STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

DEBRA NASH,

Plaintiff-Appellee,

DOCKET NO. 358494

OAKLAND COUNTY CIRCUIT COURT
CASE NO. 2020-185536-AV

VS

DAVID KERTI and AMY VANSTON,

Defendants-Appellants.

_____/

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STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this appeal under Const. 1963, art vi, sec 10, MCL 600.308(2)(a)(i), and MCR 7.203(b)(2). Defendants-Appellants David Kerti and Amy Vanston **[APPELLANT KERTI OR DEFENDANT KERTI AND APPELLANT VANSTON OR DEFENDANT VANSTON]** appeal from the Oakland County Circuit Court's May 20, 2021 Order Affirming the 52-3 District Court's November 30, 2020 Opinion and Order of the Court granting Plaintiff-Appellant Debra Nash possession of the real property in dispute. (Exhibit 1, 5/20/21 Oakland County Circuit Court **[OCCC]** Case Number 2021-185536-AV Order; Exhibit 2, 11/30/20 52-3 District Court Case Number 2020-C02397-LT Opinion and Order of the Court **[11/30/20 District Court Opinion and Order]**; Exhibit 3, 7/28/21 Oakland County Circuit Court Case Number 2021-185536-AV Register of Actions **[7/2821 OCCC Register of Actions]**; Exhibit 4, 8/12/21 52-3 District Court Case Number 2020-C02397-LT Register of Actions **[8/12/21 52-3 District Court Register of Actions]**) Defendants have ordered and received the 52-3 District Court Bench Trial Transcript **[11/2/20 BTT]**. (Exhibit 5, 52-3 District Court Case Number 2020-C02397-LT Bench Trial Transcript **[11/2/20 BTT]**) Defendants have ordered and received the Oakland County Circuit Court hearing transcript. On February 10, 2022, this Court granted Appellants' Delayed Application for Leave to Appeal. (2/10/22 Order on file)

NOTE RE EXHIBITS

Defendants include their List of Exhibits from their Delayed Application for Leave to Appeal to make reference to these documents and exhibits easier. Also, in this Brief, Defendants are keeping their exhibit references from their above application for the same reason. See List of Exhibits below. *Infra,* p 59.

QUESTIONS PRESENTED

I. Whether, in holding the bench trial only seven days after service of the Summary Proceedings Summons, Complaint, Bench Trial Notice, and other trial-related documents on Defendants-Appellants, in failing to give Defendants-Appellants reasonable and sufficient time to prepare for the bench trial, and in refusing to hold a regular hearing with testimony under oath and exhibits, the District Court violated Defendants-Appellants' federal and state due process clause rights.

Defendants-Appellants respond "Yes."

Plaintiff-Appellee would respond "No."

The District and Circuit Courts would respond "No.

II. Whether, in denying Defendants-Appellants' Motion to Adjourn Hearing due to insufficient notice of the bench trial and thus insufficient time to prepare for it, the District Court abused its discretion.

Defendants-Appellants respond "Yes."

Plaintiff-Appellee would respond "No."

The District and Circuit Courts would respond "No.

III. Whether the District Court's denial of Defendants-Appellants' Motion to Adjourn hearing due to insufficient notice of the bench trial and thus insufficient time to prepare for it was harmless error.

Defendants-Appellants respond "No."

Plaintiff-Appellee would respond "Yes."

The District and Circuit Courts would respond "Yes."

IV. Whether, in concluding that Defendants-Appellants and Plaintiff-Appellee (and her then-spouse) did not have a de facto enforceable land contract, and that Plaintiff-Appellee (and her then-spouse) did not ratify it, the District Court committed reversible error.

Defendants-Appellants respond "Yes."

Plaintiff-Appellee would respond "No."

The District and Circuit Courts would respond "No.

V. Whether, in concluding that Defendants-Appellants' substantial part performance of the de facto enforceable land contract did not override the statute of frauds or lack of de jure existence of a land contract, the District Court committed reversible error.

Defendants-Appellants respond "Yes."

Plaintiff-Appellee would respond "No."

The District and Circuit Courts would respond "No.

VI. Whether, in affirming the District Court's decisions on Issues II-V above, the Circuit Court committed reversible error.

Defendants-Appellants respond "Yes."

Plaintiff-Appellee would respond "No."

The Circuit Court would respond "No.

STATEMENT OF FACTS-PART I

In about May 2016, Defendants began looking for a home to buy. Around that time, they "found the property located at 655 Butler Drive, Lake Orion, MI 48362 [**the Property]**" and decided to buy it. They contacted the owners, Plaintiff Debra Nash **[PLAINTIFF or APPELLEE]** and her then-husband, Jamie Nash **[MR. NASH]**. Plaintiff and Mr. Nash owned the Property jointly. (Exhibit 7, 3/30/21 Appellants' Brief on Appeal to the Oakland County Circuit Court, Case No. 21-185536-AV **[3/30/21**

Appellants' Circuit Court Appellate Brief], Statement of Facts, p 6; 4/21/21 Appellee's Brief in Response to Appellants[‘] Brief on Appeal **[4/21/21 Appellee's Circuit Court Appellate Brief]**, Exhibit 8, 4/21/21 Affidavit of Jamie D. Nash **[Exhibit 8, 4/21/21 Nash Affidavit]**, para 6)

"On or around July 23, 2016, [Mr.] Nash emailed [Defendants] a purchase agreement and a lot plan. [Defendants] were in a rush to move into the Property before school started for [their] children[.]" So, "the Parties agreed to enter [into] a lease agreement **[the Lease]** before completing the sale of the Property." **Before August 5, 2016, Defendants sent Mr. Nash a draft Land Contract**. On August 5, 2016, Mr. Nash sent Defendants a Lease Agreement for them to review. **He also returned their draft Land Contract with his suggested changes and comments.** (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 6; Exhibit 9, 8/5/16 Email; Exhibit 8, 4/21/21 Nash Affidavit, para 11) Mr. Nash added that once the parties had agreed on a Land Contract price, he would have a lawyer review the Land Contract "for `both of our benefits.'" (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 6; Exhibit 9, 8/5/16 Email)

On August 6, 2016, Defendants, Plaintiff, and Mr. Nash "met at the Property. [Defendants] paid [Plaintiff] and Mr. Nash $1,200.00 in exchange for the keys to the Property." (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 6) **On August 8, 2016, Defendants, Plaintiff, and Mr. Nash "met at [Mr.] Nash's office to sign the Lease and the [Land] Contract. Under the Lease and [the Land] Contract, [Defendants] paid [Plaintiff] and [Mr.] Nash" a "15,000.00…down**

payment" for the Land Contract down payment. Mr. Nash "then explained that he would [send] the Lease and the [Land] Contract to his attorney[,] and that he would forward copies to [Defendants] later." (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 6. See also, 6/7/21 Plaintiff's Motion for Additional Unpaid Rent, Immediate Eviction, and Request for Damages Hearing, Exhibit 6, 3/30/21 Affidavit of Amy Vanston **[Vanston Affidavit],** para 4 **("On August 7-8, 2016, we paid Debra Nash and Jamie Nash $15,000 as a down payment for the Property; we signed the Contract and signed a temporary lease….**")

On August 8, 2016, the parties signed a Lease Agreement providing that:

> "1. Tenant will lease the house and detached garage with lot on Long Lake for the period leading up to a Land Contract Agreement. Land Contract Agreement will be executed and a closing [occur] within 60 days of a signed Lease Agreement. If for any reason currently unknown to either party[,] a Land Contract Agreement cannot be reached [sic][,] the tenant agrees to lease the Property for a minimum of 12 months.
>
> "2. The monthly lease payment shall be One Thousand Five [H]undred [D]ollars ($1,500.00)" Checks should be payable to Mr. Nash and mailed to his address or sent to him via electronic bank transfer. "Payments are due on the first of each month with the first payment to be due August 8, 2016." Payments over 10 days late were subject to a $50.00 late fee. If the tenant was behind on lease payments 15 days of more, the landlord had a right to evict within 15 days.
>
> "3. Security deposit of Fifteen Thousand [D]ollars ($15,000.00) to be paid upon signed lease agreement. Security deposit of $15,000.00 to be deducted from purchase price upon closing of Land Contract Agreement.
>
> "4. In addition to the monthly rent, the Tenant shall be responsible for keeping the property clean and neat, paying all utilities and maintenance expenses…."
>
> (Exhibit 7, 4/21/21 Appellee's Circuit Court Appellate Brief, Exhibit 10, 8/8/16 Lease Agreement **[Exhibit 10, 8/8/16 Lease Agreement]**)

"Afterwards, [Defendants] changed the locks to the Property[.]" **Plaintiff changed the Property's status on Zillow to "Pending Sale[.]'** An inspection was performed at the Property." (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 6) **Though Plaintiff never gave Defendants "a copy of the signed [Land] Contract[,]….under [it], [Defendants] assumed ownership of the Property."** (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 6) Based on their reasonable belief that they were land contract buyers, **Defendants "made significant improvements to the Property[.]" To do so, they took out home improvement loans[.]"** (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 7; 12/21/20 Application for Leave to Appeal, Exhibit C, Partial List of Maintenance, Repairs, and Improvements **[Exhibit 11, Partial List of Maintenance, Repairs, and Improvements**]; Vanston Affidavit, para 7) These maintenance, repair and improvement items included but were not limited to:

"Entire second floor painted doors and trim
"Shave bathroom door to close properly
"Repair holes left in house siding left from removed vent pipes
"Had 5 Ant infested trees removed endangering house property
"Had 2 yard pile of dirt removed left at the front yard
"Pipes froze on two different occasions, repaired myself
"5 rotted fence posts replaced
"Stained deck/dock to weatherproof
"Furnace repaired twice
"Replaced entire first-floor flooring
"Demo[lished] and replace[d] all first-floor casing and base moulding
"Repair[ed] water-damaged ceiling and paint[ed] the entire ceiling
"Repair[ed] wall cracks and coat[ed] the entire first floor
"Paint[ed] first floor
"Replace[d] three front windows
"Repair[ed] rotted sill plate underside window (Foundation Plate Rotted)
"Replace[d] window with doorwall

"Remodel[ed] first-floor bath"

(Exhibit 11, Partial List of Maintenance, Repairs, and Improvements. Accord, Vanston Affidavit, para 7) **Defendants can testify to their weekly conversations with Mr. Nash on their above activities. During these conversations, Defendants updated him on their above activities.**

"Lastly, Defendants "have been paying all property-related expenses, as the true owner would….[Defendants have] paid the homeowners insurance, property taxes, and water bills for the Property." Defendants offered to show proof of these payments on remand to the District Court. (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 7; Vanston Affidavit, para 8) **Defendants can show that they paid $1,500.00 a month, instead of the $1,200.00 a month listed on the proposed land contract, because Mr. Nash insisted on it and stated that he would use the additional $300 property tax and property insurance payments.**

"On May 5, 2019, [Mr.] Nash texted [Defendants] to inform them that [Plaintiff was divorcing him." (Exhibit 7, 3/30/21 Appellants' Circuit Court Appellate Brief, Statement of Facts, p 7; Exhibit 8, 4/21/21 Nash Affidavit, para 13) **In March 2020, the Lapeer County Circuit Court entered a divorce judgment awarding the Property to Plaintiff.** (Exhibit 8, 4/21/21 Nash Affidavit, paras 7, 8) According to Mr. Nash, "in early 2020, Ms. Vanston and Mr. Kerti contacted me and asked me to sign a Land Contract." Mr. Nash "did not sign" it. (Exhibit 8, 4/21/21 Nash Affidavit) But if given the opportunity, Defendants can present documents showing that Mr. Nash was far more involved in the Land Contract process. **First, on May 5, 2019, Mr. Nash asked**

Defendants to work on getting a mortgage loan to pay off the remaining land contract balance. Second, on May 5, 2019, Mr. Nash offered to give them a letter or anything else they needed for their bank: "Let me know if you need a letter or anything from me for the bank." Third, on July 19, 2019, Defendants asked Mr. Nash to give them their mortgage lender's payoff amount: "Spoke with several lenders. They need you to request the pay off balance you owe from your bank." Defendants told Mr. Nash that he could obtain this information from his mortgage lender by an automated phone number, printout, or fax. Finally, Defendants are ready to testify that they signed a Land Contract.

STATEMENT OF FACTS-PART II

Plaintiff's Counsel maintained that there was no land contract, claiming that "Defendants did not exercise the purchase option within 60 days as required by paragraph 1 of the lease." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2. Accord, Exhibit 5, 11/2/20 BTT, pp 8-9) So, Plaintiff's Counsel characterized Defendants as tenants, not as land contract buyers. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2. Accord, Exhibit 5, 11/2/20 BTT, pp 8-9)

Based on Defendants' conversations and correspondence with Mr. Nash and Defendants' payment of a $15,000.00 down payment related to execution of the land contract, **Defense Counsel asserted that Defendants had exercised the Land Contract option, that Mr. Nash had ratified their exercise of the option, and that their $15,000 down payment showed that the parties had a Land Contract.** (Exhibit 5, 11/2/20 BTT, pp 2, 13, 14) **Also, Defense Counsel pointed out that a "short-term lease…with a**

$15,000 [security deposit]" was "a little unusual." (Exhibit 5, 11/2/20 BTT, p 14) Defense Counsel stated that Mr. Nash had "obligated himself and [Plaintiff] Debra Nash," and that Defendants had reasonably relied on his assurances. (Exhibit 5, 11/2/20 BTT, p 15) **In addition, Defense Counsel asserted that Defendants had made improvements to the Property exceeding $40,000.00**. (Exhibit 5, 11/2/20 BTT, pp 13, 14) Thus, under Michigan law, Defendants were "no longer tenants." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2)

STATEMENT OF FACTS-PART III

Defense Counsel argued that the District Court lacked subject matter jurisdiction over the case, because Defendants' $15,000.00 down payment plus their $40,000.00 in improvements exceeded the District Court's $25,000.00 subject matter jurisdictional maximum. (Exhibit 5, 11/2/20 BTT, p 16) The District Court responded that since Plaintiff was asking for possession of the Property, regardless of whether any party's claimed damages exceeded the above maximum, the District Court had subject matter jurisdiction. (Exhibit 5, 11/2/20 BTT, p 16)

On October 23, 2020, the District Court issued a Civil Bench Trial Order with pretrial motion, exhibit list, witness list, and trial brief deadlines. (Exhibit 12, 10/23/20 Landlord/Tenant Civil Bench Trial Order) In relevant part, the order read: "Any pretrial motions must be filed AND heard prior to the motion cutoff date stated in the Pretrial Order unless the Court orders otherwise. All motions should conform to the Michigan Court Rules with respect to timing….Attorney scheduling conflicts and adjournment requests will be governed by MCR 2.501(D). Absent a verified emergency,

no adjournments will be granted less than two business days prior to the trial date. Parties are to comply with the Court's adjournment procedure, which can be found at the Court's homepage. https://www.oakgov.courts/dc52div3." (Exhibit 12, 10/23/20 Landlord/Tenant Civil Bench Trial Order)

On October 30, 2020, four days after receiving service of the District Court's October 23, 2020 bench trial notice and three days before the scheduled November 2, 2020 bench trial, Defendants moved to adjourn the bench trial. Defendants gave several reasons: First, **Defendants received no notice of the bench trial until October 26, 2020, only seven days before its scheduled November 2, 2020 date.** (Exhibit 13, 10/30/20 Defendants' Motion for Adjournment of the November 2, 2020 Hearing **[10/30/20 Defendants' Motion to Adjourn Hearing]**, para 2) Second, despite earlier contacts with Plaintiff's Counsel, Defense Counsel received no notice of the bench trial from Plaintiff's Counsel. (Exhibit 13, 10/30/20 Defendant's Motion to Adjourn Hearing, paras 4, 6; Exhibit 14, 4/16/20 & 4/24/20 Emails) Third, **Defense Counsel received no notice of the bench trial from Defendants until October 27, 2020, only six days before the bench trial date.** (Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing, para 3) Fourth, **Defense Counsel "in the interest [of] justice" and under the "Michigan Court Rules[,] must be given appropriate time to prepare for such a hearing."** (Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing, para 5) Fifth, **Plaintiff mischaracterized the dispute between the parties and ignored the Land Contract vs Lease issue.** (Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing, paras 7, 8,

10) Sixth, **Defendants asked for time to prepare a countercomplaint.** (Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing, para 11)

At the bench trial, the parties' counsel argued the adjournment motion. Plaintiff's Counsel denied any obligation to notify Defense Counsel of the hearing or any negotiations. Summons and Complaint filing and service met the Michigan statutory and court rules requirements, thus giving them notice of the scheduled bench trial. But Plaintiff's Counsel added: "The action was mailed to the court as soon as the executive order was lifted. That was back in July. The court just scheduled it for a hearing." She did not receive notice of the bench trial until one week before its scheduled date. (Exhibit 5, 11/2/20 BTT, pp 9-10) Defense Counsel repeated that he had received "no notice from the plaintiff [or her counsel] that they were going to file." (Exhibit 5, 11/2/20 BTT, p 10)

Defense Counsel asserted that the District Court should have held an evidentiary hearing "on the matter." (Exhibit 5, 11/2/20 BTT, p 14) When the District Court asked him "on what issue[,]" Defense Counsel responded: "We need an opportunity to be heard." (Exhibit 5, 11/2/20 BTT, p 15) The District Court replied: "Well, here's your opportunity. That's why you're here right now, okay? This is what this hearing's for." (Exhibit 5, 11/2/20 BTT, p 15) Defense Counsel responded: "[W]e have not been able to provide all of the briefs necessary." (Exhibit 5, 11/2/20 BTT, p 15) **Due to lack of notice, Defendants could not file the CDC COVID-19 declaration related to a key defense: The CDC eviction moratorium.** (Exhibit 5, 11/2/20 BTT, pp 12-13) The District Court never held an evidentiary hearing on any issue. Later,

Defendants defined everything they could not do before the District Court hearing with only six days notice of it, including adding Jamie Nash as a necessary party, subpoenaing five witnesses, gathering property tax and property insurance payments evidence, gathering property maintenance, repair, and improvements evidence, gathering property remodeling loans evidence, and gathering a voice recording on Appellee's land contract acknowledgement. (5/5/21 Appellants' Reply Brief on Appeal, p 4 FN2)

RELEVANT PROCEDURAL HISTORY

1. On March 6, 2020, Plaintiff served her Notice to Quit to Recover Possession of Property Landlord-Tenant on Defendants, and on July 17, 2020, Plaintiff filed her Notice with the 52-3 District Court. (Exhibit 15, 3/6/20/7/17/20 Notice to Quit to Recover Possession of Property Landlord-Tenant)

2. On July 17, 2020, Plaintiff filed her Summons Landlord-Tenant/Land Contract in the 52-3 District Court. But the District Court did not issue it until October 23, 2020. (Exhibit 16, 52-3 District Court 10/23/20 Summons Landlord-Tenant/Land Contract; Exhibit 4, 8/12/21 52-3 District Court Case Number 2020-C02397-LT Register of Actions **[8/12/21 52-3 District Court Register of Actions]**))

3. On July 17, 2020, Plaintiff filed her Complaint to Recover Possession of Property in the 52-3 District Court and included a Supplemental Complaint for Money Damages. (Exhibit 17, 7/17/20 52-3 District Court Complaint to Recover Possession of Property & Supplemental Complaint; Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

4. On October 23, 2020, the District Court issued Notices to Appear for a Nonjury Trial Termination of Tenancy to Defendants on November 2, 2020, (Exhibit 18, 10/23/20 52-3 District Court Notices to Appear; Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

5. On October 23, 2020, the District Court issued a Civil Bench Trial Order with pretrial motion, exhibit list, witness list, and trial brief deadlines. (Exhibit 12, 10/23/20 Landlord/Tenant Civil Bench Trial Order; Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

6. On October 26, 2020, Plaintiff served Defendants with the Summons, Complaint, Landlord/Tenant Civil Bench Trial Order, and Notice to Appear for a Nonjury Trial Termination of Tenancy. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

7. On October 30, 2020, Defendants moved to adjourn the scheduled November 2, 2020 bench trial and paid the motion fee. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions; Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing)

8. On November 2, 2020, the 52-3 District Court, Judge Julie Nicholson, ruled that it would deny Defendants' Motion to Adjourn Hearing, and on November 30, 2020, the District Court denied the motion. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2. See also, Exhibit 5, 11/2/20 BTT, p 5)

9. On November 2, 2020, the 52-3 District Court, Judge Nicholson, held the scheduled bench trial. (Exhibit 4, 12/12/21 52-3 District Court Register of Actions; Exhibit 5, 11/2/20 BTT)

10. The District Court did not hear any witness testimony or consider any known documentary evidence besides the Lease. (Exhibit 5, 11/2/20 BTT)

11. On November 2, 2020, the District Court, Judge Nicholson, ruled that it would deny Defendants' oral motion for an evidentiary hearing. (Exhibit 5, 11/2/20 BTT, pp 14-15)

12. On November 2, 2020, the District Court, Judge Nicholson, stated that it would take the case under advisement and issue a written decision. (Exhibit 5, 11/2/20 BTT, p 17)

13. On November 30, 2020, the District Court, Judge Nicholson, issued its written Decision as follows:

A. The District Court found that Defendants did not comply with the Lease's Land Contract Option requirements and thus concluded that the parties' relationship remained a landlord-tenant leasehold relationship. Under MCL 600.5714, the District Court granted Plaintiff possession of the Property. (Exhibit 2, 11/30/20 District Court Opinion and Order, pp 4, 7; Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

B. The District Court found that Defendants' $15,000 down payment was an unexecuted land contract payment and ordered that Plaintiff must return that amount to Defendants within 30 days, by December 30, 2020. (Exhibit 2, 11/30/20 District Court Opinion and Order, pp 6, 7; Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

C. The District Court found that Mr. Nash had no authority to discuss the Land Contract Option with Defendants, and that they did not execute the Land Contract in accordance with the Lease's Option Provision. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 6)

D. The District Court concluded that under MCL 600.5735(2)(b) and MCR 4.201(C)(1), Defendants had sufficient notice of the bench trial and "all proceedings in this case). (Exhibit 2, 11/30/20 District Court Opinion and Order, p 6)

E. The District Court ordered Defendants to pay Plaintiff $13,950 in unpaid rent and late fees within 30 days. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 7; Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

14. On December 14, 2020 & December 29, 2020, Plaintiff moved for reconsideration to modify the above subparagraph E provision. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

15. On December 21, 2020, Defendants applied to the Oakland County Circuit Court for leave to appeal from the District Court's November 30, 2020 Opinion and Order. (12/21/20 Application for Leave to Appeal)

16. On January 19, 2020, the District Court, Judge Nicholson, granted the Motion for Reconsideration and increased Defendants' amount owed from $13,950 to $15,450. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

17. On December 22-23, 2020, Defendants moved for a stay of execution on the

above Judgment pending completion of their appeal to the Oakland County Circuit Court. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

18. On January 19, 2021, the District Court, Judge Nicholson, granted Defendants' above motion and ordered them pay $1500.00 monthly payments into the District Court's escrow account beginning on February 1, 2021. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

19. Beginning on February 1, 2021, Defendants paid the required escrow payments. (Exhibit 4, 8/12/21 52-3 District Court Register of Actions)

20. On January 6, 2021, Defendants appealed from the District Court's November 30, 2020 Judgement to the Oakland County Circuit Court. (Exhibit 3, 7/28/21 Oakland County Circuit Court Case No. 2021-185536-AV Register of Actions)

21. On May 20, 2021, the Oakland County Circuit Court, Judge Shalina Kumar, affirmed the District Court's above decision without opinion. (Exhibit 3, 7/28/21 Oakland County Circuit Court Case No. 2021-185536-AV Register of Actions; Exhibit 1, 5/20/21 Oakland County Circuit Court Order)

22. On September 11, 2021, Defendants applied to this Court for leave to appeal from the Oakland County Circuit Court's above decision. (9/11/21 Defendants-Appellants' Delayed Application for Leave to Appeal **[Defendants' Delayed Application]** on file)

23. On September 30, 2021, Plaintiff responded to Defendants' Delayed Application. (Appellee's Brief in Response to Appellants' Delayed Application for Leave to Appeal **[Plaintiff's Delayed Application Response]** on file.

24. On February 10, 2022, this Court granted Defendants' above Delayed Application for Leave to Appeal. (2/10/22 Order on file)

THE LOWER COURTS' DECISIONS

The District Court found: "The parties entered into a lease on or about August 8, 2016 for the residential property located at: 655 Butler Drive, Lake Orion, Michigan 48362." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 1) After quoting Lease paragraph 1, the District Court further found: "Both parties agreed that per the lease, Defendants paid a $15,000 `security deposit,' to be deducted from the purchase price of the property upon closing of a land contract agreement. It is also undisputed that Defendants never purchased the property. **However, there is a dispute as to whether a land contract existed at the time Plaintiff filed the instant lawsuit."** (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2, quoting Exhibit 10, 8/8/16 Lease Agreement, para 3) The lease included an option for Defendants to buy the property. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2, citing Exhibit 10, 8/8/16 Lease Agreement, para 1. Accord, 11/2/20 BTT, pp 8-9)

The District Court concluded that it had subject matter jurisdiction over the entire case. "MCL 600.5704 provides that district courts have jurisdiction over landlord-tenant summary proceedings." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 3) Under "MCL 600.5714, a person may recover possession of the premises at issue" under a lease provision. The Lease, paragraph 2, reads: "`[I]f at anytime[sic][,] a tenant is behind on [sic] lease payment [sic] 15 days or more[,] Landlord has the right to evict and request all belong[ings] to be removed from the property within 15 days.' Plaintiff

acted in accordance with the court rules[,] by filing this action after the Notice to Quit was issued on March 6, 2020. Plaintiff gave Defendants 56 days to vacate from March 6, 2020. Defendants failed to pay rent or vacate the property[.] [T]herefore[,] Plaintiff acted within MCL 600.5714 and the Michigan Court Rules to initiate this action to retain possession." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 3, quoting Exhibit 10, 8/8/16 Lease Agreement, para 2)

The District Court denied Defendants' Motion to Adjourn Hearing. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2) The District Court explained that the court clerk had issued the Summons, and that Plaintiff had filed the Complaint in accordance with the applicable statute and court rules. **Under them, "the hearing has to be set within seven days of the summons and complaint being issue[d]," and the hearing "is happening right now."** Defendants received notice of the hearing. Defendants "could have told you [Defense Counsel] about the court date. I never saw an appearance….until you filed this motion, there was no appearance in the file from you. So to say that the court's required to give notice to some unnamed attorney is not exactly a valid argument here." (11/2/20 BTT, p 12)

The District Court rejected Defendants' Land Contract and Land Contract ratification positions. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 2) The District Court reasoned that "Defendants did not provide any evidence that Plaintiff's ex-husband had the authority to enter into a land contract[,] or that he actually executed the land contract provision within the time permitted in the lease….Mr. Nash[] is no longer an owner of the property, nor is he a party to this case." (Exhibit 2, 11/30/20

District Court Opinion and Order, pp 2-3. Accord, Exhibit 2, 11/30/20 District Court Opinion and Order, p 6) Thus, the District Court found that Defendants' discussions with Mr. Nash were not relevant. (Exhibit 2, 11/30/20 Opinion and Order, p 6) Further, Defendants did not present evidence that they had exercised the Land Contract option within the Lease's 60-day time period. Lease paragraph 1 defined "this 60-day timeframe." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 4. See also, Exhibit 10, 8/8/16 Lease Agreement, para 1) Defendants failed to show the strict adherence to the option provision required to exercise their Land Contract option or to validate any attempted exercise of it. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 4, citing *Miranda & Associates, Inc v Abro,* Unpub Opin of the Michigan Court of Appeals, Docket No 287230, 2009 WL 5149942[; 2009 Mich App Lexis 2719 (December 29, 2009) *7,] (Exhibit 19) and *Bailey v Grover,* 237 Mich 548[, 554-555; 213 NW 137] (1927)) As a result, the parties did not have a Land Contract or a Land Contract buyer-seller relationship. Instead, they had a Lease and "a landlord-tenant relationship." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 3. Accord, Exhibit 2, 11/30/20 District Court Opinion and Order, p 4) Therefore, the District Court concluded that "Plaintiff is entitled to possession and a money judgment [under] MCL 600.5714 and MC[L] 554.131." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 3. Accord, Exhibit 2, 11/30/20 District Court Opinion and Order, p 4)

The District Court also concluded that Defendants' $15,000 payment was not a Lease security deposit, but a Land Contract down payment: **"Contrary to the terminology in the lease, the payment of $15,000 is not a security deposit, but instead**

a down payment for the land contract option provision that was not executed [under] the lease agreement." (Exhibit 2, 11/30/20 District Court Opinion and Order, p 4 (our emphasis). Accord, Exhibit 2, 11/30/20 District Court Opinion and Order, pp 5-6) The District Court based its $15,000 payment decision on this principle: "`Purchase money paid for the purchase price of land can be recovered in an action for money had and received, whether consideration fails for want of title or for want of a valid contract to convey.'" (Exhibit 2, 11/30/20 District Court Opinion and Order, p 5, quoting *Taylor v Fry,* 255 Mich 333, 336[; 238 NW 274 (1931)] (further citations omitted) The District Court found that under MCL 554.601(e)(1), "the $15,000 is not a security deposit[.]" So, Plaintiff cannot retain it. (Exhibit 2, 11/30/20 District Court Opinion and Order, p 5) Under the Michigan Consumer Protection Act, "`[t]he refusal to cancel an agreement and return the deposit when such is required by law constitutes a violation of the act [.]'" (Exhibit 2, 11/30/20 District Court Opinion and Order, p 6, quoting *Marina Bay Condominiums, Inc v Schlegel,* 167 Mich App 602, 607[; 423 NW2d 284 (1988) and citing the Michigan Consumer Protection Act, MCL 445.903(1)(u). (District Court's emphasis deleted)) So, the District Court concluded that Plaintiff had to return Defendants' $15,000 down payment.

On May 12, 2021, the Oakland County Circuit Court, Judge Shalina Kumar, heard oral arguments on Defendants' appeal. The Court "question[ned]…the timing of the notices….I acknowledge that that was not ideal." But the Court found no error in the District Court's decision. The Court concluded that "the notice issue was harmless error." (Exhibit 20, 5/12/21 OCCC Hearing Transcript, p 6) On May 20, 2021, the Court

affirmed the District Court's decision without opinion. (Exhibit 1, 5/20/21 Oakland County Circuit Court Case No. 2021-185536-AV Order; Exhibit 3, 7/28/21 OCCC Register of Actions)

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURTS' DECISIONS, BECAUSE THE DISTRICT COURT'S SUMMARY PROCEEDING VIOLATED DEFENDANTS' DUE PROCESS RIGHTS.

A. RELEVANT GENERAL DUE PROCESS PRINCIPLES-PART I.

Michigan appellate courts review whether a court or other proceeding has given a party due process de novo. *Elba Township v Gratiot County Drain Commissioner,* 493 Mich 265, 277-278; 831 NW2d 204 (2013), *In Re Rood,* 483 Mich 73, 91; 763 NW2d 587 (2009) The federal and state due process clauses are coextensive. *Green v Wilson,* 455 Mich 342, 349-350; 565 NW2d 813 (1997), *Grimes v Van Hook-Williams,* 322 Mich App 521, 530; 839 NW2d 237 (2013). The federal and state due process clauses apply to summary proceedings. *Eg, Lamkin v Hamburg Township Board of Supervisors,* 318 Mich App 546, 550; 899 NW2d 408 (2017), *lv den* 500 Mich 1018; 896 NW2d 422 (2017).

"Due process requires that a party receive notice of the proceedings against it and a meaningful opportunity to be heard." *Bonner v City of Brighton,* 495 Mich 209, 235; 848 NW2d 380 (2014) (our emphasis). *Accord, Cummings v Wayne County,* 210 Mich App 249, 253; 533 NW2d 13 (2010). **To meet due process requirements, "`the opportunity to be heard `must be granted at a meaningful time and in a meaningful manner.'"** *Bonner,* 495 Mich 209, 235, quoting *Armstrong v Manzo,* 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965) (our emphasis). **"The essence of due process is the**

requirement that `a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' FN66….the procedures at issue [must] be tailored to `the capacities and circumstances of those who are to be heard' FN67 to ensure that they are given a meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake." *Bonner,* 495 Mich 209, 238-239, quoting *Joint Anti-Fascist Refugee Committee v McGrath,* 341 US 123, 171-172; 71 S Ct 624; 95 L Ed 817 (1951) (Frankfurter, J, concurring) & *Goldberg v Kelly,* 397 US 254, 268-269; 90 S Ct 1011; 25 L Ed 2d 287 (1970) (our emphasis).

"Due process is a flexible concept, and different situations may demand different procedural protections." *In Re Estate of Keyes,* 310 Mich App 266, 274; 871 NW2d 388 (2016), *lv den* 498 Mich 968; 873 NW2d 106 (2016), citing *Matthews v Eldridge,* 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). The US Supreme Court has identified three factors for evaluating and deciding whether the process provided has met due process requirements:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id at 334-335, citing *Goldberg,* 397 US 254, 263-271. *Accord, Turner v Rogers,* 564 US 431, 445; 131 S Ct 2507; 18 L Ed 2d 452 (2011), *In Re TK,* 306 Mich App 698, 707; 859 NW2d 208 (2016).

While not always requiring a trial-like proceeding, in civil cases, due process requires a meaningful opportunity to know and respond to opposing evidence. *Cummings,* 210 Mich App 249, 253. *See also, Bonner,* 495 Mich 209, 235, 238-239 (emphasizing the need for a meaningful hearing).

"[T]he Legislature cannot create a statutory regime that allows for constitutional violations with no recourse." *In Re Petition By Wayne County Treasurer,* 478 Mich 1, 10; 732 NW2d 458 (2007) (our emphasis).

"Due process requires that there be an opportunity to present every available defense." *Lindsey v Normet,* 405 US 56, 66; 92 S Ct 862; 31 L Ed 2d 36 (1972) (our emphasis)

Whether a time limit or time period is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question…." *Miller v French,* 530 US 327, 350; 120 S Ct 2246; 147 L Ed 2d 326 (2000).

Due process applies to summary proceedings. *Eg, Lamkin,* 318 Mich App 546, 550, *Al-Maliki v LaGrant,* 286 Mich App 483, 489; 781 NW2d 853 (2009). **"While efficiency is an excellent goal for trial courts to obtain, it may collide with a plaintiff's right to notice and an opportunity to be heard and prevent this Court from being able to engage in meaningful appellate review."** *Lamkin,* 318 Mich App 546, 553 (O'Connell, J, concurring) (our emphasis).

"Because the summary procedure for eviction enables the landlord to enforce the terms of the leasehold within a framework designed for speed rather than fairness, the relationship largely avoids judicial scrutiny." Mary B. Spector, *Tenants' Rights,*

Procedural Wrongs: The Summary Eviction And The Need For Reform, 46 Wayne L Rev 135, 137 (Spring 2000).

Land contract buyers and tenants have "a vital interest" in possession of their homes. *See Id*. By restricting the notice period severely, summary proceedings raise a formidable barrier to their abilities to marshal and present evidence to support their positions. Further, summary proceedings may prevent land contract buyers and tenants from raising other substantive issues besides rent payment or nonpayment. *Id* at 89-90 (Douglas, J, dissenting). Thus, summary proceedings obliterate land contract buyers' and tenants' due process rights.

B. RELEVANT DUE PROCESS PRINCIPLES—PART II

In evaluating and deciding what process is due under the federal due process clause, federal due process law, not state procedural or substantive law, controls. "`[[M]minimum] procedural requirements [are] a matter of federal law; they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions for adverse official action.'" *Cleveland Board of Education v Loudermill,* 470 US 532, 541; 105 S Ct 1487; 84 L Ed 2d 494 (1985), quoting *Vitek v Jones,* 445 US 480, 491; 100 S Ct 1254; 63 L Ed 2d 552 (1985). *Accord, Logan v Zimmerman Brush Co,* 455 US 22, 32; 102 S Ct 1148; 71 L Ed 2d 265 (1982) (also quoting *Vitek* with approval)

"[O]nce it is determined that the [federal] Due Process Clause applies, `the question remains what process is due.'" *Loudermill,* 470 US 532, 541, quoting *Morrissey v Brewer,* 408 US 472, 482; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

"[A] state cannot diminish a property right, once conferred, by attaching less than generous procedure to its deprivation[.]" *Town of Castle Rock v Gonzales,* 545 US 748, 771; 125 S Ct 2796; 162 L Ed 2d 658 (2005) (Souter & Breyer, JJ, concurring), (citing *Loudermill,* 470 US 532, 541. *Accord, Ripley v Wyoming Medical Center, Inc,* 553 F3d 1119, 1125 (CA 10, 2009), *cert den* 558 US 879; 130 S Ct 287; 175 L Ed 2d 135 (2009) (quoting preceding passage), *Godfrey v State,* 962 NW2d 84, 116 (Iowa 2021) (same), *Morgan v Bubar,* 115 Conn App 603, 631; 975 A2d 59 (2009) (same).

C. THE LEADING US SUPREME COURT CASE: *LINDSEY V NORMET*

Lindsey v Normet, 405 US 56; 92 S Ct 862; 31 L Ed 2d 36 (1972), is the leading US Supreme Court case on due process and summary proceedings. There, local officials had found an apartment building uninhabitable, and the landlord refused to repair the many problem conditions. So, the tenants refused to pay their rent. The landlord's attorney threatened to sue them for unpaid rent. But the tenants sued the landlord for declaratory and injunctive relief against the Oregon summary proceeding law. This law provided that in eviction proceedings for a tenant's failure to pay rent, the court must try the case only 2-6 days after the complaint filing date, unless the tenant provides security for accruing rent; the parties can only litigate the issues involved in the tenant's failure to pay rent; and the parties cannot litigate any defenses to eviction based on the landlord's duty to maintain the property in a habitable condition. A special three-judge panel held that these statutory provisions did not violate the Due Process Clause and thus dismissed the tenants' complaint.

Affirming, the Court held that the above statutory provisions did not violate the Due Process Clause on their face. The Court characterized tenant failure to pay rent cases and tenant holding over cases as "recurring" cases involving one or two simple issues. The Court explained in relevant part: "In those recurring cases where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue in the ensuing litigation is simply whether he has paid or held over," the Oregon law does not leave "an unduly short time for trial preparation." *Id* at 64-65. Tenants know the relevant facts as well as landlords. Tenants know whether they have paid their rent or not and "whether they have received a proper notice to quit." Like landlords, tenants know their leases' provisions. *Id* at 65. Also, the Oregon law's provision restricting the summary proceeding issues to whether the tenants have paid the rent due and whether they have adhered to the lease provisions, the Oregon law did not violate the Due Process Clause on its face. The Court explained that while barring tenants from raising housing habitability issues, the provision also barred landlords from raising back rent and other issues. The Oregon law further provided that tenants could raise their issues in separate lawsuits. *Id* at 65-66 & FN 10. Finally, the Oregon law recognized "certain equitable defenses" in these separate lawsuits. *Id* at 66 & FN11.

The obvious purpose of Oregon's and other states' summary dispossession laws is to promote "prompt" and "peaceful resolution" of disputes over real property possession. *Id* at 70. *See also, San Francisco Apartment Association v City of San Francisco,* 20 Cal App 5th 510, 516; 229 Cal Rptr 3d 124 (2018), *review den* 2018 Cal Lexis 3183 (2018), *Berg v Wiley,* 264 NW2d 145, 149-150 (Minn 1978), *Reich v Cochran,* 201 NY 450, 453-454;

94 NE 1080 (1911), Kara B. Schissler, *Note, Come Knock On Our Door: The Fair Debt Collection Practices Act's Intrusion Into New York's Summary Proceedings Law,* 22 Cardozo L Rev 315, 324 (2000) ("The primary purpose and intent of the summary proceeding is the peaceful, "speedy and expeditious disposition" of the issue as to the right of the landlord to the "immediate possession of his real property.") (citations omitted), 5 *Thompson on Real Property* (3d ed LexisNexis 2019), Sec 40.09(c) ("Separate summary dispassion statutes are designed exclusively to provide landlords with a judicially supervised possession remedy that is simpler and more efficient than a common law ejectment action."), *Restatement (Second) of Property: Landlord & Tenant,* Sec 14:1, Statutory Note (1977).

Summary dispossession procedures arose from a bargain between the landlords and the state: Landlords agreed to forego self-help evictions, and the state provided a rapid summary dispossession procedure. *San Francisco Apartment Association,* 20 Cal App 5th 510, 516 (summary dispossession procedure is intended to be a speedy remedy removing the need for landlords to use self-help), 5 *Thompson on Real Property, supra,* Sec 40.09(c), Schissler, *supra,* p 327. Another main purpose is to protect landlords against loss of rental income during lengthy litigation. *Lindsey,* 405 US 58, 85 (Douglas, J, dissenting), citing *Menefee Lumber Co.* v. *Abrams*, 138 Ore 263, 271; 5 P 2d 709 (1931) & *Friedenthal* v. *Thompson*, 146 Ore 640, 643; 31 P 2d 643 (1934).

Dissenting in *Lindsey*, Justice Douglas concluded that the above Oregon summary dispossession law did violate the Due Process Clause. He pointed out: "Over a third of our population lives in apartments or other rented housing. FN4 The home --

whether rented or owned -- is the very heart of privacy in modern America." *Id* at 81-82 (Douglas, J, dissenting). "Modern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street is a traumatic experience. Legislatures can, of course, protect property interests of landlords. **But when they weight the scales as heavily as does Oregon for the landlord and against the fundamental interest of the tenant[,] they must be backed by some `compelling . . . interest,'….No such "compelling . . . interest" underlies this statutory scheme."** *Id* (Douglas, J, dissenting) (our emphasis). *See also, Greene v Lindsey,* 456 US 444, 450-451; 102 S Ct 1874; 72 L Ed 2d 249 (1982) **("[the d]efendants have been deprived of a significant property interest in their homes"**) (our emphasis), Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv C R-C L L Rev 557, 564-571 & FN55 (1988) (citing *Greene*).

Justice Douglas concluded that the Oregon law's tight 2-4-day pretrial period for tenants to prepare for their hearings was unfairly prejudicial. Without posting security, tenants could get a 2-day adjournment. With posting security sufficient to cover the period through the trial, tenants could get a little longer adjournment. *Id* at 85 (Douglas, J, dissenting) **For most tenants, "this kind of summary procedure usually will mean in actuality no opportunity to be heard. Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words. It is, indeed, a meaningless notice and opportunity to defend. The trial is likely to be held in the presence of only**

the judge and the landlord and the landlord's attorney. FN8" *Id* at 85 (Douglas, J, dissenting) (our emphasis).

"[E]ven for tenants who have been lucky to find a lawyer, the landlord need only plead FN9 and prove FN10 the following items in order to win a judgment: (1) a description of the premises, (2) that the defendant is in possession of the premises, (3) that he entered upon them "with force," or unlawfully holds them "with force," **11** and (4) that the plaintiff is entitled to possession." *Id* (Douglas, J, dissenting).

The Oregon law's prohibition on defenses like landlords' failure to maintain or repair their properties, landlords' retaliatory evictions of tenants for reporting unsafe, unsanitary, or other bad conditions to government agencies, and retaliatory evictions for reporting housing code violations to government agencies, "reflects the ancient notion that that a lease is a conveyance of an `estate in land,'" and that the parties' "respective covenants were deemed independent of each other. This approach was appropriate in the feudal culture in which property law evolved. FN12 But this feudal notion of landlord-tenant law -- rooted in the special needs of an agrarian society -- has not been a realistic approach to landlord-tenant law for many years, FN13 and has been replaced by what eminent authorities have described as `a predominately contractual" analysis of leasehold interests.'"** *Id* at 86-87 (Douglas, J, dissenting) (our emphasis) **"`Leases of urban dwelling units should be interpreted and construed like any other contract.'" *Id* at 87 (Douglas, J, dissenting), quoting *Javins v First National Realty Corp,* 428 F2d 1071, 1075 (CA DC 1970), *cert den* 400 US 925; 91 S Ct 186; 27 L Ed 2d 185 (1970) & citing *Wright* v *Baumann*, 239 Ore 410, 413;

398 P 2d 119 (1965) & *Eggen* v *Wetterborg*, 193 Ore 145, 153; 237 P 2d 970 (1951) (our emphasis). *Accord, Auger v Tasea Investment Co,* 676 A2d 18, 25 (DC App 1996). *See also, Kline v 1500 Massachusetts Avenue Apartment Corp,* 439 F2d 477, 482 (CA DC (1970).

D. THE SUMMARY PROCEEDING DID NOT GIVE DEFENDANTS DUE PROCESS AND THUS VIOLATED THE FEDERAL AND STATE DUE PROCESS CLAUSES.

The District Court evicted Defendants from their home without due process.

Applying *Matthews'* three evaluation factors strongly supports this conclusion. As Justice Douglas recognized, the private interest, Defendants' interest in their home, was huge. Their home was their living place. Evicted people must scramble to find other homes, and many end up living in the street. In addition, the eviction's impact on their future ability to buy or rent another home even long afterward may be substantial. Future landlords can refuse to rent to Defendants, future home sellers can refuse to sell to them, and future mortgage lenders can refuse to lend to them based on their eviction. *See* Spector, *supra,* p 208**.** Here, the District Court evicted Defendants from their home during the COVID-19 pandemic. For millions of people, this situation made earning a living and earning a living far more difficult. For millions of people, this situation made finding other housing far more difficult or impossible. *See Midwest Institute of Health, PLC v Governor of Michigan,* 506 Mich 332, 433-434; 958 NW2d 1 (2020) (Bernstein, J, concurring in part & dissenting in part), Caushana M. Hill, *The COVID-19 Issue Evictions and the COVID-19 Pandemic,* 35 Probate & Property 43, 44-45 (January/February 2021), Allen M. DiSciullio, *The COVID-19 Issue The Effect of COVID-19 on Lease Negotiations,* 35 Probate & Property 43, 46-47 (January/February 2021).

"COVID-19 left many aspects of society reeling, and the home was no exception. Twenty-two million people were out of work in an instant, and the clunky, error-ridden unemployment systems in many states were woefully inadequate to the task of helping them. Over the course of the year, the pandemic drove millions into poverty. Unfortunately for many Americans, even a few days of lost wages means the difference between making rent and not. As such, it is no wonder an estimated one million evictions occurred during the pandemic.

"One year after the start of the pandemic in March 2021, roughly ten million renters in the United States were behind on rent and a total of fifty-seven billion dollars in unpaid rent had accrued. This means nearly one in five tenants around the country could not make rent. Given that renters have, on average, less than half of the income of homeowners, they have an even harder time digging themselves out of this hole without assistance."

Nino C Minea, *Tenant Protections In The COVID-19 Pandemic,* 22 J L Society 38, 41-43 (Winter 2022) (footnotes & citations omitted).

"[Many] people were all the more at risk because evictions are so easy to do in many states--and fast. Ohio allows landlords to file an eviction after three days' notice. If you miss rent on Monday in Georgia, your landlord can file for eviction on Tuesday, and if you fail to respond, you could be evicted as soon as next Wednesday. Louisiana can evict you within five days. Utah does it so quickly that people often do not have time to hire an attorney, even if they can afford one."

Minea, *supra,* pp 45-46.

Also, the risk of an erroneous deprivation of their interest through the summary proceeding was great. **Due process meant treating this case as the regular civil case that it was.** Defendants asserted substantial defenses. They asserted the CDC eviction moratorium. They asserted that besides the short-term lease, they had signed a land contract. Also, they asserted that they had paid a significant land contract deposit. Further, they asserted that they had carried out and paid for substantial home and property repairs, maintenance, and improvements. In addition, they asserted that they had paid property insurance premiums and property taxes on their home. **Through**

Defendants' Adjournment Motion, the District Court had notice of some substantial defenses. While ordering return of Defendants' deposit, the District Court never heard any evidence on and thus never considered Defendants' substantial home and property repairs, maintenance, and improvements, Defendants' loans and payments for them, or Defendants' property insurance and property tax payments. **This case was never a simple case where the only issue was whether Defendants had paid all their rent on time. Instead, again without hearing any such evidence, the District Court treated this case as such a simple case, treated Defendants like tenants with no financial or emotional investment in their home, and evicted them.**

The summary dispossession procedure also prevented Defendants from subpoenaing, let alone calling, any other witnesses besides themselves to testify at trial. Moreover, the summary dispossession process prevented Defendants from gathering documents besides those that they had to offer as evidence at trial. **Through Defendants' Adjournment Motion, the District Court had notice of their need for a reasonable time to obtain witnesses and documents for trial.** Finally, Defense Counsel had insufficient time to prepare for a summary proceeding hearing only six days away. **Through Defendants' Adjournment Motion, the District Court had notice of Defense Counsel's need for a reasonable time to prepare for the hearing.** Yet the District Court put Plaintiff's statutory procedural efficiency interest above Defendants' due process interest, denied the motion, and evicted Defendants.

Due process does not impair any government interest. Due process means treating this case like a regular civil case. The resulting administrative and fiscal

burdens of doing so are no more or no less than any other regular cases' administrative and fiscal burdens. So, due process does not impair any government interest any more or less than treating any other regular civil case like a regular civil case. Therefore, evaluating the above three *Matthews* due process factors for evaluating and deciding whether the process provided met due process requirements leads to the conclusion that the process provided did not.

In addition, regarding the ability to present defenses, *Lindsey* contradicts itself. The *Lindsey* Court began: "Due process requires that there be an opportunity to present every available defense." *Id* at 66. But then the *Lindsey* Court approved "segregate[ing] an action for possession of property from other actions arising out of the same factual situation that may assert valid legal or equitable defenses or counter-claims." *Id,* citing *Grant Timber & Mfg Co*. v *Gray*, 236 US 133; 35 S Ct 279; 59 L Ed 501 (1915) (Holmes, J) (upholding a Louisiana procedure barring "a defendant sued in a possessory action for real property" from counterclaiming or suing "to establish title or present equitable claims until after the possessory suit was [resolved]" against a due process attack and *Bianchi* v *Morales*, 262 US.170; 43 S Ct 526; 67 L Ed 2d 928 (1923) (Holmes, J) (upholding a Puerto Rico mortgage law providing "for summary foreclosure of a mortgage without allowing any defense except payment against a due process attack.") As author Mary B Spector recognized, while the *Lindsey* Defendants presented their landlord's failure to comply with the implied covenant of habitability as a defense, the Court used cases involving lack of title defenses to bar the consideration their above defense. *Lindsey,* 405 US 56, 67-68, Spector, *supra,* pp 202-203.

Further, the Court restricted the available defenses to those that state law recognized. *Lindsey,* 405 US 56, 69. Only if the state barred any defenses that it recognized as available could it violate the due process clause. If the state permitted tenants to turn their defenses into claims and sue landlords after losing possession of their homes, that was okay. **But for land contract buyers and tenants, the main issue is possession. As Justice Douglas recognized, the tenant "loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case."** *Id* at 90 (Douglas, J, dissenting). Thus, by recognizing or rejecting defenses, the state partially defines the process due. **Permitting the state to do so contradicts not only the declaration that a person can present all available defenses, but the basic idea of due process itself: To make sure that that the states do not deprive persons of life, liberty or property without procedures giving persons fundamental fairness.**

In addition, where, after losing possession, tenants have the resources to turn their defenses into claims and sue landlords after losing possession of their homes, one proceeding becomes two proceedings. That result is an inefficient use of judicial resources. Spector, *supra,* pp 206-207.

Lindsey does not apply to this case, because it is distinguishable. Unlike *Lindsey,* this case does not involve only the simple issue of failure to pay rent and a few other simple issues. As opposed to the *Lindsey* Defendants, before the hearing, Defendants notified the District Court that this case was not the usual summary-proceedings-for-failure-to-pay rent case. In contrast to the *Lindsey* Defendants, Defendants asserted that

the parties had a different kind of relationship (land contract buyers-land contract sellers) than Plaintiff's asserted landlord-tenant relationship. Unlike the *Lindsey* Defendants, Defendants could not obtain or prepare their evidence in the six-day prehearing period. These differences far outweigh any similarities. For these reasons, *Lindsey* is distinguishable and inapplicable.

Based on the above analysis, the lower courts' due process decisions were reversible error. **The District Court's six-day hearing notice was unreasonable and insufficient. Defendants notified the District Court of their substantial defenses. Thus, the District Court knew that this case was not a simple eviction-for-no-payment case. Yet, the District Court treated this case as if it was. In doing so the District Court wrongfully put Plaintiff's statutory procedural efficiency interests above Defendants' federal and state due process rights.** In affirming the District Court's decisions, the Circuit Court committed these same reversible errors. Therefore, the lower courts violated Defendants' federal and state due process rights. Accordingly, reversal of the lower courts' decisions for federal and state due process violations is in order.

II. THIS COURT SHOULD REVERSE THE LOWER COURTS' DECISIONS, BECAUSE THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTION TO ADJOURN THE BENCH TRIAL WAS AN ABUSE OF DISCRETION.

A. APPLICABLE LEGAL PRINCIPLES.

Michigan appellate courts review lower court adjournment decisions for abuse of discretion. *In Re Utera,* 281 Mich App 1, 11; 761 NW2d 253 (2008). "A trial court does not abuse its discretion[,] when its decision falls within the range of principled outcomes."

Maldonado v Ford Motor Co, 476 Mich 372, 388; 719 NW2d 809 (2006), *cert den* 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007). *Accord, Shawl v Spence Brothers, Inc,* 280 Mich App 213, 218, 220-221; 760 NW2d 674 (2008), *lv den* 483 Mich 913; 762 NW2d 507 (2009). More than one outcome may be principled. *Maldonado,* 476 Mich 372, 388. Trial courts have discretion to adjourn even summary proceedings. MCR 4.201(J)(1).

But a failure or refusal to exercise discretion is outside the range of principled outcomes and is thus an abuse of discretion. *See People v Stafford,* 434 Mich 125, 134 FN4; 450 NW2d 559 (1990) (decided under pre-*Maldonado* standard), *People v Grant,* 329 Mich App 626, 638; 944 NW2d 172 (2019), *Reith v Keiler,* 230 Mich App 346, 348; 553 NW2d 582 (1998) (decided under pre-*Maldonado* standard).

"A motion for adjournment must be based on good cause, and a court, in its discretion, may grant an adjournment to promote the cause of justice." *Soumis v Soumis,* 218 Mich App 27, 32; 553 NW2d 619 (1996). *Accord,* MCR 2.503(B)(1) & (D). To establish good cause for an adjournment, a party must show a "a legally sufficient or substantial reason." *In Re Utera,* 281 Mich App 1, 11. *See also, People v Buie,* 491 Mich 294, 319; 817 NW2d 33 (2012) (good cause means a "satisfactory, sound, or valid reason.")

B. IN DENYING DEFENDANTS' MOTION TO ADJOURN THE BENCH TRIAL, THE DISTRICT COURT ABUSED ITS DISCRETION.

At a certain bench trial point, the District Court's denial of Defendants' adjournment motion became an abuse of discretion. **When learning that the case involved more than the usual one-issue summary proceeding of whether the defendant had paid or not paid the land contract payments or rent, that point arrived,**

and the District Court's adjournment denial became an abuse of discretion. The District Court's failure to give sufficient notice of the bench trial to Defendants and Defense Counsel was the first part of the reason why. But only when the District Court learned of the need for testimony under oath on the Land Contract issues did the District Court's failure to give sufficient notice become operative. If not for this need, the summary proceedings notice period (seven days) would control. Alone, the District Court's failure to give sufficient notice did not make the District Court's adjournment decision an abuse of discretion. **However, combined with the District Court's knowledge of the need for an evidentiary hearing, including witnesses' testimony under oath and exhibits, the District Court's failure to give sufficient notice did make the District Court's adjournment decision an abuse of discretion.**

Defendants had good cause for their requested adjournment. They needed time to obtain and prepare witnesses to testify, obtain and organize exhibits, prepare and file their counterclaim, and prepare and file a trial brief. The District Court's seven-day notice did not give them anywhere near a reasonable time period to prepare for the bench trial. In contrast, from the July 17, 2020 Summons and Complaint filing date through the November 2, 2020 bench trial, Plaintiff had far more time to prepare for the bench trial. Plaintiff had over three more months than Defendants to prepare for the bench trial. **This bench trial would determine whether they would have a place to live or not. To give Defendants a reasonable amount of time to prepare for the bench trial, an adjournment was imperative.** Thus, the District Court's

adjournment decision was not a principled decision. Therefore, in asking for a bench trial adjournment, Defendants showed good cause.

In the alternative, the District Court failed to exercise its discretion, because it did not believe that it had discretion. The District Court stated that it had to set the hearing within seven days of the summons and complaint issuance date. (11/2/20 BTT, p 12) Here, October 23, 2020 was that issuance date. The District Court did not recognize that under MCR 4.201(J)(1), it had discretion to adjourn the hearing from November 2, 2020 to a later date to enable Defendants (and Plaintiff) to meet the bench trial deadlines, to obtain witnesses, and to prepare their testimony. So, the District Court's failure to recognize its adjournment discretion led to its failure or refusal to exercise its adjournment discretion. Thus, the District Court's failure or refusal to exercise its adjournment discretion here was an abuse of discretion.

The District Court's and Plaintiff's contrary positions do not nullify its abuse of discretion in denying Defendants' adjournment motion. Plaintiff's assertion that the District Court denied the motion, because Defendants did not properly plead it and did not pay the motion fee (9/30/21 Delayed Application Response, p 18) overlooks that Defendants presented the Land Contract vs. Lease issue the best they could, that the District Court heard and decided the motion based partly on that issue, and that Defendants paid the motion fee. The District Court's references to MCL 600.5714 and MCR 4.101 to justify Plaintiff's suit for possession and other relief (11/30/20 District Court Opinion and Order, p 3) ignores that the adjournment motion's issue was not Plaintiff's lawsuit initiation but the seven-day notice, no time to prepare for the bench

trial, and the failure to adjourn the bench trial to give Defendants a reasonable time to prepare for the bench trial and thus a meaningful hearing. The District Court's reference to MCL 600.5714 to try to justify the seven-day notice and service-to-bench trial period (Exhibit 2, 11/30/20 District Court Opinion and Order, p 3) overlooks that nowhere does MCL 600.5714 compel a bench trial only seven days after the notice and service date, and that nowhere does MCL 600.5714 bar a bench trial adjournment. The District Court's reference to the MCR summary proceeding rule, MCR 4.101 (11/30/20 District Court Opinion and Order, p 3), ignores the rule's express grant of discretion to district courts to adjourn summary proceedings. For the above reasons, the District Court's refusal to adjourn the hearing was not a principled decision. Based on the above analysis, the District Court's denial of Defendants' adjournment motion was an abuse of discretion. Therefore, reversal of the District Court's judgment and the Circuit Court's affirmance are in order.

III. THIS COURT SHOULD REVERSE THE LOWER COURT DECISIONS, BECAUSE THE DISTRICT COURT'S INSUFFICIENT HEARING NOTICE WAS HARMFUL ERROR.

"[A]n error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial,…or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). *See also, Chastain v GMC,* 467 Mich 858; 654 NW2d 326 (2002) (defining the above rule as the standard for deciding whether an error is harmless), *Solomon v Shuell,* 435 Mich 104, 138 FN31; 457 NW2d 669 (1990) (same), *Donkers v Kovach,* 277 Mich App 366, 390; 745 NW2d

154 (2007) (Markey, J, dissenting) (applying this standard in deciding whether an error is harmless). If an error is harmless, the appellate court will not reverse the decision, judgment, or order at issue. *Guerrero v Smith,* 280 Mich App 647, 656; 761 NW2d 723 (2008), *Ypsilanti Fire Marshal v Kircher (On Reconsideration),* 273 Mich App 496, 529; 730 NW2d 481 (2007). But where the error is harmful, the appellate court will reverse the decision, judgment, or order at issue. *Merrow v Bofferding,* 458 Mich 617, 634; 581 NW2d 686 (1998), *Illins v Burns,* 388 Mich 504, 510; 201 NW2d 624 (1972).

The District Court's insufficient hearing notice was harmful error. Failure or refusal to reverse the District Court's decision is inconsistent with substantial justice. The insufficient hearing notice was structural. **On receiving notice of the scheduled November 2, 2020 bench trial on October 26-27, 2020, on October 30, 2020, Defendants moved for the bench trial's adjournment.** In doing so, Defendants asserted their $15,000 land contract initial payment and mentioned a pending counterclaim. (Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing, paras 1-3, 8, 11) **Defendants also referred to the parties' "dispute and the ongoing negotiations" and Plaintiff's misrepresentation of the parties "conflict."** (Exhibit 13, 10/30/20 Defendants' Motion to Adjourn Hearing, para 10) **Defendants further asserted Plaintiff's mischaracterization of the parties' relationship: It was not landlord-tenant but land contract seller-land contract buyer.** (Exhibit 5, 11/2/20 BTT, pp 5, 16) Defendants cited their $15,000 land contract initial payment and their $40,000 amount spent on home improvements as removing this case from the landlord-tenant summary proceedings statute and court rules and thus from the district court's landlord-tenant summary

proceedings jurisdiction. (Exhibit 5, 11/2/20 BTT, pp 13, 14) Defendants also cited the lease's short-term period. (Exhibit 5, 11/2/20 BTT, p 14)

When the District Court asked Defense Counsel if he had filed the Center for Disease Control **[CDC]** eviction moratorium declaration, Defense Counsel responded that he had not done so. Defense Counsel explained that he had "no notice from the plaintiff" that she was going to sue. **Since he only received notice of the lawsuit on October 27, 2020, he had no time to do so.** (Exhibit 5, 11/2/20 BTT, pp 11, 14) **Defense Counsel further stated that with sufficient notice, Defendants could have prepared and filed the declaration, because "they have COVID."** (Exhibit 5, 11/2/20 BTT, p 11) **Defense Counsel added that since they had COVID-19, they did not have money to pay the monthly payments.** (Exhibit 5, 11/2/20 BTT, p 11) So, the District Court's denial of Defendants' adjournment motion was harmful error. The denial prevented them from preparing and filing the declaration, thus making the case subject to the CDC eviction moratorium. **If the case was subject to the eviction moratorium, and since, according to the District Court, Plaintiff was suing for possession of the real property and thus Defendants' eviction from that property, the moratorium would have applied and would have stopped the proceedings.** (Exhibit 5, 11/2/20 BTT, p 15) The argument that Defendants' characterization of the parties' relationship as land contract seller-land contract buyer made the eviction moratorium and declaration inapplicable overlooks that **like Plaintiff, the District Court defined the parties' relationship as landlord-tenant.** (Exhibit 5, 11/2/20 BTT, pp 15, 16) Accordingly, the

District Court's refusal to adjourn the bench trial made a big difference and was thus harmful error.

Further, Defense Counsel stated his intent to brief the land contract versus lease issue. (Exhibit 5, 11/2/20 BTT, p 15) The District Court's refusal to adjourn the bench trial made such a brief impossible. Any attempted brief within the five-day period before the bench trial would probably be inaccurate or incomplete. So, the District Court's refusal to adjourn the bench trial barred Defendants from briefing the issue de facto.

A party must serve a witness only subpoena at least two days before a scheduled hearing or trial. A party must serve a combined witness and documents subpoena at least 14 days before the scheduled hearing or trial. MCR 2.506(C)(1).

The District Court had asked the parties to prepare and file witness lists and exhibit lists. (Exhibit 12, 10/23/20 52-3 District Court Landlord/Tenant Civil Bench Trial Order) **But the District Court's refusal to adjourn the bench trial deprived Defendants of any opportunity to decide on, prepare, and call witnesses besides themselves.** Sometimes, when process servers arrive at witnesses' business places or residences, the witnesses are out. Sometimes, serving subpoenas on witnesses requires multiple attempts. Even if Defendants could contact and serve witnesses within the unreasonable five-day period that their counsel had to prepare for the bench trial, most witnesses could not "drop everything" in their business affairs and lives instantly to prepare for and attend an immediate trial. They might have mandatory deadlines to meet and events to attend. Also, some witnesses might be out of town on business or for

other reasons (like helping relatives deal with COVID-19 or its impacts). **So, the District Court's refusal to adjourn the bench trial barred Defendants from obtaining and calling outside witnesses de facto.** The contention that Defendants could have subpoenaed witnesses three, four, or five days before the bench trial overlooks that witnesses might be out, even out of town, on their service dates. As a result, the District Court's refusal to adjourn the bench trial was harmful error.

In addition, the District Court's refusal to adjourn the bench trial deprived Defendants of any opportunity to subpoena or otherwise obtain third-party documents. Even if they could contact third parties within the unreasonable the five-day period that their counsel had to prepare for the bench trial, most third parties could not "drop everything" in their business affairs and lives to search for documents immediately. They might have mandatory deadlines to meet and events to attend. Also, some document custodians might be out of town on business or for other reasons (like helping relatives deal with COVID-19 or its impacts). Finally, any service of any subpoena for documents would occur beyond MCR 2.506(C)(1)'s 14-day deadline. Thus, any persons subpoenaed for documents could challenge the document subpoenas and win their challenges. **So, the District Court's refusal to adjourn the bench trial barred Defendants from obtaining third-party documents de facto**. Therefore, the District Court's refusal to adjourn the bench trial was inconsistent with substantial justice and thus harmful error.

Lastly, if the District Court had granted Defendants' adjournment motion, their attorney would have prepared direct examinations of Defendants and cross

examinations of Debra and Jamie Nash. Their attorney would probably have called Jamie Nash as an adverse witness. Their attorney would have called the attorney whom Jamie Nash had proposed to review the land contract for both parties and examined him on nonprivileged facts and information. In addition, Defendants' attorney would have subpoenaed Defendants' friends, neighbors, and relatives seeing Defendants maintain, repair, improve, and update the real property as witnesses. Defendants' attorney would have subpoenaed and called records witnesses to show that Defendants were paying property taxes and property insurance. Their attorney would have introduced the land contract, emails, and text messages—the latter on the parties' business relations. **Their attorney would have aimed to show that the parties' actions showed a de facto land contract relationship and situation.** Accordingly, the District Court's refusal to adjourn the bench trial was inconsistent with substantial justice and thus harmful error.

IV. THIS COURT SHOULD REVERSE THE LOWER COURT DECISIONS, BECAUSE DEFENDANTS CAN MEET THE PART PERFORMANCE DOCTRINE REQUIREMENTS TO SHOW A VALID ORAL LAND CONTRACT AND REMOVE IT FROM THE STATUTE OF FRAUDS.

A. APPLICABLE LEGAL PRINCIPLES.

Michigan appellate courts review bench trial factual findings for clear error. *Eg,* MCR 2.613(C), *In Re Receivership of 11019 S. Francis Rd.,* 492 Mich 208, 218; 821 NW2d 503 (2012), *Chapdelaine v Sochocki,* 247 Mich App 167, 169; 635 NW2d 339 (2001). Michigan appellate courts review bench trial legal conclusions de novo. *Eg, In Re Receivership of 11019 S. Francis Rd.,* 492 Mich 208, 218, *Chapdelaine,* 247 Mich App 167,

169. Michigan appellate courts review bench trial applications of law to the facts de novo. *People v Berrera,* 451 Mich 261, 267 FN7; 547 NW2d 280 (1996), *Wilcoxon v Detroit Election Commission,* 301 Mich App 619, 632; 838 NW2d 183 (2013).

A party's part performance of an oral contract for the sale or other transfer of real property may be sufficient to make the statute of frauds inapplicable to a sale or other transfer of real property. *McDonald v Scheifler,* 323 Mich 117, 126; 34 NW2d 573 (1948), *Giordano v Markovitz,* 209 Mich App 676, 679; 531 NW2d 815 (1995), *lv den* 451 Mich 876; 549 NW2d 567 (1996). "`If one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be a fraud upon him to allow the other party to repudiate the contract, by interposing the statute [of frauds], equity will regard the contract as removed from the operation of the statute.'" *Mahon v Sahration,* 310 Mich 563, 568; 17 NW2d 753 (1945) (citations omitted).

The oral contract's proponent must show its existence with clear and convincing evidence. *Id, Empire Shoe Services, Inc v Gershenson,* 62 Mich App 221, 223; 233 NW2d 237 (1975). Then, the proponent must show that he/she/it has occupied the real property and made improvements to it consistent with his/her/its expectation he/she/it would ultimately own it. *Harrison v Eassom,* 208 Mich 685, 693; 176 NW 460 (1920). "Taking possession under an oral contract must, to become an element of part performance, be exclusive, open and notorious, under a claim of ownership." *Id.* Finally, the proponent must show that his/her/its part performance acts are "unequivocally referable to the alleged contract and prejudicial to the performing party [the proponent]." *White v Walper,* 299 Mich 109, 115; 299 NW 827 (1941).

"A valid contract requires: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, (5) mutuality of obligation." *Barclae v Zarb,* 300 Mich App 455, 471; 834 NW2d 100 (2013).

Ratification requires "a [party's] distinct act as would establish between himself and [the other party] a mutuality of obligation." *Dickinson v Wright,* 56 Mich 42, 47; 22 NW312 (1885). *See also, Forge v Smith,* 458 Mich 198, 209 & FN27; 580 NW2d 876 (1998) (recognizing and applying distinct act requirement) "Ratification may be express or implied, so long as there is knowledge of the material facts relating to the initial contract." *Apfelblat v National Bank Wyandotte-Taylor,* 158 Mich App 258, 262; 404 NW2d 725 (1987). The ratifying person's or principal's receipt of direct benefits is not an essential ratification precondition. But such receipt may constitute ratification or support ratification. *David v Serges,* 373 Mich 442, 443; 129 NW2d 882 (1964).

B. DEFENDANTS CAN MEET THE ORAL CONTRACT, PART PERFORMANCE, AND RATIFICATION REQUIREMENTS.

Defendants can present the evidence necessary to show a valid oral contract. Mr. Nash and Defendants were all competent to contract. The District Court's finding that Mr. Nash lacked authority to contract due to the divorce proceedings and the divorce judgment awarding Plaintiff sole ownership of the real property (Exhibit 2, 11/30/20 District Court Opinion and Order, pp 2-3, 6) overlooks that **when the parties contracted in May 2016, Mr. Nash was a co-owner.** The subject matter, a land contract interest in the real property, was proper. The consideration, a substantial down payment, monthly payments, payment of property taxes and property insurance premiums, and keeping

the real property in good maintenance and repair (Defendants) and recognition of Defendants' land contract interest and eventual transfer of home ownership (Mr. Nash and Plaintiff) was legal. Since all the parties agreed to the land contract, the land contract agreement was mutual. The parties' obligations were mutual. If given a reasonable opportunity to present evidence, Defendants can meet these requirements.

Defendants can also meet the other valid oral contract requirements. **They can show evidence of their down payment and monthly payments, property tax and property insurance payments, home improvement, maintenance, and repair payments, and home improvement loans. Also, they can show their maintenance and repair and other activities consistent with home ownership, as opposed to a lease, conducted in full public view. Further, they can testify on their expectation of paying off the Land Contract and owning the real property. In addition, they can show that they performed all their above activities in reliance on their Land Contract, not a lease, and on their reliance that they would become full real property owners. Furthermore, they can show that their above activities went far beyond renters' activities, and that their activities cost them substantial amounts of money and thus prejudiced them. Finally, they can show that their above activities benefitted Plaintiff.** To permit Defendants to lose their Land Contract interest, when they performed all their Land Contract obligations until Plaintiff's unlawful repudiation of the Land Contract, would be a fraud on them. Plaintiff's reliance on a Michigan Statute of Frauds provision, MCL 565.351, to negate any alternative land contract pathways (9/30/21 Delayed Application Response, p 17) overlooks that as outlined above, under

certain conditions, part performance and ratification can make this provision inapplicable. For these reasons, Defendants can show all elements necessary for a valid oral de facto Land Contract, part performance of it, and its removal from the statute of frauds.

Plaintiff's contrary arguments are unavailing. Plaintiff's assertion that at the District Court hearing, Defendants did not present their Land Contract vs. Lease issue and thus waived or forfeited it (9/30/21 Plaintiff's Delayed Application Response, p 19) ignores that in their presentation, Defendants referred to the issue, and in its decision, the District Court referred to the issue. (Exhibit 5, 11/2/20 BTT, pp 2, 13, 14; Exhibit 2, 11/30/20 District Court Opinion and Order, pp 4, 5, 6) Plaintiff's and the District Court's position that the parties had no land contract and Plaintiff's position that Defendants' home improvements did not mean home ownership (*Eg,* Plaintiff's Delayed Application Response, pp 15, 16, 17; Exhibit 2, 11/30/20 District Court Opinion and Order, pp 2-3) ignore Plaintiff's and Mr. Nash's acts based on a land contract. Mr. Nash would never ask renters about obtaining a mortgage loan to buy the Property from his spouse and him. Mr. Nash would never invite renters to contact him, should they need any documents to obtain a mortgage loan. Furthermore, Plaintiff's and the District Court's position does not account for Mr. Nash's continuous contacts with Defendants on their home maintenance, repairs, and improvements. In addition, Plaintiff's and the District Court's position ignores Defendants' numerous, substantial home improvements, maintenance, and repairs and Defendants' home improvement loans. Someone in Mr. Nash's position would hardly discuss specific payments directed

towards property tax and property insurance payments with renters. Plaintiff's contention that Defendants did not pay the property taxes and property insurance (9/30/21 Plaintiff's Delayed Application Response, p 16) overlooks Mr. Nash's request for Defendants to pay $300 more per month towards them and Defendants' resulting increased payments towards them. If given the opportunity, Defendants can present evidence on all these points. **All these acts and events support Defendants' position that the parties had a de facto Land Contract, and that Defendants partially performed under it.**

Mr. Nash and Plaintiff ratified Defendants' acts based on the Land Contract. Mr. Nash and Plaintiff, with knowledge of Defendants' extensive maintenance, repairs, and improvements based on Defendants' Land Contract expectations and situation, accepted the benefits from these activities and thus ratified them. Mr. Nash and Plaintiff, with knowledge of Defendants' payment of $15,000.00 as a Land Contract down payment, accepted the payment and the benefits flowing from it. Mr. Nash and Plaintiff, with knowledge of Defendants' payments towards property taxes and property insurance, accepted these payments for those purposes and the benefits flowing from these payments. If Plaintiff and Mr. Nash had provided the necessary mortgage loan payoff document and letter, and if Defendants had used them to obtain a mortgage loan to pay off the Land Contract balance, Plaintiff and Mr. Nash would have accepted the mortgage loan proceeds for that purpose. The Land Contract balance probably equaled or exceeded Plaintiff's and Mr. Nash's mortgage loan balance on the Property. As a result, Defendants meet the distinct acts and the other ratification

requirements. Accordingly, the parties had a de facto Land Contract, and Defendants partially performed it.

The District Court's contrary position is unavailing. **The District Court's finding that Mr. Nash lacked authority to discuss a Land Contract with Defendants** (Exhibit 2, 11/30/20 District Court Opinion and Order, pp 2-3, 6) **overlooks that all relevant Mr. Nash-Defendants communications and contacts occurred from mid-2016 to March 2020. During that entire period, according to Mr. Nash's own Affidavit, he was the Property's co-owner.** (Exhibit 8, 4/21/21 Nash Affidavit) In addition, he was the de facto co-Land Contract seller. So, Defendants' communications with Mr. Nash were relevant. As a result, Mr. Nash had the necessary authority, and the District Court's finding here was clearly erroneous.

The District Court's finding that Defendants did not present any evidence that Mr. Nash had executed the Land Contract within the 60-day lease period (Exhibit 2, 11/30/20 District Court Opinion and Order, pp 2-3) **does not account for the above numerous and substantial events showing a de facto Land Contract, Defendants' part performance of it, and Plaintiff's and Mr. Nash's ratification of it. Even assuming that this finding is correct, it does not nullify their eager acceptance of many considerable benefits from the de facto Land Contract, their ratification of it, or the resulting fraud on Defendants.** Likewise, the District Court's conclusion that Defendants' inability to finalize a written Land Contract within 60 days after the August 8, 2016 Lease date (Exhibit 2, 11/30/20 District Court Opinion and Order, p 4) does not negate the de facto Land Contract, Defendants' partial performance, Plaintiff's and Mr. Nash's ratification

of it, their eager acceptance of many considerable benefits from it, and the resulting fraud on Defendants. Accordingly, the District Court's conclusion that Plaintiff was entitled to a possession and money judgment is reversible error.

For all the above reasons, reversal of the lower courts' decisions is justified.

CONCLUSION

THEREFORE, DEFENDANTS-APPELLANTS DAVID KERTI AND AMY VANSTON respectfully request this Court to

A. Reverse the Oakland County Circuit Court's May 20, 2021 Order affirming the 52-3 District Court's November 30, 2020 Opinion and Order granting Plaintiff-Appellee possession of the real property in dispute and a money judgment.

B. Remand this case to the 52-3 District Court for a new hearing on the merits.

Dated: May 28, 2022

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CERTIFICATE OF SERVICE

Howard Yale Lederman certifies that on May 31, 2022, he served copies of Defendants-Appellants' Brief on Appeal, Certificate of Service, and List of Exhibits with Note via this Court's electronic filing system on:

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LIST OF EXHIBITS

Exhibit 1, 5/20/21 Oakland County Circuit Court **[OCCC]** Case Number 2021-185536-AV Order.

Exhibit 2, 11/30/20 52-3 District Court Case Number 2020-C02397-LT Opinion and Order of the Court **[11/30/20 District Court Opinion and Order]**.

Exhibit 3, 2/28/21 Oakland County Circuit Court Case Number 2021-185536-AV Register of Actions **[7/2821 OCCC Register of Actions]**.

Exhibit 4, 8/12/21 52-3 District Court Case Number 2020-C02397-LT Register of Actions **[52-3 District Court Register of Actions]**.

Exhibit 5, 52-3 11/2/20 District Court Case Number 2020-C02397-LT Bench Trial Transcript **[11/2/20 BTT]**.

Exhibit 6, 9/3/21 Affidavit Explaining Delay.

Exhibit 7, 3/30/21 Appellants' Brief on Appeal to the Oakland County Circuit Court, Case No. 21-185536-AV **[3/30/21 Appellants' Circuit Court Appellate Brief]**.

Exhibit 8, 4/21/21 Affidavit of Jamie D. Nash **[4/21/21 Nash Affidavit]**.

Exhibit 9, 8/5/16 Email.

Exhibit 10, 8/8/16 Lease Agreement.

Exhibit 11, Partial List of Maintenance, Repairs, and Improvements.

Exhibit 12, 10/23/20 52-3 District Court Landlord/Tenant Civil Bench Trial Order.

Exhibit 13, 10/30/20 Defendants' Motion for Adjournment of the November 2, 2020 Hearing **[10/30/20 Defendants' Motion to Adjourn Hearing]**.

Exhibit 14, 4/16/20 & 4/24/20 Emails.

Exhibit 15, 3/6/20/7/17/20 Notice to Quit to Recover Possession of Property Landlord-Tenant.

Exhibit 16, 52-3 District Court 10/23/20 Summons Landlord-Tenant/Land Contract.

Exhibit 17, 7/17/20 52-3 District Court Complaint to Recover Possession of Property & Supplemental Complaint.

Exhibit 18, 10/23/20 52-3 District Court Notices to Appear.

Exhibit 19, *Miranda & Associates, Inc v Abro,* Unpub Opin of the Michigan Court of Appeals, Docket No 287230, 2009 WL 5149942[; 2009 Mich App Lexis 2719 (December 29, 2009).

Exhibit 20, 5/12/21 OCCC Hearing Transcript.

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