dissent concurred in by two other justices, Justice Riley noted that, "'irrespective of specific grant by constitution or legislation,'" the inherent power doctrine supplies "'authority to incur and order paid all such expenses as are reasonably necessary for the holding of court and the administration of the duties of courts of justice.'" *Id.* at 734 (Riley, J., dissenting), quoting 20 Am Jur 2d, Courts, § 78, p 440, and 59 ALR3d, § 2, p 574. Justice Riley explained that

"[t]his inherent authority of the court is nonajudicatory. It does not deal with justiciable matters. It only relates to the administration of the business of the court.

"One aspect of the administration of district and circuit courts is the determination of the operational needs of the court and the establishment of a budget to provide for these needs." [*Hillsdale*, *supra* at 734-735.]

It is clear from these and other precedents, see, e.g., *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 299-300; 586 NW2d 894 (1998); *Livingston Co v Livingston Circuit Judge*, 393 Mich 265, 273; 225 NW2d 352 (1975); *Ottawa Co Controller v Ottawa Probate Judge*, 156 Mich App 594, 602-603; 401 NW2d

> 869 (1986); [*17th Dist Probate Ct v Gladwin Co Bd of Comm'rs*, 155 Mich App 433, 451-452; 401 NW2d 50 (1986) (*Gladwin)*], that a court has inherent power to take whatever steps are reasonably necessary to fulfill the judicial function.[22]

In taking those steps reasonably necessary to fulfill the judicial function, a court must remember that "'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'"[23] A court has the inherent power to seek "financing that is reasonable and necessary."[24] When a court files suit seeking adequate funding, it must show that the funding unit has failed to appropriate funds to allow the court to function "servicably as a co-equal branch of Michigan's government . . . ."[25] This Court defined "serviceability" as follows:

> Serviceability must be defined in the context of Justice Black's opinion, *i.e.* "urgent", "extreme", "critical", and "vital" needs. A serviceable level of funding is the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out. A function funded below a serviceable level, however, will not be fulfilled as required by statute.[26]

The lower court's determination that the Trial Court's requested budget, specifically the requested appropriation for the retiree benefits package, was reasonable and necessary represents a factual finding that we review for clear error.[27] The lower court found that the Trial Court had reduced its staff to the "bare bones" and would be unable to function at a serviceable level if required to make more cuts. The lower court further found that funding the requested benefits was indispensable to serviceability. Many employees had taken on extra duties and all employees had accepted concessions to their detriment. Continuing to operate without the bargained-for retirement benefits package would cause morale to plummet and competent

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[22] *46th Circuit Trial Court, supra* at 488-490.

[23] *Hillsdale, supra* at 717; quoting *United States v Will*, 449 US 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980).

[24] *Gladwin, supra* at 454-455, citing *Livingston, supra* and *Hillsdale, supra*.

[25] *Wayne Circuit Judges v Wayne Co*, 383 Mich 10, 33; 172 NW2d 436 (1969) (*Wayne I*) (opinion by Black, J.).

[26] *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs*, 93 Mich App 114, 124; 286 NW2d 62 (1979). See also *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 148 Mich App 702, 708; 385 NW2d 267 (1983).

[27] MCR 2.613(C); *Alan Custom Homes, supra* at 512. See also *Gladwin, supra* at 456-457.

employees to take alternate employment, leading to a decrease in productivity. These findings were based on the record evidence and were not clearly erroneous.

The Counties' contention that the Trial Court's budget request was excessive and unreasonable in light of the state of the Counties' budgets is without merit. Although the Counties assert that they were financially unable to fund the Trial Court at the requested level, they have not demonstrated that the requested funds were necessary to fund other "obligations having the same rank and priority . . . ."[28] Second, the Trial Court presented evidence that certain employees in each of the funding units received identical pension benefits.[29] Third, the Trial Court was not required to select a retiree benefits package consistent with that provided by any of the three funding units. Administrative Order No. 1998-5 provides that a court with multiple funding units may implement "a single, uniform personnel policy that does not wholly conform with specific personnel polices of any of the court's funding units."[30] Finally, we note that the lower court's factual determination that the retiree benefits package was a reasonable and necessary expense to the continued serviceability of the Trial Court is consistent with longstanding precedent finding similar court expenses to be within reason.[31] Accordingly, the lower court did not commit clear error by determining that the requested appropriation to fund the retiree benefits package was reasonable and necessary to the continued serviceability of the Trial Court.

IV. Award of Attorney Fees to the Trial Court Based on Inherent Powers

A. Entitlement to Attorney Fees

Early in the litigation, the lower court determined that the Trial Court was entitled to recover its attorney fees expended in seeking adequate funding. The funding units were each required to provide one-third of these fees. As a court has the inherent power to seek adequate funding, it must also have the inherent power to seek attorney fees in order to bring such litigation. These attorney fees are based on the constitutional power of a court, not a party's

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[28] *Wayne Co Prosecutor*, *supra* at 128, quoting *Wayne Circuit Judges v Wayne Co*, 15 Mich App 713, 728-729; 167 NW2d 337 (1969), rev'd in part on other grounds *Wayne I*, *supra*.

[29] See Administrative Order No. 1998-5, § II. 459 Mich clxxvi-clxxvii (1998). See also *Livingston*, *supra* at 288 (dissent by Levin, J.) ("In determining the amounts to be appropriated for judicial needs, a board of commissioners necessarily considers other county needs and the wage levels of other employees paid with county funds.").

[30] Administrative Order No. 1998-5, § VI. 459 Mich clxxxi.

[31] See *Branch Co Bd of Comm'rs v Service Employees Int'l Union, Local 586*, 168 Mich App 340, 349; 423 NW2d 658 (1988); *Ottawa Co Controller*, *supra* (finding that a court has the power to set expenses, such as employee wages, within the funding unit's overall appropriations to the court). See also *Cameron v Monroe Co Probate Court*, 457 Mich 423, 427-428; 579 NW2d 859 (1998) (finding that "the supervision and administration of court personnel is a necessary expense of justice for which the county is expected to pay").

success on the merits. Furthermore, as the policy of this state is to assess interest on awards of attorney fees and costs, the lower court properly determined to assess interest at the statutory rate. The Trial Court was entitled to the fees incurred in litigating all its claims, as the contract claims were part and parcel of the inherent powers funding litigation. The lower court also determined that the Trial Court was entitled to attorney fees under MCL 49.73, which requires a county to secure and fund outside counsel for a county official, including a judge, who is named as a defendant, based on the Counties' counterclaims.

The Counties filed an interlocutory appeal of the lower court's order. In the prior published opinion, this Court affirmed the lower court's order. However, this Court found that MCL 49.73 was inapplicable under the circumstances as the Trial Court had instituted this action.[32] Furthermore, this Court determined that the amount of attorney fees that a court may recover in funding litigation must be limited. Therefore, a court may only recover attorney fees at an hourly rate that was 150% of that charged by its funding unit's counsel, and only 150% of the total fees expended by the funding unit.[33]

The Counties continue to challenge the lower court's order and now contend that the previous published opinion of this Court was erroneous as well. Even if we were to agree with the Counties' challenges, we would be unable to provide any relief. We are bound by the previous published opinion of this Court.[34] We are further bound by the law of the case doctrine.

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case.[35]

Accordingly, we decline to review the Counties' claimed errors.

B. Relieving Otsego County of its Duty to Pay the Trial Court's Attorney Fees

The Counties also challenge the lower court's order relieving Otsego County of its responsibility to fund the Trial Court's attorney fees and reapportioning its duty among the other two counties. Although Otsego County sought to be indemnified by the Counties for its share of

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[32] *46th Circuit Trial Court*, *supra* at 486-488.

[33] *Id*. at 499-501.

[34] MCR 7.215(C)(2); *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). The fact that the Counties appealed this decision to the Michigan Supreme Court, which held the application in abeyance pending the resolution of these consolidated appeals, has no effect on the prior opinion's precedential value. MCR 7.215(C)(2); *Johnson v White*, 261 Mich App 332, 347; 682 NW2d 505 (2004).

[35] *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), citing *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

the attorney fees, the lower court instead determined that it was entitled to relief based on equitable principles. In doing so, the lower court rejected the Counties' attempt to reapportion the fees according to the Trial Court funding formula, under which Otsego County was responsible for the lion's share of the budget.

We review a lower court's decisions in equity de novo and all underlying findings of fact for clear error.[36] "Jurisdiction of the courts of equity is recognized where 'the facts involved in litigation are such that a claimed legal remedy, although available, will not afford adequate relief.'"[37] Otsego County's indemnification claim sounded in tort as it was based on the Counties' "wrongdoing" in failing to fund the Trial Court and instigating this litigation. As the underlying suit is constitutional in nature, such indemnification would be precluded, denying Otsego County adequate relief. Otsego County was brought into this litigation with "clean hands"—it had continually funded the Trial Court at the requested level. Accordingly, it was entitled to the equitable relief granted by the lower court.[38]

Additionally, the lower court properly found that the Counties were not immune from Otsego County's motion to be relieved from its duty to pay the Trial Court's attorney fees. As noted previously, the Trial Court's right to collect attorney fees arose from its constitutional inherent powers. Those powers may not be abridged or restricted by statute, by allowing another governmental unit to be immune while violating that constitutional power.[39]

The Counties also challenged the propriety of the lower court's order as Otsego County failed to present the claim to the Counties' clerks pursuant to MCL 46.11(m). Although the lower court determined that the statute only requires the presentment of claims based on private wrongs, nothing in the plain language of the statute supports that theory. However, it would have been futile for Otsego County to present its claim for relief to the Counties as the Counties continually fought the payment of the Trial Court's attorney fees and were seeking the reapportionment of those fees in their favor.[40]

C. Determining the Reasonableness of the Trial Court's Attorney Fees Without an Evidentiary Hearing

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[36] *Eller v Metro Industrial Contracting, Inc,* 261 Mich App 569, 571; 683 NW2d 242 (2004).

[37] *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 561; 492 NW2d 246 (1992), quoting *Wild v Wild*, 360 Mich 270, 276-277; 103 NW2d 607 (1960).

[38] *Rose v Nat'l Auction Group*, 466 Mich 453, 462-463; 646 NW2d 455 (2002).

[39] *Persichini v William Beaumont Hosp*, 238 Mich App 626, 638-639; 607 NW2d 100 (1999). See also *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987) (opinion of Brickley J.), aff'd sub nom *Will v Michigan State Police,* 491 US 58 (1989).

[40] See *Manor House Apartments v City of Warren*, 204 Mich App 603, 606; 516 NW2d 530 (1994); *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 681; 513 NW2d 217 (1994) (finding that a party need not take futile actions).

In the previous appeal, the Counties challenged the lower court's determination regarding the reasonableness of the Trial Court's requested attorney fees. This Court determined that the Counties forfeited the right to an evidentiary hearing by failing to request one. This Court also determined that the Counties would not be entitled to a hearing, even if one had been requested, because the parties presented a sufficient record from which the lower court could determine the reasonableness of counsel's hourly rates and the hours expended on the litigation.[41]

As the litigation continued, the lower court granted the Trial Court's continuing requests for attorney fees without evidentiary hearings, although requested by the Counties. We review a lower court's determination regarding the necessity of an evidentiary hearing regarding the reasonableness of requested attorney fees for an abuse of discretion.[42] As the Trial Court continually presented evidence of the same nature and quality, the lower court properly determined with each request that the record was sufficient for a review without an evidentiary hearing.

V. Fraud and Innocent Misrepresentation

In defense of the Trial Court's contract claims, the Counties asserted that Crawford County was induced to approve of the retiree healthcare plan, as Judge Davis misrepresented the actual costs of the plan. Specifically, the Counties claimed that Judge Davis represented that the annual payment per retiree would be over $1,000 less than the actual cost. The Counties also asserted that they were induced to approve of the pension plan upgrade without adequate cost information as the Trial Court and Otsego County misrepresented that they did not possess actuarial valuations regarding this plan.

All of these claims were dismissed prior to trial, as they lacked factual support. A letter written by Crawford County Controller, Paul Compo, to the Counties' counsel, Mr. Cohl, on December 17, 2001, became public during discovery. In this letter, Mr. Compo admitted that the Crawford County Board of Commissioners was aware of the correct annual payment figure before passing the resolution approving the plan and included the incorrect figure in the resolution to cause a reaction.[43] Based on this letter, the lower court dismissed the Counties'

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[41] *46th Circuit Trial Court*, *supra* at 502-504.

[42] *Id.* at 502.

[43] The letter states in relevant part:

> [Implementation Order 2000-11] states that each of the funding units had passed resolutions approving the shift in benefits. This is not entirely true. Crawford had passed a motion to approve the caps in retirement health care insurance, knowing the numbers were wrong as a way to "call the [Trial] Court's bluff."

(continued…)

fraud defense against the Trial Court and imposed sanctions upon the Counties and their counsel for filing a frivolous defense. The lower court also dismissed the Counties' claim that the Trial Court misrepresented actuarial valuations regarding the pension upgrade. The Counties learned by records received through a Freedom of Information Act request before this litigation commenced that the Trial Court did not possess any relevant actuarial valuations. None of the valuations analyzed the proposed pension plan and each contained a disclaimer that it was inapplicable to other levels of benefits. The lower court declined to sanction the Counties for raising the defense on this ground.

Before trial, the Counties voluntarily dismissed their fraud claim against Otsego County. In 2001, Otsego County passed a resolution approving the pension plan. This resolution indicated that the approval was based on an actuarial valuation prepared in January of 2001. During discovery, Otsego County admitted that it never possessed the cited valuation and based its resolution approving of the pension plan on form language provided by the Michigan Employees' Retirement System. The lower court sanctioned the Counties and their counsel for raising this claim as the Counties could not allege that they relied on a resolution and actuarial valuation dated *after* their own resolutions approving the pension plan.

The Counties now challenge the lower court's dismissal of their fraud claims against the Trial Court pursuant to MCR 2.116(C)(10).[44] We review a lower court's determination regarding a motion for summary disposition de novo.[45] A motion under MCR 2.116(C)(10) tests the factual support of a party's claim.[46] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[47] Summary disposition is appropriate

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(…continued)

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> The [Trial] Court also included a copy of the minutes for the Special Board Meeting of August 29th, 2000. During this meeting the Board agreed to fund the retirement health care as proposed for 17 years. They did not agree to the terms and conditions outlined in the proposed contract. They agreed to this because they believed the information provided on this issue by the [Trial Court] was erroneous and would cause the [Trial] Court to react.

[44] The lower court actually granted the Trial Court's motion to strike the Counties' fraud defense. However, the lower court based its decision on the lack of factual support for the claims. Accordingly, we will review the lower court's decision as a motion for summary disposition pursuant to MCR 2.116(C)(10).

[45] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[46] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999).

[47] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[48]

> The elements of fraudulent misrepresentation are (1) the [declarant] made a material misrepresentation, (2) the representation was false, (3) when making the representation, the [declarant] knew or should have known it was false, (4) the [declarant] made the representation with the intention that the [induced party] would act upon it, and (5) the [induced party] acted upon it and suffered damages as a result. A claim of innocent misrepresentation is shown if a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation.[49]

The letter from Mr. Compo clearly indicates that the Board knew of the error and purposely included the figure in its resolution. Furthermore, several commissioners admitted at their depositions that they knew of the error or believed the figure was incorrect. Accordingly, the lower court properly dismissed this defense. Furthermore, as the Trial Court actually did not possess any relevant actuarial valuations to disclose to the Counties, the lower court properly dismissed that defense as well.

However, the Counties also challenge the use of Mr. Compo's letter by the opposing parties and the lower court. The Counties assert that the letter was protected by the attorney-client privilege and, therefore, any injustice caused as a result of its use must be remedied. The Trial Court and Otsego County do not dispute that the letter would be protected by the attorney-client privilege;[50] however, they assert that the Counties waived their right to assert that privilege. Whether a party has waived the attorney-client privilege is a question of law, which we review de novo.[51]

The Trial Court and Otsego County first relied upon the letter during Mr. Compo's deposition. The Counties objected to its use at that time; however, neither party could determine how the letter was disclosed. Although the Counties contend that opposing counsel received this letter by improper means, the Counties concede for purposes of this appeal that the letter was disclosed to the opposing parties inadvertently during discovery. Following Mr. Compo's deposition, the Trial Court and Otsego County continually relied on the letter in seeking the dismissal of the Counties' fraud claims and in seeking sanctions for these frivolous claims. However, the Counties failed to reassert their objection to the use of the letter based on the

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[48] *MacDonald, supra* at 332.

[49] *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

[50] As neither party disputes that the letter would be protected by the privilege, we will assume for purposes of this appeal that the privilege applies.

[51] *Leibel v Gen Motors Corp*, 250 Mich App 229, 240; 646 NW2d 179 (2002).

attorney-client privilege until five months after the last fraud claim had been dismissed and three months after the lower court had entered its final judgment on the merits. The attorney-client privilege is personal and may only be waived by the client.[52] The client's waiver of that privilege cannot be predicated upon an inadvertent disclosure; it must be '"an intentional, voluntary act and cannot rise by implication."'[53] While the inadvertent disclosure of the letter did not waive the Counties' right to assert the privilege, the Counties' failure to object over a *prolonged* period of time is a voluntary and intentional act evincing the Counties' waiver of that privilege. Granting the Counties relief now, after their extended acquiescence to the use of the letter throughout this litigation, would result in a waste of judicial time and resources. Accordingly, we affirm all actions taken as a result of the use of this letter.

VI. Standing Under the UBAA

Prior to trial, the lower court sua sponte questioned the Counties' standing to raise claims against Otsego County based on the UBAA. After giving the parties an opportunity to brief the issue, which the Counties neglected to do, the lower court found that the UBAA clearly provides that only the Attorney General or a prosecuting attorney has standing to institute a civil action for a violation of the act.[54] Therefore, the lower court dismissed the Counties' claims to the extent they were based on the UBAA.[55] The lower court also sanctioned the Counties' counsel for filing these claims when the lack of standing was self-evident.

Whether a party has standing is a question of law that we review de novo.[56] Generally, to have standing, "a party must have a legally protected interest that is in jeopardy of being adversely affected."[57] A party raising a claim must have ""some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.""[58] However, the Counties' claims are governed by statute. This Court has already held that, according to the plain language of that statute, the only parties with standing to bring an action

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[52] *Paschke v Retool Industries*, 445 Mich 502, 518 n 15; 519 NW2d 441 (1994), quoting *Passmore v Passmore Estate*, 50 Mich 626, 627; 16 NW 170 (1883); *Leibel*, *supra* at 240.

[53] *Sterling v Keidan*, 162 Mich App 88, 91; 412 NW2d 255 (1987), quoting *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969).

[54] MCL 141.440.

[55] The Counties voluntarily dismissed these claims in their entirety on the first day of trial when they could find no other grounds upon which to base their claims.

[56] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

[57] *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997).

[58] *Id.*, quoting *Bowie v Arder*, 441 Mich 23; 42-43; 490 NW2d 568 (1992), quoting 59 Am Jur 2d, Parties, § 30, p 414.

under the UBAA are the Attorney General and prosecuting attorney.[59] Accordingly, the lower court properly dismissed the Counties' claims against Otsego County for lack of standing.

We also reject the Counties' contention that the lower court should not have raised the issue of standing. The Counties contend that the Trial Court waived its right to raise this defense by failing to include the defense as a motion for summary disposition under MCR 2.116(C)(5) in its first responsive pleading pursuant to MCR 2.116(D)(2). However, this Court has determined that a standing defense need not be raised under MCR 2.116(C)(5); it could also be raised under MCR 2.116(C)(8), which can be raised at any time.[60] Furthermore, we see no need to prohibit a lower court from considering an issue of its own accord, especially where that consideration will prevent further error for our review.[61]

VII. Sanctions for Frivolous Claims and Defenses

The Counties and their counsel challenge the imposition of sanctions for filing a frivolous fraud defense against the Trial Court and for filing a frivolous fraud claim and claims predicated upon the UBAA against Otsego County. We review a lower court's determination that a claim or defense is frivolous for clear error. A determination is clearly erroneous when, although there is sufficient evidence to support it, we are left with a definite and firm conviction that a mistake has been made.[62] Pursuant to MCR 2.114(D), an attorney or party that signs a pleading certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[.]"[63] Sanctions may be imposed on the attorney, client, or both for a violation of this rule. These sanctions "may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorney fees."[64] A party raising a frivolous claim or defense is also subject to costs pursuant to MCR 2.625(A)(2) and MCL 600.2591[65] as follows:

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[59] *Rayford v Detroit*, 132 Mich App 248; 347 NW2d 210 (1984).

[60] See *Kaiser v Schreiber*, 258 Mich App 357, 369-371; 670 NW2d 697 (2003) (opinion by Sawyer, J.), rev'd on other grounds 469 Mich 944 (2003). See also MCR 2.116(D)(3).

[61] See *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004); *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502.

[62] *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

[63] MCR 2.114(D)(2).

[64] MCR 2.114(E).

[65] MCR 2.625(A)(2) directs that costs may be charged pursuant to the statute.

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by asserting the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

* * *

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.[66]

As noted previously, the lower court properly determined that Crawford County had actual knowledge that the annual payment cap represented by Judge Davis was incorrect at the time the resolution was passed. Their counsel learned of this fact one year before the lawsuit was initiated. Accordingly, the lower court properly determined that the Counties' fraud defense against the Trial Court was frivolous at the time it was filed and, therefore, imposed sanctions against both the Counties and their counsel.[67]

Also as noted above, it is clear from the plain language of the UBAA and binding precedent of this Court that the only parties with standing to raise a claim under that statute are the Attorney General and prosecuting attorney. This authority was available long before counsel filed these claims in this litigation. As these were statutory claims, counsel could have no argument that standing was conferred on any other ground. Accordingly, the lower court also properly imposed sanctions against counsel for filing the UBAA claims against Otsego County.

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[66] MCL 600.2591.

[67] The dissent argues that these sanctions are duplicative as the Counties were already required to pay the Trial Court's attorney fees and costs and, therefore, were unnecessarily punitive and a waste of taxpayer dollars. However, neither the court rule nor the statute makes a distinction between attorneys for private, versus public, clients. A careful review of the record in this case would indicate that both the proceedings before the lower court and this Court were entirely frivolous. These sanctions are designed to reimburse counsel for excess work necessitated by such meritless claims and were properly imposed.

The Counties and their counsel also challenge the lower court's imposition of sanctions without first holding an evidentiary hearing. As noted above, the Trial Court presented a sufficient record from which the lower court could determine the reasonableness of its fees without an evidentiary hearing. Otsego County presented an identically sufficient record, including detailed billing statements and affidavits of counsel.[68] Therefore, no evidentiary hearing was required to determine the reasonableness of the fees imposed as sanctions. However, the Counties also challenge the lower court's determinations regarding the percentage of counsel's time used in defending the claims for which sanctions were imposed. Judge Kolenda presided over the entire proceeding and was aware of the amount of time spent litigating the issues in court. Furthermore, he equitably divided the fees among each claim raised in the lawsuits. Under the circumstances, this formula was a reasonable approximation of the time actually expended and we find no abuse of discretion.[69]

VIII. Disinterested Judge

The Counties contend that the Supreme Court Administrative Office improperly assigned an interested judge in violation of Administrative Order No. 1998-5. The order requires the assignment of a disinterested judge to hear a case involving a funding dispute between a court and its funding unit. The Counties failed to move for Judge Kolenda's disqualification in the lower court. Whatever their articulated reason for failing to do so, it is fatal to their claim. Accordingly, the Counties waived appellate review of their challenge to the judicial assignment by failing to raise an objection below.[70]

IX. Motion for Guidance

Shortly before we were scheduled to hear oral argument in this case, the Counties filed a motion for guidance asserting that the Trial Court ceased to exist on August 1, 2004, with the passage of Administrative Order No. 2004-2.[71] With that order, the Michigan Supreme Court ended the demonstration project status of the 46th Circuit Trial Court. The Supreme Court also adopted the concurrent jurisdiction plan proposed by the Trial Court. However, a review of the concurrent jurisdiction plan clearly reveals that the Trial Court intends to continue to function as a unified trial court system. Accordingly, we reject the Counties' frivolous contention that the entire litigation must be dismissed.

Affirmed.

Neff, J., concurred.

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[68] The Counties do not contest the reasonableness of the hourly rates of Otsego County's counsel.

[69] See *Costs I*, *supra* at 104-106.

[70] See MCR 2.003(C)(1), (3).

[71] Administrative Order No. 2004-2, 470 Mich lxiv (2004).

/s/ Jessica R. Cooper
/s/ Janet T. Neff