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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Peter D. O'Connell, Presiding

NORTHERN AMERICAN BROKERS, LLC, a Michigan limited liability company, and MARK RATLIFF, an individual,

Plaintiffs/Appellees,

v

HOWELL PUBLIC SCHOOLS, a Michigan general powers school district;

Defendant/Appellant,

and ST. JOHN PROVIDENCE, a Michigan corporation,

Defendant.

Supreme Court No. 155498

COA Docket No. 330126

Lower Court Case No. 15-028669-CH

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S POSITION

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STATEMENT IDENTIFYING THE
ORDER APPEALED FROM AND RELIEF SOUGHT

This case involves the Court of Appeals' erroneous validation of an alleged promise to pay a commission contrary to the statute of frauds, MCL 566.132(1)(e). Plaintiffs/Appellees, North American Brokers, LLC ("NAB") and Mark Ratliff ("Ratliff") (collectively, "Plaintiffs"), filed this action to recover a commission they claim to be owed to them as a result of the sale of real property located in Livingston County, Michigan (the "Property"). Plaintiffs' claims were filed against both the seller, Defendant/Appellant, Howell Public Schools ("Howell") and the buyer, St. John Providence ("SJP") of the Property.[1]

The Livingston County Circuit Court granted summary disposition in favor of Howell and, in relevant part, dismissed Plaintiffs' promissory estoppel claim.[2] The Court of appeals reversed. A copy of the February 9, 2017 Opinion of the Court of Appeals (the "COA Opinion") is attached as Exhibit A. Howell then filed its Application for Leave to Appeal the COA Opinion (the "Application") with this Court on March 22, 2017.

The Application, which Amicus Curiae supports, seeks reversal of the COA Opinion and reinstatement of the Circuit Court's grant of summary disposition in favor of Howell. By Order dated January 3, 2018, this Court directed the Clerk to schedule oral argument on whether to grant the Application or take other action. This Court ordered the filing of supplemental briefs by the

---

[1] SJP was dismissed from this lawsuit on October 23, 2015 and, therefore, is not a party to this appeal.

[2] The dismissal of Plaintiffs' claims for quantum meruit, negligent misrepresentation, procuring cause and breach of contract was not appealed by Plaintiffs.

parties on the issue of whether promissory estoppel is an exception to the statute of frauds, and invited persons and groups interested in the determination of that issue to move the Court for permission to file briefs amicus curiae.

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STATEMENT OF QUESTION PRESENTED

I. WHETHER PROMISSORY ESTOPPEL IS AN EXCEPTION TO THE STATUTE OF FRAUDS, MCL 566.132?

The Court of Appeals answered:	"Yes."
The Circuit Court answered:	"No."
Plaintiffs/Appellees answer:	"Yes."
Defendant/Appellant answers:	"No."
Amicus Curiae answers:	"No."

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I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Realtors® (the "Association") is Michigan's largest non-profit trade association, comprised of 47 local boards and a membership of more than 28,000 appraisers, brokers and salespersons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions, many of which involve brokers and salespeople entering into agreements for the payment of a commission upon the sale of real property. Michigan's statute of frauds unambiguously requires that such agreements be in writing and signed by the person agreeing to pay the commission. In accordance with Michigan law, Michigan Realtors® have been consistently taught that there is no entitlement to a commission based upon agreements or promises that are not in writing and are not signed by the party to be charged. This training is universally employed by Michigan Realtors® in their daily business practices and is built into the various multiple listing services operations in Michigan. This rigorous adherence to the law promotes stability and consistency in the business practices of Realtors® and, at the same time, protects property buyers and sellers from fraudulent commission claims. The application of promissory estoppel to circumvent the statute of frauds creates an exception to an otherwise clear rule and fosters uncertainty and ambiguity in what are currently fairly "cut and dried" transactions.

The Court of Appeals held that the Circuit Court erred by dismissing Plaintiffs' promissory estoppel claim as being barred by the statute of frauds. COA Opinion, p 4, Exhibit A. This ruling is erroneous. Under basic principles of statutory construction, the statute of frauds bars claims for commissions that are not evidenced in writing and signed by the person paying the commission. Further, under this State's laws and policy, this legal principle should not be changed by the simple

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pleading of a claim for promissory estoppel as opposed to breach of contract, quantum meruit, specific performance and the like.

One of the goals of the Association is to advocate for good business practices in the real estate industry. Requiring written and signed commission agreements promotes this goal. Accordingly, the present case involves issues which are compelling to the Association and its members; and the Association and its members have a significant interest in the outcome of this case.

The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. In Grand Rapids v Consumers Power Co, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association, therefore, seeks leave to file this brief amicus curiae in support of the Position of the Defendant/Appellant.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS – NEED TO ADD CITES TO RECORD

The Association adopts the Statement of Facts set forth in Howell's Application, as highlighted by the following:

1. According to Plaintiffs, they became aware that Howell was selling the Property when they saw Howell's for sale by owner sign (the "Sign") on the Property. Appellant's Appendix, 10a.

2. The Sign stated that the Property was for sale and was "broker protected." Appellant's Appendix, 10a.

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3. Howell never signed an agreement with Plaintiffs to assist in the sale of the Property.

4. The Property was at all times for sale by owner.

5. SJP, the buyer, also refused to form a relationship with Plaintiffs.

   a. In fact, although Plaintiffs informed SJP that the Property was for sale and scheduled a site inspection with SJP at the Property, SJP did not appear at the inspection.

   b. And, while Plaintiffs sent SJP a letter of intent which they requested SJP execute and return in order to establish a relationship, SJP refused to do so.

6. Almost simultaneously, Plaintiffs sent Howell a "Confidentiality, Commission & Broker Protection Agreement" ("NAB Proposal") by e-mail in order to attempt to establish a relationship with Howell and bring SJP forward as a buyer. Howell never signed the NAB Proposal and notified Plaintiffs on December 10, 2013 that Howell's legal counsel opposed the NAB Proposal in its entirety.

7. Although Plaintiffs represented to Howell that in SJP, they had a buyer who was ready, willing and able to purchase the Property, Plaintiffs did not actually provide a ready, willing and able buyer for the Property because SJP refused to contract and do business with Plaintiffs.

8. Therefore, Howell refused Plaintiffs' demand to be paid a commission.

9. A commission was paid to another broker when SJP purchased the Property.

10. Plaintiffs filed this lawsuit asserting that they are entitled to a commission for SJP's purchase of the Property. Plaintiffs base this assertion on the fact that the Sign on the Property

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included the words "broker protected." Plaintiffs claim that these words induced Plaintiffs to believe that they would be entitled to a commission on the sale of the Property if they provided Howell with a buyer for the Property.

11. Plaintiffs' complaint asserted the following claims: (1) promissory estoppel; (2) quantum meruit; (3) negligent misrepresentation; (4) procuring cause; and (5) breach of contract.

12. Howell filed a motion to dismiss pursuant to MCR 2.116(C)(7) and (8). In relevant part, Howell asserted that, based on Michigan's statute of frauds, MCL 566.132, Plaintiffs failed to state a claim against Howell because Plaintiffs admitted that there was no written and signed agreement between Plaintiffs and Howell for the payment of a commission on the sale of real property ("Howell's SD Motion").

13. On October 15, 2015, the Livingston County Circuit Court granted Howell's SD Motion. In relevant part, the Circuit Court found that the statute of frauds barred Plaintiffs' claim for promissory estoppel. Appellant's Appendix, 4a-5a.

14. On November 12, 2015, Plaintiffs filed a claim of appeal with the Michigan Court of Appeals, asserting that the Circuit Court incorrectly granted Howell's SD Motion because: (1) a promissory estoppel claim is not barred by the statute of frauds; and (2) alternative, there is a writing (the Sign) sufficient to entitle Plaintiffs to a commission from Howell. Appellant's Appendix, 6a.

15. The Court of Appeals reversed the Circuit Court's grant of summary disposition as to its promissory estoppel claim, stating that it was bound by the precedent of this Court to hold that

application of the statute of frauds was suspended as to Plaintiffs' promissory estoppel claim. Appellant's Appendix, 8a, and COA Opinion, pp 3-4, Exhibit A.

III. ARGUMENT

A. Standard of Review

This Court's review of this matter is de novo. A decision to deny or grant summary disposition as well as issues of statutory interpretation and application are all reviewed de novo. Dressel v Ameribank, 468 Mich 557, 561; 664 NW2d 151 (2003); McJunkin v Cellasto Plastic Corp, 461 Mich 590, 596; 608 NW2d 57 (2000).

B. The Commission Provision of the Statute of Frauds Unambiguously Prohibits a Promissory Estoppel Exception to Its Application

The statute of frauds requires that, in order to be enforceable, certain types of agreements must be in writing and signed by the party to be charged. Crown Tech Park v D&N Bank, FSB, 242 Mich App 538, 548; 619 NW2d 66 (2000). As its title suggests, the purpose for which the statute of frauds was adopted by virtually every state in the nation is to protect against fraud and perjury. Black's Law Dictionary (6th ed), p 595. Michigan's statute of frauds, as relevant here, provides:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> * * *
>
> (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

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MCL 566.132(1)(e) (emphasis supplied) (the "Commission Provision"). This statutory language does not provide an express exception for claims for promissory estoppel. Nor, as discussed below, does this statutory language support a judicially created exception for claims for promissory estoppel. Rather, the plain and unambiguous language of the Commission Provision expressly precludes claims based on oral promises by rendering such promises void as a matter of law. Accordingly, because a valid claim for promissory estoppel requires proof of a "definite and clear" promise,[3] such a claim simply cannot succeed in the face of the plain and unambiguous language of the Commission Provision.

In general, the "goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language." Bank of America, NA v First American Title Ins Co, 499 Mich 74, 85; 878 NW2d 816 (2016). If the statute is unambiguous on its face, the Court simply enforces the statute as written. Id. In doing so, the Court "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." Jesperson v Auto Club Ins Ass'n, 499 Mich 29, 34; 878 NW2d 799 (2016). "[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole," and "a word or phrase should be given meaning by its context or setting." Hannay v Dep't of Transp, 497 Mich 45, 57; 860 NW2d 67 (2014), quoting People v Couzens, 480 Mich 240, 249-250; 747 NW2d 849 (2008).

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[3] State Bank of Standish v Curry, 442 Mich 76, 96; 500 NW2d 104 (1993).

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More specifically, as to the statute of frauds, because "the general statute had no application to [a] promise [made] to a real estate broker to pay him for negotiating a sale or purchase of land," the Commission Provision of the statute is in derogation of common law and, therefore, must be strictly construed. Stephenson v Golden, 279 Mich 710, 753; 276 NW 869 (1937). As stated by this Court:

> Before the enactment of subdivision 5 of section 13417 above [now MCL 566.132(1)(e)], the general statute of frauds had no application to the promise to a real estate broker to pay him for negotiating a sale or purchase of land. In such case, the broker has no interest in the land either before or after the transaction, the promise being merely one to pay for work and labor. 2 Reed on Statute of Frauds, §756, citing many cases; 29 Am & Eng Enc of Law, 2d Ed, p 802, and cases cited; Wood on Statute of Frauds, §16. The provisions of subdivision 5 of section 13417, 3 Comp Laws 1929, are in derogation of the common law and [are] to be strictly construed.

Id. (emphasis supplied).[4] See also, Summers v Hoffman, 341 Mich 686, 694; 69 NW2d 198 (1955) (the statute of frauds provision relating to agreements to pay commission upon sale of real estate is in derogation of common law and must be strictly construed).

Thus, in Smith v Starke, 196 Mich 311; 162 NW 998 (1917), this Court held that oral agreements to pay a commission for procuring a purchaser on the sale of land were void under the

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[4] Similar to the current version of the Commission Provision, 3 Comp Laws 1929 §13417 provided: "In the following cases specified in this section, every agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith," . . . "Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate."

plain language of the statute of frauds and that the courts of this State were without authority to add words of limitation by judicial construction. This Court stated:

> Without qualification, [the Legislature] declared void 'every agreement . . . to pay any commission.' The Legislature having failed to use the words of limitation, we cannot add them by judicial construction. Where the legislative expressions are obscure, the courts may construe a statute, giving a reasonable and sensible interpretation thereto, but where the statute is plain and unambiguous in its terms, its construction is not for the courts; the courts have nothing to do but obey it. In re Klein's Estate, 152 Mich 420; 116 NW 394.

Id. at 314-315 (emphasis supplied). See also, Summers, 341 Mich at 695 ("There are no words of limitation contained in [the Commission Provision]").

The plain language of the Commission Provision of the statute of frauds renders void any "agreement, contract or promise" to "pay a commission for or upon the sale of an interest in real estate that is not in writing and signed by the party to be charged." MCL 566.132(1)(e). The statute does not void only unwritten, unsigned "agreements" and "contracts." The statute expressly voids unwritten, unsigned "promises" as well. In fact, the Legislature used the word "promise" to describe the items that the Commission Provision renders void five (5) times. Therefore, any exception to the statute of frauds based on a "promise" is in direct conflict with the unambiguous, plain language of the Commission Provision of the statute of frauds – a statute which, as a matter of law, is to be strictly construed. Stephenson, 279 Mich at 753. And, promissory estoppel claims, which require proof of a promise that is "definite and clear," are necessarily barred by the plain and unambiguous language of the Commission Provision.

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In addition, the creation of a promissory estoppel claim exception to the operation of the statute of frauds renders the words "promise" in the statute nugatory – mere surplusage. In fact, the creation of a promissory estoppel claim exception to the operation of the statute of frauds renders the entire Commission Provision nugatory – mere surplusage. There is simply no preclusive effect with respect to oral or unsigned commission agreements, contracts or promises if the statute of frauds can be circumvented by merely alleging promissory estoppel. Rather, the very premise for the Commission Provision, and having commission agreements, contracts and <u>promises</u> in writing and signed, is to avoid fraudulent claims and perjury. Black's Law Dictionary (6th ed), p 595. The object of the statute, and the harm it was designed to protect against, is thus subverted and negated by a judicially created exception promissory estoppel claims. Accordingly, promissory estoppel claims, based on a promise to pay a commission which is insufficient to meet the criteria of the statute of frauds, should not be permitted under Michigan law.

C. Historically, the Commission Provision was Applied by Michigan Courts to Bar, Without Exception, <u>All</u> Oral and/or Unsigned Claims for a Commission

1. Plaintiffs' Historical Analysis of this Court's Application of the Statute of Frauds is flawed

Virtually the whole of Plaintiffs' Supplemental Brief contains a discussion of the history of the statute of frauds and the application of estoppel claims to circumvent the statute of frauds. The vast majority of the case law cited by Plaintiffs in this regard is not applicable to their case. Plaintiffs' discussion of Michigan case law conflates two estoppel doctrines – promissory estoppel and

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equitable estoppel. As discussed below, these doctrines are not alike in either their elements or application. The equitable cases cited by Plaintiffs do not apply.

This case and this Court's Order of January 3, 2018, directing the scheduling of oral argument and the filing of supplemental briefs, pertain solely to promissory estoppel. Promissory estoppel is an equitable estoppel claim/cause of action with the following elements: (1) a "definite and clear promise"; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. Novak v Nationwide Mutual Ins Co, 235 Mich App 675; 686-687; 599 NW2d 546 (1999); Ardt v Titan Ins Co, 233 Mich App 685, 692; 593 NW2d 215 (1999).

In a promissory estoppel action, the existence and scope of a promise are questions of fact. State Bank of Standish v Curry, 442 Mich 76, 84; 500 NW2d 104 (1993). In determining whether a requisite promise exists, Michigan Courts objectively examine the words and actions surrounding the transaction in question, the nature of the relationship between the parties, and the circumstances surrounding the parties' actions. Novak, 235 Mich App at 687. "[R]eliance is reasonable only if it is induced by an actual promise." Standish, 442 Mich at 84. "To support a claim of estoppel, a promise must be definite and clear." Id. at 85. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Id. at 85, quoting 1 Restatement Contracts, 2d § 2, p 8. "[A] promise must be distinguished from a statement of opinion, a prediction of future events, or a party's will, wish, or desire for something to happen." Id. at 86 and 89.

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By contrast, equitable estoppel is an equitable defense, the elements of which are: (1) a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. Michigan National Bank fo Detroit v Kellam, 107 Mich App 669; 309 NW2d 700, lv denied, 413 Mich 870 (1982). Equitable estoppel cannot be used to establish a cause of action. Frick v Design Developers Inc, 214 Mich App 177, 181; 542 NW2d 331 (1995). That is, "[i]n the absence of an underlying cause of action, an equitable estoppel claim must fail." Id.

Accordingly, the defense of equitable estoppel, pursuant to which the proponent of the defense need not prove, among other things, an affirmative promise, definite and clear, is not applicable here. As a result, much of the case law cited by Plaintiffs in their supplemental brief is immaterial to the sole issue before this Court – whether promissory estoppel is an exception to the statute of frauds, MCL 566.132.

2. The Correct Historical Analysis of this Court's Application of the Statute of Frauds Compels the Conclusion that a Promissory Estoppel Exception should not Exist under Michigan Law

The Commission Provision was originally enacted in 1913. Thereafter, this Court applied the Commission Provision to preclude all claims based on oral and/or unsigned agreements, contracts or promises to pay a commission without exception, without limitation, and as a matter of course – as demonstrated by the following cases:

- Paul v Graham, 193 Mich 447; 160 NW 616 (1916) (Under Comp Laws 1897, §9515, subd 5, as amended by Pub Acts 1913, No. 238, providing that every agreement or promise

to pay any commission for or upon sale of any interest in realty shall be writing, etc., no recovery can be had unless agreement therefor is in writing).

- Slocum v Smith, 195 Mich 281; 161 NW 830 (1917) (Under Pub Acts 1913, No. 238, §2, commissions which purchaser of land agreed to pay broker cannot be recovered unless contract be in writing).

- Smith v Starke, 196 Mich 311; 162 NW 998 (1917) (Pub Acts 1913, No. 238, requiring agreements to pay commission on sale of land to be in writing, held to apply to agreement by broker to pay plaintiff for procuring purchaser).

- Fleming v James S Holden Co, 200 Mich 519; 166 NW 1042 (1918) (As agreement to pay broker's commission for leasing building is required by Pub Acts 1913, No. 238, §2, subd 5, to be evidenced by writing).

- Purdy v Law, 212 Mich 275; 180 NW 251 (1920) (Action cannot be maintained on parol contract for exchange of land reciting commission agreement between parties).

- Renaud v Moon, 227 Mich 547; 198 NW 895 (1924) (Under Comp Laws 1915, §11981, an agreement for division of commission for sale of land, to be valid, must be in writing).

The Court of Appeals adopted this approach as well. For example, in Gustafson v Bud Clark, Inc, 5 Mich App 118; 145 NW2d 858 (1966), the Court of Appeals stated:

> This Court must determine whether the oral agreement to pay the broker for services rendered to a prospective buyer is unenforceable in accordance with the provisions of the statute of frauds.
>
> This case is controlled by Slocum v Smith (1917), 195 Mich 281, 282, 283; 161 NW 830, which held:
>
> > While it is true, as counsel say, that a purchase is not a sale nor a sale a purchase, it is equally true that there cannot be a purchase without a sale, nor a sale without a purchase. The history of the reasons leading up to this legislation is persuasive that the law was intended to apply to an agreement for a purchase as well as a sale because one is a necessary complement of the other. Both are clearly within the mischief which was intended to be remedied by the legislature, and we

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> think a reasonable and liberal construction of the statute will make it apply to an agreement for a purchase as well as to a sale of real estate.

Id. at 119-120. Similarly, in Judy v Lentz, 6 Mich App 511; 149 NW2d 478 (1967), the Court of Appeals held that the statute of frauds precluded recovery of a commission even where the plaintiff had fully performed and the defendant had partially performed through partial payment of the commission. And, in Aetna Mtg Co v Dembs, 13 Mich App 686; 164 NW2d 771 (1968), the Court of Appeals affirmed the trial court's dismissal of an action based upon an alleged oral agreement for a commission for obtaining a mortgage, quoting 12 CJS Brokers §62, pp 141-142, stating as follows:

> Under an applicable statute requiring an agreement, authorizing or employing an agent or broker to purchase or sell real estate for a commission or other compensation, to be in writing and providing that, if it is not in writing, it shall be invalid or void, or that no action shall be brought thereon, a broker is not entitled to commissions unless the contract under which he acts is in writing. (Mead v Rehm (1932), 256 Mich 488; 239 NW 858; Morris v O'Neill (1927), 239 Mich 663; 215 NW 8; Wilcox v Dyer-Jenison-Barry Land Co (1921), 217 Mich 35; 185 NW 776; Purdy v Law (1920), 212 Mich 275; 180 NW 251; Smith v Starke (1917), 196 Mich 311; 162 NW 998; Slocum v Smith (1917), 195 Mich 281; 161 NW 830; Paul v Graham (1916), 193 Mich 447; 160 NW 616.)

Id. at 691.

This Court's unequivocal and straightforward application of the Commission Provision led invariably to its repudiation of theories of recovery designed to circumvent the Commission Provision. For example, as early as 1916, the theory of quantum meruit was advanced as a basis to recover on a commission agreement otherwise barred by the statute of frauds.

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This Court declined to allow recovery based on a theory of quantum meruit reasoning that "the exception would soon swallow the rule." Importantly, this Court stated:

> Plaintiff takes the further ground that if the agreement shall be adjudged to be within the statute, then he is entitled to have the judgment affirmed under his count on the quantum meruit. To sustain that count he showed by competent testimony what the value of plaintiff's services was for selling the tracts. It has been the rule of this court to permit recoveries for services actually performed under contracts void under the statute of frauds, either at the contract price or under a quantum meruit. Fuller v Rice, 52 Mich 435; 18 NW 204; Moore v Nason, 48 Mich 300; 12 NW 162; Smith v Mfg Co, 175 Mich 371; 141 NW 563; Smith v Piano Co, 185 Mich 313; 151 NW 1025. If this rule is to be made applicable to this section of the statute of frauds, it would practically nullify the effect of the statute. Demands for commissions by real estate brokers are not usually made or pressed until the contract is performed. This being so, a recovery could be had, in nearly every instance, either at the contract price or under the quantum meruit. In order to give the act the effect which the Legislature evidently intended it should have, we have decided to hold that no recovery can be had under this section unless the agreement therefor is in writing. This is in accord with the holding of other courts which have construed similar statutes. Leimbach v Regner, 70 NJ Law, 608; 57 Atl 138; Blair v Austin, 71 Neb 401; 98 NW 1040; McCarthy v Loupe, 62 Cal 299.

Paul, 193 Mich at 451 (emphasis supplied).

Since its 1916 opinion in Paul, this Court has, many times, affirmed the dismissal of quantum meruit claims designed to evade the statute of frauds. In Smith, this Court wrote:

> Without qualification, [the Legislature] declared void 'every agreement . . . to pay any commission.' The Legislature having failed to use the words of limitation, we cannot add them by judicial construction. Where the legislative expressions are obscure, the courts may construe a statute, giving a reasonable and sensible interpretation thereto, but where the statute is plain and unambiguous in its terms, its construction is not for the courts; the courts have

> nothing to do but obey it. In re Klein's Estate, 152 Mich 420; 116 NW 394.

Smith, 196 Mich at 315 (emphasis supplied). See also, Slocum, 195 Mich at 286 (Where a contract for payment of commissions for effecting purchase of land was not in writing, and hence unenforceable under Pub Acts 1913, No. 238, broker cannot recover on quantum meruit for service performed).

More recently, in Ekelman v Freeman, 350 Mich 665; 87 NW2d 157 (1957), the plaintiff brought an action to recover for services allegedly rendered in procuring a purchaser for real estate. This Court held that the statute of frauds, requiring that every agreement, contract and promise to pay a commission for the sale of real estate be in writing and signed, precluded recovery by the broker under a theory of quantum meruit since any such oral agreement was void. Id. at 667-670. This Court explained:

> Acceptance of the theory that recovery may be had on the basis of an implied contract in a case like the instant controversy would, in effect, nullify the statute. It would allow recovery in practically all such cases where, as here, no claim for a commission is, or can be, made until the services have been fully performed. Such result would defeat the attempt of the legislature to remedy the situation giving rise to the amendment. The fact that defendants paid plaintiff $300 in December, 1955, does not alter the situation. Liability to make additional payments was not thereby created.

Id. at 671 (emphasis supplied).

The Ekelman Court relied on this Court's prior opinion in Mead v Rehm, 256 Mich 488; 239 NW 858 (1932). In Mead, this Court found an agreement to pay a commission void where it was

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not signed by the party to be charged but, rather, by that party's alleged agent. This Court's justification for its ruling was related as follows:

> While the statute does not expressly state that one assuming to exclude the contract for another must have written authority to do so, yet it does state that he must be lawfully authorized to sign the name of another. This agreement was not signed by John and Grace Rehm, neither did George Rehm sign their names thereto. If John Rehm may be held liable under the claimed verbal authority, then the evil the statute was intended to prevent will be present, and one who cannot be held liable on a verbal promise to pay a commission would be worse off than before the statute, for his liability would depend upon the promise of one asserting verbal authorization. A verbal agreement to pay the commission is rendered absolutely void by the statute, and there can be no recovery on quantum meruit, even though the service was rendered and accepted.

Mead, 256 Mich at 490 (emphasis supplied).

For similar reasons, this Court has rejected claims of specific performance designed to circumvent the statute of frauds. For example, in Bradley v May, 214 Mich 194; 183 NW 64 (1921), the plaintiffs sought specific performance of an alleged oral agreement for defendants to pay them a commission. Defendants claimed that the alleged agreement was void under the statute of frauds. Id. at 195. Relying on its earlier decision in Paul, this Court held that plaintiff could not avoid the statute of frauds by pleading the equitable claim of specific performance, stating:

> "But the rule which requires a plaintiff to show a present subsisting right of action is equally regarded in equity as at law. Although a court of equity will supply a remedy where none exists at law, yet it will not create a right of action where the law gives none." Waterman on Specific Performance, 16.

Id. at 198-199. See also, Tri-Mount/Preserves Bldg Co v TCF Nat'l Bank, unpublished opinion per curiam of the Court of Appeals, issued Oct 4, 2005 (Docket No. 254077); 2005 WL 2445461, wherein the Court of Appeals, relying on Bradley, supra, held that plaintiff's claim for specific performance of an alleged oral commission agreement was barred by the statute of frauds. A copy of the Tri-Mount/Preserves opinion is attached as Exhibit B.

In sum, historically, the Michigan appellate Courts have applied the Commission Provision of the statute of frauds, without exception. The logic by which this was done was both consistent and sound – exceptions should not "swallow the rule" and statutes are to be applied as written. This same logic applies here where a claimant seeks to evade the statute of frauds by pleading promissory estoppel. Accordingly, promissory estoppel claims, based on a promise to pay a commission which is insufficient to meet the criteria of the statute of frauds, should not be permitted under Michigan law.

D. Promissory Estoppel Claims have Properly been Disallowed as being Barred by Operation of the Statute of Frauds in Cases Involving the Sale of Real Estate

Closely related to the Commission Provision are those sections of the statute of frauds barring claims involving oral and/or unsigned contracts for the sale of real estate. MCL 566.108; MCL 566.106. These provisions of the statute of frauds, like the Commission Provision, render certain oral agreements void. Specifically, MCL 566.108 provides, in part:

> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing.

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MCL 566.108. Similarly, MCL 566.106 provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCL 566.106 (collectively, the "Real Estate Provisions").

The Commission Provision and the Real Estate Provisions, however, differ in one important aspect – the Real Estate Provisions, unlike the Commission Provision, do not expressly apply to "promises." Nonetheless, years ago, a Michigan federal court, applying Michigan law, found that the Real Estate Provisions precluded claims for promissory estoppel. Specifically, Hazime v Martin Oil Co of Indiana, 792 F Supp 1067 (ED Mich, 1992), involved the enforceability of an alleged oral agreement for the sale of real estate under a theory of promissory estoppel. The federal court held that the agreement was not enforceable, stating:

> A survey of Michigan cases involving doctrine of promissory estoppel reveals that there has never been a decision that addresses whether it may be applied to a statute of frauds case, like this one, involving a real estate transaction. Nevertheless, the Court is satisfied that if the Michigan Supreme Court looked at the issue today, it would rule that, under the circumstances of this case, the doctrine of promissory estoppel may not be applied to a statute of frauds case involving the sale of real estate.

Id. at 1069. The rationale employed by the federal court was as follows:

> The statute of fraud[s] is . . . necessary "to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transactions

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> occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests." North Coast Cookies, Inc v Sweet Temptations, Inc, 16 Ohio App 3d 342, 348; 476 NE2d 388 (1984).

Id. at 1069, quoting Seale v Citizens S&L Ass'n, 806 F2d 99, 104 (CA 6, 1986) (emphasis supplied).

The Hazime opinion was subsequently relied upon by the Michigan Court of Appeals in Tri-Mount/Preserves, supra. There, the Court of Appeals stated:

> Plaintiffs have not cited any authority in support of their position that promissory estoppel can be applied to enforce an unwritten contract involving an interest in real property, in avoidance of the statute of frauds. A party's failure to cite authority in support of its position waives the issue on appeal. People v Weathersby, 204 Mich App 98, 113; 514 NW2d 493 (1994). Further, it does not appear that Michigan law permits application of promissory estoppel in this context. Hazime v Martine Oil of Indiana, Inc, 792 F Supp 1067, 1069 (ED Mich, 1992). We therefore conclude that plaintiffs cannot rely on promissory estoppel to avoid the statute of frauds.

Tri-Mount, *3, Exhibit B.

Most recently, the US District Court, Eastern District of Michigan, cited both Hazime and Tri-Mount/Preserves as authority for its dismissal of plaintiffs' promissory estoppel claim involving the sale of real estate pursuant to the statute of frauds. McCann v US Bank, NA, 873 F Supp 2d 823, 834 (ED Mich, 2012). The Court noted:

> As a general matter, under Michigan law "the doctrine of promissory estoppel may not be applied to a statute of frauds case involving the sale of real estate." Hazime v Martin Oil of Ind, Inc, 792 F Supp 1067, 1069 (ED Mich 1992) (Cohn, J.); see also Tri-Mount/Preserves Bldg Co, Inc v TCF Nat'l Bank, No. 254077, 2005 WL 2445461, at *3 (Mich.Ct.App. Oct. 4, 2005) (unpublished) ("Plaintiffs have not cited any authority in support of their position that promissory estoppel can be applied to enforce an unwritten

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> contract involving an interest in real property, in avoidance of the statute of frauds . . . . Further, it does not appear that Michigan law permits application of promissory estoppel in this context.").
>
> * * *
>
> Moreover, as the Michigan Court of Appeals has pointedly observed, promissory estoppel is a judicially-created doctrine. Applying it to circumvent the statute of frauds would be "contrary to well-founded principles of statutory construction and is inconsistent with traditional notions of the separation of powers between the judicial and legislative branches of government." Crown Tech Park v D & N Bank, FSB, 242 Mich App 538; 619 NW2d 66, 71 n 4 (Mich Ct App 2000) (citing Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 14-29 (1997)). That is, the judiciary is obliged to defer to the policy choices of the legislature:
>
> > Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions. Unlike a traditional common-law contract claim or defense, the statute of frauds is legislatively mandated. Thus, such contracts must be reduced to writing . . . . The Michigan Legislature has determined that, for those contracts specifically identified in the statute of frauds, it is important to provide certainty and to avoid controversy over the terms of alleged contracts.

Id. at 834 and 835, quoting Crown Tech Park v D & N Bank, FSB, 242 Mich App 538; 619 NW2d 66, 71, n 4 (2000).

According to this Court, the legislative purpose for enacting the Commission Provision of the statute of frauds was:

> to <u>protect the owners of real estate against unfounded claims</u> based on alleged oral agreements for the payment of commissions for services in procuring sales. 12 CJS Brokers §62, p 142; Thompson v Carey's Real Estate, 335 Mich 474; 56 NW2d 255; Summers v Hoffman, 341 Mich 686, 695; 69 NW2d 198; 48 ALR2d 1033.

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Ekelman, 350 Mich at 667 (emphasis supplied). These same policy concerns motivated the enactment of the Real Estate Provisions – to prevent fraudulent, unfounded claims. Farah v Nickola, 352 Mich 513, 519; 90 NW2d 464 (1958) (statute of frauds exists for purpose of preventing fraud or opportunity for fraud, not as an instrumentality to be used in aid of fraud or as a stumbling block in path of justice). The legislative intent and legislative purpose for enacting both the Real Estate Provisions and the Commission Provision of the statute of frauds are the same. Accordingly, both provisions should be interpreted and applied the same. That is, the Commission Provision, like the Real Estate Provisions, should be applied without any exception for claims for promissory estoppel.[5] And, promissory estoppel claims, based on a promise to pay a commission which is insufficient to meet the criteria of the statute of frauds, should not be permitted under Michigan law.

E. Contrary to the Opinion of the Court of Appeals, This Court's Opinion in Opdyke Does Not Require that a Promissory Estoppel Claim Survive a Summary Disposition Motion Based on the Statute of Frauds

The Court of Appeals held that it was constrained by this Court's precedent to reverse the Circuit Court's grant of summary disposition on Plaintiff's promissory estoppel claim. COA Opinion, pp 3-4, Exhibit A. For the reasons discussed below, this is not true.

According to the Court of Appeals, this Court's decision in Opdyke Investment Co v Norris Grain Co, 413 Mich 354; 320 NW2d 836 (1982) established a promissory estoppel exception

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[5] Further, the argument can be made that there is even more support for prohibiting promissory estoppel claims as an exception to the Commission Provision than the Real Estate Provisions since the Commission Provision expressly encompasses "promises," whereas the Real Estate Provisions do not.

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to the statute of frauds – creating precedent which the Court of Appeals was obligated to follow. COA Opinion, p 3, Exhibit A. The Court of Appeals stated:

> Regardless of the wisdom of using a judicially created exception to a statute, we must apply it. The Michigan Supreme Court created and has upheld the exception. See Opdyke Investment Co, 413 Mich at 365. "This Court is bound to follow decisions of our Supreme Court." People v Strickland, 293 Mich App 393, 402; 810 NW2d 660 (2011). It is a fundamental principle that only the Michigan Supreme Court has the authority to overrule one of its prior decisions. Paige v City of Sterling Hts, 476 Mich 495; 720 NW2d 219 (2006). We do not have the power to overrule the Supreme Court's determination that promissory estoppel is an exception to the statute of frauds.

COA Opinion, pp 3-4, Exhibit A (footnote omitted). Arguably, however, Opdyke need not be read so broadly such that, as cautioned by the Court of Appeals, the doctrine of promissory estoppel "subsumes the statute of frauds and makes the statute of frauds irrelevant." COA Opinion, p 4, n 2, Exhibit A.

At issue in Opdyke was an alleged contract to make a contract and the legal sufficiency of the written evidence vis-á-vis the statute of frauds. Opdyke, 413 Mich at 359. More specifically, this Court examined the question of whether parol evidence may be used to supplement written evidence for statute of frauds compliance purposes, answering that question affirmatively. Id. at 367. Ultimately, this Court concluded that the evidence sufficiently met the requirements of the applicable statutes of frauds. Id. at 369. As to plaintiff's promissory estoppel claim, this Court stated:

> Finally, to the extent that plaintiff's complaint states a cause of action based on "promissory estoppel", accelerated judgment was inappropriate. This Court acknowledged this theory of recovery in The Vogue v Shopping Centers, Inc (After Remand), 402 Mich 546; 266 NW2d 148 (1978), without adopting any particular

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> version of promissory estoppel. See, e.g., 1 Restatement Contracts 2d, § 90, p 242; 1A Corbin, Contracts, §§204-205, pp 232-250; In re Timko Estate, 51 Mich App 662; 215 NW2d 750 (1974). In this case, disputed questions of fact exist as to whether a noncontractual promise was made by the defendants and reasonably relied upon by the plaintiff. Since the statute of frauds only applies to certain "contracts", recovery based on a noncontractual promise falls outside the scope of the statute of frauds. The plaintiff's alternate theory of promissory estoppel is sufficiently pleaded and supported to survive the defendants' motion for accelerated judgment based on the statute of frauds.

Id. at 369-370 (emphasis supplied).

The Vogue case cited by this Court in Opdyke was indeed the case in which this Court adopted promissory estoppel as a viable theory of recovery under Michigan law. The Vogue v Shopping Centers, Inc (After Remand), 402 Mich 546; 266 NW2d 148 (1978). However, the Vogue case did not involve the statute of frauds. Id. Therefore, this Court was "breaking new ground" in Opdyke when it discussed promissory estoppel in the context of the statute of frauds. A careful reading of Opdyke, however, does not indicate that this Court adopted promissory estoppel as a wholesale "exception" to the statute of frauds but, rather, as a claim which, under certain facts, merely does not implicate application of the statute of frauds.

As stated in the quote above, the Opdyke Court allowed the plaintiff therein to proceed with its promissory estoppel claim because the alleged promise that formed the basis of that claim was a "noncontractual promise" that fell "outside the scope of the statute of frauds." Opdyke, 413 Mich at 370. This Court did not elaborate on the nature or substance of the "noncontractual promise." However, the language quoted above confirms that the "noncontractual promise" there at issue was of a nature and substance so as to be outside the categories of agreements, contracts and promises

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subject to the statute of frauds. As a result, the breadth of Opdyke is not an all-encompassing validation of all promissory estoppel claims as "exceptions" to the statute of frauds. Rather, Opdyke provides only a class of cases in which promissory estoppel claims may survive a statute of frauds challenge – specifically, where the alleged promise is separate and distinct from the agreement, contract or promise that is void under the statute of frauds.

Accordingly, under Opdyke, where the promise upon which a plaintiff relies to overcome a statute of frauds defense is the same promise presented as grounds for a separate promissory estoppel claim, the promissory estoppel claim should be dismissed along with those claims that are barred by the statute of frauds. On the other hand, under Opdyke, where the promise upon which a plaintiff relies to overcome a statute of frauds defense is separate and distinct from the agreement, contract or promise that is void under the statute of frauds, the promissory estoppel claim can be maintained. Opdyke, read in this light, does not compel the outcome reached by the Court of Appeals in this case. Accordingly, the Opinion of the Court of Appeals should be reversed. Simply put, promissory estoppel claims, based on a promise to pay a commission which is insufficient to meet the criteria of the statute of frauds, should not be permitted under Michigan law.[6]

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[6] Alternatively, assuming but denying that the Opdyke case can be interpreted so as to establish promissory estoppel as a broad and blanket "exception" to the statute of frauds, application of the Opdyke decision should be limited to those provisions of the statute of frauds primarily at issue therein. The Commission Provision of the statute of frauds renders void "agreement[s], contract[s], [and] promise[s]." By contrast, the primary provision of the statute of frauds at issue in Opdyke, MCL 566.108, expressly applies only to "contract[s]." As such, Opdyke may be distinguished from this case and the Court of Appeals erred in concluding otherwise.

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F. Contrary to the Opinion of the Court of Appeals, the Crown Tech Park Case Applies to This Case and Mandates Reversal

In Crown Tech Park v D & N Bank, FSB, 242 Mich App 538, 550; 619 NW2d 66 (2000), the Court of Appeals held that promissory estoppel claims were precluded based on the unambiguous language of the statute of frauds barring "an action." The specific provision of the statute of frauds there at issue was subsection 2 of MCL 566.132, pertaining to promises and commitments made by financial institutions. Crown Tech Park, 242 Mich App at 549. That subsection provides:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

MCL 566.132(2) (emphasis supplied).

The Crown Tech Park Court read the language prohibiting "an action" to be "unqualified and a broad ban." Id. at 550. The Crown Tech Park Court took note of the "generic and encompassing" language used to describe the types of oral "promises or commitments" proscribed by the statute of frauds as being consistent with interpreting subsection 2 to preclude all actions – including actions based on promissory estoppel. Id.

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The Crown Tech Park case is analogous to this case for the reason that the provision therein at issue and the Commission Provision both contain prohibitions against oral "promises." However, the Court of Appeals rejected the application of the Crown Tech Park case to this case. COA Opinion, p 3, Exhibit A. Specifically, the Court of Appeals held that the Crown Tech Park case did not apply here because the Commission Provision of the statute of frauds "does not contain the same mandatory language," barring "an" action, as does subsection 2. COA Opinion, p 3, Exhibit A. Admittedly, the Commission Provision does not contain language barring "an action." However, the Commission Provision need not contain that precise language to be equally effective as subsection 2 at barring claims for promissory estoppel. Instead of barring "an action," the Commission Provision includes the functional equivalent by making any oral, unsigned agreement, contract or promise to pay a commission "void."

As a matter of law, an agreement, contract or promise that is void is incapable of supporting "an action." Therefore, declaring an agreement, contract or promise void is the same thing as saying that no action can be maintained on that agreement, contract or promise. As stated by this Court:

> "Void" is defined as: "[n]ull; ineffectual; nugatory; having no legal force or binding effect . . . ." Black's Law Dictionary (6th ed). "Void contract" is similarly defined as: "[a] contract that does not exist at law; a contract having no legal force or binding effect . . . . [S]uch contract creates no legal rights and either party thereto may ignore it at his pleasure, insofar as it is executory." Id.

Epps v 4 Quarters Restoration LLC, 498 Mich 518, 537; 872 NW2d 412 (2015) (emphasis supplied).[7]

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[7] By contrast, a "voidable contract" is defined as: "[a] contract that is valid, but which may be legally voided at the option of one of the parties . . . . One which can be avoided (cancelled) by one party because a right of rescission exists as a result of some defect or illegality (e.g., fraud or incompetence)." Id. at 538 (citations omitted).

In sum, the Commission Provision of the statute of frauds uses the word "void" to describe the disposition of all oral and/or unsigned agreements, contracts and promises to pay a commission. As a result, oral and/or unsigned agreements, contracts and promises to pay a commission are a "nullity from the outset," which cannot "as a matter of law grant any authority" upon which to bring "an action." Id. at 538-539. The Crown Tech Park decision is compatible with this case and supports the conclusion that promissory estoppel claims are not an exception to the Commission Provision under Michigan law.

G. Policy and Practical Considerations Weigh in Favor of Reversing the Opinion of the Court of Appeals and Reinstating the Decision of the Circuit Court

The 47 local boards of the Association provide multiple listing services throughout the State of Michigan. A Multiple Listing Service ("MLS") is the primary vehicle by which sellers of residential real estate market their property to buyers. The strict application of the Commission Provision of the statute of frauds is the bedrock upon which MLSs efficiently operate in the State of Michigan and eliminates the risks to sellers of potential payment of more than one commission to competing brokers.

If a seller wishes to place his or her property in a MLS, he or she must enter into a listing agreement with a Realtor® broker. The listing agreement specifically obligates the seller to pay the Realtor® broker a commission upon the Realtor® broker's performance of the terms of the listing agreement and the successful sale of a seller's property. Upon obtaining a listing, the Realtor®

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broker submits the listing to one or more MLSs.[8] In submitting the listing to the MLS, the Realtor® broker offers cooperation and compensation to all other Realtors® participating in the MLS. Typically, the listing Realtor® broker will offer compensation in some percentage of the purchase price to other cooperating Realtor® brokers who are participants in the MLS. The terms of the listing agreement authorize the listing Realtor® broker to offer such compensation to cooperating Realtors® to induce them to procure a buyer to purchase the seller's property. This unilateral offer of compensation by the Realtor® listing broker is accepted by a cooperating Realtor® when he or she procures a buyer who makes an offer which is accepted by a seller and which ultimately results in a closing.

During the course of a listing, in most cases the seller's property will be shown by numerous Realtors® to many potential buyers. In some instances, potential buyers may be shown the same property by more than one Realtor®. Further, various offers may be submitted by Realtors® on behalf of prospective buyers during the course of a listing agreement which result in interaction and negotiations between a seller, listing Realtor® broker, Realtor® and prospective buyer.

In some instances, more than one Realtor® claims to have procured a buyer for a specific listed property. Each Realtor® claims entitlement to the compensation offered by the listing Realtor® broker through the MLS. These competing claims pose no risk to the seller or the buyer with respect to traditional claim for compensation. The competing Realtors® are required by the Code

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[8] In some instances, a listing submitted to an MLS will end up being displayed on multiple MLSs maintained by multiple local boards. For example, a listing submitted to the Lenawee County Association of Realtors® will be displayed on MLSs maintained by eighteen (18) different boards. These boards share and display listings through the Great Lakes Repository which displays the listings to the public and at least 17,000 Realtors®.

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of Ethics of the National Association of Realtors® to arbitrate all such disputes pursuant to the National Association of Realtors® Code of Ethics and Arbitration Manual, as amended to conform with Michigan Law (the "Manual"). Article 17 provides in pertinent part:

> In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between Realtors® (principals) associated with different firms, arising out of their relationship as Realtors®, the Realtors® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, Realtors® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.

In addition, all Realtors®, upon applying for membership in an association of Realtors®, must agree to abide by the Manual and to binding arbitration of all such disputes.

The application of promissory estoppel to the Commission Provision of the statute of frauds potentially subjects sellers of residential real estate in Michigan to claims for more than one commission. Again, the seller enters into a listing agreement with a Realtor® broker which specifically obligates the seller to pay a Realtor® broker a commission in satisfaction of the Commission Provision of the statute of frauds. The Manual precludes any other Realtor® from entering into a listing agreement with a seller when that seller is already subject to a listing agreement. Article 16 of the Manual provides:

> Realtors® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other Realtors® have with clients.

Thus, the system established through the MLS effectively protects sellers (and buyers when entering into buyer's agency agreements that provided for compensation of Realtors® acting as a

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buyer's agent) from defending and/or paying claims for commissions for which there is no written agreement. Again, it is premised upon the strict application of the Commission Provision of the statute of frauds.

In addition, the Michigan legislature has also addressed the application of the Commission Provision of the statute of frauds to commercial real estate. In the Commercial Real Estate Broker's Lien Act, MCL 570.581, et seq (the "Act") real estate brokers engaged in the sale of commercial real estate in the State of Michigan were granted the right to place a lien on properties to secure payment of commissions which they claim were owed them. Specifically, commercial real estate brokers are required to file a claim of lien in a form set forth in MCL 570.584(10). In order to file a claim of lien under the Act, a commercial real estate broker is required to swear to the following in his or her lien claim:

> 2. On ____________, the broker-claimant entered into a written agreement with the (owner) (buyer) obligating the (owner) (buyer) to pay a commission to the broker-claimant. A legible copy of the agreement is attached as Exhibit B.

MCL 570.584(10). The Michigan legislature, in adopting the Act, assumed strict application of the Commission Provision of the statute of frauds.

In sum, the continued operation of an efficient and orderly market for the sale and purchase of real estate is dependent upon the strict application of the Commission Provision of the statute of frauds. Therefore, this Court should not endorse a judicially created exception to the Commission Provision in any form – including promissory estoppel.

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IV. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Court grant the Association leave to file this Amicus Curiae Brief in support of the position of Defendant/Appellant, grant the Application, reverse the Opinion of the Court of Appeals and reinstate the decision of the Circuit Court, granting summary disposition in favor of Howell on Plaintiffs' claim for promissory estoppel.

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LIST OF EXHIBITS
TO MICHIGAN REALTORS'® AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLANT'S APPLICATION

A. COA Opinion

B. Tri-Mount/Preserves Bldg Co v TCF Nat'l Bank, unpublished opinion per curiam of the Court of Appeals, issued Oct 4, 2005 (Docket No. 254077); 2005 WL 2445461

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EXHIBIT A

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S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

NORTH AMERICAN BROKERS, LLC, and MARK RATLIFF, Plaintiffs-Appellants,	UNPUBLISHED February 9, 2017
v HOWELL PUBLIC SCHOOLS, Defendant-Appellee, and ST. JOHN PROVIDENCE, Defendant.	No. 330126 Livingston Circuit Court LC No. 15-028669-CH

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Plaintiffs, North American Brokers, LLC, and Mark Ratliff (the Brokers), appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) to defendant Howell Public Schools (the Schools) on the basis that the Statute of Frauds, MCL 566.132, barred the Brokers' claim to broker commission. We reverse the trial court's grant of summary disposition on the Brokers' claim of promissory estoppel and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Brokers asserted in their complaint that in late 2013, they worked with defendant St. John Providence, who is not a party to this action, to develop a concept that required a particular type of property. The Brokers believed that the Latson School property, which the Schools had for sale, suited their concept. The property had a for-sale sign that indicated it was "broker protected." The Brokers approached St. John Providence about the property. The Schools and St. John Providence eventually reached a purchase agreement through another real estate agency. In the end, the Brokers received no commission.

In August 2015, the Brokers sued the Schools and St. John Providence, alleging a variety of claims that included a count of promissory estoppel. In lieu of filing an answer, the Schools

moved to dismiss this action under MCR 2.116(C)(7), arguing that the statute of frauds and governmental immunity barred the Brokers' claims.

II. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law. *Id*. The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence that would be admissible at trial. *Id*. We consider the contents of the plaintiff's complaint to be true, unless contradicted by the documentary evidence. *Id*.

III. ANALYSIS

The Brokers contend that the trial court erred by granting the Schools' motion for summary disposition because the statute of frauds did not bar their claim for broker commission on a promissory estoppel theory. We reluctantly agree.

The statute of frauds requires certain types of agreements to be in writing and signed by the party against whom it will be enforced. MCL 566.132; *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548; 619 NW2d 66 (2000). This includes "[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate." MCL 566.132(1)(e).

The for-sale sign on the Latson property is certainly not a signed writing for the purposes of the statute of frauds. However, the doctrines of "estoppel and promissory estoppel have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 365; 320 NW2d 836 (1982).

> The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promissee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. [*Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).]

In this case, the Brokers alleged that the "broker protected" sign was a promise that induced them to cultivate St. John Providence as a buyer and otherwise properly pleaded an action for promissory estoppel.[1]

---

[1] While the Schools dispute whether the sign did in fact induce the Brokers' to act and whether the circumstances are such that the promise must be enforced, for the purposes of a motion under MCR 2.116(C)(7), this Court must accept the complaint as true unless contradicted by the

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The continued validity of the judicially created promissory estoppel exception to the legislative statute of frauds has been the subject of considerable debate. This Court has rejected a claim that the promissory estoppel exception applies to claims against financial institutions. *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 556; 619 NW2d 66 (2000). In *Crown Tech Park*, the defendant contended that the trial court erred by finding that the statute of frauds did not bar the plaintiff's promissory estoppel claim. *Id*. at 548. This Court recognized that we have held that the common-law claim of promissory estoppel may bar application of the statute of frauds. *Id*.

But in 1992, the Legislature amended the statute of frauds to add MCL 566.132(2), which specifically concerns claims against financial institutions. *Id*. The *Crown Tech Park* Court recognized that by stating that the promise must be in writing, "[t]he plain language in this amendment of the statute of frauds addresses the area of conduct promissory estoppel ordinarily governs—oral promises." *Id*. This *Crown Tech Park* Court further relied on language in subsection 2 barring *any* action to conclude that those actions included promissory estoppel actions. *Id*. at 550-551.

Crown Tech Park does not apply to this case because MCL 566.132(1) does not contain the mandatory language that MCL 566.132(2) contains. Additionally, the Court in *Crown Tech Park* recognized that it was not ruling on application of the promissory estoppel section to MCL 566.132(1), though it questioned the continued validity of the exception. It stated that "the role of the judiciary is to apply the statute of frauds as written, without second-guessing the wisdom of the Legislature." *Crown Tech Park*, 242 Mich App at 548 n 4. However, it also stated that "[n]otwithstanding our serious concerns . . . legislative amendments of the statute of frauds enacted in 1992 clearly provide that a viable claim of promissory estoppel cannot be asserted in the present case." *Id*.

This is not the first time that this Court has questioned the continuing validity of utilizing a judicially created exception that is inconsistent with the language of the statute. This Court reluctantly applied the promissory estoppel exception to the statue of frauds to a case involving MCL 566.132(1). *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prods, Inc*, 254 Mich App 608, 613-615; 658 NW2d 494 (2003), vacated 469 Mich 1046 (2004). Even though the Michigan Supreme Court vacated this Court's opinion in *Kelly-Stehney* on other grounds, Justice WEAVER noted that "the Court of Appeals sharply criticized the judicially created exceptions to the statute of frauds . . . ," and would have determined whether that doctrine remained valid. *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prods, Inc*, 469 Mich 1046, 1046; 677 NW2d 838 (2004) (WEAVER, J, dissenting).

Regardless of the wisdom of using a judicially created exception to a statute, we must apply it. The Michigan Supreme Court created and has upheld the exception. See *Opdyke Investment Co*, 413 Mich at 365. "This Court is bound to follow decisions of our Supreme Court." *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011). It is a fundamental principle that only the Michigan Supreme Court has the authority to overrule one of

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moving party's documentary evidence. *Odom*, 482 Mich at 466. Here, the Schools submitted no documentary evidence in support of their motion and instead also relied on the complaint.

its prior decisions. *Paige v City of Sterling Hts*, 476 Mich 495; 720 NW2d 219 (2006). We do not have the power to overrule the Supreme Court's determination that promissory estoppel is an exception to the statute of frauds.[2]

In this case, the Brokers pleaded a claim of promissory estoppel. The trial court granted summary disposition on the basis that the statute of frauds barred the Brokers' contract claims and governmental immunity barred its negligence claims. But because promissory estoppel remains an exception to the statute of frauds, the trial court erred by granting summary disposition on the Brokers' promissory estoppel claim.[3]

We reverse the trial court's grant of summary disposition on the Brokers' promissory estoppel claim and remand for further proceedings on that claim. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray

---

[2] While we acknowledge that our opinion reaches the *correct* result under our present legal framework, it is the *wrong* result. We urge the Michigan Supreme Court to grant leave to address the issue presented in this case. The judicially created doctrine of promissory estoppel, as applied to the facts of this case, subsumes the statute of frauds and makes the statute of frauds irrelevant.

[3] The Brokers also contend that the trial court erred by granting summary disposition on the basis of governmental immunity. The trial court granted summary disposition on the Brokers' negligence claim because of governmental immunity, not the promissory estoppel claim that is the subject of this appeal. Accordingly, the Brokers' argument that the trial court improperly applied governmental immunity to a contract claim lacks merit.

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EXHIBIT B

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2005 WL 2445461
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

TRI-MOUNT/PRESERVES BUILDING COMPANY, INC., Tri-M Preserve, L.L.C., and Tri-Mount Management Company, Inc., Plaintiffs-Appellants,
v.
TCF NATIONAL BANK, Larry Michael Czekaj, Gary P. Mach, and Golf Course Properties, L.L.C., Defendants-Appellees.

No. 254077.
|
Oct. 4, 2005.

Before: SAAD, P.J., and JANSEN and MARKEY, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs are related corporate entities that were involved in the development of a residential subdivision on a seventy-two-lot parcel in Livingston County. Defendant TCF National Bank ("TCF") held a mortgage on the parcel. Plaintiffs defaulted on the mortgage loan in 2001, and TCF purchased the parcel at a foreclosure sale in January 2002. Plaintiffs failed to redeem the property during the statutory redemption period. Defendant Larry Czekaj, TCF's vice president, negotiated with plaintiffs' owner, John Vincenti, to restructure plaintiffs' debt and enable plaintiffs to repurchase the parcel on land contract, but they failed to agree on a mutually acceptable set of terms. On September 23, 2002, Czekaj sent Vincenti a letter setting forth TCF's terms for approving the sale to plaintiff. On October 16, 2002, before Vincenti responded, TCF withdrew the offer.

Plaintiffs subsequently filed this action, alleging claims for "promissory fraud," specific performance, promissory estoppel, breach of covenant of good faith/fair dealing, tortious interference with a contract or business expectancies, and conspiracy. Defendants, relying on the statute of frauds, moved for summary disposition of all six counts pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendants' motion, explaining:

> I will tell you that I looked at all of these letters. I looked to see if there was some type of meeting of the minds even that took place, notwithstanding the letters. And there were definitely a lot of negotiations. There were a lot of notations. There were lists of terms and honestly, I don't know what role Mr. Vinscenti's [sic] trip to Europe played in this, but it looks like there was a delay during which the Defendant sent a letter and said we're no longer interested. Most convincing, however, is Mr. Vinscenti's testimony. He's the president and the founder of the Plaintiff's [sic]. He admitted, in his deposition testimony, the parties never finalized an agreement, nor was an agreement reduced in writing with all of the necessary terms. And that is why I asked whether any of the letters were signed by both parties. I know that you can create a kind of an ugly contract, if you will, by having another party sign a letter with an offer, but that didn't happen in this case. And I find that all six of these counts fail for those reasons. There are also statute of frauds questions with respect to Counts II and III. So I am granting summary disposition as to all six counts.

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This Court reviews de novo a trial court's resolution of a motion for summary disposition. *Veenstra v. Washtenaw Country Club,* 466 Mich. 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v. State of Michigan,* 470 Mich. 105, 119; 680 NW2d 386 (2004). The reviewing court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* The motion may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v. Detroit Entertainment, LLC,* 261 Mich.App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

***2** Here, plaintiffs' specific performance and promissory estoppel claims fail as a matter of law because plaintiffs cannot satisfy the statutory requirement of a signed and written memorandum of a contract to convey an interest in real estate. MCL 566.108 provides, in pertinent part:

> Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing....

In *Eerdmans v. Maki,* 226 Mich.App 360, 364-365; 573 NW2d 329 (1997), this Court held:

> A valid contract requires mutual assent on all essential terms.... Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract.... Before a contract can be completed, there must be an offer and acceptance.... An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.... Acceptance must be unambiguous and in strict conformance with the offer.... Finally, a contract for the sale of land must also satisfy the statute of frauds.... To satisfy the statute of frauds, there must be a writing signed by either (1) the party making the sale or (2) a person lawfully authorized in writing to act on behalf of the person making the sale. [Citations and internal quotation marks omitted.]

Plaintiffs clearly cannot satisfy the writing requirement. Vincenti and Czekaj never achieved mutual assent to all essential terms in the correspondence that they exchanged between July and October 2002. Vincenti and Czekaj both proposed terms for a mutually acceptable arrangement, but never achieved one. Czekaj set forth conditions that plaintiffs would have to satisfy before TCF would sell the parcel on land contract, but plaintiffs never signed Czekaj's September 23, 2002, letter, or any other writing demonstrating acceptance of those terms.

Plaintiffs attempt to avoid MCL 566.108 by arguing that summary disposition was improper because continued discovery might reveal more about the parties' intent during negotiations. However, the statute unequivocally requires a *signed writing,* and plaintiffs have failed to produce one. Additional depositions cannot ameliorate that failure. Plaintiffs correctly state that MCL 566.108 does not impose rigid requirements on the form of the written contract, but this is not helpful to their position. Although our Supreme Court has declined to adopt rigid rules for compliance with the statute of fraud, *Forge v. Smith,* 458 Mich. 198, 206; 580 NW2d 876 (1998); *Opdyke Investment Co v. Norris Grain Co,* 413 Mich. 354, 367; 320 NW2d 836 (1982), plaintiffs have failed to produce any writing that satisfies the basic requirement of a signed note or memorandum evincing both parties' agreement on essential terms. Plaintiffs argue that TCF's September 23, 2002, letter stated the material terms of the sale. As indicated previously, however, plaintiffs never signed the

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letter or any other writing demonstrating an acceptance of those terms.

***3** Plaintiffs also argue that defendants erroneously relied on MCL 566.132(2) as additional support for their statute of frauds defense. MCL 566.132(2) provides:

> Action to enforce promises or commitments, conditions for bringing. An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

Plaintiffs argue that this statute does not apply because the alleged contract concerned the sale of land, not the extension of credit. This argument lacks merit, because plaintiffs' purchase of the parcel from TCF depended on TCF granting plaintiffs credit after plaintiffs defaulted on the prior loan and TCF foreclosed. The sale of the land was intertwined with the extension of credit, and plaintiffs cannot logically ignore the financing aspect of the deal. In any event, even if MCL 566.132(2) did not apply, the alleged contract was still unenforceable under MCL 566.108.

Plaintiffs also argue that the equitable doctrine of promissory estoppel preserves "the substance of the contract," even if the contract is unenforceable under the statute of frauds. The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. *Novak v. Nationwide Mut Ins Co,* 235 Mich.App 675, 686-687; 599 NW2d 546 (1999). Plaintiffs have not cited any authority in support of their position that promissory estoppel can be applied to enforce an unwritten contract involving an interest in real property, in avoidance of the statute of frauds. A party's failure to cite authority in support of its position waives the issue on appeal. *People v. Weathersby,* 204 Mich.App 98, 113; 514 NW2d 493 (1994). Further, it does not appear that Michigan law permits application of promissory estoppel in this context. *Hazime v Martine Oil of Indiana, Inc,* 792 F Supp 1067, 1069 (ED Mich, 1992). We therefore conclude that plaintiffs cannot rely on promissory estoppel to avoid the statute of frauds.

Plaintiffs also argue extensively that the trial court erred in finding that no "meeting of the minds" existed as a matter of law before the conclusion of discovery. Without a writing to satisfy the statute of frauds, however, plaintiffs could not prevail in this action even if they could show that Vincenti and Czekaj verbally agreed on the contractual terms. In any event, the trial court did not err in finding no genuine issue of material fact on this issue. Although Vincenti testified in his deposition that he believed that he and Czekaj would eventually consummate the deal, he admitted several times that he and Czekaj never agreed to a set of mutually acceptable terms.

***4** Viewing the evidence in a light most favorable to plaintiffs, there was no genuine issue of material fact concerning the existence of an enforceable contract for the sale of the parcel. Plaintiffs failed to satisfy the statute of frauds, and failed to raise any legally viable alternative to producing a signed, written agreement. Accordingly, the trial court properly granted summary disposition for defendants on the specific performance and promissory estoppel claims. [1]

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 2445461

Footnotes

1 Plaintiffs do not challenge the trial court's dismissal of the remaining counts.

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