STATE OF MICHIGAN
IN THE COURT OF APPEALS

DETROIT THERMAL, LLC.,
an Ohio limited liability company,

Plaintiff-Appellee,

v

HIGHGATE HOTELS, INC., a
Texas corporation,

Defendant-Appellant.
_____/

Court of Appeals No. 276321

Wayne Circuit Case No. 04-436053-CZ
Hon. Michael James Callahan

DEFENDANT-APPELLANT HIGHGATE HOTELS, INC'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Dated: October 4, 2007

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STATEMENT REGARDING JURISDICTION

Defendant-appellant Highgate Hotels, Inc. ("Highgate") appeals from the Judgment entered by the Wayne County Circuit Court, Hon. Michael J. Callahan, which is a "final order" as defined by MCR 7.202(6)(a)(i). Jurisdiction is appropriate under MCL 600.308 and MCR 7.203(A)(1).

STATEMENT OF QUESTIONS INVOLVED

I. Did the trial court reversibly err in entering judgment for Detroit Thermal following a bench trial, where its determination that Highgate was a party to the contract was erroneous and based on evidence that should have been excluded as both inadmissible hearsay and wrongly propounded by a witness who was not identified in response to Highgate's deposition notice under MCR 2.306(B), and where Highgate owes no obligations under the contract in any event because neither Detroit Thermal nor its predecessor, Detroit Edison, obtained prior consent before assigning it?

The Circuit Court Answered: **No**
Plaintiff-Appellee Detroit Thermal, LLC Answers: **No**
Defendant-Appellant Highgate Hotels, Inc. Answers: **Yes**

II. Even if the trial court had correctly found Highgate to be a party to the contract, did it reversibly err in awarding Detroit Thermal $96,677 in early-termination fees where Detroit Thermal's own witnesses testified that it, and not Highgate, terminated the agreement, and where the fees in any event constitute an unenforceable penalty?

The Circuit Court Answered: **No**
Plaintiff-Appellee Detroit Thermal, LLC Answers: **No**
Defendant-Appellant Highgate Hotels, Inc. Answers: **Yes**

III. Did the trial court reversibly err in denying Highgate's pretrial motion for summary disposition based on its determination that there was a question of fact as to whether Highgate was a party to the contract at issue?

The Circuit Court Answered: **No**
Plaintiff-Appellee Detroit Thermal, LLC Answers: **No**
Defendant-Appellant Highgate Hotels, Inc. Answers: **Yes**

IV. Did the trial court reversibly err in awarding case-evaluation sanctions to Detroit Thermal where Judgment for Detroit Thermal was improperly entered?

The Circuit Court Answered: **No**
Plaintiff-Appellee Detroit Thermal, LLC Answers: **No**
Defendant-Appellant Highgate Hotels, Inc. Answers: **Yes**

INTRODUCTION

In this contract dispute, plaintiff-appellee Detroit Thermal, LLC ("Detroit Thermal") sought to collect $293,000 in unpaid charges, interest and an early-termination penalty arising from its sale of steam to the Pontchartrain Hotel in downtown Detroit. Defendant-appellant Highgate Hotels, Inc. ("Highgate"), the hotel's property manager, sought summary disposition and defended at trial on the basis that it was not a party to the steam-service contract. Among other things, Highgate presented evidence from the person who signed the contract that he was employed by, and signed on behalf of, the hotel owner, Pontch Limited Partnership, and not Highgate. But contrary to both the evidence and the law, the trial court found that Highgate was liable for amounts owed by Pontch Limited Partnership under the contract, and awarded damages, interest and case-evaluation sanctions of nearly $312,000 to Detroit Thermal.

Its rulings should be reversed.

STATEMENT OF FACTS

I. Highgate Operates The Hotel For Its Owner Pursuant To A Hotel-Management Agreement.

The Hotel Pontchartrain is a 25-story hotel located at the corner of Washington Boulevard and Jefferson Avenue in downtown Detroit. At all relevant times it was owned by Pontch Limited Partnership ("Property Owner)," a Delaware limited partnership. DX A, Warranty Deed. Defendant Highgate, a Texas corporation based in Irving, Texas, oversaw day-to-day hotel operations on the Property Owner's behalf, pursuant to a 1997 "Hotel Management Agreement" between the two. DX B. Under that contract, which governed the relationship between Highgate and Pontch Limited Partnership, Highgate managed the latter's business affairs, using Pontch Limited Partnership's funds:

> 6.1 In performing its services under this Agreement, Operator [Highgate] shall act solely as agent and for the account of Owner. Operator shall not be deemed to be in default of its obligations under this Agreement to the extent it is unable to perform any obligation due to the lack of available funds from the operation of the Hotel or as otherwise provided by Owner.
>
> 6.2 Operator shall in no event be required to advance any of its funds (whether by waiver or deferral of its management fees or otherwise) for the operation of the Hotel. [DX B, ¶¶ 6.1-6.2].

Significantly, the Management Agreement also expressly excluded Highgate from liability for the Property Owner's debts:

> 5.1 In the performance of its duties as Operator of the Hotel, Operator shall act solely as agent of Owner. Nothing in this Agreement shall constitute or be construed to be or create a partnership or joint venture between Owner and Operator. Except as otherwise provided in this Agreement, (a) all debts and liabilities to third persons incurred by Operator in the course of its operation and management of the Hotel in accordance with the provisions of this Agreement shall be the debts and liabilities of Owner only and (b) Operator shall not be liable for any such obligations by reason of its management, supervision, direction and operation of the Hotel as agent for Owner in accordance with and in compliance with the terms of this Agreement. Operator may so inform third parties with whom it deals on behalf of Owner and may take any other reasonable steps to carry out the intent of this paragraph. [*Id*, ¶ 5.1 (emphasis added).

II. The Steam Contract

This dispute centers on charges and early-termination penalties arising from a 1998 contract for steam between Detroit Edison and "Pontchartrain." Detroit Edison in 1998 entered into a Mid-Size Steam Sales Agreement ("Steam Contract") with the Property Owner, Pontch Limited Partnership, LLC. DX F. The Steam Contract listed the Customer as "Pontchartrain," and called for Edison to provide steam service to "the Customer's premises located at 2 Washington Blvd, Detroit, MI 48226." DX F, pp 1, 4. The Steam Contract was signed on behalf of the Property Owner by Dale Gannon, who was the hotel's General Manager from November

1997 until April 2000. *Id*, p 4; *see also* Tr 12/7/06, p 13[1]; *also* Highgate's Motion for Summary Disposition ("MSD") & Ex C, Gannon Affidavit, ¶ 4. The fundamental factual issue in dispute was whether Detroit Edison entered into the contract with the Property Owner or with Highgate – and therefore, which of the latter two companies was responsible for unpaid steam and early-termination charges imposed by Detroit Thermal, which took over the contract from Detroit Edison.

Gannon, the only witness with personal knowledge of the Steam Contract's formation, unequivocally resolved this issue by testifying that he was an employee of Pontch Limited Partnership, the Property Owner. Tr 12/7/06, pp 6-9, 15; *also* Gannon Affidavit, Ex C to MSD, ¶ 5. He was employed by Pontch Limited Partnership as the hotel's general manager from November 1997 until April 2000. Tr 12/7/06, pp 6-7. In his capacity as General Manager, Gannon had authority to enter into contracts on behalf of the Property Owner, and he testified consistently that in signing the Steam Contract he was acting on its behalf – and **not** on behalf of Highgate. Tr 12/7/06, pp 9-10, 13-18, 32; *also* Gannon Affidavit, Ex C to MSD, ¶¶ 7, 9-12 (emphasis added). Indeed, it is undisputed that Gannon has never been an employee of Highgate and never entered into contracts on Highgate's behalf including any agreements with Detroit Edison or Detroit Thermal. Tr 12/7/06, pp 8-9, 14-15; Gannon Affidavit, Ex C to MSD, ¶¶ 6-12. He testified unequivocally that his paycheck and W-2 bore the name "Pontch Limited Partnership LLC," and not Highgate. *Id* at 7-8 (emphasis added). Indeed, he has never worked for Highgate Hotels, or received a paycheck from it. *Id* at 8-9.

Functioning essentially as the chief executive officer of the hotel, Gannon produced financial statements and funded various accounts to pay its operating expenses. Tr 12/7/06, p 9.

[1] Gannon testified at trial via deposition.

He was familiar with utility agreements such as the Steam Contract, and testified that in most of the agreements the hotel simply was referenced as "Pontchartrain." *Id* at 10. Utility bills were paid out of the Pontch Limited Partnership LLC operating expense account, which was funded exclusively from deposits of revenue from the hotel. *Id* at 10-12, 38-40.

Gannon signed the Steam Contract on behalf of the hotel, Tr 12/7/06, p 13. The contract was drafted by Detroit Edison and simply presented to him for his signature; neither he nor Pontch Limited Partnership LLC had any role in its creation. *Id*, pp 13, 27. It was Edison that in the contract identified the "customer" as "Pontchartrain," *Id*. Gannon testified unequivocally and without refutation that he signed <u>on behalf of Pontch Limited Partnership LLC</u>, doing business as the Pontchartrain. *Id* at 14 (emphasis added). He further testified that "probably 95 percent of the time" the hotel was known simply as "Pontchartrain," and that accounts were set up and agreements entered into frequently under that name. *Id* at 14-15. <u>Gannon had no authority whatsoever from Highgate to sign the Steam Contract, and did not send it to Highgate for its review or comment before signing it</u>. Tr 12/7/06, p 15 (emphasis added). While Gannon reported to Steve Barick of Highgate, his testimony remained uncontroverted that he was employed by Pontch Limited Partnership, LLC. Tr 12/7/06, pp 38, 15. Shown the Hotel Management Agreement and its provision that on-site staff would be employed by <u>Highgate</u>, Gannon testified that he had never before seen that document, and that it was inconsistent with his actual employment: "I did not have the ability to bind Highgate Hotels in any agreement….I was not an employee of Highgate Hotels." *Id* at 17-18; 32.

Gannon testified that his intent in signing the Steam Contract was to bind "the hotel…the actual asset," owned by Pontch Limited Partnership LLC. Tr 12/7/06, p 42. His testimony was not refuted in any way.

The Steam Contract contained an unambiguous non-assignment clause which provided that the agreement "shall not be assigned by either party without the prior written consent of the other party and shall not be unreasonably withheld." DX F, ¶ 4. Detroit Thermal purchased the Central District Steam System from Detroit Edison Company in early 2003. MSE & Ex B, Kozar dep., p 5.[2] It is undisputed that Highgate never consented to the assignment. Tr 12/11/06, p 37.

The Steam Contract also contained an early-termination clause, permitting the seller to impose an early-termination charge "[i]f the Customers [*sic*] terminates steam service prior to the end of the first five (5) years of the Agreement period…." DX F, p 3, ¶ 5 (emphasis added). In the event that the contract was renewed a separate payment calculation was applied, but again, the clause was triggered only if "the Customer terminates service prior to the end of the renewal period…." *Id* (emphasis added). As discussed below, Detroit Thermal – not the Property Owner, and certainly not Highgate – ultimately terminated the Steam Contract.

As called for in the Management Agreement, Highgate used Pontch Limited Partnership's funds to pay steam service invoices – first to Detroit Edison, and then to Detroit Thermal. Specifically, Pontch Limited Partnership maintained its own separate operating account at Bank One from which Highgate paid the hotel's steam service bills. DXs C and E. Comparison of the checks used to pay the invoices indicates a Bank One account number of 362789374, *see, e.g.*, Ex E, p 1 – Pontch Limited Partnership's account and DX C (signature cards for account); *see also* MSD & Ex D, Barick dep., p 14. Highgate never paid bills on behalf of the Pontchartrain out of its own funds. MSD & Ex D, Barick Dep. p. 13.

[2] Pages cited from individual depositions were appended to the motion for summary disposition in sequential order in a single exhibit.

The Steam Contract provided the hotel with a significantly lower rate than had it purchased steam at Detroit Edison's tariff rate. Tr 11/29/06, pp 57-61; *see also* DX M and PX 10.

III. Detroit Thermal Terminates the Steam Contract.

After losing more than $10 million operating the hotel, Pontch Limited Partnership surrendered the hotel deed to GE Capital in September 2004. Tr 12/11/06, p 33; Tr 11/29/06 & Ex M. Detroit Thermal received notice of the deed surrender when it was contacted by Richard Cairns of GFMI Management, Inc, the management company hired by Pontch Limited Partnership's creditor to take over as the property manager after the surrender. MSD & Ex F. Detroit Thermal terminated the Steam Contract on September 28, 2004 when it learned of the surrender and the change in management companies. DXs M and P; *see also* MSD & its Ex G, Marsalese dep., p. 45. Significantly, given that nearly $100,000 of the amount sought by Detroit Thermal was pursuant to the early-termination clause, the decision to terminate the Steam Contract was made by Detroit Thermal – not by Pontch Limited Partnership, and certainly not by Highgate:

> Q: Okay. Who made the decision to terminate the Pontchartrain [Steam] Contract?
>
> A: DTLLC [Detroit Thermal LLC] management. [MSD & Ex G, Marsalese dep., p. 45].

At the time it terminated the Steam Contract, Detroit Thermal claimed it was owed $194,570 for steam service from June 2004 through September 2004. Complaint ¶ 10. Despite the fact that *it* terminated the contract, and not Pontch Limited Partnership or Highgate, Detroit Thermal also claimed it was owed $95,928 under the early-termination provision. *Id.* At trial, Detroit Thermal calculated its claim – including unpaid steam and repair charges, interest and the

early-termination penalty – to be $293,392.04. PX 13; Tr 11/29/06, pp 57-64. Of that amount, $96,677.03 was the early-termination penalty. *Id,* p 71. Detroit Thermal calculated the early-termination charge based on the formula set forth in the Steam Contract (DX F, ¶ 5), not based on actual damages or amounts of steam it was not able to sell. *Id* at 71-72. Indeed, there were no lost sales, since Detroit Thermal continued selling steam to GE after it took over the deed. *Id* at 71-72.

With Pontch Limited Partnership LLC defunct, Detroit Thermal turned to Highgate for the money. Highgate refused to pay since it was not liable, explaining to Detroit Thermal its relationship with the Property Owner. Detroit Thermal memorialized its pre-litigation conversation with Highgate in an October 28, 2004 email:

- Pontchartrain Inc is the General Partner of Pontchartrain Limited Partnership (2 other Ltd partners were an individual and a trust)
- Highgate Hotels was under contract with Pontchartrain Limited Partnership for management services for the Pontchartrain Hotel
- Pontchartrain Limited Partnership owned the Pontchartrain Hotel
- Pontchartrain Limited Partnership is responsible for the debt (recall $290,498)
- However, Pontchartrain Limited Partnership's only asset it had was the Pontchartrain Hotel in which the lender (GE Capital) took back [MSD & Ex H; also DX L].

Contrary to Detroit Thermal's contention that Highgate and Pontch Limited Partnership, LLC were essentially one and the same, the Property Owner also left Highgate holding the bag for more than $100,000 in unpaid management fees. Tr 12/11/06, p 32.

V. Detroit Thermal Files Suit

With Pontch Limited Partnership defunct, Detroit Thermal filed this action against Highgate, alleging breach of contract and various equitable claims. Following discovery,

Highgate sought summary disposition, arguing that while it was the management company for the hotel, it was not a party to the Steam Contract, which had been signed by Gannon, an employee of Pontch Limited Partnership, LLC. Because Highgate had never assumed any obligations under the contract, it argued, it could not be liable for the debts of the hotel's owner. Highgate's 8/26/05 Motion for Summary Disposition. Detroit Thermal opposed the motion, arguing that the Contract was signed by a Highgate employee – because the hotel management agreement called for all hotel employees to be Highgate employees. Following oral argument, the trial court denied the motion:

> THE COURT: That's what I believe is the function of the manager. The motion is denied. I think that there is a question of fact whether or not Highgate is a party to the contract. But particularly in view of the fact that somebody from Highgate signed the contract. [Tr 10/7/05, p 7; *see also* 10/7/05 Order].

The case was tried to the bench over three days in November and December 2006, and the proofs largely were those adduced on summary disposition – with a few noteworthy exceptions.

For instance, Highgate during discovery had served a deposition notice under MCR 2.306(B)(5), directing Detroit Thermal to produce a corporate representative to testify about seven issues material to the case. DX H, 4/1/05 Notice of Taking Detroit Thermal's Deposition Pursuant to MCR 2.306(B)(5). Among other things, the Notice directed Detroit Thermal to produce one or more representative(s) to testify as to:

> 3. Factual support for Plaintiff's allegation that Highgate Hotels has or had a contract with Plaintiff for steam service at the Pontchartrain Hotel;
>
> 4. Factual support for Plaintiff's allegation that Highgate Hotels is obligated to pay Plantiff's open invoices for steam services or claim for cancellation charges;
>
> 5. Whether Highgate Hotels ever promised to pay Plaintiff for steam services at the Pontchartrain Hotel or in fact sent Plaintiff payment for same; [and]

6. Plaintiff's damage claim in this matter…. [DX H, Notice, p 2].

Detroit Thermal produced a single witness, John Kozar, to testify at deposition as to all issues. Tr 11/29/06, pp 19-20. Further, Highgate served an interrogatory directing Detroit Thermal to identify any witness who would testify that it agreed to pay the debt; at no time did Detroit Thermal identify Cheryl Garrison, its marketing coordinator. *Id*, pp 20-22. However, Detroit Thermal at trial produced Garrison, whom the trial court allowed to testify over Highgate's objections:

> THE COURT: Well since she's here, she's all dressed up. She looks like she's ready to go. I'll hear it. It's subject to strike….[Tr 11/29/06, p 20].

Garrison testified that on one occasion, Lamar Vines, one of the Property Owner's managers who succeeded Gannon, told her that his "boss" was Steve Barick, Highgate's Senior VP of Operations. Tr 11/29/06, p 23; Tr 12/19/06, p 12. Along the same lines, Garrison testified that on three occasions she discussed with Vines who owned the Pontchartrain, and that each time he told her "Highgate Hotels." Tr 11/29/06, pp 24-25. Despite the obvious hearsay nature of that testimony, and the fact that it pertained to several of the categories for which Detroit Thermal was directed to produce a representative to testify, the trial court allowed the testimony over Highgate's objection. *Id* at 24. (On cross-examination, Garrison admitted that her only knowledge of ownership was what Vines supposedly told her, and that she was in no position to dispute DX A, the warranty deed, showing that the owner in fact was Pontch Limited Partnership. *Id* at 27. She further admitted that she did not know Gannon (the only signer of the Steam Contract who testified), nor did she speak with Steve Barick nor anyone else about Highgate. *Id* at 28-29. Nor, for that matter, did she know who owned the bank account on which the steam payment checks were drawn. *Id*).

In fact, Vines testified unequivocally that, as general manager of the Pontchartrain from November 2003 to October 2004, he was employed exclusively by Pontch Limited Partnership, not Highgate. Tr 3/14/05, pp 10, 12.[3] His paycheck and W-2 were from Pontch Limited Partnership. Tr 3/14/05, pp 4-5. He was the highest-ranking employee at the hotel, and his liaison with Highgate, the hotel management company, was Steve Barick. Tr 3/14/05, pp 4-7, 16-17, 19. Vines specifically rejected plaintiff's counsel's attempt to characterize Barick as his "boss," even "from a practical point of view," stating unequivocally that "I considered Mr. Barick to be the liaison between the hotel and the management company." *Id* at 19. He oversaw the hiring of hotel employees, who filled out an application and were interviewed by the hotel's Human Resources department – not Highgate. Tr 3/14/05, pp 19-20. As part of his duties, he would receive invoices from hotel suppliers (such as Detroit Thermal), review it and send it off to Highgate in Texas for payment. *Id*, pp 12-13.

Barick's oversight responsibilities over Vines and any other hotel employees was purely a function of the contractual relationship between Highgate and Pontch Limited Partnership, as spelled out in detail in the Hotel Management Agreement, DX B.

John Kozar, the Detroit Thermal account executive in charge of the hotel steam account, had his testimony at trial exposed as completely incredible. Though he claimed Vines had told him "that Highgate Hotels was operating under the name Hotel Pontchartrain," Tr 11/29/06, p 40, that was exposed as flatly contrary to his earlier deposition testimony:

> "Q. At any time, did Mr. Vines specifically say that Highgate is operating under the name of Hotel Pontchartrain, anything like that?"
>
> Your answer was

[3] Vines testified at trial via his March 2005 telephone deposition, as part of Detroit Thermal's case. Tr 12/11/06, p 43.

"A. No." [Tr 11/29/06, p 41, quoting deposition tr, p 61].

Kozar also admitted that there was no interruption in Detroit Thermal's steam supply to the hotel after Pontch Limited Partnership tendered the deed to GE Capital; instead Detroit Thermal negotiated a new agreement with GE Capital, that gave it a higher price. Tr 11/29/06, pp 47-52. (As a "tariff" or non-contract customer, the new owners paid a substantially higher rate than contract customers such as the Property Owner – $19.89 per thousand pounds of steam, as opposed to the rates in the $12-to$15 range charged to the Property Owner in 2004. Tr 11/29/06, pp 57-61; *see also* DX M and PX 10). Detroit Thermal in fact considered filing a lien against the property to secure its debt, but decided not to because it wanted to negotiate a new contract with GE. Tr 11/29/06, pp 47-49 & DX M. Kozar agreed that the purpose of the early-termination clause is to allow Detroit Thermal to recover fixed costs that it would otherwise not recover when a customer terminates its contract early. Tr 11/29/06, pp 51-52.

Kozar also admitted that it was Detroit Edison (Detroit Thermal's predecessor) that drafted the Steam Contract, and that used the term "Pontchartrain" for the customer – the contract was not drafted by Highgate or Pontch Limited Partnership LLC. *Id* at 51; *see also* Ex F.

V. The Trial Court Finds For Detroit Thermal.

The trial court granted a directed verdict to Highgate on Detroit Thermal's equitable claims, but found for Detroit Thermal on its contractual claim and held Highgate liable for all the damages Detroit Thermal sought. The court found that the September 2004 Warranty Deed in Lieu of Foreclosure, DX G, was the "primary indicia of ownership" of the Pontchartrain, and noted that it was executed by Mr. Khimji, general partner of Pontch Limited Partnership. Tr

12/19/06, pp 26.[4] The court further found that "Mr. Barick hired Dale Gannon, who was employed as an at-will employee of Mr. Barick to run the Detroit location," and that Khimji "signed checks to pay the invoices for the steam that was consumed in the operation of the Pontchartrain Hotel in downtown Detroit." *Id.*

The court rejected Highgate's position that there was a legal distinction between itself, as operator of the hotel pursuant to the contract, and Pontch Limited Partnership – in the process, subtly but significantly shifting the burden of proof to Highgate to show that it was *not* the owner:

> …we know, as a matter of fact, that Highgate Hotels was both an owner and an operator of hotels.
>
> I don't find in this record any evidence that distinguishes that function as to the defendant in the operation of the Pontchartrain. [Tr 12/19/06, pp 26-27].

In the end, the trial court simply disregarded the separate corporate forms of Pontch Limited Partnership and Highgate, and found that Khimji's involvement with both was sufficient grounds to impose liability on the latter:

> And it is because Mr. Khimji signed the checks and signed the warranty deed, and was identified as a principle of Highgate Hotels that I find for the plaintiff and enter Judgment against Highgate Hotels finding that at the time thermal services were incurred, that Highgate was the user of the services, as the owner of the hotel.
>
> And principally, my fact finding focuses at the end, as it did at the beginning, on the issuance of the warranty deed. And any intervening titles that Mr. Khimji used in the identification of the operator of the Pontchartrain are quite beside the point. There are invoices for steam [that] were paid by him; the warranty deed was signed by him.
>
> And therefore, I find on that basis, that he was owner and is liable for the debt of [$293,392.04 and] the ordinary judgment rate interest on that amount. [*Id*, p 27].

[4] The 12/19/06 transcript consistently misspells "Pontchartrain" and "Pontch," which will be corrected here for purposes of clarity.

On January 29, 2007 the court entered judgment accordingly, and also awarded Detroit Thermal $17,472.32 in case-evaluation sanctions.

ARGUMENT

I. The Trial Court Erred In Finding That Highgate Was Liable For the $196,715 In Steam Charges.

B. Standard of Review

A trial court's factual findings in a bench trial are reviewed for clear error and its conclusions of law are reviewed de novo. *Ligon v City of Detroit*, __ Mich App __, __; __ NW2d __ (2007), *citing Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

B. Detroit Thermal Failed to Carry Its Burden of Proving that Highgate Was a Party To, Or Otherwise Took On Obligations Under, the Steam Contract.

1. The Trial Court's Factual Findings Were Clearly Erroneous, and the Admissible Evidence Requires Judgment for Highgate.

Plaintiff bears the burden of proving the existence of the contract it seeks to enforce, and there is no presumption in favor of execution of a contract "since, regardless of the equities in a case, the court cannot make a contract for the parties when none exists." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543; 487 NW2d 499 (1992), *quoting Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). No contract is valid without a meeting of the minds, i.e. mutual assent. *Id*, 194 Mich App at 548. "In determining whether parties have assented to a contract, the Court must apply an objective test, asking whether the expressed words of the parties and their visible acts would lead a reasonable person to conclude that they mutually assented to be bound." *R & D Distrib Corp v Health-Mor Indus*, 118 F Supp 2d 806, 809 (ED Mich, 2000). One party's subjective state of mind is not a relevant factor to consider.

Kamalnath, 194 Mich App at 548. It is axiomatic that a Court cannot re-write a contract to bind a non-party because that party never agreed to the terms of the contract. *EEOC v Frank's Nursery*, 177 F3d 448, 460 (CA 6, 1999). Here, the trial court in essence *did* rewrite the Steam Contract to bind Highgate, a party that never agreed to be bound to that contract.

The trial court plainly could not find Highgate liable as a signatory to the contract, since Highgate was not a signatory. The Steam Contract was signed by Gannon, who, as an employee of Pontch Limited Partnership, was not authorized to act on behalf of Highgate. Tr 12/7/06, pp 6-9, 13-18, 42; *see also* MSD & Ex C, Gannon Affidavit, ¶¶ 5-10; *Id* & Ex D, Barick dep, p 27. Instead, the court simply blurred the legal lines of distinction between the owner of the property, Pontch Limited Partnership, and its operator, Highgate, and found that the latter's conduct in operating the hotel – including sending in regular payments for steam – effectively made *it* liable for the Steam Contract, in place of the defunct Pontch Limited Partnership. In the process, the court impermissibly shifted to Highgate the burden of *disproving* its assent to the contract:

> …we know, as a matter of fact, that Highgate Hotels was both an owner and an operator of hotels.
>
> I don't find in this record any evidence that distinguishes that function as to the defendant in the operation of the Pontchartrain. [Tr 12/19/06, pp 26-27].

But in making that statement the trial court flatly ignored the Hotel Management Agreement between Highgate and Pontch Limited Partnership, which plainly set out that the former was the operator, and the latter the owner, of the Hotel Pontchartrain. Under that contract, which governed the relationship between Highgate and Pontch Limited Partnership, Highgate managed the hotel's business affairs, using Pontch Limited Partnership's funds:

> 6.1 In performing its services under this Agreement, Operator [Highgate] shall act solely as agent and for the account of Owner. Operator shall not be deemed to be in default of its obligations under this Agreement to the extent it is unable to perform any

> obligation due to the lack of available funds from the operation of the Hotel or as otherwise provided by Owner.
>
> 6.2 Operator shall in no event be required to advance any of its funds (whether by waiver or deferral of its management fees or otherwise) for the operation of the Hotel. [DX B, ¶¶ 6.1-6.2].

This is consistent with all of the trial testimony and evidence: bills were paid out of Pontch Limited Partnership's checking account, DXs C and E, which were funded with revenues from the hotel. Tr 12/7/06, pp 10-12, 38-40.

Of even greater significance, the Management Agreement expressly excluded Highgate from liability for the Property Owner's debts:

> 5.1 In the performance of its duties as Operator of the Hotel, Operator shall act solely as agent of Owner. Nothing in this Agreement shall constitute or be construed to be or create a partnership or joint venture between Owner and Operator. Except as otherwise provided in this Agreement, (a) all debts and liabilities to third persons incurred by Operator in the course of its operation and management of the Hotel in accordance with the provisions of this Agreement shall be the debts and liabilities of Owner only and (b) Operator shall not be liable for any such obligations by reason of its management, supervision, direction and operation of the Hotel as agent for Owner in accordance with and in compliance with the terms of this Agreement. Operator may so inform third parties with whom it deals on behalf of Owner and may take any other reasonable steps to carry out the intent of this paragraph. [DX B, ¶ 5.1) (emphasis added).

Further, the Warranty Deed, DX A, plainly established Pontch Limited Partnership as the owner of the hotel, and not Highgate.

A finding of fact is clearly erroneous if there is no evidentiary support for it, or if this Court if left with a definite and firm conviction that a mistake has been made. *Hill v City of Warren (Aft Rem)*, __ Mich App __; __ NW2d __ (2007), *citing A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 588; 654 NW2d 572 (2002). The trial court's professed inability to find any evidence showing that Highgate was an operator, and not an owner, was clearly

erroneous. In stating that it did not "find in this record any evidence that distinguishes [between ownership and operation] as to the defendant in the operation of the Pontchartrain, Tr 12/19/06, pp 26-27, the trial court clearly erred – the Management Agreement constitutes once such piece of evidence; the deed, another.

The trial court made another clearly erroneous factual finding in essentially disregarding the separate corporate forms between Highgate and Pontch Limited Partnership LLC:

> And principally, my fact finding focuses at the end, as it did at the beginning, on the issuance of the warranty deed. And any intervening titles that Mr. Khimji used in the identification of the operator of the Pontchartrain are quite beside the point. There are invoices for steam [that] were paid by him; the warranty deed was signed by him.
>
> And therefore, I find on that basis, that he was owner and is liable for the debt….. [Tr 12/19/06, p 57].

But Highgate never took any actions consistent with an assumption of the Steam Contract; Pontch Limited Partnership maintained its own separate operating account at Bank One from which invoices were paid., and never paid bills on behalf of the Pontchartrain out of its own funds. Highgate did not sign the deed that was tendered to GE. And completely contrary to the trial court's findings, the checks that paid the steam invoices – PX 11 – were signed by Jaffer Khimji <u>from the account of Pontch Limited Partnership, in his capacity as a partner of it</u>. *See*, Tr 12/11/06, pp 34-35 & 38-39, ***see also*** PX 11 (checks from account number 362789374) and DX 3 (signature card for same account, signed by Jaffer Khimji, Mahmood Khimji and Mehdi Khimji as partners for Pontch Limited Partnership). The trial court's findings to the contrary, on which its ultimate ruling was based, were clearly erroneous.

The trial court also erred in allowing Detroit Thermal's marketing director, Cheryl Garrison, to testify over Highgate's objection. While Michigan appellate courts have not specifically opined on the issue of whether a corporate party may designate one representative

for deposition under MCR 2.306(B)(5) but offer a different representative at trial to give more favorable testimony, the Staff Comments to the rule indicate that it is comparable to FRCP 30(b)(5) and (6). Therefore, it is appropriate to consider the manner in which federal courts have construed FRCP P 30(b)(6) under similar circumstances.

In *Rainey v Am Paper Ass'n*, 26 F Supp 2d 82 (DDC, 1998), the district court refused to consider for summary judgment purposes an affidavit defendant offered that materially differed from the theory articulated at deposition by defendant's Rule 30(b)(6) representative, agreeing with plaintiff that it violated the representative-designation mechanism of Rule 30(b)(6):

> Plaintiff's theory is consistent with both the letter and spirit of Rule 30(b)(6). First, the Rule states plainly that persons designated as corporate representatives "shall testify as to matters known or reasonably available to the organization." FRCP 30(b)(6). This makes clear that a designee is not simply testifying about matters within his or her own personal knowledge, but rather is "speaking for the corporation" about matters to which the corporation has reasonable access….By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party "to prepare its designee to be able to give binding answers" in its behalf. Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) depositions.
>
> That, however, is precisely what the Kurtz affidavit serves to do in the instant case….. the Kurtz affidavit's quantitative assertion works a substantial revision of defendant's legal and factual positions. This eleventh hour alteration is inconsistent with Rule 30(b)(6), and is precluded by it. [26 F Supp 2d at 94-95 (internal citations omitted)].

See also, United States v Taylor, 166 FRD 356, 361, *aff'd* 166 FRD 367 (MD NC, 1996) (designee "presents the corporation's 'position' on the topic") (internal citation omitted).

The *Rainey* Court concluded that unless defendants could prove that the information contained in the affidavit was "not known or was inaccessible," the corporation "cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." 26 F Supp 2d at 95; *see also Catalina Rental Apts, Inc v Pac Ins Co*, 2007 US Dist

LEXIS 20760, *6 (SD Fla, 2007) ("Any other interpretation of the Rule would allow the responding corporation to 'sandbag' the depositional process 'by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial"); *see also Caraustar Indus v N Ga Converting, Inc*, 2006 US Dist LEXIS 91829 (WD NC, 2006) (citing *Rainey* and striking a declaration that was offered for the sole purpose of retracting an admission made during the deposition of Plaintiff's Rule 30(b)(6) witness); *Ierardi v Lorillard, Inc*, 1991 US Dist Lexis 11320, 1991 WL 158911, * 3 (ED PA, 1991). Similarly, in *Dorocon, Inc v Burke*, 2005 US Dist LEXIS 38839 (DDC, 2005), plaintiff designated two individuals as its corporate representatives under Rule 30(b)(6). Both were deposed, and after plaintiff tried to put forth evidence and/or testimony contradicting their deposition testimony, the court granted defendants' motion to exclude it. "By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party to prepare its designee to give binding answers on its behalf." *Id*. at *62.

In this case, Detroit Thermal produced a single witness, Kozar, to testify at the MCR 2.306(B)(5) deposition as to all issues. Tr 11/29/06, pp 19-20. Highgate also served an interrogatory directing Detroit Thermal to identify any witness who would testify that it agreed to pay the debt; at no time did Detroit Thermal identify Cheryl Garrison, its marketing coordinator. *Id*, pp 20-22. However, Detroit Thermal then produced Garrison at trial, and the court allowed her to testify over Highgate's objection, using reasoning that would be laughable were the stakes not so high:

> THE COURT: Well since she's here, she's all dressed up. She looks like she's ready to go. I'll hear it. It's subject to strike….[Tr 11/29/06, p 20].

Garrison testified that Lamar Vines told her once that his "boss" was Steve Barick, Highgate's Senior VP of Operations. Tr 11/29/06, p 23; Tr 12/19/06, p 12. Along the same lines, Garrison testified that on three occasions she discussed with Vines who owned the Pontchartrain, and that each time he told her, "Highgate Hotels." Tr 11/29/06, pp 24-25. This testimony was critical, because it went to the central issue of whether Highgate could be held liable for Pontch Limited Partnership's debt, and it should have been excluded for two separate and independent reasons. First, it pertained to several of the categories for which Detroit Thermal was directed to produce a representative to testify, and Detroit Thermal did not prove that the information was "not known or inaccessible" to it at the time of Kozar's deposition. *Rainey*, 26 F Supp 2d at 95. And second, it plainly was hearsay not within any exception: Lamar Vines was not employed by Highgate, and thus could not bind it for purposes of MRE 801(d)(2). *See*, *Bachman v Swan Harbour Assocs*, 252 Mich App 400; 653 NW2d 415 (2002) (testimony not admissible as admission of party opponent where proffering party failed to establish that declarant was defendant's employee and made the statement during and within the scope of his employment). The trial court erred in allowing Garrison to testify, over Highgate's objection.

2. Highgate Cannot Be Liable for the Debt of the Hotel's Owner.

Based on the *admissible* evidence, it is plain that judgment should have been entered for Highgate. As an agent of Pontch Limited Partnership, LLC, the Pontchartrain's owner, Highgate is not liable for the debts of the Hotel Pontchartrain. An agent is not liable for the debts of its principal, and "may work on behalf of a principal within the scope of the agency agreement as if the agent had stepped into the shoes of the principal without incurring any personal liability." *Uniprop Inc v Morganroth & Morganroth, PC*, 260 Mich App 442, 447; 678 NW2d 638 (2004) (emphasis added). It is a long-established principle that agency agreements, like the Hotel

Management Agreement, do not create rights in third parties. *Id* at 448-449. In fact, a person who deals with an agent is bound to inquire into the *extent* of his authority, ignorance of which is no excuse. *Cutler v Grinnell Bros*, 325 Mich 370, 376; 38 NW2d 893 (1949).

It is undisputed that Highgate was the Property Owner's agent and that Highgate was not obligated to use its own funds to pay the Hotel Pontchartrain's debts:

> 6.1 In performing its services under this Agreement, Operator [Highgate] shall act solely as agent and for the account of Owner. Operator shall not be deemed to be in default of its obligations under this Agreement to the extent it is unable to perform any obligation due to the lack of available funds from the operation of the Hotel or as otherwise provided by Owner.
>
> 6.2 Operator shall in no event be required to advance any of its funds (whether by waiver or deferral of its management fees or otherwise) for the operation of the Hotel. [DX B, ¶¶ 6.1-6.2].

The Management Agreement further provides that "[i]n the performance of its duties as Operator of the Hotel, Operator shall act solely as agent of Owner." *Id*, ¶ 5.1. By signing the Steam Contract, Gannon was authorized to bind Pontchartrain Limited Partnership, LLC only, and his action could have no binding effect whatsoever on Highgate. Fundamental principles of agency law dictate that Highgate is not liable for the Pontchartrain's debts.

Detroit Thermal will argue that Highgate is liable because it was acting on behalf of an "undisclosed principal." *See*, Response in opposition to MSD, pp 11-12, *citing Penton Publishing, Inc v Markey*, 212 Mich App 624; 538 NW2d 104 (1995) and *Detroit Pure Milk Co v Farnsworth*, 114 Mich App 447; 319 NW2d 557 (1981). But while Detroit Thermal repeatedly made that argument (and cited those cases) to the trial court, it has assiduously avoided stating accurately the operative legal principle. It is indeed true that "[a]n agent contracting for an undisclosed principal is personally liable for contractual obligations," as Detroit Thermal's cited authority states. But it is also true under that same authority that "a principal is considered

undisclosed unless a party transacting with the principal's agent has notice that the agent is acting for the principal and notice of the principal's identity." *Penton Publishing*, 212 Mich App at 626, *citing Detroit Pure Milk Co*, 138 Mich App at 478 and *Dodge v Blood*, 299 Mich 364, 370; 300 NW 121 (1941) (emphasis added). Here, Detroit Thermal plainly had notice that Highgate was acting for the principal, Pontch Limited Partnership, of whose identity it knew. In paying roughly $2.5 million to assume the Steam Contract from Detroit Edison, Detroit Thermal undertook due diligence, Tr 11/29/06, pp 63-64, 66, and knew or should have known who its customer was. Further, Pontch Limited Partnership was listed on the deed, DX A, and thus the entire world was on notice that it – and not Highgate, or anyone else – owned the 25-story hotel built upon perhaps the most storied location in downtown Detroit, the site first settled by the French in 1701. *See, Hitchcock v Simpkins*, 99 Mich 198, 203; 58 NW 47 (1894) (recorded deed "was notice to the world" of son's rights set forth in it); *accord Galpin v Abbott*, 6 Mich 17, 29 (1858); *see also Adams v Adams (On Recon)*, __ Mich App __, __ & n 8; __ NW2d __ (2007) (recording instrument with the register of deeds shall be notice to all persons except the landowner), *citing* MCL 565.25(4).

Another court faced with almost identical facts refused to hold the hotel-management company liable for the debts of hotel owners. In *Campbell-Ewald Co v 525 Lexington Ave Assoc, et al*, 179 AD2d 483; 578 NYS2d 186 (NY App Div, 1992), MSD & Ex I, a hotel-management company managed a series of New York hotels owned by defendants. The relationship between the management company and the hotel's owners was governed by a "Hotel Management and Operating Agreement" which provided that the owners were "solely responsible for all debts and liabilities to third persons incurred by [the management company] in the course of the performance of its obligations." *Id.* The hotel-management company

contracted for advertising that ultimately was not paid for, and plaintiff sued the hotel's owners for the monies owed; the management company later was joined as a defendant. The New York appellate court held that summary judgment dismissing claims against the management company should have been granted:

> [the hotel's owners'] attempt to foist upon [the management company] the responsibility for the payment of the advertising services rendered by plaintiff for the Halloran House is precluded by the express provisions of the Agency Agreement, by which 525 Lexington, as the owner of the Halloran House, is solely responsible for the payment of advertising fees. *Id.* at 484.

Exactly like in *Campbell-Ewald Co*, the responsibility of payment for the steam invoices is precluded by the express provisions of the Management Agreement, by which the Property Owner was solely responsible to make payment:

> Except as otherwise provided in this Agreement, (a) <u>all debts and liabilities to third persons incurred by Operator in the course of its operation and management of the Hotel in accordance with the provisions of this Agreement shall be the debts and liabilities of Owner only</u> and (b) <u>Operator shall not be liable for any such obligations</u> by reason of its management, supervision, direction and operation of the Hotel as agent for Owner in accordance with and in compliance with the terms of this Agreement…..[DX B, ¶ 5.1 (emphasis added)].

The trial court erred reversibly in allowing Detroit Thermal to hold Highgate liable for the debts of its principal.

3. Detroit Thermal Did Not Comply With the Steam Contract's Non-Assignment Clause Requiring the Customer's Prior Approval.

Even if all of Detroit Thermal's other claims are accepted, the trial court erred in imposing liability because the Steam Contract contained an unambiguous non-assignment clause with which Detroit Thermal failed to comply.

Parties to a contract may lawfully require consent as a condition precedent to assignment of the contract. *Hy King Associates, Inc v Versatech Mfg Indus, Inc*, 826 F Supp 231, 238-239 (ED Mich, 1993); *Kaczmarek v La Perriere*, 337 Mich 500, 504-506; 60 NW2d 327 (1953). "A

contractual right can be assigned unless…assignment is validly precluded by contract." Restatement Contracts 2d, § 317(2)(c). In *Hy King Associates*, an individual, King, formed a corporation and contracted with defendant Versatech to act as its sales representative. King retired and transferred his shares to another individual who continued operating the corporation as the sales representative but eventually sued Versatech, claiming various notice and termination rights under the contract. Dismissing the suit, Judge Gadola held that defendant had no obligation to the plaintiff because the contractual non-assignment clause had not been followed:

> …the agreement clearly and unambiguously declares that any assignment without defendant's written consent "shall be deemed null and void and of no effect." Clearly, defendant's liability in this case is predicated on an valid assignment of the agreement to plaintiff. Because the agreement was never assigned, defendant cannot be liable to plaintiff. [826 F Supp at 238-239].

Section 5.A of the contract in *Hy King Associates* provided that King "shall not assign or transfer this Agreement or any rights or obligations hereunder except with the prior written consent of [defendant]. Any attempt at assignment without such written consent shall be deemed null and void and of no effect." 826 F Supp at 238. Section 5.G, meanwhile, provided that the agreement "shall bind and inure to the benefit of the parties hereto or their assigns, <u>but shall be [assigned] by the agent only with the consent of the principal</u>." *Id* at 239 (emphasis added). As the court held, the language of those sections "is clear and unambiguous and must be construed against plaintiff as a matter of law, i.e., that there is no contractual relationship under the agreement between plaintiff and defendant." *Id*. "It is a basic rule of construction that a court cannot change the terms of an agreement. Nor can it supply material provisions absent from a clear and unambiguous writing." 826 F Supp at 239, *citing Purlo Corp v 3925 Woodward Ave*,

341 Mich 483; 67 NW2d 684 (1954) and *Giffels & Vallet v Edward C Levy Co*, 337 Mich 177; 58 NW2d 899 (1953).

Like the contract in *Hy King Associates*, the Steam Contract plainly and unambiguously provided that it "shall be binding upon the parties and their successors and permitted assigns," and that it "shall not be assigned by either party without the prior written consent of the other party and shall not be unreasonably withheld." DX F, p 4, ¶ 6 (emphasis added). Detroit Thermal purchased the Central District Steam System from Detroit Edison Company in early 2003. Tr 11/29/06, pp 31-33; *see also* MSD & Ex B, Kozar dep., p 5. It is undisputed that Highgate never consented to the assignment from Edison to Detroit Thermal. Tr 12/11/06, p 37. Nor is the non-assignment provision a mere technicality – upon questioning by the trial court, Kozar, Detroit Thermal's account executive, conceded that there was a value to utility customers Edison and Detroit Thermal in including such a provision requiring customer consent:

> THE COURT: I guess my question is if Edison sells their interest to you, why would anybody care about that assignment?
>
> A. The only logical reason I can think of is because we were new to the area and people were not as comfortable dealing with a new entity as opposed to a one hundred year-old entity such as Detroit Edison. [Tr 11/29/06, p 33].

Detroit Thermal cannot have it both ways. Highgate was not a signatory to the Steam Contract, yet Detroit Thermal succeeded in imposing liability on Highgate imposed under it. But Detroit Thermal must accept ***all*** the contract's terms – including the non-assignment clause, with which it undeniably failed to comply. In the end, Highgate simply cannot be liable to Detroit Thermal under the contract.

II. The Award of Nearly $100,000 Under the Early-Termination Clause Was Both Factually and Legally Erroneous.

Nearly one-third of Detroit Thermal's total damage claim was encompassed within Count V of its complaint, which sought $95,928 under the early-termination clause of the Steam Contract. Complaint ¶ 29-35. The trial court first denied Highgate's motion for summary disposition (and motion for reconsideration), then awarded Detroit Thermal that sum following trial. With each of those rulings, the court reversibly erred.

A. Standard of Review

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005) (citation omitted). Review is limited to the evidence that was presented to the trial court at the time of the motion. *Id*, *see also Pena v Ingham Co Rd Comm*, 225 Mich App 299, 313 & n 4; 660 NW2d 351 (2003).

A court's factual findings following a bench trial are reviewed for clear error and its conclusions of law are reviewed de novo. *Ligon*, __ Mich App at __; *Glen Lake-Crystal River Watershed Riparians*, 264 Mich App at 531.

Issues of contract interpretation present questions of law that are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Whether a contract term is an unenforceable penalty also is a question of law. *Moore v St Clair County*, 120 Mich App 335, 339; 328 NW2d 47 (1982).

B. The Termination Clause of the Contract Was Improperly Invoked, Given That It Was Detroit Thermal That Terminated the Contract.

The Steam Contract (which was drafted by Detroit Thermal's predecessor, Detroit Edison) provides:

5. Early Termination Charge

> If the Customers [sic] terminates the [S]team [Contract] prior to the end of the first five (5) years of the Agreement period, the Customer agrees to pay the Company an Early Termination Charge.
>
> ---
>
> If the Customer allows the [Steam] [C]ontract to automatically renew, and the Customer terminates service prior to the end of the renewal period, then the Customer will be responsible for Early Termination Charges. [DX F, p 3, ¶ 5 (emphasis added); *also* MSD & Ex A, ¶ 5].

In connection with its motion for summary disposition, Highgate attached indisputable evidence that the contract was terminated by Detroit Thermal, when it learned that Pontch Limited Partnership had surrendered the deed to GE. Phillip Marsalese, Detroit Thermal's Sales and Marketing Director, flatly admitted that at his deposition:

> Q: Okay. Who made the decision to terminate the Pontchartrain [Steam] Contract?
>
> A: DTLLC [Detroit Thermal LLC] management. MSD & Ex G, Marsalese dep, p 45; *see also* MSD & Ex F].

It is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Indeed, "[o]ne does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain, and enforces it for him after it is made." *Id* at 51-52, *citing* 15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17 (internal footnotes omitted). Even if one concludes (as the trial court did) that Highgate was a party to the Steam Contract, or otherwise obligated for the open account balance, there is simply no conceivable means by which it can also be held liable for the early-termination penalty of nearly $100,000 – the parties to the Steam Contract made that clause

operative only where the customer terminates, and even Detroit Thermal admits that Highgate did not terminate the agreement. At a minimum, the matter must be remanded for the trial court to excise from the judgment the $96,677.03 representing Detroit Thermal's claim under the early-termination clause. DX 13.[5]

C. The Clause Also Is Unenforceable As a Matter of Law As An Impermissible Penalty, Since Detroit Thermal Continued Selling Steam to the Hotel and Never Suffered Any Lost Sales Following the Change of Ownership.

Separately, the trial court also erred in awarding damages under the early-termination provision, which in this case constitutes an unenforceable penalty. A liquidated damages clause may not be enforced if it is an unreasonable penalty. *Watson v Harrison*, 324 Mich 16, 20; 36 NW 295 (1949). In determining whether an early-termination clause is a penalty, the court does not look to the parties' intent "but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter." *Id.* A liquidated damages provision is enforceable, provided that "the amount is reasonable in relation to the possible injury suffered and not unconscionable or excessive." *St Clair Medical, PC v Borgiel*, 270 Mich App 260; 715 NW2d 914 (2006), *citing UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998). The governing principle is one of

> …*just compensation* for the *loss* or *injury actually sustained*; considering it no greater violation of this principle to confine the injured party to the recovery of *less*, than to enable him, by the aid of the court to extort *more.* It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives *only* the *damages actually*

[5] This is not some mere technicality permitting Highgate to avoid paying Detroit Thermal amounts to which it is entitled. As is discussed in the next section, Detroit Thermal admits that the early-termination provision was intended to reimburse it its fixed costs that it otherwise would not recoup when a customer terminates early, Tr 11/29/06, p 51, and that it suffered no such losses here, because it simply kept supplying steam to the hotel after the deed was tendered. *Id* at 53.

> *sustained*. [*Curran v Williams*, 352 Mich 278, 283; 89 NW2d 602 (1958), *quoting Jaquith v Hudson*, 5 Mich 123, 133-135 (1858) (italics in original)].

Here, the amount that Detroit Thermal claimed and was awarded under the early-termination clause, bore no rational relation to the amount of harm, which was zero by Detroit Thermal's own admission. Detroit Thermal's own witness, Kozar, testified that the purpose of the early-termination clause is to allow Detroit Thermal to recover fixed costs that it would otherwise not recover when a customer terminates its contract early – which was not a consideration here, because Detroit Thermal simply continued to sell steam to GE after the latter was tendered the hotel deed by Pontch Limited Partnership. Tr 11/29/06, pp 47-49, 51-52 & DX M. (Highgate submitted similar testimony from Kozar in support of its motion for summary disposition. MSD & Ex B, Kozar Dep, p 52). In other words, Detroit Thermal picked up where it left off in selling steam, and an award of nearly $100,000 is an unconscionable windfall to it.

UAW-GM Human Resources Ctr demonstrates why the early-termination surcharge awarded here was an improper penalty. In *UAW-GM Human Resources Ctr*, the liquidated-damages clause in the room-rental agreement between the parties allowed defendant-hotel in the event of cancellation to collect from plaintiff liquidated damages equal to 65 percent of what plaintiff's total room, food and beverage revenue for the entire stay would have been – subject to defendant's promise to mitigate damages by making every effort to re-rent the facilities. 228 Mich App at 508-509. This Court viewed the liquidated-damage provision as reasonable when taken in its entirety, and remanded for the trial court to determine the amount of liquidated damages due. *Id* at 509.

In contrast, Detroit Thermal's 49-percent surcharge atop the unpaid steam bills cannot be deemed anything but a penalty. Detroit Thermal admits that the purpose served by the early-termination charge was absent here, because it simply continued supplying steam to the hotel

after Pontch Limited Partnership tendered the deed. DX M. Moreover, had the early-termination clause in this contract contained a duty-to-mitigate provision like the one that played so great a role in this Court's reasonableness determination in *UAW-GM Human Resource Ctr*, Detroit Thermal could not have black-boarded the $96,677 figure it laid out in DX 13 – it was able to mitigate any damages fully. The trial court erred reversibly both in denying Highgate's motion for summary disposition as to Count V of the Complaint, and in including the $96,677 early-termination amount in the judgment.

III. The Trial Court Erroneously Denied Highgate's Motion for Summary Disposition.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo; the record is reviewed in the same manner as the trial court to determine whether the moving party is entitled to judgment as a matter of law. *Scalise*, 265 Mich App at 10 (citation omitted). Review of a pretrial motion for summary disposition is limited to the evidence that was presented to the trial court at the time of the motion. *Id*, 265 Mich App at 10; *see also Pena*, 225 Mich App at 313 & n 4; *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 189-190; 729 NW2d 898 (2006).

B. There Was No Factual Question That Highgate Was Not a Party to the Steam Contract, and Could Not Be Liable Under It.

As discussed above, this matter should not even have gone to trial. Highgate's pretrial motion for summary disposition established that there was no genuine factual issue for trial as to whether it could be held liable for any debt to Detroit Thermal – either the $196,715 in steam charges or the $95,928 assessed under the early-termination clause. The trial court denied the motion:

> I think that there is a question of fact whether or not Highgate is a party to the contract. But particularly in view of the fact that somebody from Highgate signed the contract. [Tr 10/7/05, p 7; *see also* 10/7/05 Order].

The trial court's rationale shows a patent misunderstanding of the facts. Gannon, the signer of the Steam Contract for the customer, "Pontchartrain," made clear in his affidavit that he was never employed by Highgate, and that he signed on behalf of Pontch Limited Partnership, LLC. MSD & Ex C, Gannon Affidavit. Detroit Thermal responded to that indisputable factual assertion with only vague charges such as "all of Pontchartrain's employees were in actuality employees of Highgate." Response, p 7. Indeed, it even patently misrepresented on the crucial facts of Gannon's employment and authority, asserting falsely that "Gannon was an employee of Highgate at the time he executed the contract," because ¶ 5.2 of the Hotel Management Agreement provided that "all hotel employees shall be employees of [Highgate]." Response, p 2. Regardless of that isolated provision in the Management Agreement, Gannon in fact was never employed by Highgate, in any capacity.

A party may not create a genuine issue of material fact by merely asserting conclusory statements. *Rose v National Auction Group,* 466 Mich 453; 646 NW2d 455 (2002) (conclusory assertions regarding breach of duty). Once a properly supported motion for summary disposition is made under MCR 2.116(C)(10), a nonmovant who would have the burden of proof at trial (such as Detroit Thermal) may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *PT Today, Inc v Commissioner of the Office of Fin and Ins Svcs*, 270 Mich App 110; 715 NW2d 398 (2006) (citation omitted). The existence of a disputed fact must be established by admissible evidence. *Id*, citing MCR 2.116(G)(6). Here, Detroit Thermal entirely failed to respond to Highgate's properly supported motion with admissible documentary evidence

showing a genuine factual issue over Gannon's employment status – and thus, his supposed binding of Highgate to the steam debt. Summary disposition was erroneously denied.

Further, "[a]n exercise in semantics will not create a factual issue precluding summary disposition." *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244; 621 NW2d 450 (2000), *Camden v Kauffman*, 240 Mich App 389, 397; 613 NW2d 335 (2000). For the trial court to deny summary disposition because it found "a question of fact whether or not Highgate is a party to the contract," was simply an exercise in semantics, since the undisputed admissible evidence showed that Highgate was not. Further, it ignored that under Michigan law, agency agreements (like the Hotel Management Agreement) simply do not create rights in third parties. *Uniprop Inc*, 260 Mich App at 448-449. Because Detroit Thermal produced no admissible evidence sufficient to warrant trial on the issue of whether Highgate was a party to the contract, the trial court reversibly erred in denying Highgate's motion for summary disposition. Its judgment should be vacated, and judgment entered in favor of Highgate.

IV. Because the Judgment Was Improperly Entered, the Award of Case-Evaluation Sanctions Also Should Be Vacated.

A. Standard of Review

A trial court's decision to impose case-evaluation sanctions is reviewed de novo. *Rohl v Leone*, 258 Mich App 72; 669 NW2d 579 (2003).

B. Correction of the Judgment Requires Reversal of Case-Evaluation Sanctions.

In determining whether an award of sanctions under MCR 2.403 is appropriate, the relevant verdict against which the judge the case-evaluation award is the ultimate verdict that is left after appellate review is complete. *Hyde v Univ of Mich Bd of Regents*, 226 Mich App 511; 575 NW2d 36 (1997). The case-evaluation award here was for $150,000, which Highgate accepted and Detroit Thermal rejected. Based on that, and its award at trial, the trial court

included in the judgment case-evaluation sanctions in the amount of $17,472.32. However, correction by this Court of the erroneous rulings below should leave Detroit Thermal with a "verdict" of zero for purposes of MCR 2.403 – thereby requiring that the case-evaluation award be vacated, as well.

CONCLUSION/RELIEF REQUESTED

For the foregoing reasons, Highgate requests that the court's judgment be vacated and judgment entered in favor of Highgate. At a minimum, the trial court should be directed to remove from its judgment the $95,928, plus interest and other costs, attributable to the early-termination clause, which under no circumstances may be imposed upon Highgate.

Respectfully submitted,

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