

APPENDIX TABLE OF CONTENTS

Order of the Supreme Court of Michigan (July 25, 2017)	1a
Opinion of the Court of Appeals of the State of Michigan (September 15, 2016)	3a
Final Order of the Circuit Court for the County of Oakland (October 8, 2014)	11a
Order of the Supreme Court of Michigan Denying Motion for Reconsideration (October 31, 2017)	12a
Order of the Court of Appeals Denying Motion for Reconsideration (October 26, 2016)	14a
Brief of the Appellant (October 5, 2015)	15a
Appellee’s Brief (November 9, 2015)	45a
Appellee’s Motion for Reconsideration (August 15, 2017)	69a
Appellees Motion for Reconsideration (October 6, 2016)	81a
Appellee’s Application for Leave to Appeal (December 7, 2016)	93a

**ORDER OF THE
SUPREME COURT OF MICHIGAN
(JULY 25, 2017)**

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

v.

LAKE VILLA OXFORD ASSOCIATES, LLC,
and KENNETH C. BURNHAM,

Defendants-Appellants,

and

HOMESTEAD PROPERTIES, LP,

Defendant-Appellee,

and

CHRISTOPHER INVESTMENT COMPANY, INC.,
ROBB EVANS & ASSOCIATES, OXFORD BANK
CORP., MICHIGAN BELL TELEPHONE CO.,
AT&T MICHIGAN, CONSUMERS POWER CO.,
CONSUMERS ENERGY CO., DETROIT EDISON
CO., FANCH CABLEVISION OF MICHIGAN,
TW FRANCH TWO CO., TW FRANCHTWO CO.,
CABLE COMM., MCGLONE LEASING
INVESTMENT CO., MCGLONE LEASING
INVESTMENT COMPANY, INC., CC VIII
OPERATING, CHARTER COMMUNICATIONS,

CHARTER TOWNSHIP OF OXFORD,
OAKLAND COUNTY TREASURER, CAPITOL
INFRASTRUCTURE, CONNEXION
TECHNOLOGIES, and NEWBURY
MANAGEMENT SERVICES, LLC,

Defendants.

SC: 154900

COA: 327469

Oakland CC: 2012-126588-CK

Before: Stephen J. MARKMAN, Chief-justice
Brian K ZAHRA, Bridget M. McCORMACK,
David F. VIVIANO, Richard H. BERNSTEIN,
Joan L. LARSEN, Kurtis T. WILDER, Justices

On order of the Court, the application for leave to appeal the September 15, 2016 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

OPINION OF THE COURT OF APPEALS
OF THE STATE OF MICHIGAN
(SEPTEMBER 15, 2016)

STATE OF MICHIGAN
COURT OF APPEALS

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

v.

LAKE VILLA OXFORD ASSOCIATES, LLC,
and KENNETH C. BURNHAM,

Defendants-Appellee,

and

HOMESTEAD PROPERTIES, LP,

Defendant-Appellant,

and

CHRISTOPHER INVESTMENT COMPANY, INC.,
ROBB EVANS & ASSOCIATES, OXFORD BANK
CORP., MICHIGAN BELL TELEPHONE CO.,
AT&T MICHIGAN, CONSUMERS POWER CO.,
CONSUMERS ENERGY CO., DETROIT EDISON
CO., FANCH CABLEVISION OF MICHIGAN,
TW FRANCH TWO CO., TW FRANCHTWO CO.,
CABLE COMM., MCGLONE LEASING INVEST-
MENT CO., MCGLONE LEASING INVESTMENT
COMPANY, INC., CC VIII OPERATING, CHARTER

COMMUNICATIONS, CHARTER TOWNSHIP OF
OXFORD, OAKLAND COUNTY TREASURER,
CAPITOL INFRASTRUCTURE, CONNEXION
TECHNOLOGIES, and NEWBURY
MANAGEMENT SERVICES, LLC,

Defendants.

No. 327469

Oakland Circuit Court LC No. 2012-126588-CK

Before: CAVANAGH, P.J., and SAAD
and FORT HOOD, JJ.

PER CURIAM

In this action for payment of a guaranty, defendant Homestead Properties, LP, appeals as of right an order denying its motion for summary disposition which was followed by a jury trial and a judgment in favor of defendants Lake Villa Oxford Associates, LLC, and Kenneth C. Burnham. We reverse and remand for proceedings consistent with this opinion.

This case was initiated by KeyBank National Association in response to Lake Villa Oxford and Burnham's failure to repay a loan for \$30.05 million and mortgage regarding a 174-acre parcel in Oxford (the subject property). In KeyBank's action, numerous parties having an interest in the subject property were named, including Homestead and Christopher Investment, but only Homestead, Lake Villa Oxford, and Burnham remain parties to this action.

Burnham acted as manager of several related companies, including Lake Villa Oxford and Lake Villa

Rochester. The subject property here was owned by Lake Villa Oxford but, as stated above, KeyBank held a mortgage on the property which secured a \$30.05 million loan. That loan was also secured by a personal guaranty from Burnham. And when Christopher Investment loaned Lake Villa Rochester \$4.45 million, the loan was secured by a second mortgage on the subject property and Burnham, again, personally guaranteed the loan.

Shortly after that agreement with Lake Villa Rochester, Christopher Investment assigned its rights under the loan, mortgage, and guaranty to Homestead. While this case progressed, Homestead notified Lake Villa Rochester and Burnham that they were in default under the loan and mortgage for failure to repay, and that it sought repayment by either Lake Villa Rochester under the loan, or from Burnham under the guaranty. Burnham responded by arguing that the guaranty was not assignable because it stated: "This Agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns." Burnham argued that the guaranty was only assignable to parties that he had permitted, and that no such permission extended to Homestead. Homestead disagreed, arguing that the language did not create an anti-assignment clause but, even if it did, the assignment was still effective with regard to Homestead, and Burnham's sole grievance was with Christopher Investment for breaching the alleged anti-assignment clause.

Homestead moved for summary disposition on those grounds and the trial court denied the motion, holding that there was a question of fact for a jury regarding whether there was an anti-assignment

clause. The case proceeded to trial. Homestead's witnesses testified that they did not believe Burnham's permission was required for assignment. Burnham testified that he intended the guaranty to be personal to Christopher Investment and to be only assignable when he permitted. And he did not permit Christopher Investment to assign the guaranty to Homestead.

The jury was then presented with a verdict form that did not include a question asking if the language of the guaranty created an anti-assignment clause. Rather, the verdict form contained the following question, to which Homestead objected: "IS HOMESTEAD AN INTENDED 'PERMITTED ASSIGNEE' OF THE PERSONAL GUARANTY OF KEN BURNHAM? ANSWER: _____ [YES OR NO]." The jury answered the question in the negative, finding that Homestead was not an "intended permitted assignee" of Burnham's personal guaranty and, thus, held that Homestead did not have a cause of action against Burnham under the guaranty. The trial court later entered judgment on the jury verdict in favor of Burnham and Lake Villa Oxford.

Subsequently, Homestead moved for a judgment notwithstanding the verdict, arguing that the assignability of Burnham's guaranty was a purely legal issue that should not have been submitted to the jury. Further, as a matter of law, an anti-assignment clause was not created by the subject language—"permitted assigns"—but, even if it had been, Burnham's claim was to be asserted against Christopher Investment, not defensively against Homestead. Alternatively, Homestead requested a new trial, arguing that the above-quoted jury verdict form question was misleading because it included the word "intended," which was

not part of the contract. It also assumed that an anti-assignment clause existed and that Burnham's permission was required instead of asking the jury whether an anti-assignment clause was created by the language of the contract. The trial court denied Homestead's motion and this appeal followed.

Homestead argues that the trial court erred when it denied its motion for summary disposition because an anti-assignment clause was not created by the language of the guaranty. We agree.

This Court reviews *de novo* a decision on a motion for summary disposition. *Maiden v. Rozwood*, 461 Mich. 109, 118, 597 N.W.2d 817 (1999). In evaluating a motion brought under MCR 2.116(C)(10), the reviewing court must consider any affidavits, pleadings, depositions, admissions, or other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* at 120, citing MCR 2.116(G)(5). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id.* "Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed *de novo*." *McDonald v. Farm Bureau Ins. Co.*, 480 Mich. 191, 197, 747 N.W.2d 811 (2008).

"That contracts are enforced according to their terms is a corollary of the parties' liberty to contract." *Coates v. Bastian Bros, Inc.*, 276 Mich. App. 498, 503, 741 N.W.2d 539 (2007). The goal of contract interpretation, therefore, "is to determine the intent of the contracting parties." *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 362, 375, 666 N.W.2d 251 (2003). "Accordingly, we examine the language in the contract, giving it its ordinary and plain meaning if such would be apparent to a reader of the

instrument.” *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 47, 664 N.W.2d 776 (2003). In other words, this Court applies the plain meaning of the language in a contract unless the language of the contract is ambiguous. *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 353, 596 N.W.2d 190 (1999). “A contract is said to be ambiguous when its words may reasonably be understood in different ways.” *Vushaj v. Farm Bureau Gen Ins Co of Mich*, 284 Mich. App. 513, 515, 773 N.W.2d 758 (2009), quoting *Raska v. Farm Bureau Mut. Ins. Co. of Mich.*, 412 Mich. 355, 362, 314 N.W.2d 440 (1982). “Courts may not impose an ambiguity on clear contract language.” *Coates*, 276 Mich. App. at 503. “Whether a contract is ambiguous is a question of law.” *Id.* at 504. “Only when contractual language is ambiguous does its meaning become a question of fact.” *Id.*

Here, the contract language at issue is the alleged anti-assignment clause found in the guaranty. “Under general contract law, rights can be assigned unless the assignment is clearly restricted.” *Burkhardt v. Bailey*, 260 Mich. App. 636, 652, 680 N.W.2d 453 (2004), citing Calamari & Perillo, *Contracts* (3d ed.), § 18-10, p. 735. This Court has previously cited 3 Restatement Contract, 2d, § 317(2), p. 15, for the notion that contractual rights are assignable so long as the assignment is not “validly precluded by contract.” *Kingston v. Markward & Karafilis, Inc.*, 134 Mich. App. 164, 171-172, 350 N.W.2d 842 (1984). Michigan courts “have striven to uphold freedom of assignability.” *Detroit Greyhound Employees Fed. Cred. Union v. Aetna Life Ins. Co.*, 381 Mich. 683, 689, 167 N.W.2d 274 (1969) (internal citations and quotation omitted). Indeed, “those who would compose a contractual bar

against alienation must use “the plainest words.” *Id.* (citations omitted).

Burnham argues, as he did in the trial court, that the contractual language—“[t]his Agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns”—is enough to upset the right of alienability supported by Michigan law. We cannot agree. The clause at issue does not mention assignability and it contains no negative language regarding assignment. Further, nowhere in the contract does it state that assignment is prohibited absent consent and, moreover, the contract does not use negative language to describe assignability. In other words, there is no language like, for example, “this contract shall not be assigned” or “this contract is not assignable by Christopher Investment without the prior written consent of Kenneth C. Burnham.” To the contrary, the clause at issue speaks positively about the possibility of assignments. Consistent with the general rule that contract rights are assignable, it states that the contract “shall be binding and inure to the benefit of the parties and their respective successors and permitted assigns.” Plainly, that language considers and approves of the possibility of assignment.

In summary, considering the plain language of the contract, and the absence of strict language in “the plainest words” barring assignment, we conclude that the guaranty was assignable by law. *See id.*; *see also Wilkie*, 469 Mich. at 47. As such, the trial court erred when it denied Homestead’s motion for summary disposition. That decision is reversed and this matter is remanded to the trial court for determination of the amount of money owed under the guaranty.

Our resolution of this issue renders the remaining issues raised by Homestead in this appeal irrelevant, and we decline to consider them.¹

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Henry William Saad

/s/ Karen M. Fort Hood

¹ We note, however, that the jury verdict form contained reversible error because it assumed the issue the jury was required to answer. Instead of asking the jury to decide whether the language of the guaranty created an anti-assignment clause that required Burnham's permission, the jury was essentially told that such permission was required for assignment and then asked if it had been given. That question amounted to error affecting the outcome of the proceeding and would require reversal. *See Case v. Consumers Power Co.*, 463 Mich. 1, 6, 615 N.W.2d 17 (2000).

**FINAL ORDER OF THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND
(OCTOBER 8, 2014)**

STATE OF MICHIGAN, CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

v.

LAKE VILLA OXFORD ASSOCIATES, LLC,
KENNETH BURNHAM, ET AL.,

Defendants.

Case No. 2012-126588-CK

Before: Hon. Rae Lee CHABOT, Circuit Court Judge.

IT IS HEREBY ORDERED that judgment is entered in favor of Kenneth Burnham and Lake Villa Oxford Associates, LLC, in accordance with the Jury Verdict rendered on May 15, 2014.

IT IS SO ORDERED.

In accordance with MCR 2.602(A)(3), this is a final judgment resolving the last pending claim and closing this case.

/s/ Rae Lee Chabot
Circuit Court Judge

**ORDER OF THE SUPREME COURT OF MICHIGAN
DENYING MOTION FOR RECONSIDERATION
(OCTOBER 31, 2017)**

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

v.

LAKE VILLA OXFORD ASSOCIATES, LLC,
and KENNETH C. BURNHAM,

Defendants-Appellants,

and

HOMESTEAD PROPERTIES, LP,

Defendant-Appellee,

and

CHRISTOPHER INVESTMENT COMPANY, INC.,
ROBB EVANS & ASSOCIATES, OXFORD BANK
CORP., MICHIGAN BELL TELEPHONE CO.,
AT&T MICHIGAN, CONSUMERS POWER CO.,
CONSUMERS ENERGY CO., DETROIT EDISON
CO., FANCH CABLEVISION OF MICHIGAN,
TW FRANCH TWO CO., TW FRANCHTWO CO.,
CABLE COMM., MCGLONE LEASING INVEST-
MENT CO., MCGLONE LEASING INVESTMENT
COMPANY, INC., CC VIII OPERATING, CHARTER

COMMUNICATIONS, CHARTER TOWNSHIP OF
OXFORD, OAKLAND COUNTY TREASURER,
CAPITOL INFRASTRUCTURE, CONNEXION
TECHNOLOGIES, and NEWBURY
MANAGEMENT SERVICES, LLC,

Defendants.

SC: 154900

COA: 327469

Oakland CC: 2012-126588-CK

Before: Stephen J. MARKMAN, Chief Justice
Brian K ZAHRA, Bridget M. McCORMACK,
David F. VIVIANO, Richard H. BERNSTEIN,
Joan L. LARSEN, Kurtis T. WILDER, Justices

On order of the Court, the motion for reconsideration of this Court's July 25, 2017 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

**ORDER OF THE COURT OF APPEALS
DENYING MOTION FOR RECONSIDERATION
(OCTOBER 26, 2016)**

COURT OF APPEALS, STATE OF MICHIGAN

KEYBANK NATIONAL ASSOCIATION

v.

LAKE VILLA OXFORD ASSOCIATES

Docket No. 327469

LC No. 2012-126588-CK

Before: Mark J. CAVANAGH, Presiding Judge,
Henry William SAAD, Karen M. FORT HOOD, Judges.

The Court orders that the motion for reconsideration is DENIED.

/s/ Mark J. Cavanagh
Presiding Judge

**BRIEF OF THE APPELLANT
(OCTOBER 5, 2015)**

STATE OF MICHIGAN
IN THE COURT OF APPEALS

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

v.

LAKE VILLA OXFORD ASSOCIATES, LLC,
KENNETH BURNHAM,

*Defendants/Cross-
Defendants/Cross-
Plaintiff's/Appellees,*

and

HOMESTEAD PROPERTIES,

*Defendant/
Cross-Plaintiff/Cross-
Defendant/Appellant,*

v.

CHRISTOPHER INVESTMENT CO., INC.,
ROBB EVANS & ASSOC, OXFORD BANK CORP,
MICHIGAN BELL TELEPHONE CO, AT&T
MICHIGAN, CONSUMERS POWER CO., CON-
SUMERS ENERGY CO., DETROIT EDISON CO.,
FANCH CABLEVISION OF MICHIGAN,
TW FRANCH TWO CO., TW FRANCHTWO CO.,

CABLE COMM., MCGLONE LEASING INVEST-
MENT CO., MCGLONE LEASING INVESTMENT
CO I, CC VII OPERATING, CHARTER
COMMUNICATIONS, CHARTER TWP OF
OXFORD, OAKLAND CITY TREASURER,
CAPITOL INFRASTRUCTURE, and
CONNEXION TECHNOLOGIES,

Defendants.

Court of Appeals No. 327469
Oakland Circuit Court Case No. 2012-126588-CK

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Statement of Jurisdiction

This is an appeal from the Oakland County Circuit Court's final judgment dated October 8, 2014, and its order denying a timely filed motion seeking relief from that judgment, which was entered on April 29, 2015. This Court has jurisdiction under MCR 7.203 (A)(1) and the appeal is timely under MCR 7.204(A)(1)(b).

Statement of Questions Involved

I. Did the trial court err when it denied Homestead's motion for summary disposition, because:

- A. Burnham's guaranty did not contain an anti-assignment clause; and
- B. Even if Burnham's guaranty did contain an anti-assignment clause, the assignment was nonetheless valid between Burnham and Homestead?

Homestead answers yes.

Burnham answers no.

The trial court answered no.

II. Did the trial court err when it instructed the jury with a misleading jury verdict form?

Homestead answers yes.

Burnham answers no.

The trial court answered no.

Introduction

Homestead Properties is an investor. In this case it purchased an unpaid loan in the principal amount

of \$4.45 million. As part of the transaction, the lender assigned to Homestead a guaranty from the borrower's manager, Kenneth Burnham, which had been pledged as security for the loan. But when the loan went unpaid and Homestead attempted to collect on the guaranty, Burnham balked, asserting that without his approval, any assignment of his promise was void.

As a matter of law, that is not a defense to Homestead's claim. The circuit court, however, erred and sent the issue to the jury. First, whether there was an anti-assignment clause is a preliminary question of law that the court must answer—it is not a jury question. As Homestead demonstrated in its motion for summary disposition, there was no anti-assignment clause here, and it was error not to grant the motion. Second, even if there were an anti-assignment clause, Burnham's only recourse was to sue the lender for breaching it. Assignments—generally and certainly in this case—are not void just because such clauses are present. Both questions were for the court to answer. The court erred when it denied summary disposition and allowed the jury to decide whether the guaranty was assignable without Burnham's consent.

If this Court agrees with Homestead on either issue, judgment must enter in favor of Homestead, notwithstanding the jury's verdict. Even if there were a jury-triable issue as to assignability, however, Burnham led the court into serious issue-framing and instructional errors that unfairly prejudiced Homestead at trial. The trial court, which refused to seriously consider these issues in a postjudgment motion, should be reversed.

Statement of Facts

As the caption reveals, this case originally involved a large number of parties when it was filed in 2012. The issues of all parties other than Homestead Properties and Kenneth Burnham were resolved earlier and need not be discussed here.¹ The only proceedings relevant to this appeal are Homestead's summary disposition motion, the one-day jury trial between Homestead and Burnham, and Homestead's JNOV motion.

In August 2007, nonparty Lake Villa Rochester LLC borrowed \$4.45 million from Christopher Investment Company, Inc. and used the funds to purchase a manufactured home community. Lake Villa executed a promissory note in the amount of \$4.45 million in favor of Christopher Investment. (Tab A, Homestead's 1/15/14 motion for summary disposition, at Ex 1.) Defendant/Appellee Kenneth Burnham, a member-manager of the Lake Villa entity, signed the note on its behalf. The Note identified an "Initial Due Date" of August 31, 2009, and an "Extended Due Date" of August 31, 2010.

At the same time, Burnham also guaranteed the debt, signing a "Guaranty of Payment" in his individual capacity. (*Id.* at Ex 2, p.1.) The Guaranty states:

Guarantor unconditionally and irrevocably, guarantees, as primary obligor and not as surety only, the prompt and full payment when due of the entire principal amount of

¹ Lake Villa Oxford Associates asserted a claim against Homestead, but recovered nothing on that claim at trial, and did not file a cross-appeal.

the Note, all interest that accrues on the Note, and all other amounts to be paid by Borrower to Lender under the Note . . .

(*Id.*)

Burnham made several relevant agreements in the Guaranty. First, he acknowledged that his promise to pay would remain in effect if the loan was modified or its terms were changed:

Modification by Lender. Guarantor's obligations under this Guaranty shall remain fully binding if the Note or any other Loan Documents for the Loan are modified or if Lender grants any extension or indulgence to Borrower for the guaranteed debt. Guarantor acknowledges that his consent to any renewals, extensions, or modification of the Loan Documents includes the following, none of which shall affect Guarantor's obligations under this Guaranty; . . .

any changes in the terms of the Note, the mortgage, or any other Loan Documents . . .

(*Id.*) Next, he agreed that he would pay the "holder of the Note"—regardless of whether the holder happened to be the defined "Lender" or some other entity—if Lake Villa failed to pay:

Collection from Guarantor. If Borrower does not promptly make payments on the Note when due, by acceleration or otherwise, the holder of the Note may require Guarantor to pay all or part of the outstanding debt . . .

(*Id.* at p.2, emphasis added.) He also acknowledged that his payment obligations were “unconditional”:

Guaranty unconditional. Guarantor’s obligations under this Guaranty are unconditional and are not conditioned on the validity of any provision of the Note or any other Loan Document or agreement prepared in connection with the Loan.

(*Id.*) And, finally, Burnham agreed that his promises under the Guaranty would remain binding on each party’s successors and assigns:

Binding effect. This agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.

(*Id.* at p.3.) It is only the one word “permitted” in front of “assigns” that resulted in a trial in this case. Burnham argued that the term “permitted assigns” allowed him veto power over Christopher Investment’s ability to assign the Guaranty and that no assignment could occur without his advance consent.

It is undisputed that the Guaranty does not expressly state that it may not be assigned without Burnham’s consent. It is also undisputed that the Guaranty does not specify a consequence if it is nonetheless assigned without Burnham’s consent.

The Guaranty Is Sold and Assigned

In January 2008, Christopher Investment began shopping the Lake Villa note and all related loan documents. (Tab B, Homestead’s 2/7/14 reply brief, at Ex 2, p.3.) In reviewing the potential acquisition, one

set of potential buyers asked Burnham to provide his financial information, which he did. (*Id.* at Ex 2, p.2.) In disclosing this information, Burnham stated that he was “interested in purchasing a portion of this note,” and wished to participate in a “mutually beneficial deal.” (*Id.*) This shows that Burnham was interested in minimizing his exposure—an implicit recognition that the Guaranty was valid and enforceable, no matter who held it. (Burnham would have no incentive to reduce the outstanding amount of the note if he truly believed the Guaranty could not be assigned without his permission.)

Although the January 2008 transaction did not materialize, in February 2008, Christopher Investment sold the loan to Homestead. Ed Rogers, Homestead’s general partner and a witness the trial court prevented from giving highly relevant testimony, testified that one of his main duties as general partner is “to collect on money that’s owed to us.” (Tab C, 5/12/14 transcript at 65.)

As part of the transaction, Homestead obtained separate assignments of the note and the guaranty. (Tab A at Exs 3, 4.) The Assignment of Promissory Note stated “the Promissory Note is in existence and the amount due is outstanding on the date of this Assignment.” (*Id.* at Ex 3.) The Assignment of Guaranty of Payment stated that “the Guaranty of Payment is in existence on the date of this Assignment.” (*Id.* at Ex 4.) Rogers testified that he was aware of the steps taken in 2008 and 2009 to “secure the rights of Homestead Properties” in acquiring the Lake Villa loan documents. (Tab C at 69-71.)

Lake Villa (and its manager, Burnham) received the loan proceeds of \$4.45 million, but failed to make

the required payments under the note. (Answer to Cross-Complaint ¶¶ 16, 18, 23, 26.) Burnham has never made any payments on the Guaranty. (*Id.*)

In February 2013, Homestead filed its cross-claim against Burnham in this case, alleging breach of the Guaranty among other claims. (Cross-Complaint at Count II, ¶¶ 24-27.) Burnham admits that neither he nor Lake Villa ever made any payment under the Note, the entire amount of which remains outstanding, or the Guaranty. (Answer to Cross-Complaint ¶¶ 16, 18, 23, 26.) Thus, there is no dispute that the money is due and owing, and there has been no argument that the debt was paid, discharged, or forgiven. It simply has never been paid, to anyone.

In January 2014, Homestead moved for summary disposition, asking the trial court to rule that as a matter of law, the assignment of the Guaranty to Homestead was valid, and the Guaranty was fully enforceable against Burnham. (Tab A.) In response, Burnham asserted that:

- The assignment to Homestead was invalid because Burnham’s “understanding” was that no assignment could occur without his permission;
- Section 12 of the Guaranty constituted “a ‘contract to the contrary’ of the general rule for free assignments”; and
- “there is a genuine and material fact dispute whether the Guaranty was assignable without Mr. Burnham’s consent.”

(Tab D, Burnham’s 12/1/14 response brief, at pp. 8, 11 (exhibits omitted).)

The court denied summary disposition, declining to rule as a matter of law whether the Guaranty had been validly assigned. Specifically, the court stated, “it’s possible for a reasonable juror to determine the guaranty was not assignable without Burnham’s consent.” (Tab E, 2/12/14 transcript at p. 6.)

Evidentiary and Instructional Errors at Trial

A jury trial occurred in May 2014. (Tab C is the transcript.) The court refused to allow Homestead’s general partner, Rogers, to testify that the Guaranty was considered an “asset” by Homestead, apparently sustaining the objection by Burnham’s counsel that Rogers was not an expert and therefore should not be permitted to characterize it as such. Rogers was explaining his job duties, which include accounting for Homestead’s assets:

Q [by Homestead’s counsel]: . . . as the General Partner of Homestead Properties, you go about getting the Homestead Properties asset—assets back from the receiver?

A [by Rogers]: Yes, we start investing in the park. We start . . . operating them and we start actively pursuing our litigation on them—pursuing our—our promissory note and guarantee. . . .

Q: And then Homestead gets back all of its assets, doesn’t it?

A: Yes, it did.

Q: Okay. That includes the Lake Villa Rochester loan document?

A: Absolutely. That is one of our assets. It's an important assets [sic] to—to the portfolio.

[Burnham's counsel, objecting]: Your Honor, we would object that the personal guarantee characterizes an asset. We really don't know that. I mean, he can't identify that as an expert that it's an asset. That's the reason we're here. . . .

The court: Sustained.

(*Id.* at 73-74.) Later, Rogers also attempted to testify that the acquisition of the Burnham Guaranty was a “standard” transaction and typical of the types of loans Homestead generally acquired. The court also refused to allow this testimony. (*Id.* at 76.)

A short time later, the court permitted Burnham to read into evidence his own lawyer's hearsay opinion (written five years earlier, in 2008) that the Guaranty was not assignable. (*Id.* at 128.) Specifically, the statement—which was contained in an email written years ago by a non-witness—was read into evidence by a witness who was neither the writer nor the direct recipient (although he was cc'd). (*Id.* at 128-129.) It was offered to prove that the Guaranty was not assignable as a matter of law. (*Id.*)

When the case went to the jury, the verdict form ultimately approved by the court contained the following question:

- IS HOMESTEAD AN INTENDED “PERMITTED ASSIGNEE” OF THE PERSONAL GUARANTY OF KEN BURNHAM?

This question is not consistent with the actual contract terms. While the contract includes the term

“permitted assigns,” it does not contain the word “intended.” Homestead objected to the inclusion of this question (*Id.* at 147, 150-155), which had been proposed by Burnham. The court recognized that it was “kind of a trick question,” but nonetheless ordered it included in the verdict form. (*Id.* at 154.)

Burnham’s counsel stated repeatedly during closing argument that the Guaranty was a “personal” guaranty, stating that “because he is the guarantor he is the only one that can allow his personal signature to transfer to another party. Nobody else can do that.” (*Id.* at 171.) As shown above, the Guaranty itself is not labeled a personal guaranty; it is titled simply, “Guaranty of Payment.” (Tab A at Ex 2.)

The jury returned a verdict of no cause of action against Homestead. (Tab F, completed verdict Form.) Judgment was entered on October 8, 2014. (Tab G.) Homestead filed a motion for judgment notwithstanding the verdict (or in the alternative for a new trial) (Tab H, exhibits omitted), arguing that the case never should have gone to the jury (because the court erred in denying summary disposition on the anti-assignment clause issue), and that once it was presented to the jury, evidentiary errors and the misleading jury form prejudiced Homestead and led to the no cause verdict. Burnham responded (Tab D) and Homestead filed a reply (Tab I). During the hearing on the motion, the circuit court stated:

All right, you know, it’s possible there were mistakes of fact or law, and certainly no offense to you, but that’s what the Court of Appeals is for. I don’t find a compelling case for a Judgment Notwithstanding the Verdict, or for a new trial, so denied.

(Tab J, 4/29/15 transcript at p.12.)

The circuit court entered an order denying Homestead's motion later that day, citing the reasons stated on the record. (Tab K.) This appeal followed.

Argument

The issues for this Court are simple:

- Should the trial court have ruled that there is no anti-assignment clause in Burnham's Guaranty, rather than sending the issue to the jury?
- Is the existence of an anti-assignment clause no defense to Homestead's claim against Burnham in any event?

The answer to both questions is "yes." Only if this Court answers both questions "no" does it need to reach Homestead's third and final question:

- Was the assignment question that was presented to the jury over Homestead's objection prejudicially erroneous?

Normally, when a court finds that a contract is irreconcilably ambiguous, it is appropriate to let the jury decide what the contract means. But when faced with a claim that an anti-assignment clause exists, a court must employ a more rigorous analysis. As detailed below, it is for the court, not a jury, to decide whether the guaranty did or did not contain an anti-assignment clause. The circuit court erred in not deciding this issue. It is a pure legal question, not one that can be sent to a jury by finding an "ambiguity."

In resolving that question, the circuit court should have ruled that there was no anti-assignment

clause. Moreover, even if there were, the court should have ruled that the assignment to Homestead was nonetheless valid, since Burnham's complaint (if any) was with the lender that violated the (alleged) clause, not Homestead. The court should have ruled that the Guaranty was validly assigned as a matter of law, and the only issue for trial should have been the amount of Burnham's liability under that Guaranty. The erroneous rulings had a domino effect; they led to a subsequent series of errors that materially and unfairly prejudiced Homestead and effectively denied it the right to a fair trial.

Homestead asks this Court to set aside the judgment and enter judgment in its favor, notwithstanding the jury's verdict. Alternatively, Homestead requests a new trial.

I. THE TRIAL COURT MISINTERPRETED THE UNAMBIGUOUS TERMS OF THE PARTIES' CONTRACT, AND IT FURTHER MISAPPLIED RELEVANT CONTRACT LAW

A. The Standard of Review Is *De Novo*

This Court reviews a trial court's ruling on a motion for summary disposition *de novo*. *Associated Builders & Contractors v. Wilbur*, 472 Mich. 117, 123 (2005). A trial court's ruling on a motion for Judgment notwithstanding the verdict is also reviewed *de novo*. *Craig v. Oakwood Hospital*, 471 Mich. 67, 77 (2004). Issues of contract interpretation present questions of law and are reviewed *de novo*. *Burkhardt v. Bailey*, 260 Mich. App. 636, 646 (2004).

B. There Is No Anti-Assignment Clause, but Even If One Existed, the Assignment Itself Was nonetheless Valid and Enforceable

1. The Language in the Contract Did Not Create an Anti-Assignment Clause

“Generally, all legitimate causes of action are assignable.” *Grand Traverse Convention & Visitor’s Bureau v. Park Place Motor Inn, Inc.*, 176 Mich. App. 445, 448 (1989). If, at the time of the assignment, the assignor actually possessed the rights being assigned, the assignment is valid. *Weston v. Dowty*, 163 Mich. App. 238, 242 (1987).

Moreover, commercial documents such as promissory notes and guaranties are freely assignable unless assignment is clearly restricted. *Burkhardt, supra*, 260 Mich. App. at 653. Homestead argues that in light of the general rule, the addition of the word “permitted” before the word “assigns” is insufficient as a matter of law to create an anti-assignment clause. Such clauses must be explicit, and there is no express requirement here that Burnham’s permission must be obtained in advance of any assignment.

It is a general rule of contract law that the assignment of rights is allowed unless such assignment is clearly restricted. *Burkhardt, supra*, 260 Mich. App. at 653; Calamari & Perillo, *Contracts* (3d ed.), § 18-10, p. 735. Courts should strive to uphold the freedom of assignability, and those who seek to bar alienation must use “the plainest words” to prohibit assignment. *Detroit Greyhound Employees FCU v. Aetna Life Ins. Co.*, 381 Mich. 683, 689 (1969). Further, courts are not inclined to construe provisions of a contract as conditions precedent unless compelled by

the language in the contract. *Reed v. Citizens Ins. Co. of America*, 198 Mich. App. 443, 447 (1993) over'd on other grounds; *see also Hope Land Mineral Corp. v. Panhandle E Pipe Line Co.*, No. 234202, 2003 WL 21279571, at*2 (Mich. App. 2003) (Tab L) (“trial court’s interpretation that the clause was an anti-assignment clause was improper” where right of assignment was not clearly restricted and “there is nothing in the contract at issue to compel this construction”).

The baseline rule is that a guaranty, like any other contract, is assignable absent clear language to the contrary, and the contracting party “has power to substitute a new party as holder of the right” of performance. *Kingston v. Markward & Karafilis, Inc.*, 134 Mich. App. 164, 172 (1984), quoting 4 Corbin, Contracts § 868, pp. 468-469 (1951). *See DVI Capital Co. v. Zeleh*, No. 232732, 2003 WL 21702516, at*3 (Mich. App. 2003) (Tab M) (assignment of guaranties was valid and did not alter guarantors’ obligations). Mere, the Guaranty does not include an express restriction on assignment or transfer; if anything, it contains language suggesting assignment was a possibility the parties contemplated and approved. By way of example:

- the Guaranty defines Christopher Investment as “Lender” and refers to “Lender” in almost every paragraph, but in paragraph 5, captioned “Collection from Guarantor,” it states that if borrower does not pay when required, Burnham will pay the outstanding debt to “the holder of the Note”—a non-defined term that suggests the parties recognized the possibility that the note could be held by, or assigned to, someone other than Lender (Tab A at Ex 2, p.2);

- Burnham expressly waived his rights to any notice of presentment, demand, “or any other notice” regarding the Guaranty (*id.* at p.1); and
- Burnham agreed that his obligations would “terminate on the payment of all amounts owing under the Loan Documents,” but no other right of termination is identified (*id.* at p.2). Under the Guaranty, the only way Burnham’s obligations are extinguished is through payment.

For the contract to be capable of the meaning urged by Burnham, the term “permitted assigns” must be read to afford him a broad veto power over the lender’s assignment rights. This reading would nullify the above contract language. It is not possible to teach this meaning without disregarding all of these provisions.

The common-sense meaning of the term “permitted assigns” means each party’s own permitted assigns; it is another way of reaffirming that a party is permitted to assign the agreement to assignees of its choosing. It is not reasonable to construe this language as an anti-assignment clause giving Burnham veto power; such restrictions must be spelled out in “the plainest words.” *Detroit Greyhound, supra*, 381 Mich. at 689. (Typically, such restrictions are imposed through language stating the guarantor must be given notice of, or must consent to, assignments.) Because the term is not defined or explained that way, the circuit court erred when it concluded that the jury could determine whether an anti-assignment clause existed, and whether Burnham’s consent was necessary.

The Guaranty enables the lender to control the business relationship, as the borrower and guarantor

waived all substantive rights regarding notices and possible objections. (Tab A at Ex 2, p.1.) For Burnham’s reading to be the correct one—for “permitted assigns” to mean that Burnham was given veto power over assignability—the waiver of notice provision must mean nothing at all. The only way all terms can be read harmoniously is if “permitted assigns” refers to the assigning party’s assigns.² This Court reads contracts “as a whole, giving harmonious effect, if possible, to each word and phrase. *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 51, n.11 (2003), *citing Singer v. Goff*, 334 Mich. 163, 168 (1952). In *Wilkie*, this Court ruled that a specific contract provision was ambiguous, but the Supreme Court reversed, concluding that even if the specific provision appeared ambiguous standing alone, any perceived ambiguity was eliminated when the provision was read in conjunction with the other terms of the contract. *Wilkie, supra*, at 51 (“if ¶ 4(a)(1) appears ambiguous by itself, when read with ¶¶ 4(b)(2) and (3) the ambiguity is eliminated”). The same analysis applies here. To the extent the term “permitted assigns” contains any inherent ambiguity, such ambiguity is eliminated when the provision is read, as it must be, harmoniously with the rest of the Guaranty.

² In denying Homestead’s motion for summary disposition, the circuit court stated (incorrectly) that the record “reflects that Christopher Investments sought permission to make the assignment.” This was an inaccurate characterization of the January 2008 emails contemplating a possible purchase of the loan. (See Tab B at Ex 2, pp 2-3.) Moreover, resort to extrinsic evidence was unnecessary, as the Guaranty itself gave no indication that the lender’s right of assignment was restricted in any way.

If this Court agrees that the above language did not create an anti-assignment clause, and it was error for the circuit court to send the question to a jury, then Homestead's motion for summary disposition should be granted, with a ruling that the Guaranty is enforceable as a matter of law. If the Court is satisfied that Burnham has also conceded the amount of the debt, then judgment can enter into Homestead's favor in the full amount of \$4.45 million, and no further circuit court proceedings will be necessary. If, however, the Court believes additional proceedings are necessary to determine the current outstanding amount of the debt, the case can be remanded for that limited purpose.

2. Even if the Words "Permitted Assigns" Created an Anti-Assignment Clause, the Assignment Was Nonetheless Valid and Enforceable

Although there is no anti-assignment clause in the Guaranty, whether Burnham or Homestead is correct on that point is ultimately irrelevant; it has no bearing on the assignability of the document. Even accepting the meaning urged by Burnham—even if there is an anti-assignment clause—the assignment to Homestead was valid and enforceable as a matter of law.

The law is well settled that even where a contract contains a clear, express non-assignability clause, such a clause does not prevent or render invalid an assignment to a third party; the act of assigning merely constitutes a breach of the underlying agreement between the assignor and the obligor:

A contract term prohibiting assignment of rights under the contract, unless a different

intention is manifested . . . (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.

Restatement Contracts, 2d, § 322(2)(h) (emphasis added); *see also Oliver/Hatcher Const. & Dev, Inc. v. Shain Park Associates*, No. 275500, 2008 WL 2151716 (Mich. App. 2008) (Tab N) (“trial court erred in ruling that the assignments were void on the ground that they were made without Oliver/Hatcher’s consent”).

If A and B enter into a contract, and they agree the contract will not be assignable, but then A purports to assign the contract to C anyway, the legal result is not that the assignment to C is invalid. Under the Restatement, and a host of Michigan cases (*see below*), the assignment is valid, as a matter of law. The legal result is that B has a cause of action against A, for breaching the agreed-upon anti-assignment clause. The assignment to C, however, remains valid and enforceable. That is precisely this case. Even if the Burnham Guaranty contains an express non-assignability clause, the existence of such a provision has no impact on the validity of the assignment by Christopher Investment to Homestead. The act of assigning may have been a breach by Christopher Investment of its agreement with Burnham, but the result of that breach is that Burnham can sue Christopher Investment—not that the assignment itself is void *ab initio* or deemed invalid as a matter of law.

“The modern trend with respect to contractual prohibitions on assignments is to interpret them narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to assignee.” *Wonsey v. Life Ins.*

Co. of North America, 32 F.Supp.2d 939, 943 (ED. Mich. 1998). “Michigan courts follow this general rule.” *Epicentre Strategic Corp-Michigan v. Cleveland Const., Inc.*, No. 04-40278, 2007 WL 1017644 (ED. Mich. 2007) (Tab O). These cases recognize that the obligor, the party obligated to perform, is not harmed by a mere assignment of payments under a contract, *Wonsey, supra*, 32 F.Supp.2d at 943; *see also In re Jackson*, 311 BR 195, 201 (WD. Mich. 2004) (“Unless the circumstances indicate the contrary, a contract term prohibiting assignment of the contract’ bars only the delegation to an assignee of the performance by the assignor of a duty or condition”). Here, no harm befell Burnham when his Guaranty was assigned from Christopher Investment to Homestead. His obligations did not change one iota. The only distinction is who he must pay—not how much, or when, or under what circumstances. His substantive duties are not modified in the least. That is why, in this suit, it was such a critical error to ask the jury to decide whether the guaranty was assignable.

In *Morris v. Schnoor*, No. 315006, 2014 WL 235 5705 (Mich. App. 2014) (Tab P), this Court ruled that the assignment of a promissory note was valid and enforceable despite a clear and undoubted anti-assignment clause:

This finding is based on the theory that once a party to a contract performs its obligations to the point that the contract is no longer executory, its right to enforce the other party’s liability under the contract may be assigned without the other party’s consent, even if the contract contains a non-assignment clause.

Morris, supra, at*27 (emphasis added), *citing Detroit, T & I.R. Co. v. Western Union Telegraph Co.*, 200 Mich. 2, 5-7 (1918); *Bd. of Trustees of Mich. State Univ. v. Research Corp.*, 898 F. Supp. 519, 521-522 (WD Mich. 1995); *see also Bay Business Services, Inc., v. Kolitz*, No. 247992, 2004 WL 2389959 (Mich. App. 2004) (Tab Q) (assignment without consent valid despite “a provision prohibiting assignment of the agreement without the written consent of the parties”).

Burnham argued that the contract clause in this case amounted to a “contract to the contrary” of the general rule for free assignments,” but in *In re Jackson*, the court rejected precisely this argument:

The Debtor urges the Court to determine that the anti-assignment clause in the Settlement Agreement renders inapplicable the general rule that contract rights and duties are assignable. We find however, that Michigan law mandates application of the general rule. . . .

. . . Therefore, the Debtor, having held up her end of the bargain . . . had every right to partially assign her interest . . . irrespective of the anti-assignment clause,

In re Jackson, supra, 311 BR at 201. Christopher Investment, having loaned the money as agreed, could effectively assign the right to repayment, together with any guaranty of that right. If Burnham has a complaint, it is not with Homestead.

Thus, under the authority cited above, even an assignment in direct violation of an anti-assignment clause will nonetheless be held valid, enforceable, and effective. The act of assigning merely constitutes

a breach of the promise not to assign, the consequence of which is the creation of a cause of action against the assignor.

In the lower court, Burnham never responded directly to this argument; instead, he mischaracterized it as a “quasi ‘holder in due course’ argument that does not square with the record.” (Tab I at 13-14.)³ But holder in due course principles apply to negotiable instruments, and Homestead is arguing neither that it is a holder in due course of the Guaranty nor that the Guaranty is a negotiable instrument.

Homestead’s argument is simpler and more straightforward. Under all relevant authority, the existence of an anti-assignment clause in a standard guaranty does not in any way prevent, or invalidate, the assignment of that guaranty. There are a few limited exceptions, but none of them apply. For example, an anti-assignment clause may preclude assignment of a personal services contract *Northwestern Cooperage & Lumber Co. v. Byers*, 133 Mich. 534, 537 (1903) (“a master cannot validly assign over his apprentice. But the right to perform an agreement, and receive the money to be earned thereby, is not within this principle of personal confidence”). Additionally, assignment may be precluded if it “would materially change the obligor’s duty.” Rest. (2d) Contracts, § 322 cmt a.

But, as explained in Homestead’s motion and reaffirmed in *Northwestern Cooperage*, the assignment of a straightforward promise to pay does not create a material change in the obligor’s duty—and it certainly

³ In fact, Burnham never addressed a single one of the nine authorities cited by Homestead on this point.

did not do so here. Whether an obligor (such as Burnham) performs for the benefit of an assignee (such as Homestead) or the original assignor (such as Christopher Investment), “[s]uch a change is immaterial in the usual case of a duty to pay money.” *Id.* § 334 cmt b. Furthermore:

Where a right to the payment of money is fully earned by performance, for example, a provision that an attempt to assign forfeits the right may be invalid as a contractual penalty . . . a contractual prohibition which serves no legitimate interest of the obligor is disregarded.

Id. § 322 cmt b. That is exactly the scenario here: the assignment of the Guaranty did not prejudice Burnham in any way, and he had no legitimate interest in precluding it. none of the exceptions to the general rule applies.

The question of whether the Guaranty was (or was not) assignable without Burnham’s consent should never have gone to the jury. This error must be corrected, and judgment must enter in favor of Homestead on the issue of Burnham’s liability under the Guaranty. If necessary, a limited trial can then decide the amount actually owed under the Guaranty.

II THE JURY VERDICT FORM WAS MISLEADING AND WARRANTS A NEW TRIAL

A. The Standard of Review Is *De Novo*

Claims of error in jury instructions are reviewed *de novo*. *Cox v. Flint Board of Hospital Managers*, 467 Mich. 1, 8 (2002). Likewise, a court’s ruling on a

postjudgment motion for judgment notwithstanding the verdict is also reviewed *de novo*. *Craig v. Oakwood Hospital, supra*, 471 Mich. at 77.

B. The Jury Verdict Form Approved by the Court Was Misleading and Caused Instructional Error Requiring Reversal

Jury instructions are reviewed in their entirety to determine if an error requiring reversal has occurred. *People v. Chapo*, 283 Mich. App. 360, 373 (2009). Reversal based on instructional error should be granted if the failure to reverse would be inconsistent with substantial justice. *Case v. Consumers Power Co.*, 463 Mich. 1, 6 (2000); MCR 2.613(A).

A new trial can be ordered if a court determines that a misleading jury verdict form was used. This is even true where the prejudiced party fails to object, but it is later recognized that “an unintentional typographical error with significant legal ramifications went unnoticed by the parties and the trial court.” *Pease v. Riley*, No. 291440, 2010 WL 4259374, at*2 (Mich. App. 2010) (Tab R). In *Pease*, the trial court “granted plaintiff’s a new trial based on the erroneous wording employed on the verdict form.” *Id.* at*1. This Court affirmed the decision. *Id.*

This is a much easier case than *Pease*. Here, the prejudiced party, Homestead, did object to Burnham’s proffered jury question, but the trial court overruled the objection. In fact, rather than choose between the competing jury verdict forms, the court merely determined, it appears, that the forms proffered by each side would be “combined” into one. (Tab C at 147, 150-155.)

The jury verdict form ultimately approved, and used, contained a misleading question. The question sent to the jury was:

- IS HOMESTEAD AN INTENDED “PERMITTED ASSIGNEE” OF THE PERSONAL GUARANTY OF KEN BURNHAM?

The issue of the assignment should never have gone to the jury at all, as explained above. Still, once it was determined that the question would be sent to the jury—because, in the trial court’s opinion, the jury was required to construe the relevant contract provision—the court had an obligation to at least ensure its instruction was consistent with the actual contract terms. Specifically, the verdict form asking the jury to construe the term “permitted assigns” should not have included the loaded and misleading word “intended.” Homestead objected (Tab C at 147, 150-155), but the court ordered it included. The question suffers from a number of deficiencies.

First, the inclusion of the word “intended” changes the meaning of the question from whether Homestead was permitted as an assignee—which is the term used in the contract—to whether Homestead was intended as an assignee. It implies that the parties to the Guaranty intended to permit some assigns but not others, as if there were a list of acceptable assignees and a list of unacceptable assignees. There was no evidence in the case suggesting that Burnham intended to accept some assignees but not others. The inclusion of that word fundamentally—and unfairly—shifted the focus of the question from (a) whether Homestead was permitted as an assignee by the terms of the document itself, to (b) whether Burnham intended for Homestead to be an assignee at the time he signed the Guaranty.

Second, the trial court also refused Homestead's request to modify the question to include the term "successors," even though that term is contained in the actual language of the Guaranty. (Tab C at 153-155.) This was important; the jury could have determined that Homestead was a successor of the type contemplated by the Guaranty, even if he was not an "intended" assign. There was no basis for the court's exclusion (and rejection) of this express contract term, particularly after it approved inclusion of the word "permitted."

Third, the Guaranty was not a "personal" guaranty, and the question should not have included that word. Burnham's counsel stated repeatedly during closing argument that the Guaranty was a "personal" guaranty, stating that "because he is the guarantor he is the only one that can allow his personal signature to transfer to another party. Nobody else can do that." (*Id.* at 171.) As shown above, this is a misstatement of the law, and moreover, the Guaranty is not labeled a personal guaranty in any event; it is titled simply, "Guaranty of Payment." (Tab A at Ex 2.) Nothing in the document justified the inclusion of the word "personal" in the jury question.

When presented with this issue during oral argument on Homestead's motion for judgment notwithstanding the verdict, the trial court stated erroneously that Homestead had consented to this jury question. (Tab J at 7-9.) In fact, Homestead objected to its inclusion, but the objection was overruled. (*Id.*, Tab C at 147, 150-155) The trial court acknowledged that there may have been errors, but said, "that's what the Court of Appeals is for." (Tab J at 12.)

When the trial court approved of Burnham's proffered question, the resulting instruction distorted and confused the fundamental issue the jury was being asked to decide. The issue should have been⁴ whether Burnham's consent was a condition precedent to assignment—not whether Homestead was a party that was intended and approved, by Burnham personally, in advance.

Put another way, the phrasing of the question improperly bestowed the trial court's blessing upon the argument Burnham should have been forced to prove: it implicitly suggested that his consent was required, as a starting point. By asking the jury to decide whether Homestead was an "intended permitted assignee," the question implied by its wording that only intended and permitted assignees could possibly take an assignment of the Guaranty—when, in fact, that was the very question being posed to the jury. In other words, the jury should have been asked:

Was Burnham's consent required before the Guaranty could be assigned?

And not:

Was Homestead a permitted intended assignee under the personal Guaranty?

⁴ Again, Homestead's position is that this issue never should have gone to the jury, because the assignment did occur, and was enforceable, as a matter of law—regardless of whether the words "permitted assigns" constituted an anti-assignment clause. But once the trial court decided to send the question to the jury, it had an obligation to ensure it was not misleading, and that it accurately characterized the allegedly ambiguous provision.

Once this case went to a jury, the ultimate issue for the jury's determination was whether any permission was necessary before assignment could occur. But the question sent to the jury effectively foreclosed that issue, instead asking the jury to decide whether Homestead was among the (theoretical) "intended" assigns to which Burnham had consented. This distorted the issue and effectively precluded the jury from reaching a conclusion that Burnham's consent was not necessary in any event.

The trial court's misleading and erroneous instruction caused a substantial injustice to Homestead, and the failure to reverse on this basis would be inconsistent with substantial justice. *Case, supra*, 463 Mich. at 6. This is especially true when considered in light of the trial court's other errors (*e.g.*, allowing an email from Burnham's lawyer to be read into the record as expert testimony regarding the Guaranty's assignability; barring Rogers from testifying from his personal knowledge regarding what Homestead considered an asset, and whether this transaction was a typical one for Homestead). If this Court agrees (and concludes that the issue was for the jury), the matter should be remanded for a new trial.

Conclusion and Relief Requested

Homestead respectfully asks this Court to reverse the trial court's order denying summary disposition, and to enter an order ruling that:

- A. The Guaranty was validly assigned and is immediately enforceable against Burnham; and

- B. As acknowledged by Burnham and Lake Villa, the full amount of the debt remains unpaid and is currently due and owing to Homestead.

Alternatively, Homestead respectfully asks the Court to remand for a new trial, consistent with this Court's opinion on the assignment issue.

Respectfully submitted,

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Dated: October 5, 2015

**APPELLEE'S BRIEF
(NOVEMBER 9, 2015)**

STATE OF MICHIGAN
IN THE COURT OF APPEALS

HOMESTEAD PROPERTIES, LP,

Plaintiff/Appellant,

v.

KENNETH BURNHAM, ET AL.,

Defendants/Appellees.

Court of Appeals Case No. 327469
Lower Court Case No. 2012-126588-CK

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Statement of Jurisdiction

This is an appeal of a final order under MCR 7.202(6). This Court has jurisdiction over this matter pursuant to MCL 600.308(1)(a), *See also* MCR 7.205(D).

Statement of the Questions Involved

I. The trial court found “it’s possible for a reasonably jury to find that the guaranty was not assignable without Burnham’s consent.” Did the lower court err when it determined that contested terms to a contract presents an appropriate question of fact for a jury to decide?

Trial Court answers, “No.”

Appellee Burnham answers, “No.”

Appellant Homestead answers, “Yes.”

II. Whether Homestead can prove that its evidence objections are preserved?

Trial Court answers, “No.”

Appellee Burnham answers, “No.”

Appellant Homestead answers, “Yes.”

III. Whether Homestead can prove that the admitted evidence is the result of manifest injustice?

Trial Court answers, “No.”

Appellee Burnham answers, “No.”

Appellant Homestead answers, “Yes.”

Statement of Facts & Procedural History

The Christopher Investments-Burnham Promissory Note & Personal Guaranty

On August 31, 2007, Ken Burnham and Christopher investment Company Inc. executed a Promissory Note and Guaranty of Payment. (Defs' Sum. J. Ex. F—Promissory Note of 8/31/2007; Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007.) Mr. Burnham promised to pay “to the order of Christopher Investment Company Inc.” \$4,450,000, in consideration for a loan of the same amount. (Defs' Sum. J. Ex. F—Promissory Note of 8/31/2007 at ¶ 1.) On the same day, Mr. Burnham personally guaranteed payment “to Christopher Investment Company, Inc.,” referencing the promissory note executed between the two parties. (Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 1.) The Guaranty identifies Christopher Investment Company as the “Lender,” and Mr. Burnham as the “Guarantor.” (*Id.*) The Guaranty provides for various rights and remedies for the contracting parties. Subparagraph Twelve provides, as follows: “This agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.” (Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 12.) Christopher Investment Company drafted both documents. (Defs' Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014 at ¶ 7.) The parties intended that assignments be pre-approved before execution. (*Id.*; *see also* Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 12.) The parties' course of dealing illustrates that an assignment of the contract needed consent of the obligor. (Defs' Sum. J. Ex. Letter from

Davidson Fink to Terman of 9/15/2010; Defs' Sum. J. Ex. Letter from Davidson Fink to Terman of 9/20/2010; *see also* Trial Ex. D-B.) Mr. Burnham also advised agents of Homestead Properties of the Guaranty's assignment provision, prior to this action. (Defs' Sum. J. Ex. B—Affidavit of Ken Burnham of 1/27/2014; Defs' Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014.)

SEC Investigates Homestead Properties; Christopher Investments Wrongfully Assigns Ken Burnham's Personal Guaranty to Homestead Properties

In July 2010, Appellee Burnham was subpoenaed to testify in an SEC case brought against Homestead Properties, the movant and cross-plaintiff here. (Defs' Sum. J. Ex. A—SEC Subpoena of 7/23/2010; Ex. B—Burnham Aff. of 1/27/2014.) Upon information and belief, the SEC was investigating Homestead for fraud and other inappropriate business activities. (Defs' Sum. J. Ex. A—SEC Subpoena of 7/23/2010; Ex B—Burnham Aff. of 1/27/2014.) The subpoena sought, *inter alia*, "All communications with . . . Homestead Properties" and "Christopher Investment Company Inc." (Defs' Sum. J. Ex. A—SEC Subpoena of 7/23/2010 at Attach. 1, ¶ 16(b)-(c)).

Mr. Burnham gave testimony to SEC officials in August 2010. (Defs' Sum. J. Ex. A—SEC Subpoena of 7/23/2010.) During the course of the deposition, Burnham was shown a financial statement, which purported to be a financial statement of Kenneth C. Burnham, showing assets liabilities, liquidity, income and net worth. Mr. Burnham testified that the financial statement produced was fraudulent. (Defs' Sum. J. Ex. B—Burnham Aff. of 1/27/2014.) Mr. Burnham testified that the financial statement was not prepared and

signed by him, that he was unfamiliar with it, and that it substantially misstated Burnham's financial position. (*See* Defs' Sum. J. Exhibit B, Burnham Aff. of 1/27/2014 ["I gave no personal financial information to Christopher Investments, the original note holder, or to Homestead Properties"]; Defs' Sum. J. Ex. C—Letter of Davidson Fink of 9/23/2010). Subsequently, Christopher Investment Company sold the Guaranty to Homestead, in violation of the contract, and over Mr. Burnham's objection. (*See* Defs' Sum. J. Ex. B—Burnham Aff. of 1/27/2014 at ¶ 5.)

On April 3, 2013, Homestead Properties brought suit against Lake Villa Oxford Associates and Ken Burnham for, inter alia, breach of guaranty. (Homestead Cross-Compl. at Count II, ¶ 24-27.) In response, Mr. Burnham alleged fourteen affirmative defenses, sounding in fraud, unclean hands, illegality and contributory negligence. (K. Burnham Verified Answer and Affirmative Defenses.) Mr. Burnham has alleged Homestead is estoppel to assert rights associated with the guaranty, because the assignment is invalid. (K. Burnham Third Affirmative Defense; Seventh Affirmative Defense.) Mr. Burnham's response also states that permission prior to assignment was a condition precedent to Homestead's claim on the Guaranty. (K. Burnham Eleventh Affirmative Defense.) Thus the assignment—Homestead's basis for recovery—is invalid, and constitutes a breach of contract enforceable against the wrongful holder of the Guaranty. (*See* K. Burnham Affirmative Defenses 1-14.)

The Summary Judgment Hearing

On January 15, 2014, Homestead brought a motion for summary disposition, under MCR 2.116 (C)(8),

(C)(9), or (C)(10). Homestead argued Burnham contested the contract's terms. Burnham argued that his consent was required before the guaranty could be assigned; Burnham submitted an affidavit and other documentation in support of his argument. The parties intended that assignments be pre-approved before execution. (Defs' Sum. J. Ex Affidavit of Ken Burnham of 2/5/2014 at ¶ 7.) On February 12, 2014, this Court held Oral Argument on Homestead's Motion for Summary Judgment. (Attach. Sum. J. Tr. of 2/14/2014.) The Court found that the evidence contravened Homestead's argument that the guaranty was assigned "by operation of law." (Attach. Sum. J. Tr. of 2/14/2014 at 5.) "The Record also reflects that Christopher Investment sought permission to make the assignment." (Attach. 1—Sum. J. Tr. of 2/14/2014 at 6.) The Court found it "possible for a reasonable juror to determine the guaranty was not assignable without Burnham's consent." (Attach. 1—Sum. J. Tr. of 2/14/2014 at 6.) (Which is exactly what happened at trial.)

The Trial: Homestead Offers No Evidence on the Meaning of "Permitted Assigns"

At trial, Homestead called two witnesses in its case-in-chief, plus Ken Burnham under the adverse witness statute. At the outset of trial, Defense Counsel asked for a proffer on Homestead's evidence of contract interpretation:

Mr. Lucas: We've looked at Mr. Farmer's witness list, and as your Honor knows, the ultimate issue in this case for the jury to decide is one of the intent of the parties on some words that are contained within the personal guarantee. We would ask Mr. Farmer to proffer what the wit-

ness is going to testify to pertaining to the ultimate issue of fact. We believe that neither one of these witnesses have personal knowledge as to what the intent of the parties were at the time that the contracts were executed.

(Attach. 2—Trial Trans. of May 12, 2014 at 8.) The Court denied Defense Counsel’s request for a proffer and allowed Homestead to present its case. (*Id.* at 9.)

In its opening statement, Homestead’s Counsel told the jury that the case was about, inter alia, “the personal guarantee that Mr. Burnham signed . . .” (*Id.* at 52.) Homestead also promised the jury that it would contradict Burnham’s anticipated testimony about that personal guarantee:

[S]o [Burnham’s] looking at the end of that guarantee where it says ‘This guarantee is binding on successors and permitted assigns’ and he’s going to say, ‘That means I get to decide who’s a permitted assign’ and he’s going to seize on that to try to make his argument that my client, who bought this loan [and] guarantee can’t enforce it against him. That’s what this case is going to be about.

(*Id.* at 52 [emphasis added].) Homestead promised the jury “facts will show” Mr. Burnham’s consent to Homestead’s purchase of the personal guarantee “was not required” because “[l]enders sell loans all the time.” (Attach 2—Tr. Trans. at 53, 55). But Homestead never presented the jury with such a case; Homestead never called an expert or otherwise qualified witness to testify to that respect.

First, Homestead called Edward Rogers, General Partner at Homestead Properties. (*Id.* at 65.) Homestead elicited “formal education” testimony from Rogers that he held economics and psychology degrees from the University of California Santa Barbara, and taught “MBA courses,” at the University of California Irvine. (*Id.* at 66.) During this line of questioning, Defense Counsel objected to Homestead’s apparent attempt to qualify Rogers as an expert. The Court sustained the objection. (Attach 2—Tr. Trans. at 67.) Homestead made no proffer. (*Id.*) Defense Counsel also objected to Homestead’s apparent attempt to elicit Rule 702 expert testimony from Rogers. The Court sustained the objection. (Attach 2—Tr. Trans. at 73-74.) Homestead made no proffer; Homestead’s only response to the objection was that it “sounds like an argument to me.” (*Id.*)

Edward Rogers testified that he was “just a regular investor” in 2008—the time period relevant to trial. (*Id.* at 66.) Rogers also testified that he was only “vaguely aware” of the 2008 dealings between Homestead, Christopher Investments & Lake Villa. (*See, e.g.*, Tr. Trans. at 69.) On cross-examination, Rogers admitted that he had no first-hand knowledge regarding the personal guarantee’s negotiation or creation:

Q: You weren’t there when the—when the contract between my client and Mr.—

A: No, I was not there.

Q: —Greg Christopher was negotiated, were you?

A: No, I was not.

Q: You don't know what Greg Christopher's intent was in negotiating that contract for personal guarantee, do you?

A: No, I—I do not know.

Id. at 76-77. Rogers also admitted that he had no first-hand knowledge regarding the issue of intent for the personal guarantee:

Q: Let's go back to the personal guarantee. Have you ever spoken to Mr. Greg Christopher about that personal guarantee?

A: No, I have not.

Q: Okay, so my final question to you is that you really don't know what Mr. Christopher meant, do you?

A: No, I do not.

Id. at 80-81. Rogers could not testify on the meaning of "permitted assigns." The Court did not accept Rogers' testimony as expert testimony under Rule 702. (*Id.* at 67.)

Next, Homestead called Ken Burnham, under the adverse witness statute. (*Id.* at 81.) On cross-examination, Mr. Burnham testified that the personal guarantee was intended to be a personal one to Christopher Investments—as he contended on the summary disposition phase of the case:

My position is that the guarantee was negotiated with Mr. Christopher and that provision was put in there to protect me from my guarantee going somewhere that I didn't want it to go.

(*Id.* at 96.) On direct exam of Burnham, the following colloquy took place:

Q: What was your intent when you signed the personal guarantee with Christopher Investment?

A: My intent was that that guarantee be personal to Greg Christopher and that, if for some reason he wanted to assign that guarantee, he would need my permission.

* * *

Q: Did you give permission—

A: No.

Q: —to Mr. Christopher to sell the personal guarantee to Homestead?

A: No, I didn't.

Id. at 104-105. During Homestead's case-in-chief, Mr. Burnham was asked to read an email directed to agents of Homestead, which was in evidence by stipulation of the parties. (Tr. Trans. at 3, 123.) The evidence was presented to show that Homestead "offered [Burnham] money in exchange for his personal guaranty" because Homestead knew it needed Burnham's consent to assume the guaranty. (Tr. Trans. at 125.) Homestead did not object to the Defense's use of the email (Tr. Trans. at 125). Homestead presented no evidence contrary to Mr. Burnham's understanding of the agreement.

Finally, Homestead called Heath Biddlecome as its final witness. (Tr. Trans. at 106.) Biddlecome testified that he was a financial advisor that started Homestead Properties in 2008. (*Id.* at 107-108.)

Biddlecome testified that Homestead purchased loan documents as a “standard loan package” (*Id.* at 112), but was not proffered as an expert on commercial transaction or commercial contract interpretation. On cross-examination, Biddlecome admitted that he could not provide any first-hand knowledge on the issue of guarantee’s intent:

Q: You weren’t there when Mr. Burnham and Mr. Christopher negotiated their contract, were you?

A: No, I was not.

Q: And you weren’t there when they negotiated their personal guaranty, were you?

A: I was not there.

(*Id.* at 117.) Once Biddlecome was excused, Homestead rested its case. In all, Homestead offered ten items into evidence; none of it spoke to the issue of contractual intent. (*Id.* at 2.) Moreover, Homestead did not offer any testimony or evidence regarding the meaning of the personal guarantee. Instead, the defense presented evidence that Homestead attempted to buy the personal guarantee from Mr. Burnham before and after Homestead bought loan documents from Christopher Investments. *Id.* at 123; (*see also* Ex. 3—Tr. Ex. D-B). The evidence showed Homestead knew the claim on the Burnham guarantee was meritless in 2008—five years before it brought suit on that claim in this Court. (Ex. 3—Tr. Ex. D-B) After a one-day trial, the jury rendered a verdict in favor of Lake Villa and Ken Burnham. (Dkt Entry of 5/15/2014, codes FDJ, 0TH.) This action follows.

Summary of the Argument

Homestead's appeal should not prevail. The trial court did not err when it found that Burnham presented a material fact question for trial. At the summary judgment stage, Burnham submitted evidence contesting the terms of the contract itself. Likewise, Homestead's contention that the jury verdict form misled the fact-finder is without merit. Nothing in the verdict form constitutes "manifest injustice" to Homestead. Finally, Homestead's evidence arguments are waived under MRE 103, because Appellee cannot show proper, preserved, or specified objections in the record, or "manifest injustice" due to the admitted evidence. In the end, Homestead could not convince a judge or jury that of its view of the law and facts applicable to the case. This Court should let those decisions stand.

Standard of Review

A JNOV should not be granted unless the moving party is entitled to a judgment as a matter of law. *Orzel by Orzel v. Scott Drug Co.*, 449 Mich. 550, 557-58. "The standard of review for judgments notwithstanding the verdict requires review of the evidence and all legitimate inferences in light most favorable to the non-moving party." *Id.* Likewise, a motion for new trial should not be granted "unless refusal to take this action appears to the court inconsistent with substantial justice." *Balance v. Dunnington*, 241 Mich. 383 (1928); *see also Watkins v. Manchester*, 220 Mich. App. 337, 340 (1996) (new trial only appropriate when the result is manifestly against the clear weight of evidence). Harmless errors and irregularities that do not affect the substantial rights

of the parties should not be grounds for a new trial. MCR 2.611; *see also* *Severn v. Sperry Corp.*, 212 Mich. App. 406 (1995) (new trial only when the overwhelming weight of evidence favors the losing party); *Bell v. Merritt*, 118 Mich. App. 1982 (error to overturn verdict when Judge may draw different inference from fact-finder).

The Michigan Court of Appeals reviews the proper construction and interpretation of a contract under the *de novo* standard of review. *Bandit Industries, Inc. v. Hobbs Int'l Inc. (After Remand)*, 463 Mich. 504, 511 (2001). Summary disposition is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. MCR 2.116. A Rule 2.116(C)(10) motion challenges the factual sufficiency of plaintiff's claims. *See, e.g., Corley v. Detroit Board of Educ.*, 470 Mich. App. 274 (2004). Movant's motion should be granted if there are no genuine and material fact issues and movant is entitled to a judgment as a matter of law. *Adams Outdoor Advertising v. Charter Township of Canton*, 269 Mich. App. 365, 711 N.W.2d 391 (2006). The Rule is not fashioned as a sanction. *See Brenner v. Kolk*, 226 Mich. App. 149, 573 N.W.2d 65 (1997). The reviewing court must evaluate the facts in a light most favorable to the non-moving party. *See Jackson v. Saginaw County*, 458 Mich. 141, 580 N.W.2d 870 (1998). In other words, the motion-opponent gets the "benefit of the doubt." *Stevens v. McLouth Steel Prods Corp.*, 433 Mich. 365, 446 N.W.2d 95 (1989); *see also Lytle v Malady (On Rehearing)*, 458 Mich. 153, 579 N.W.2d 906 (1998) (trial court should consider affidavits, pleadings, depositions, admissions, and other material supporting and opposing motion to deter-

mine whether it is impossible for claim or defense to be supported at trial because of deficiency that cannot be overcome).

Argument

“Hear the other side.”—St. Augustine

HOMESTEAD’S APPEAL IS MERITLESS; THE RECORD
SHOWS THE JURY CONSIDERED EVIDENCE OF
CONTRACTUAL INTENT

**A. THE TRIAL COURT’S SUMMARY JUDGMENT & JNOV
ORDERS SHOULD BE AFFIRMED BECAUSE KENNETH
BURNHAM PRESENTED SUFFICIENT EVIDENCE THAT
THE GUARANTY’S TERMS WERE AMBIGUOUS**

The lower court’s decisions at the summary judgment and post-trial stages should stand. Homestead maintains that it is a “permitted assignee” of Burnham’s personal guaranty Christopher assignment by “operation of law.” That argument did not carry the day at the summary judgment phase of the case. That argument did not carry the day at the post-trial motion phase of the case. It should not prevail now. *See Bandit Industries, Inc. v. Hobbs Int’l Inc. (After Remand)*, 463 Mich. 504, 511 (2001) (surety contract is a special contract strictly construed in favor of the surety). Homestead construes the word “permitted” as superfluous text. (Appellant’s Br. at 10 [permitted is “insufficient as a matter of law”].) We do not. Most importantly, the lower court and the jury did not read it that way. This Court should not reform the contract to fit Homestead’s view of the case. *See e.g., Czapp v. Cox*, 179 Mich. App. 216, 219 (1989) (“Every word must be taken to have been used for a purpose and no word should be taken as sur-

plusage” quoting *McIntosh v. Groomes*, 227 Mich. 215, 218 (1924)). A contract is ambiguous if its language is reasonably susceptible to multiple interpretations. See *Gortney v. Norfolk & W. Ry. Co.*, 216 Mich. App. 535 (1996). If the contract is ambiguous, its interpretation is a question of fact that must be decided by the jury in light of relevant extrinsic evidence. *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447 (2003); *Hewett Grocery Co v. Biddle Purchasing Co.*, 289 Mich. 225, 236, 286 NW 221 (1939). Homestead’s attempt to present an alternative construction of the personal guaranty does not advance its case; instead, Appellant’s argument only reveals that a genuine issue for trial existed.

Homestead concedes juries decide what ambiguous contract terms mean, but denies that the guaranty’s terms are ambiguous. (Homestead Sum. J. Br.; Homestead JNOV Br. at 9; Appellant’s Br.) That argument remains unavailing now, as it was post-trial, and pre-trial. The Court did not err when it found the guaranty ambiguous. See *Fifth-Third Mortgage-MI, LLC v. Hance*, 493 Mich. 862 (2012). At the summary judgment stage—and at trial—Burnham submitted evidence contesting the terms of the contract itself. The evidence rebutted Homestead’s use of *Aiton* and its progeny for the proposition that “generally all legitimate causes of action are assignable” (Homestead Br. at 9). See e.g., *Finance Amer. Private Brands v. Harvey E. Hall, Inc.*, 380 A.2d 1377 (Del. Super. Ct. 1977) (special guaranty not assignable). Again, Homestead’s authority on this question presumes the contract language is unambiguous. But when the parties’ intent is at issue, it is a material question of fact, and not a legal question. See *Klapp v. United*

Ins. Group Agency Inc., 468 Mich. 459, 663 N.W.2d 447 (2003). This is why Homestead's use of *Burkhardt v. Bailey* is unavailing. 260 Mich. App. 636, 656-657 (2004) (finding that the contract was unambiguous); *but see Butterfield v. Metal Flow Corp.*, 185 Mich. App. 630, 462 N.W.2d 815 (1990) (contested contract terms go to the jury).

Likewise Homestead's use of *Hope Land Mineral Corp v. Panhandle E. Pipe Line Co.*, is misplaced, as the *Hope Land* court noted that contracts terms are construed against the drafter. No. 234202, 2003 WL 21279571 at *2 (Mich. App. 2003) *See, e.g., Shay v. Aldrich*, 487 Mich. 648, 673 (2010) ("it is an elementary rule of construction that in case of doubt, a contract is to be strictly construed against the party by whose agent it was drafted."); *Stroud v. Glover*, 120 Mich. App. 258 (1982) (same); *Brauer v. Hobbs*, 151 Mich. App. 769 (1986) (same); 2 Restatement Contracts § 206. Thus the lower court correctly denied Homestead's motion summary judgment. *See e.g., Gale v. RD Bloomfield Associates, Ltd Partnership*, No. 191647, 1997 WL 33352774 at *3 (Mich. Ct. App. Apr. 15, 1997) ("[W]hen the terms of a contract are contested, the actual terms of the contract are to be determined by the jury even when the evidence of the contract terms is uncontradicted").

Finally, Homestead's secondary authority does not fit the facts of the case. Homestead makes a quasi "holder in due course" argument that does not square with the record; Burnham's claims and defenses applied at trial. Homestead, as the "assignee[,] is subject to all of the terms of the contract between the obligor and the assignor, the assignee is also vulnerable to defenses of the obligor that arise under those terms

of during the performance of the assignment. These include nonoccurrence of a condition . . .” *See* E. Allan Farnsworth, *Contracts* § 11.8, pp. 730 [Vulnerability of Assignee to Obligor’s Defenses and Claims] (3d ed. 1999) (emphasis added). *See also* Restatement (Second) *Contracts* § 336(1) (“The assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor.”) Moreover, “[s]ince the assignor’s rights are vulnerable to such defenses from the time the agreement is made, the assignee’s rights are similarly vulnerable, despite the fact that the event giving rise to the defense may not have occurred at the time of the assignment or even at the time the obligor had notice of it.” *See* E. Allan Farnsworth, *Contracts* § 11.8, pp. 730 [Vulnerability of Assignee to Obligors Defenses and Claims] (3d ed. 1999) (emphasis added). Thus, Homestead’s argument that the jury instructions were somehow misleading is incorrect. (Homestead Br. at 15.)

The parties’ course of dealing illustrates that an assignment of the guaranty needed consent of the obligor, Ken Burnham. (Defs’ Sum. J. Ex. Letter from Davidson Fink to Terman of 9/15/2010; Defs’ Sum. J. Ex. Letter from Davidson Fink to Terman of 9/20/2010; *see also* Trial Ex. D-B.) The judge and fact-finder considered evidence showing that Burnham told Homestead Properties of the Guaranty’s assignment provision, prior to this action. (Deft’ Sum. J. Ex. B—Affidavit of Ken Burnham of 1/27/2014; Defs’ Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014.) The evidence showed that Homestead “offered [Burnham] money in exchange for his personal guaranty” because Homestead knew it needed Burnham’s consent to assume the guaranty. (Tr. Trans. at 125.) These are

immutable, determinative facts that Homestead cannot overcome. *See* MCL § 440.1205(1) (“A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for their expressions and their conduct.” [emphasis added]). Appellant should not prevail on any of these points.

B. HOMESTEAD CANNOT SHOW A PATENT, REVERSIBLE ERROR IN THE JURY INSTRUCTIONS

This Court “reviews jury instructions in their entirety.” *Stoddard v. Manufacturers Nat’l Bank of Grand Rapids*, 234 Mich. App. 140 (1999). “The trial court does not commit error requiring reversal if, on balance, the parties’ theories and the applicable law were presented to the jury adequately and fairly.” *Stoddard*, 234 Mich. App. at 140, *citing* *Murdock v. Higgins*, 454 Mich. 46 (1997). In this case, Homestead cannot say that its position and theory of the case are not reflected with the jury instructions and verdict form. Homestead’s use of *Pease* is also misplaced, because the verdict form was not erroneously worded; instead, the question: “Was Homestead a permitted intended assignee under the personal Guaranty?” presented the case plainly to the jury¹. Moreover, the lower court modified the original instruction to read, “Is Homestead an intended permitted assignee of the personal guarantee of Ken Burnham, period”, based upon Homestead’s urging. (Tr. Trans. at 155.) Home-

¹ Homestead agrees that the controlling issue was “whether Burnham’s consent was a condition precedent to [the] assignment” (JNOV Br. at 17.) The lower court gave an instruction on conditions precedent. (Jury Inst. #33.)

stead made no further objections to the instructions or verdict form. (*Id.* at 153-157.) In fact, the parties assisted the lower court amend the instructions to present to the jury. (*Id.* at 157-158.) *See also Phinney v. Perlmutter*, 222 Mich. App. 513, 537, 564 N.W.2d 532 (1997) (stipulation to jury verdict form waived argument because “[e]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence”). Thus, Homestead’s argument regarding the omission of the word “successors” does not establish reversible error. MCR 2.512(C); *see also Heaton v. Benton Const. Co.*, 286 Mich. App. 528, 537 (2009) (“The failure to timely and specifically object precludes appellate review absent manifest injustice.”).

The jury was not misled; the jurors considered whether the contract contained a condition precedent to Burnham’s performance. Mere semantics cannot buttress an action to set aside a jury verdict. *Johnson v. Corbet*, 423 Mich. 304, 377 (1985); *Stoddard v. Manufacturers Nat’l Bank of Grand Rapids*, 234 Mich. App. 140 (1999) (“The failure to give a properly requested, applicable, and accurate instruction does not require a reversal unless that failure to vacate the jury verdict would be inconsistent with substantial justice.”). *See also* MCR 2.512(C) (grounds for objecting to jury instructions must be stated with specificity); *McNeel v. Farm, Bureau General Ins. Co of Michigan*, 289 Mich. App. 76, 89 (2010) (same); *Bouverette v. Westinghouse Elec Corp.*, 245 Mich. App. 391 (2001) (same).

The lower court found that Burnham presented sufficient evidence that a fact question existed for the jury to decide; this Court should let that decision

stand. *Stoddard*, 234 Mich. App. 163 (trial court does not commit reversible error if, on balance, the parties' theories and the applicable law were presented "adequately and fairly"); *see also Grzesick v. Cepela*, 237 Mich. App. 554, 559 (1999) (same). Nothing in the verdict form or the instructions constitute "manifest injustice" to Homestead. The jury verdict should be affirmed, along with the lower court's decision to let the verdict stand.

C. HOMESTEAD'S EVIDENCE ARGUMENTS ARE WAIVED UNDER MRE 103

Homestead also argues that it is entitled to a new trial based upon "evidentiary errors." (Homestead Br. at 17-20.) That position is unsupported by the record. A trial court's decision to admit or exclude evidence is subject to an abuse of discretion standard of review. *See People v. Katt*, 468 Mich. 272, 278 (2003). This premise is embodied with Rule 611(a), which grants a trial court with broad power to "control the questioning of witnesses." *Lamson v. Martin (After Remand)*, 216 Mich. App. 452, 458 (1996) *see also* 29 Am Jur Evidence § 381.

It is axiomatic that a party must make timely and specific objections at trial—or the matter is waived. *See, e.g., Downie v Kent Prods, Inc.*, 420 Mich. 197 (1984); MRE 103(a) ([E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.); MCR 2.613(A) (error in admission or exclusion of evidence is not a ground for granting a new trial unless inconsistent with substantial justice). Here, Homestead failed to make cognizable objections that would preserve the matters for review. Unfor-

tunately for Homestead, there is no basis in law or fact for a new trial.

Here, Homestead cannot shoulder its burden of showing “manifest injustice” for several reasons. First, Homestead either failed to object—or make an offer of proof—for all of the evidentiary issues it raises now. *See, e.g., People v. Hackett*, 421 Mich. 338 (1984) (to avoid waiver, a party must [1] specify at trial the purpose for the offered evidence and [2] provide an offer of proof). Moreover, Homestead made no Rule 105 requests for admissibility. MRE 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”) (emphasis added). Homestead’s arguments here are an attempt to resurrect matters that were waived at trial. Appellants should lose.

Second, Homestead’s evidentiary arguments are waived for lack of specificity. *See Joba Constr. Co. v. Burns & Roe, Inc.*, 121 Mich. App. 615 (1982) (objections must be specific, precise, or else waived). Moreover, none of the objections Homestead makes now are “apparent from the context” at trial, under Rule 103(a)(2). *People v. Burton*, 433 Mich. 268 (1989) (when the admissibility of evidence is disputed, the burden rests with the proponent of the evidence to lay a proper foundation). This leaves Homestead to show plain error, under Rule 103. The burden is great here; Homestead must show that the alleged errors affected the outcome of the trial—in light of the weight of the properly admitted evidence. *People v.*

McLaughlin, 258 Mich. App. 635, 650 (2003). Again, Homestead cannot establish plain error.

D. HOMESTEAD CANNOT PROVE PLAIN ERROR

Homestead now contends that the Court wrongly excluded testimony that Homestead considered the personal guaranty a valuable Homestead asset. (Homestead Br. at 18-19.) That is incorrect for at least two reasons: (1) Homestead's did not provide its current rationale for admitting the evidence at trial; and (2) the record shows that the evidence is cumulative. *See People v. Aldrich*, 246 Mich. App. 101, 113 (2001) (“[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion.”). It is not error to exclude cumulative, quasi-702 evidence—especially when the proponent fails to make a proffer. *See, e.g., Temborius v. Slatkin*, 157 Mich. App. 587 (1986) (legal conclusions are not opinions and inferences within the scope of Rule 701 [lay opinion testimony]); *Richardson v. Ryder Truck Rental Inc.*, 213 Mich. App. 447, 455 (1995) (distinguishing the scope of lay opinion testimony under Rule 701 and “qualified” expert testimony under Rule 702). The record shows that jury considered the credibility of Homestead's evidence and witness—the jury simply did not give that evidence the weight Homestead wishes now. That is not error, but the sole province of the fact-finder.

Finally, Homestead argument that the Court should vacate the verdict because Burnham's testimony and use of the email was inadmissible hearsay is erroneous. (Homestead Br. at 20.) Hearsay is (1) an out of court statement (2) offered for the truth of the matter asserted. MRE 801. Again, there was no specific hearsay objection at trial; thus is it waived under

Rule 103, because it is untimely. Assuming *arguendo* that the Homestead's objection was timely and specific, the objection remains wanting. The record reveals that the evidence was offered, *inter alia*, to prove the effect on the hearer, intent, and knowledge—all non-hearsay purposes. See e.g., *Shuler v. Michigan Physicians Mut. Liab. Co.*, 260 Mich. App. 492 (2004) (statements offered to show effect on the recipient is non-hearsay); McCormick Evidence § 249 (West 2014) (acts of legal significance offered to show course of dealing is non-hearsay); Fed R. Evid. 801 advisory committee's note. In sum, Homestead's evidentiary objections are not born of the record, but of hindsight.

Conclusion

The record shows that the jury properly considered contested contract terms, the credibility of Homestead's evidence and did not give it the weight Homestead desired. This is not appealable error, but matters within the sole province of the fact-finder. For the reasons articulated above, Homestead's motion should be DENIED.

Respectfully submitted,

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Dated: November 9, 2015

**APPELLEE'S MOTION FOR RECONSIDERATION
(AUGUST 15, 2017)**

STATE OF MICHIGAN
IN THE SUPREME COURT

HOMESTEAD PROPERTIES, LP,

Plaintiff-Appellant,

v.

KENNETH BURNHAM, ET AL.,

Defendants-Appellees.

Supreme Court No. 154900
Court of Appeals Case No. 327469
Lower Court Case No. 2012-126588-CK

Statement of Jurisdiction

This is a motion for reconsideration of the Court's July 25, 2017 Order, denying the Petitioners' Application for Leave to Appeal. This Court has jurisdiction over this matter pursuant to MCL 600.308(1)(a). *See also* MCR 7.303.

Statement of the Questions Involved

I. In *Wilke v. Auto-Owners Insurance Co*, this Court recognized the parties' "freedom to contract as they see fit," as a "bedrock principle" of contract law. *Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003). Moreover,

“Summary Judgment is rarely appropriate where motive and intent play leading roles.” *Opyke Inv. Co. v. Norris Grain Co*, 413 Mich. 354, 360 (1982). In *Klapp v. United Ins. Group*, this Court held that the jury may consider relevant extrinsic evidence to find a contested contract term’s meaning. Following *Klapp*, the trial court found “it’s possible for a reasonable jury to find that the guaranty was not assignable without Burnham’s consent,” because the phrase, “permitted assigns” was ambiguous. After a jury defense verdict, the Court of Appeals reversed, holding that the personal guaranty’s “permitted assigns” clause was unambiguous—even though Burnham submitted uncontroverted extrinsic evidence of the original parties’ intent not to assign the guaranty without Burnham’s consent. Did the Court of Appeals err when it determined that contested terms to a contract did not present an appropriate question of fact for a jury to decide?

Court of Appeals answers, “No.”

Appellee Burnham answers, “Yes.”

Appellant Homestead answers, “No.”

Appellees, by and through undersigned counsel, move for reconsideration of the Court’s Order of July 25, 2017 based upon the following:

1. On July 25, 2017, the Court entered an Order denying Appellees Application for Leave to Appeal. The Court denied the application because it was “not persuaded that the question presented should be reviewed by this Court.” (Ex. 1—Supreme Court Order of 7/25/2017.)

2. Burnham prays that this Court reconsider. The Court's Order lets stand the Michigan Court of Appeals' opinion and order that reversed the trial court's summary disposition decision and vacated the jury's verdict—both in favor of Appellees. (Court of Appeals' Order of 9/15/2016 at 4.) In *Klapp v. United Ins. Group*, this Court held that the jury may consider relevant extrinsic evidence to find a contested contract term's meaning. Following *Klapp*, the trial court found “it's possible for a reasonable jury to find that the guaranty was not assignable without Burnham's consent,” because the phrase, “permitted assigns” was ambiguous. Despite this sound application of law, the Court of Appeals reversed the trial court, and held that the guaranty between the guarantor, Appellee Ken Burnham, and Christopher Investments was assignable to Appellant Homestead, on “freedom of assignment” grounds. (Ex. 2—Opinion of 9/15/2016, citing *Detroit Greyhound Employees Fed. Cred. Union v. Aetna Life Ins. Inc.*, 381 Mich. 683, 689 (1967).) The Court of Appeals held “permitted assigns” to be an unambiguous right to assign Burnham's personal guaranty without his consent. The Court of appeals held that a personal guaranty was assignable by operation of law, in “absence of the strictest language, in the “plainest words” barring assignment . . .” (Ex. 2—Opinion at 4).

3. A party may move for reconsideration of a Court order if it “file[s] the items required by [MCR 7.313(A)] within 21 days after the date of certification of the order.” MCR 7.313(E). Summary disposition is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. MCR 2.116. Questions concerning inter-

pretation—or whether a contract is ambiguous—are subject to *de novo* review. *Klapp v. United Ins. Group*, 468 Mich. 469 (2003). But summary judgment is “hardly ever appropriate” when questions of intent are present. *Brown v. Pointer*, 390 Mich. 346, 354, 212 N.W.2d 201 (1973).

4. Reconsideration of the question presented is proper for several reasons. Chief among them is the binding precedent implicated in this case. Since 1938, we’ve applied the maxim that a contract must be “construed so as to give effect to every word or phrase as far as practicable.” *Mondou v. Lincoln Mut. Cas. Co.*, 283 Mich. 353, 358-59 (1938); *Hunter v. Pearl Assurance Co., Ltd.*, 292 Mich. 543, 545 (1940). But that did not happen below. The Court of Appeals erred when it determined that contested terms to a contract did not present an appropriate question of fact for a jury to decide. The Court of Appeals erred when it did not give effect to the word “permitted” in the phrase “permitted assigns.” *See Klapp*, 468 Mich. at 468 (“[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.”) Review is warranted because the lower court’s decision contravenes comprehensive interpretation axioms, and rendered the word “permitted” superfluous text. *See Blackhawk Dev. Corp. v. Village of Dexter*, 473 Mich. 33, 49, 700 N.W.2d 364 (2005); *Philips v. Homer (In re. Egbert R. Smith Trust)*, 480 Mich. 19 745 N.W.2d 754 (2008). *See also Thomson Elec. Welding Co. v. Peerless Wire Fence Co.*, 190 Mich. 496, 505, 157 NW 67 (1916).

5. The Court of Appeals’ finding that phrase, “permitted assigns” to be an unambiguous right to

assign Burnham’s personal guaranty, without the condition of his consent achieved, contravenes *Wilke*. Review is warranted because the lower court’s opinion contravenes well-worn rules of contract law. As *Klapp* instructs, “courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity . . .” *Klapp*, 468 Mich. at 467. Burnham applied the summary disposition rules to show that the contract at issue was not a “general” one—and the general rules of assignment did not apply. A jury agreed. Respectfully, Appellees’ application for leave to appeal should be revisited and granted because: (1) *stare decisis*; (2) proper application of summary disposition rules; and (3) the right to a jury trial have significant public interest under MCR 7.305(B)(2), and are significant to our State’s constitutional jurisprudence under MCR 7.305(B)(3). The summary disposition rules should not be bent to divest litigants to their earned right to a civil trial.

6. The summary disposition rules did not abrogate a litigant’s right to a civil jury trial—if followed. At the summary judgment stage—and at trial—Burnham submitted evidence contesting the terms of the contract itself. The evidence rebutted Homestead’s use of *Aiton* and its progeny for the proposition that “generally all legitimate causes of action are assignable.” *See e.g.*, UCC 1-303; *Finance Amer. Private Brands v. Harvey E. Hall, Inc.*, 380 A.2d 1377 (Del. Super. Ct. 1977) (special guaranty not assignable).

7. It is well settled that questions of intent, credibility, or state of mind, summary judgment are “hardly ever appropriate” for summary disposition. *Brown v. Pointer*, 390 Mich. 346, 354, 212 N.W.2d 201 (1973). This Court generally adheres to the principle

of stare decisis—and requires its subordinate courts to do the same. *Robinson v. Detroit*, 462 Mich. 439, 463; 613 N.W.2d 307 (2000). The lower court did not follow this precedent. These holdings remain binding upon all lower courts. Therefore, “all lower courts and tribunals are bound by that prior decision[s] and must follow [them] even if they believe that it was wrongly decided or has become obsolete. *Boyd v. WG Wade Shows*, 443 Mich. 515, 523, 505 N.W.2d 544 (1993).

8. In *Wilke v. Auto-Owners Insurance Co*, our Supreme Court recognized the parties’ “freedom to contract as they see fit,” as a “bedrock principle” of contract law. *Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003). But *Wilke’s* bedrock principle was not new. For over half a century, the general rule of assignments is subordinate to well-worn freedom of contract principles, illuminating the parties’ intent. *See Sobczak v. Kotwicki*, 347 Mich. 242, 249, 79 N.W.2d 471 (1956). Since 1939, juries—not judges—decide what ambiguous contract terms mean. *Hewett Grocery Co v. Biddle Purchasing Co.*, 289 Mich. 225, 236, 286 NW 221 (1939); *Brown v. Forrester Constr. Co*, 372 Mich. 204, 125 N.W.2d 315 (1963) (jury required because extrinsic evidence was properly presented). Review is warranted because Burnham did not draft the instrument; yet the lower held that the guaranty could be assigned, in part, because the instrument “does not use negative language to describe assignability.” (Ex. 2—Order of 9/15/2016 at 4.) The lower court’s opinion does not illustrate what made its reading of the contested language the only plausible one. Grant leave because Burnham’s interpretation of the Guaranty is

reasonable. The word permit,¹ modifies the term, assignment. It means to “allow (something) to happen,” to give permission for (something),” or “to allow (someone) to do or have something.” Merriam-Webster’s Dictionary and Thesaurus 599 (2007). While the lower court relied on *Detroit Greyhound Employees Fed. Cred. Union v. Aetna*—Aetna does not support the premise. This error is a clearly palpable one, because it shifts the burden to the non-drafting party. *See, e.g., EAC Credit Corp. v. King*, 507 F.2d 1232, 1236 (5th Cir. 1975)²; Keith A. Rowley, Contract Construction and Interpretation—From “the Four Corners” to Parol Evidence (And Everything In Between), 69 Miss. L.J. 164 (1999)³. While the contract “language considers and approves of the possibility of assignment” (Ct. App. Op. at 4), that is not dispositive of the analysis.

9. This Court should reconsider and “give meaning to every word and phrase in a contract,” under *Klapp*. The Court of Appeals’ decision ignores word “permitted” and renders the phrase “permitted assigns” meaningless. Moreover, the lower court erroneously never considered whether the contract was latently ambi-

1 *See also* Random House Collegiate Dictionary (2010) (permit “to tolerate; consent to; to grant.”)

2 “The person claiming under the guaranty has the burden of showing that the debt whose recovery is sought falls within the contractual terms and that all conditions upon the guarantor’s liability have occurred,”

3 “The prevailing view among American Courts and commentators is that a court need not find ambiguity or less-than-full integration before it may apply these rules of construction and interpretation to determine the meaning and consequence of the parties’ written intent.”

guous, given the context implicating the “permitted assigns” clause. A contract is ambiguous if its language is reasonably susceptible to multiple interpretations. *See Gortney v. Norfolk & W. Ry. Co.*, 216 Mich. App. 535 (1996); *Goodwin, Inc. v. Coe*, 392 Mich. 195, 212, 200 N.W.2d 664 (1974). In *Goodwin*, this Court explained:

[T]he detection of ambiguity requires admissibility of extrinsic evidence to prove it, or . . . disprove it, “as well as to resolve any ambiguity proven to exist.” Second, “extrinsic evidence is admissible to indicate the actual intent of the parties.”

Coe, 392 Mich. at 206 (emphasis added by the Court). As this Court clarified in *Klapp*, “[t]he law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties’ conduct, the statements of its representatives, and past practice to aid in interpretation.” *Id.* at 470.

10. Review is also warranted because the lower court’s decision contravenes the parol evidence rule. For ninety-one years, parol evidence has been admissible to explain a writing’s intended meaning. *See Collier v. Stebbins*, 236 Mich. 147, 210 NW 264 (1926); *Biltmore Land Co. v. Munro’s Estate*, 271 Mich. 125, 260 NW 135 (1935) (parol evidence admissible to show purpose parties intended to accomplish); 4A Mich. Pl. & Pr. § 36:779 (3d ed. West 2014) (“parol evidence is admissible as to the circumstances, custom, preliminary negotiations, and the intent of the parties”). Here, the trial judge’s decision was correct. The meaning of “permitted assigns” was ambiguous and subject to fact-finding and the review of evidence by the Jury. The evidence showed that not only had the

Homestead asked for the guarantee prior to its purchasing the Loan, and been denied—but also after purchasing the loan, Homestead tried to buy the guaranty. This conclusively demonstrated that it was the intent of the parties that a limitless guarantee was not part of the contract’s true purpose. The evidence showed the parties themselves believed the personal guaranty was unique—and not ordinary bearer-paper. In fact, Homestead believed it. Homestead knew that the guarantee did not run with the Note. That’s why Appellant tried to buy the Guaranty after it alleged purchased it from Christopher Investments. No one from Homestead ever rebutted that evidence—not at the summary judgment stage, not at trial, not on appeal and not now. As *Klapp* instructs, “courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity . . .” *Klapp*, 468 Mich. at 467.

11. As it stands, the Court is being employed to affirm a poor business decision—and rectify the poor business judgment of the Appellant Homestead. none of the cases the Court of Appeals employs contain any language standard established to which the “permitted assigns” clause in this case could be judged. *See Burkhardt v. Bailey*, 260 Mich. App. 636, 652, 680 N.W.2d 453 (2004)(restating of general contract law that contracts are generally assignable); *Kingston v. Markward & Karafilis, Inc.*, 134 Mich. App. 164, 171-172, 350 N.W.2d 842 (1984)(same)⁴.

⁴ The lower court misemploys *Detroit Greyhound Employees Fed. Cred. Union v. Aetna Life Ins. Co.*, 381 Mich. 683, 689, 167 N.W.2d 274 (1969). The lower court gives no guidance as to what constitutes “plainest words.” In fact, Aetna provides:

Two quotations. dating back to 1886 and 1887 respectively, will serve to present for application to this case

12. The lower court's treatment of assignment law is incorrect, and should be taken up by this Court. The right to assign a contractual right may be limited by the contracting parties themselves. *See* UCC § 2-210(2); Restatement (SECOND) of Contracts § 317(2) (c). Appellees maintained that Burnham's consent was a condition precedent to the right to assign. *McDonald v. Perry*, 342 Mich. 578 (1955); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11-7 (3d 1987) (discussing contractual conditions); Keith A. Rowley, *Contract Construction and Interpretation—From the Four Corners?* 69 Miss. L.J. 164 (1999) (“in deciding whether a guaranty is limited or continuing, a court may consider evidence of surrounding circumstances”). Indeed, there is a “general rule” for assignments. But since 1895, the intent of the assignor must be “clear.” *Merchant's Nat'l Bank v. Gregg*, 107 Mich. 146, 64 NW 1052 (1895); *Granger v. French*, 152 Mich. 356, 116 NW 181 (1908); *Menenberg v. Carl R. Sams Realty Co.*, 337 Mich. 143 (1953); *Edison v.*

a mature rule of interpretive contract law: “The facts and circumstances attending the making of a contract are indispensable to a correct construction or interpretation thereof, and if it is executory, and its terms uncertain or ambiguous, the manner in which the parties themselves have treated it in carrying it into effect is entitled to great weight as affording a practical construction which the parties themselves have placed upon its intent and meaning.” *Switzer v. Pinconning Mgf. Co.*, 59 Mich. 488, 493, 26 N.W. 762, 764: “if there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration they would be effectually removed by this practical construction.”

Detroit Greyhound Employees Fed. Cred. Union v Aetna Life Ins. Co., 381 Mich. 683, 689, 167 N.W.2d 274 (1969).

Babka, 111 Mich. 235, 69 NW 499 (1899); Restatement (SECOND) of Contracts § 324 (1981); 6 Am Jur 2d Assignments § 11(contract may not be assigned when it involves a relationship of confidence); UCC § 2-210(1), Permitted modifies assigns. The lower court's construction saps the phrase's plain meaning.

13. Finally, the lower court's decision contravenes *stare decisis*. As this Court has explained, "[t]he application of *stare decisis* is generally the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Burnham followed the rules, won at summary judgment, and won at trial. Without leave of this Court.

WHEREFORE, Appellees ask this Court to reconsider the Order of 7/25/2017 and GRANT their application for leave.

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Dated: August 15, 2017

**APPELLEES MOTION FOR RECONSIDERATION
(OCTOBER 6, 2016)**

STATE OF MICHIGAN
IN THE COURT OF APPEALS

HOMESTEAD PROPERTIES, LP,

Plaintiff-Appellant,

v.

KENNETH BURNHAM, ET AL.,

Defendants-Appellees.

Court of Appeals Case No. 327469
Lower Court Case No. 2012-126588-CK

Appellees by and through undersigned counsel,
move for reconsideration of the Court's Opinion and
Order of September 15, 2016 based upon the following:

Statement of Jurisdiction

This is a motion for reconsideration of the Court's
September 15, 2016 Opinion and Order. This Court has
jurisdiction over this matter pursuant to MCL
600.308(1)(a). *See also* MCR 7.205(D).

Statement of the Question Involved

I. The trial court found "it's possible for a rea-
sonable jury to find that the guaranty was not
assignable without Burnham's consent." Did the lower

court err when it determined that contested terms to a contract presents an appropriate question of fact for a jury to decide?

Trial Court answers, “No.”

Court of Appeals answers, “Yes.”

Appellee Burnham answers, “No.”

Appellant Homestead answers, “Yes.”

Introduction

The decision of the three judge panel in *Homestead et. al. v. Kenneth Burnham et. al.*, if left to stand, would undermine three bedrock principals of contract law:

1.) That a contract should be interpreted in light of the actions and understandings of the parties to that contract. In this case, prior to purchasing the Note at issue the Plaintiff Homestead was informed that permission would not be given for the assignment of the Guarantee of that Note under the restrictive “permitted assigns” clause. The undisputed evidence presented to the jury in this case was that independently and separately, after Homestead had inadvisably purchased the note, Homestead attempted to purchase the Guarantee of Kenneth Burnham.

Homestead knew and accepted that it had not purchased the Guarantee of Burnham as evidenced by their subsequent attempt to purchase the same. Shortly after its purchase of the Note, it was revealed that Homestead had illegally used comingled investor funds for the note purchase. This resulted in an enforcement action being undertaken by the SEC, wherein Homestead was put into receivership. The attorneys for the

Receiver, who was the legal owner of the Note, Robb Evans and Associates noted that the “guarantee was never any good” in this case.

The attorneys for the Plaintiff have now untruthfully attested that the Guarantee was unambiguous from the outset, and that it was always Plaintiff understanding that “permitted assigns” meant permitted as per law, rather than permitted by parties to the contract.

The Plaintiff is attempting to use this court to undo a bad business decision, and ratify an illegal act by misrepresenting the understanding of the parties.

2.) The courts should give meaning to every word and phrase in a contract. Judge Chabot of the Oakland County Circuit made the correct decision when she referred the issue of the meaning the “permitted assigns” to a finder of fact, the Jury.

- a.) Logically, “permitted assigns” could mean requiring permission of one of the parties to the contract.
- b.) “permitted assigns” could also mean permitted by operation of law., (Although we note that to have the word “permitted” would be unnecessary if it Guarantee would be assignable per the general rule of assignments anyway).

The possibility of two different meanings is the definition of ambiguity. The jury heard the evidence, and found that Homestead knew it was not buying the guarantee, and in fact tried to buy the guarantee of Burnham after its purchase of the note.

3.) Parties should be free to contract as they see fit. In this case the original parties to the Guarantee saw fit to add restrictive language to the assignment clause. The only testimony as to what the intent of this language was, was offered by the Defendant. That testimony was that the permission of Burnham was needed to assign the Guarantee.

In *Wilke v. Auto-Owners Insurance Co.*, our Supreme Court recognized the parties' "freedom to contract as they see fit," as a "bedrock principle" of contract law. *Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003). Appellees seek reconsideration of the Court's Opinion and Order in this case. On September 15, 2016, this Court held that the guaranty between the guarantor, Appellee Ken Burnham, and Christopher Investments was assignable to Appellant Homestead, on "freedom of assignment" grounds. (Attachment No. 1—Opinion of 9/15/2016, citing *Detroit Greyhound Employees Fed. Cred. Union v. Aetna Life Ins. Inc.*, 381 Mich. 683, 689 (1967).) But the general rule of assignments is subordinate to well-worn freedom of contract principles, illuminating the parties' intent. *See Sobczak v. Kotwicki*, 347 Mich. 242, 249, 79 N.W.2d 471 (1956). The parties' course of dealing proves that the guaranty was unique, and could not be assigned to Homestead without Ken Burnham's consent. Accordingly, Appellees ask this Court to revisit its application of the bedrock principle to the facts of this case and vacate the September 15, 2016 Order.

Statement of Facts & Procedural History

The Christopher Investments-Burnham Personal Guaranty

On August 31, 2007, Ken Burnham and Christopher Investment Company Inc. executed a Guaranty of Payment. (Defs' Sum. J. Ex. F—Promissory Note of 8/31/2007; Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007.) Mr. Burnham personally guaranteed payment “to Christopher Investment Company, Inc.,” referencing the promissory note executed between the two parties. (Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 1.) The Guaranty identifies Christopher Investment Company as the “Lender,” and Mr. Burnham as the “Guarantor.” (*Id.*) The Guaranty provides for various rights and remedies for the contracting parties—including assignments: “This agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.” (Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 12.) Christopher Investment Company drafted both the Lake Villa Promissory Note and Mr. Burnham's personal Guaranty. (Ex. 4—Defs' Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014 at ¶ 17.) The parties intended that assignments be pre-approved before execution. (*Id.*; *see also* Defs' Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 12.) The guaranty does not define the term, “permitted assigns.”

Subsequently, Christopher Investment tried to assign its rights to the Guaranty to Homestead. The parties' course of dealing illustrates that an assignment of the contract needed consent of the obligor. (Defs' Sum. J. Ex. Letter from Davidson Fink to Terman of

9/15/2010; Defs' Sum. J. Ex. 4—Letter from Davidson Fink to Terman of 9/20/2010; *see also* Trial Ex. D-B.) Mr. Burnham told Homestead Properties' agents of the Guaranty's assignment provision—immediately after the sale of the note; Burnham told Homestead's agents that he did not consent to the assignment of his guaranty. (Ex. 4—Defs' Sum. J. Ex. B—Affidavit of Ken Burnham of 1/27/2014; Defs' Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014.) As a result of the transaction, the SEC placed the Appellant into receivership; the SEC stated that the guaranty at issue did not appear to be valid. The parties intended that assignments be pre-approved before execution. (Ex. 4—Defs' Sum. J. Ex. Affidavit of Ken Burnham of 2/5/2014 at ¶ 7.) Ken Burnham is the only person with first-hand knowledge that testified about the guaranty's creation in this case. At trial, Ken Burnham told the fact-finder that guaranty was personal and unique:

My position is that the guarantee was negotiated with Mr. Christopher and that provision was put in there to protect me from my guarantee going somewhere that I didn't want it to go.

(Appellee's Br. Ex. 2—Tr. Trans. at 96.) Mr. Burnham told the jury that he did not intend to assign his personal guaranty to Homestead:

Q: What was your intent when you signed the personal guarantee with Christopher investment?

A: My intent was that that guarantee be personal to Greg Christopher and that, if for

some reason he wanted to assign that guarantee, he would need my permission.

[. . .]

Q: Did you give permission—

A: No.

Q: —to Mr. Christopher to sell the personal guarantee to Homestead?

A: No, I didn't.

Id. at 104-105. (*See also* Attach. No. 1—Op. at 2, ¶ 5.) Homestead's witnesses testified that they "did not believe Burnham's permission was required for assignment" (Op. at 2, ¶ 5). As a result, the jury reached a verdict in Mr. Burnham's favor. Homestead's post-trial and appellate actions followed.

Standard of Review

Rule 2.119(F) provides that a party may bring a motion for reconsideration in cases of "palpable error." *See Kokx v. Bylenga*, 241 Mich. App. 655, 659, 617 N.W.2d 368 (2000); MCR 7.215(I). This Court reviews contract interpretation questions *de novo*. *Bandit Industries, Inc. v. Hobbs Int'l Inc. (After Remand)*, 463 Mich. 504, 511 (2001). Summary disposition is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. MCR 2.116.

Argument

The Parties' Actual Intent Must Temper the Default "Freedom of Assignment" Rule—Ken Burnham Paroled Evidence That His Personal Guaranty Could Not Be Assigned Without His Consent

The Court's analysis erroneously presumes a fully-integrated instrument and erroneously shifts the burden on the non-drafting party to rectify undefined terms. Moreover, the Court's use of *Detroit Greyhound Employees Fed. Cred. Union v. Aetna* presumes Ken Burnham drafted the Guaranty. (Opinion at 4.) But he did not draft it—Homestead's predecessor did.

Burnham's interpretation of the Guaranty is reasonable—and rooted in fact. The word permit¹ modifies the term, assignment. It means to "allow (something) to happen," to give permission for (something)," or "to allow (someone) to do or have something." Merriam-Webster's Dictionary and Thesaurus 599 (2007). The Court's opinion does not interpret this term under the plain meaning rule. It does not answer "who can permit an assignment of the guaranty?"² Instead, the Court used *Aetna* to construe the guaranty against Burnham. (Opinion at 4, ¶ 1 *citing Aetna*, 381 Mich. 683, 689, 167 N.W.2d (1969) ("those who would compose a contractual bar against alienation must use 'the plainest words'"). But the absence of

1 See also Random House Collegiate Dictionary (2010) (permit "to tolerate; consent to; to grant permission; to allow a person to do something").

2 Mr. Burnham's construction is plausible—and rightfully went to the jury on the intent issue. Consider, *arguendo*, the following query: Under the instant facts, could Burnham assign his personal guaranty to a third party, over Christopher Investments' objection?

“clear language” does not automatically mean unique personal guarantees are assignable. The *Kingston* panel noted that some contracts are not assignable when the assignment alters the obligor’s risk:

3 Restatement, 2d § 317(2), p. 15 provides . . . A contractual right can be assigned unless (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance or materially reduce its value to him, . . . or assignment is validly precluded by contract. Comment (d) to 317(2) of the Restatement provides that the definition of a “material increase” in the burden of risk imposed depends on the nature of the contract and on the circumstances.

Kingston v. Markward & Karafilis, Inc., 134 Mich. App. at 171-72. Burnham put forth uncontroverted evidence that an unpermitted assignment would constitute a “material increase” of his bargained-for burden. The unpermitted assignment would (1) reduce the deal’s value to him; (2) increase his exposure; (3) diminish his bargaining power, and (4) alter his risks. Thus the unpermitted assignment eliminates Burnham’s power to control his affairs. Burnham knew the folks at Christopher Investments; he did not know Homestead. (Ex. D-B [“Ken Burnham dealt with Greg Christopher on a personal basis, trusted him and on that basis was willing to guarantee the obligation.”].)

The guaranty’s language is far from perfect—but that does not end the inquiry. The intent of the original

contracting parties should control the outcome of this case, not the default assignment rules. *See Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003); E. Allan Farnsworth, *Contracts* § 11.8 [Vulnerability of Assignee to Obligor’s Defenses and Claims] (3d ed. 1999). The evidence showed the parties themselves believed the personal guaranty was unique—and not ordinary bearer-paper³. In fact, Homestead believed it. Homestead knew that the guarantee did not run with the Note. That’s why Appellant tried to buy the Guaranty after it alleged purchased it from Christopher Investments. (Ex. D-B.) No one from Homestead ever rebutted that evidence—not at the summary judgment stage, the trial, and now.

Finally, the Court erred when it did not consider whether the term “permitted assigns” was latently ambiguous under the circumstances. Parol evidence is admissible to explain the guaranty’s intended meaning. *See Biltmore Land Co. v. Munro’s Estate*, 271 Mich. 125, 260 NW 135 (1935) (parol evidence admissible to show purpose parties intended to accomplish); 4A Mich. Pl. & Pr. § 36:779 (3d ed. West 2014) (“parol evidence is admissible as to the circumstances, custom, preliminary negotiations, and the intent of the parties”). A contract is ambiguous if its language is reasonably susceptible to multiple interpretations. *See Gortney v. Norfolk & W Ry Co*, 216 Mich. App. 535 (1996). If the contract is ambiguous, its interpretation is a question of fact that must be

³ *See* Black’s Law Dictionary 712 (6th ed. 1990); (defining special guaranty as one “addressed to a particular person or group of persons, who are the only ones who can enforce it; contingent guaranty as one “in which the guarantor will not be liable unless a specified event occurs.”).

decided by the jury in light of relevant extrinsic evidence. *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447 (2003); *Hewett Grocery Co. v. Biddle Purchasing Co.*, 289 Mich. 225, 236, 286 NW 221 (1939). The contract's ambiguity could be latent, as here; latent ambiguity arises "from a collateral matter when the document's terms are applied or executed." *Shay v. Aldrich*, 487 Mich. 648 (2010); *McCarty v. Mercury Metalcraft Co.*, 372 Mich. 567 (1964) (latent ambiguity present where "some fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings" [internal citations omitted]).

The parties' course of dealing reflects this construction. *See Ditzik v. Shaffer Lumber Co.*, 139 Mich. App. 81, 360 N.W.2d 876 (1984) (course of dealing, practical interpretation of contract given "great weight"). The record shows Christopher Investments, and its escrow agent, asked Burnham for the right to transfer the original guaranty of Burnham to Homestead properties. Burnham, through its attorneys, Davidson, Fink of Rochester, NY denied them the permission to do so. (*See Ex. E.*) The reason for the request was the express understanding, and language in the Guaranty that permitted the Guaranty only to be assigned with the permission of the Guarantor. This provision only applied to the Guaranty and not the Note and Mortgage. The trial judge and the jury were right. Burnham's parol evidence proves that unpermitted assignment of the personal guaranty is "validly precluded by contract," based upon *Kingston's* circumstances of the case standard. *See Kingston v. Markward*

& *Karafilis, Inc.*, 134 Mich. App. 164, 350 N.W.2d 842 (1984). The Court should vacate the decision⁴.

Conclusion

For the reasons articulated above, Appellee prays that the Court harmonize its precedent under MCR 7.215(J), vacate its September 15, 2016 Order and DENY Homestead's Appeal, on all grounds.

Respectfully submitted,

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Dated: October 6, 2016

⁴ The Court noted, in *dicta*, that the jury questionnaire constitutes reversible error. (Op, at 4 n.1.) Appellees maintain that it does not, under *Stoddard v. Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich. App. 140 (1999) ("The trial court does not commit error requiring reversal if, on balance, the parties' theories and the applicable law were presented to the jury adequately and fairly."). Appellees respectfully request an opportunity to be heard on this issue, should the Court deem it appropriate.

**APPELLEE'S APPLICATION
FOR LEAVE TO APPEAL
(DECEMBER 7, 2016)**

STATE OF MICHIGAN
IN THE SUPREME COURT

HOMESTEAD PROPERTIES, LP,

Plaintiff/Appellant,

v.

KENNETH BURNHAM, ET AL.,

Defendants/Appellees.

Supreme Court No. 154900
Court of Appeals Case No. 327469
Lower Court Case No. 2012-126588-CK

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Statement of Grounds for Supreme Court Review

“We cannot understand provisions unless we understand their history.”

-Chief Justice Thomas M. Cooley

This is an Application for Leave to Appeal the Michigan Court of Appeal’s September 15, 2016 Opinion and Order, and its denial of reconsideration, on October 26, 2016. This Court should grant Appellees Kenneth Burnham and Lake Villa LLC’s application for leave to appeal because it raises issues that have significant public interest under MCR 7.305(B)(2), and are significant to our State’s constitutional jurisprudence under MCR 7.305(B)(3). Since its inception, this Court has sought to protect the right to a jury trial of ones peers—a guarantee, found in our Constitution. Const. 1963 art 1, § 17, § 20. But the truth is, trials are rarely seen today. Today, many cases do not make it beyond Rule 2.116, the Summary Judgment Rule. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 600 (2004); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141-142 (2000) (“[T]he increase in summary dispositions of civil cases stirs fear that, in the haste to resolve weak cases, courts risk overriding the constitutional imperatives of due process and the right to a civil jury trial under the Fifth and Seventh Amendments.”). But the Rule does not eliminate the right to a trial, or change well-worn axioms of our contract law. Instead, parties must submit evidence that presents questions of fact that a jury can answer. When this happens, summary judgment is improper—and the

right to trial is preserved. *Hewett Grocery Co. v. Biddle Purchasing Co.*, 289 Mich. 225, 236 (1939) (“Where a [contract’s] meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, with proper instructions.”).

Grant leave because the Court of Appeals’ decision misapplies the summary judgment rule, and contravenes well-worn axioms on what to do with latent, ambiguous contracts. In *Wilke v. Auto-Owners Insurance Co.*, this Court recognized the parties’ “freedom to contract as they see fit,” as a “bedrock principle” of contract law. *Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003). Seventy-nine years earlier, this Court “[t]he cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.” *McIntosh v. Groomes*, 198 NW 954, 955 (Mich. 1924) (emphasis added). Leave is appropriate here, as the lower court subordinated Appellee’s uncontroverted evidence of the contracting parties’ intent to the “default” rules of assignability.

This case is about whether the original parties to a personal guaranty intended the guarantor’s special contract to be freely assigned without his consent. At the summary judgment stage, at trial, and on appeal—Ken Burnham, the personal guarantor, submitted evidence contesting the terms of the contract itself. The evidence rebutted the Court of Appeals’ conclusion that generally all legitimate contracts are freely assignable. *See e.g., Finance Amer. Private Brands v. Harvey E. Hall, Inc.*, 380 A.2d 1377 (Del. Super. Ct. 1977) (special guaranty not assignable).

In this case, prior to purchasing the Note at issue the Plaintiff Homestead was informed that permission would not be given for the assignment of the Guarantee of that Note under the restrictive “permitted assigns” clause. The undisputed evidence presented to the jury in this case was that independently and separately, after Homestead had inadvisably purchased the note, Homestead attempted to purchase the Guarantee of Kenneth Burnham.

The Judge and Jury heard evidence that Appellant Homestead knew and accepted that it had not purchased the Guarantee of Burnham. The Jury heard evidence that Homestead had illegally used comingled investor funds for the note purchase. This resulted in an enforcement action being undertaken by the SEC, wherein Homestead was put into receivership. The attorneys for the Receiver, who was the legal owner of the Note, Robb Evans and Associates noted that the “guarantee was never any good” in this case.

As this Court explained in *Shay v. Aldrich*, latent ambiguity “arises not upon the words of the will, deed, or other instrument, as looked at themselves, but upon those words applied to the object or to the subject which they describe.” *Aldrich*, 198 N.W.2d 629, 641 (Mich. 2010). Leave is appropriate here, because the lower court did not consider any of the evidence presented on whether a triable issue existed, under *Quinto v. Cross & Peters Co.*, and other Supreme Court precedent.

Statement of Jurisdiction

This is an application for leave to appeal a court of appeals decision. This Court has jurisdiction over this matter pursuant to Const. 1963 art 3, § 8, art 6,

§ 1, § 4. *See also* MCR 7.301(A)(2). This application is timely, as it is filed within 42 days of the court of appeals' decision. *See* MCR 7.302(C).

Statement of the Case Identifying Judgment Order on Appeal

This is an appeal by leave and review of the lower court's decision to vacate a jury verdict and reverse the trial court's decision denying summary judgment. On February 12, 2014, the trial court held Oral Argument on Homestead's Motion for Summary Judgment. (Ex. 3—Sum. J. Tr. of 2/14/2014.) The lower court found that the evidence contravened Homestead's argument that the guaranty was assigned "by operation of law." (Ex. 3—Sum. J. Tr. of 2/14/2014 at 5.) The trial court found, [t]he Record also reflects that Christopher Investment sought permission to make the assignment." (Ex. 3—Sum. J. Tr. of 2/14/2014 at 6.) The trial court also found it "possible for a reasonable juror to determine the guaranty was not assignable without Burnham's consent." (Ex. 3—Sum. J. Tr. of 2/14/2014 at 6.) After a one-day trial, the jury rendered a verdict in favor of Lake Villa and Ken Burnham. (Dkt Entry of 5/15/2014, codes FDJ, OTH.) Subsequently, the trial court denied Homestead JNOV post-trial motion; Homestead appealed the result to the Michigan Court of Appeals. On September 15, 2016, the Michigan Court of Appeals reversed the trial court's decision and vacated the jury's verdict. (Court of Appeals' Order of 9/15/2016 at 4.) On October 26, 2016, the Michigan Court of Appeals denied Appellees' Request for Reconsideration under 7.215(l). (Court of Appeals' Opinion of 9/15/2016; 10/26/2016). Accordingly, Appellant seeks leave of this Court.

Statement of the Questions Involved

I. In *Wilke v. Auto-Owners Insurance Co.*, this Court recognized the parties' "freedom to contract as they see fit," as a "bedrock principle" of contract law. *Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003). Moreover, "Summary Judgment is rarely appropriate where motive and intent play leading roles." *Opyke Inv. Co. v. Norris Grain Co.*, 413 Mich. 354, 360 (1982). The trial court found "it's possible for a reasonable jury to find that the guaranty was not assignable without Burnham's consent," because the phrase "permitted assigns" was ambiguous. But the Court of Appeals reversed, holding that the personal guaranty's "permitted assigns" clause was unambiguous—even though Burnham submitted uncontroverted evidence of the original parties' intent not to assign the guaranty without Burnham's consent. Did the lower court err when it determined that contested terms to a contract did not present an appropriate question of fact for a jury to decide?

Court of Appeals answers, "No."

Appellee Burnham answers, "Yes."

Appellant Homestead answers, "No."

Statement of Facts & Procedural History

The Christopher Investments-Burnham Promissory Note & Personal Guaranty

On August 31, 2007, Ken Burnham and Christopher Investment Company Inc. executed a Promissory Note and Guaranty of Payment. (Defs' Sum. J. Ex. F—Promissory Note of 8/31/2007; Defs' Sum. J. Ex. G Guaranty of Payment of 8/31/2007.) Mr. Burnham pro-

mised to pay “to the order of Christopher Investment Company Inc.” \$4,450,000, in consideration for a loan of the same amount. (Defs’ Sum. J. Ex. F—Promissory Note of 8/31/2007 at ¶ 1.) On the same day, Mr. Burnham personally guaranteed payment “to Christopher Investment Company, Inc.,” referencing the promissory note executed between the two parties. (Defs’ Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 1.) The Guaranty identifies Christopher Investment Company as the “Lender,” and Mr. Burnham as the “Guarantor.” (*Id.*) The Guaranty provides for various rights and remedies for the contracting parties. Subparagraph Twelve provides, as follows: “This agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.” (Defs’ Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 12.) Christopher Investment Company drafted both documents. (Ex. 4—Defs’ Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014 at ¶ 7.) The parties intended that assignments be pre-approved before execution. (*Id.*; *see also* Defs’ Sum. J. Ex. G—Guaranty of Payment of 8/31/2007 at ¶ 12.) The parties’ course of dealing illustrates that an assignment of the contract needed consent of the obligor. (Defs’ Sum. J. Ex. Letter from Davidson Fink to Terman of 9/15/2010; Defs’ Sum. J. Ex. 4—Letter from Davidson Fink to Terman of 9/20/2010; *see also* Trial Ex. D-B.) Mr. Burnham also advised agents of Homestead Properties of the Guaranty’s assignment provision, prior to this action. (Ex. 4—Defs’ Sum. J. Ex. B—Affidavit of Ken Burnham of 1/27/2014; Defs’ Sum. J. Ex. H—Affidavit of Ken Burnham of 2/5/2014.)

Sec Investigates Homestead Properties; Christopher Investments Wrongfully Assigns Ken Burnham's Personal Guaranty to Homestead Properties

In July 2010, Appellee Burnham was subpoenaed to testify in an SEC case brought against Homestead Properties, the movant and cross-plaintiff here. (Defs' Sum. J. Ex A—SEC Subpoena of 7/23/2010; Ex. B—Burnham Aff. of 1/27/2014.) Upon information and belief, the SEC was investigating Homestead for fraud and other inappropriate business activities. (Defs' Sum. J. Ex A—SEC Subpoena of 7/23/2010; Ex B—Burnham Aff. of 1/27/2014.) The subpoena sought, inter alia, "All communications with . . . Homestead Properties" and "Christopher Investment Company Inc." (Defs' Sum. J. Ex. A—SEC Subpoena of 7/23/2010 at Attach. 1, ¶ 16(b)-(c)).

Mr. Burnham gave testimony to SEC officials in August 2010. (Defs' Sum. J. Ex. A—SEC Subpoena of 7/23/2010.) During the course of the deposition, Burnham was shown a financial statement, which purported to be a financial statement of Kenneth C. Burnham, showing assets liabilities, liquidity, income and net worth. Mr. Burnham testified that the financial statement produced was fraudulent. (Defs' Sum. J. Ex. B—Burnham Aff. of 1/27/2014.) Mr. Burnham testified that the financial statement was not prepared and signed by him, that he was unfamiliar with it, and that it substantially misstated Burnham's financial position. (*See* Defs' Sum. J. Exhibit B, Burnham Aff. of 1/27/2014 ["I gave no personal financial information to Christopher Investments, the original note holder, or to Homestead Properties"] Defs' Sum. J. Ex. C—Letter of Davidson Fink of 9/23/2010). Subsequently, Christopher Investment Company sold the Guaranty to

Homestead, in violation of the contract, and over Mr. Burnham's objection. (*See* Defs' Sum. J.Ex. B—Burnham Aff. of 1/27/2014 at ¶ 5.)

On April 3, 2013, Homestead Properties brought suit against Lake Villa Oxford Associates and Ken Burnham for, inter alia, breach of guaranty. (Homestead Cross-Compl. at Count II, ¶¶ 24-27.) In response, Mr. Burnham alleged fourteen affirmative defenses, sounding in fraud, unclean hands, illegality and contributory negligence. (K. Burnham Verified Answer and Affirmative Defenses.) Mr. Burnham has alleged Homestead is estoppel to assert rights associated with the guaranty, because the assignment is invalid. (K. Burnham Third Affirmative Defense; Seventh Affirmative Defense.) Mr. Burnham's response also states that permission prior to assignment was a condition precedent to Homestead's claim on the Guaranty. (K. Burnham Eleventh Affirmative Defense.) Thus the assignment—Homestead's basis for recovery—is invalid, and constitutes a breach of contract enforceable against the wrongful holder of the Guaranty. (*See* K. Burnham Affirmative Defenses 1-14.)

The Summary Judgment Hearing

On January 15, 2014, Homestead brought a motion for summary disposition, under MCR 2.116 (C)(8), (C)(9), or (C)(10). Homestead argued Burnham contested the contract's terms. Burnham argued that his consent was required before the guaranty could be assigned; Burnham submitted an affidavit and other documentation in support of his argument. The parties intended that assignments be pre-approved before execution. (Ex. 4—Defs' Sum. J. Ex. Affidavit of Ken Burnham of 2/5/2014 at ¶ 7.) On February 12, 2014,

the trial court held Oral Argument on Homestead's Motion for Summary Judgment. (Ex. 3—Sum. J. Tr. of 2/14/2014.) The lower court found that the evidence contravened Homestead's argument that the guaranty was assigned "by operation of law." (Ex. 3—Sum. J. Tr. of 2/14/2014 at 5.) "The Record also reflects that Christopher Investment sought permission to make the assignment." (Ex. 3—Sum. J. Tr. of 2/14/2014 at 6.) The lower court found it "possible for a reasonable juror to determine the guaranty was not assignable without Burnham's consent." (Ex. 3—Sum. J. Tr. of 2/14/2014 at 6.)

The Trial: Homestead Offers No Evidence on the Meaning of "Permitted Assigns"

At trial, Homestead called two witnesses in its case-in-chief, plus Ken Burnham under the adverse witness statute. At the outset of trial, Defense Counsel asked for a proffer on Homestead's evidence of contract interpretation:

Mr. Lucas: We've looked at Mr. Farmer's witness list, and as your Honor knows, the ultimate issue in this case for the jury to decide is one of the intent of the parties on some words that are contained within the personal guarantee. We would ask Mr. Farmer to proffer what the witness is going to testify to pertaining to the ultimate issue of fact. We believe that neither one of these witnesses have personal knowledge as to what the intent of the parties were at the time that the contracts were executed.

(Ex. 2—Trial Trans. of May 12, 2014 at 8.) The Court denied Defense Counsel’s request for a proffer and allowed Homestead to present its case. (*Id.* at 9.)

In its opening statement, Homestead’s Counsel told the jury that the case was about, inter alia, “the personal guarantee that Mr. Burnham signed . . .” (*Id.* at 52.) Homestead also promised the jury that it would contradict Burnham’s anticipated testimony about that personal guarantee:

[S]o [Burnham’s] looking at the end of that guarantee where it says ‘This guarantee is binding on successors and permitted assigns’ and he’s going to say, ‘That means I get to decide who’s a permitted assign’ and he’s going to seize on that to try to make his argument that my client, who bought this loan [and] guarantee can’t enforce it against him. That’s what this case is going to be about.

(*Id.* at 52 [emphasis added].) Homestead promised the jury “facts will show” Mr. Burnham’s consent to Homestead’s purchase of the personal guarantee “was not required” because “[l]enders sell loans all the time.” (Ex. 2—Tr. Trans. at 53, 55). But Homestead never presented the jury with such a case; Homestead never called an expert or otherwise qualified witness to testify to that respect.

First, Homestead called Edward Rogers, General Partner at Homestead Properties. (*Id.* at 65.) Homestead elicited “formal education” testimony from Rogers that he held economics and psychology degrees from the University of California Santa Barbara, and taught “MBA courses,” at the University of California

Irvine. (*Id.* at 66.) During this line of questioning, Defense Counsel objected to Homestead’s apparent attempt to qualify Rogers as an expert. The Court sustained the objection. (Ex. 2—Tr. Trans. at 67.) Homestead made no proffer. (*Id.*) Defense Counsel also objected to Homestead’s apparent attempt to elicit Rule 702 expert testimony from Rogers. The Court sustained the objection. (Ex. 2—Tr. Trans. at 73-74.) Homestead made no proffer; Homestead’s only response to the objection was that it “sounds like an argument to me.” (*Id.*)

Edward Rogers testified that he was “just a regular investor” in 2008—the time period relevant to trial. (*Id.* at 66.) Rogers also testified that he was only “vaguely aware” of the 2008 dealings between Homestead, Christopher Investments & Lake Villa. (*See, e.g.*, Tr. Trans. at 69.) On cross-examination, Rogers admitted that he had no first-hand knowledge regarding the personal guarantee’s negotiation or creation:

Q: You weren’t there when the—when the contract between my client and Mr.—

A: No, I was not there.

Q: —Greg Christopher was negotiated, were you?

A: No, I was not.

Q: You don’t know what Greg Christopher’s intent was in negotiating that contract for personal guarantee, do you?

A: No, I—I do not know.

Id. at 76-77. Rogers also admitted that he had no first-hand knowledge regarding the issue of intent for the personal guarantee:

Q: Let's go back to the personal guarantee. Have you ever spoken to Mr. Greg Christopher about that personal guarantee?

A: No, I have not.

Q: Okay, so my final question to you is that you really don't know what Mr. Christopher meant, do you?

A: No, I do not.

Id. at 80-81. Rogers could not testify on the meaning of "permitted assigns." The Court did not accept Rogers' testimony as expert testimony under Rule 702. (*Id.* at 67.)

Next, Homestead called Ken Burnham, under the adverse witness statute. (*Id.* at 81.) On cross-examination, Mr. Burnham testified that the personal guarantee was intended to be a personal one to Christopher Investments—as he contended on the summary disposition phase of the case:

My position is that the guarantee was negotiated with Mr. Christopher and that provision was put in there to protect me from my guarantee going somewhere that I didn't want it to go.

(*Id.* at 96.) On direct exam of Burnham, the following colloquy took place:

Q: What was your intent when you signed the personal guarantee with Christopher Investment?

A: My intent was that that guarantee be personal to Greg Christopher and that, if for some reason he wanted to assign that guarantee, he would need my permission.

* * *

Q: Did you give permission—

A: No.

Q: —to Mr. Christopher to sell the personal guarantee to Homestead?

A: No, I didn't.

Id. at 104-105. During Homestead's case-in-chief, Mr. Burnham was asked to read an email directed to agents of Homestead, which was in evidence by stipulation of the parties. (Ex. 2—Tr. Trans. at 3, 123.) The evidence was presented to show that Homestead "offered [Burnham] money in exchange for his personal guaranty" because Homestead knew it needed Burnham's consent to assume the guaranty. (Tr. Trans. at 125.) Homestead did not object to the Defense's use of the email (Tr. Trans. at 125). Homestead presented no evidence contrary to Mr. Burnham's understanding of the agreement.

Finally, Homestead called Heath Biddlecome as its final witness. (Tr. Trans. at 106.) Biddlecome testified that he was a financial advisor that started Homestead Properties in 2008. (*Id.* at 107-108.) Biddlecome testified that Homestead purchased loan documents as a "standard loan package" (*id.* at 112), but was not proffered as an expert on commercial transaction or commercial contract interpretation. On cross-examination, Biddlecome admitted that he

could not provide any first-hand knowledge on the issue of guarantee's intent:

Q: You weren't there when Mr. Burnham and Mr. Christopher negotiated their contract, were you?

A: No, I was not.

Q: And you weren't there when they negotiated their personal guaranty, were you?

A: I was not there.

(*Id.* at 117.) Once Biddlecome was excused, Homestead rested its case. In all, Homestead offered ten items into evidence; none of it spoke to the issue of contractual intent. (*Id.* at 2.) Moreover, Homestead did not offer any testimony or evidence regarding the meaning of the personal guarantee. Instead, the defense presented evidence that Homestead attempted to buy the personal guarantee from Mr. Burnham before and after Homestead bought loan documents from Christopher Investments, *Id.* at 123; (*see also* Ex. 4, Ex. 5—Tr. Ex. D-B), The evidence showed Homestead knew the claim on the Burnham guarantee was meritless in 2008—five years before it brought suit on that claim in this Court. (Ex. 5—Tr. Ex. D-B [Emails of 1/23/2008]) After a one-day trial, the jury rendered a verdict in favor of Lake Villa and Ken Burnham. (Dkt Entry of 5/15/2014, codes FDJ, OTH.)

The Post-Trial Motion Hearing & Appeal

On October 29, 2014, Homestead filed a motion for new trial and/or JNOV arguing that the (1) guarantee did not present a jury question, because it was assigned by “operation of law”; (2) jury instructions

and verdict form were defective; and (3) evidential errors unduly prejudiced Homestead. (*See* Homestead Mot. JNOV.) At the hearing, the lower court addressed Homestead's contentions regarding the jury instructions and verdict form:

I am following your argument completely, I think . . . But—but—but the plaintiff was represented by counsel, okay? I didn't force this verdict form on anyone. The parties agreed to it. And I know you—I don't want to be a person piling on [Homestead's Trial Counsel] because I like [Homestead's Trial Counsel] I think he did a nice job and I think he's an excellent lawyer, but he was here and he approved this.

(JNOV Hrg Trans. of 4/29/2015 at 7.) Homestead maintained that it preserved an objection to the verdict form. (*Id.* at 8.)

After considering the identical arguments Appellant raises here, the lower court denied the motion: "I don't find a compelling case for a Judgment Notwithstanding the Verdict, or for a New Trial, so denied." (JNOV Tr. of 4/29/2015 at 12.)

On September 15, 2016, the Michigan Court of Appeals reversed the trial court's decision and vacated the jury's verdict. (Court of Appeals' Order of 9/15/2016 at 4.) It held "permitted assigns" to be an unambiguous right to assign Burnham's personal guaranty without his consent. Although Burnham did not draft the instrument, the lower held that the guaranty could be assigned, in part, because the instrument "does not use negative language to describe assignability." (Court of Appeals' Order of 9/15/2016 at 4.) The court

relied on Detroit Greyhound Employees *Fed. Cred. Union v. Aetna* to support its conclusion. On October 26, 2016, the lower court upheld its decision, following a motion to reconsider under MCR 7.215(1). This action follows.

Summary of the Argument

This Court should reverse the lower court's Order and reaffirm the trial court and jury verdict. The lower court misapplied the law regarding the interpreting an undefined, partially integrated contract. The trial court did not err when it found that Burnham presented a material fact question for trial. At the summary judgment stage, Burnham submitted evidence contesting the terms of the contract itself. The intent of the parties as to the meaning of "permitted assigns" was a fact question a jury decided—not a legal question for the Court of Appeals to decide. *Contra Proferentem* remains a viable canon of construction. This Court should reverse the Court of Appeals and affirm the Jury's verdict.

Standard of Review

The Michigan Supreme Court reviews the proper construction and interpretation of a contract under the *de novo* standard of review. *Bandit Industries, Inc. v. Hobbs Int'l Inc. (After Remand)*, 463 Mich. 504, 511 (2001).

Summary disposition is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. MCR 2.116. A Rule 2.116(C)(10) motion challenges the factual sufficiency of plaintiff's claims. *See, e.g., Corley v. Detroit Board of Educ.*, 470 Mich. App. 274 (2004). Movant's motion should be granted if there are no

genuine and material fact issues and movant is entitled to a judgment as a matter of law. *Adams Outdoor Advertising v. Charter Township of Canton*, 269 Mich. App. 365, 711 N.W.2d 391 (2006). The Rule is not fashioned as a sanction. *See Brenner v. Kolk*, 226 Mich. App. 149, 573 N.W.2d 65 (1997). The reviewing court must evaluate the facts in a light most favorable to the non-moving party. *See Jackson v. Saginaw County*, 458 Mich. 141, 580 N.W.2d 870 (1998). In other words, the motion-opponent gets the “benefit of the doubt.” *Stevens v. McLouth Steel Prods. Corp.*, 433 Mich. 365, 446 N.W.2d 95 (1989); *see also Lytle v. Malady (On Rehearing)*, 458 Mich. 153, 579 N.W.2d 906 (1998) (trial court should consider affidavits, pleadings, depositions, admissions, and other material supporting and opposing motion to determine whether it is impossible for claim or defense to be supported at trial because of deficiency that cannot be overcome).

Argument

THE COURT OF APPEALS ERRONEOUSLY DEVALUES EXTRINSIC EVIDENCE OF CONTRACTUAL INTENT, AT THE SUMMARY JUDGMENT STAGE OF THE CASE

Ken Burnham asks this Court to grant him leave on important questions of summary judgment standards and contract law, As this Court explained in *Opyke Inv. Co. v. Norris Grain Co.*:

A genuine issue of fact is created when the affidavits, pleadings, depositions, admissions and documentary evidence, viewed in the light most favorable to the party opposing the motion, might permit inferences contrary to the facts as asserted by the movant.

Opyke Inv. Co. v. Norris Grain Co., 413 Mich. 354, 360 (1982). When the parties' intent is at issue, as here, it is a material question of fact, and not a legal question. *See Klapp v. United Ins. Group Agency Inc.*, 468 Mich. 459, 663 N.W.2d 447 (2003).

The lower court's analysis erroneously presumes a fully-integrated instrument and erroneously shifts the burden on the non-drafting party to rectify undefined terms. Moreover, the Court's use of *Detroit Greyhound Employees Fed. Cred. Union v. Aetna* presumes Ken Burnham drafted the Guaranty. (Opinion at 4.) But he did not draft it—Homestead's predecessor did.

Burnham submitted evidence that his interpretation of the Guaranty is reasonable, rooted in fact, and true. The word permit¹ modifies the term, assignment. It means to "allow (something) to happen," to give permission for (something)," or "to allow (someone) to do or have something." Merriam-Webster's Dictionary and Thesaurus 599 (2007). The lower court's opinion does not interpret this term under the plain meaning rule. It does not answer "who can permit an assignment of the guaranty?"² Instead, the Court used *Aetna* to construe the guaranty against Burnham. (Opinion at 4, ¶ 1 citing *Aetna*, 381 Mich. 683, 689, 167 N.W.2d (1969) ("those who would compose a contractual

¹ *See also* Random House Collegiate Dictionary (2010) (permit "to tolerate; consent to; to

² Mr. Burnham's construction is plausible—and rightfully went to the jury on the intent issue. Consider, *arguendo*, the following query: Under the instant facts, could Burnham assign his personal guaranty to a third party, over Christopher Investments' objection?

bar against alienation must use ‘the plainest words’). But the absence of “clear language” does not automatically mean unique personal guarantees are assignable. The *Kingston* panel noted that some contracts are not assignable when the assignment alters the obligors risk:

3 Restatement, 2d § 317(2), p. 15 provides . . . A contractual right can be assigned unless (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance or materially reduce its value to him, . . . or assignment is validly precluded by contract. Comment (d) to 317(2) of the Restatement provides that the definition of a “material increase” in the burden of risk imposed depends on the nature of the contract and on the circumstances.

Kingston v. Markward & Karafilis, Inc., 134 Mich. App. at 171-72. Burnham put forth uncontroverted evidence that an unpermitted assignment would constitute a “material increase” of his bargained-for burden. The unpermitted assignment would (1) reduce the deal’s value to him; (2) increase his exposure; (3) diminish his bargaining power, and (4) alter his risks. Thus the unpermitted assignment eliminates Burnham’s power to control his affairs. Burnham knew the folks at Christopher Investments; he did not know Homestead. (Ex. D-B [“Ken Burnham dealt with Greg Christopher on a personal basis, trusted him and on that basis was willing to guarantee the obligation.”].)

The guaranty's language is far from perfect—but that does not end the inquiry. The intent of the original contracting parties should control the outcome of this case, not the default assignment rules. *See Wilke*, 469 Mich. 41, 664 N.W.2d 776 (2003); E. Allan Farnsworth, *Contracts* § 11.8 [Vulnerability of Assignee to Obligor's Defenses and Claims] (3d ed. 1999). The evidence showed the parties themselves believed the personal guaranty was unique—and not ordinary bearer-paper³. In fact, Homestead believed it. Homestead knew that the guarantee did not run with the Note. That's why Appellant tried to buy the Guaranty after it alleged purchased it from Christopher Investments. (Ex. D-B.) No one from Homestead ever rebutted that evidence—not at the summary judgment stage, not at trial, and not now. *See e.g., Czapp v Cox*, 179 Mich. App. 216, 219 (1989) (“Every word must be taken to have been used for a purpose and no word should be taken as surplusage” quoting *McIntosh v. Groomes*, 227 Mich. 215, 218 (1924)). *See, e.g., Shay v. Aldrich*, 487 Mich. 648, 673 (2010) (“it is an elementary rule of construction that in case of doubt, a contract is to be strictly construed against the party by whose agent it was drafted.”); *Stroud v. Glover*, 120 Mich. App. 258 (1982)(same); *Brauer v. Hobbs*, 151 Mich. App. 769 (1986)(same); 2 Restatement Contracts § 206.

Finally, the lower court erred when it did not consider whether the term “permitted assigns” was latently ambiguous under the circumstances. It is

³ *See* Black's Law Dictionary 712 (6th ed. 1990); (defining special guaranty as one “addressed to a particular person or group of persons, who are the only ones who can enforce it; contingent guaranty as one “in which the guarantor will not be liable unless a specified event occurs.”).

well established parol evidence is admissible to explain the guaranty's intended meaning—even at the summary judgment phase of the case. *See Biltmore Land Co. v. Munro's Estate*, 271 Mich. 125, 260 NW 135 (1935) (parol evidence admissible to show purpose parties intended to accomplish); 4A Mich. Pl. & Pr. § 36:779 (3d ed. West 2014) (“parol evidence is admissible as to the circumstances, custom, preliminary negotiations, and the intent of the parties”). A contract is ambiguous if its language is reasonably susceptible to multiple interpretations. *See Gortney v. Norfolk & W Ry Co.*, 216 Mich. App. 535 (1996). If the contract is ambiguous, its interpretation is a question of fact that must be decided by the jury in light of relevant extrinsic evidence. *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447 (2003); *Hewett Grocery Co. v. Riddle Purchasing Co.*, 289 Mich. 225, 236, 286 N.W. 221 (1939); *Butterfield v. Metal Flow Corp.*, 185 Mich. App. 630, 462 N.W.2d 815 (1990) (contested contract terms go to the jury). The contract's ambiguity could be latent, as here; latent ambiguity arises “from a collateral matter when the document's terms are applied or executed.” *Shay v. Aldrich*, 487 Mich. 648 (2010); *McCarty v. Mercury Metalcraft Co.*, 372 Mich. 567 (1964) (latent ambiguity present where “some fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings” [internal citations omitted]).

The parties' course of dealing reflects this construction. *See Ditzik v. Shaffer Lumber Co.*, 139 Mich. App. 81, 360 N.W.2d 876 (1984) (course of dealing, practical interpretation of contract given “great weight”). The record shows Christopher Investments, and its escrow agent, asked Burnham for the right to trans-

fer the original guaranty of Burnham to Homestead properties. Burnham, through its attorneys, Davidson, Fink of Rochester, NY denied them the permission to do so. (*See Ex. E.*) The reason for the request was the express understanding, and language in the Guaranty that permitted the Guaranty only to be assigned with the permission of the Guarantor. This provision only applied to the Guaranty and not the Note and Mortgage. The trial judge and the jury were right. Burnham's parol evidence proves that unpermitted assignment of the personal guaranty is "validly precluded by contract," based upon *Kingston's* circumstances of the case standard. *See Kingston v. Markward & Karafills, Inc.*, 134 Mich. App. 164, 350 N.W.2d 842 (1984). This Court should vacate the lower court's decision. *See Bandit Industries, Inc. v. Hobbs Int'l Inc. (After Remand)*, 463 Mich. 504, 511 (2001) (surety contract is a special contract strictly construed in favor of the surety). The lower court's decision is inconsistent with clear Michigan Supreme Court precedent permitting the kind of proofs and fact questions Ken Burnham offered at summary judgment. Those proofs and questions entitled him to a trial, which he won. It is error to discount the parties' course of dealing when interpreting the personal guaranty. The lower court's decision erroneously divests Ken Burnham of his hard-fought jury verdict. Leave should be granted here.

Conclusion

The record shows that the jury properly considered contested contract terms, the credibility of Homestead's evidence and did not give it the weight Homestead desired. This is not appealable error, but matters

within the sole province of the fact-finder. For the reasons articulated above, the Court of Appeals' decision should be REVERSED and Homestead's Appeal should be DENIED. Appellee prays that the Michigan Supreme Court GRANT his application for leave and reaffirm our deeply-held commitment to consistent summary judgment practice and the freedom of contract.

Respectfully submitted,

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