STATE OF MICHIGAN
IN THE SUPREME COURT

INTERNATIONAL OUTDOOR, INC.,

Plaintiff/ Appellant

v.

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

Defendants/ Appellees.

.

_____/

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

Plaintiffs/Appellees,

v.

INTERNATIONAL OUTDOOR, INC.,

Defendant/ Appellant.

.

MSC Case No. 166756

COA Case No. 359082
Consolidated with
COA Case No. 359811

Oakland County Circuit Court
Case No. 2016-155472-CB
Case No. 2016-155489-CB

Reply Brief in Support of International Outdoor's Application for Leave to Appeal

Oral Argument Requested

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1	Retrial, Vol. II, pp. 181-182; Retrial, Vol. III, p. 17; Trial. Vol. II, p. 50
2	Retrial, Vol. I, pp. 189-194

Introduction

Plaintiff/appellant International Outdoor, Inc. had a lease that allowed it to place a billboard on property owned by defendant/appellee SS MITX ("Simply Storage"). Defendant/appellee Lamar Advertising of Michigan later entered into its own lease with Simply Storage to place a billboard on that property.[1] Litigation followed. Although Lamar didn't raise this argument at first, it eventually argued that International never renewed its lease and that International principal Randy Oram had prepared and submitted a backdated renewal.[2] A jury disagreed, holding that International had the superior lease.

Then a witness that Lamar knew about before the first trial—Patrick Depa—parroted the story that Lamar asserted unsuccessfully at the first trial. He signed a false affidavit stating that he saw Oram backdate International's lease renewal. An evidentiary hearing established that Depa lied repeatedly in his affidavit. But the trial court granted a new trial. This time, a jury ruled for Lamar and the Court of Appeals affirmed in a published opinion. *Int'l Outdoor, Inc. v SS MITX, LLC,* __ Mich App __ (Docket No. 359082, 2023).

International asks this Court to grant its application for leave to appeal. Lamar opposes that application. *Lamar Advertising of Michigan, Inc. and SS MITX, LLC's Answer in Opposition to International Outdoor, Inc.'s Application for Leave to*

[1] References to Lamar include Simply Storage unless otherwise noted.

[2] International never received a notice of default. Had Simply Storage mailed one, International would have had a contractual right to cure. ***Attachment 1,*** Retrial, Vol. II, pp. 181-182; Retrial, Vol. III, p. 17; Trial. Vol. II, p. 50.

Appeal (the "Answer"). Lamar's answer tells the Court that International's application offers four arguments, and "none of them presents a legal principle of major significant to the state's jurisprudence." *Answer,* p. 2.

That assertion is a red flag. The Court of Appeals issued a published opinion that changed Michigan law on two points. It overruled *Stallworth v Hazel,* 167 Mich App 345 (1988), making it easier for parties to get new trials. It also expanded exceptions to the American rule, making it easier for parties to get attorney fees from their opponents. These are major changes to Michigan law. Lamar's response? A shrug.

This Court should not adopt Lamar's cavalier approach. When the Court of Appeals changed Michigan law below, it misapplied existing precedent and failed to consider the impact that its new rules would have on litigation throughout Michigan. Had it done so, it would have seen that its conclusions are unsound and inconsistent with governing law. Accordingly, this Court should intervene by granting leave to appeal or peremptorily reversing the Court of Appeals.

Argument

1. The Court of Appeals erred by eliminating the due-diligence requirement for most of MCR 2.612.

Lamar sought a new trial based on false testimony from Patrick Depa. Before the first trial, Lamar knew that Depa was Lamar's director of real estate and that he assisted with answering Lamar's discovery requests. *Att. L to Application, Interrogatory Responses*, p 2. Oram also identified Depa in his deposition. *Att. QQ to Application, Oram dep.*, p. 16. Yet Lamar didn't call him as a witness in the first trial.

Then Lamar produced a false affidavit in which Depa parroted the theory Lamar pursued unsuccessfully at the first trial. The trial court granted a new trial based on this (false) evidence from a known witness. That was improper under *Stallworth v Hazel,* 167 Mich App 345 (1988), which held that a party cannot obtain a new trial based on testimony from a witness it knew or should have known about before the first trial. The Court of Appeals overruled *Stallworth* and held for the first time that there is no due-diligence requirement for new-trial motions based on fraud under MCR 2.612. The Court of Appeals erred in making these new rules.

Lamar argues that due diligence is not necessary because this Court listed diligence as a requirement for a new trial under MCR 2.612(C)(1)(b) (new evidence), but not MCR 2.612(C)(1)(c) (fraud). Lamar's analysis is inaccurate. Rule 2.612(C)(1)(b) is not about a party's diligence in general. It's about whether the specific evidence at issue could have been discovered before the deadline for a motion for a new trial: "Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)." MCR 2.612(C)(1)(b). Nothing about the language in MCR 2.612(C)(1)(b) suggests that it is meant to preempt the entire concept of diligence. In particular, nothing in MCR 2.612(C)(1)(b) suggests an intent to allow parties to pursue claims based on "new" evidence they *actually* knew about before the first trial.

That leads to another of Lamar's unsupported claims. It purported to offer new evidence of fraud—which would indicate that it must satisfy the requirements for *both* new evidence (MCR 2.612(C)(1)(b)) and fraud (MCR 2.612(C)(1)(c)). That, after

all, is what MCR 2.612 says. Whenever a party asserts newly discovered evidence, as Lamar did, they must show that it could not have been discovered in time to move for a new trial. MCR 2.612(C)(1)(b).

To avoid having to show that its new evidence meets the requirements for new evidence in MCR 2.612(C)(1)(b), Lamar argues that each ground listed in MCR 2.612 is "independent" and that "a party does not need to prove them in any sort of combination." *Answer,* p. 22. It cites no support for that argument—and none exists. Under Lamar's approach, any party who wants to move for a new trial based on evidence it could have discovered earlier only has to select a new label. It can assert "fraud" instead of "new evidence"—even when purporting to offer new evidence—to prevent courts from looking at whether it could have discovered that new evidence with a little diligence. Lamar's argument renders MCR 2.612(C)(1)(b) a nullity by making the rules for new evidence dependent on how a party chooses to label their motion. Therefore, Lamar's interpretation of MCR 2.612 is invalid. *Brown v Gainey Transp Serv, Inc,* 256 Mich App 380, 385 (2003).

Lamar is wrong about *Stallworth,* too. *Stallworth* did not "rewrite" MCR 2.612, as Lamar claims. Rather, it concluded that a motion that asserts *fraud* based on *new evidence* must satisfy *both* rules. *Stallworth,* 167 Mich App at 356 ("Because plaintiff's allegation of perjury is dependent upon newly discovered evidence, we conclude that such perjury should warrant relief from judgment only if it could not have been discovered and rebutted at trial by the exercise of due diligence."). Lamar

has never explained why this approach is improper. In fact, *Stallworth*—unlike the Court of Appeals below—follows the plain language of the governing rule.

Stallworth is not alone. This Court has held that a party must establish due diligence when seeking a new trial. *Second Mich Co-Op Housing Ass'n v First Mich Co-op Housing Ass'n,* 362 Mich 460 (1961); *Canfield v City of Jackson,* 112 Mich 120 (1897). Lamar argues that *Second Michigan* and *Canfield* are inapplicable because they address "newly acquired evidence" rather than fraud. *Answer,* p. 24. Yet Lamar *also* asserted that it had newly acquired evidence: Depa's story. If those cases deal with newly acquired evidence, then they apply here.

Moreover, *Second Michigan* was about newly discovered evidence that witnesses had testified in a manner inconsistent with previous statements. *Second Michigan,* 362 Mich at 462-463 ("It asserted in substance that two witnesses called by First Michigan, Eberle, the auditor, and Holliday, the comptroller of First Michigan, had taken contradictory positions regarding this check, that Second Michigan had not established 'its right to the $58,000.00 item,' and sought in support thereof to introduce statements made by them prior to trial as 'newly-discovered' evidence."). So *Second Michigan* is about allegations of false testimony, just like this case.

Canfield addressed new evidence about a party's failure to secure city council approval. It didn't address MCR 2.612 (which did not yet exist) and instead stated a general rule: a party can move for a new trial only if the evidence could not have been discovered with reasonable diligence before the first trial. *Canfield,* 112 Mich at 123.

Lamar asserts—without citing a single authority—that the enactment of MCR 2.612 nullified *Canfield*. *Answer,* p. 24. In fact, parties must look to this Court to say when a court rule has superseded an opinion. *People v Williams,* 483 Mich 226, 228 (2009), concluding, as a matter of law, that MCR 6.120 supersedes *People v Tobey,* 401 Mich 141 (1977). This Court has never held that MCR 2.612 supersedes *Canfield*. Quite the contrary: this Court applied *Canfield* in *People v Rao,* 491 Mich 271 (2012). Lamar's claim that *Canfield* is no longer law is wrong.

That leaves Lamar's final argument on this issue. It asserts that if diligence was required, it *did* exercise diligence. But this argument relies on a false presentation of the record. Lamar argues that International "deliberately refused to identify Depa[.]" *Answer,* p. 1. Wrong. International listed Depa as its director of real estate in response to the first interrogatory from Lamar. *Att. L to Application, Interrogatory Responses,* p. 2. International also stated that Depa helped prepare responses to Lamar's discovery requests. *Id.* This is a case about real estate. Any competent attorney would know from these responses that Depa potentially had information about the case. After all, he helped answer interrogatories.

The Court of Appeals focused on the fact that International didn't list Depa in response to other interrogatories. But that rationale is inconsistent with the written record. Given International's interrogatory response and Oram's testimony at his deposition, Lamar knew about Patrick Depa, knew he was International's real estate person, and knew he helped answer questions about this case. Yes, International didn't list Depa as a witness that it "believe[d]" had information about the case. Depa

did not begin peddling his false claims until after the first trial was over. Yes, International didn't list Depa as someone with information about the complaint or the defendants' denials. But no one—not the Court of Appeals and not Lamar—has pointed to an allegation in the complaint or defendants' denials that should have prompted International to list Depa. Moreover, Lamar buries the fact that Oram disclosed Depa at his deposition as one of the "primary people" who assisted with identifying billboard locations. *Att. QQ to Application, Oram dep.*, p. 16.

The truth is that International *did* disclose Depa—both in writing and in Oram's deposition—and Lamar had all the information it needed to depose him about this case. Under MCR 2.612(C)(1)(b), *Stallworth, Second Mich,* and *Canfield,* Lamar's knowledge of Depa precluded it from seeking a new trial based on Depa's new willingness to support the theory that Lamar pursued unsuccessfully at the first trial. The Court of Appeals erred in overruling *Stallworth* and failing to apply the other governing authorities.

2. The Court of Appeals abused its discretion in granting a new trial.

The circuit court never should have granted a new trial. No one could read Patrick Depa's affidavit and reasonably conclude that it established a valid basis for setting aside the judgment. To the contrary, the evidentiary hearing proved Depa unworthy of trust. Granting a new trial based on his testimony was an abuse of discretion—and Lamar does not rebut that fact.

Lamar tries to excuse Depa with the argument that nobody's perfect. It is certainly true that everyone makes mistakes.[3] But Depa's false testimony hardly falls into the "everyone makes mistakes" category. Instead, he offered *calculated* lies designed to obtain relief to which Lamar was not entitled.

The briefing to date has already covered Depa's lies. (See Argument 2 in International's application.) These lies are so obvious and so incontestable that Lamar does not deny them. It only argues that those lies are not such a big deal. To see the flaw in Lamar's argument, consider the issue of Oram's computer.

Lamar could not prove at the first trial that Oram prepared a backdated lease renewal. It wanted to find evidence on Oram's computer, and it insinuated that Oram had falsely testified that his computer was unavailable. Enter Patrick Depa. He confidently declared that Oram still had the same computer that he supposedly used to create a backdated lease renewal. *Att. M to Application, Depa affidavit,* ¶6. And those words worked. They led to renewed discovery, to an evidentiary hearing, to a second trial, and to numerous filings about Lamar's desire to access to International's computers. Depa's words made that post-trial inquiry into International's computers possible.

But those words were a lie. Depa admitted that he had *no idea* what computer Oram had. *Att. J, Aug. 2019 hrg.,* pp. 92-93. So he lied, pulling at the thread that Lamar hoped would unravel the whole sweater. Lamar wants the Court to bless this

[3] On that score, Lamar is correct that testimony about Randy Oram's use of checks came from Randy Oram rather than Hind Oram. *Answer,* p. 34, n. 26. That attribution was an error.

calculated, strategic lie. The Court should not do so. Instead, it should grant leave or peremptorily reverse the Court of Appeals.

3. The Court of Appeals erred by upholding tortious interference with contract without being able to cite a clause that someone breached.

To prevail on a tortious-interference-with-contract claim, a party must establish that the defendant's actions caused a failure to perform a contractual duty. *Hutton v Roberts,* 182 Mich App 153 (1989). No one can cite a clause that Lamar or Simply Storage failed to perform. The Court of Appeals could uphold the trial court's verdict only by pretending—contrary to the record—that Lamar really pleaded tortious interference *with business relationship,* not tortious interference with contract. Michigan law did not give the Court of Appeals the option to change Lamar's claim in this fashion.

Lamar's response tries to make it seem like International's argument is based on the wrong caselaw. It asserts that *Hutton* offers a broader rule than the rest of Michigan law and argues that International stipulated to *Hutton*'s standard. *Answer,* p. 36. That's misdirection. International already cited *Hutton* and argued that Lamar's claim fails even under *Hutton's* broader standard. *Application,* pp. 50-51.

Then Lamar argues that someone really did fail to perform under the Lamar/Simply Storage lease. It asserts that the lease was to allow Lamar to erect a sign on the property, and Simply Storage "was required to allow any such construction." *Answer,* p. 36. Yet Lamar never says how it failed to perform under the lease or how Simply Storage failed to perform.

According to Lamar, the lease asserts that "Simply Self Storage would not allow any other advertising sign on the Property." *Answer,* p. 36. That cannot be evidence of a failure to perform because Simply Storage did *not* allow another sign on the property. Lamar also asserts that "Simply Self Storage agreed to grant Lamar full access to perform all acts necessary to build its sign." *Answer,* p. 36. There is no evidence that Simply Storage refused Lamar that right to "perform all acts necessary to build its sign." What did Lamar want to do that Simply Storage refused? When did that refusal take place? Lamar never provides evidence to support these arguments.

Ultimately, Lamar's brief betrays the problem with its own tortious-interference argument. Lamar states that its access to the property depended on approval from the City of Auburn Hills. And "[t]he only reason that Lamar did not obtain the approval and build the sign was that International Outdoor falsely claimed that it had a valid lease for the same property. … The City of Auburn Hills refused to approve the PUD agreement necessary for the construction of the sign until the competing leases issue was resolved." *Answer,* p. 37. See also ***Attachment 2,*** Retrial, Vol. I, pp. 189-194 (stating that Simply Storage withdrew permission after Auburn Hills tabled Lamar's application).

There it is. The problem had nothing to do with Lamar or Simply Storage failing to fulfill their contractual obligations. It was the city's refusal to approve Lamar's application—an act that was *outside the scope of contractual duties.* In other words, Lamar's complaint asserts tortious interference with contract but its arguments on appeal are about tortious interference with *business expectancy*. These

theories are not interchangeable. *Knight Enterprises v RPF Oil Co*, 299 Mich 275, 279 (2013) (holding that "tortious interference with a contract or contractual relations is a cause of action distinct from a tortious interference with a business relationship or expectancy"). Lamar only pleaded one theory—tortious interference with contract—and Lamar's own brief proves that the facts do not support that theory. Accordingly, the Court of Appeals erred in holding that Lamar had a valid tortious-interference-with-contract claim.

4. The Court of Appeals erred in awarding attorney fees.

Finally, International submits that the panel erred when it modified Michigan's centuries-old rule on attorney fees. Each party must pay their own attorney fees unless there is a specific statutory or caselaw exception. That principle is the "American rule." International submits that the Court of Appeals' opinion violates the American rule by remanding for consideration of attorney fees. In International's view, the American rule only allows parties to recover fees under the "wrongful conduct" exception based on litigation with third parties. So the Court of Appeals misapplied Michigan law when it held that Lamar could seek attorney fees from International based on its litigation *with International*. Additionally, International asserts that it is improper to apply the American rule based on a fraud/wrongful conduct exception when no one actually found fraud or wrongful conduct below.

Lamar disagrees. It asserts that the Court of Appeals' decision to remand for consideration of attorney fees from International (as opposed to a third party) is

consistent with *Brooks v Rose,* 191 Mich App 565, 575 (1991), *Spectrum Health v Grahl,* 270 Mich App 248 (2006), and *Ypsilanti Charter Township v Kircher,* 281 Mich App 251 (2008). Lamar has misread these cases.

Brooks doesn't award attorney fees at all. Rather, the Court held that the defendants' claim for fees did not fit into "any of the recognized exceptions to the general rule that such fees are not recoverable." *Brooks,* 191 Mich App at 575. Lamar is in the same position.

In *Spectrum Health,* the Court found that there was no "wrongful, fraudulent, or unlawful" conduct to justify an award of attorney fees. *Spectrum Health,* 270 Mich App at 259. Likewise, the jury below did not find "wrongful, fraudulent, or unlawful" conduct. So there's no basis for an award of attorney fees here.

Ypsilanti Charter doesn't advance Lamar's position because the court awarded attorney fees for one party's repeated failure to obey court orders. *Ypsilanti Charter Township,* 281 Mich App at 286-287. That's not the scenario presented below. And an award of sanctions for a party's disobedience (as in *Ypsilanti Charter*) is not the same thing as an award of attorney fees as damages (which the Court of Appeals granted below).

Neither Lamar nor the Court of Appeals cite a single case in which a party obtained attorney fees under the facts present here: as damages in litigation against the liable party, and with no finding of fraudulent or wrongful conduct. Consequently, the Court of Appeals erred in awarding these damages.

Conclusion

For the foregoing reasons, International respectfully requests that the Court grant its application for leave to appeal or peremptorily reversed the Court of Appeals.

Respectfully submitted,

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Certificate of Compliance

I certify that the Petitioner's Reply Brief complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Century Schoolbook), and the word count for this brief is 3,151.

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Dated: April 17, 2024