STATE OF MICHIGAN
IN THE COURT OF APPEALS

INTERNATIONAL OUTDOOR, INC.,

Plaintiff/Appellee,

Court of Appeals Case No. 345784

v.

Lower Court Case No. 2016-155472-CB

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC.,

Defendants/Appellant

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Court of Appeals Case No. 345784

Plaintiff/Appellant

Lower Court Case No. 2016-155489-CB

v.

INTERNATIONAL OUTDOOR, INC.,

Defendant/Appellee.

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LAMAR'S EMERGENCY MOTION FOR REMAND UNDER MCR 7.208(A)(1) and MCR 7.211(C)

ACTION ON THIS MOTION IS NEEDED BY AUGUST 16, 2019

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STATEMENT OF QUESTIONS INVOLVED

I. Whether this Court should, on an emergency basis, remand this action to the trial court with *nunc pro tunc* or retroactive effect so that the trial court's orders can continue in full force and effect, so that discovery can proceed as scheduled, and so that the evidentiary hearing can proceed as scheduled?

Plaintiffs/Appellees International Outdoor answers: No

Defendant/Appellant Lamar Advertising of Michigan, Inc. answers: Yes

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I. INTRODUCTION

Appellant Lamar Advertising of Michigan, Inc. ("Lamar") asks this Court to remand this case to the trial court so that the trial court can continue with an evidentiary hearing scheduled for August 23, and that the on-going discovery ordered by the trial court may also continue. The Appellee International Outdoor belatedly raised a jurisdictional challenge to the trial court's orders, which resulted in this Court issuing an opinion reversing the trial court's order denying the motion dismiss. But this Court specifically told the parties that "[t]his Court, however, may remand to allow additional evidence to be taken. MCR 7.216(A)(5). In light of the pending appeal, the proper procedure to obtain the development of a factual record is by a motion for remand pursuant to MCR 7.211(C) in the pending claim of appeal[.]" This is that motion. Lamar asks this Court to consider this motion on an emergency basis so that a deposition scheduled for August 17, which is to be conducted in Portland, Oregon, and in which counsel for Lamar having obtained non-refundable airline tickets, may proceed as scheduled.

The underlying dispute between the parties involves competing leases to erect a billboard on the same piece of property. The property is owned by Defendant SS MITX, LLC ("Simply Self Storage"). International Outdoor had the first in time lease with Simply Self Storage. International Outdoor claims it renewed the lease via a written lease renewal sent by its President, Randy Oram. At trial, Mr. Oram testified that the only evidence of the lease renewal was his testimony and the lease renewal itself. Simply Self Storage testified that it never received the lease renewal, believed the prior lease had expired, and subsequently leased the same property to Lamar. The jury sided with International Outdoor. But almost one year after judgment was entered in the case, Patrick Depa, a former International Outdoor employee (who was not identified as a witness in the trial or as someone with knowledge of the facts of the case) came forward with an affidavit stating that Mr. Oram perjured himself because he did not timely renew the lease and he submitted a fabricated

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lease renewal that he created in July 2016 and backdated to December 2013 to make it appear timely. Lamar and Simply Self Storage timely filed a motion to set aside the judgment with the trial court pursuant to MCR 2.612(C). The issue before this Court is the authority of the trial court to conduct the evidentiary hearing it has scheduled for August 23 and to continue with the discovery that has been ongoing in this case.

Lamar asks this Court to grant this motion on an emergency basis and remand this matter to the trial court immediately. Lamar asks this Court to issue such an order *nunc pro tunc* or retroactively, so that the orders issued to date, that the discovery that is ongoing, and that the evidentiary hearing that has been scheduled may continue as previously ordered. Lamar asks that this Court: (1) grant this motion on an emergency basis; (2) remand this matter to the trial court *nunc pro tunc* or retroactively, so that the trial court's orders from June 19, 2019 forward remain effective; and (3) award any other relief that this Court deems appropriate, just and equitable

II. BACKGROUND

A. Judgment and Appeal

The trial court entered a judgment in favor of International Outdoor against Lamar on June 7, 2018. (Ex. 1; Judgment). On September 17, 2018, the trial court issued an order denying Lamar's motion for JNOV. (Ex. 2; 09/17/18 Order). On October 8, 2018, Lamar timely filed a claim of appeal as of right with this Court. (Ex. 3; Court of Appeals Register of Actions). That appeal has been fully briefed, but this Court has not scheduled a date for oral argument on appeal (both Lamar and International Outdoor having preserved oral argument). (Ex. 3).

B. The Motion to Set Aside the Judgment Based on Fraud or Misconduct of a Party; and Subsequent Action in The Trial Court, and This Court's Reversal

In late-May 2019, Patrick Depa contacted counsel for Simply Self Storage – unsolicited – stating that in July 2016 he had witnessed Randy Oram fabricate and backdate the lease renewal

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to December 2013. (Ex. 4; Depa Aff.). Mr. Depa's May 30, 2019 affidavit directly contradicted Mr. Oram's trial testimony when he told the jury that the lease renewal was created and sent in December 2013. *Compare* (Ex. 4 at ¶4) *with* (Ex. 5; Trial Tr. at II:105:18-20).

On the basis of Mr. Depa's affidavit, on June 6, 2019 Lamar and Simply Self Storage filed a motion to set aside the trial court's judgment on the basis of fraud or other misconduct of a party under MCR 2.612(C)(1)(c). (Ex. 6; Motion to Set Aside Judgment). International Outdoor opposed that motion on the merits but did not raise any claim regarding the jurisdiction of the trial court. The trial court held a hearing on that motion on June 19, 2019 and at the conclusion of the hearing issued the following order: "Defendants' Motion is HELD IN ABEYANCE until such time as the Court holds an evidentiary hearing on the matter." (Ex. 7; 06/19/19 Order). The trial court's June 19 order allowed the parties to conduct discovery regarding the statements made in Mr. Depa's affidavit and how those statements contradict Mr. Oram's testimony at trial. (*Id.*). Since June 19, the trial court has issued other orders on motions brought by the parties regarding the scope and procedure for discovery. *See, e.g.,* (Ex. 8; 07/03/19 Order Granting, In Part, International Outdoor's Motion for Protective Order); (Ex. 9; 07/03/19 Protective Order); (Ex. 10; 07/24/19 Order Denying International Outdoor's Motion for Reconsideration); (Ex. 11; 07/31/19 Order Granting Lamar's Emergency Motion Regarding Computer Inspection). However, the trial court did not issue any order setting aside or amending the June 7, 2018 judgment.

On July 31, 2019, for the first time, International Outdoor raised the issue of the trial court's jurisdiction to set aside the judgment given this pending appeal, by filing a motion to dismiss Lamar and Simply Self Storage's motion. The trial court denied International Outdoor's motion. (Ex. 12; 08/07/19 Order Denying International Outdoor's Motion to Dismiss). International

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Outdoor filed an emergency application for leave to appeal that order in this Court on August 13, 2019. On August 14, 2019 this Court ordered:

> In lieu of granting the application for leave to appeal, the Court orders, pursuant to MCR 7.205(E)(2), that the August 7, 2019 order of the Oakland County Circuit Court denying plaintiff's motion to dismiss postjudgment proceedings hereby is REVERSED. Generally, once an appeal is filed, the trial court does not have jurisdiction to amend its final orders or judgments. *Lemmen v Lemmen*, 481 Mich 164, 165-166; 749 NW2d 255 (2008); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 542; 730 NW2d 481 (2007). This Court, however, may remand to allow additional evidence to be taken. MCR 7.216(A)(5). In light of the pending appeal, the proper procedure to obtain the development of a factual record is by a motion for remand pursuant to MCR 7.211(C)(1) in the pending claim of appeal, *International Outdoor Inc v SS Mitx LLC*, Docket No. 345784. [(Ex. 13; 08/14/19 Court of Appeals Order in Docket No. 350180)].

C. Facts Necessitating Emergency Action by This Court

1. There Is Ongoing and Continuing Discovery Including A Non-Party Witness Deposition Scheduled for Saturday, August 17, 2019 In Portland Oregon

The most immediate issue facing the parties is the scheduled deposition of Patrick Depa set for Saturday, August 17, 2019 at 2:30 p.m. in Portland Oregon. (Ex. 14 Patrick Depa Deposition Notice). On the basis of International Outdoor's deposition notice, counsel for Lamar purchased non-refundable airline tickets to attend the deposition. (Ex. 15; Airline Tickets). International Outdoor now takes the position that based on this Court's August 14, 2019 order, the entirety of the motion to set aside the judgment is a nullity and thus there is no need for the deposition; yet, if the motion for remand is granted, it wants to proceed with the deposition. (Ex. 19). The parties need an answer from this Court regarding the remand issue so that the deposition may proceed as scheduled on Saturday, August 17.

2. There Is A Court-Ordered Discovery Cutoff for August 19, 2019 And A Noticed Deposition Needs to Be Completed

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In its order holding in abeyance the motion to set aside the judgment, the trial court ordered that the parties could conduct limited discovery, but the discovery had to be completed "on or before August 19, 2019." (Ex. 7). Lamar had noticed the deposition of Jeffrey Sieving on August 15, 2019. (Ex. 16; Sieving Dep. Notice); *see also* (Ex. 8). Given this Court's August 14, 2019 order, however, International Outdoor has refused to produce Mr. Sieving for his deposition on August 15. (Ex. 19). Given the time needed to file this motion, and given the relief requested in this motion, Lamar has cancelled the original deposition date and re-noticed the deposition for August 19, 2019. (Ex. 17; Re-Notice of Jeffrey Sieving Deposition). Here, too, the parties need clarification from this Court to determine whether the deposition can proceed as currently scheduled to meet the trial court's discovery cutoff deadline.

3. International Outdoor Wants To (Again) Delay the Computer Inspection

One of the issues raised by Mr. Depa's affidavit was that the computer Mr. Oram used to create the fabricated lease renewal was still in International Outdoor's possession. (Ex. 4 at ¶6). At trial, Mr. Oram testified that the computer was no longer in his possession. (Ex. 5 at II:110:7-10). If the computer was in Mr. Oram's possession, it presumably would show when the letter was, in fact, created (or if the letter had been created and deleted, or other such information). On the basis of this disputed fact, the trial court ordered a forensic examination of the computer and server, in its June 19 order (Ex. 7). Initially, International Outdoor agreed to produce the computer for inspection, provided that it was subject to extensive resections in a protective order. To that end, the parties agreed on the record to the terms of a protective order placing substantial restrictions (including an expert's eyes-only provision) on the inspection. (Ex. 9).

But, since the time for the inspection has come due, International Outdoor has thrown up a series of roadblocks intended to interfere with the inspection. First, International Outdoor

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attempted to renege on its agreement in open court and have the protective order rescinded via a motion for reconsideration in the trial court. When the trial court denied that motion, (Ex. 10), International Outdoor filed an emergency application for leave to appeal that order with this Court. This Court denied that application and sanctioned International Outdoor for a vexatious appeal. (Ex. 18; 07/25/19 Order in Docket No. 349907).[1]

Next, International Outdoor refused to allow the forensic computer expert to leave its offices with a copy of the hard drive and server he had created an image of so that he could analyze the image on the equipment at his office; this objection was not made based on any provision of the protective order or any motion for a further protective order but just International Outdoor's refusal to allow the expert to complete his work. Lamar then had to file an emergency motion to allow the expert to take the imaged computer and server with him to his office to work on the inspection. The trial court granted that motion (Ex. 11), but International Outdoor's tactics delayed the inspection by several days.

Now, International Outdoor demands that all work on the inspection stop again until this Court remands this action to the trial court. (Ex. 19; 08/14/19 E-mail Breutsch to Neuman). Here, too, Lamar request action from this Court so that the on-going discovery process regarding the computer will not continue to be interrupted and delayed.

4. There Is an Evidentiary Hearing Scheduled for August 23, 2019

In its June 19 order, the trial court set a hearing date for an evidentiary hearing on this motion for August 23, 2019. (Ex. 7). Based on that order, Mr. Depa – who lives in Oregon - secured time off from his new employer and secured air travel and lodging arrangements so that

[1] Nothing in that July 25, 2019 order from this Court indicated that the trial court lacked jurisdiction to conduct the proceedings that led to the emergency application for leave to appeal.

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he could be here for the August 23 hearing. Lamar has also retained its expert witness on computer forensics to appear and testify that same day. Now, International Outdoor wants to use this Court's August 14, 2019 order as a means for delaying this action. (Ex. 19). Lamar does not want to delay or adjourn the evidentiary hearing scheduled for August 23.

5. Patrick Depa Has Credibly Alleged That International Outdoor Has Attempted to Intimidate Him and Prevent Him from Testifying

On July 21, 2019, Mr. Depa contacted counsel for Simply Self Storage to tell him that he received two phone calls from Steve "Shea",[2] who Mr. Depa described as "a friend of Randy's." (Ex. 20; 07/21/19 E-mail). In the first call, Mr. Shaya told Mr. Depa to "recant what I wrote in my affidavit because Randy and his lawyers are going to sue me until I am broke, get personal with me and my past, call my mother and kids by subpoena and wreak [*sic*] all future job opportunities." (*Id*.). In the second call, made on July 21, Mr. Shaya became much more threatening telling Mr. Depa "sin is punishable by death. That I should just write him an affidavit recanting all of what I said so he could get it to Randy. He said 'Patrick just end all of this nonsense before this ends in blood shed.'" (*Id*.). Lamar is significantly concerned, given the detail expressed by Mr. Depa in the threats made to him, that any delay in this hearing would increase the likelihood of further threats, or, worse yet, action on those threats.

D. International Outdoor Is Attempting to Escape Liability for Committing A Fraud on The Court by Using Conflicting Court Rules to Avoid the Merits of The Motion

International Outdoor has taken the position that if this Court grants a motion for remand, then Lamar "would have to re-file your motion and we would have to deal with the issue of its timeliness under the court rule." (Ex. 19). Stated more completely, International Outdoor takes

[2] The e-mail identified Steve "Shea" but subsequent written materials submitted by International Outdoor identify him as Steve "Shaya". (Ex. 14)

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the position that if this Court remands this case to the trial court, then the motion to set aside the judgment would have to be re-filed. The problem being, that the time for filing a motion to set aside the judgment is limited by MCR 2.612(C)(2) to one year after the entry of the judgment. The judgment was entered in this case on June 7, 2018, and International Outdoor intends to argue that any re-filed motion would be untimely. (Ex. 19)

III. ARGUMENT

A. The Conflicting Court Rules at Issue

The crux of the issue before this Court is the conflict between two court rules: MCR 2.612(C) and MCR 7.208(A). MCR 2.612(C) provides, in pertinent part:

> (1) On motion and on just terms the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> ***
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> ***
>
> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c) **within one year after the judgment**, order, or proceeding was entered or taken. (emphasis added).

MCR 7.208(A) provides:

> (A) Limitations. After a claim of appeal is filed or leave to appeal is granted, **the trial court or tribunal may not set aside or amend the judgment** or order appealed from except:
>
> (1) by order of the Court of Appeals,
> (2) by stipulation of the parties,
> (3) After a decision on the merits in an action in which a preliminary injunction was granted, or
> (4) As otherwise provided by law. (emphasis added).

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The conflict arises when, as here, newly discovered evidence comes to light after a claim of appeal is filed, but before the running of the absolute one-year time limit on the time to file a motion for relief from judgment. As the leading treatise on the Michigan Curt Rules explained:

> The effect of a pending appeal on the power of the trial court to grant relief under MCR 2.612(C), however, ***creates problems***. MCR 7.208(A) provides that, after a claim of appeal is filed or leave to appeal granted, the trial court may not set aside or amend the judgment or order appealed from except by order of the court of appeals, by stipulation of the parties, or otherwise provided by law. Yet the time for filing a motion seeking relief from the judgment continues to run while the case is pending on appeal. ***This leads to undesirable complications***, either requiring a party seeking relief from judgment to present its grounds first to the appellate court, which may then remand the case to the trial court if the grounds are well taken, or requiring the motion to be filed in the trial court while the appeal is pending although the court cannot act upon it until the case is remanded. [(Ronal S. Longhofer, Michigan Court Rules Practice (2018 ed), Author's Commentary, § 2612.20, p. 840)[3] (emphasis added)].

The problems identified in Longhofer's commentary are only exacerbated in this case where Simply Self Storage was approached by Mr. Depa (whose knowledge of the facts regarding the renewal letter was not disclosed by International Outdoor during the course of discovery in this action – despite an interrogatory request on that issue) mere weeks before the one-year time limit on filing a motion for relief from judgment was set to expire. Thus, Lamar and Simply Self Storage could not even avail themselves of the first option – filing a motion in the Court of Appeals asking it to remand the case to the trial court to decide the motion to set aside the judgment. Lamar and Simply Self Storage were only left with filing the motion for relief from judgment in the trial court and proceeding from there. Lamar and Simply Self Storage's filing the motion for relief from judgment in this Court on June 6, 2019 – one day before the one year time limit was set to expire was not an attempt to skirt the court rules or ask the trial court to engage in a prohibited practice -

[3] A copy of the relevant section is attached to this brief as Exhibit 21.

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it was their only choice to preserve this substantial issue. Lamar and Simply Self Storage were trapped by an unintended conflict in two different court rules.

B. How This Court Had Addressed This Similar Situation in The Past – Entering an Order Remanding the Case *Nunc Pro Tunc*

This Court has addressed a similar procedural issue in *Korneffel v Flynn*, unpublished opinion per curiam of the Court of Appeals dated Aug. 1, 2000 (Docket No. 207234).[4] In *Korneffel*, the plaintiffs sued the defendants for forfeiture of a land contract. *Korneffel, supra.* at p. 2. The defendants attempted to redeem the property and a dispute arose over the redemption process. *Id*. While the dispute over the redemption was pending the defendants continued to live in the property. *Id*. Thus, as part of the damages, the plaintiffs asked the trial court to award them the reasonable rent for the property while the litigation was pending and the defendants were living at the property. *Id*. At the close of trial, the trial court granted a judgment to the plaintiffs for the reasonable rent, including the taxes which were paid into escrow, with no set off for those taxes against the award of reasonable rent. *Id*. at p. 9. During the course of arguing post-trial motions – without the benefit of a transcript – defense counsel convinced the trial court that the issue of setoff had not been decided at trial. *Id*. The trial court, based on the defendants' argument, lowered the amount of the judgment by $209,000 to reflect a setoff for the taxes. *Id*. Thereafter, the defendants filed an appeal. *Id*. While the appeal was pending and after the plaintiffs got the transcript, they filed a motion to correct the judgment with the trial court. *Id*. With the benefit of the transcript, the trial court corrected the judgment while the matter was pending on appeal. *Id*.

[4] This opinion is attached to this brief as Exhibit 22. Lamar relies on this unpublished opinion because of the procedural similarity to this action – where a party filed an appeal, then filed a motion under MCR 2.612(C)(1)(c), then the trial court held a hearing and entered an order modifying the judgment based on the motion. Lamar is not aware of published authority addressing such similar procedural history.

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The defendants, just like International Outdoor, argued on appeal that the trial court was without jurisdiction to correct the judgment under MCR 7.208(A). *Id*. In response, the plaintiffs argued "that the language 'as otherwise provided by law' contained in MCR 7.208(A) allows an amendment of judgment pursuant to MCR 2.612(C)(1)(a) or (c)[.]" *Id*. This Court recognized the tension between MCR 7.208(A) and MCR 2.612(C) and turned to Longhofer for guidance, quoting and relying on Section 2612.20 of the treatise. *Id*. at p. 10.

Ultimately, this Court refused to vacate or reverse the trial court's order, concluding that "given the unusual circumstances, it would be a waste of judicial resources to remand this matter to the trial court to do what has already been done. Therefore, in lieu of remanding the matter to the trial court for correction of the judgment, we will treat the order of November 21, 1997 as though it was entered *nunc pro tunc*." *Id*.

Given the procedural similarities between this action and *Korneffel*, a similar result should apply here. Specifically, given: (1) the "unusual circumstances" of a previously unidentified witness coming forward just days before the expiration of the one-year deadline imposed by MCR 2.612(C)(2), while the case was pending on appeal; and (2) the "waste of judicial resources to remand this matter to the trial court to do what has already been done" given all of the activity that has occurred - without objection from International Outdoor - for the previous two months, this Court should likewise "treat the order . . . as though it was entered nunc pro tunc" *Id.*; *see also* MCR 7.216(A)(1), (5), and (7) (granting this Court the authority to "exercise any or all powers of amendment of the trial court"; "remand the case to allow additional evidence to be taken"; and "enter any judgment or order or grant further or different relief as the case may require"). Lamar asks that this Court grant this motion, remand the case *nunc pro tunc* or retroactive to June 5, 2019, so that all of the filings in the trial court continue to have full force and effect.

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C. This Court Can and Should Remand This Matter Consistent with MCR 2.608(A)(1) or MCR 2.612(C)(1)

The very rule at issue regarding the split of jurisdiction between the trial court and this Court when a claim of appeal is filed specifically provides that "the trial court or tribunal may not set aside or amend the judgment or order appealed from ***except (1) by order of the Court of Appeals***." MCR 7.208(A) (emphasis added). Thus, this Court has the express authority to issue an order re-instituting jurisdiction in the trial court to set aside or amend the judgment. *Id*. Further, there is nothing in this rule restricting this Court from establishing that the effect of the order is *nunc pro tunc*, or retroactive so that all of the actions taken to date by the trial court are of full force and effect from the time they were taken going forward. MCR 7.208(A)(1); *see also* MCR 7.216(A)(1) and (7). This authority is consistent with the action that this Court took in *Korneffel* allowing the order setting aside the judgment entered by the trial court while the appeal was pending to stand, despite the restriction of MCR 7.208(A). *Korneffel, supra* at p. 10.

Alternatively, MCR 7.211(C) authorizes this Court to remand a matter to the trial court on the motion of a party. Although not a precise fit for the procedural posture of this case, Lamar can demonstrate the requisite elements for a remand to be granted under this rule as well. Specifically, MCR 7.211(C) provides that a motion to remand "must identify an issue sought to be reviewed on appeal and show: (i) that the issue is one that is of record and that must be decided by the trial court;" and "must be supported by affidavit or offer of proof regarding the facts to be established at hearing." Here, Lamar can demonstrate all of these elements.[5] First, Lamar has identified that

[5] To the extent that International Outdoor claims that the motion for remand is untimely under MCR 7.211(C)(1)(a) (specifying that a motion for remand must be filed "[w]ithin the time for filing the appellant's brief") this Court has the authority to excuse non-compliance with that deadline under MCR 7.216(B)("When any nonjurisdictional act is required to be done within a designated time, the Court of Appeals may permit it to be done after expiration of the period on motion showing that there was good cause for delay or that it was not due to the culpable

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the issue to be decided by the trial court is whether it should set aside the judgment for fraud on the court based on the perjured testimony of Randy Oram and the fabricated evidence he submitted to the trial court on the central issue of the trial. (Ex. 6). This is an action to be taken by the trial court. MCR 2.612(C)(1)(c). Lamar and Simply Self Storage have supported their position with the affidavit of Mr. Depa identifying the specific perjured statements of Mr. Oram and the fabricated evidence he submitted. (Ex. 4).

MCR 2.611 likewise does not limit this Court's ability to grant a motion for remand to have *nunc pro tunc* or retroactive effect. MCR 2.611. Further, this Court can "grant any judgment or order or grant further or different relief as the case may require." MCR 7.216(A)(7). Thus, as an equally viable alternative, Lamar asks this Court to remand this matter to the trial court with *nunc pro tunc* or retroactive effect to June 5, 2019 under MCR 7.211(C).

D. If This Court Does Not Allow Retroactive or *Nunc Pro Tunc* Effect to Its Order, International Outdoor Will Attempt to Use the Conflicting Court Rules to Subvert Justice

Lamar's request for *nunc pro tunc* or retroactive effect to the emergency remand order is critical because International Outdoor has already indicated that it will argue on remand that the entire motion must be re-filed and then it will argue that the motion is untimely. (Ex. 19). This would give rise to the very concern recognized by Longhofer and this Court in *Korneffel* – it would effectively cut short the time for filing a motion for relief from judgment, where an appeal has

negligence of the party or attorney"). Here, the motion for remand would have been due on December 10, 2018, the extended time for Lamar's brief on appeal. (Ex. 3). But Lamar did not know of Mr. Depa's knowledge of Mr. Oram's perjury and fabrication of evidence until Mr. Depa approach Simply Self Storage in May 2019. Lamar had good cause and was not culpably negligent in not filing the motion for remand prior to December 10, 2018 – it did not know and was concealed from knowing of the factual basis for its eventual motion.

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been taken, by requiring a party to go to this Court first for permission to file the motion for relief from judgment. This is an inequitable result not intended by the court rules.

Since the time for the court-ordered computer inspection in July 2019, International Outdoor has been working feverishly to stop this proceeding. It has filed two emergency applications for leave to appeal and has refused to cooperate with the computer inspection, causing Lamar to have to file its own emergency motion in the trial court. Its latest gambit is to use the conflicting court rules to avoid the hearing. (Ex. 19). If it is successful, International Outdoor will not have to defend the serious and credible allegations that it submitted fabricated evidence and relied on perjured testimony. (Ex. 4) As set forth above, any delay is not because Lamar or Simply Self Storage did not timely raise the issue, but because of the conflict amongst MCR 2.612(C) and MCR 7.208(A). Fortunately, MCR 1.105 provides a helpful reminder and guidance here: "These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not effect the substantial rights of the parties." This Court should make certain that International Outdoor does not manipulate the court rules to avoid answering the serious allegations leveled against it.

E. The Trial Court's Previous Orders Are Not Void Because the Trial Court Has Always Had Subject Matter Jurisdiction

Lamar anticipates that International Outdoor will argue that this Court cannot give retroactive or *nunc pro tunc* effect to the order to remand because the trial court's orders since June 19, 2019 are void. This is not a correct statement of law, because the cases International Outdoor relies upon all involve a statutory lack of subject matter jurisdiction; not a temporary limitation on jurisdiction imposed by MCR 7.208(A). The plain text of MCR 7.208(A) states that the trial court "may not set aside or amend the judgment or order appealed from". *See also Wilson v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990) ("Filing of a claim of appeal

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divests the circuit court of its ***jurisdiction to amend its final orders***."); Thus, according to the plain text of MCR 7.208(A) and the cases interpreting that rule, the only prohibition is on the trial court actually granting the motion and actually setting aside or amending the judgment.

Here, the trial court has not taken either of the two prohibited actions. The trial court has neither set aside, nor amended, the judgment. Rather, the trial court's June 19 order held that "Defendant's motion is HELD IN ABEYANCE until such time as the Court holds an evidentiary hearing on the matter." That order is completely consistent with MCR 7.208(A). Further, nothing in MCR 7.208(A) prohibits a party from filing a motion under MCR 2.612(C)(1)(c), thus, Lamar and Simply Self Storage's timely filing of the original motion to set aside was not improper or a transgression of MCR 7.208(A).

Rather, International Outdoor jumps from the limited text of the court rule ("the trial court or tribunal may not set aside or amend the judgment or order appealed from") to the conclusion that when an action is on appeal the trial court does not have "subject-matter jurisdiction" over this motion and any order the trial court did issue "would be void." While International Outdoor identified several cases in which the trial court lacked subject matter jurisdiction, in those cases did not involve a pending appeal and the application of MCR 7.208; rather, in those cases the court found there was no statutory jurisdiction given to the trial court over the subject matter of the dispute. *See Banner v Banner* 45 Mich App 148, 155; 206 NW2d 234 (1977) (Plaintiff argued that judgment should be set aside as void because the trial court lacked jurisdiction over parties to a divorce case who had reconciled); *Toledo, A A & N R Co v Munson*, 57 Mich 42, 45-46, 23 NW 455, 456 (1885) (jury lacked jurisdiction to award equitable relief, thus the judgment based on jury verdict was void); *Jackson City Bank & Tr Co v Fredrick*, 271 Mich 538, 543-44, 260 NW 908, 909 (1935) (question over whether parties to a divorce had lived in Michigan for two years

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sufficient to confer statutory subject matter jurisdiction on the court to issue a decree of divorce). Those cases are not applicable to resolving the tension between MCR 7.208(A) and MCR 2.612(C). International Outdoor cannot argue that the circuit court, a court of general jurisdiction, did not have jurisdiction over the subject matter of this dispute (i.e., seeking declaratory relief as between the two competing leases and money damages for tortious interference with the leases). The claim that all of the trial court's orders are void for lack of subject matter jurisdiction is not supported in the law. This Court can and should give its remand order *nunc pro tunc* or retroactive effect.

IV. CONCLUSION

This case involves a substantial and credible allegation of fraud on the court through the presentation of perjured testimony and fabricated evidence. The trial court has taken steps to allow those allegations to be decided on the merits. This Court should allow that process to continue without delay, uninterrupted, and should not allow International Outdoor to escape having to answer these allegations on the basis of an unintended conflict of the court rules. Therefore, Lamar asks that this Court: (1) grant this motion on an emergency basis; (2) remand this matter to the trial court *nunc pro tunc* or retroactively, so that the trial court's orders from June 19, 2019 forward remain effective; and (3) award any other relief that this Court deems appropriate, just and equitable.

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Dated: August 14, 2019

Respectfully submitted:

ALTIOR LAW, P.C.

____/s/ Stephen T. McKenney_____
Kenneth F. Neuman (P39429)
Stephen T. McKenney (P65673)
Attorney for Defendant/Appellant
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smckenney@altiorlaw.com

CERTIFICATE OF SERVICE

I certify that on August 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the Court's TrueFiling system (File & Serve option), which will send notification of such filing to the individuals listed on the Service Recipient List.

/s/ Stephen T. McKenney
Stephen T. McKenney (P65673)
Attorney For Lamar Advertising
of Michigan, Inc.

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EXHIBIT 1

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FILED Received for Filing Oakland County Clerk 6/7/2018 10:40 AM

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,

Plaintiff,

vs.

SS MITX, LLC, a Delaware limited liability Company d/b/a SIMPLY SELF STORAGE and **LAMAR ADVERTISING OF MICHIGAN, INC.,** a Michigan corporation

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC. d/b/a **THE LAMAR COMPANIES** and **SS MITX, LLC** d/b/a **SIMPLY SELF STORAGE**

Plaintiffs,

vs.

INTERNATIONAL OUTDOOR, INC.,

Defendant.

Case No. 2016-155472-CB

Hon. Wendy Potts

Case No. 16-155489-CB

Hon. Wendy Potts

STEVEN M. POTTER (P33344)
RICK J. PATTERSON (P55706)
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JUDGMENT

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan
on: JUN 7 2018

PRESENT: Hon. Wendy Potts
Circuit Court Judge

This action having come before the Court and the Jury, the issues having been tried, and the Jury having rendered its verdict on April 24, 2018, Judgment is entered as follows:

1. This Court, based on the Jury's verdict, finds that INTERNATIONAL OUTDOOR, INC. timely renewed its lease with SS MITX, LLC and that lease continues to be in full force and effect.

2. In favor of INTERNATIONAL OUTDOOR, INC. and against LAMAR ADVERTISING OF MICHIGAN, INC. in the amount of Four Hundred Five Thousand and 00/100 ($405,000.00) Dollars, with regard to Count II of INTERNATIONAL OUTDOOR INC.'S Complaint in the lead case in this consolidated action.

3. As to LAMAR ADVERTISING OF MICHIGAN, INC. d/b/a The Lamar Companies and SS MITX, LLC d/b/a Simply Self Storage's Complaint in the consolidated, later-filed action against INTERNATIONAL OUTDOOR, INC.: no cause of action.

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4. The issue of attorney fees and costs is reserved for further determination by this Court.

Circuit Court Judge J. C

JUN 7 2018

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EXHIBIT 2

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

INTERNATIONAL OUTDOOR INC Plaintiff,
V
SS MITX Defendant,

NO: 2016-155472-CB
HON. WENDY POTTS

In the matter of:

ORDER REGARDING MOTION

Motion Title: Lamar's Motion for JNOV

The above named motion is:

- ☐ granted.
- ☐ granted in part, denied in part.
- ☒ denied.
- ☒ for the reasons stated on the record.

In addition:

DATED: 09/17/2018

HON. WENDY POTTS
Circuit Court Judge

FILED Received for Filing Oakland County Clerk 9/17/2018 2:45 PM

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EXHIBIT 3

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Case Search

Case Docket Number Search Results - 345784

Appellate Docket Sheet

COA Case Number: 345784

INTERNATIONAL OUTDOOR INC V SS MITX LLC

1	INTERNATIONAL OUTDOOR INC Oral Argument: Y Timely: Y	PL-AE	RET	(55706) **PATTERSON RICK J**
2	SS MITX LLC	DF	RET	(35981) **LEVASSEUR CHRISTOPHER**
3	SIMPLY SELF STORAGE	DB		
4	LAMAR ADVERTISING OF MICHIGAN INC Oral Argument: Y Timely: Y	DF-AT	RET	(65673) **MCKENNEY STEPHEN T**

COA Status: OPEN

Case Flags: Electronic Record

10/08/2018 1 Claim of Appeal - Civil
- Proof of Service Date: 10/08/2018
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Fee Code: EPAY
- Attorney: 65673 - MCKENNEY STEPHEN T

06/07/2018 2 Order Appealed From
- From: OAKLAND CIRCUIT COURT
- Case Number: 2016-155472-CB
- Trial Court Judge: 29604 POTTS WENDY LYNN
- Nature of Case:
  - Judgment for Plaintiff

10/08/2018 3 Notice Of Filing Transcript
- Date: 10/08/2018
- Timely: Y
- Reporter: 7118 - TRASKOS SANDRA J
- Hearings:
  - 09/17/2018

10/18/2018 4 Appearance - Appellee
- Date: 10/18/2018
- For Party: 1 INTERNATIONAL OUTDOOR INC PL-AE
- Attorney: 33344 - POTTER STEVEN M

11/05/2018 5 Docketing Statement MCR 7.204H
- For Party: 4 LAMAR ADVERTISING OF MICHIGAN INC DF-AT
- Proof of Service Date: 11/05/2018
- Filed By Attorney: 65673 - MCKENNEY STEPHEN T

11/30/2018 6 Stips: Extend Time - AT Brief
- Extend Until: 12/10/2018
- Filed By Attorney: 65673 - MCKENNEY STEPHEN T
- For Party: 4 LAMAR ADVERTISING OF MICHIGAN INC DF-AT

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12/10/2018 7 Brief: Appellant
Proof of Service Date: 12/10/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 65673 - MCKENNEY STEPHEN T
For Party: 4 LAMAR ADVERTISING OF MICHIGAN INC DF-AT

01/11/2019 8 Stips: Extend Time - AE Brief
Extend Until: 01/22/2019
Filed By Attorney: 55706 - PATTERSON RICK J
For Party: 1 INTERNATIONAL OUTDOOR INC PL-AE
P/S Date: 01/11/2019

01/22/2019 10 Brief: Appellee
Proof of Service Date: 01/22/2019
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 55706 - PATTERSON RICK J
For Party: 1 INTERNATIONAL OUTDOOR INC PL-AE

01/23/2019 9 Noticed
Record: REQST
Mail Date: 01/24/2019

01/24/2019 11 Electronic Record Filed

02/12/2019 13 Brief: Reply
Proof of Service Date: 02/12/2019
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 65673 - MCKENNEY STEPHEN T
For Party: 4 LAMAR ADVERTISING OF MICHIGAN INC DF-AT

03/15/2019 14 Correspondence Received
Date: 03/15/2019
For Party: 4 LAMAR ADVERTISING OF MICHIGAN INC DF-AT
Attorney: 65673 - MCKENNEY STEPHEN T
Comments: firm name change and e-mail address update

Case Listing Complete

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EXHIBIT 4

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AFFIDAVIT

STATE OF OREGON)
)ss
COUNTY OF BENTON)

PATRICK DEPA, being first duly sworn, deposes and states that:

1. I am a former employee of International Outdoor, Inc. I make this affidavit on the basis of my personal knowledge of the facts stated in this affidavit. If called upon to testify, I can and will confirm each of the statements made below.

2. I was employed with International Outdoor from September 2010 until July 2018. My title was Real Estate Director and my job duties consisted of procuring leases for new billboard sites, upgrading static billboards to digital, acting as liaison to all maintenance contractors to maintain current billboard inventory, and presenting staff reports for all zoning board of appeals and planning commission meetings.

3. In the course of my employment, I became aware that International Outdoor was engaged in a dispute with SS MITX, LLC (commonly referred to as Simply Self Storage) and Lamar Advertising of Michigan, Inc. over the right to erect a billboard at Simply Self Storage's Auburn Hills, Michigan, location.

4. In connection with that dispute, I am aware that International Outdoor and my boss, Randy Oram claimed that a letter was sent to Simply Self Storage in December 2013 for the purpose of renewing a 2009 lease for the right to erect a billboard at the Auburn Hills location.

5. I have personal knowledge that the lease renewal letter was not sent in December 2013. I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016. Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time.

6. The computer Mr. Oram used to create the letter was still in his office when I left employment with International Outdoor in July 2018.

7. I know that Mr. Oram made use of this falsified letter as part of International Outdoor's lawsuit against Simply Self Storage and Lamar. I was greatly troubled by Mr. Oram's actions, so I met with the Company's attorney, Jeff Sieving, to enlist his help in preventing Mr. Oram from committing a fraud by using the backdated letter.

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8. During our meeting, I revealed to Jeff Sieving that I had seen Randy Oram create the backdated letter. Mr. Sieving acknowledge this information, but refused to take any action to prevent Mr. Oram from using the letter as evidence in the lawsuit.

9. As the lawsuit between International Outdoor and Lamar/Simply Self Storage proceeded, I continued to make complaints to Jeff Sieving about the letter and Mr. Oram's actions, and repeatedly asked that he intervene to stop Mr. Oram. Mr. Sieving never expressed any doubts about what I had witnessed or suggested in any way that he did not believe me. He nonetheless refused to do anything about it.

10. I am also aware that the Lamar and Simply Self Storage had taken a positon in the lawsuit that International Outdoor had abandoned any claim to the Auburn Hills location. I know the position taken by Lamar/SSS was and is true. We at International Outdoor took no further action after December 2009 to secure the right to erect a billboard on the property because of the difficulty and expense of doing so. Conversations occurred on at least two occasions but Mr. Oram always steered Alan White and myself to other sites that had better chances of success.

11. The Simply Self Storage Auburn Hills lease file stayed in a drawer and was never bought out or spoken about again until January or February 2016. Around this time, a new employee, James Faycurry, was hired. James had come to International Outdoor from Adams Outdoor, a competitor, and he advised us that changes in the law had made erecting a sign in Auburn Hills more feasible than it had been in the past.

12. Specifically, James told us that Auburn Hills had amended its zoning ordinance to allow billboards, but only as a planned unit development (PUD). As part of the PUD, Auburn Hills required that there be a public benefit to the City if they were going to allow a new digital sign in their city. James said that Adams Outdoor made a donation to the City of Auburn Hills of close to $160,000 for a new park, plus a slot of advertising on the sign. As a result, Adams Outdoor was allowed to begin constructing a digital sign in the City of Auburn Hills in late 2015.

13. This information caused Randy Oram to again become interested in exploring the possibility of building a billboard in Auburn Hills. I reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact. He then directed me to try to reach out to Simply Self Storage to get it renewed, but I did not have a good contact number.

14. This was Alan White's lease (a former International Outdoor employee), but he left the company due to a medical condition and was not easy to contact. When I finally made contact with Alan, he was aware that the lease had expired and he tried to provide me with a current contact number for Simply Self Storage, but was unsuccessful. I even wrote letters to the legal departments at Simply Self Storage's corporate offices in Florida and/or Texas. I received no response.

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15. Randy Oram then instructed a few of us employees to use the Adams Outdoors information and packets to put together similar packages for other properties in Auburn Hills that I was attempting to get leases with. We turned our attention to this project and we essentially gave up on the Simply Storage Auburn Hills location for a second time.

16. Shortly after this occurred, I was checking the Auburn Hills website for meeting agendas and discovered that Lamar was taking a case to the planning commission for a new billboard to be located on the Simply Self Storage location. I advised Randy Oram of this development, which caused him to be become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. We looked at every file, every server, and every computer, and found no such letter.

17. Mr. Oram never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. Mr. Oram made us double and triple check, and no renewal letter was found. When I later spoke to Alan White about this, he confirmed that he never sent a renewal letter. He explained that there was no reason to do so because Randy Oram had decided not to move forward with the Auburn Hills site.

18. It was after the above-mentioned search for a renewal letter proved to be unsuccessful that I witnessed Randy Oram create and backdate a renewal letter, as described above.

PATRICK DEPA

Subscribed and Sworn to Before
Me this 30th day of May, 2019.

Notary Public

OFFICIAL STAMP
RUTH ANN POST
NOTARY PUBLIC-OREGON
COMMISSION NO. 977676
MY COMMISSION EXPIRES AUGUST 22, 2022

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EXHIBIT 5

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FILED Received for Filing Oakland County Clerk 7/16/2018 11:31 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited Liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME II

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Friday, April 20, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
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(248) 377-1700

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For Lamar Advertising:	KENNETH F. NEUMAN (P39429) STEPHEN T. McKENNEY (P65673) Neuman Anderson Grieco & McKenney, PC 401 S. Old Woodward Avenue, Suite 460 Birmingham, Michigan 48009 (248) 594-5252
For SS MITX, LLC:	CHRISTOPHER E. LEVASSEUR (P35981) Stark Reagan, PLC 1111 West Long Lake Road, Suite 202 Troy, Michigan 48098 (248) 641-9955
Transcript Provided by:	Accurate Transcription Services, LLC Firm # 8493 (734)944-5818
Transcribed by:	Kara Van Dam, CER #7987

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whole truth, and nothing but the truth?

MR. ORAM: I do.

MR. POTTER: I had these out. I apologize to the jury. I had the renewal letter out when I showed the other witness the renewal letter and I've misplaced it.

THE COURT: What exhibit number is that, six?

MR. POTTER: No the renewal letter is -- it's 25 and 26. Here they are. Okay. Thank you, Your Honor.

Mr. Oram, I'm going to do background and let you know what this jury -- get them to know who you are, but I'm going to get right to the point of what this is about.

Your Honor, at this point --

RANDY ORAM

called at 10:33 a.m., by the plaintiff and sworn by the clerk testified:

DIRECT EXAMINATION

BY MR. POTTER:

Q Mr. Oram, did you send a renewal letter to Simply Storage in December of 2013 extending your lease?

A Yes, sir.

Q I'm going to show you plaintiff's exhibit 26.

A Can I get my glasses?

Q No, you cannot have your glasses.

A Thank you.

Q Mr. Oram, is that a copy of the renewal letter that you

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respect to state legislation which would have been Public Act 4629 which was approved in January 28th of 2014 which dictated certain rules, state guidelines, with respect to billboards primarily. And, also just to give them an update that we were still pursuing things and those variables may impact our future also within Auburn Hills.

Q Now, let's -- that computer that that letter was sent on, do you still -- are you still in possession of that computer?

A No, sir.

Q And, how many computers are you removed from that computer?

A This is my -- the current computer that I have is my third computer since 2013.

Q And, what about your server? Do you have a server in place at International Outdoor?

A Yes we do.

Q And, that server has been in place since when?

A We've had a server, as I've mentioned in my testimony since 2004.

Q And, did you have a virus -- strike that. Was there a virus that inflicted your server in 2014?

A Yes.

Q A computer virus?

A Yes and we've probably changed our servers as well.

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EXHIBIT 6

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FILED Received for Filing Oakland County Clerk 6/6/2019 4:01 PM

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

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

ALTIOR LAW, P.C.
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Attorney for Lamar Advertising

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rjpatterson@potterlaw.com
Attorneys for International Outdoor

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NOTICE OF HEARING

PLEASE BE ADVISED THAT SS MITX And Lamar Advertising Of Michigan's Motion For Relief From Judgment Under MCR 2.621(C)(1)(c) will come for hearing before the Honorable Martha Anderson in her courtroom on Wednesday, June 19, 2019 at 8:30 a.m.

Respectfully submitted,

ALTIOR LAW, P.C.

/s/ Stephen T. McKenney
Stephen T. McKenney (P65673)
Attorneys for Lamar Advertising of Michigan, Inc.

STARK REAGAN, PLC

/s/ Christopher E. LeVasseur
Christopher E. LeVasseur (P35981)
Attorneys for SS MITX, LLC

Dated: June 6, 2019

CERTIFICATE OF SERVICE

I certify that on June 6, 2019 I electronically filed the forgoing paper with the Clerk of the Court using the Court's MiFile True Filing system and EFS (e-file and serve) option, which will send notification of such filing to the individuals listed on the Case Service List.

/s/ Denise L. Ward
Denise L. Ward, Legal Assistant
Altior Law, P.C.
dward@altiorlaw.com

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

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

ALTIOR LAW, P.C.
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SS MITX AND LAMAR ADVERTISING OF MICHIGAN'S MOTION FOR RELIEF FROM JUDGMENT UNDER MCR 2.612(C)(1)(c)

SS MITX, LLC[1] and Lamar Advertising of Michigan, Inc., for their Motion for Relief from Judgment under MCR 2.612(C)(1)(c), for the reasons stated in the brief in support of this motion, request that this Court: (1) grant the motion by vacating the judgment; (2) alternatively, if it deems necessary, order an evidentiary hearing on the issue of whether the judgment should be set aside for fraud, misrepresentation, and perjury; (3) if necessary, allow for a brief discovery period prior to that hearing; and (4) grant any other relief that this Court deems appropriate, just and equitable.

Respectfully submitted,

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Attorneys for Lamar Advertising of Michigan, Inc.

STARK REAGAN, PLC

/s/ Christopher E. LeVasseur
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Attorneys for SS MITX, LLC

Dated: June 6, 2019

[1] SS MITX has asserted, and continues to assert, that, as to SS MITX, no adverse finding was made by the jury and no judgment was entered against it after the trial of this action. However, the serious misconduct, misrepresentation and fraud committed by International Outdoor, Inc. and its president Randy Oram, as described more fully in the attached brief, compels it to join in the instant motion. In doing so, SS MITX does not waive its contention that no judgment was entered in favor of International Outdoor as to SS MITX.

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

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

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BRIEF IN SUPPORT OF SS MITX AND LAMAR ADVERTISING OF MICHIGAN'S MOTION FOR RELIEF FROM JUDGMENT UNDER MCR 2.612(C)(1)(c)

I. INTRODUCTION

> When the truth is concealed or deliberately distorted, the reaction must be outrage. Anything less accepts dishonesty and by accepting it encourages it . . . It tears at the very fabric of the legal system and at the objective of the rule of law, which is to keep peace in the community by fairly resolving the disputes endemic to communal life. Reverence for the truth is an essential component of fairness. If the public ever comes to believe that the courts do not abhor dishonesty, they will not accept the courts' decisions as fair and will not be willing to submit their disputes to them. [*Traxler v Ford Motor Co*, 227 Mich App 276, 290 n.1, 576 NW2d 398 (1998) (citations omitted)]

This motion is about the truth - belatedly discovered - by the defendants SS MITX, LLC ("Simply Self Storage") and Lamar Advertising Company of Michigan, Inc. ("Lamar") – and the extraordinary efforts plaintiff International Outdoor, Inc. ("IO") employed to conceal the truth; to directly and unashamedly lie to this Court and the jury that tried this case. Mere days ago, former IO employee Patrick Depa, on his own and without any solicitation, approached counsel for Simply Self Storage to say that he had personal knowledge that the alleged lease renewal letter – the very core piece of evidence on which the trial in this action turned; the document that the jury specifically found had been timely sent by IO's president, Randy Oram - "was not sent in December 2013. I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016. Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time."

Depa's affidavit establishes that Oram's testimony was perjured and the document IO submitted into evidence in support of its claims was fabricated and falsified. Consequently, Lamar and Simply Self Storage bring this motion for relief from judgment under

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MCR 2.612(C)(1)(c) and ask this Court to vacate this judgment, or, alternatively to conduct an evidentiary hearing on whether to vacate this judgment, based on IO's fraud, misrepresentation, and other misconduct.

II. BACKGROUND

A. The Core Facts In Dispute In The Case

This case involves competing claims between IO and Lamar to the right to erect a billboard on property owned by Simply Self Storage in Auburn Hills. There is no dispute that the first-in-time lease was signed between IO and Simply Self Storage on March 17, 2009. (Ex. 1; the "IO Lease"). The IO Lease was effective for a five-year period and expired by its own terms on March 17, 2014. (Ex. 1). The IO Lease provided that IO could renew the lease by sending a written notice of renewal. (*Id.*). IO claimed that it did send the notice of renewal and supported that claim at trial through the testimony of Oram and the introduction of a letter it claimed was a photocopy of the renewal it sent. (Ex. 2; Trial Tr. at II:105:18-106:11); (Ex. 3; Alleged Renewal Letter). Simply Self Storage and Lamar contested IO's story about the lease renewal supporting their position with, *inter alia*, testimony from Simply Self Storage employees that searched diligently and could not find any evidence of the renewal. (Ex. 2 at I:212:10-213:25; II:30:18-31:8; II:87:14-88:6). Put simply, the key question at the trial was whether or not IO sent the renewal to Simply Self Storage. In fact, the first question the jury was asked was: "Did IO send written notice to Simply Self Storage to renew its lease prior to March 16, 2014?" (Ex. 4; Verdict Form).

B. The Affidavit Of Patrick Depa Demonstrates That Randy Oram Committed Perjury And Fabricated Evidence.

Patrick Depa is the former Real Estate Director for IO. (Ex. 5; Depa Aff. at ¶2). Depa worked for IO between September 2010 and July 2018. (*Id.*) Depa was responsible for procuring

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leases for new billboard sites, upgrading static billboards to digital, acting as liaison to all maintenance contractors to maintain current billboard inventory, and presenting staff reports for all zoning board of appeals and planning commission meetings. (*Id.*). Given his role at IO and the time frame in which he worked there, Depa had first-hand knowledge of the IO Lease, the alleged renewal of the IO Lease and the Lamar Lease. (*Id.* at ¶¶3-5). Depa was aware of this action between IO and Lamar and Simply Self Storage and the critical issue of whether the IO Lease was or was not renewed. (*Id.* at ¶5).

Based on this knowledge, Depa has sworn that:

> I have personal knowledge **that the lease renewal letter was not sent in December 2013**. I know this because **I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016. Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time.** [(*Id.* at ¶6) (Emphasis added)].

Depa tried to raise the issue of Oram's fabrication of the renewal letter with IO's general counsel, Jeffrey Sieving, but Sieving – who acknowledged that Oram had created and backdated the letter – refused to take any action. (*Id.* at ¶¶7-9).[2]

Depa stated that the issue of the IO Lease did not re-surface until January or February 2016, when IO learned that non-party Adams Outdoor had used the Planned Unit Development ("PUD") process to obtain approval for a billboard in Auburn Hills. (*Id.* at ¶¶12-13). Oram then asked Depa to search IO's files for the IO Lease, so that IO could pursue a billboard in Auburn Hills. (*Id.* at ¶13). Depa "reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact." (*Id.*). In response, Oram asked Depa to contact

[2] Although he was not counsel of record and did not testify at the trial, Sieving was present for the entire trial. Depa's affidavit raises serious concerns about Sieving's knowledge of the perjured testimony and fabricated evidence and his willingness to allow the false testimony and exhibits to be used at the trial.

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Simply Self Storage to see if they would belatedly renew the IO Lease, but Depa was never able to connect with Simply Self Storage. (*Id*. at ¶¶13-14).

After unsuccessfully trying to contact Simply Self Storage about a belated lease renewal, in 2016 Depa was reviewing the City of Auburn Hills website and learned that Lamar had applied for a PUD to erect a billboard on the Simply Self Storage property in Auburn Hills (*Id*. at ¶16). Depa then "advised Randy Oram of this development, which caused him to become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. **We looked at every file, every server, and every computer, and found no such letter.**" (*Id*. at ¶16) (Emphasis added). Depa specifically recalled Oram emphasizing that he "never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. **Oram made us double and triple check, and no renewal letter was found.**" (*Id*. at ¶17) (Emphasis added). Depa stated that once it became clear that there was no renewal of the IO Lease, he "witnessed Randy Oram create and backdate a renewal letter." (*Id*. at ¶18).

1. Depa's Affidavit Exposes Randy Oram's Perjury.

Depa's affidavit stands in stark contrast to the testimony of Oram at trial. The contradictions are clear and leave no room for reconciliation; Oram perjured himself on these key issues at trial:

Depa's Affidavit	**Oram's Trial Testimony**
"I have personal knowledge that the lease renewal letter was not sent in December 2013." (Ex. 5 at ¶4)	"Q: Mr. Oram, did you send a renewal letter to Simply Storage in December of 2013 extending your lease? A: Yes, sir." (Ex. 2 at II:105:18-20)

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"I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016." (Ex. 5 at ¶5)	"Q: . . . I understood from your testimony that there was nobody else present when you were typing the letter? A: I don't believe so. If they were, it was just in passing, but no I would have typed it on my own." (Ex. 2 at II:224:5-9)
"Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time." (Ex. 5 at ¶5).	"Q: And, you understand that the whole defense in this case is that you're – you're a liar, you understand that? A: I'm – yes I'm understanding that. Q: You're a liar and that you created this document after the fact to cover your position with IO, correct? A: It seems that way, yes. Q: Did you do that? A: Absolutely not." (Ex. 2 at II: 113:20-114:3)
"The computer Mr. Oram used to create the letter was still in his office when I left employment with IO in July 2018" (Ex. 5 at ¶6)	"Q: Now let's – that computer that that letter was sent on, do you still – are you still in possession of that computer? A: No, sir." (Ex. 2 at II:110:7-10)
"I was checking the Auburn Hills website for meeting agendas and discovered that Lamar was taking a case to the planning	"Q: And did you eventually find out about – well tell the jury how you found out – found out about the Lamar Lease . . .

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commission for a new billboard to be located on the Simply Self Storage location. I advised Randy Oram of this development, which caused him to be become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. We looked at every file, every server, and every computer, and found no such letter. Mr. Oram never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. Mr. Oram made us double and triple check, and no renewal letter was found. When I later spoke to Alan White about this, he confirmed that he never sent a renewal letter. He explained that there was no reason to do so because Randy Oram had decided not to move forward with the Auburn Hills site." (Ex. 5 at ¶¶16-17)	A: In mid-July it came up that we are ready to proceed with respect to – as a company in our real estate meetings, we were ready to proceed with respect to Auburn Hills. My son was interning home from college and this was the internship he had at our company . . . I instructed him to look into Auburn Hills and . . . report back to me with what's going on… He reported back to me on the Friday – it would have been the 22nd of July . . . Then I proceeded to try to get a hold of Simply Self Storage to share with them that there must be some type of a misunderstanding with respect to this particular property, here's my lease, here's my lease renewals. . ." (Ex. 2 at II:124:18-126:20)
"I reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact . . . We	"Q: So not only do we not have the computer the only thing in your possession related to the Auburn Hills transaction was a copy of the

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looked at every file, every server, and every computer, and found no such letter . . . Mr. Oram made us double and triple check, and no renewal letter was found. (Ex. 5 at ¶¶13, 16 and 17)	lease that you entered into as I understand it, correct? A: That's right a hard copy. Q: And, this 2013 renewal letter correct? A: There's another letter with this. So, there was the lease and the cover letter as well as the renewal letter. So, that's what was in the file." (Ex. 2 at II:194:6-15).

2. The Manufactured Evidence

Depa's affidavit also establishes that Oram fabricated and backdated the renewal letter. (Ex. 5 at ¶4). IO introduced the alleged renewal letter into evidence and directly represented to this Court that it was a copy of the renewal letter created and sent on December 20, 2013. (Ex. 2 at II:105:18-106:11); *see also* (Ex. 3). Thus, according to Depa's affidavit, Exhibit 26 admitted at the trial was a complete fabrication and IO misrepresented what that exhibit was, when it was created, and that it was, in fact, a timely lease renewal. *Compare* (Ex. 5 at ¶4) *with* (Ex. 2 at II:105:18-106:11); *see also* (Ex. 3). IO relied on this manufactured evidence at trial to support its key contention that it timely renewed the IO Lease, with Oram explaining that the only evidence he had to support his position was "my word . . . and the renewal letter."[3]

C. Simply Self Storage And Lamar's Attempts To Conduct Discovery Into The Relevant Facts Shows That IO Concealed Depa's Information.

[3] Oram's answer here also referenced another "letter" which was offered, but not admitted as evidence at the trial because it was hearsay; so, the only evidence at trial in support of Oram's position was "my word and . . . the renewal letter." (Ex. 2 at. II:224:3; II:108:12-109:9).

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Lamar and Simply Self Storage diligently sought, through discovery, information that would prove that Oram did not send the renewal letter that he claims to have sent (and which was never received by Simply Self Storage). Lamar and Simply Self Storage conducted written discovery, depositions, and sought to inspect the computers used by IO to see if they could find proof that IO never sent the renewal letter. The evidence they sought was the very same proof Depa offered in his affidavit. But Lamar and Simply Self Storage could not find this proof - and they literally could not find Depa - because Oram and IO used deceptive and false discovery responses to conceal Depa's knowledge and further conceal Depa's knowledge of the fabrication and backdating of the letter. Thus, Lamar and Simply Self Storage did not have the opportunity to pursue evidence of this nature through discovery or present it at trial.

1. Simply Self Storage And Lamar Asked IO To Identify All People With Knowledge About The Facts And IO Failed To Identify Depa.

In its first discovery set to IO, Lamar asked and IO responded:

> 2. Identify all persons that you believe may have information regarding the facts giving rise to the claims and defenses in this action.
>
> ANSWER: Randy Oram; Alan Scott White, President and CEO of Wise Commercial Real Estate; Kurt O'Brien, President of Simply Storage; Kyle Schmutzler, SVP of Real Estate. In addition, please see all individuals identified in the documents produced in response to Defendant/Counter Plaintiff's document requests. [(Ex. 6; IO's Answers to Lamar's Interrogatories at p. 2)].

Similarly, Lamar asked IO to identify all people with information about the facts alleged in the complaint, denied in the answer, or alleged in the affirmative defenses, and IO gave the same response. (Ex. 6. at p. 3, #6). Neither of IO's answers identified Depa as someone with knowledge of the facts or allegations in the case, but Depa's affidavit clearly demonstrates that he had relevant, critical, and first-hand knowledge of both. (Ex. 5 at ¶¶4-16). Depa was also never identified on any of IO's witness lists in this action.

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2. Lamar's Request For A Forensic Computer Inspection And IO's Lies About The Computer On Which The Document Was Created.

Lamar asked IO to permit an inspection of the computer on which the alleged renewal letter was created. (Ex. 7; IO Supplemental Answers to Lamar's Second Discovery Set at p. 1, #1). IO responded, on September 6, 2017, that "[w]ith regard to the computer on which the original version was created, the computer cannot be identified or located at this time." In a supplemental answer filed on November 22, 2017, IO explained that "the computer used to create the December 20, 2013 Renewal Documents was removed from service…" (*Id.* at p. 2). Lamar again followed up on this issue in Oram's February 16, 2018 deposition by asking him:

> Q: Did your IT experts search your backup systems to see if they could find the source metadata for what is Exhibits 9 and 10[4]?
>
> A: We couldn't find anything.
>
> Q: But that's not my question. Did you direct –
>
> A: The computers aren't there.
>
> Q – IT experts – let me get the question on the record. Did you direct IT experts to search the backups to your server to find the original sources of the Exhibits 9 and 10 what's known as the metadata?
>
> A: I don't know what metadata is, so I couldn't tell you. The folder is lost. The whole Auburn Hills folder is completely gone. It's not on my computer. It's not in our company, so –
>
> Q: But did you employ or ask any expert to search?
>
> A: I don't know if my wife or Jeff from our office asked anybody else. I did not, no. [(Ex. 8; Oram Dep. at 159:5-22)].

[4] Exhibit 9 of the deposition was the alleged renewal and Exhibit 10 was the letter that accompanied it.

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Oram's testimony and the statements IO made in response to the request for inspection are untrue, misleading, and contradicted by Depa's affidavit in three respects: (1) Oram's statement that the computer on which the original alleged renewal document was created was no longer in IO's possession as of September or November 2017 or February 2018, is untrue because Depa says "[t]he computer Mr. Oram used to create the letter was still in his office when I left employment with International Outdoor in July 2018." *Compare* (Exs. 7 and 8) *with* (Ex. 5 at ¶6). (2) Oram's statement that IO could not search the computer on which the renewal letter was created because "the computers aren't there" is untrue both because the computer on which the document was created was there and Oram did ask Depa to search the computer for evidence of the renewal. *Compare* (Ex. 8) *with* (Ex. 5 at ¶¶4, 16-17). (3) Depa's search of the computer was not unsuccessful because there was nothing to search; Depa's search in fact revealed that there never was a renewal letter. *Compare* (Exs. 7 and 8) *with* (Ex. 5 at ¶¶16-17).

III. ARGUMENT

A. The Governing Legal Standards

MCR 2.612(C)(1) provides, "[o]n motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds … (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A motion to set aside a judgment for fraud, misrepresentation, or other misconduct of an adverse party must be filed "within one year after the judgment…."

The plain language of MCR 2.612(C)(1)(c) reflects three separate grounds for setting aside a judgment, "[f]raud (intrinsic or extrinsic), misrepresentation, <u>or</u> other misconduct of an adverse party." MCR 2.612(C)(1)(c) (Emphasis added). Because MCR 2.612(C)(1)(c) is unambiguous, it must be applied based on its plain language and meaning. *Family Independence Agency v Jefferson*

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(In re KH), 469 Mich 621, 628; 677 NW2d 800 (2004). Further, because MCR 2.612(C) is remedial, it should be construed liberally. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988) ("the well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy."); *see also Hesling v CSX Transp, Inc*, 396 F3d 632, 641 (CA 5 2005) (Holding that Federal Rule of Civil Procedure 60(b)(3)[5] "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect," and, therefore, "is remedial and should be liberally construed.").

No published opinion of the Michigan courts defines what constitutes a "misrepresentation" or "other misconduct of an adverse party" for purposes of MCR 2.612(C)(1)(c). The Michigan Court of Appeals has looked to Black's Law Dictionary to define the term "misrepresentation" when it is used in a statute amongst other legal terms such as "fraud," but not defined. *In re Moiles*, 303 Mich. App. 59, 70, 840 N.W.2d 790, 796-797 (2013), *rev'd on other grounds*, *Helton v. Beaman*, 497 Mich. 1001, 861 N.W.2d 621, 621 (2015). Black's Law Dictionary defines "misrepresentation" as "[t]he act of making a false or misleading assertion about something, usu. with the intent to deceive." (Black's Law Dictionary, 9th Ed.); *In re: Moiles, supra* at 70. Consistent with this definition, the Michigan Court of Appeals has recently held that an unintentional false representation is grounds for relief from judgment as a misrepresentation under MCR 2.612(C)(1)(c). *Sullivan v Sullivan*, unpublished per curiam opinion of the Court of

[5] MCR 2.612(C)(1)(c) is nearly identical to Rule 60(b)(3), which provides "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: … (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." The Michigan Supreme Court has expressly recognized that "we find instructive the interpretation of FR Civ P 60(b), which substantively is the same as MCR 2.612, and from which the Michigan court rule is derived." *Triplett v St Amour*, 444 Mich 170, 201; 507 NW2d 194 (1993).

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Appeals dated May 17, 2018 (Docket Nos. 330543 and 333273).[6] This is consistent with opinions of the federal appellate courts regarding the meaning of "misrepresentation" under Rule 60(b)(3). *Jordan v Paccar, Inc*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued Sep. 17, 1996 (Case No. 95-3478); 97 F3d 1452 (Table) ("It is possible to give each operative word in Rule 60(b)(3) independent effect quite simply … '[m]isrepresentation' can be interpreted as an affirmative misstatement…"); *Lonsdorf v Seefeldt*, 47 F3d 893, 897 (CA 7 1995) ("Fed. R. Civ. P. 60(b)(3) applies to both intentional and unintentional misrepresentation.").

The Sixth Circuit has held that the identical "other misconduct" language in Fed. R. Civ. P. 60(b)(3), "can be interpreted to reach questionable behavior affecting the fairness of litigation other than statements or the failure to make statements." *Pacaar, Inc*., *supra.* "Failure to disclose or produce material requested in discovery can constitute "misconduct" within the purview of 60(b)(3)." *Abrahamsen v Trans-State Express*, 92 F3d 425, 428 (CA 6 1996), (citation and quotation omitted). Further, "misconduct" necessitating relief from judgment need not be intentional:

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions -- elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. . . We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents -- at least avoidable ones -- should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." [*Anderson v Cryovac,* 862 F2d 910, 923 (CA 1 1988)].

[6] A copy of this opinion is attached as Exhibit 9. *Sullivan* is cited because no published decision of Michigan appellate courts prior to *Sullivan* has addressed the sufficiency of an unintentional misrepresentation under MCR 2.612(C)(1)(c).

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"Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). "[W]here there are conflicting allegations and affidavits with respect to the question whether there has been a fraud perpetrated upon the court, the trial court is ***required*** to conduct an evidentiary hearing in order to ascertain if the fraud existed." *Id.* at 179 (emphasis added).

B. The Facts Established In Depa's Affidavit Support Vacating The Judgment.

Depa's affidavit provides credible and unbiased evidence of IO and Oram's misrepresentations and misconduct in connection with the trial in this action. (Ex. 5). The central issue at the trial was whether IO had renewed its lease with Simply Self Storage. The *only* evidence offered by IO in support of its contention that the lease had been renewed was (1) the alleged renewal letter, and (2) Oram's testimony. (Ex. 2 at II:224:3) (Oram explaining that the only evidence he had to support his position was "my word . . . and the renewal letter."). Depa's affidavit undermines both these pieces of evidence because it establishes that the renewal letter was fabricated, and that Oram perjured himself when he authenticated the renewal letter in his sworn testimony. (Ex. 5 at ¶¶4, 16-17). Further, Depa's affidavit establishes that IO and Oram gave this same misleading and untrue testimony about the scheme to backdate the renewal letter, throughout discovery in this case, by giving misleading answers about Depa's knowledge of the facts and the availability of computer evidence to support Lamar and Simply Self Storage's position that the letter was fabricated and was never received by Simply Self Storage. *Compare* (Ex. 5 at ¶¶4,6, 16, and 17) *with* (Exs. 6, 7, and 8).

Courts evaluating claims for relief from judgment based on allegations of perjury, fabrication of evidence, or discovery misconduct have routinely granted those motions, and where

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they have not, appellate courts have been quick to reverse. *Fraige v American-National Watermattress Corp*, 996 F2d 295 (CA Fed 1993) is instructive. In *Fraige*, the plaintiff, Vinyl Products, sued defendant, Am-Nat, for infringement of a patent on a waterbed mattress with a certain type of fibrous construction. *Id*. at 296. Vinyl Products filed a motion for preliminary injunction, and in response Am-Nat's president submitted "false and forged documentation" in which he "altered, or had altered, a waterbed mattress advertisement of Am-Nat's predecessor to show the presence of a fibrous material inside the mattress." *Id*. The falsified advertisement made it appear that Am-Nat's advertisement using the fibrous material, "predate[d] [Vinyl Products'] patent application by several years." *Id.* It was then "shown to witnesses who testified at the preliminary injunction hearing," and Am-Nat's president "attested to the authenticity of the advertisement that had been altered and falsely stated that copies of that advertisement (as altered) had been distributed to customers several years before the filing date of [Vinyl Products'] patent application." *Id*. The district court denied the motion for preliminary injunction. *Id.*

During the jury trial later in the case, Vinyl Products discovered that Am-Nat fabricated the advertisement, but not before the jury was exposed to the fabricated evidence. *Id*. The jury returned a verdict finding Vinyl Products' patent invalid and judgment was entered. *Id.* Vinyl Products moved to set aside the judgment under Rule 60(b)(3). The trial court denied Vinyl Products' motion, despite its finding that the "forged documents and false declarations … went directly to the question of whether a particular waterbed manufactured by defendant's predecessor contained wave absorbing fiber at a time which would invalidate plaintiff's patent."

The Federal Circuit reversed, finding an abuse of discretion, and ordered a new trial on the validity of Vinyl Products' patent. *Id.* at 300. The court reasoned that Am-Nat's president's "scheme was deliberately planned and carefully executed for the purpose of interfering with the

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judicial process, not only at the preliminary injunction hearing stage but also at trial." *Id*. at 298. Further, the court reasoned that it was improper for Am-Nat to argue, and for the trial court to assess, the effectiveness of Am-Nat's fraud:

> Here, Am-Nat is likewise in no position to dispute the effectiveness of its fraud. The district court should not have tried to evaluate its effect on the jury and its findings as to the patent's validity. It was impossible accurately to appraise, the extent to which the jury relied on testimony tainted by the false and forged documentation. When it became known that the jury was presented testimony based on fraudulent documentation, where that testimony was relevant and material to the issue of patent validity, all of the jury's invalidity findings became suspect. (*Id*.) (Internal citation omitted).

Having reversed for an abuse of discretion, the court concluded, "[a]ny other decision by this court would condone, and possible encourage misconduct of the type here involved…." *Id.*

Fraige is not alone. Numerous other courts have held that it is an abuse of discretion to not grant relief from judgment based on falsified evidence, perjured testimony, and/or other misconduct. In *Lonsdorf*, the Seventh Circuit held it was an abuse of discretion to not grant a new trial under Rule 60(b)(3) where the defendant had "materially altered a document admitted into evidence and relied on those alterations".[7] In *Peacock Records, Inc v Checker Records, Inc*, 365

[7] In *Lonsdorf*, the plaintiff sued Seefeldt for sexual harassment during her work training. During the case, Seefeldt admitted in evidence an altered training schedule which listed many of the alleged acts of harassment as scheduled training activities. *Id*. at 896. It was only after trial that Plaintiff discovered a carbon-copy of the training schedule, which revealed that Seefeldt had altered the document admitted in evidence. *Id.* Plaintiff then filed a motion for relief from judgment under Rule 60(b)(3) arguing "fraud" and "misconduct." The trial court denied the motion, but the Seventh Circuit reversed and ordered a new trial. It reasoned that "Fed. R. Civ. P. 60(b)(3) applies to both intentional and unintentional misrepresentation." *Id*., at 897. Further, "[a] determination of whether the alleged misrepresentation altered the result of the case is unnecessary because Rule 60(b)(3) protects the fairness of the proceedings, not necessarily the correctness of the verdict." The court concluded that "[i]t is patently obvious that Seefeldt benefited from the use of a fraudulently altered document and Lonsdorf suffered an injustice, [for which] Fed. R. Civ. P. 60(b)(3) provides an escape valve to protect the fairness and integrity of litigation in federal courts." *Id*., at 898.

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F2d 145, 147 (CA 7 1966), the court reversed a denial of a motion for relief from judgment based on alleged perjury:

> We hold that where it appears that perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be *weighed*, on a motion to set aside the judgment. This seems self-evident. The factual question which the district court failed to answer is, "Was the judgment obtained in part by the use of perjury?" If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice.

In *Abrahamsen*, the Sixth Circuit affirmed a district court's grant of a motion under Rule 60(b)(3) based on a defendant's withholding an inculpatory statement sought by plaintiff both during discovery and at trial, reasoning that "[f]ailure to disclose or produce material requested in discovery can constitute 'misconduct' within the purview of 60(b)(3)."[8]

In *Sullivan*, the Michigan Court of Appeals held it was an abuse of discretion to deny a motion under MCR 2.612(C)(1)(c) where the judgment was based on an *unintentional* misrepresentation. *Sullivan* concerned an award of spousal support in a consent judgment. *Id*. at p. 1. The parties agreed on the amount of spousal support based on the plaintiff's representation on January 12, 2015, concerning the number of his vested shares of stock. *Id.* Upon learning that plaintiff misrepresented the number of vested shares of stock, defendant moved for partial relief from judgment under MCR 2.612(C)(1)(c). The trial court denied defendant's motion, finding that plaintiff had not *intentionally* lied, but had instead *unintentionally* misstated the actual number of his vested shares at the time of the consent judgment. *Id*. at pp. 1-2. The Michigan Court of Appeals reversed, finding it was an abuse of discretion to deny defendant's motion for partial relief

[8] The Sixth Circuit held that "a 60(b)(3) motion may be granted where the court is "reasonably well satisfied that the testimony given by a material witness is false; that, without it, a jury might have reached a different conclusion; that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial." *Id*. at 428 (citations omitted).

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from judgment. *Id*. at p. 3. "Although defendant admittedly focused in her motion on deliberate and intentional fraud, her motion also referred to relief from judgment based on a "material misrepresentation." *Id*. The court reasoned "the central issue at the January 12, 2015, hearing was the distribution of vested shares." *Id*. Therefore, "regardless of whether plaintiff intended to lie or did not intend to lie, he did in fact make a material representation at this time, and this representation was false." *Id*. Consequently, "it was an abuse of discretion for the trial court to deny the motion for relief from judgment." *Id*.

IV. CONCLUSION

Applying the well-established legal framework to the facts of this case, Depa's affidavit establishes that: (1) Oram lied under oath about sending the lease renewal in December 2013; (2) Oram fabricated the lease renewal in 2016 and backdated it to 2013 and then introduced the false and backdated letter into evidence in the trial by falsely stating that the letter was created in 2013; (3) Oram lied throughout discovery to conceal the fact that the computer on which he fabricated the alleged renewal letter and backdated to 2013 was in existence, could have been inspected, was searched by Depa, and was found not to have contained any copy of the renewal letter because no such letter existed. These actions represent fraud, misrepresentation, or other misconduct of an adverse party, sufficient for this Court to set aside the judgment in this action. It would be reversible error for this Court not to do so. Therefore, Lamar and Simply Self Storage request that this Court grant the relief requested in the motion.

Dated: June 6, 2019

Respectfully submitted,

ALTIOR LAW, P.C.

/s/ Kenneth F. Neuman
Kenneth F. Neuman (P39429)
Attorneys for Lamar Advertising of Michigan, Inc.

STARK REAGAN, PLC

/s/ Christopher E. LeVasseur
Christopher E. LeVasseur (P35981)
Attorneys for SS MITX, LLC

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CERTIFICATE OF SERVICE

I certify that on June 6, 2019 I electronically filed the forgoing paper with the Clerk of the Court using the Court's MiFile True Filing system and EFS (e-file and serve) option, which will send notification of such filing to the individuals listed on the Case Service List.

/s/ Denise L. Ward
Denise L. Ward, Legal Assistant
Altior Law, P.C.
dward@altiorlaw.com

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EXHIBIT 1

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LEASE

Lease No. I-75/Featherstone
(Auburn Hills)

AGREEMENT of Lease ("Lease") made this 17th day of March, 2009 ("Lease Execution Date"), by and between International Outdoor Inc., as Tenant, and SS MITX, LLC, a Delaware limited liability company, whose address is 7932 West Sand Lake Road, Suite 108, Orlando, Florida 32819, as Landlord.

Landlord owns the premises commonly known as 1096 Doris Road, Auburn Hills, Michigan 48124 and more particularly described on Exhibit A attached hereto (the "Premises").

Landlord does hereby Lease and demise to Tenant, the portion of the Premises particularly described on Exhibit B attached hereto (the "Leased Premises")

for the term of five (5) years, beginning and ending as set forth in this agreement (subject to any extension options hereunder), at the yearly rental set forth below.

As used in this Lease, the "Advertising Date" shall mean the first day on which all of the following conditions have been satisfied: (a) the Tenant's sign structure has been fully constructed on the Leased Premises, (b) all utilities, including electric, have been connected to the sign structure and are fully operational, and (c) Tenant has obtained all necessary permits and licenses to erect and operate the sign structure(s) and display(s) and advertise on the Leased Premises and such permits and licenses are satisfactory to Tenant. Tenant shall notify Landlord in writing of the Advertising Date promptly after such date. Landlord acknowledges that it may be necessary for Tenant to initiate litigation with the City of Auburn Hills in order to obtain permits and licenses which are satisfactory to Tenant and that Landlord shall not have the right to terminate this Lease in the event Tenant initiates any such litigation. Tenant shall not name Landlord as a party to any such litigation unless Landlord is a necessary party. If Landlord is a necessary party, Tenant shall indemnify Landlord for any costs associated with any such litigation.

In consideration of the foregoing and the mutual promises herein contained, and other good and valuable consideration, Tenant agrees to pay Landlord yearly rent in the amount of One Dollar ($1) per year for the period between the Lease Execution Date and the Advertising Date, and in the amount of Twelve Thousand and 00/100 Dollars ($12,000.00) per year beginning on the Advertising Date. Such yearly rental is to be paid in advance (subject to a 30-day delay for processing) with adjustments to be made promptly when the advertising status of the display(s) is changed. When feasible, the payment date will be adjusted to coincide with an anniversary of the effective date. Rental shall be deemed to have been made on the date(s) scheduled, unless Landlord notifies Tenant of non-receipt of payment.

Tenant shall have the right to erect, place and maintain advertising sign structures (with a minimum of two faces and measuring at least 14 feet by 48 feet (672 square feet/face)) and equipment therefor on the Leased Premises and post, paint, illuminate and maintain advertisements on such structures and for uses incidental thereto and Tenant shall also have the right to use the Leased Premises for any other purpose not prohibited by applicable law. Such use shall include, without limitation, access to the Leased Premises over those areas described and depicted on Exhibit C attached hereto as "Access Areas" (the "Access Areas"). Landlord agrees to allow Tenant full access to the Leased Premises and the Access Areas for the purpose of erecting, maintaining, changing or removing the displays at any time. In the event the City of Auburn Hills does not permit Tenant to erect sign structures with a minimum of two faces and measuring at least 14 feet by 48 feet (672 square feet/face), then the yearly rental shall be reduced in proportion to the reduction in total square feet/face of the approved sign structure. For example, in the event the City of Auburn Hills approves a two-faced structure measuring only 10 feet by 30 feet (300 square feet/face), then the yearly rental shall be reduced to $5,400 (300 square feet/face divided by 672 square feet/face multiplied by $12,000). Landlord shall not allow the construction, placement or erection of any structures on the Premises or neighboring property of Landlord which will block, obstruct, hinder or impair the visibility of any portion of Tenant's sign structures on the Leased Premises, including without limitation, the planting of any trees, shrubs or other landscaping on the Premises or neighboring property of Landlord. Tenant agrees not to allow advertising of alcohol or cigarettes on its advertising sign structures, nor will Tenant allow any advertising which contains obscene, lewd or lascivious displays or self storage

PLAINTIFF'S EXHIBIT 8 tabbies

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displays. If the Tenant violates the foregoing restrictions on advertising, upon not more than 10 days notice from Landlord, Tenant shall remove such displays.

All structures, displays, equipment and materials placed upon the Leased Premises by Tenant are Tenant's trade fixtures and equipment, and shall always be and remain Tenant's property, and may be removed by Tenant at any time prior to or within a reasonable time after the expiration or earlier termination of this Lease or any extension thereof.

Unless specifically stated otherwise herein, Landlord represents and warrants that it owns the Premises, and that it has full authority to enter into this Lease. Landlord covenants and warrants that if Tenant shall pay the rental as herein provided and shall keep and perform the other covenants herein stated, Tenant shall and may, peaceably and quietly have, hold and enjoy the use of the Leased Premises and Access Areas for the term of this Lease and any extensions thereof.

If at any time the view of Tenant's displays is obstructed or obscured, or the use or installation of such displays is prevented or restricted by law or by Tenant's inability to obtain any necessary permits or licenses (each individually a "Condition" and collectively, the "Conditions"), and Landlord has not cured such Condition within thirty (30) days after receiving written notice from Tenant of such Condition, Tenant may, at its option, terminate this Lease, and Landlord agrees to refund to Tenant the rent previously paid for the unexpired portion of this Lease. If any of the Conditions shall at any time temporarily exist, then Tenant may, at its option, instead of terminating this Lease, be entitled to an abatement of rent payable hereunder during the period such conditions or any of them exist, and to the refund of any rent paid in advance for the period of such abatement. Landlord shall cooperate fully with Tenant in obtaining any necessary permits, licenses or other approvals for Tenant's use of the Leased Premises at no cost or expense to Landlord.

Tenant agrees to save Landlord harmless from any and all claims or demands on account of bodily injury or physical property damage, caused by or resulting from any negligent or willful act of Tenant's agents or employees in the construction, maintenance, repair, change or removal of Tenant's displays on the property, and agrees to carry, at its own cost and expense, adequate public liability insurance covering any such contingency so long as this Lease shall remain in effect. Landlord agrees to save Tenant harmless from any and all claims or demands on account of bodily injury or physical property damage caused by or resulting from any negligent or willful act of Landlord, its agents and employees. Notwithstanding the foregoing, the parties release each other and their respective authorized representatives from any claims for damage to any person or to the Premises that are caused by or result from risks insured against under any all-risk or fire insurance policies carried by either of the parties. Each party to the extent possible shall obtain, for each policy of insurance, provisions permitting waiver of any claim against the other party for loss or damage within the scope of the insurance and each party to the extent permitted, for itself and its insurer, waives all such insured claims against the other party.

In the event of condemnation or the threat of condemnation by any lawful government authority, Tenant shall have the right to participate in any condemnation award or settlement to the extent of Tenant's damages for the loss of the use of the sign or signs; the cost of removal or replacement from or on the Leased Premises; and the loss of the leasehold interest.

Landlord represents and warrants that, to the best of its knowledge, the Premises is in compliance with all applicable federal, state, and local laws, regulations and ordinances and that there is no existing violations nor has Landlord received any notice of any violations of any laws, court orders, ordinances, regulations, requirements of any city, county, state or federal governmental authorities, including, without limitation, departments of housing, building, fire, labor, health, or other municipal departments.

Tenant shall provide all utility service connections to the Leased Premises and shall pay any hookup charges or connection fees for such utilities and Landlord shall give Tenant access to neighboring lands under the control of Landlord for such purposes. Tenant shall pay, during the term of this Lease, all normal electricity charges for Tenant's use of the Leased Premises.

Upon request by Tenant, Landlord shall obtain and deliver to Tenant from any present or future mortgagee, trustee, fee

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owner, prime landlord or any person having an interest in the Premises superior to this Lease a written nondisturbance agreement in recordable form providing that so long as Tenant performs all of the terms, covenants and conditions of this Lease and agrees to attorn to the mortgagee, beneficiary of the deed of trust, purchaser at a foreclosure sale, prime landlord or fee owner, Tenant's rights under this Lease shall not be disturbed and shall remain in full force and effect for the term of this Lease, and Tenant shall not be named or joined by the holder of any mortgage or deed of trust in any action or proceeding to foreclose thereunder. Tenant shall pay the reasonable attorney fees charged by such present or future mortgagee, trustee, fee owner, prime landlord or person having in interest in the Premises superior to this Lease in connection with the negotiation of the nondisturbance agreement, but not in excess of $500.00.

Landlord shall pay when due all real and personal property taxes and assessments with respect to the Premises and the improvements and structures thereon, including those of Tenant.

Before exercising any remedies for breach or default or failure to perform under this Lease, the nondefaulting party shall give the defaulting party thirty (30) days written notice of such default or failure to perform. If Landlord defaults or fails to perform any of its obligations under this Lease, Tenant, in addition to any other remedies available under applicable law, at Tenant's option, may perform Landlord's obligations or cause the performance of Landlord's obligations and deduct the reasonable cost thereof from the rent subsequently accruing. Tenant shall add to that sum interest at the highest rate permitted under applicable law. Tenant shall have the right to vacate or abandon the Leased Premises without it being a default, provided that Tenant continues to pay rent and perform all its other obligations under the Lease. In the event either party institutes legal proceedings against the other for breach of or interpretation of any of the terms, conditions or covenants of this Lease, the party against whom a judgment is entered shall pay all reasonable costs and expenses relative thereto, including reasonable attorneys' fees of the prevailing party.

Landlord and Tenant each represent to each other that it has dealt with no broker in connection with this Lease and that no broker has been the procuring cause of or has otherwise represented it in this transaction, and each further agrees that it shall be solely responsible and liable for any commission or claim for commission, fee or expense arising out of its communication with any broker. Landlord and Tenant each agree to indemnify and hold harmless the other for any claim, loss, cost or expense, including reasonable attorneys' fees, incurred by the other in connection with a breach of this paragraph.

Landlord and Tenant agree not to record this Lease, but each party agrees, upon request by the other, to execute and record a memorandum of this Lease in recordable form and in compliance with applicable law.

Landlord hereby grants to Tenant the exclusive and irrevocable option to renew this Lease for seven (7) additional term(s) of five (5) years each by giving Landlord written notice prior to the expiration date of this Lease or any applicable renewal period. All renewals under this paragraph shall be on the same terms and conditions of this Lease, except that the rent for first five (5) year Renewal Term shall equal one hundred five percent (105%) of the rent charged for the Initial Term, during the Second Renewal Term the rent charged shall be one hundred ten percent (110%) of the rent charged for the Initial Term, during the Third Renewal Term the rent charged shall be one hundred fifteen percent (115%) of the rent charged for the Initial Term, during the Fourth Renewal Term the rent charged shall be one hundred twenty percent (120%) of the rent charged for the Initial Term, during the Fifth Renewal Term the rent charged shall be one hundred twenty five percent (125%) of the rent charged for the Initial Term, during the Sixth Renewal Term the rent charged shall be one hundred thirty percent (130%) of the rent charged for the Initial Term, and during the Seventh Renewal Term the rent charged shall be one hundred thirty five percent (135%) of the rent charged for the Initial Term.

Neither Landlord nor Tenant shall be bound by any agreement or representation, express or implied, not contained herein. This Lease shall be deemed to have been accepted and its terms enforceable only upon the acceptance hereof by Tenant in the space provided. Following such acceptance, it shall inure to the benefit of and be binding upon the parties hereto and to their respective tenants, heirs, successors, personal representatives, executors, administrators, and assigns. Tenant shall have the right to sell, assign and set over all of Tenant's right, title and interest in this Lease to any financially responsible assignee upon the express and written assumption by the assignee of all of the obligations of Tenant herein named and upon such assumption, Tenant shall be fully discharged from any and all

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obligations under this instrument. Tenant shall have the right to sublease all or any part of the Leased Premises provided Tenant is not relieved of any liability under this Lease. In the event of any change of ownership of the Premises, Landlord agrees to notify Tenant promptly of such change, and Landlord also agrees to give the new owner formal written notice of the existence of this Lease and to deliver a copy thereof to such new owner.

Additional Provisions (none if left blank):_____

In witness whereof, the undersigned have executed this Lease as of the day and year first above written.

Executed in the presence of:

LANDLORD:

SS MITX, LLC

By:_____
Kurt O'Brien
Its: Manager

ACCEPTED AND AGREED TO BY TENANT:

INTERNATIONAL OUTDOOR

Executed in the presence of:

Blank signature

James Golani

By:_____
Lalif Z. "Randy" Oram
Its: President

Initials (illegible)

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EXHIBIT A

DESCRIPTON OF PREMISES

Part of the Southwest ¼ of Section 23, Town 3 North, Range 10 East, Pontiac Township, (now City of Auburn Hills, Oakland County, Michigan, described as: Beginning at a point on the West Right of Way line of Interstate 75, distant North 88 degrees 38 minutes 47 seconds West, 110.00 feet from the center of said Section 23; thence South 09 degrees 52 minutes 07 seconds East, 509.66 feet; thence North 87 degrees 59 minutes 39 seconds West, 438.85 feet; thence North 09 degrees 52 minutes 07 seconds West, 504.67 feet; thence South 88 degrees 38 minutes 47 seconds East 437.83 feet to the point of beginning.

Except land described in Declaration of Taking recorded in Liber 11265, Page 30 which is recited as:

All that part of the following described Tract "A" described as: Beginning at a point on the West right of way line of Interstate I-75 distant North 88 degrees 38 minutes 47 seconds West, 110.00 feet along the East and West ¼ line of Section 23, Town 3 North, Range 10 East, Pontiac Township, (now City of Auburn Hills), Oakland County, Michigan, from the center of said Section 23; thence South 09 degrees 52 minutes 07 seconds East, 509.66 feet; thence North 87 degrees 59 minutes 39 seconds West, 75.00 feet; thence North 08 degrees 33 minutes 24 seconds West, 506.62 feet to the East and West ¼ line of said Section 23; thence South 88 degrees 38 minutes 47 seconds East, 63.00 feet along said East and West ¼ line to the point of beginning.

Together with a perpetual easement for ingress and egress, roadway and public utility purposes as contained in Grant of Easement recorded in Liber 9193, Page 101 and Easement Agreement recorded in Liber 10257, Page 349, which rights were assigned by certain Assignment of Rights under Easement Agreements recorded in Liber 9723, Page 102 and Liber 10257, Page 277.

Together with an easement for advertising sign structure and rights of ingress and egress thereof, as created under a certain Grant of Easement dated December 7, 1994 and January 18, 1995, recorded in Liber 15209, Page 466.

Tax Parcel No. 14-23-327-019

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EXHIBIT B

DESCRIPTION OF LEASED PREMISES

To be mutually agreed upon by Landlord and Tenant prior to Tenant obtaining building permit for the sign structure.

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EXHIBIT C

ACCESS AREAS

To be mutually agreed upon by Landlord and Tenant prior to Tenant obtaining building permit for the sign structure.

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EXHIBIT 2

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME I

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Thursday, April 19, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

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For Lamar Advertising:	KENNETH F. NEUMAN (P39429) STEPHEN T. McKENNEY (P65673) Neuman Anderson Grieco & McKenney, PC 401 S. Old Woodward Avenue, Suite 460 Birmingham, Michigan 48009 (248) 594-5252
For SS MITX, LLC:	CHRISTOPHER E. LeVASSEUR (P35981) Stark Reagan, PLC 1111 West Long Lake Road, Suite 202 Troy, Michigan 48098 (248) 641-9955
Transcript Provided by:	Accurate Transcription Services, LLC Firm # 8493 (734)944-5818
Transcribed by:	Kara Van Dam, CER #7987

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2013, exercising its first option to renew the International Outdoor lease along with a check. Do you see that?

A Yes.

Q And, it says neither admit nor deny, correct?

A Correct.

Q And, that was your answer on behalf of the corporation, correct?

A Yes.

Q So, you didn't say we didn't get the letter, correct?

A Correct.

Q You said Simply Storage has no record receiving a letter, correct?

A That's correct.

Q Which means you couldn't find the letter, correct?

A Correct.

Q But, there was -- but you're not saying it wasn't received, correct?

A Correct.

Q There's a difference, you understand that; correct?

A Yes.

Q And, in fact it's true that when you signed this you're answering on behalf of all of Simply Storage, correct?

A Yes at the direction of the company's legal department.

Q But, when you answered it on behalf of all of Simply

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Storage, you yourself had only reviewed your email?
A My email?
Q Correct.
A Which email are you referring to?
Q Well, look at your deposition, page 30, 31, and 32. Actually you just need to read page 30, line 16, through page 31, line 4.
A Okay.
Q Okay. So, you're under oath at your deposition, correct?
A Yes.
Q And, at the time of your deposition you testified that you did not conduct any search beyond your own emails for this letter, correct?
A As far as emails go, correct, just my emails.
Q Right. But, what else did you search?
A The files, the property files that I told you previously that I had in my office.
Q In your office?
A Correct. My district manager Ellen Hart (ph) who was notified and was the district manager for that property. We had her check her desk, her files.
Q Okay.
A She checked her archived emails. Me personally I helped her checked for the hard copies but I didn't go through her emails.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited Liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME II

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Friday, April 20, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

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For Lamar Advertising:	KENNETH F. NEUMAN (P39429) STEPHEN T. McKENNEY (P65673) Neuman Anderson Grieco & McKenney, PC 401 S. Old Woodward Avenue, Suite 460 Birmingham, Michigan 48009 (248) 594-5252
For SS MITX, LLC:	CHRISTOPHER E. LEVASSEUR (P35981) Stark Reagan, PLC 1111 West Long Lake Road, Suite 202 Troy, Michigan 48098 (248) 641-9955
Transcript Provided by:	Accurate Transcription Services, LLC Firm # 8493 (734)944-5818
Transcribed by:	Kara Van Dam, CER #7987

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A That is correct.
Q You were present at his deposition, correct?
A Correct.
Q Mr. O'Brien's deposition?
A Yes.
Q You heard him say he doesn't know whether he got the letter or not, correct?
A That is correct.
Q And, the letter being the renewal letter from International Outdoor, correct?
A Correct.
Q And, as you indicated in your deposition you never asked Mr. O'Brien whether he got that letter, correct?
A I do not specifically remember asking him that, no.
Q And, he's the only guy the letter was addressed to, correct?
A It was addressed to our office, him at our office.
Q So, if you're going to do a search to determine whether or not somebody received a letter as their corporate counsel, wouldn't you think you'd go to the guy who the letter's addressed to and say did you get this letter?
A I went back and I asked him again, I realized how that sounds in a deposition but I've worked with Kurt O'Brien for almost 14 years. I know exactly how his standard operating procedure is. If something comes in of a legal

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nature he writes my name on it, he puts it on my desk. We've been going -- that's been our standard operating procedure for almost 14 years. Mr. O'Brien is the CEO of the company. To ask him about every piece of mail that he's received, you know, I doubt he's going to remember one specific letter.

Q The point is you didn't do it, correct?

A At that time I did not do it. I have done that since.

Q And -- and -- well, your deposition -- we say at that time, you deposition was February of this year. So, in February you hadn't asked him if you'd received a letter, correct?

A Correct.

Q And, in addition to that you know that there were discovery requests out and a request to admit out in this case that that issue was a critical issue in, correct?

A Whether the letter was received?

Q Yes.

A And, to my knowledge --

Q No, I'm asking you, you understand that to be a critical issue in this case, correct?

A Correct.

Q Okay. So, even though that's a critical issue in the case as of -- and you signed -- I'll show you the request to admit, they were done in 2017, but as of the time of your

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THE COURT: This is his statement. You did open the door on the payment of rent.

MR. POTTER: Thank you.

THE COURT: Bring them in.

THE CLERK: Please rise for the jury.

(At 10:15 a.m., jury entered courtroom.)

THE COURT: Please be seated everybody.

Members of the jury we're going to continue with the witness who was under oath.

Mr. Neuman.

MR. NEUMAN: Thank you, Your Honor. Very, very quickly.

BY MR. NEUMAN:

Q Simply Self Storage, do you guys maintained either on your computer system or hard -- hard copies, files for all the various billboard leases and other transactions that your company engages in?

A We do, yes.

Q And, when you were asked to do a search of the company records related to this International Outdoor lease, did you find anything?

A I found the lease.

Q You found the original lease that we've been talking about here, the 2009 lease?

A That is correct.

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Q And, was that in an International Outdoor file?
A For -- for an Auburn Hills, yes, International Outdoor file.
Q Anything else in that file related to this International Outdoor Auburn Hills lease?
A There was nothing else contained in that file.
Q Any emails from Mr. Oram or his in-house attorney, Mr. Seething (ph) or his agent, Mr. White, anything like that?
A No.
Q Any letters from the International Outdoor organization to Auburn Hills, hey we really want to have a sit down and pursue a permit so that we can put of a billboard, anything like that?

MR. POTTER: Your Honor, we can go on and on about what's not there when he's already said there was nothing there. I'm sure he could think of 100 things.

THE COURT: Is there an objection?

MR. POTTER: Yes, I object to relevancy to this. It's already been handled. It's redundant evidence.

THE COURT: Move it along please.

MR. NEUMAN: I will.

BY MR. NEUMAN:
Q Did you expect to find everything that had been sent to International -- excuse me that had been sent to Simply Self Storage related to the International Outdoor lease

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whole truth, and nothing but the truth?

MR. ORAM: I do.

MR. POTTER: I had these out. I apologize to the jury. I had the renewal letter out when I showed the other witness the renewal letter and I've misplaced it.

THE COURT: What exhibit number is that, six?

MR. POTTER: No the renewal letter is -- it's 25 and 26. Here they are. Okay. Thank you, Your Honor.

Mr. Oram, I'm going to do background and let you know what this jury -- get them to know who you are, but I'm going to get right to the point of what this is about.

Your Honor, at this point --

RANDY ORAM

called at 10:33 a.m., by the plaintiff and sworn by the clerk testified:

DIRECT EXAMINATION

BY MR. POTTER:

Q Mr. Oram, did you send a renewal letter to Simply Storage in December of 2013 extending your lease?

A Yes, sir.

Q I'm going to show you plaintiff's exhibit 26.

A Can I get my glasses?

Q No, you cannot have your glasses.

A Thank you.

Q Mr. Oram, is that a copy of the renewal letter that you

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sent to International Outdoor in December of 2020?

A '13.

Q December 20th, 2013; sorry.

A Yes, that's correct.

MR. POTTER: Your Honor, I'd move for the admission of exhibit 26.

MR. NEUMAN: I think you've already ruled on this Your Honor, but we -- we reaffirm our objections.

THE COURT: I've ruled on it. It's admitted.

(At 10:35 a.m., plaintiff's exhibit 26 is admitted in to evidence.)

MR. POTTER: And, Misty, could you put that up on the board so they can see -- the jury can see it please?

BY MR. POTTER:

Q And, you were present at Mr. O'Brien's deposition, correct?

A Yes.

Q And, you heard him acknowledge that the address was correct, yes?

A Yes, that's correct.

Q And, you sent it to Mr. O'Brien because he executed the lease?

A That's correct.

Q And, the address which you sent this to is contained within the lease?

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Q And, you had -- had you ever received any default notice from Simply Storage as to why you weren't paying the one dollar a year?

A No, sir.

Q Had you ever received any notice of default from Simply Storage indicating you were in breach of any terms of the original underlying lease?

A No, sir.

Q Now, in addition to that letter, did you also send another letter to Mr. O'Brien on that day?

A Yes.

Q I'm going to show you exhibit 25 and ask you if you sent that letter to Mr. O'Brien on exhibit 20 -- or on December 20th, 2013.

A Yes, they were attached together.

MR. POTTER: Your Honor, I would move to admit these, what was attached to the renewal letter, exhibit 25.

MR. NEUMAN: Again, Your Honor, we -- we affirm our objection but you've already ruled.

THE COURT: I don't think I've ruled on 25.

MR. NEUMAN: It's hearsay.

MR. POTTER: It's not -- it's not hearsay. It went with the renewal letter. It's -- first off the rule of completeness would require it and it's a letter that he

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sent being offered to prove the course of conduct between the parties. These people have said they didn't hear from Mr. Oram at all from 2009 to 2016. Here's two letters we say that were sent.

THE COURT: I'm allowing in the alleged notice. This is clearly hearsay.

MR. POTTER: Even though the deponent's here to be examined on it?

THE COURT: It's hearsay.

MR. POTTER: Okay. All right. So, give me 26 back.

BY MR. POTTER:

Q Without telling me what was in 26, did you send a second letter to Mr. Oram (sic) at that time?

A It's in 25, yes I did.

Q I'm sorry, without telling what's in 25, did you send a second letter in -- with your letter of December -- with your letter renewing the lease?

A Yes.

Q And, why did you send that second letter?

A Just to share with Mr. O'Brien as to the changes that were taking place to this particular point in time in 2013. There was --

Q Changes with regard to what?

A There was changes -- there was conversations in 2013 with

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respect to state legislation which would have been Public Act 4629 which was approved in January 28th of 2014 which dictated certain rules, state guidelines, with respect to billboards primarily. And, also just to give them an update that we were still pursuing things and those variables may impact our future also within Auburn Hills.

Q Now, let's -- that computer that that letter was sent on, do you still -- are you still in possession of that computer?

A No, sir.

Q And, how many computers are you removed from that computer?

A This is my -- the current computer that I have is my third computer since 2013.

Q And, what about your server? Do you have a server in place at International Outdoor?

A Yes we do.

Q And, that server has been in place since when?

A We've had a server, as I've mentioned in my testimony since 2004.

Q And, did you have a virus -- strike that. Was there a virus that inflicted your server in 2014?

A Yes.

Q A computer virus?

A Yes and we've probably changed our servers as well.

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Q And, did you actually place it in the envelope? Is that something you would do?
A I typed the letter, I prepared the letter to be put in the envelope and had either myself, my wife, or the administrative assistant write the address on there and get it ready for mail.
Q And -- and tell us how the mail is picked up from your office back then.
A The mail, as it is today and it's been there since 2000 -- since we've been there, but a mailman -- we are on Orchard Lake in Farmington Hills and a mailman physically comes into the premises and there's a certain spot where our mail goes and there's a certain spot where our mail goes out. So, he exchanges the swap right then and there. If he's not there then -- we've had the same mailman till today.
Q So, did this letter come back for insufficient postage to you?
A No sir, it did not.
Q And, you understand that the whole defense in this case is that you're -- you're a liar, you understand that?
A I'm -- yes I'm understanding that.
Q You're a liar and that you created this document after the fact to cover your position with International Outdoor, correct?

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A It seems that way, yes.
Q Did you do that?
A Absolutely not.
Q Are you the entity that entered into two leases for the same property?
A No, sir.
Q You heard Mr. Schmutzler's testimony, correct?
A That's correct.
Q You heard him say he would never entered into a lease that he entered into, yet he did with you; you heard that, correct?
A Yes, I did.
Q And, did you hear Mr. Schmutzler say that he didn't receive the letter that was sent to the resident agent?
A Yes, I did.
Q Now --

MR. POTTER: It's exhibit 16, Rick.

Your Honor -- strike that.

BY MR. POTTER:
Q Mr. Oram, after -- and I'm not going to go through with the jury everything that we just put up on the board, but you were in the courtroom when I showed the emails between you and Mr. Schmutzler, correct?
A That's correct.
Q And, in one email he says we're going with Lamar, correct?

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those variables that I shared with you, they got changed as well as they put a process in place if somebody wanted to apply for a billboard they put a different process in place.

Q What was that process called if you wanted to apply for a billboard that you could do?

A It's called a Plan Unit Development that's been discussed here as a PUD, P-U-D, and it allows you a mechanism as to the process if you wanted to go through approval for a billboard here's the way that you do it. Up until January 25th of 2016 the mechanism for a billboard, there was no formal mechanism.

Q And, were you following what was going on in Auburn Hills?

A Yes, sir.

Q And, were you following what was going on in Auburn Hills because of your lease with Simply Storage?

A Yes sir, absolutely.

Q And, did you eventually find out about -- well tell the jury how you find out -- found out about the Lamar lease without -- and I'm going to caution you, I know this involves your son. You cannot tell this jury what your son said to you, okay.

A Okay.

Q You can only tell your -- tell the jury what you son did and then -- and then you can say that he reported back to

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you but don't say what he said, okay.

A Okay. In mid-July it came up that we are ready to proceed with respect to -- as a company in our real estate meetings, we were ready to proceed with respect to Auburn Hills. My son was interning home from college and this was the internship that he did at our company to see if, you know, this is something that he wants to pursue. He's a -- this year he's a junior at Michigan State. So, he was interning and I said well why don't -- we have the --

Q Well first off you can't say what you said. Did you give him any instructions?

A Yes. I instructed him to look into Auburn Hills and see what the updated -- go get a copy of the ordinance, go get all the details, the modified ordinance that I knew had gotten modified, and report back to me with respect to what's going on.

Q All right. And, then he did that?

A Yes, sir.

Q And, he reported back to you?

A He reported back to me on the Friday -- it would have been the 22nd of July.

Q All right. And, did you subsequently learn after that that Lamar had business before the Auburn Hills City Council on the 25th?

A I was aware that they were going to, yes on the 22nd I was

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aware of that.

Q Okay. And, what did you understand the business of Lamar -- that Lamar had in front of the Auburn -- Auburn Hills City Council to be on July 25th of 2016?

A That they were going to try to get approval with respect to potentially putting a billboard on the property at 1096 Doris Road which was the same exact property that I had under contract.

Q And, as a result of that knowledge what -- what did you do in response to gaining that knowledge?

A I first called the attorney in the law firm that prepared the paperwork.

Q And, don't tell us anything about that conversation. But, the first thing you did was to call your lawyer?

A That's correct.

Q Then what did you do?

A Then I proceeded to try to get a hold of Simply Storage to share with them that there must be some type of a misunderstanding with respect to this particular property, here's my lease, here's my lease renewals, and I think I shared with them that I think that you guys may have made a mistake and leased out the same property to two different people and, you know, would you please delay the hearing that Monday night until we figure out what's going on here. That's what I asked them to do.

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A It's been mentioned in a couple of different occasions.
Q You would agree with me that backdating a document means if this was created in 2016 and you put a date of 2013 on it that would be backdating, you agree with that?
A That would be fraud, but that would be --
Q That would be fraud, I would agree with you. So, not only do we not have the computer the only thing in your possession related to the Auburn Hills transaction was a copy of the lease that you entered into as I understand it, correct?
A That's right, a hard copy.
Q And, this 2013 renewal letter, correct?
A There was another letter with this. So, there was the lease and the cover letter as well as the renewal letter. So, that's what was in the file.
Q But, you told the jury all about engineered drawings, we heard about that, correct?
A That's correct.
Q And, you did -- you did all this work in 2010, correct? Or, 2009 after the lease was signed up until the point when you ran into great resistance with Auburn Hills, right?
A I'm sorry.
Q You told us --
A I told you that I --

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Q But, we didn't do any of that so we don't have any of that evidence. We just have your word for it, right?
A You have my word and the letter and the renewal letter.
Q And, you've testified that, you know, you typed the letter on a computer that we don't have any more so -- and I -- I understood from your testimony that there was nobody else present when you were typing the letter?
A I don't believe so. If they were it was just in passing, but no I would have typed it on my own.
Q So, again, we don't have any witnesses for that and then I think you testified that you folded the letter and stuffed it in the envelope so apparently nobody saw you do that. So, we don't have any witnesses for the either, right?
A It seems -- apparently.
Q I would recall today, although I don't recall from your deposition testimony, but recall today you saying that you then gave the envelope to somebody else to actually up the -- write the address on?
A No, my deposition testimony stated that either I, my administrative assistant, or my wife or another young lady named Mary Petraski (ph) which was in our office at the time, if one of us would have written the address on there. We don't use the computer to type the address on there, we handwrite the address is most all the cases that I've been involved in. And, then we would prepare the

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EXHIBIT 3

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INTERNATIONAL OUTDOOR

SS MITX, LLC
C/o Mr. Kurt O'Brien
7932 West Sand Lake Road, Suite 108
Orlando, Florida 32819

December 20, 2013

Re: Lease between SS MITX, LLC (collectively, "Landlord") and International Outdoor Inc., a Michigan corporation ("Tenant") dated March 17, 2009 (the "Lease") with respect to property located at 1096 Doris Road, Auburn Hills, Michigan 48124 (the "Property")

Dear Mr. O'Brien:

Pursuant to the current Lease in effect, Tenant hereby notifies Landlord that Tenant exercises its first option to renew the term of the Lease for Five (5) years at the property. A check is enclosed for the option term. Accordingly, the term of the Lease is extended from March 17, 2014 to March 16, 2019. As provided in the lease, the renewal term shall be on the terms and conditions of the Lease in effect.

International Outdoor, Inc.

By: Latif Z. "Randy" Oram
Latif Z. "Randy" Oram

Its: President

Sincerely,

Latif Z. "Randy" Oram

Latif Z. "Randy" Oram
President
International Outdoor, Inc.

MAIN OFFICE:
28423 Orchard Lake Rd. Suite 200
Farmington Hills, MI 48334
www.IOBillboard.com
Phone (248) 489-8989
Fax (248) 489-8990

SATELLITE OFFICE:
16140 James Couzens Fwy.
Detroit, MI 48221

PLAINTIFF'S EXHIBIT 26

IOI 746

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EXHIBIT 4

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VERDICT FORM

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Did International Outdoor send written notice to Simply Self Storage to renew its lease prior to March 16, 2014?

Answer: yes (yes or no)

If your answer is "yes," go on to Question No. 2.
If your answer is "no," skip to Question No 4.

QUESTION NO. 2: Did Lamar tortiously interfere with International Outdoor's contractual relationship with Simply Self Storage?

Answer: yes (yes or no)

If your answer is "yes," go on to Question No. 3.
If your answer is "no," do not answer any further questions.

QUESTION NO. 3: What is the amount of damages suffered by International Outdoor as a result of Lamar's tortious interference with International Outdoor's contractual relationship with Simply Self Storage?

Answer: $ ~~355,000.00~~ 405,000.—

If you answered Question No. 3, do not answer any further questions.

QUESTION NO. 4: Did International Outdoor tortiously interfere with Lamar's contractual relationship with Simply Self Storage?

Answer: _____ (yes or no)

If your answer is "yes," go on to Question No. 5.
If your answer is "no," do not answer any further questions.

QUESTION NO. 5: What is the amount of damages suffered by Lamar as a result of International Outdoor's tortious interference with Lamar's contractual relationship with Simply Self Storage?

Answer: $_____

Signed,

Markus Runnan
Foreperson

4/24/18
Date

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EXHIBIT 5

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AFFIDAVIT

STATE OF OREGON)
)ss
COUNTY OF BENTON)

PATRICK DEPA, being first duly sworn, deposes and states that:

1. I am a former employee of International Outdoor, Inc. I make this affidavit on the basis of my personal knowledge of the facts stated in this affidavit. If called upon to testify, I can and will confirm each of the statements made below.

2. I was employed with International Outdoor from September 2010 until July 2018. My title was Real Estate Director and my job duties consisted of procuring leases for new billboard sites, upgrading static billboards to digital, acting as liaison to all maintenance contractors to maintain current billboard inventory, and presenting staff reports for all zoning board of appeals and planning commission meetings.

3. In the course of my employment, I became aware that International Outdoor was engaged in a dispute with SS MITX, LLC (commonly referred to as Simply Self Storage) and Lamar Advertising of Michigan, Inc. over the right to erect a billboard at Simply Self Storage's Auburn Hills, Michigan, location.

4. In connection with that dispute, I am aware that International Outdoor and my boss, Randy Oram claimed that a letter was sent to Simply Self Storage in December 2013 for the purpose of renewing a 2009 lease for the right to erect a billboard at the Auburn Hills location.

5. I have personal knowledge that the lease renewal letter was not sent in December 2013. I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016. Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time.

6. The computer Mr. Oram used to create the letter was still in his office when I left employment with International Outdoor in July 2018.

7. I know that Mr. Oram made use of this falsified letter as part of International Outdoor's lawsuit against Simply Self Storage and Lamar. I was greatly troubled by Mr. Oram's actions, so I met with the Company's attorney, Jeff Sieving, to enlist his help in preventing Mr. Oram from committing a fraud by using the backdated letter.

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8. During our meeting, I revealed to Jeff Sieving that I had seen Randy Oram create the backdated letter. Mr. Sieving acknowledge this information, but refused to take any action to prevent Mr. Oram from using the letter as evidence in the lawsuit.

9. As the lawsuit between International Outdoor and Lamar/Simply Self Storage proceeded, I continued to make complaints to Jeff Sieving about the letter and Mr. Oram's actions, and repeatedly asked that he intervene to stop Mr. Oram. Mr. Sieving never expressed any doubts about what I had witnessed or suggested in any way that he did not believe me. He nonetheless refused to do anything about it.

10. I am also aware that the Lamar and Simply Self Storage had taken a positon in the lawsuit that International Outdoor had abandoned any claim to the Auburn Hills location. I know the position taken by Lamar/SSS was and is true. We at International Outdoor took no further action after December 2009 to secure the right to erect a billboard on the property because of the difficulty and expense of doing so. Conversations occurred on at least two occasions but Mr. Oram always steered Alan White and myself to other sites that had better chances of success.

11. The Simply Self Storage Auburn Hills lease file stayed in a drawer and was never bought out or spoken about again until January or February 2016. Around this time, a new employee, James Faycurry, was hired. James had come to International Outdoor from Adams Outdoor, a competitor, and he advised us that changes in the law had made erecting a sign in Auburn Hills more feasible than it had been in the past.

12. Specifically, James told us that Auburn Hills had amended its zoning ordinance to allow billboards, but only as a planned unit development (PUD). As part of the PUD, Auburn Hills required that there be a public benefit to the City if they were going to allow a new digital sign in their city. James said that Adams Outdoor made a donation to the City of Auburn Hills of close to $160,000 for a new park, plus a slot of advertising on the sign. As a result, Adams Outdoor was allowed to begin constructing a digital sign in the City of Auburn Hills in late 2015.

13. This information caused Randy Oram to again become interested in exploring the possibility of building a billboard in Auburn Hills. I reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact. He then directed me to try to reach out to Simply Self Storage to get it renewed, but I did not have a good contact number.

14. This was Alan White's lease (a former International Outdoor employee), but he left the company due to a medical condition and was not easy to contact. When I finally made contact with Alan, he was aware that the lease had expired and he tried to provide me with a current contact number for Simply Self Storage, but was unsuccessful. I even wrote letters to the legal departments at Simply Self Storage's corporate offices in Florida and/or Texas. I received no response.

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15. Randy Oram then instructed a few of us employees to use the Adams Outdoors information and packets to put together similar packages for other properties in Auburn Hills that I was attempting to get leases with. We turned our attention to this project and we essentially gave up on the Simply Storage Auburn Hills location for a second time.

16. Shortly after this occurred, I was checking the Auburn Hills website for meeting agendas and discovered that Lamar was taking a case to the planning commission for a new billboard to be located on the Simply Self Storage location. I advised Randy Oram of this development, which caused him to be become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. We looked at every file, every server, and every computer, and found no such letter.

17. Mr. Oram never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. Mr. Oram made us double and triple check, and no renewal letter was found. When I later spoke to Alan White about this, he confirmed that he never sent a renewal letter. He explained that there was no reason to do so because Randy Oram had decided not to move forward with the Auburn Hills site.

18. It was after the above-mentioned search for a renewal letter proved to be unsuccessful that I witnessed Randy Oram create and backdate a renewal letter, as described above.

PATRICK DEPA

Subscribed and Sworn to Before
Me this 30th day of May, 2019.

Notary Public

OFFICIAL STAMP
RUTH ANN POST
NOTARY PUBLIC-OREGON
COMMISSION NO. 977676
MY COMMISSION EXPIRES AUGUST 22, 2022

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EXHIBIT 6

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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,

Plaintiff,

vs

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC. d/b/a THE LAMAR COMPANIES and SS MITX, LLC d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

vs

INTERNATIONAL OUTDOOR, INC.,

Defendant.

Case No. 2016-155472-CB
Hon. Wendy Potts

Case No. 16-155489-CB
Hon. Wendy Potts

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon the attorney(s) of record for all parties to the above cause at their respective addresses disclosed on the pleadings on 2.9.17
by: ☐U.S. Mail ☐Hand Delivered
☐Fax ☒E-Mail

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POTTER, DeAGOSTINO, O'DEA & PATTERSON

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INTERNATIONAL OUTDOOR, INC.'S ANSWERS TO LAMAR ADVERTISING OF MICHIGAN, INC.'S INTERROGATORIES

NOW COMES INTERNATIONAL OUTDOOR, INC., by and through its attorneys, POTTER, DeAGOSTINO, O'DEA & PATTERSON, and for its Answers to LAMAR ADVERTISING OF MICHIGAN, INC.'S, Interrogatories, hereby states as follows:

1. Identify any and all persons who provided information used in answering this First Discovery Set.

ANSWER:

Randy Oram, President; Jeff Sieving, Corporate Counsel; and Patrick Depa, Director, Real Estate 28423 Orchard Lake Rd., Ste. 200, Farmington Hills, Michigan 48334.

2. Identify all persons that you believe may have information regarding the facts giving rise to the claims and defenses in this action.

ANSWER:

Randy Oram; Alan Scott White, President and CEO of Wise Commercial Real Estate; Kurt O'Brien, President of Simply Storage; Kyle Schmutzler, SVP of Real Estate. In addition, please see all individuals identified in the documents produced in response to Defendant/Counter Plaintiff's document requests.

3. Have you read and reviewed the definitions and general instructions that constitute the preamble to these Interrogatories?

ANSWER:

Yes.

4. Prior to answering these Interrogatories, have you made a due and diligent search of your books, records, and papers, with a view to eliciting all information available in this action? Describe all sources of documents that you reviewed.

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ANSWER:

Yes.

5. Identify each person whom Defendant may call as an expert witness at trial and, as to each person:

a. state the subject matter on which such person is expected to testify;

b. state the substance and the facts and opinions to which such person is expected to testify;

c. set forth a summary of the grounds for each such opinion;

d. describe in detail the education, experience or other background upon which you will rely in qualifying such person as an expert; and

e. identify each document reflecting such education, experience or other background, including, but not limited to, all resumes, curriculum vitae and lists of publications and produce all such documents.

ANSWER:

None have been identified at this time.

6. Identify any and all person(s) with information about the facts alleged in the complaint and/or the Defendant's denials of those facts, as alleged in the Answer and Affirmative Defenses.

ANSWER:

Randy Oram; Alan Scott White, President and CEO of Wise Commercial Real Estate; Kurt O'Brien, President of Simply Storage; Kyle Schmutzler, SVP of Real Estate. In addition, please see all individuals identified in the documents produced in response to Defendant/Counter Plaintiff's document requests.

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7. Identify any and all insurance agreement(s) under which a person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

ANSWER:

None.

8. Identify any and all agents, employees or attorneys for Defendant who ever had any conversations with any employee or agent of the City of Auburn Hills between January 1, 2009 and the date on which you respond to these interrogatories, about the Property.

ANSWER:

Randy Oram and Jeff Sieving.

9. Describe in detail all conversations, about the Property, between Defendant (including any and all agents, employees or attorneys for Defendant) and the City of Auburn Hills (including any employee, agent or attorneys for the City of Auburn Hills) between January 1, 2009 and the date on which you respond to these interrogatories. For each such conversation, please identify:

a. The names of the person(s) participating in the conversation(s);

b. What was discussed in the conversation(s);

c. When the conversation(s) occurred;

d. Where the conversation(s) occurred; and

e. Whether Defendant is aware of any notes or other written documents memorializing the conversation. If Defendant is aware of any such notes or other written documents memorializing the conversation, identify those documents.

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ANSWER:

Plaintiff/Counter Defendant objects to this interrogatory as overly broad and unduly burdensome. The interrogatory is unreasonable because it seeks the exact details regarding time and content of conversations over a period of more than eight years. Notwithstanding and without waiving this objection, Jeff Sieving and Randy Oram have conversed with City Counsel, Steve Cohen and Derk Beckerleg. See emails and meeting minutes in Exhibit A to Plaintiff's document production. There are no notes memorializing the conversations other than the emails.

10. Identify any and all agents, employees or attorneys for Defendant who ever had any conversations with any employee or agent of the State of Michigan Department of Transportation between January 1, 2009 and the date on which you respond to these interrogatories, about the Property.

ANSWER:

Jeff Sieving.

11. Describe in detail all conversations, about the Property, between Defendant (including any and all agents, employees or attorneys for Defendant) and the State of Michigan Department of Transportation (including any employee, agent or attorneys for the State of Michigan Department of Transportation) between January 1, 2009 and the date on which you respond to these interrogatories. For each such conversation, please identify:

a. The names of the person(s) participating in the conversation(s);

b. What was discussed in the conversation(s);

c. When the conversation(s) occurred;

d. Where the conversation(s) occurred; and

POTTER, DeAGOSTINO, O'DEA & PATTERSON

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e. Whether Defendant is aware of any notes or other written documents memorializing the conversation(s). If Defendant is aware of any such notes or written documents memorializing the conversation(s), identify the documents.

ANSWER:

Plaintiff/Counter Defendant objects to this interrogatory as overly broad and unduly burdensome. The interrogatory is unreasonable because it seeks the exact details regarding time and content of conversations over a period of more than eight years. Notwithstanding and without waiving this objection, all conversations with MDOT were with respect to FOIA requests and to inquire about the improper locational approval granted Lamar. See emails between Jeff Sieving and MDOT employees.

12. If your response to Request for Admission number 1, in this First Discovery Set, is anything other than an unequivocal admission, describe in detail why the IO Lease attached as Exhibit 1 to this First Discovery Set is not a complete and accurate copy of the lease between Simply Self Storage and Defendant for the Property.

ANSWER:

The attached lease does not include IO's renewal of the lease.

13. If your response to Request for Admission number 2 is anything other than an unequivocal admission,

a. Identify the date on which each rent payment was made;

b. Identify the means by which each rent payment was made (i.e., check, wire transfer, etc.)

c. Identify how the rent was delivered to Simply Self Storage (i.e., mail, in-person delivery, etc).

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ANSWER:

Not applicable.

14. If your response to Request for Admission number 3 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to obtain any permit or approval from the City of Auburn Hills to erect and operate the sign structure(s) and display(s) as described in the IO Lease;

b. Identify the date(s) on which Defendant took these acts;

c. Identify the person(s) who took the acts on behalf of Defendant;

d. Identify the person(s) employed by or affiliated with the City of Auburn Hills to whom the acts were directed.

ANSWER:

a. Plaintiff's employees communicated with city employees and agents in relation to a billboard on the subject property and participated at city council meetings after it was determined Lamar was pursuing a permit to erect a billboard on Simply Storage's property.

b. The specific dates of conversations are unknown except as reflected in emails in Exhibit A to Plaintiff's document production.

c. Jeff Sieving and Randy Oram.

d. Steve Cohen, city counsel, counsel for the city and individuals identified in Exhibit A.

15. If your response to Request for Admission number 4 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to obtain any permit or approval from the City of Auburn Hills to erect and operate the sign structure(s) and display(s) as described in the IO Lease;

POTTER, DeACOSTINO, O'DEA & PATTERSON

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b. Identify the date(s) on which Defendant took these acts;

c. Identify the person(s) who took the acts on behalf of Defendant;

d. Identify the person(s) employed by or affiliated with the City of Auburn Hills to whom the acts were directed.

ANSWER:

Not applicable.

16. If your response to Request for Admission number 5 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to construct the sign structure on the Property;

b. Identify and describe in detail all acts that Defendant took to connect utilities to the sign structure at the Property;

c. Identify and describe in detail all acts that Defendant took to obtain all necessary licenses and permits to erect and operate the sign structure(s) and display(s) at the Property;

d. Identify the date(s) on which Defendant took these acts;

e. Identify the person(s) who took the acts on behalf of Defendant;

ANSWER:

IOI objects to the form of this request and the term "conditions precedent" and that the "Advertising Date" is established by IOI. Notwithstanding and without waiving this objection, IOI admits the conditions that would trigger the "Advertising Date" do not exist.

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17. If your response to Request for Admission number 6 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to renew the IO Lease, consistent with the renewal requirements on page 3 of the IO Lease;

b. Identify the date(s) on which Defendant took these acts;

c. Identify the person(s) who took the acts on behalf of Defendant;

d. Identify the person(s) employed by or affiliated with Simply Self Storage to whom the acts were directed.

ANSWER:

Randy Oram mailed the renewal notice to Simply Self Storage on December 20, 2013, to Kurt O'Brien, 7932 W. Sand Lake Rd., Ste. 108, Orlando, Florida 32819. See IOI 788.

18. If your response to Request for Admission numbers 7 and 9 are anything other than an unequivocal admission, then describe in detail the factual basis for this excuse. Further,

a. Identify the person(s) on behalf of Simply Self Storage who agreed to this excuse;

b. Identify the terms of this excuse;

c. Identify the date on which Defendant and Simply Self Storage agreed to the excuse.

ANSWER:

a. Kurt O'Brien and Kyle Schmutzler.

b. Pursuant to terms of the IO/Simply Self Storage Lease: "Rental shall be deemed to have been made on the date(s) scheduled, unless Landlord notifies Tenant of non-receipt of payment" and IO was never notified of

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non-payment. See also Kurt Schmutzler's email dated February 26, 2009.

c. **February 26, 2009, and March 17, 2009.**

19. If you response to Request for Admission number 8 is anything other than an unequivocal admission,

a. Identify the amendment terms;

b. Identify the date of the amendment;

c. Identify all documents memorializing the amendment;

d. Identify the person(s) on behalf of Defendant who agreed to the amendment; and

e. Identify the person(s) on behalf of Simply Self Storage who agreed to the amendment.

ANSWER:

Not applicable.

POTTER, DeAGOSTINO, O'DEA & PATTERSON

RICK J. PATTERSON (P55706)
Attorney for International Outdoor, Inc.
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248)377-1700

Dated: February 9, 2017

POTTER, DeAGOSTINO, O'DEA & PATTERSON

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EXHIBIT 7

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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,

Plaintiff,

vs

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC. d/b/a THE LAMAR COMPANIES and SS MITX, LLC d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

vs

INTERNATIONAL OUTDOOR, INC.,

Defendant.

Case No. 2016-155472-CB
Hon. Wendy Potts

Case No. 16-155489-CB
Hon. Wendy Potts

POTTER, DeAGOSTINO, O'DEA & PATTERSON
STEVEN M. POTTER (P33344)
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STARK REAGAN, P.C.
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NEUMAN ANDERSON GRIECO & MCKENNEY, P.C.
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STEPHEN T. MCKENNEY (P65673)
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INTERNATIONAL OUTDOOR, INC.'S
ANSWERS TO LAMAR ADVERTISING OF
MICHIGAN, INC.'S SECOND DISCOVERY SET TO DEFENDANT

NOW COMES INTERNATIONAL OUTDOOR, INC., by and through its attorneys, POTTER, DeAGOSTINO, O'DEA & PATTERSON, and for its Answers to LAMAR ADVERTISING OF MICHIGAN, INC.'S, Second Discovery Set, hereby states as follows:

REQUESTS FOR PRODUCTION

1. Produce for inspection any and all systems on which the .pdf version, and the original version of the file that became the .pdf version, of the documents Bates Marked "IOI 745" and "IOI 746" existed.

ANSWER:

IOI objects to the request to produce the system onto which the documents were scanned because it is overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks the disclosure of confidential, proprietary, and privileged material. With regard to the computer on which the original version was created, the computer cannot be identified or located at this time.

SUPPLEMENTAL ANSWER:

Pursuant to the Order entered November 8, 2017 regarding the Motion to Compel Inspection, Plaintiff IOI supplements its prior answer as follows:

1. **IOI has determined that it is not in possession or control of the computer used to create the December 20, 2013 Renewal Documents. It is possible for a computer to be swapped from one employee to another. When a computer is swapped to another employee the computer's memory is deleted and the computer is reformatted for the new user. IOI's practice is to swap equipment out of service when it becomes obsolete. When a computer is removed from service due to obsolescence, its hard drive is removed and discarded. Similarly, any computer infected with a virus is removed from service and discarded. The computer used to create the December 20, 2013 Renewal Documents was removed from service in accordance with the foregoing practice.**

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2. **The provisions regarding the inspection of the computer are not applicable because the computer is no longer in IOI's possession or control.**

The foregoing Answers are true to the best of my knowledge, information and belief.

By: /s/ Katy J. "Rowe" Oram
Katie J. Oram

Prepared by:

POTTER, DeAGOSTINO, O'DEA & PATTERSON

Steven M. Potter (P33344)
Rick J. Patterson (P55706)
Attorneys for IOI
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ANSWERS was served upon the attorneys of record for all parties to the above cause by email at the addresses listed in the caption for this matter on November 22, 2017

Rick J. Patterson (P55706)

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EXHIBIT 8

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE OAKLAND COUNTY

IN THE BUSINESS COURT

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,
Plaintiff,

vs. Case No. 2016-155472-CB
Hon. Wendy Potts

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,
Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES, and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,
Plaintiffs,

vs. Case No. 2016-155489-CB
Hon. Wendy Potts

INTERNATIONAL OUTDOOR, INC.,
Defendant.

_____

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The Deposition of LATIF (RANDY) ORAM,
Taken at 401 South Old Woodward Avenue, Suite 460,
Birmingham, Michigan,
Commencing at 9:12 a.m.,
Friday, February 16, 2018,
Before Cindy Mendenhall, CSR-5220, RPR.

APPEARANCES:

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2701 Cambridge Court
Suite 223
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rjpatterson@potterlaw.com
Appearing on behalf of International Outdoor, Inc.

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CHRISTOPHER E. LeVASSEUR
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Appearing on behalf of SS MITX, LLC d/b/a Simply Self Storage.

KENNETH F. NEUMAN
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Appearing on behalf of Lamar Advertising of Michigan, Inc., d/b/a The Lamar Companies.

ALSO PRESENT:
Jeff Sieving
Richard Rickert

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backup. When did you implement a backup system -- that's --

A. We've had a variety of different backup systems.

BY MR. NEUMAN:

Q. Did your IT experts search your backup systems to see if they could find the source metadata for what is Exhibits 9 and 10?

A. We couldn't find anything.

Q. But that's not my question. Did you direct --

A. The computers aren't there.

Q. -- IT experts -- let me get the question on the record.

Did you direct IT experts to search the backups to your server to find the original sources of the Exhibits 9 and 10, what's known as the metadata?

A. I don't know what metadata is, so I couldn't tell you. The folder is lost. The whole Auburn Hills folder is completely gone. It's not on my computer. It's not in our company, so --

Q. But did you employ or ask any expert to search?

A. I don't know if my wife or Jeff from our office asked anybody else. I did not, no.

Q. Do you know what happened with the physical server that existed at your company in 2014? What became of that physical piece of equipment?

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EXHIBIT 9

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STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SULLIVAN,

Plaintiff-Appellee,

v

DENISE SULLIVAN,

Defendant-Appellant.

UNPUBLISHED
May 17, 2018

Nos. 330543 & 334273
Livingston Circuit Court
LC No. 14-006162-DO

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Defendant appeals as if on leave granted (1) an October 22, 2015, order denying her motion for relief from judgment and granting plaintiff's motion to modify spousal support and (2) a March 28, 2016, order again modifying spousal support. This Court initially denied leave to appeal for lack of merit in the grounds presented, *Sullivan v Sullivan,* unpublished order of the Court of Appeals, issued May 19, 2016 (Docket No. 330543); *Sullivan v Sullivan*, unpublished order of the Court of Appeals, issued December 2, 2016 (Docket No. 334273), but the Supreme Court remanded for consideration as on leave granted, *Sullivan v Sullivan*, 500 Mich 957; 892 NW2d 367 (2017); *Sullivan v Sullivan*, 500 Mich App 958; 891 NW2d 477 (2017). We reverse in part and remand for further proceedings before a different judge.

Plaintiff and defendant divorced after a 36-year marriage. The divorce trial took place on October 1, 2014, and the court made a dispositional ruling from the bench on October 30, 2014. In the original dispositional ruling, the court erroneously failed to make an award regarding the vested shares of stock in plaintiff's (now former) employer, Ramco-Gershenson, Inc. On January 12, 2015, the date scheduled for entry of judgment, the parties negotiated the issue of vested shares off the record and entered into a consent judgment on that same date. The consent judgment provided, among other things, that plaintiff would provide a modifiable amount of $12,000 a month in spousal support; this was in accordance with the court's rulings after the divorce trial. The judgment also dealt with the disposition of the vested shares of stock.

On August 27, 2015, defendant filed a motion to enforce certain aspects of the judgment and a motion for partial relief from judgment based on fraud. Defendant asserted that, at the time of the January 12, 2015, negotiations, plaintiff had failed to disclose that he had resigned from his job in December 2014, that a separation agreement had changed the amount of vested Ramco stock that he owned because certain unvested shares had vested, and that he had received

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a substantial lump-sum payment. Defendant asserted that plaintiff's 2014 total income was substantially higher than he had represented, the value of the concealed stock was $471,144.46, and he no longer had the employer-provided life insurance required by the divorce judgment.

Over the course of the following months, the trial court held various hearings, denied defendant's claim of fraud, ordered that plaintiff comply with certain aspects of the consent judgment, reduced (on October 22, 2015) the spousal support to $2,000 a month, and then raised (on March 26, 2016) the spousal support to $4,000 a month.

Defendant first argues that the trial court erred in denying the motion for partial relief from judgment because, before the signing of the consent judgment, plaintiff made a material misrepresentation that inured to defendant's detriment. This court reviews for an abuse of discretion a trial court's decision regarding a motion for relief from judgment. *Yee v Shiawassee Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002).

MCR 2.612(C)(1)(c) allows for relief from judgment on grounds of "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A showing of "fraud or misrepresentation" warranting relief from judgment requires the moving party to provide significant, specific allegations and strict factual proof. *Yee*, 251 Mich App at 405.

The parties agree that at the January 12, 2015, hearing, the issue of the vested shares of Ramco stock was central. Plaintiff's attorney represented that plaintiff had 33,679 vested shares.[1] Plaintiff contends that the trial court's finding that plaintiff had not lied to the court must be afforded deference and was supported by the evidence because plaintiff later testified that he believed the court was asking about the circumstances existing in October 2014 and also testified that he did not know that certain vesting had, as of January 12, already occurred. But plaintiff's testimony that he did not know that vesting had already occurred and thought it would occur in late January is belied by his testimony that he knew about the components of his severance package with Ramco. The severance agreement spoke to the vesting of the so-called "non-performance" stock shares[2] on the date of plaintiff's December 19, 2014, resignation, provided that plaintiff did not revoke (within seven days) the release and discharge provisions.[3] With regard to the so-called "performance" stock shares, the severance agreement indicated that plaintiff would be entitled to a payout for the shares, "for which vesting will be accelerated and will vest in full [sic] and plaintiff will be paid for such performance share units, based on the

[1] Plaintiff does not argue that this statement by the attorney should not be attributed to plaintiff, arguing instead that "[plaintiff] honestly believed that he was being asked about the vested stock shares he held at the time of [the October divorce] trial."

[2] The previously-unvested shares were divided into "performance" and "non-performance" shares. In accordance with his separation agreement with Ramco, plaintiff received a payout for the vesting of 9,300 unvested performance shares; received vested shares for 15,226 of the non-performance, unvested shares; and lost 5,232 of the unvested shares.

[3] It is not disputed that plaintiff did not exercise his seven-day right to revoke.

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market price of the Trust's shares on the Resignation Date, within 30 calendar days after the Release provisions . . . become effective." Plaintiff received the payment for the performance shares on January 9, 2015.[4]

The Michigan Supreme Court has stated:

> [t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (quotation marks and citations omitted).]

In addition, the *Titan* Court noted that even misrepresentations made innocently can be actionable if the effect on the plaintiff is equally egregious. *Id.* at 556. See also *M&D, Inc v WB McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998) (discussing innocent misrepresentation in the context of a contract).[5] Although defendant admittedly focused in her motion on deliberate and intentional fraud, her motion also referred to relief from judgment based on a "material misrepresentation."

Even accepting the court's finding that plaintiff thought that the relevant period for determining the amount of vested shares was October 30, 2014, the central issue at the January 12, 2015, hearing was the *distribution of vested shares*. Keeping this in mind, regardless of whether plaintiff intended to lie or did not intend to lie, he did in fact make a material representation at this time, and this representation was false. Plaintiff's attorney said "[h]e has 33,679 . . . shares . . . that vested." Plaintiff admitted to knowledge of the separation agreement, and this agreement, viewed in context, indicated that plaintiff's non-performance shares would vest before January 12 (i.e., on the resignation date) and that the performance shares would vest at some point in the near future (in actuality, payment for these ended up being made on January 9). Under these circumstances, the assertion about having only 33,679 vested shares was made recklessly. In addition, given that the issue being negotiated at the January 12 hearing was distribution of the vested shares, plaintiff clearly made the assertion with the intention that defendant act upon it, and evidence shows that defendant did act upon it to her detriment.

Under these circumstances, it was an abuse of discretion for the trial court to deny the motion for relief from judgment. Defendant must be allowed to reopen the issue of distribution

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[4] Plaintiff testified that when he signed the Ramco separation agreement, he knew that he would be getting this payment at some point.

[5] This Court has held that "[j]udgments entered pursuant to the agreement of parties are of the nature of a contract." *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994).

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of the vested stock, given that it represents a significant asset. In addition, because spousal-support factors include a consideration of the "property awarded to the parties," see *Luckow v Luckow*, 291 Mich App 417, 424; 805 NW2d 453 (2011),[6] the issue of spousal support must also be revisited.

In its October 22, 2015, order, the court held the issue of life insurance in abeyance, stating that it would revisit in March 2016 whether plaintiff needed to obtain life insurance for defendant. It does not appear that this issue was ever addressed with finality. The court referred to life insurance at a hearing on October 5, 2015, stating "you better get some life insurance,"[7] but it is not clear to whom the court was speaking, and, at any rate, the court *later* stated that it was holding the issue in abeyance. The life-insurance issue remains outstanding and must also be addressed on remand.

Defendant next argues that the October 22, 2015, order violated her constitutional rights to due process because she received inadequate notice of the hearing on that date and was erroneously denied discovery. She also argues that the court erred in modifying the spousal-support award at that time. This Court reviews constitutional (e.g., due process) issues de novo. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). This Court reviews for an abuse of discretion a trial court's decision to grant or deny discovery. *Shinkle v Shinkle*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

We review "the trial court's factual findings relating to the award or modification of [spousal support] for clear error." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655.

The lower-court record contains a notice of hearing, dated October 14, 2015, stating that plaintiff's motion to modify spousal support would be heard on October 21, 2015. The record

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[6] In *Luckow*, 291 Mich App at 424, the court stated that several factors are pertinent to spousal support, including:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, and (11) general principles of equity. [Quotation marks and citation omitted.]

[7] The register of actions, in an entry dated October 5, 2015, states "DEFT'S MOT TO ENFORCE JUDGMENT; GRANTED AS TO LIFE INSURANCE ON PLTF," but the parties point to no order, aside from the ambiguous oral statement on October 5, 2015.

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contains another document, entitled "Praecipe, request for hearing" and dated October 14, 2015; this document states: "Please place on the motion calendar for Monday, November 2, 2015." But this latter document also states: "Scheduled to be Heard on Wednesday, October 21, 2015," "By Permission of Judge's Clerk, Lisa."[8] In addition, the register of actions states, in an October 13, 2015, entry, that the motion to modify spousal support would be "set for same date as evid hear 10/21[.]"

Toward the end of the October 21, 2015, hearing, the court stated that it thought the spousal-support motion was scheduled to be heard that day,[9] but defendant's attorney stated that it was not scheduled to be heard until November and that defendant had a right to discovery. The trial court stated that there was no right to discovery with regard to the motion and scheduled the hearing for the following day. On appeal, defendant contends that her rights to due process were violated because of the two dates listed on the praecipe. This argument is not tenable, however. The document labeled "Praecipe" *requests* a motion date of November 2, but then states that the motion is "Scheduled to be Heard on Wednesday, October 21, 2015," "By Permission of Judge's Clerk[.]" In addition, the notice of hearing served on defense counsel on the same date as the praecipe states that the motion would be heard on October 21, 2015. It is a stretch to argue that defense counsel had no notice, under these circumstances, that the motion would be heard on October 21, and even assuming, arguendo, that there was some ambiguity regarding the date of the hearing, at the very least defense counsel was put on notice that he needed to clarify which date was applicable.

Defendant also argues that she did not realize the hearing on spousal support would be an evidentiary hearing related to the determination of the amount of support to be paid. However, plaintiff's motion to modify spousal support clearly requested that the court do the following: "Following a hearing, determine the appropriate amount of support that should be paid due to the fact that [p]laintiff has lost his job." The notice of hearing states: "Plaintiff's Motion to Modify Spousal Support will be brought on for hearing on Wednesday, October 21, 2015." Under these circumstances, defendant should have been aware that the October 21, 2015, hearing would involve a redetermination of spousal support based on the limited issue of job loss. Defendant takes issue with the lack of discovery, and on appeal cites MCR 2.302(A)(4), which states: "After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules." But the hearing was scheduled for October 21 and defense counsel did not make his oral, on-the-record "motion" for discovery until that date, in the midst of the fraud hearing. Under these circumstances, it is difficult for us to find that the trial court erred with regard to discovery, and, at any rate, we are now remanding this case for a reevaluation of spousal support.

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[8] An October 14, 2015, proof of service indicates that both the "Praecipe" and the "Notice of Hearing" were served on defendant's attorney on October 14, 2015.

[9] The court had, earlier that day, expressed that it did not know when the motion was scheduled to be heard, but plaintiff's counsel said, "we had it set for today."

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As stated in *Moore*, 242 Mich App at 654:

> The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case. An alimony award can be modified upon a showing of changed circumstances. The modification of an alimony award must be based on new facts or changed circumstances arising since the judgment of divorce.

Defendant contends that because plaintiff quit his job *before* entry of the consent judgment on January 12, 2015, there was no change of circumstances warranting a modification of spousal support. This argument elevates form over substance. The $12,000 a month in spousal support was based on the trial court's rulings after the divorce trial (and before the termination of employment), and the parties merely formalized this amount in the consent judgment. The trial court did not clearly err in finding a change of circumstances. Defendant also contends that the trial court's ruling was improper because the court stated that the change in circumstances happened "through no fault of [plaintiff's] own." But plaintiff did provide plausible reasons for why he terminated his employment with Ramco, stating that "it was made quite clear that neither [he nor his boss] had confidence in each other's decision[-]making ability, and the best thing would be for me to go." Accordingly, we cannot conclude that the trial court clearly erred in ruling that plaintiff's decision to quit was not made on a whim.

Defendant states: "Discussing . . . the findings on the spousal support factors is virtually meaningless in light of the fact that [defendant] did not have an opportunity to present her case." Nevertheless, she argues that the trial court failed to address many of the required spousal-support factors and erroneously imputed income to defendant while not imputing income to plaintiff. It is not entirely clear, however, that the court was imputing income to defendant. The court stated that there was no reason defendant could not work, but made no reference to imputing a certain income to defendant. In addition, it is not entirely clear that the court did *not* impute income to plaintiff, seeing as the court ordered him to pay spousal support despite his unemployment. At any rate, the issue of spousal support must be revisited on remand, as we have already noted.

Defendant next argues that the trial court erred in failing to grant her certain attorney fees. The trial court did not address this issue. In general, an issue must be raised and addressed to be preserved. *Polkton v Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). "[T]his Court may disregard the issue preservation requirements and review may be granted if failure to consider the issue would result in manifest injustice." *Id.* at 95-96. We address this issue because, while defense counsel did not discuss the attorney-fee issue during his closing argument on October 21, 2015, the fact remains that defendant did request attorney fees in her written motion that was being heard on that date.[10]

[10] In general, this Court reviews for an abuse of discretion a court's grant or denial of attorney fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Here, though, as noted, the

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Defendant, in her August 27, 2015, motion to enforce judgment, argued that plaintiff had failed to take certain steps to enforce the judgment, such as transferring certain monies from his IRA. She requested attorney fees under MCR 3.206(C)(2)(b) "for the reason that [p]laintiff refused to comply with the Consent Judgment despite having the ability to comply and that his fraudulent misrepresentations caused [d]efendant to incur substantial attorney fees in connection with all necessary attorney fees incurred [sic] to bring this matter to the attention of this [c]ourt." Defendant claims that the court ordered plaintiff to comply with various "equalization of accounts" orders and that the court should have awarded attorney fees in conjunction with that. Although the pertinent transcript reveals that plaintiff represented that everything that needed to be done was in the process of being accomplished and the court did not explicitly "order" anything orally, the court did order certain equalization actions in its written order dated October 22, 2015.

MCR 3.206(C)(1) states: "A party [in a domestic-relations action] may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding." MCR 3.206(C)(2)(b) states that "[a] party who requests attorney fees and expenses must allege facts sufficient to show that . . . the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." Contrary to defendant's suggestion, these rules do not contain a *requirement* that attorney fees be awarded upon request even if expenses were incurred because of an unjustified refusal to comply with a court order. See, e.g., *Butler v Simmons-Butler*, 308 Mich App 195; 863 NW2d 677 (2014) (stating that MCR 3.206(C)(2)(b) *allows* attorney fees if a party refused to comply with a court order). At any rate, the court, as noted, simply did not address the request for attorney fees. This Court has held that the "failure to exercise . . . discretion" can amount to an abuse of discretion. See *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 49; 445 NW2d 186 (1989). Because it is appropriate to remand this case for further proceedings as previously discussed, we also remand the issue of attorney fees.

Defendant next argues that the case should be assigned to a different judge on remand. Defendant did not move to disqualify the trial judge below. Accordingly, this issue is not preserved. See, e.g., *Welch v District Court*, 215 Mich App 253; 545 NW2d 15 (1995). However, the Michigan Supreme Court has remanded proceedings to a different judge of its own volition, without even discussing any motions below or arguments on appeal. See *People v Smith*, 496 Mich 133, 144; 852 NW2d 127 (2014) (remanding a criminal case to a different judge because the initial judge demonstrated hostility towards the prosecution). In the divorce case of *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992), the Court remanded the matter to a different judge, based on an appearance of impropriety, without discussing any motions made below. Accordingly, the absence of a motion to disqualify does not mean that defendant's

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court simply did not address defendant's attorney-fee request, so there has been no exercise of discretion to review.

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argument should be rejected automatically. As defendant points out, MCR 7.216(A)(7) allows the Court of Appeals to "grant . . . relief as the case may require[.]"[11]

MCR 2.003(C)(a) allows for judicial disqualification based on bias or prejudice. MCR 2.003(C)(b) allows for disqualification because of a failure "to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." Canon 2(A) states, in part, that a judge "must expect to be the subject of constant public scrutiny" and "must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen[.]" Canon 2(B) states that that a judge "should promote public confidence in the integrity and impartiality of the judiciary" and "should treat every person fairly, with courtesy and respect."

The record is replete with instances in which the judge treated defendant or her attorney, Bruce Sage, with apparent hostility. We will list some (but not all) of the instances. At one point, Sage thought that the judge was finished speaking and attempted to respond, stating, "I thought you were finished," and the judge said, "Oh, for heavens [sic] sake. If I take a breath that doesn't mean I stopped." The judge was discussing payment amounts to equalize accounts, and after stating "It's not rocket science" to Sage and "No frickin' way" in response to the court clerk, she stated to Sage, "every time you start saying you didn't know [in response to questions about what defendant had in her accounts] I'm gonna sanction you a $100 [sic]." When Sage presented an email purportedly from plaintiff and attempted to admit it, the judge discussed the requirement of laying a foundation and said, "I mean really." When Sage asked if the judge was ordering defendant, who lives in Florida, to appear in person for an evidentiary hearing, the judge said, "You bet I am." When the judge issued a decision at the conclusion of the October 22, 2015, hearing without first allowing or even mentioning closing arguments, Sage attempted to request a closing argument but the judge reprimanded him, stating, "Are you makin' a joke?" and suggesting that it was imperious of Sage to mention closing arguments *after* the judge's decision. Sage attempted to explain that he did not interject earlier because he "didn't want to interrupt you, Your Honor," but the judge said, "No, Mr. Sage, I'm not [allowing closing arguments]. We're done. Get the other people in here."

When defendant was attempting to explain her financial situation, the judge said, "Yeah, so do some explaining about why you only have 120 in the bank." When defendant explained that her cost for cable and her landline telephone was $250 a month and her cellular-telephone cost was $235 a month, the judge said, "that's ridiculous." Defendant explained that she had pets to care for, including a blind and elderly dog, and the judge stated, in regard to defendant's pets: "maybe you need to get rid of them" (in order to save money). The judge stated that defendant should have saved more money in 2015, but did not place this in the context of

[11] In general, a motion to disqualify is reviewed for an abuse of discretion. See *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). But here, as discussed, defendant argues for assignment to a new judge without having argued as much below, emphasizing general principles of fairness and allegations of animosity and the appearance of impropriety. Because the issue was not raised in the lower court, there was not an exercise of discretion for this Court to review.

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defendant's having been unaware for a large part of that year that plaintiff had lost his job and would not be paying spousal support of $12,000 a month into the future.

It is true that some of these remarks, viewed in isolation, are of relatively little impact or import, but it is important to view them as a pattern. Sage did not demonstrate hostility or aggressiveness throughout the proceedings but the judge displayed a pattern towards him and defendant of at least apparent hostility. It seems especially egregious for the judge to have recommended that defendant "get rid of" her pets. While there might be certain situations in which rehoming pets might indeed be a necessity (for example, if someone is destitute and living in a homeless shelter), defendant was not in that type of situation. The appearance of justice would be better served if the case is remanded to a different judge. See *Sparks*, 440 Mich at 163; see also MCR 2.003(C)(b) and Code of Judicial Conduct, Canon 2(A) and (B).

Defendant lastly takes issue with the March 2016 spousal-support hearing, stating that plaintiff did not comply with a document subpoena and effectively deprived defendant of her constitutional rights to due process and that the court erred in its spousal-support findings.

With regard to the subpoena, plaintiff unambiguously testified at the March hearing that he had no other documents to produce regarding his 2015 income. He testified that he had yet to file his tax return for 2015 but would provide defendant's counsel with a copy of the return when it was filed. As such, defendant's argument about the subpoena is without merit.

Contrary to defendant's implication, the court made no specific findings regarding imputation or non-imputation of income at the March hearing but did order plaintiff to pay defendant $4,000 a month despite his current lack of employment. The court referred to the fact that both defendant and plaintiff were earning money from stock dividends and noted that the initial support order had been set based on a high income. On appeal, defendant argues that the court was required to revisit all the spousal-support factors, but it appears that the court was properly looking at what it viewed to be the *changed* circumstances, i.e., plaintiff's loss of employment. At any rate, because the distribution of stock must be revisited, a revisiting of spousal support is also warranted, as we have already discussed.

Reversed in part and remanded for further proceedings before a different judge. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel

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EXHIBIT 7

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

INTERNATIONAL OUTDOOR INC Plaintiff,
V
SS MITX Defendant,

NO: 2016-155472-CB
HON. MARTHA D. ANDERSON

In the matter of:

ORDER REGARDING MOTION

Motion Title: **Defendants Lamar Advertising of Michigan, Inc. d/b/a The Lamar Companies and SS MITX, LLC's Motion for Relief from Judgment, pursuant to MCR 2.612(C)(1)(c)**

The above named motion is:

- ☐ **granted.**
- ☐ **granted in part, denied in part.**
- ☐ **denied.**
- ☐ **for the reasons stated on the record.**

In addition: Defendants' Motion is HELD IN ABEYANCE until such time as the Court holds an evidentiary hearing on the matter.

* The Evidentiary Hearing is scheduled for Friday, August 23, 2019 at 9:00 a.m.

* The parties may conduct limited discovery in this matter for the sole purpose of conducting the deposition of Patrick Depa as well as the two depositions of the IT individual(s) sought by Defendants at the time of hearing. These depositions shall be completed within 60 days (i.e., on or before August 19, 2019).

DATED: 06/19/2019

Martha D Anderson

HON. MARTHA D. ANDERSON
Circuit Court Judge

FILED Received for Filing Oakland County Clerk 6/19/2019 2:19 PM

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EXHIBIT 8

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

International Outdoor, Inc.
Plaintiff,

-v-

SS MLTX, LLC and Lamar Advertising of Michigan
Defendant.

Case No. 2016-155472-CB
HONORABLE MARTHA D. ANDERSON

ORDER / RE: MOTION

At a session of said Court, held in the City of Pontiac, Oakland County, Michigan, this 3RD day of July, 2019.

Present: **HONORABLE MARTHA D. ANDERSON**
Circuit Court Judge

This matter having come before the Court on (Plaintiff/Defendant):

Int'l outdoor's, Motion for Protective Order
Name State nature of motion

and the Court being advised in the premises;

IT IS HEREBY ORDERED that the motion is:

☐ Granted

☐ Denied

☒ Granted in part, as explained in the comment below.

Comment: Defendants may depose Jeffrey Sieving. The deposition must be to the events that occurred in 2016

Martha D Anderson
HON. MARTHA D. ANDERSON, Circuit Court Judge

APPROVED AS TO ~~SUBSTANCE AND~~ FORM only

P77706

P65673

P66203

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FILED Received for Filing Oakland County Clerk 7/3/2019 10:41 AM

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EXHIBIT 9

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FILED Received for Filing Oakland County Clerk 7/3/2019 1:04 PM

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

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

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Attorneys for International Outdoor

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PROTECTIVE ORDER

At a session of Court held in the City of Pontiac,
County of Oakland, State of Michigan, on
7-3-2019

PRESENT: HONORABLE MARTHA D. ANDERSON

Circuit Judge

Pursuant to MCR 2.302(C) and to the Court's authority,

IT IS HEREBY ORDERED that, with respect to Lamar Advertising of Michigan, Inc.'s ("Lamar") Demand for Inspection dated June 24, 2019 (the "Demand for Inspection") the following limits, conditions, and procedures will be placed on International Outdoor, Inc.'s response to the Demand for Inspection:

1. International Outdoor will make available for inspection and forensic imaging: (a) the computer from Latif "Randy" Oram's office at International Outdoor during, but not limited to, the period of July 2016 to July 2018 (the "Computer"); and (b) any servers that were connected to the computer from Latif "Randy" Oram's office at International Outdoor during, but not limited to, the period of July 2016 to July 2018 (the "Server"). The inspection shall be conducted by Spectrum Computer Forensics ("Spectrum"). The inspection shall occur on or before July 26, 2019.
2. Spectrum's inspection of the Computer and the Server shall be an "experts' eyes' only" inspection. This means that Spectrum can inspect and make a forensic image(s) of the Computer and Server, but cannot disclose the substance of that inspection or the forensic imaging to anyone, including Lamar, SS MITX, LLC ("Simply Self Storage"), their employees or agents, or their counsel. Spectrum shall verify that no information, software or programs shall be added to the Computer or Server.
3. After the inspection, Spectrum can identify any documents or information found during its inspection and imaging that it reasonably believes are relevant to the issues raised

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in the May 30, 2019 affidavit of Patrick Depa, which was attached to Lamar and Simply Self Storage's June 6, 2019 Motion for Relief from Judgment under MCR 2.612(C)(1)(c). Spectrum's identification cannot include any communications between International Outdoor and its counsel, Potter, DeAgostino O'Dea & Patterson. Spectrum can provide a brief description of the relevant documents or information it found to all counsel of record.

4. After Spectrum provides a brief description of the relevant documents or information it found to all counsel of record, counsel then must meet and confer to discuss the production of the documents or information identified by Spectrum and can either: (a) agree to produce the documents or information to the parties and their counsel; or (b) have the issue of whether the documents or information should be produced to the parties and their counsel decided by this Court.

5. Any information produced by International Outdoor in response to the inspection, including the Computer, Server, or any forensic images made of either the Computer or Server, shall be used solely for the purposes of this action and may not be used for any other purpose.

IT IS FURTHER ORDERED that regarding the subpoena issued by Lamar to Harry Iskander, dated June 20, 2019, that subpoena shall be modified to require only that Mr. Iskander produce responsive documents created after January 1, 2014.

This is NOT a final order, does NOT resolve the last pending claim and does NOT close this case.

Martha D Anderson

CIRCUIT COURT JUDGE

JS

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EXHIBIT 10

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

INTERNATIONAL OUTDOOR INC Plaintiff,
V
SS MITX Defendant,

NO: 2016-155472-CB
HON. MARTHA D. ANDERSON

In the matter of:

ORDER REGARDING MOTION

Motion Title: Plaintiff's Motion for Reconsideration Regarding Protective Order dated July 3, 2019

The above named motion is:

- ☐ **granted.**
- ☐ **granted in part, denied in part.**
- ☒ **denied.**
- ☒ **for the reasons stated on the record.**

In addition:

DATED: 07/24/2019

Martha D Anderson

HON. MARTHA D. ANDERSON
Circuit Court Judge

FILED Received for Filing Oakland County Clerk 7/24/2019 11:51 AM

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EXHIBIT 11

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

International Outdoor
Plaintiff,

-v-

Lamar and SSM|TX
Defendant.

Case No. 2016-155472-CB
HONORABLE MARTHA D. ANDERSON

ORDER / RE: MOTION

At a session of said Court, held in the City of Pontiac, Oakland County, Michigan, this 31ST day of July, 2019.

Present: **HONORABLE MARTHA D. ANDERSON**
Circuit Court Judge

This matter having come before the Court on (Plaintiff/Defendant):

Defendant's, Motion for RE: Computer and Server Inspection and Imaging
Name State nature of motion

and the Court being advised in the premises;

IT IS HEREBY ORDERED that the motion is:

☒ Granted

☐ Denied

☐ Granted in part, as explained in the comment below.

Comment: Once the imaging is complete Spectrum Computer Forensics may take the images back to their office for inspection.

Martha D Anderson
HON. MARTHA D. ANDERSON, Circuit Court Judge

APPROVED AS TO ~~SUBSTANCE AND~~ FORM ONLY

P66673
P57473
P35981

I-99 (46561)

FILED Received for Filing Oakland County Clerk 7/31/2019 11:46 AM

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EXHIBIT 12

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

International Outdoor, Inc
Plaintiff,

-v-

55 Mitx, LLC & Lamar Advertising of Michigan, Inc.
Defendant.

Case No. 2016-155472-CB
HONORABLE MARTHA D. ANDERSON

ORDER / RE: MOTION

At a session of said Court, held in the City of Pontiac, Oakland County, Michigan, this 7th day of August, 2019.

Present: **HONORABLE MARTHA D. ANDERSON**
Circuit Court Judge

This matter having come before the Court on (Plaintiff/Defendant):

International Outdoor's, Motion for To Dismiss
Name State nature of motion

and the Court being advised in the premises;

IT IS HEREBY ORDERED that the motion is:

☐ Granted

☒ Denied

☐ Granted in part, as explained in the comment below.

Comment: For the reasons stated on the record.

Martha D Anderson
HON. MARTHA D. ANDERSON, Circuit Court Judge

APPROVED AS TO ~~SUBSTANCE~~ AND FORM ONLY

(P72969)

(P57473)

(P35981)

I-99 (46561)

FILED Received for Filing Oakland County Clerk 8/7/2019 1:06 PM

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EXHIBIT 13

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Court of Appeals, State of Michigan

ORDER

International Outdoor Inc v SS Mitx LLC

Docket No. 350180

LC No. 2016-155472-CB

Mark J. Cavanagh
Presiding Judge

Colleen A. O'Brien

Jonathan Tukel
Judges

The Court orders that the motion for immediate consideration is GRANTED.

In lieu of granting the application for leave to appeal, the Court orders, pursuant to MCR 7.205(E)(2), that the August 7, 2019 order of the Oakland Circuit Court denying plaintiff's motion to dismiss postjudgment proceedings hereby is REVERSED. Generally, once an appeal is filed, the trial court does not have jurisdiction to amend its final orders or judgments. *Lemmen v Lemmen*, 481 Mich 164, 165–166; 749 NW2d 255 (2008); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 542; 730 NW2d 481 (2007). This Court, however, may remand to allow additional evidence to be taken. MCR 7.216(A)(5). In light of the pending appeal, the proper procedure to obtain the development of a factual record is by a motion for remand pursuant to MCR 7.211(C)(1) in the pending claim of appeal, *International Outdoor Inc v SS Mitx LLC*, Docket No. 345784.

This order is to have immediate effect, MCR 7.215(F)(2).

The Court retains no further jurisdiction.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 14 2019
Date

Jerome W. Zimmer Jr.
Chief Clerk

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EXHIBIT 14

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v

Case No. 16-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC.,

Defendant,

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

v

Case No. 16-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.
_____/

THOMAS P. BRUETSCH (P57473)
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_____

NOTICE OF TAKING VIDEO DEPOSITION DUCES TECUM OF PATRICK DEPA

RECEIVED by MCOA 8/14/2019 7:41:08 PM

TO: All Counsel of Record

PLEASE TAKE NOTICE that the video deposition of PATRICK DEPA will take place on Saturday, August 17, 2019 at 2:30 p.m. (PDT Time) at the Sheraton Portland Airport Hotel, 8235 Northeast Airport Way, Portland, OR 97220. Said deposition will be taken in accordance with the Michigan Court Rules. The deposition will be visually recorded.

This Notice is given as provided for in Rules 2.305(A)(C), 2.306(B), and 2.315 of the Michigan Court Rules. You may be present to examine the witness.

The witness shall bring with him to the deposition a copy of the records set out in Exhibit A to this Notice.

By: /s/Thomas P. Bruetsch (P57473)
OTTENWESS, TAWEEL & SCHENK, PLC
Attorney for International Outdoor, Inc.
535 Griswold St., Suite 850
Detroit, MI 48226
(313) 965-2121

Dated: July 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the MIFile system which will send notification of such filing to the attorneys of record.

By: /s/Diane Sutherland
OTTENWESS, TAWEEL & SCHENK, PLC

Dated: August 7, 2019

RECEIVED by MCOA 8/14/2019 7:41:08 PM

EXHIBIT A

The witness shall bring with him to the deposition the following physical and/or electronic documents or records in his possession, custody, or control:

1. Any and all documents (including but not limited to documents created or stored electronically) removed from, copied from, forwarded, or otherwise taken from International Outdoor, Inc.

2. All text messages and emails between the deponent, Patrick Depa, and any current or former employee of International Outdoor, Inc., created between January 1, 2016 and present.

3. All communications, including but not limited to text messages and/or emails, with any person employed by and/or representing Lamar Advertising of Michigan, the Lamar Companies, and/or SS MTX LLC, d/b/a Simply Self Storage, created between July, 2018, and present.

4. Records showing all deposits into any of the deponent's bank accounts between May 1, 2019 and present.

5. All text messages and emails, between deponent and Steve Shaya between July 1, 2018 and present.

6. Cellular telephone logs/usage information showing all cellular telephone calls and text messages for deponent's cell phone between May 1, 2019 and present.

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EXHIBIT 15

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E-ticket

Kiwi.com booking number: [redacted]

Detroit → Portland

Departure 6h 32m

1. Flight - Sat, Aug 17

Detroit - Detroit Metropolitan **DTW**	06:05
Las Vegas - McCarran International **LAS**	07:22

Flight no: NK111 *Airline: Spirit Airlines* *Duration: 4h 17m*

Layover 53m

2. Flight - Sat, Aug 17

Las Vegas - McCarran International **LAS**	08:15
Portland - Portland International **PDX**	10:30

Flight no: NK1408 *Airline: Spirit Airlines* *Duration: 2h 15m*

Visas

Kiwi.com is not responsible for any visa issue, including airport transit visas; this is the responsibility of the passenger. Kindly note that without the correct documents, you may not be allowed to board the aircraft. You can learn more about your visa requirements by visiting the **IATA Travel Centre** or by contacting the embassy or your foreign ministry.

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E-ticket

Kiwi.com booking number: [redacted]
Reservation number (PNR): [redacted]

KIWI.COM

Flight information	Detroit - Detroit Metropolitan **DTW**	2019 Aug 17 06:05 Local time
	Las Vegas - McCarran International **LAS**	2019 Aug 17 07:22 Local time
	Flight no: NK111 *Airline: Spirit Airlines*	Economy
Passengers	Stephen McKenney	PNR: [redacted]
	Passenger details required before 16 Aug	
	1× Personal item	45 × 35 × 20 cm — 10 kg

Baggage restrictions are part of each individual airline's policy and may be subject to change. To check your current baggage allowance, sign in to Manage My Booking on Kiwi.com.

It is usually much cheaper to order checked baggage with us in advance than to pay for it at the airport.

Check-in

Details required
Please provide your passport/ID details in Manage My Booking before 16 Aug 10:05 UTC. We need these details to check you in online. We'll send your boarding passes to you by email on or before 17 Aug.

E-ticket notice

All services provided by Spirit Airlines are subject to their Terms and Conditions. More information is available on their website.

Credit card used to purchase the trip

This is a copy of the company credit card used to purchase your trip: some carriers may require it for verification. Print your e-ticket and carry it with you on your trip.

[redacted]

[redacted]

spirit

RECEIVED by MCOA 8/14/2019 7:41:08 P

E-ticket

Kiwi.com booking number: [redacted]
Reservation number (PNR): [redacted]

KIWI · COM

Flight information	Las Vegas - McCarran International **LAS**	2019 Aug 17 08:15 Local time
	Portland - Portland International **PDX**	2019 Aug 17 10:30 Local time
	Flight no: NK1408 *Airline: Spirit Airlines*	Economy
Passengers	Stephen McKenney	PNR: [redacted]
	Passenger details required before 16 Aug	
	1× Personal item	45 × 35 × 20 cm — 10 kg

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Check-in

Details required
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Credit card used to purchase the trip

This is a copy of the company credit card used to purchase your trip: some carriers may require it for verification. Print your e-ticket and carry it with you on your trip.

[redacted]

[redacted]

spirit

RECEIVED by MCOA 8/14/2019 7:41:08 P

E-ticket

Kiwi.com booking number: [redacted]

Contact	If you have any issues, get in touch with us on: US: +12028444159 GB: +442038085910 RU: +74993488053 TH: +6620184125 AU: +61261450125
Passport/Visa/Health	Kiwi.com is not responsible for any visa issues including airport transit visas. Boarding might be refused if you don't have the right documentation. Please ensure that you have all necessary visas, vaccinations, and a passport/ID valid for at least 6 months after your final travel date.
Meals	Most low-cost carriers do not include meals with the reservation. Snacks and refreshments can usually be purchased en route. Contact us by phone to order a meal in advance. Some food and drinks may be allowed on board, but liquids are limited to 100ml and must be kept in a zip-lock plastic bag.
Fare conditions	Our services are non-refundable and non-cancellable. All changes are subject to fees. Visit Manage My Booking if you need to make any changes.

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[redacted]

From: Alaska Airlines <Alaska.IT@alaskaair.com>
Sent: Friday, August 2, 2019 5:54 PM
To: [redacted]
Subject: Confirmation Letter - [redacted] 08/18/19 - from Alaska Airlines

If you have trouble viewing this message, click here to request a plain text-only version of this email.

Confirmation code: [redacted]

You're all set. Thank you for booking with Alaska and we look forward to seeing you on board.

View full details about your flight reservation and fare.

VIEW/MANAGE

Flight	Departs	Arrives	Class	Traveler(s)	Seat(s)
Alaska 2148 Bombardier Q400	Portland, OR (PDX) Sun, Aug 18 5:05 am	Seattle (SEA) Sun, Aug 18 5:55 am	X (Coach)	Stephen Mckenney	17B
Flight Operated By Horizon Air as AlaskaHorizon. Check in with Alaska Airlines.					
Alaska 792 Boeing 737-900	Seattle (SEA) Sun, Aug 18 6:50 am	Detroit (DTW) Sun, Aug 18 2:15 pm	X (Coach)	Stephen Mckenney	

Additional information

Prohibited hazardous materials

The Federal Government has specific restrictions about hazardous materials in carry-on and checked baggage. Failure to declare hazardous materials may result in civil and criminal penalties. For more information, visit: the FAA website.

Summary of airfare charges

Stephen Mckenney
MP# Enter Mileage Program
Ticket [redacted]

Base Fare and Surcharges	$226.98
Taxes and Other Fees	$40.02
Per person total	$267.00
Total charges for air travel	**USD $267.00**

View all taxes, fees and charges

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Total charges and credits

Nonrefundable fare of $267.00 was charged to the Mastercard card with number [redacted] held by Stephen T Mckenney on 08/02/2019.

Saver fare restrictions

This is a Saver fare reservation. It is not eligible for refund or credit beyond the first 24 hours after booking. Saver tickets purchased within 24 hours of scheduled departure are not eligible for refunds or cancellations.

Travel insurance by Allianz Global Assistance

Purchase travel insurance benefits and travel assistance services for your trip from Allianz Global Assistance. Learn more

Flight notifications

Flight notifications are how we will contact you with important travel information. Get alerts about departures, arrivals, gate changes, cancelations and more.

SIGN UP

Web Check-in

When traveling on Alaska Airlines, save time by checking in online 1 to 24 hours prior to departure. You can also check in at one of our airport kiosks or at the ticket counter.

CHECK IN

For more information about minimum check-in times, required identification, international travel, and traveling with minors, please visit our website.

Manage your flight reservation

View full details about your flight reservation and fare.

Alaska Airlines reservations 1-800-ALASKAAIR (1-800-252-7522)

MANAGE

Baggage

Carry-on baggage: On Alaska Airlines flights, each traveler is limited to one carry-on bag plus one personal item. See our carry-on baggage page for the latest policies and size information.

Get the Visa Signature® card

Apply for the Alaska Airlines Visa Signature® card and get more: a new 40,000 bonus mile offer.

APPLY NOW

Sign up for email deals

Our email deals features exclusive fare sales, discount codes and web specials tailored to your preferences, as well as Alaska Airlines Mileage Plan offers and news.

Sign up

Service requests

Alaska Airlines provides a meet and assist service for travelers who need assistance through the airport. Request this service online or over the phone.

View reservation

InFlight service

Many Alaska Airlines flights offer the option to purchase a meal. We've also equipped almost all of our fleet with InFlight WiFi so you can surf the web or stay productive inflight. For more info, please see our on board guide.

For your security

Do you have a redress number? If so, and you did not provide it when you made your reservation,

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Checked baggage: Alaska Airlines rules and fees apply for this itinerary. See the checked baggage page for details and exceptions.

Alaska Airlines® baggage service guarantee
Get your bags in 20 minutes guaranteed.

Your rights

Please review important information about your consumer rights and our limitations of liability.

You may also wish to review the contract of carriage applicable to your trip.

please visit www.alaskaair.com or call reservations.
To learn more about redress numbers go to www.dhs.gov/trip.

Destinations

View information for:
Seattle
Detroit

Contact us

Share your thoughts with us, contact us.

Please do not reply to this email. Need help? contact us.
If you have an account with us and wish to unsubscribe from marketing email, visit the manage email page.
You may still receive transactional messages from Alaska Airlines. Privacy Notice

This email was sent to smckenney9@hotmail.com.
Reference number PL103436490. Requested at 08/02/2019 02:45 PM

Alaska Airlines, PO Box 68900, Seattle, WA 98168-0900.
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View our privacy notice or contact us.

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EXHIBIT 16

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

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

ALTIOR LAW, P.C.
Kenneth F. Neuman (P39429)
Stephen T. McKenney (P65673)
401 South Old Woodward Ave., Ste. 460
Birmingham, MI 48009
Phone: 248.594.5252
kneuman@altiorlaw.com
smckenney@altiorlaw.com
Attorney for Lamar Advertising

STARK REAGAN, PLC
Christopher E. LeVasseur (P35981)
1111 West Long Lake Rd., Ste. 202
Troy, MI 48098
Phone: 248.641.9955
clevasseur@starkreagan.com
Attorney for Simply Self Storage

POTTER DEAGASTINO O'DEA & PATTERSON
Steven M. Potter (P33344)
Rick J. Patterson (P55706)
2701 Cambridge Court Suite 223
Auburn Hills, MI 48326
Phone: 248.377.1700
spotter@potterlaw.com
rjpatterson@potterlaw.com
Attorneys for International Outdoor

RECEIVED by MCOA 8/14/2019 7:41:08 PM

NOTICE OF TAKING DEPOSITION *DUCES TECUM* OF JEFFREY SIEVING

PLEASE TAKE NOTICE that pursuant to MCR 2.306, Lamar Advertising of Michigan, Inc. will take the deposition of Jeffrey Sieving on August 15, 2019 commencing at 1:00 p.m., and continuing until completed, at the offices of Altior Law, P.C., 401 S. Old Woodward, Ste. 460, Birmingham, MI 48009 before a notary public, at which time you may attend and cross examine.

PLEASE TAKE FURTHER NOTICE that, pursuant to the MCR 2.306(B) and MCR 2.310, Lamar requests that the deponent produce for production, inspection and/or copying all documents (including, without limitation, e-mails or text messages) in any way containing the following information:

1. The "receipts for computer repairs" that were identified by International Outdoor's attorney as being in Mr. Sieving's briefcase at the trial on April 20, 2018 (see trial transcript volume II, page 244, line 9; excerpt attached as Exhibit A).
2. The "receipt for invoice and for computer repair from Harry Isklander" that were identified by International Outdoor's attorney as being in Mr. Sieving's briefcase at the trial on April 20, 2018 (see trial transcript volume II, page 244, lines 9-10; excerpt attached as Exhibit A)
3. Documents and electronically stored information that comprise, relate to, or reflect the "April seventh, 2014, data recovery of files from virtual server, reconfigure network, and back up of all documents and stations" as identified by International Outdoor's attorney as being the subject of those receipts in Mr. Sieving's briefcase (see trial transcript volume II, page 244, lines 9-13; excerpt attached as Exhibit A).

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4. Documents and electronically stored information that comprises International Outdoor's complete employment file and personnel record for Patrick Depa.
5. Documents and electronically stored information that contains an invoice or receipt for payment for any new computers purchased by International Outdoor between July 1, 2016 and July 31, 2018.
6. A copy of all "Project Plans/Goals" for Patrick Depa for the time period between 2012 and 2018.
7. A copy of all "Project Plans/Goals" for any employee or contractor of International Outdoor, which reference the 1096 Doris Rd., Auburn Hills, MI (the "Property").
8. A copy of all "Project Update" documents for Patrick Depa for the time period between 2016 and 2018.
9. A copy of all "Project Update" documents for any employee or contractor of International Outdoor, which reference the Property.
10. Documents and electronically stored information that comprises International Outdoor's complete employment file and personnel record for James Faycurry.
11. Documents and electronically stored information that comprises International Outdoor's complete employment file and personnel record for Alan Scott White.

Respectfully submitted,

ALTIOR LAW, P.C.

By: /s/ Stephen T. McKenney
Stephen T. McKenney (P65673)
Attorneys for Lamar Advertising
401 South Old Woodward, Suite 460
Birmingham, MI 48009
(248) 594-5252
smckenney@altiorlaw.com

Dated: July 24, 2019

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CERTIFICATE OF SERVICE

I certify that on July 24, 2019, I electronically served the forgoing paper upon all counsel of record using the Court's MiFile True Filing System (E-Serve option), which will send notification of such service to the individuals listed on the Case Service List.

/s/ Denise L. Ward
Denise L. Ward, Legal Assistant
Altior Law, P.C.
dward@altiorlaw.com

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EXHIBIT A

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FILED Received for Filing Oakland County Clerk 7/16/2018 11:31 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited Liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME II

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Friday, April 20, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

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(At 2:42 p.m., proceeding reconvened.)

MR. POTTER: I have something I want to address with the Court.

THE COURT: You want to talk to me?

MR. POTTER: Yes.

THE COURT: All right. Please be seated.

MR. POTTER: So, I was not aware of this and I should have been aware of this, but the corporate counsel had in his briefcase receipts for computer repairs and we have a receipt for invoice and for computer repair from Harry Isklander. And, on April seventh, 2014, data recovery of files from virtual server, reconfigure network, and back up of all documents and stations. In light of what they did there I'd like to recall him and ask him if this is receipt for what happened with the virus.

THE COURT: That's going to open up lots more questions. So, what I -- I mean it's going to -- you're going to have a chance to look at the receipt but that's going to open up questions.

MR. POTTER: Well, I was not -- they didn't request this at any time in the litigation and they didn't serve a subpoena on him to produce this at trial. So, what happened was after the deposition evidently these -- his deposition, these documents were located --

FILED Received for Filing Oakland County Clerk 7/16/2018 11:31 AM

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EXHIBIT 17

RECEIVED by MCOA 8/14/2019 7:41:08 PM

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

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

ALTIOR LAW, P.C.
Kenneth F. Neuman (P39429)
Stephen T. McKenney (P65673)
Matthew D. Smith (P72969)
401 S. Old Woodward, Suite 460
Birmingham, MI 48009
(248) 594-5252
kneuman@altiorlaw.com
smckenney@altiorlaw.com
msmith@altiorlaw.com
Attorneys for Lamar Advertising

OTTENWESS, TAWEEL & SCHENK, PLC
Thomas P. Bruetsch (P57473)
535 Griswold St., Suite 850
Detroit, MI 48226
(313) 965-2121
tbruetsch@ottenwesslaw.com
Attorneys for International Outdoor

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STARK REAGAN, PLC
Christopher E. LeVasseur (P35981)
1111 West Long Lake Rd., Ste. 202
Troy, MI 48098
(248) 641-9955
clevasseur@starkreagan.com
Attorney for Simply Self Storage

RE-NOTICE OF TAKING DEPOSITION *DUCES TECUM* OF JEFFREY SIEVING

PLEASE TAKE NOTICE that pursuant to MCR 2.306, Lamar Advertising of Michigan, Inc. will take the deposition of Jeffrey Sieving on Monday, August 19, 2019 commencing at 9:00 a.m., and continuing until completed, at the offices of Altior Law, P.C., 401 S. Old Woodward, Ste. 460, Birmingham, MI 48009 before a notary public, at which time you may attend and cross examine.

PLEASE TAKE FURTHER NOTICE that, pursuant to the MCR 2.306(B) and MCR 2.310, Lamar requests that the deponent produce for production, inspection and/or copying all documents (including, without limitation, e-mails or text messages) in any way containing the following information:

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Respectfully submitted,

ALTIOR LAW, P.C.

By: /s/ Stephen T. McKenney
Stephen T. McKenney (P65673)
Attorneys for Lamar Advertising
401 South Old Woodward, Suite 460
Birmingham, MI 48009
(248) 594-5252
smckenney@altiorlaw.com

Dated: August 14, 2019

CERTIFICATE OF SERVICE

I certify that on August 14, 2019, I electronically served the forgoing paper upon all counsel of record using the Court's MiFile True Filing System (E-Serve option), which will send notification of such service to the individuals listed on the Case Service List.

/s/ Denise L. Ward
Denise L. Ward, Legal Assistant
Altior Law, P.C.
dward@altiorlaw.com

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EXHIBIT A

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FILED Received for Filing Oakland County Clerk 7/16/2018 11:31 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited Liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME II

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Friday, April 20, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

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(At 2:42 p.m., proceeding reconvened.)

MR. POTTER: I have something I want to address with the Court.

THE COURT: You want to talk to me?

MR. POTTER: Yes.

THE COURT: All right. Please be seated.

MR. POTTER: So, I was not aware of this and I should have been aware of this, but the corporate counsel had in his briefcase receipts for computer repairs and we have a receipt for invoice and for computer repair from Harry Isklander. And, on April seventh, 2014, data recovery of files from virtual server, reconfigure network, and back up of all documents and stations. In light of what they did there I'd like to recall him and ask him if this is receipt for what happened with the virus.

THE COURT: That's going to open up lots more questions. So, what I -- I mean it's going to -- you're going to have a chance to look at the receipt but that's going to open up questions.

MR. POTTER: Well, I was not -- they didn't request this at any time in the litigation and they didn't serve a subpoena on him to produce this at trial. So, what happened was after the deposition evidently these -- his deposition, these documents were located --

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EXHIBIT 18

RECEIVED by MCOA 8/14/2019 7:41:08 PM

Court of Appeals, State of Michigan

ORDER

International Outdoor Inc v SS Mitx LLC

Docket No. 349907

LC No. 2016-155472-CB

Deborah A. Servitto
Presiding Judge

Kathleen Jansen

Colleen A. O'Brien
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The application for leave to appeal is DENIED for lack of merit in the grounds presented. The denial is without prejudice to the filing of a motion by defendants-appellees, within 21 days of the Clerk's certification of this order, for actual and punitive damages pursuant to MCR 7.212(C)(2) to recover the amount of actual damages, including reasonable attorney fees, incurred by defendants-appellees as a result of the vexatious appeal filed by International Outdoor Incorporated. MCR 7.211(C)(8); *Fette v Peters Const Co*, 310 Mich App 535, 553-554, 871 NW2d 877 (2015).

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL 25 2019
Date

Chief Clerk

RECEIVED by MCOA 8/14/2019 7:41:08 PM

EXHIBIT 19

RECEIVED by MCOA 8/14/2019 7:41:08 PM

Stephen McKenney

From: Tom Bruetsch <tbruetsch@OttenwessLaw.com>
Sent: Wednesday, August 14, 2019 3:00 PM
To: Kenneth Neuman
Cc: Stephen McKenney; Christopher LeVasseur
Subject: COA ruling

Gentlemen:

As Mr. Neuman and I agreed earlier this afternoon, the Court of Appeals ruling means that there is nothing currently before the trial court. FYI, we have sent a copy of the COA order to Judge Anderson's clerk with an inquiry about the hearing date.

As long as there is nothing before the trail court, there is no basis to continue the discovery. As I discussed with Mr. Neuman, the deposition of Jeff Sieving will not proceed tomorrow. I see that you ha re-noticed the deposition. I don't think that is appropriate given that there is no matter pending.

I understand that you intend to file a motion to remand. Therefore, with respect to Mr. Depa's deposition, if the Court of Appeals remands the case this week, we would conduct that deposition. If no remand comes from the court, then that deposition would be cancelled.

In addition, the COA ruling means that there is no basis or authorization for your expert to possess, review or analyze my client's data. His work should stop, and all of our data should be returned immediately.

As I discussed with Mr. Neuman, if the matter is remanded, we should bow to the realities concerning the timing of the hearing. It would seem to me that even if a motion to remand is granted, you would have to re-file your motion and we would have to deal with the issue of its timeliness under the court rule. Whatever the trail court decided on that question would likely be appealed by the losing party. Furthermore, even were your expert authorized to continue analyzing my client's data (which he is not), I'm told that he will not be ready with any kind of summary until sometime next week, at the earliest. That prejudices my client's ability to defend itself at the hearing. Under the circumstances we should agree that even if there is a remand, the hearing will be put off until sometime in September.

THOMAS P. BRUETSCH
(313) 788-7026 (direct) | (313) 965-7680 (fax)
TBruetsch@OttenwessLaw.com

OTTENWESS, TAWEEL & SCHENK, PLC

The Buhl Building
535 Griswold, Suite 850
Detroit, MI 48226

From: Kenneth Neuman [mailto:kneuman@altiorlaw.com]
Sent: Tuesday, August 13, 2019 12:29 PM
To: Tom Bruetsch
Cc: Stephen McKenney; Christopher LeVasseur
Subject: RE: Depa Deposition

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EXHIBIT 20

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From: Patrick Depa
Sent: Sunday, July 21, 2019 5:33 PM
To: Christopher LeVasseur
Subject: Re: International Outdoor

Hi Chris,

So you were right, the threats are coming I received to phone calls from a person I used to work with, Steve Shea, a friend of Randy's.

The first phone call came a couple of days ago where Steve said I should recant what I wrote in my affidavit because Randy and his lawyers are going to sue me until I am broke, get personal with me and my past, call my mother and kids by subpoena and wreak all future job opportunities. Also, he said they will come into my employment and interview my bosses too.

Then just now he called me and said he just went to church and said that sin is punishable by death. That I should just write him an affidavit recanting all of what I said so he could get it to Randy. He said "Patrick just end all of this nonsense before this ends in blood shed". I said "I hope it doesn't lead to blood shed" and Steve said "But you just don't know".

I have to say I do get a little nervous when I go out at night. Let's touch base either tomorrow or Tuesday. I might have some time tomorrow morning but my afternoon and evening, with a night meeting, is packed.

Pat

On Jul 17, 2019, at 7:01 AM, Christopher LeVasseur <clevasseur@starkreagan.com> wrote:

Good morning Patrick; can you give me a call when you have a chance? I want to give you a status update; either office (248-641-9955) or cell (248-310-6931) is fine.

Christopher E. LeVasseur
Stark Reagan, P.C.
1111 W. Long Lake Road
Troy, Michigan 48098
Telephone: 248-641-9955
Facsimile: 248-641-9921
clevasseur@starkreagan.com
www.starkreagan.com
<image001.jpg>

PRIVILEGED AND CONFIDENTIAL: This communication and any accompanying attachments are confidential and privileged. They are intended for the sole use of the addressee. If you are not the intended recipient, you are advised that any use of this communication and any accompanying attachments is strictly prohibited, including but not limited to the reading, disclosure, copying, distribution or the taking of any action in reliance upon this communication and any accompanying attachments. Moreover, any such disclosure shall not compromise or waive the attorney-client or other privileges as to this communication and any accompanying attachments. If you have received this message in error,

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EXHIBIT 21

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MICHIGAN COURT RULES PRACTICE

COURTROOM HANDBOOK ON MICHIGAN CIVIL PROCEDURE



2018

Ronald S. Longhofer

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§ 2612.19 Appellate Review—Relief Prior to Appeal

Except as provided in MCR 2.614(A)(1), a motion for relief from judgment does not affect the finality of a judgment or suspend its operation.[1] With respect to the time for filing an appeal, under MCR 7.204(A)(1)(b), an appeal in a civil action must be taken within:

> 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

An order denying a motion for relief from judgment under MCR 2.612(C) is final and appealable. An order granting such a motion is technically interlocutory, in the sense that it does not finally dispose of the case but reopens it for further proceedings in the trial court. However, its operation in this respect is essentially the same as an order granting a new trial after final judgment. As observed in the Author's Commentary to Rule 2.611, there are good reasons for appellate review of such an order before the new trial is undertaken, and in recent years the appellate courts have quite routinely granted leave to appeal in such situations. The same practice should apply to appeals from orders granting relief from a judgment under MCR 2.612(C).

§ 2612.20 Appellate Review—Relief Pending Appeal

The effect of a pending appeal on the power of the trial court to grant relief under MCR 2.612(C), however, creates problems. MCR 7.208(A) provides that, after a claim of appeal is filed or leave to appeal granted, the trial court may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or otherwise provided by law. Yet the time for filing a motion seeking relief from the judgment continues to run while the case is pending on appeal. This leads to undesirable complications, either requiring a party seeking relief from judgment to present its grounds first to the appellate court, which may then remand the case to the trial court if the grounds are well taken, or requiring the motion to be filed in the trial court while the appeal is pending although the court cannot act upon it until the case is remanded. Under the latter approach, the trial court could indicate its intention to grant the motion upon remand, and a remand could then be obtained from the appellate court under MCR 7.211(C).

§ 2612.21 Appellate Review—Relief After Remand

There should be no doubt about the power of the trial court to entertain a motion under MCR 2.612(C) after the appellate court has finished with the case and remanded it. The trial judge cannot disregard the mandate of the appellate court as to matters expressly considered and decided by it, but it should be free to consider whether certain circumstances not previously shown to either court would justify relief from the judgment under a motion brought under MCR 2.612(C). The trial court is not free to do so, however, as to grounds that could have been raised on appeal but were not.[1]

Rule 2.613 Limitations on Corrections of Error

(A) Harmless Error. An error in the admission or the exclusion of evidence, an error in

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erally an abuse of discretion for court to decide motion without first conducting an evidentiary hearing regarding allegation).

[Section 2612.19]

[1]MCR 2.612(C)(2).

[Section 2612.21]

[1]South Macomb Disposal Authority v. American Ins. Co., 243 Mich. App. 647, 625 N.W.2d [illegible] (2000) ("The trial court is precluded by the doctrine of res judicata from considering issues not

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EXHIBIT 22

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STATE OF MICHIGAN

COURT OF APPEALS

CURTIS G. KORNEFFEL and MAUREEN A. KORNEFFEL,

Plaintiffs-Appellees,

v

WENDELL C. FLYNN and MARGARET ANN FLYNN,

Defendants-Appellants.

UNPUBLISHED
August 1, 2000

No. 207234; 208899
Wayne Circuit Court
LC No. 93-334893-CH

Before: Meter, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

In this action for reasonable rent pursuant to MCL 600.5750; MSA 27A.5750, defendants appeal an order of judgment in the amount of $1,867,606, rendered in plaintiffs' favor following a bench trial in Wayne Circuit Court. We affirm.

I

These consolidated appeals stem from a land contract default and forfeiture by the vendees, defendants Flynn, of their interest in a mansion and property along the Detroit River in Grosse Ile. The vendors of the property are plaintiffs, the Korneffels. The origins of this case are related in a prior published Michigan Supreme Court decision, *Flynn v Korneffel*, 451 Mich 186, 189-190; 547 NW2d 249 (1996), addressing another aspect of the legal conflict herein:

> On February 1, 1980, Michael and Marylou Baghdoian purchased a large residence situated on a valuable parcel of waterfront property on land contract from Sam and Pamela Piunti. Plaintiffs in the present proceeding, Wendell and Margaret Flynn, purchased the Baghdoians' interest and are the current vendees of the land contract. Subsequently, plaintiffs failed to pay a $376,040.71 balloon payment that became due on February 1, 1988.

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> Thereafter, the vendors, the Piuntis, declared the contract forfeit and began summary proceedings in the 33rd District Court. The Flynns neither answered the complaint nor defended their interest in the summary proceedings. On March 30, 1988, the district court entered a judgment of forfeiture and possession for breach of land contract. After entry of default, plaintiffs' ninety-day period of redemption commenced. To perfect this right, plaintiffs were obligated to pay approximately $450,000, inclusive of unpaid real estate taxes. While these proceedings were pending, the current defendants and vendors, Curtis and Maureen Korneffel, purchased the Piunti's interest and were substituted in the summary proceedings action. The redemption period was scheduled to expire June 28, 1988.

The Korneffels obtained a writ of restitution on June 29, 1988.[1] The Flynns thereafter sought to enforce their right of redemption, unsuccessfully pursuing the matter on appeal to this Court and ultimately, the Supreme Court. The Supreme Court, in the opinion set forth above, held that the Flynns did not properly effectuate redemption pursuant to statute and common law; the Court therefore concluded the judgment of forfeiture and writ of restitution had been properly entered against the present defendants. See *id.* at 195-207.

Various stays during the pendency of the Flynns' appeals allowed them to remain in possession of the property. Consequently, because defendants continued to hold over on the property, the present case seeking reasonable rent was instituted by plaintiffs in December 1993. Defendants pleaded only one affirmative defense to the action: "Another action had been initiated by the same parties involving the same claims." Significant to the present appeal, the trial court sanctioned defendants for their failure to comply with discovery by barring them from presenting any witnesses or exhibits at the bench trial held in July 1997. The trial culminated in a damage award being entered in favor of plaintiffs for rent, waste, and taxes owed by defendants. On September 5, 1997, judgment was entered in favor of plaintiffs in the amount of $1,669,561.80, inclusive of pre-judgment interest, taxable costs, and mediations sanctions. An order denying defendants' motion for a new trial was entered on October 17, 1997. On November 7, 1997, the trial court granted plaintiffs' motion to correct judgment, thereby increasing the amount of the judgment by $198,045, for a total judgment of $1,867,606. Defendants now appeal.[2]

II

---

[1] As the Supreme Court noted, *id.* at 190, n 3, the Flynns "not only defaulted in making the final balloon payment, but also had failed to make monthly payments on the land contract, and had not paid real estate taxes on the property for a series of years. In fact, the Flynns did not pay taxes on the property for the years 1984-1987, and paid less than half the amount due on the contract.

[2] Two appeals have been consolidated in the present matter: defendants' appeal by right of the September 5, 1997, judgment and defendants' appeal by leave granted of the November 7, 1997, order correcting judgment.

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Defendants first contend the trial court abused its discretion in precluding them from presenting any witnesses or exhibits at trial because of their failure to comply with plaintiffs' pretrial discovery requests. We disagree.

Defendants did not file a witness list, refused to respond to interrogatories or deposition notices directed to both defendants and failed to allow plaintiffs access to the property. No discovery response was given to plaintiffs even though an order to compel discovery was entered on August 12, 1994, and an order to show cause was entered on August 29, 1994. Plaintiffs ultimately obtained an order compelling an inspection of the property by plaintiffs' two expert witnesses. Defendants' counsel signed the final pretrial order which clearly stated defendants were not to have witnesses or exhibits.

MCR 2.313(B)(2) provides in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (b) an order refusing to allow the disobedient party to support or oppose designate claims or defenses, or prohibiting the party from introducing designated matters into evidence.

The trial court's imposition of discovery sanctions is reviewed for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990); *Middleton v Margulis*, 162 Mich App 218, 223; 412 NW2d 268 (1987). As explained in *Dean, supra* at 32-33:

> Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [Footnotes omitted.]

See also *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999); *Chrysler Corp v Home Ins Co*, 213 Mich App 610, 612; 540 NW2d 485 (1995); *LaCourse v Gupta*, 181 Mich App 293, 296-297; 448 NW2d 827 (1989).

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Defendants do not deny there was a failure to comply with discovery in this case. However, defendants blame their former counsel for the transgressions. After changing counsel, defendants moved to amend the final pretrial order barring the presentation of evidence, claiming they were unaware of their former counsel's failure to provide discovery. Defendants now contend they only wanted to present two witnesses at trial – an expert on real property valuations to rebut the estimates and conclusions regarding the property's value proffered by plaintiffs' expert, and defendant Wendell Flynn, who would have testified about improvements made to the property. With regard to the preclusion of exhibits, defendants contend the trial court abused its discretion in barring them from presenting pictures showing the condition of the property prior to their purchase to demonstrate the improvements that they made.

However, the facts defendants now claim they or their expert would have testified to at trial were precisely the objects of plaintiffs' pretrial discovery requests that were ignored by defendants. The unanswered interrogatories and request for production of documents served on defendants included questions concerning improvements made to the property and defendants' perception of the market value of the property, for the purpose of determining potential setoffs or information regarding market and rental value and allowing plaintiffs to validate the potential proofs of defendants. Defendants did not even attempt to provide plaintiffs with any of this information. Although plaintiffs were aware that defendants would be potential witnesses, the record indicates defendants refused to provide any information regarding the substance of their testimony by way of offer of proof prior to trial. Thus, defendants should not now be heard to complain. In any event, the record indicates defendants were not restricted in utilizing any of their information regarding improvements in cross-examining plaintiffs' expert witness at trial.

Defendants cannot sincerely blame their failure to comply with discovery on their former attorney, because it is well established that "notice to an attorney is notice to the client who employs him." *Reinecke v Sheehy*, 47 Mich App 250, 262; 209 NW2d 460 (1973). Moreover, defendant Wendell Flynn's affidavit, in which he indicates he was unaware he would be precluded from calling witnesses at trial, is directly contradicted by the fact that this issue was argued in his presence before the trial court on September 27, 1995 (per plaintiffs' motion in limine to bar witnesses), and defendants' counsel stated on the record there were "probably not" any witnesses that would be presented. "[W]here the client stands by and permits work to be done, or an argument to be made on his behalf * * * we think it may fairly be assumed from his silence and acquiescence that he consented thereto." *Bessman v Weiss*, 11 Mich App 528, 531; 161 NW2d 599 (1968), quoting *Eggleston v Boardman*, 37 Mich 14, 19, 20 (1877). Recourse, if any, lies in an action for professional malpractice against defendants' former counsel.

We conclude the record supports plaintiffs' contention that defendants engaged in a continuous pattern of delay and repeatedly denied plaintiffs the discovery to which they were entitled. Thus, under the circumstances, the trial court did not abuse its discretion in imposing sanctions for defendants' abuse of the discovery process. *Dean, supra*.

III

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Defendants next argue that during trial their counsel attempted to cross-examine plaintiffs' expert about why he failed to use available single family residential reports instead of reports for investment properties when estimating rental return, but the trial court improperly cut off this inquiry. The gist of defendants' complaint is the trial court based its damage award entirely upon plaintiffs' expert's testimony; the expert was, according to defendants, comparing apples to oranges, thereby reflecting on his competency. Defendants also contend the trial court improperly disallowed cross-examination of plaintiff Curtis Korneffel with respect to whether money was tendered to plaintiffs before the redemption period expired; plaintiffs purportedly opened the door to this line of questioning with testimony that defendants did not timely pay the redemption monies.

The scope and duration of cross-examination of witnesses rests in the trial court's sound discretion and exercise of that discretion will not be reversed by the court absent a clear showing of abuse. *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995); *Gibson v Henkin*, 141 Mich App 468, 471; 367 NW2d 418 (1985).

Because this was a bench trial, the trial judge was aware that the issue of timeliness of the redemption payments had been resolved against defendants in *Flynn v Korneffel*, *supra,* and ruled this line of inquiry to be irrelevant in this suit for reasonable rent. We affirm that defendants were properly foreclosed from using the redemption money issue to impeach the credibility of plaintiff Curtis Korneffel because that issue had been resolved and in no way affected the credibility of his testimony.

With regard to defendants' purported inability to cross-examine plaintiffs' expert witness about his use or failure to use single family residential reports as the basis of his rental appraisal, the record belies defendants' contention that there was never an explanation for the expert's failure to examine the residential rental reports. The record indicates the expert testified that the mansion in question, due to its unusual character, was "not the type of property that's typically leased or rented in the marketplace" and, therefore, was not amenable to the usual or typical methods of rent estimations. The expert further testified he did use information regarding returns for residential property as well as the commercial segment of the real estate market, taking a "conservative approach" in estimating the market value of the property. Defendants' counsel was curtailed in his questioning, but only after he persisted in asking a question for which the witness testified that he did not know the answer. The question had been asked and answered. See *In re Wardell Jones*, 142 Mich App 207, 212; 369 NW2d 212 (1985). Because the record shows defendants were not unduly limited in their cross-examination of the witness, we find no abuse of discretion in this regard.

IV

Defendants next contend the proofs did not support a finding of waste.[3] At trial, plaintiffs requested damages for waste to the carriage house in the amount of $224,378, which was the amount in

[3] "Waste" is defined as "Action or inaction by a possessor of land causing unreasonable injury to the holders of other estates in the same land." Black's Law Dictionary, 6th Ed. See also *Nusbaum v Shapero*, 249 Mich 252, 263; 228 NW 785 (1930).

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fact awarded by the trial court. Defendants argue his award is contradicted by the absence of testimony regarding the condition of the carriage house in 1981 compared to its condition in 1996 and the dearth of testimony that the condition of the carriage house detracted from the property's overall value, which increased from $1,150,000 in 1988 to $2,250,000 at the time of trial.

Findings of fact are reviewed under a clearly erroneous standard. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Id.*

Plaintiffs' expert testified on cross-examination that he did inspect the interior and exterior of the carriage house in September 1995 while it was occupied by defendants. He took photographs of the property, including the carriage house, at that time and again in January 1997. He testified he was also on the property after possession was returned to plaintiffs. The expert's written estimate of reasonable rental value indicates the wooden frame carriage house "had been partially demolished and was left needing extensive reconstruction and renovation." The report further stated that

> The estimated cost to reconstruct and renovate the partially demolished carriage house has been reviewed and is found to be a reasonable estimation to put this home back in livable condition. These costs were prepared by a professional cost estimator utilizing the current R. S. Means cost manual. The total cost before an allowance for contingencies is $208,681 and with the inclusion of a reasonable allowance of 5% for same is rounded to $220,000.

Pictures of the demolition are contained in this expert's estimate of reasonable rental. The expert further noted that defendants removed "significant portions of the interior," removed "the eastern portion of the building area and basically the back section . . . of the carriage house has been removed as well as other portions of the structure." The carriage house thus decreased the value of the property as a whole.

A review of the record leads this Court to the conclusion that the testimony and exhibits produced in conjunction with the expert's presentation contradict defendants' contention that there was no evidence the carriage house diminished the property's value in some way. Although the overall value of the mansion and property substantially increased over the term of the holding over by defendants, the values would have increased more but for the waste/damages committed by defendants. Therefore, we conclude the trial court's findings of fact regarding waste were not clearly erroneous. *Walters, supra*.

V

Defendants next argue they put over $1.4 million in improvements into the property and were entitled to a setoff or credit for those improvements against reasonable rent. Although the trial court permitted defendants limited questioning regarding improvements, they now maintain they were unfairly precluded, for the reasons stated in subsections I and II of this opinion, *supra*, from presenting proofs

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about the substantial improvements they made while in possession of the property. Defendants contend "because this is primarily an action for equitable rent, equitable standards must be applied."[4]

We have already determined, *supra*, that the trial court properly refused to allow defendants to testify or produce any evidence regarding improvements that were made to the property. Many of plaintiffs' ignored discovery inquiries were directed to the topic of improvements. Thus, when this issue is viewed in conjunction with the sanctions imposed and the reasons for such sanctions, we conclude the trial court did not abuse its discretion in excluding evidence of a setoff. Moreover, defendants did not plead any affirmative defense in their answer relating to a setoff or improvements as required by MCR 2.111(F)(3)(b) and (c), and therefore have waived this defense. *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 494-495; 603 NW2d 317 (1999). Finally, the land contract itself specifically provided in paragraph 3(f) that

> If the purchaser shall fail to perform this contract or any part thereof, the Seller immediately after such default shall have the right to declare the same forfeited and void, and retain whatever may have been paid hereon, and all improvements that may have been made upon the premises, together with additions and accretions thereto, and consider and treat the Purchaser as his tenant holding over without permission. . . .

Consequently, by virtue of the terms of the land contract, when defendants defaulted, they lost whatever they paid on the contract as well as the value of the improvements. For these reasons, defendants' argument is meritless.

VI

Defendants next complain the trial court abused its discretion by not excluding and by relying on plaintiffs' expert's testimony where his calculations regarding reasonable rent were speculative because such calculations were based on rates of return for investment properties rather than more analogous single family residences. We disagree.

Defendants neither objected to the expert witnesses' testimony as speculative nor moved to exclude such testimony, and in fact stipulated to entry of the expert's appraisal report. In any event, as previously noted, the expert testified that this mansion type of residence, is "not the type of property

---

[4] This case is in fact grounded in a statutory remedy. It is a request for reasonable rent pursuant to MCL 600.5750; MSA 27A.5750, which states in pertinent part:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. . . . The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be.

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that's typically leased or rented in the marketplace" and, therefore, the typical or normal way in which a real estate appraiser would estimate rent was not applicable. The expert did not find any comparable rental properties and thus utilized a return on investment approach. Under the circumstances, the trial court did not abuse its discretion in admitting the expert testimony and, further, did not clearly err in its findings of fact in this regard. *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995).

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VII

Defendants' remaining appellate issues concern the propriety of the trial court's issuance of an order correcting the original judgment. Plaintiffs served their motion to correct judgment on defendants on October 20, 1997, eight days before defendants filed the present appeal. While the appeal was pending, the trial court modified the judgment by entering its order of November 21, 1997, increasing the judgment by $198,045. Defendants now claim the trial court was without jurisdiction to correct the judgment, the original judgment amount was stipulated to, and no clerical error in the original judgment warranted amendment. We disagree.

The question of the trial court's jurisdiction is one of law that we review de novo. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 395; 554 NW2d 345 (1996). We review the trial court's decision to correct the judgment for an abuse of discretion. *Detroit Free Press, Inc v Dep't of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999); *McDonald's Corp v Twp of Canton*, 177 Mich App 153, 158; 441 NW2d 37 (1989).

In support of their argument that the trial court did not have jurisdiction to amend the judgment after an appeal had been taken, defendants cite MCR 7.208(A), which provides in part:

> After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law. . . .

A review of the record indicates the motion to correct judgment was precipitated by the following circumstances. At the time of trial, plaintiffs did not seek to recover, as an element of damages, those taxes which had been paid into an escrow account by defendants at the time of trial, but only taxes that were unpaid from March 1, 1996, amounting to $24,221. The trial court ultimately compensated plaintiffs for these taxes, including the exact amount requested by plaintiffs in the judgment rendered in their favor. Further, at the conclusion of the bench trial, the trial court expressly determined there would not be a setoff for real estate taxes paid by defendants against the reasonable rent. However, during the course of the parties' argument on posttrial motions, defendants' attorney, without the benefit of the trial transcript, erroneously (but we presume, inadvertently) led the court to believe the matter of a setoff or credit for real estate taxes had not been argued or settled during trial. As a result, the trial court reduced the judgment amount by $209,000, crediting defendants for taxes paid into the escrow account. Plaintiffs thereafter filed a motion to correct judgment. The day before the motion was heard, both parties' counsel received the trial transcript, which in fact showed that the issue of a setoff for paid taxes in fact had been addressed and rejected by the trial court during the trial. The trial court consequently amended and increased the judgment to conform to the proofs and to reflect its original holding that defendants were not entitled to a setoff for paid taxes.

On the basis of these facts, plaintiffs argue that the language "as otherwise provided by law" contained in MCR 7.208(A) allows an amendment of judgment pursuant to MCR 2.612(C)(1)(a) or (c), which provides in pertinent part:

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> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Reconciliation of the provisions of MCR 2.612 with MCR 7.208 is problematic, however, as recognized in Dean & Longhofer, Michigan Court Rules Practice (4th ed), Author's Commentary, § 2612.20, pp 487-488:

> The effect of a pending appeal on the power of the trial court to grant relief under MCR 2.612(C), however, creates problems. MCR 7.208(A) provides that, after a claim of appeal is filed or leave to appeal granted, the trial court may not set aside or amend the judgment or order appealed from except by order of the court of appeals, by stipulation of the parties, or otherwise provided by law. Yet the time for filing a motion seeking relief from the judgment continues to run while the case is pending on appeal. This leads to undesirable complications, either requiring a party seeking relief from judgment to present its grounds first to the appellate court, which may then remand the case to the trial court if the grounds are well taken, or requiring the motion to be filed in the trial court while the appeal is pending although the court cannot act upon it until the case is remanded. Under the latter approach, the trial court could indicate its intention to grant the motion upon remand, and a remand could then be obtained from the appellate court under MCR 7.211(C).

Such a complicated situation exists here, where at the time the trial court issued its order correcting the judgment, the lower court record had already been transferred to this Court pursuant to defendants' appeal, thereby depriving the trial court of jurisdiction to enter the order. See MCR 7.208(C). However, we conclude that, given the unusual circumstances, it would be a waste of judicial resources to remand this matter to the trial court to do what has already been done. Therefore, in lieu of remanding to the trial court for correction of the judgment, we will treat the order of November 21, 1997, as though it was entered nunc pro tunc. Cf. *Safie Enterprises, Inc v Nationwide Mutual Fire Ins Co*, 146 Mich App 483, 491-493; 381 NW2d 747 (1985); *Jefferson Maintenance Co v Detroit Electrotype Co*, 7 Mich App 619, 622-623; 152 NW2d 699 (1967).

Defendants nonetheless argue that plaintiffs stipulated to a setoff of taxes. However, a review of the record does not bear this out, but rather indicates plaintiffs' attorney expressly told the court that "my clients are not stipulating to the decisions of the court that led to the offset or credit, and we reserve the right of appeal as to the credit; but we have agreed to the amount that if a credit were given for prior taxes that this should be the amount."

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Finally, defendants argue there was no clerical mistake warranting a correction of the judgment. Plaintiffs originally filed their motion to correct judgment pursuant to MCR 2.612(A), citing clerical error as the ground for amendment. However, upon receipt and review of the trial transcript, plaintiffs concluded that the grounds cited in MCR 2.612(C) more accurately covered these circumstances and framed their argument accordingly. We agree that the issue falls within the purview of MCR 2.612(C). Most important is that the result properly reflected the trial court's original findings rendered at the conclusion of the trial. The trial court therefore did not abuse its discretion in correcting the judgment.

Affirmed.

/s/ Patrick M. Meter
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin

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