STATE OF MICHIGAN

COURT OF APPEALS

GLENN S. MORRIS and GLENN S. MORRIS TRUST,

Plaintiffs/Counter Defendants-Appellees,

v

R. JUDD SCHNOOR and MADCAP ENTERPRISES, L.L.C., substituting for MORRIS, SCHNOOR & GREMEL, INC.,

Defendants/Counter Plaintiffs/Third Party Plaintiffs,

v

MORRIS INSURANCE AGENCY,

Third Party Defendant,

and

DAVID W. CHARRON and CHARRON & HANISCH, P.L.C.,

Appellants.

UNPUBLISHED
May 29, 2014

No. 315006
Kent Circuit Court
LC No. 07-006441-CR

GLENN S. MORRIS,

Plaintiff-Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., CHARRON & HANISCH, P.L.C., and DAVID W. CHARRON,

Defendants,

No. 315007
Kent Circuit Court
LC No. 09-001878-CB

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,

Appellant.

MORRIS, SCHNOOR & GREMEL PROPERTIES, L.L.C.,

Plaintiff-Appellee/Cross-Appellant/Cross-Appellee,

v

No. 315702
Kent Circuit Court
LC No. 09-011842-CB

MORRIS, SCHNOOR & GREMEL, INC., and DAVID W. CHARRON,

Defendants,

and

CHARRON & HANISCH, P.L.C.,

Defendant Cross-Appellee/Cross-Appellant,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,

Appellant/Cross-Appellee.

GLENN S. MORRIS,

Plaintiff-Appellee/Cross-Appellant/Cross-Appellee,

v

No. 315742
Kent Circuit Court
LC No. 09-001878-CB

MORRIS, SCHNOOR & GREMEL, INC., and DAVID W. CHARRON,

Defendants,

and

CHARRON & HANISCH, P.L.C.,

Defendant Cross-Appellee/Cross-Appellant,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,

Appellant/Cross-Appellee.

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

In **Docket No. 315006**, attorneys David W. Charron (Charron) and Charron & Hanisch, P.L.C.,[1] appeal as of right the entry of an order finding them in civil contempt for violation of the trial court's August 22, 2008, order precluding the transfer of the business assets of their client, defendant Morris, Schnoor & Gremel, Inc.

In **Docket Nos. 315007, 315702, and 315742**, New York Private Insurance Agency, P.L.C. (NYPIA), appeals as of right the entry of judgments against it for violation of the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.* NYPIA specifically contends the entry of the judgments to be in error premised on (1) a violation of due process because NYPIA was a nonparty, previously dismissed from the litigation, (2) the lack of standing of plaintiffs, Glenn S. Morris (Morris) and Morris, Schnoor & Gremel Properties, L.L.C. (MSG Properties), because they were not creditors of defendant Morris, Schnoor & Gremel, Inc. (MSG), and (3) NYPIA's status as a good-faith purchaser that took for value.

Morris and MSG Properties and defendant Charron & Hanisch, P.L.C., have filed cross appeals in **Docket Nos. 315702 and 315742**. On cross-appeal, Morris and MSG Properties challenge (1) the trial court's dismissal of claims against Charron in his individual capacity, (2) the trial court's refusal to impose monetary sanctions against Charron & Hanisch and MSG for their violation of the UFTA, (3) the dismissal of claims against Charron & Hanisch, NYPIA, MSG, and Charron based on the trial court's determination that Morris lacked standing to assert

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[1] At times, the trial court and parties refer to the law firm of Charron & Hanisch as "C&H."

the claims, and (4) the trial court's dismissal of NYPIA as a party defendant. In turn, Charron & Hanisch cross-appeal (1) the trial court's factual determination that Charron & Hanisch and NYPIA were debtors of Morris and MSG Properties under the UFTA, (2) the trial court permitting Morris to initiate an action under the UFTA despite Morris's failure to qualify as a creditor of MSG, (3) the trial court's decision to permit Morris to bring an action under the UFTA as an assignee of a debt instrument without proof that Morris had also been commensurately assigned a UFTA cause of action by the assignor of the debt instrument, and (4) the trial court's factual determination that MSG, Charron & Hanisch, and NYPIA engaged in a fraudulent transfer of MSG's assets under the UFTA. We affirm.

I. HISTORICAL BACKGROUND

The underpinnings of this appeal arose in conjunction with a circuit court action (Lower Court Case No. 07-06441-CR), involving efforts by Glenn S. Morris to seek the corporate dissolution of MSG due to a falling out that had occurred between Morris and his partner, R. Judd Schnoor (Schnoor). MSG was engaged in the sale of "different forms of insurance." Morris and Schnoor were equal partners, each owning 50 percent of the stock of MSG.[2]

While the 2007 case remained pending, Morris initiated a complaint against MSG, Charron, and NYPIA on February 20, 2009 (Lower Court Case No. 09-001878-CB). The filing of this complaint was consistent with the concerns expressed by the trial court that the 2007 pleadings failed to directly assert or include claims of fraudulent transfer. In his initial 2009 complaint, Morris alleged counts of: (a) fraudulent transfer, (b) commercially unreasonable sale, (c) fraud, and (d) conversion. Morris asserted, as the factual basis for his fraudulent transfer claim, that Charron & Hanisch effectuated a private sale of its lien interest in MSG's assets to NYPIA, a corporation formed on November 7, 2008, for $395,000, which reflected the value of the indebtedness owed by MSG to Charron & Hanisch for attorney fees incurred for legal services between July and November 2008. It is this transfer of assets that comprises the primary issue underlying the litigation for the appeals.

While the various motions for summary disposition were pending on Morris's 2009 complaint, MSG Properties filed a verified complaint (Lower Court Case No. 09-011842-CB) against MSG, Charron, Charron & Hanisch, and NYPIA. MSG Properties brought claims of: (a) fraudulent transfer, (b) commercially unreasonable sale, and (c) conversion. MSG Properties alleged that its assets were transferred to MSG to pay for leasehold improvements to property leased by MSG from the Promenade of Rockford, L.L.C. ("Promenade"), which was owned by Schnoor and Morris. In October of 2006, MSG executed promissory notes to secure the repayment of the transferred funds, including the execution of three promissory notes to MSG Properties. After the notes went into default, the repayment of the funds was rendered impossible following the sale of MSG's assets to Charron & Hanisch and the subsequent transfer to NYPIA. According to MSG Properties, these actions were taken with the intent to avoid a legitimate financial obligation and to defraud MSG Properties.

[2] Morris's stock interest in MSG was held by the Glenn S. Morris Trust.

II. CONTEMPT PROCEEDINGS

For the first issue on appeal, Charron and Charron & Hanisch contest, as non-parties, the trial court's holding of them in civil contempt for their liquidation of the assets of MSG, in violation of the August 22, 2008, injunctive order. The disputed order provided: "IT IS FURTHER ORDERED that Defendant R. Judd Schnoor shall not transfer assets of Morris, Schnoor & Gremel, Inc., outside the ordinary course of business without authorization from the Court." Charron and Charron & Hanisch contend that the injunctive order was applicable only to Schnoor, because MSG, Charron, and Charron & Hanisch were not named or included in the order's restrictions. Charron and Charron & Hanisch also take issue with any determination by the trial court that Schnoor actually violated the court order, asserting the lack of any evidence suggesting that Schnoor actively participated or had involvement in the selling of MSG's assets to NYPIA. A particular and repetitive point of contention in the lower court by Charron was the legitimate transfer of a security interest in MSG's assets for outstanding attorney fees in May 2008, months before the injunctive order was issued, and that the subsequent sale and liquidation of those assets was effectuated by Charron & Hanisch, an entity not identified or named in the injunctive order.

Charron and Charron & Hanisch further dispute the intended duration of the injunctive order and the failure of the trial court and opposing litigants to take timely action after having learned of the asset transfer and sale, allowing the proceedings to continue for years before completion of the contempt proceedings. It is implied that, had the opposing litigants and trial court acted in a timely manner, any improper conduct could have more readily been corrected and reversed, with delay only further complicating matters and increasing the potential for damages to be incurred.

The decision of a trial court to hold a party or individual in contempt is reviewed for an abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). This Court also reviews "a trial court's issuance of a contempt order for an abuse of discretion." *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). A trial court's factual findings are reviewed for clear error and questions of law are reviewed de novo. *Id*. "The abuse of discretion standard recognizes that there will be circumstances where there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Porter v Porter*, 285 Mich App 450, 454-455; 776 NW2d 377 (2009) (citation omitted).

In finding MSG, Charron, and Charron & Hanisch in contempt, the trial court referenced testimony and documents produced at trial, which established Charron's and Schnoor's knowledge of the order's existence and its content, in addition to the presence of both Schnoor and Charron in the courtroom when the order and its purpose were discussed. The trial court rejected any argument pertaining to the "infirmity of the order" based on the demonstrated understanding of Charron and Schnoor with regard to "the injunctive force of the order." The trial court also rejected any claim that MSG "should be absolved of responsibility because it simply had all of its assets seized by a secured creditor," explaining:

> To be sure, a debtor that has its assets seized by a secured creditor in a true arm's length transaction may be able to plead lack of culpability because its role in the

> asset transfer was wholly passive. But here, where the record is replete with evidence of Judd Schnoor's involvement in the concerted effort to find a friendly buyer for the assets of MSG, the Court cannot countenance a claim that MSG was merely a victim of its secured creditor's predation. Instead, the proof of Judd Schnoor's contempt of the court order of August 22, 2009 [sic], is "clear and unequivocal," so the Court necessarily concludes that MSG – through its principal, Judd Schnoor – acted in contempt of the court order.

Based on the evidence, the trial court concluded the case presented "a textbook example of contempt of court by Attorney Charron, who recognized that a court order prohibited all transfers of MSG's assets outside the ordinary course of business, yet took actions on behalf of his client (MSG) and his own law firm that did precisely what the court order forbade. That is, Attorney Charron siphoned all of the assets of MSG through his law firm and passed them on to NYPIA."

A. DISTINGUISHING CIVIL AND CRIMINAL CONTEMPT

Initially, given the trial court's decision to impose civil contempt sanctions, it is useful to distinguish the purposes underlying civil and criminal contempt. In *Porter*, 258 Mich App at 455-456 (citations and quotation marks omitted), this Court explained:

> Criminal contempt differs from civil contempt in that the sanctions are punitive rather than remedial. Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. Criminal contempt is intended to punish the contemnor for past conduct that affronts the dignity of the court. Thus, when a court exercises its criminal contempt power it is not attempting to force the contemnor to comply with an order, but is simply punishing the contemnor for past misconduct that was an affront to the court's dignity. On the other hand, if the court employs its contempt power to coerce compliance with a present or future obligation or to reimburse the complainant for costs incurred by the contemptuous behavior, including attorney fees, the proceedings are civil. Thus, there are two types of civil contempt sanctions, coercive and compensatory. Nevertheless, civil sanctions primarily intended to compel the contemnor to comply with the court's order may also have a punitive effect. If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil. . . . The order in such a case is not in the nature of a punishment, but is coercive, to compel him to act in accordance with the order of the court.

As recognized by this Court in *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 623-624; 821 NW2d 896 (2012) (citations omitted):

> [A] trial court has the inherent and statutory authority to enforce its orders. Further, "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." And the validity of an order is determined by the courts, not the parties.

Further, "'A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal.'" *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004), quoting *In re Contempt of Dudzinski*, 257 Mich App at 111.

MCL 600.1711(2) provides, "When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." Contempt proceedings are governed by MCR 3.606(A)(1). "A finding of willful disobedience of a court order is *not* necessary for a finding of civil contempt." *Davis*, 296 Mich App at 625, citing *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501; 608 NW2d 105 (2000) (emphasis in original).

B. CIVIL CONTEMPT RULING

Ostensibly, Charron and Charron & Hanisch's initial challenge is to the authority of the trial court to hold them, as non-parties, in contempt of court premised on Schnoor being the only individual or entity specifically ordered restrained from transferring the assets of MSG. Contrary to this position, MCR 3.310(C)(4) addresses the "form and scope of [an] injunction," and provides, in relevant part:

> An order granting an injunction or restraining order . . . is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. [Emphasis added.]

There exists no reasonable contention, given the status of Charron and Charron & Hanisch as the attorneys for both Schnoor and MSG throughout the underlying litigation and at all times relevant to the issuance of the injunctive order of August 22, 2008, that they would not be bound by the restrictions contained within that order. The record also establishes that Schnoor was the sole principal and owner of MSG, consistent with the trial court's denial of Morris's request for dissolution and the entry of an order requiring Morris to sell his shares in MSG to Schnoor. Similarly, David Charron was a principal of Charron & Hanisch. "[O]fficers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully." *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 17-18; 779 NW2d 237 (2010). Throughout the proceedings it was evident that MSG and Charron & Hanisch, as corporate entities, were co-extensive with their owners and principals, Schnoor and Charron, respectively, permitting the trial court to impute knowledge to the corporate entities premised on the admissions of their officers. See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 214; 476 NW2d 392 (1991) (citation omitted) ("[T]he combined knowledge of employees may be imputed to a corporation.")[3] In addition:

[3] The *Upjohn* Court affirmatively cited the "standard for imput[ing] collective knowledge" as elucidated in *Copeman Laboratories Co v Gen Motors Corp*, 36 F Supp 755, 762 (ED Mich, 1941):

> In general, "the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation's stock." However, the courts can ignore this corporate fiction when it is invoked to subvert justice. [*Lakeview Commons v Empower Yourself*, 290 Mich App 503, 509; 802 NW2d 712 (2010), quoting *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).]

With regard to attorneys Charron and Charron & Hanisch, it is also recognized,

> in civil cases, a client is bound by an attorney's actions and inactions as long as the attorney's conduct was within the scope of the attorney's authority. See *Everett v Everett*, 319 Mich 475, 482; 29 NW2d 919 (1947), quoting *Jones v Leech*, 46 Iowa 186, 187 (1877) ("'The law regards the neglect of an attorney as the client's own neglect and will give no relief from the consequences thereof.'"); *White* [*v Sadle*, 350 Mich 511,] 522; 87 NW2d 192 [1957] (in Michigan, an attorney's neglect is generally attributable to his client); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 224; 600 NW2d 638 (1999) ("A party is responsible for any action or inaction by the party or the party's agent."). See also *Prate v Freedman*, 583 F2d 42, 48 (CA 2, 1978) ("In our legal system, an attorney is his client's agent and representative. . . . Like any other principal, a client may be bound by the acts of his agent, acting within the scope of his authority."). [*Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 104; 666 NW2d 623 (2003).]

The record demonstrates that both Charron and Schnoor were present in the trial court when imposition of the injunction was discussed, and that both Charron and Schnoor acknowledged under oath an awareness of the injunctive proscriptions, with Charron acknowledging specifically that as of October 14, 2008, he was aware and had notice of the trial court's written order and its legitimacy. Charron suggests that the May 22, 2008, grant of the security interest by MSG to Charron & Hanisch, having occurred before the issuance of the injunctive order, belies any possible violation of that order. While superficially accurate, focus on the initial transfer of the security interest is simply a red herring to avoid the indisputable sale of MSG's assets in November 2008, three months after the entry of the injunctive order, by Charron & Hanisch to NYPIA. By emphasizing only the initial date of transfer, Charron & Hanisch ignores the activity that occurred during the interim time period between the issuance of the order and the effectuation of the asset sale, which demonstrates a concerted effort to find a

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> When a person representing a corporation is doing a thing which is in connection with and pertinent to that part of the corporation business which he is employed, or authorized or selected to do, then that which is learned or done by that person pursuant thereto is in the knowledge of the corporation. The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing acquire, while acting under and within the scope of their authority. [*Upjohn Co*, 438 Mich at 214.]

friendly buyer and to protect Schnoor's ability to continue his employment, resulting in a transaction that was not at "arms-length."

The injunctive order specifically prohibited Schnoor from transferring the assets of MSG "outside the ordinary course of business without authorization from the Court." The language of MCR 3.310(C)(4) rendered the injunctive proscription "binding" on not only Schnoor, but also any of the "officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them" with "actual notice" of the order. Schnoor and Charron admitted knowledge of the order and its legitimacy before the November 2008 transfer to NYPIA. Their knowledge as officers is readily imputed to their respective agencies and corporations. The existence of the injunctive order, the acknowledged awareness of the order's content, and the binding effect of the order on Schnoor and Charron, by name and by professional relationship, rendered it necessary to receive "authorization from the Court," before effectuating the November 2008 asset sale. Charron, in his October 14, 2008, e-mail belies his contention at trial that he respected the trial court's order. In the e-mail, Charron clearly recognizes an obligation to inform the trial court of a transfer, yet seeks to differentiate his actions based on whether they were undertaken as a secured creditor versus as an attorney for MSG. Such a suggestion is disingenuous at best, given that Charron elected to wear both hats, that of creditor and attorney, simultaneously. Further, Charron's active participation in seeking to identify a friendly buyer and his denial of a sale of the assets in violation of the injunction when questioned in December of 2008, are indicative of the inability to separate his voluntary assumption of both roles.

Charron's suggestion that Schnoor was not an active participant and did not benefit from the transfer also lacks merit. Schnoor was the sole owner of MSG. While he may not have authored many of the e-mails suggesting various options or actions to avoid the injunctive order, he was a recipient and, therefore, cannot legitimately deny knowledge now. He testified, under oath, that he was aware of the existence of the injunctive order, and that Charron was acting as his attorney during the relevant time period. Contrary to Charron's assertion, Schnoor did benefit, as the asset transfer and sale resulted in the dissolution or avoidance of extensive debts, in addition to securing his future employment. Even if the Court were to accept the assertion that Schnoor was a passive recipient or actor in this drama, "[a] finding of willful disobedience of a court order is *not* necessary for a finding of civil contempt." *Davis*, 296 Mich App at 625 (emphasis in original, citation omitted).

It is also suggested that because Charron & Hanisch was the only true beneficiary of the transaction, this demonstrates a lack of collusion and the absence of any evidence of an attempt to avoid the injunctive restraints. The assertion that only Charron & Hanisch benefited from the transaction is irrelevant with regard to whether the injunctive order was violated. Proof of the receipt of a benefit is unnecessary to show violation of the order. Further, the argument that Charron & Hanisch was the only beneficiary of the transfer, thereby eliminating the possibility of collusion or evasion regarding the injunction, is eviscerated by Charron's admission to authoring an e-mail on October 14, 2008, indicating to the various recipients, "There are two ways we can handle this. We can either tell [Judge] Yates about it or we can fly under the radar." Charron further acknowledged at trial, while under oath, that this same e-mail indicated his knowledge of the injunctive order, "[a]nd [that] the only mechanism is either that the – something's not subject to the order or that there's an ordinary business exception," implying his

understanding of the necessity for court approval of any action to be taken regarding MSG's assets.

Charron further contends that the discussion of the injunction in August 2008 suggests that its effective duration was only intended for a two-week period. Even assuming this assertion to be true, Charron admitted that by mid-October 2008 he had received a copy of the written order and learned that it did not contain a time frame restriction. As such, Charron was on notice and carried the burden or onus of seeking clarification if he believed the written order did not comport with the trial court's oral ruling. "A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Kirby v Mich High School Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998). As recognized by this Court in *In re Contempt of Dudzinski*, 257 Mich App at 111:

> A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal. Allowing such behavior would encourage noncompliance with valid court orders on the basis of misguided subjective views that the orders are wrong. There exists no place in our justice system for self-help.

Further, given the well-recognized precept that a court "speaks only through its written orders and judgments, not through its oral pronouncements," *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009), it is disingenuous of Charron, as an attorney, to suggest that he gave greater weight and priority to the trial court's verbal statements than to the written order.

Charron's argument that the time lapse between the trial court and litigants learning of the sale of MSG's assets in December 2008 and the conclusion and ruling of the contempt proceeding has impacted damages suggests a failure to understand both the trial court's contempt ruling and the reasoning followed in determining damages. Charron was held liable for "attorney fees and costs . . . incurred in the contempt trial." He was not responsible for attorney fees and costs incurred from the sale of the assets to the contempt proceeding. Hence, neither what transpired during this interim period nor the duration between events impacted the sanction. Similarly, the sanction imposed against MSG and Charron & Hanisch is calculated to reflect "one-half the value of MSG's assets that were seized by C&H and then transferred through the asset purchase by NYPIA that took place on November of 2008." Hence, there was no accumulation or increase attributable to the amount of the sanctions based on the time lapse between the asset sale and the conclusion of the contempt hearing.

In a throw-away comment at the outset of the appellate reply brief, Charron and Charron & Hanisch suggest that this did not comprise a contempt action but was rather a tort action, with a judgment imposed without sufficient evidence of damages or due process. First, any complaint with regard to the provision of only "rudimentary due process" is unavailing because "a civil contempt proceeding only requires rudimentary due process, i.e., notice and an opportunity to present a defense." *In re Moroun*, 295 Mich App 312, 331-332; 814 NW2d 319 (2012) (citations omitted). Second, the trial court repeatedly informed the litigants that it would conduct a contempt hearing pertaining to violations of the August 22, 2008, injunctive order concurrent with the trial of the UFTA claims. Third, the contention regarding the proper characterization of

the action and right to due process constitutes mere hyperbole, as Charron and Charron & Hanisch provide no specific argument or legal citation in support of the comment. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009). The gravamen of the issue before the trial court is clearly one of contempt for the trial court's order of August 22, 2008, and thus this Court need not be concerned by Charron and Charron & Hanisch's attempt to characterize the action as one in tort.

C. ORDINARY COURSE OF BUSINESS EXCEPTION

In the second issue on appeal, Charron and Charron & Hanisch contend that the trial court's injunction was not violated because the granting of the security interest and subsequent foreclosure and sale of the assets was "in the ordinary course of business," as permitted by the language of the injunctive order. They imply that MSG owed substantial attorney fees to Charron & Hanisch for work performed and that the debt was incurred in the ordinary or routine course of representing MSG's business interests. We find that Charron and Charron & Hanisch improperly focus, with regard to violation of the injunction, on the initial grant of the security interest in May 2008, rather than on the subsequent foreclosure and sale of the assets in November 2008.

To preserve an issue for appellate review, it must be raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Charron and Charron & Hanisch asserted in the lower court that the transfer of MSG's assets and their subsequent sale to NYPIA were in the ordinary course of business, but this argument was rejected by the trial court in its ruling of contempt. The issue is, therefore, preserved for appellate review. For the first time on appeal, however, Charron and Charron & Hanisch assert as an issue the trial court's misuse of its contempt power. "Issues raised for the first time on appeal are not ordinarily subject to review in a civil case." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007) (citation omitted). This aspect of the issue is not technically preserved.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App at 671. Questions of law are reviewed de novo in contempt proceedings. *Porter*, 285 Mich App at 455. "We review a trial court's findings in a contempt proceeding for clear error, and such findings must be affirmed if there is competent evidence to support them." *In re Kabanuk*, 295 Mich App 252, 256; 813 NW2d 348 (2012). When determining if competent evidence exists to support the contempt findings, this Court does not weigh the evidence or the credibility of the witnesses. *Id*. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

The phrase "ordinary course of business" is defined by Black's Law Dictionary (9th ed), as "[t]he normal routine in managing a trade or business." Charron & Hanisch assume, because the debt owed was not disputed, that the subsequent grant of the security interest and foreclosure

must have occurred within the ordinary course of business. The determination of whether a transaction occurred in the ordinary course of business requires a more detailed investigation.

As a starting point, the concept of what constitutes the ordinary course of business is explained in bankruptcy law. In dealing with preferential treatment of creditors, there is a recognized exception identified as the "ordinary course of business" defense, as contained within 11 USC 547(c)(2). To use the ordinary course of business defense, it must be demonstrated that the challenged transfer was:

> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (C) made according to ordinary business terms[.] [*Id.*]

In making the determination of what constitutes "ordinary" in defining a transaction, several factors are considered, including: (a) the timing of the transaction, (b) the amount and manner of payment, and (c) the circumstances of the transaction. *Yurika Foods Corp v United Parcel Serv*, 888 F2d 42, 45 (CA 6, 1989).[4] A circumstance to be considered is "whether the debtor or creditor engaged in any unusual collection or payment activity." *Sulmeyer v Suzuki*, 25 F3d 728, 732 (CA 9, 1994), amended 94 Cal Daily Op Serv 4786; 94 DAR 8770 (9th Cir Cal, 1994). The grant of the security interest by MSG to Charron & Hanisch was a unique circumstance having never previously occurred between these entities. While it is not unusual for an attorney to take a secured interest from a client to assure payment of fees incurred, "[w]hether a transfer was taken in the 'ordinary course' requires a consideration of the pattern of payments engaged in by the debtor and the insider prior to the transfer challenged. Courts must engage in a 'peculiarly factual' analysis." *In re DCT, Inc v Colletta*, 295 BR 236, 239 (ED Mich, 2003) (citations omitted). Certain factors have been delineated in determining whether the criteria have been met to demonstrate whether a transfer was "made in the ordinary course of business or financial affairs of the debtor and the transferee," and include:

> (1) the length of time that parties have been engaged in this manner of dealing with each other (regularity of this business practice); (2) whether the contested payments exceeded the amounts typically paid; (3) whether the payments were remitted in a manner that differed from earlier payments; (4) whether there appears any unusual action by either the debtor or the creditor to collect or pay on the debt; and (5) whether the creditor did anything to obtain an advantage, such as receive additional security, in consideration of the debtor's declining financial situation. [11 USCA 547(c)(2)(B) (2000); *In re Pillowtex Corp*, 427 BR 301, 307 (Bankr D Del, 2010).]

[4] This Court is not bound by federal decisions, but may use such rulings for guidance. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 410 (1997).

In the context of the factual history involving MSG and Charron & Hanisch, there is no indication of the previous demand or receipt of a security interest for payment of overdue attorney fees. Rather, the record suggests that MSG made cash payments to Charron & Hanisch, albeit on an irregular schedule. Charron & Hanisch alleged an outstanding debt by MSG for legal services of approximately $400,000. Yet, rather than receive a security interest in MSG's assets equivalent to the amount owed, Charron & Hanisch took a security interest in all of MSG's assets. Thus, the receipt of security by Charron & Hanisch was substantially in excess of the amount owed. Given the long-standing history of representation by Charron & Hanisch of MSG, it cannot be reasonably suggested that the law firm was unaware of the financial difficulties being encountered by MSG, as they were a significant aspect of the ongoing litigation as demonstrated by MSG and Schnoor's assertions that funds were lacking to continue to pay the promissory note with Morris. Charron also asserted throughout the proceedings in the lower court that the taking of the security interest was a means to assure his law firm's continued ability to represent MSG. If this is construed as a "retention agreement," it must be recognized, "retention payments [are], by their very nature unusual and out of the ordinary" and render the "ordinary course exception" inapplicable. *In re DCT, Inc*, 295 BR at 239.

Similarly, in determining what constitutes a fraudulent transfer under the UFTA, MCL 566.34(1)(b)(*ii*) states:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor . . . [i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

In turn, MCL 566.33(1) provides "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied [and] does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." Because the UFTA does not define "reasonably equivalent value," MCL 566.31, the use of that term can be interpolated from bankruptcy proceedings, which have found that a determination of "reasonably equivalent value" necessitates (a) a finding regarding whether the debtor actually received value, and (b) whether what the debtor relinquished is reasonably equivalent to what was received in return. *Grochocinsky v Reliant Interactive Media Corp*, 322 BR 836, 844 (ND Ill, 2005). In other words, "the test utilized to determine 'reasonably equivalent value' requires the court to determine the value of what was transferred and compare that to the value the debtor received." *Id.*, citing *Barber v Golden Seed Co*, 129 F3d 382, 387 (CA 7, 1997). "Whether 'reasonably equivalent value' has been given is a question of fact that depends on the circumstances surrounding the transaction. The factors utilized to determine reasonably equivalent value are: (1) whether the value of what was transferred is equal to the value of what was received; (2) the market value of what was transferred and received; (3) whether the transaction took place at arm's length; and (4) the good faith of the transferee." *Grochocinsky*, 322 BR at 844, citing *Barber*, 129 F3d at 387. Given the uniqueness of the grant of the security interest between these

two parties and the excess value granted by the security interest as encompassing all of MSG's assets, we find that the transfer was extraordinary and not in the ordinary course of business.

D. PRIOR DISCLOSURES PRECLUDING CONTEMPT

In related contentions, Charron and Charron & Hanisch challenge the determination of contempt of the trial court's injunctive order premised on the disclosure of the existence of the security interest through Schnoor's testimony at his earlier contempt hearings and the filing of a public document, in conjunction with the alleged discrepancy between the trial court's written ruling evidencing no specific duration for the injunctive order and the oral discussion of the order on the record suggesting a limited duration of enforcement. As acknowledged by Charron and Charron & Hanisch, a trial court "speaks only through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App at 678. Hence, any verbal reference by the trial court pertaining to discussions of duration for the order or clarity of the order and its intended scope are irrelevant given the actual wording of the order. This is particularly disingenuous given Charron's acknowledgement of his receipt of the written order and his comprehension of its legitimacy approximately one month before Charron & Hanisch foreclosed on the assets and sold them to NYPIA. There can be no legitimate argument by Charron and Charron & Hanisch that they were unaware of the trial court's intent in issuing the injunctive order to preserve the assets of MSG to assure payment on various promissory notes, which were the centerpieces of the litigation.

Charron and Charron & Hanisch again argue that the delay between the learning of the asset transfer and the contempt ruling should somehow preclude liability. This argument is misleading, as the timing of these events is irrelevant since any damages awarded were determined as of the date of the sale of the assets and pertained only to the costs and fees incurred for the contempt portion of the proceedings. Charron and Charron & Hanisch again assume the stance of blaming the victim rather than explaining why neither the law firm nor MSG volunteered to unwind or rescind the transaction with NYPIA. We assume that such a resolution was untenable given the position taken in the litigation that contempt had not occurred and that NYPIA was a good faith purchaser for value. To have acknowledged that the transaction should be reversed would presumably suggest a violation of the UFTA and the incurrence of liability and damages under that alternative theory.

E. ABUSE OF AUTHORITY AND THE PURPOSE OF CIVIL CONTEMPT

It is also argued that the trial court abused its contempt powers by assuring collectability rather than merely seeking to obtain respect for its earlier ruling and order. Charron and Charron & Hanisch appear to misconstrue the purpose and use of civil contempt as distinguished from criminal contempt. The United States Supreme Court has distinguished criminal contempt from civil contempt in terms of the character and purpose of the punishment imposed. Specifically:

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between [criminal and civil contempt] cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the

> authority of the court. [*Gompers v Bucks Stove & Range Co*, 221 US 418, 441; 31 S Ct 492; 55 L Ed 797 (1911).][5]

Our Supreme Court has similarly indicated:

> If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order. The order in such a case is not in the nature of a punishment, but is coercive, to compel him to act in accordance with the order of the court. If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by fine or imprisonment, or both; and this is by way of punishment. In one case the private party is interested in the enforcement of the order, and, the moment he is satisfied, the imprisonment ceases. On the other hand, the State alone is interested, in the enforcement of the penalty, it being a punishment which operates *in terrorem*, and by that means has a tendency to prevent a repetition of the offense in other similar cases. [*In re Contempt of Dougherty*, 429 Mich 81, 95-96; 413 NW2d 392 (1987) (citations and quotation marks omitted, emphasis in original).]

"Thus, a court has three sanctions available to remedy or redress the contemnor's contemptuous behavior: (1) criminal punishment to vindicate the court's authority, (2) coercion, to force compliance with a court order, and (3) compensatory relief for the complainant." *In re Contempt of Rochlin*, 186 Mich App 639, 647; 465 NW2d 388 (1990), citing *In re Contempt of Dougherty*, 429 Mich at 98. Of importance in determining the type of contempt being imposed and the nature of the remedy, our Supreme Court specified:

> [W]here there is only a past duty to obey the court order, or a present duty, but only a past violation of the order, a coercive sanction is not permissible. It is not a proper sanction because there is nothing to coerce. In fact, defendant is, at the time of the hearing, either in actual compliance with the order, or under no present duty to comply. In such a case the court is limited to imposing a criminal sanction, after a properly conducted criminal contempt proceeding, or issuing a civil contempt order compensating the complainant for actual losses. [*In re Contempt of Dougherty*, 429 Mich at 100.]

In the circumstances of this case, the trial court specifically declined to invoke the type of contempt that would lead to incarceration, finding, "this contempt proceeding is in the nature of a civil action against the alleged contemnors for compensation for the loss flowing from the alleged violation of the Court's order of August 22, 2008."

Addressing the implication that the sanctions imposed for civil contempt are not an appropriate form of relief, we consider a federal decision, *Electrical Workers Pension Trust*

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[5] See discussion in *In re Contempt of Rochlin*, 186 Mich App 639, 644; 465 NW2d 388 (1990).

Fund of Local Union #58, IBEW v Gary's Electric Serv Co, 340 F3d 373 (CA 6, 2003), which discussed civil contempt sanctions:

> In our opinion, the sanction of civil contempt is more properly considered a compensatory remedy and an encouragement to comply with court orders. As we stated above, the objective of any contempt determination is to enforce the message that court orders and judgments are to be taken seriously. Moreover, judicial sanctions can be used not only to coerce compliance, but also to compensate the complainant. Thus, the sanction of civil contempt may include a fine designed to compensate . . . not only for the money . . . squandered but also for the money . . . diverted . . . and paid to other creditors. Thus, because this contempt proceeding is brought to compensate . . . for losses based on [the] failure to comply with the court's order and not as a medium for collecting the underlying judgment, it is not a collection action but a compensatory tool which expressly permits the use of monetary sanctions in this manner. [*Id.* at 385 (citations omitted).]

Based on the trial court's explication of the reason for its ruling, it is consistent with the purpose of civil contempt proceedings. *In re Contempt of Dougherty*, 429 Mich at 92-93.[6]

F. IMPROPER FACTUAL INFERENCES

Finally, Charron and Charron & Hanisch suggest the trial court "improperly inferred facts" by using information or communications obtained from an exchange that occurred on December 22, 2008, when counsel for Morris and MSG Properties approached the trial court based on rumors pertaining to the imminent sale of MSG's assets. Charron and Charron & Hanisch attempted to disqualify the trial court judge, alleging he engaged in ex parte communications with counsel for Morris. Notably, Charron participated by telephone in the exchange, and the trial court declined to recuse itself from further proceedings. A review of the record does not indicate that Charron & Hanisch followed the requisite protocol in seeking to disqualify the trial judge. See MCR 2.003(D); *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006).

Charron and Charron & Hanisch contend the trial court was precluded from considering the exchange and evidence resulting from this event in the determination of civil contempt because of the trial court's participation in these communications and the occurrence after the actual closing of the Article 9 asset sale. In reviewing the trial court's contempt ruling, it is clear that the basis for the trial court's finding of civil contempt was premised on evidence indicating the knowledge of Charron and Schnoor of the trial court's order before the foreclosure and sale

[6] We note that the argument of Charron and Charron & Hanisch regarding the use of civil contempt bears some similarity to issues raised in the recent decision of our Supreme Court in *In re Bradley*, 494 Mich 367; 835 NW2d 545 (2013), which addresses civil contempt under the auspices of MCL 600.1721 and will be discussed specifically in reference to the third issue on appeal.

of the security interest held in MSG's assets. In referencing the interaction of December 22, 2008, the trial court noted that Morris had raised concerns about the security of MSG's assets and that Charron's response suggested such concern was unfounded. Although the trial court indicated that Charron's responsive e-mail left a "false impression," the court indicated only that the e-mail demonstrated "Charron's view of the propriety of his firm's sale of the assets," not his contempt for the trial court's order. Further, it appears that Charron and Charron & Hanisch are confusing the issues. Although the trial court limited its determination on the UFTA issue to events that occurred up to and including the sale of the assets in November of 2008, no such restriction was necessary or implicit in the evaluation undertaken pertaining to contempt. As such, the finding of civil contempt was premised on the violation of the trial court's order precluding the transfer or dissolution of MSG's assets. The trial court's reference to the December 2008 exchange comprised merely an observation that Charron did not view his behavior as having been in violation of the order. Charron's subjective view of his behavior is irrelevant because, "A finding of willful disobedience of a court order is *not* necessary for a finding of civil contempt." *Davis*, 296 Mich App at 625 (citation omitted).

G. LIABILITY ALLOCATION

In the third issue on appeal, Charron and Charron & Hanisch contend the trial court erred in failing to allocate liability, pursuant to MCL 600.2957(1) and MCL 600.1721, in the award for civil contempt for Morris's wrongdoing in the solicitation of clients away from MSG.

To preserve an issue for appellate review, it must be raised before, addressed, or decided by the trial court. *Polkton Charter Twp*, 265 Mich App at 95. The issue of wrongdoing by Morris is preserved for appellate review, but the allegations pertaining to error by the trial court in failing to allocate liability are not preserved.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App at 671. Questions of law are reviewed de novo in contempt proceedings. *Porter*, 285 Mich App at 455. "We review a trial court's findings in a contempt proceeding for clear error, and such findings must be affirmed if there is competent evidence to support them." *In re Kabanuk*, 295 Mich App at 256. When determining if competent evidence exists to support the contempt findings, this Court does not weigh the evidence or the credibility of the witnesses. *Id*. "Statutory construction is a question of law subject to review de novo." *Vandonkelaar v Kid's Kourt, LLC*, 290 Mich App 187, 196; 800 NW2d 760 (2010). "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette*, 278 Mich App at 328.

The trial court determined, following various hearings, that there was no evidence to substantiate Schnoor's claims that Morris had improperly solicited clients from MSG. The trial court ruled on several occasions:

> Now, at the end of this saga that entailed years – rather than months – of wide-ranging discovery, the record reveals that the claims asserted in the counter-complaint are allegations full of sound and fury, signifying nothing.

* * *

> Mr. Morris's departure from MSG was acrimonious, and Mr. Morris achieved extraordinary success in obtaining clients upon his departure from MSG. This surely was galling to Mr. Schnoor, whom the Court cannot begrudge suspicions about the reasons for Mr. Morris's success. But there is no evidence – either direct or circumstantial – to support the theory that Mr. Morris achieved this success by impermissible means. Thus, the Court must grant summary disposition to Mr. Morris and his trust on MadCap's claims in counts two through five of the First Amended Counterclaim.
>
> * * *
>
> In the final analysis, the Court was – and remains – satisfied that the eyes-only access that was granted to MSG's counsel afforded MSG a full and fair opportunity to unearth all information that might lend credence to MSG's claim that Glenn Morris used improper methods to steal clients from MSG. The mere fact that that remarkably intrusive discovery yielded no evidence whatsoever of improper conduct means precisely what it appears to mean: There is no evidence to support the claims of MadCap that Glenn Morris acted improperly in building his client base at his new agency. Accordingly, the motion for reconsideration filed by MadCap must be denied.

Charron and Charron & Hanisch's ongoing assertion of wrongdoing is insufficient to change the factual determinations by the trial court.

Charron and Charron & Hanisch also argue the applicability of MCL 600.1721 and MCL 600.2957(1), which state, respectively:

> If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury. [MCL 600.1721.]

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304,[7] in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action. [MCL 600.2957(1) (footnote added).]

[7] Referring to MCL 600.6304 pertaining to multiple defendants.

In arguing the propriety of applying these statutory provisions, Charron and Charron & Hanisch cite to our Supreme Court's decision in *In re Bradley*, 494 Mich 367; 835 NW2d 545 (2013). Reliance on *In re Bradley* is unavailing, based on our Supreme Court's limitation regarding the use of this decision. Specifically:

> Our holding, however, should not be interpreted as constraining courts' inherent contempt powers. While our holding does constrain a court's statutory authority to order punishment in the form of compensation in a civil contempt proceeding against a governmental entity, our holding does not infringe on those powers of contempt that are inherent in the judiciary, as recognized in our Constitution and codified by the Legislature. Inherent in the judicial power is the power to prescribe acts that are punishable as contempt through fine or imprisonment, or both. This inherent judicial power to punish contempt, which is essential to the administration of the law, does not include the power to mete out certain punishments for contemptuous acts beyond those contempt powers inherent in the judiciary. Clearly, the punishment the Legislature authorized in MCL 600.1721, compensation for contemptuous misconduct, is not encompassed by the judiciary's inherent power to punish contempt. Because our holding only involves the GTLA's application to civil contempt petitions that seek indemnification damages under MCL 600.1721, it does not infringe on courts' inherent power to punish contempt by fine or imprisonment, or both. Moreover, our definition of "tort liability" does not encompass contempt proceedings that seek to invoke courts' inherent contempt powers; although those proceedings undoubtedly involve a noncontractual civil wrong, the sanction sought does not impose legal responsibility in the form of compensation for the harm done. [*Id.* at 394-396 (footnotes omitted).]

Based on the Court's explicit distinction between a contempt action premised in tort liability from that involving a trial court's "inherent power to punish contempt," the analysis is unavailing. *Id.*; see also *Electrical Workers Pension Trust Fund*, 340 F3d at 385.

Further, the trial court, in awarding damages, while not based on an attribution of fault, did take into consideration the diminished value or revenue available to MSG due to the migration of clients to Morris. The trial court's forecast of annual revenue for MSG at the time of the asset sale in November 2008, took into consideration the "steady migration" of clients from MSG to Morris's new insurance agency and the resultant decline in the value of those assets. This factor has, thus, been adequately addressed by the trial court and contemplated in the award of damages, obviating error.

H. ALLEGATIONS OF JUDICIAL NAIVETE

Charron and Charron & Hanisch also contend the trial judge's "inexperience and susceptibility" to persuasion by Morris's counsel impacted the outcome of this case. Other than a blatant assertion, Charron and Charron & Hanisch provide no citation to the lower court record or legal authority in support of this contention. "It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's

arguments, and then search for authority either to sustain or reject the appellant's position." *DeGeorge*, 276 Mich App at 594-595. Further, there is no evidence to demonstrate such an allegation. This litigation encompassed three separate lower court files, multiple pleadings, almost seven years of litigation and a large number of hearings, resulting in thousands of pages of transcripts and numerous written rulings. The trial court often complimented all counsel involved in this litigation regarding their persuasive abilities and professionalism. Rarely did the trial court rule spontaneously from the bench. Rather, the majority of decisions were reduced to lengthy opinions and orders, provided after the hearings and belying any suggestion that the trial court's rulings were either ill-considered or elicited without proper reflection and consideration of the evidence.

I. ASSET VALUATION

1. STOCK VERSUS ASSETS

In the fourth issue on appeal, Charron and Charron & Hanisch contend the trial court erred in its valuation of MSG's stock in its award of damages and erroneously equated the value of MSG's assets to the value of its stock. It is also argued that there was insufficient evidence or lack of proof of the damages actually incurred or that the MSG stock retained any value at the time of the Article 9 sale to justify the amount awarded.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App at 671. Questions of law are reviewed de novo in contempt proceedings. *Porter*, 285 Mich App at 455. "We review a trial court's findings in a contempt proceeding for clear error, and such findings must be affirmed if there is competent evidence to support them." *In re Kabanuk*, 295 Mich App at 256. When determining if competent evidence exists to support the contempt findings, this Court does not weigh the evidence or the credibility of the witnesses. *Id*. In addition, as noted in *Kowalesky v Kowalesky*, 148 Mich App 151, 155-156; 384 NW2d 112 (1986) (footnote omitted), "this Court will review the method applied by the trial court, and its application of that method, to determine if the trial court's valuation was clearly erroneous."

Charron and Charron & Hanisch rely on MCL 450.1855a to support their argument that all of a corporation's liabilities must be considered before any distribution to shareholders. The statutory provision states, in relevant part:

> Before making a distribution of assets to shareholders in dissolution, a corporation shall pay or make provision for its debts, obligations, and liabilities. Compliance with this section requires that, to the extent that a reasonable estimate is possible, provision be made for those debts, obligations, and liabilities anticipated to arise after the effective date of dissolution. . . . After payment or adequate provision has been made for the corporation's debts, obligations, or liabilities, the remaining assets shall be distributed, except as otherwise provided in this section, in cash, in kind, or both in cash and in kind, to shareholders according to their respective rights and interests. [MCL 450.1855a.]

The applicability of this statutory provision is questionable, as Morris's request for dissolution was denied. Contrary to the position asserted by Charron and Charron & Hanisch, the determination of the proper method of valuation must be consistent with the purpose of contempt to "compensate . . . for losses based on [the] failure to comply with the court's order." *Electrical Workers Pension Trust Fund*, 340 F3d at 385. In its ruling, the trial court was seeking to compensate Morris for the value of MSG at the time of the sale of assets to NYPIA.

The respective experts, using alternative methods, both considered and discounted the value of certain assets and considered particular liabilities in arriving at their respective determinations. The trial court found both experts' opinions to be "riddled with flawed assumptions." In determining value, the trial court recognized "the vicissitudes of broader markets and the contraction of capital markets during the time period," but noted "MSG had a stable flow of revenue in an industry that was relatively recession-proof." In determining the annual revenue stream for MSG, the trial court noted the concurrence of the two experts, in addition to the tax returns prepared for both MSG and NYPIA, discounted for consideration of the "steady migration" of clients from the agency. Then, relying on additional testimony and evidence adduced at trial, the trial court determined a standard in the insurance industry for valuation through multiplication of the agency's revenue by a "figure in the neighborhood of 1.50." In the use of these figures, the trial court determined the value of MSG's assets to be $2,736,000 at the time of the transfer to NYPIA and attributed one-half of the value as being representative of Morris's interest ($1,368,000) and comprising just compensation. As this value is well within the range of testimony elicited, there is no clear error.[8]

"Although a closely held corporation's stock is not publicly traded, and no established market value exists to assist the courts in valuing a closely held corporation's stock, the courts generally recognize that a closely held corporation's stock has an ascertainable value." *Butterfield v Metal Flow Corp*, 185 Mich App 630, 641; 462 NW2d 815 (1990). As discussed in *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994), "A trial court has great latitude in determining the value of stock in closely held corporations, and where a trial court's valuation . . . is within the range established by the proofs, no clear error is present." Ultimately, this Court defers to the trial court in the determination of the credibility of expert witnesses. MCR 2.613(C); *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). Despite evidence of disagreement among the experts in this case, any credibility determination remains within the province of the trial court.

[8] Wayne Walkotten determined that the "book value" of $2.3 million plus the value of assets, made MSG "worth $3,300,000 at the time of sale." Before using a marketability discount, Thomas Vereecke calculated an earnings before interest, taxes, depreciation, and amortization (EBITDA) value of $818,713. David Young, when approached as a potential purchaser, opined the value of MSG's assets to be between $1.3 million and $1.7 million. William Woodworth estimated annual revenues of MSG to be in the realm of $1.5 to $2 million. The 2008 tax returns indicated $2,322,000 in taxable revenue for MSG and NYPIA. In turn, the 2009 tax returns for NYPIA indicated $1,422,538 in revenue from insurance premiums, which did not include revenue from contingency payments.

See *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Because the trial court's determination of value fell within the range of proofs adduced at trial, it is not clearly erroneous.

As our Supreme Court has discussed in *Vos v Child, Hulswit & Co*, 171 Mich 595, 597; 137 NW 209 (1912) (citation omitted), when evaluating the measure of damages applicable for a breach of contract for the sale of stock:

> Compensation is the general standard for the measure of damages. It is the actual and proximate loss caused by the wrong for which the plaintiff is entitled to indemnity. Hence the general rule is that the measure of damages for the failure to deliver property according to the contract, or for its conversion, is the value of the property at the time it was to be delivered, or at the time it was converted. [*Id.*; see also *Butterfield*, 185 Mich App at 639.]

This is consistent with the imposition of sanctions for civil contempt:

> Sanctions for civil contempt serve two purposes: "to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience." Compensatory awards seek to ensure that the innocent party receives the benefit of the injunction:
>
> > the Court will be guided by the principle that sanctions imposed after a finding of civil contempt to remedy past noncompliance with a decree are not to vindicate the court's authority but to make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed. [*Robin Woods, Inc v Woods*, 28 F3d 396, 400 (CA 3, 1994) (citation omitted).]

Charron and Charron & Hanisch confuse the purpose of the contempt award. The trial court clearly indicated the award was intended to compensate Morris for the loss incurred to the value of MSG's assets based on their seizure and subsequent transfer to NYPIA. In truth, Charron and Charron & Hanisch are not contesting that the trial court could determine the value of MSG's assets, but rather that the trial court did not accept the valuation of assets as proffered by their expert, Thomas Vereecke.

2. USE OF MULTIPLIER

For its fifth issue on appeal, Charron and Charron & Hanisch challenge the trial court's use of a multiplier in the determination of the value of MSG's assets. They assert that application of the multiplier was in error because it was inappropriate based on the absence of non-competition agreements and the instability in revenue. Charron and Charron & Hanisch also dispute the trial court's grant of greater weight to the testimony of Morris's expert, Wayne Walkotten, due to his lack of a CPA designation, as opposed to their expert, Vereecke.

Evidence and testimony was adduced at trial substantiating the use of a multiplier, such as that used by the trial court, for determining the valuation of assets for an insurance agency. Walkotten submitted materials that were accepted into evidence of the use of a multiplier as an

industry standard for such valuations. Similarly, James Morris testified to the use of a multiplier of 1.5 as acceptable within this particular industry. During James Morris's testimony, it was acknowledged that Judd Schnoor, during his contempt hearing, testified to the use of a multiplier of 1.25 in the valuation of the assets of MSG and that, similarly, Larimore had provided an affidavit using "a multiple of 1.5."

This Court reviews "a trial court's findings in a contempt proceeding for clear error, and such findings must be affirmed if there is competent evidence to support them." *In re Kabanuk*, 295 Mich App at 256. When determining if competent evidence exists to support the contempt findings, this Court does not weigh the evidence or the credibility of the witnesses. *Id*. Throughout these proceedings, the valuation of MSG and its assets was a matter of tremendous contention. At least four witnesses testified to the use of a multiplier in the valuation of an insurance agency's assets. While a dispute existed regarding the proper multiplier to be used, three of the witnesses opined that a multiplier of approximately 1.5 was appropriate. Based on this evidence within the trial court record, the trial court's election to use the multiplier of 1.5 is not clearly erroneous.

Charron and Charron & Hanisch also contend error in the use of the multiplier because it did not take into account the absence of noncompetition agreements or the declining revenue stream experienced by MSG and NYPIA. Contrary to the assertion that Walkotten failed to account for the absence of noncompetition agreements, Walkotten specifically acknowledged and included in his valuation the lack of noncompetition agreements for the principals of MSG, but considered this offset by the retention of Judd Schnoor and his son as employees of NYPIA and major producers. In terms of the fluctuation in revenue, Walkotten testified that he considered "the specific company itself" and looked at its income as both a "function of a multi-year average" and premised on "historical data." In his valuation, Walkotten acknowledged the loss of business by MSG, and in applying the discounted cash flow method to MSG,

> actually applied a zero percent growth rate to the agency, and then discounted the cash flow at a 15 percent discount rate. In the future, a 15 percent discount rate is a little bit higher risk than an average insurance company, in that a risk was applied because of some of the volatility going on at the agency.

As such, the criticisms of Charron and Charron & Hanisch are without support in the record.

3. CREDIBILITY OF EXPERTS

At the most basic level, Charron and Charron & Hanisch challenge the trial court's more favorable attitude toward and acceptance of Walkotten's testimony over that of their expert, Vereecke. Primarily, they assert Walkotten should not have been qualified as an expert due to the questionable status of his CPA license. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion* or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the

> product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

Charron and Charron & Hanisch do not dispute the value to the trial court, as the factfinder in this matter, of obtaining "specialized knowledge" to assist in understanding the evidence "or to determine a fact in issue," given the complexity and unique issues involved in the valuation of an insurance agency. MRE 702. Rather, they assert that Walkotten did not qualify as an expert witness based on his lack of a particular level of CPA certification or licensure. Yet, education and licensure are not the only factors determining whether an expert may render an opinion. An expert may be qualified as such based on "knowledge, skill, experience, training or education." MRE 702. "The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). "The party presenting the expert bears the burden of persuading the trial court that the expert has the necessary qualifications and specialized knowledge that will aid the fact-finder in understanding the evidence or determining a fact in issue." *Id.*

Walkotten performed "insurance agency consulting" involving "valuation." His company performed approximately 100 valuations annually of insurance agencies involving "fair market valuations or calculation of value." Despite possible discrepancies in his professional credentials, Walkotten qualified as an expert to render an opinion based on his experience. MRE 702.

A similar issue arose during trial based on Walkotten's provision of a calculation of value rather than a conclusion of value. The trial court rejected the concern expressed by Charron based on testimony by Walkotten that he, rather than Morris, ascertained the method of valuation used premised on his independent professional judgment. The trial court determined that the issue is one of weight rather than admissibility. As recognized by our Supreme Court, "Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995) (citation omitted); see also *Albro v Drayer*, ___ Mich App ___; ___ NW2d ___ (Docket No. 309591, issued January 28, 2014), slip op at 3.

Although Charron and Charron & Hanisch assert the trial court should have afforded greater weight and credibility to the testimony of their expert, Vereecke, it is recognized that regard must be paid to the special opportunity of the trial court to judge the credibility of the witnesses that appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Ultimately, "it is the factfinder's responsibility to determine the credibility and weight of trial testimony." *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008) (internal citations omitted). The trial court's ruling demonstrated that it paid attention to both experts and found both of their analyses "flawed." Any implication by Charron and Charron & Hanisch that the trial court merely accepted the entirety of the testimony and opinion rendered by Walkotten is belied by the ruling.

III. UNIFORM FRAUDULENT TRANSFER ACT

A. NON-PARTY LIABILITY

In its first issue on appeal, NYPIA challenges the trial court's determination of liability premised on its status as a non-party in the underlying litigation and, commensurately, the failure to join NYPIA as a defendant or necessary party. NYPIA argues that as a non-party, it lacked proper notice and an opportunity to be heard based on reassurances by the trial court that it was defending itself only in the contempt proceeding and not under the allegations made pursuant to the UFTA. NYPIA asserts the error of the trial court's ruling is further substantiated by its dismissal from the 2009 proceedings involving the UFTA claims, following the successful outcome of its motions for summary disposition. In response to Morris and MSG Properties, NYPIA disagrees that any deficiency in notice was cured by the motion for reconsideration and that it cannot demonstrate prejudice.

1. DUE PROCESS

"Whether proceedings complied with a party's right to due process presents a question of constitutional law that [this Court] review[s] de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). This Court also reviews the grant or denial of summary disposition de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005), overruled in part on other grounds *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). Specifically:

> MCR 2.116(C)(8) permits a trial court to grant summary disposition when an opposing party has failed to state a claim on which relief can be granted. Thus, a motion under this rule tests the legal sufficiency of a claim. The motion may not be supported or opposed with affidavits, admissions, or other documentary evidence, and must be decided on the basis of the pleadings alone. The trial court reviewing the motion must accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts. A motion for summary disposition under MCR 2.116(C)(8) may be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. [*Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 131; 839 NW2d 223 (2013) (citations omitted).]

Similarly, "[t]he interpretation and application of a statute presents a question of law that the appellate court reviews de novo." *Bloomfield Twp v Kane*, 302 Mich App 170, 174; 839 NW2d 505 (2013). Court rules are interpreted under the same standard. *Blint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007). A trial court's decision regarding joinder is reviewed for an abuse of discretion. See *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 136; 715 NW2d 398 (2006).

"Procedural due process serves as a limitation on government action and requires [the] government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property." *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). "Due process is a flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). "Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be

heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Id*. In turn, fundamental fairness has been found to include:

> (1) consideration of the private interest at stake, (2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value of additional or substitute procedures, and (4) the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. [*Thomas*, 249 Mich App at 724.]

NYPIA was not deprived of due process. NYPIA appeared and participated in the hearings pertaining to the imposition of a restraining order of the profit-sharing distributions, and its concerns were specifically addressed by the trial court. Counsel for NYPIA called witnesses for this proceeding. Morris filed a motion with the trial court seeking to designate NYPIA as a real party in interest regarding MSG's counterclaims in the 2007 action, or alternatively to be named as a counterplaintiff.

In the 2009 actions, Morris filed an amended complaint against MSG, Charron, and NYPIA. NYPIA, along with Charron and MSG, was the subject of a request by Morris for a restraining order. NYPIA filed answers and affirmative defenses, along with a motion for summary disposition pertaining to these claims and a supplemental brief. NYPIA argued, in favor of summary disposition, that it was insulated as a good-faith transferee from a claim of fraudulent transfer, the failure of Morris to prove the elements of fraud, and the absence of conversion because of NYPIA's status as a good faith transferee. The trial court granted summary disposition to NYPIA on all three of the UFTA claims set forth by Morris. NYPIA filed a separate motion for summary disposition on Morris's claim of commercially unreasonable sale and conversion, which the trial court also granted.

NYPIA participated in various discovery motions and expressed concerns regarding the impact of the litigation on NYPIA. Despite its status as a non-party, the trial court indicated:

> Now, Mr. Gerling, obviously it's good to have you here in this sense because, even if you're no longer a party, you still have to worry about third-party discovery. And so, one way or another, I think you're going to be bound up in this to some degree or another, even if there is no potential liability.

NYPIA was also a recipient of a show cause motion initiated by Morris for contempt regarding violation of the August 22, 2008 order. The trial court entered a show cause order encompassing NYPIA. The trial court also addressed a motion for reconsideration submitted by NYPIA.

On more than one occasion, NYPIA appeared in the trial court and sought clarification of its role in the litigation as it progressed. While acknowledging NYPIA's non-party status, the trial court indicated that the "clawback" provision of the UFTA had the potential to impact NYPIA. The trial court expressed hesitancy in definitively stating that NYPIA was out of the proceedings. NYPIA continued, through summary disposition motions, to challenge its liability under the UFTA. The trial court specifically recognized the necessity of inclusion of NYPIA

and the provision of notice as matters proceeded to trial. NYPIA subsequently received a notice of a pretrial scheduling conference. NYPIA participated in pretrial hearings and specifically engaged the trial court in a discussion of its role and status in the litigation, which resulted in the trial court indicating, "You're out of the 2009 case for once, for all, and forever."

NYPIA was a full and involved participant during the 23 days of trial that ensued, calling and cross-examining witnesses, making opening and closing arguments, and providing a trial brief. In addition to contesting any liability due to lack of notice in the 2007 case, NYPIA also argued its status as a good faith transferee as preclusive of any determination of its involvement in a fraudulent transfer of MSG's assets. NYPIA was also integrally involved in several postjudgment proceedings through the filing of objections and in seeking reconsideration of the trial court's ruling.

Further, the substance of the trial and various proceedings focused on (a) the knowledge of and violation of the order precluding the transfer of MSG's assets, and (b) the purposeful and fraudulent activities engaged in to consummate the asset transfer and avoid obligations to Morris and MSG Properties. NYPIA's defense included arguments that it had no knowledge of the injunctive order and that it could not be liable under the UFTA because it was a good faith transferee for value. While its trial brief focused on the contempt proceedings, NYPIA acknowledged having "submitted prior pleadings involved in the 2009 and the instant cases and incorporates herein the factual matters and legal arguments set forth." In addition, NYPIA's counsel often led cross-examination of the witnesses and conducted the direct examination of Vereecke to determine the valuation of MSG's assets at the time of transfer to NYPIA. Such testimony directly pertains to the validity of whether the transfer was for value and is irrelevant with regard to the existence of notice of the injunctive order.

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of fraud. The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.

Alternatively, Morris and MSG Properties contend that NYPIA's motion for reconsideration after trial served to cure any purported deficiencies in notice. Although NYPIA disputes this assertion, this Court has stated:

> Under MCR 2.119(F), a trial court has discretion to grant rehearing or reconsideration of a decision on a motion. "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). The trial court may even give a party a second chance on a previously decided motion. *Id.* Additionally, in *Boulton* [*v Fenton Twp*, 272 Mich App 456,] 463-464; 726 NW2d 733 [(2006)], this Court

> determined that any error by a court in granting summary disposition sua sponte without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless under MCR 2.613(A), if the party is permitted to fully brief and present the argument in a motion for reconsideration. [*Al-Maliki*, 286 Mich App at 486.]

NYPIA did file a motion for reconsideration following the conclusion of trial asserting a deprivation of due process in terms of its ability to assert a "good faith" defense under the UFTA, which was denied by the trial court. As such, NYPIA was afforded an additional opportunity to set forth its arguments on this issue.

2. NECESSARY PARTIES AND JOINDER

NYPIA also challenges the failure to join it as a party defendant or necessary party in the UFTA claims that proceeded to trial. "Under MCR 2.205(A), persons must be joined if 'their presence in the action is essential to permit the court to render complete relief. . . .' The purpose of the rule is to prevent the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present." *Mason Co v Dep't of Community Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011). In general, the "[j]oinder of parties is appropriate in situations in which their respective rights and obligations arise out of the same contract, transaction, occurrence or like circumstances, and any questions of law or fact is common to the claims of them all." *Yedinek v Yedinek*, 383 Mich 409, 416; 175 NW2d 706 (1970). The essential inquiry under MCR 2.205(A) is whether a party's presence in the litigation was necessary to render complete relief. See, e.g., *Gordon Food Serv, Inc v Grand Rapids Material Handling Co*, 183 Mich App 241, 243; 454 NW2d 137 (1989), and *Williams & Works, Inc v Springfield Corp*, 76 Mich App 541, 550; 257 NW2d 160 (1977).

NYPIA was initially a defendant in the 2009 lower court cases. Despite the grant of summary disposition in favor of NYPIA, the trial court engaged in several discussions with NYPIA's counsel regarding the potential remedies under the UFTA's "clawback" provision and the impact on NYPIA. The complexity of this apparent dissonance is within the language of the UFTA. Specifically, MCL 566.38 addresses the recovery of judgment under the UFTA and provides in relevant part:

> (1) A transfer or obligation is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.
>
> (2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 7(1)(a), *the creditor may recover a judgment for the value of the asset transferred*, as adjusted under subsection (3), *or the amount necessary to satisfy the creditor's claim*, whichever is less. The *judgment may be entered against either of the following*:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made.

> (b) *Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee*. [Emphasis added.]

The provision permits recovery from NYPIA as a "subsequent transferee" if it is demonstrated that NYPIA does not qualify as "a good-faith transferee who took for value." MCL 566.38(2)(b).

Our Supreme Court has discussed the implications of the UFTA in the context of divorce actions in *Estes v Titus*, 481 Mich 573, 586-587; 751 NW2d 493 (2008). In that matter, the Court noted:

> The UFTA specifically provides for avoiding a fraudulent transfer or attaching a particular fraudulently transferred asset. Relief under the UFTA determines only the creditor's right to fraudulently transferred property. The court in a UFTA action would transfer directly to the creditor any property interest that would have been awarded to the debtor . . . but for the parties' fraud. [Footnotes omitted.]

"It is well established that a grantee who receives property or money without giving fair consideration to the fraudulent grantor is subject to having the conveyance set aside and to any other remedies normally available to the defrauded creditor." *Kelley v Thomas Solvent Co*, 722 F Supp 1492, 1499 (WD Mich, 1989).

This Court addressed the issue of joinder under the UFTA with reference to debtor transferors in *Mather Investors, LLC v Larson*, 271 Mich App 254, 259-260; 720 NW2d 575 (2006). Specifically, "the UFTA clearly does not contain any language requiring joinder of the debtor transferor. . . . The dispositive inquiry is whether the circumstances of the individual case permit complete adjudication without joining the debtor transferor." *Id.* at 259. In addition:

> First, a "debtor" under the UFTA "means a person who is liable on a claim." MCL 566.31(f). A claim need not be reduced to judgment or undisputed. MCL 566.31(c). However, the transferor must actually be liable for the claim to be a "debtor." Indeed, the remainder of the UFTA appears to presume that liability has already been established. A claim under the UFTA cannot proceed otherwise. Furthermore, the UFTA only permits voiding a transaction upon action by the creditor, not by the transferee. See MCL 566.37(1)(a); 566.38(2). [*Id.*]

MCL 566.37(2) permits, "If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds." As such, the subsequent transferee is not a necessary party to a recovery, as the action pertains to the recovery of the fraudulently transferred asset and needs only the establishment of the creditor's right to recovery. Any alleged unfairness to the subsequent transferee is alleviated by provisions in the UFTA, as contained in MCL 566.38(1), which provides that "[a] transfer or obligation is not voidable . . . against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." Had NYPIA not had a role to play in the ultimate fraud premised on the asset transfer not being "for a reasonably equivalent value," the referenced clawback provision of the UFTA would be inapplicable.

This Court has also previously determined that the burden falls upon a defendant to object when a plaintiff fails to comply with the requirements of MCR 2.205. *United Services Automobile Ass'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1992). Any such objection must be timely made at the risk of being waived. *Id*. Although NYPIA questioned its role and potential liability, it did not object to its non-party status. Further, NYPIA was originally a defendant in the 2009 actions. Based on NYPIA's full participation in trial and other proceedings to demonstrate its status as a good-faith transferee and failure to object or appeal its non-party status, its allegation of error on appeal regarding a violation of MCR 2.205 is not timely and is without merit.

3. STANDING

a. ASSIGNMENT OF RIGHTS

NYPIA also challenges the trial court's ruling in entering a judgment in favor of Morris and MSG Properties, based on the failure to demonstrate that either was a valid creditor of MSG and the subsequent lack of standing. NYPIA asserts the assignment by James Morris of his promissory note with MSG to Glenn Morris was invalid because it was contrary to a contractual anti-assignment provision contained within the accompanying purchase and sale agreement. NYPIA further contends that James Morris did not assign or transfer any right to a possible UFTA claim and that such claims are not subject to assignment.

A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 251. The appeal also requires this Court to engage in the interpretation of promissory notes executed between various parties. This Court's review of these contracts, including whether the contractual language is ambiguous, is de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). In addition, "[w]hether a party has legal standing to assert a claim constitutes a question of law that we review de novo." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). This Court reviews "de novo questions of law, such as statutory interpretation." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002). While this Court reviews de novo the applicability of equitable doctrines such as estoppel, the factual findings supporting an equitable decision are reviewed for clear error. *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008).

James Morris signed a purchase and sale of insurance agency agreement on July 1, 1996, for the sale of Morris, Schnoor & Gremel, Inc. Paragraph 3 of the agreement stated:

> Neither Seller nor Purchaser shall assign this Agreement or any interest in it, without the prior written consent of the other, except Purchaser may assign any or all of its rights to any subsidiary or affiliated business association owned by Purchaser, without Seller's consent.

Payment of the purchase price of $200,000 was through a promissory note, executed concurrently with the sales agreement and attached thereto. The promissory note indicated that it was "given pursuant to the terms of an Agreement for Purchase and Sale of Insurance Agency," but did not contain any language precluding assignment of the promissory note. There is no disagreement or legitimate dispute that MSG, the purchaser identified in the sale agreement, breached the agreement and promissory note by failing to maintain and continue installment payments. After the breach, on February 20, 2009, James Morris assigned to Glenn Morris "all of his right, title and interest in the Promissory Installment Note."

"Generally, all legitimate causes of action are assignable." *Grand Traverse Convention & Visitor's Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445, 448; 440 NW2d 28 (1989). If, at the time of the assignment, the assignor actually possessed the rights being assigned, the assignment is valid. *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Id*. at 242. "[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

i. ANTI-ASSIGNMENT CLAUSE

NYPIA argues that the anti-assignment clause in the sale agreement negates the general rule that contract rights are assignable. Contrary to the assertions of NYPIA, in the circumstances of this case, "Michigan law mandates application of the general rule." *In re Jackson*, 311 BR 195, 201 (WD Mich, 2004).

> This finding is based on the theory that once a party to a contract performs its obligations to the point that the contract is no longer executory, its right to enforce the other party's liability under the contract may be assigned without the other party's consent, even if the contract contains a non-assignment clause. *Detroit, T & I R Co v Western Union Telegraph Co*, 200 Mich 2; 166 NW 494 (1918); *Bd of Trustees of Mich State Univ v Research Corp*, 898 F Supp 519 (WD Mich, 1995). [*Id.*]

An executory contract has been defined as "a contract that remains wholly unperformed or for which there remains something still to be done on both sides." *Id.*, citing Black's Law Dictionary (8th ed.). James Morris had fully performed his contractual duty in turning over the insurance agency that was the subject of the sale. Because James Morris had upheld his end of the bargain, he had a right to assign his interest in the promissory note to his son. "The modern trend with respect to contractual prohibitions on assignments is to interpret them narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to assignee." *Wonsey v Life Ins Co of North America*, 32 F Supp 2d 939, 943 (ED Mich, 1998). "Unless the circumstances indicate the contrary, a contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition." *In re Jackson*, 311 BR at 201, citing Restatement (Second) of Contracts § 322(1) (1979). As discussed in the Restatement 2d Contracts § 322:

> (1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
>
> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
>
> (a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation;
>
> (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;
>
> (c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.

In addition, MSG was the first to breach the sales agreement and promissory note by failing to remit continuing payments. It is a well-recognized precept in contract law that "one who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Sentry Ins A Mut Co v Lardner Elevator Co*, 153 Mich App 317, 323; 395 NW2d 31 (1986). Given MSG's failure to respond to James Morris's demand for payment and acceleration, it is unlikely that MSG would have consented to his request for assignment.

ii. PROMISSORY NOTE LANGUAGE

Further, the promissory note does not contain language precluding assignment. A promissory note is a contract. *Collateral Liquidation v Renshaw*, 301 Mich 437, 443; 3 NW2d 834 (1942). "Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent." *Wausau Underwriters Ins Co v Ajax Paving Indus, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). Specifically, given the absence of any anti-assignment provision in the promissory note, to interpret the promissory note as containing such a provision would "violate[] the basic principle of contract law that courts are not permitted to rewrite contracts by adding additional terms." *Comerica Bank v Cohen*, 291 Mich App 40, 47; 805 NW2d 544 (2010). The sale agreement referenced the existence of a promissory note merely as the mechanism for payment. The promissory note did not incorporate the terms of the sales agreement, indicating only it was issued in accordance therewith. As noted in *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922) (citation and quotation marks omitted):

> In a written contract a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its contents had been repeated in the contract. But if the reference be made for a particular purpose, expressed in the contract, it becomes part of it only for that purpose.

In viewing the documents, there is no suggestion of the incorporation of terms or conditions. The reference of the promissory note within the sales agreement suggests it is merely identified as the means to effectuate payment and not to construe terms or extend restrictions.

Contrary to NYPIA's claim, Glenn Morris, premised on the assignment of the promissory note by James Morris, was a creditor of MSG for purposes of the UFTA. A "creditor" is defined in the UFTA simply as "a person who has a claim." MCL 566.31(d). In turn, the terms "debt" and "debtor" are defined respectively, as a "liability on a claim" and "a person who is liable on a claim." MCL 566.31(e), (f). The claim brought by Morris was pursuant to MCL 566.34(1)(a), which provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.

James Morris testified at trial that Laura Fett had informed him that Schnoor had instructed her to cease payments on his promissory note. Fett confirmed that she had been told to discontinue payments on the promissory notes to James Morris and MSG Properties, and that this instruction for non-payment remained consistent after she became affiliated with NYPIA. Because the amounts owed on the James Morris promissory note and the promissory notes to Morris and MSG Properties constituted the only debts not paid in full after the transfer of assets to NYPIA, the trial court found sufficient evidence was demonstrated to show that Charron & Hanisch and MSG possessed the "actual intent to hinder, delay, or defraud" and, thus, violated MCL 566.34(1)(a).

b. ASSIGNMENT OF FRAUD CLAIMS

NYPIA also challenges the assignment of the promissory note as not including an assignment of any right by James Morris to Glenn Morris to pursue a claim under the UFTA. In addition, NYPIA contends that a right of action for fraud is personal in nature and, therefore, not assignable.

The assignment of interest by James Morris to his son indicated a transfer and assignment of "all of his rights, title and interest in the Promissory Installment Note," suggesting all rights inherent in the note were conveyed to Glenn Morris, including any right to litigate claims. Historically, our Supreme Court has held, "that a right of action for fraud is not assignable, has no application to an assignment of something which is in itself tangible; capable of delivery; involving a right of property. In such case, the right to whatever remedy the assignor has follows the assignment." *Jones v Hicks*, 358 Mich 474, 483; 100 NW2d 243 (1960), quoting *Sweet v Clay*, 88 Mich 1, 11; 49 NW 899 (1891). Despite the existence of "the general rule that a right of action for fraud is not assignable . . . such rule would not prevent showing fraud incidentally as the basis for enforcing an assignable claim. . . ." *Jones*, 358 Mich at 484, citing *Howd v Breckenridge*, 97 Mich 65, 69; 56 NW 221 (1893).

NYPIA conflates its arguments regarding the assignability of an action for fraud and standing. Given our finding on the assignability of the promissory note from James Morris to Glenn Morris, there is no question or issue pertaining to the right of Glenn Morris to pursue payment in accordance with the obligation arising under the note. Rather than necessitating proof that Glenn Morris could stand in the shoes of James Morris for purposes of demonstrating fraud, the evidence adduced throughout these proceedings shows that MSG and its various collaborators were seeking to avoid the payment of any monies to Morris and those with whom he was closely associated. Hence, the assertion of fraud by Morris under the UFTA is personal to him and not derivative of the rights of James Morris under the promissory note.

As discussed by this Court in *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013), quoting *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 329-330; 506 NW2d 283 (1993), "To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected." "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988). In addition:

> MCR 2.201(B) requires that, generally, an action must be prosecuted in the name of the real party in interest. A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy. In addition, the doctrine protects a defendant from multiple lawsuits for the same cause of action. A defendant is not harmed provided the final judgment is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded to bar any further suit instituted by any other party. [*Barclae*, 300 Mich App at 483, quoting *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997) (citations omitted).]

The proofs adduced throughout this litigation demonstrate the effort by MSG, and those acting in concert with it, to avoid any financial obligation to Glenn Morris. The assertions of fraud under the UFTA were applicable to both Morris's claims under the promissory note owed to him by Schnoor and the promissory note assigned to him by James Morris. Glenn Morris had a right of action to pursue payment as the assignee of James Morris. MCR 2.201(B); see also *Prof Rehab Assoc*, 228 Mich App at 177 ("[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed."). The fraud engaged in to avoid that obligation was personal to Glenn Morris. The fraud was clearly directed at Glenn Morris, with little concern for the harm that might also result to those close to him. As such, the claim of fraud was personal to Glenn Morris and not derivative.

Further, given the damages assessed, whether the remedy awarded by the trial court was under the UFTA or breach of contract is essentially irrelevant, as the judgment provided for the balance owed on the promissory note, plus the default interest rate incurred from the time of default, or $67,541.81. There was no dispute in the lower court that the obligation of MSG on the promissory note to James Morris was in default, the amount outstanding on that debt, and the applicable interest rate. "A trial court's ruling may be upheld on appeal [even] where the right

result issued, albeit for the wrong reason." *Gleason v Mich Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (citation omitted).

4. INCONSISTENT CLAIMS AND ESTOPPEL

NYPIA also challenges the standing of MSG Properties to pursue a claim under the UFTA premised on Morris having previously disclaimed in other litigation the validity of the promissory note effectuated between MSG and MSG Properties. NYPIA asserts MSG Properties should be estopped from taking a contrary position in this litigation regarding the validity of the promissory note.

The precepts and concept of judicial estoppel[9] have been discussed recently by this Court in *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479-480; 822 NW2d 239 (2012) (citations and quotation marks omitted):

> Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.
>
> This doctrine is utilized in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.
>
> Under the prior success model of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. In accordance with this model of judicial estoppel, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. The prior success model, however, does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits.

Morris disputed the validity of the various promissory notes issued by MSG to MSG Properties in the prior 2007 action for dissolution, yet in the later proceedings in 2009, Morris sought enforcement of the promissory note. NYPIA contends that the assumption of this contrary position estops or precludes Morris from subsequently arguing the validity of the promissory note.

Estoppel is not applicable as argued by NYPIA. Morris contested the legitimacy or validity of the promissory note from MSG to MSG Properties in seeking dissolution. In denying

[9] NYPIA does not identify the type of estoppel it claims should be applicable. Based on the arguments, we assume the claim of estoppel is one for judicial estoppel.

dissolution of the corporation, the trial court did not rule on or address the validity of the promissory note. Hence, the assumption of an inconsistent position in the 2009 case does not invoke the doctrine of estoppel.

In the 2007 action, neither NYPIA nor MSG Properties were parties. "Subject to exceptions in favor of innocent parties, the general rule is that acts of officers of a corporation in any transaction in which both a corporation and they, themselves, individually are interested do not bind the corporation." *Cope-Swift Co v John Schlaff Creamery Co*, 223 Mich 543, 551; 194 NW 550 (1923). Further, MSG Properties as a corporation has a legal identity that is recognized as separate and distinct from that of its owners, including Morris. See *In re ClassicStar Mare Lease Litigation*, 727 F3d 473, 490 (CA 6, 2013), citing *Cedric Kushner Promotions, Ltd v King*, 533 US 158; 121 S Ct 2087; 150 L Ed 2d 198 (2001). As a consequence, MSG Properties as a corporate entity is not estopped from litigating the validity of the promissory note in the 2009 case.

5. CREDITOR STATUS AND STANDING

NYPIA further asserts that MSG Properties lacks standing because it is not a creditor of MSG. While this argument is primarily premised on Morris's prior declamation of the promissory note that serves as the basis for MSG Properties' status as a creditor, there is also a separate implication by NYPIA regarding the invalidity of the promissory note. MSG contemporaneously effectuated three promissory notes, for varying amounts, in favor of MSG Properties. There was no credible argument that all three promissory notes were valid. Rather, it was asserted that one of the three notes was valid, with the trial court determining that the $1,009,152.35 note was to be enforced.

MSG Properties is a creditor of MSG based on both the initial effectuation of the promissory note and its submission of payments, albeit very few. Monies were removed from MSG Properties' assets to cover indebtedness incurred by MSG. Promissory notes were effectuated to repay MSG Properties. Any argument that the debt is invalid is belied by the fact that MSG initiated payments on the note. In the context of examining the application of statutes of limitations, it is recognized "that a payment is equivalent to a new promise to pay on an obligation. . . ." *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635, 638; 491 NW2d 864 (1992), citing *Collateral Liquidation, Inc v Palm*, 296 Mich 702; 296 NW 846 (1941). More recently, as reasserted by our Supreme Court:

> A voluntary and unqualified payment . . . is the best evidence that the debtor does not claim his legal rights, but, on the contrary, intends to waive them and to perform his moral obligation to pay the whole of the just debt. [*Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 498; 607 NW2d 68 (2000) (citation omitted).]

Based on MSG's initial remission of payments on the promissory note, it cannot now disclaim its validity. Consequently, MSG Properties' status as a creditor of MSG is established for purposes of standing and the UFTA. MCL 566.31(d), (e), (f).

B. UFTA APPLICABILITY

NYPIA also challenges the trial court's entering of judgment against it under the UFTA, based on its status as a good faith transferee for value. NYPIA further asserts the trial court erred in the use and determination of "reasonably equivalent value" rather than "value" as contained in the relevant provision of the UFTA.

As discussed in *Menard, Inc v Dep't of Treasury*, 302 Mich App 467, 471; 838 NW2d 736 (2013) (citations and quotation marks omitted):

> The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. Once the intent of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.

A trial court's findings of fact in a bench trial are reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); MCR 2.613(C). A finding of fact is determined to be clearly erroneous when, despite the existence of supporting evidence, a reviewing court is left with a definite and firm conviction that a mistake has been made. *Alan Custom Homes*, 256 Mich App at 512. Deference is to be afforded to a trial court's superior ability to judge the credibility of the witnesses observed during the course of trial. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

The trial court determined a violation of the UFTA, pursuant to MCL 566.34(1)(a), which provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.

The determination of "actual intent" under MCL 566.34(1)(a) is delineated in MCL 566.34(2), which indicates:

> Consideration may be given, among other factors, to whether 1 or more of the following occurred:
>
> (a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

"Transfer" is defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.31(*1*).

To fully address NYPIA's contention of error, it is useful to follow the analysis of the trial court in the context of the statutory scheme of the UFTA. The trial court determined a violation of MCL 566.34(1)(a), premised on the transfer of the debtor's (MSG's) assets to Charron & Hanisch, with the intent to "hinder, delay, or defraud" Morris and MSG Properties as creditors of MSG. In reaching this conclusion, the trial court determined through documentary and testamentary evidence the existence of certain "badges of fraud," as detailed in MCL 566.34(2), including: (1) MSG's retention of possession or control of its assets following the transfer (MCL 566.34(2)(b)); (2) MSG was mired in a lawsuit at the time of the transfer (MCL 566.34(2)(d)); (3) the assets transferred included all of MSG's assets (MCL 566.34(2)(e)); and (4) concerns pertaining to the value of the assets transferred when juxtaposed against the amount of the debt owed (MCL 566.34(2)(h)). In addition, evidence was adduced at trial demonstrating that other unsecured creditors of MSG ultimately received payment on their debts but that purposeful decisions had been made to stop payments to Morris and MSG Properties. The intent of MSG was further called into question by e-mails indicating a concerted and purposeful effort to keep assets and payments from Morris and MSG Properties in conjunction with the efforts to identify a "friendly buyer" for the assets and the effectuation of the subsequent transfer from

Charron & Hanisch to NYPIA in an abbreviated time frame and without the level of investigation and inquiry one would expect from sophisticated business persons.

1. MCL 566.38

In accordance with MCL 566.38(1), "A transfer or obligation is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." Further, pursuant to MCL 566.38(2):

> Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 7(1)(a), the creditor may recover a judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against either of the following:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made.
>
> (b) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

The trial court determined that the transfer of the assets from MSG to Charron & Hanisch was voidable, because Charron & Hanisch did not receive the transfer in good faith and for reasonably equivalent value. See MCL 566.38(1). Charron & Hanisch did not meet the "good faith" requirement based on the fact that it did not simply exercise its rights as a creditor of MSG, but rather became intrinsically and intimately involved in seeking to find a "friendly buyer" for those assets in order to protect MSG and Schnoor. The transfer of assets from MSG to Charron & Hanisch was demonstrated not to be for "reasonably equivalent value," in that the assets were valued anywhere between $540,000 and $3,300,000. Even using the lower valuation figure, the assets transferred to secure payment of the debt of approximately $400,000 were worth at least $140,000 more than provided in the exchange. Of further note, when the initial transfer of the assets by the grant of the security interest to Charron & Hanisch occurred in May 2008, the value of the assets would have indisputably been even higher.

Because MSG's creditor, Charron & Hanisch, did not take the assets in good faith and for reasonably equivalent value in accordance with MCL 566.38(1), the transfer was voidable pursuant to MCL 566.37(1)(a), which permits, "In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in section 8 may obtain . . . [a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim."

2. REASONABLY EQUIVALENT VALUE

NYPIA contends that recovery was precluded against it under MCL 566.38(2)(b), because as a subsequent transferee it was "a good-faith transferee who took for value." Definitions are not provided within MCL 566.31 for the terms "good faith" or "value" or the phrase "reasonably equivalent value." "If a statute does not expressly define its terms, a court may consult dictionary definitions." *Mount Pleasant Pub Schs v Mich AFSCME Council 25 et al*, 302 Mich App 600, 608; 840 NW2d 750 (2013) (citation omitted). Further, subsections of

the UFTA cited by NYPIA in its argument use the term value and not reasonably equivalent value, as used in other subsections of the UFTA. This Court has historically indicated a reluctance to impute language to a statute that the Legislature did not use. "This could represent a specific omission by the Legislature, and words excluded from a statute – particularly when used elsewhere in the statute – must be presumed to have been excluded for a specific purpose." *Robinson v City of Lansing*, 486 Mich 1, 25; 782 NW2d 171 (2010) (Young, J, concurring).

In accordance with *In re Agricultural Research and Technology Group, Inc*, 916 F2d 528, 540 (CA 9, 1990), "value is to be determined in light of the [UFTA's] purpose, in order to protect the creditors." In the Michigan statutory scheme, the UFTA does not define the phrase "reasonably equivalent value,"[10] other than the language of MCL 566.33, which states, in part:

> (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. . . .
>
> (2) For the purposes of sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

The phrase "reasonably equivalent value" has its origin in the federal Bankruptcy Code, 11 USC 548. *Leibowitz v Parkway Bank & Trust Co (In re Image Worldwide, Ltd)*, 139 F3d 574, 577 (CA 7, 1998). The UFTA has been interpreted to require that the value provided in exchange for the transaction be received by and benefit the debtor-transferor and not some third party or entity. See *Nat'l Westminster Bank NJ v Anders Engineering, Inc*, 289 NJ Super 602, 606; 674 A2d 638 (1996). In determining "reasonably equivalent value," courts are to "consider all the facts and circumstances . . . keeping in mind that any significant disparity between the value received and obligation assumed by the debtor-transferor will significantly harm innocent creditors." *In re Mich Machine Tool Control Corp*, 381 BR 657, 669 (ED Mich, 2008) (citation omitted). Reasonably equivalent value has also been deemed to be interchangeable with the term "fair consideration." *In re Auto Specialties Mfg Co*, 153 BR 457, 498 (WD Mich, 1993). In *In re Otis & Edwards, PC*, 115 BR 900, 908 (ED Mich, 1990), it was opined:

> The key to understanding the concept of fair consideration is found not in the form of the terms but rather the transactional context in which the issue arises. To this court "fair consideration" equals "reasonably equivalent value." What constitutes fair consideration (or reasonably equivalent value), will change from setting to setting.

[10] The phrase "reasonably equivalent value" is also contained in MCL 566.34(1)(b) and MCL 566.35 of the UFTA, which were not relied upon by the trial court in its determination of liability.

"Under the UFTA the standard for evaluating the values exchanged between the debtor and the transferee, is whether the debtor 'made the transfer or incurred the obligation . . . without receiving a reasonably equivalent value. . . .'" *Id.* at 908 n 40. Further recognizing the interconnection of these terms in both the context of bankruptcy and UFTA proceedings, it has been observed:

> [I]f the debtor receives property or discharges or secures an antecedent debt that is substantially equivalent in value to the property given or obligation incurred by him in exchange, then the transaction has not significantly affected his estate and his creditors have no cause to complain. By the same token, however, if the benefit of the transaction to the debtor does not substantially offset its cost to him, then his creditors have suffered, and . . . the transaction was not supported by "fair" consideration. [*Rubin v Manufacturers Hanover Trust Co*, 661 F2d 979, 991 (CA 2, 1981).]

"The touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Mellon Bank, NA v Metro Communications, Inc*, 945 F2d 635, 647 (CA 3, 1991).

Black's Law Dictionary (9th ed) defines "value" as "[t]he monetary worth or price of something; the amount of goods, services, or money that something commands in an exchange." Similarly, this Court has previously determined:

> Random House Webster's College Dictionary (1997) defines "value" as "monetary or material worth, as in commerce," "the worth of something in terms of some medium of exchange," "equivalent worth in money, material, or services," and "estimated or assigned worth." Hence, the ordinary sense of the word "value" refers to the fair market value of the property rather than the fair market value minus the amount of any security interests held by creditors. [*Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 326; 725 NW2d 80 (2006).]

In defining fair market value:

> this Court has explained that the common understanding of "fair market value" is "the amount of money that a ready, willing, and able buyer would pay for the asset *on the open market*. . . ." *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325-326; 725 NW2d 80 (2006) (emphasis added). Black's Law Dictionary similarly defines "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." Black's Law Dictionary (7th ed), p 1549 (emphasis added). An "arm's-length" transaction, in turn, is defined as "relating to dealings between two parties who are not related . . . and who are presumed to have roughly equal bargaining power; not involving a confidential relationship[.]" *Id*. at 103. [*Mackey v Dep't of Human Servs*, 289 Mich App 688, 699; 808 NW2d 484 (2010).]

Although the trial court used the terminology of reasonably equivalent value, in actuality it was determining NYPIA's liability premised on the actual value of the assets. A great deal of time and effort was expended at trial in seeking to determine the fair market value of MSG's assets through testimony, including that of experts Vereecke and Walkotten. They specifically undertook a valuation of MSG's assets premised on their worth to an unrelated third-party in the open market. While the figure ultimately calculated by the trial court as representative of the value of MSG's assets did not strictly coincide with the opinion of either expert, it did reflect a value on the open market and, thus, is consistent with the requirements of MCL 566.38(2)(b).

3. GOOD FAITH

In addition, the trial court determined that NYPIA was not a good faith transferee. While insufficient evidence was found to exist to demonstrate knowledge on the part of the officers of NYPIA of the August 2008 injunctive order to hold NYPIA in contempt, that did not supplant the inquiry to determine whether NYPIA took the assets in good faith. Although the term good faith is not defined in the UFTA, the UCC defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." MCL 440.1201(2)(t). Similarly, the term is defined by Random House Webster's College Dictionary (1992), p 575, as "accordance with standards of honesty, trust, sincerity." Black's Law Dictionary (7th ed) defines "good faith" as:"

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.

Based on this definition, NYPIA's status as a good faith transferee is questionable. Little investigation was undertaken by Woodworth in determining the value of MSG. Despite the absence of any experience in the insurance industry, Woodworth undertook and completed the purchase of MSG in approximately a 10-day period. Although verifying the specific assets being sold by Charron, Woodworth did not receive any guarantees regarding the stability of staffing or the existence of non-competition agreements. While agreeing to pay $395,000 for the assets, Woodworth asserted he was not aware of concerns pertaining to MSG's existing line of credit. No negotiations ensued regarding the purchase price. Acceptance of the purchase price was also without reviewing any financial statements or balance sheets of the agency. Certainly, the method of undertaking in this matter calls into question the "observance of reasonable commercial standards of fair dealing in a given trade or business." Particularly, when combined with the valuation of the assets obtained by NYPIA, the trial court was justified in its determination that it was not a good faith transferee for value.

C. CORPORATE OFFICER LIABILITY

On cross-appeal, Morris and MSG Properties argue that the trial court erred in its determination that Charron could not be held liable in his individual capacity for their claims of conversion, commercially unreasonable sale, fraud, and violation of the UFTA. To the extent the issue as presented suggests total alleviation of liability for Charron as an individual by the trial court, it misrepresents the actual rulings, as Charron was found to be in contempt of court and

held liable for the attorney fees and costs incurred by Morris and MSG Properties for the contempt proceeding.

This Court reviews a trial court's decision to grant or deny a motion for summary disposition de novo. *Wayne Co Employees Retirement Sys v Charter Co of Wayne*, 301 Mich App 1, 24-25; 836 NW2d 279 (2013). Issues of statutory interpretation are also reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The clearly erroneous standard of review is applied to a trial court's findings of fact in a bench trial. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995).

In *Appletree Mktg*, 485 Mich at 17, our Supreme Court explained, "Michigan law has long provided that corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit." As supporting authority, the Court cited *Moore v Andrews*, 203 Mich 219; 168 NW 1037 (1918) and 2 Restatement Agency, 3d, § 7.01, p 115. *Appletree Mktg*, 485 Mich at 17 n 39. The *Moore* Court held that an action for conversion may arise against directors, officers, or agents of a corporation to a person injured by their torts. *Moore*, 203 Mich at 232-233. The relevant wording of the Restatement provides, "An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment." 2 Restatement Agency, 3d, § 7.01, p 115.

1. CONVERSION

A statutory conversion claim is governed by MCL 600.2919a, which provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

"Common law conversion . . . consists of any 'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Appletree Mktg*,

485 Mich at 13-14, quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

To support a claim for statutory conversion, it must be demonstrated that there existed a knowing purchase, receipt or aiding in the concealment of any stolen, embezzled or converted property. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999); MCL 600.2919a. To sustain an action for conversion, it must be demonstrated that the defendant "obtained the [property] without the owner's consent to the creation of a debtor-creditor relationship" and "must have had an obligation to return the specific [property] entrusted to his care." *Lawsuit Finan, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (citation omitted). Conversion cannot be demonstrated in this instance, as Charron & Hanisch obtained the property with the consent of the owner, MSG.[11] Further, Charron assisted Charron & Hanisch in obtaining MSG's assets as security for an undisputed debt. Charron did not personally obtain, control or exercise dominion over MSG's assets. It was unnecessary to ascertain the liability of Charron as an individual on the claim for conversion based on the security interest maintained by Charron & Hanisch when compared to Morris and MSG Properties' status as unsecured creditors of MSG. Article 9 of the UCC provided priority of interest in the assets to Charron & Hanisch. MCL 440.9312(5). Consequently, the foreclosure by Charron & Hanisch could not "constitute a wrongful act of dominion." *Prime Finan Servs, LLC v Vinton*, 279 Mich App 245, 275; 761 NW2d 694 (2008), citing *Foremost Ins Co*, 439 Mich at 391. Because the underlying claim for conversion could not be maintained, any error by the trial court in determining the applicability of the corporate officer defense is rendered irrelevant.

2. UFTA

Similarly, the trial court did not impose liability against Charron as an individual under the UFTA, as he was not a creditor of MSG and as Charron & Hanisch maintained the claim for payment. MCL 566.31(d).

With regard to the claim of commercially unreasonable sale, MCL 440.9627 provides:

> (1) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
>
> (2) A disposition of collateral is made in a commercially reasonable manner if the disposition is made in the usual manner on any recognized market, at the price current in any recognized market at the time of the disposition, or

[11] As stated in *Foremost Ins Co*, 439 Mich at 391, "[A] person can[not] 'convert' his own property." (Citation omitted.)

> otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.
>
> (3) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in a judicial proceeding, by a bona fide creditors' committee, by a representative of creditors, or by an assignee for the benefit of creditors.
>
> (4) Approval under subsection (3) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

Contrary to the position of Morris and MSG Properties, Article 9 of the UCC does not require a secured creditor, such as Charron & Hanisch, to act in the best interest of other creditors. See *Yamaha Motor Corp, USA v Tri-City Motors and Sports, Inc*, 171 Mich App 260, 274-275; 429 NW2d 871 (1988). "A secured creditor does not owe any duty to those holding subordinate interests to proceed to enforce his remedies." *Nat'l Acceptance Co of America v Virginia Capital Bank*, 491 F Supp 1269, 1276 (DC VA, 1980). As discussed in 79 CJS Secured Transactions § 104, "A creditor with a perfected security interest in collateral has no liability to unsecured creditors of its debtors." As such, the trial court correctly declined to impose liability under this theory.

3. COMMON LAW FRAUD

Finally, Morris and MSG Properties contend error in the trial court's failure to hold Charron, as an individual, liable for fraud. It is assumed that the events underlying the claim of fraud pertain to Charron's verbal representations impliedly denying a transfer of MSG's assets when questioned by the trial court following the submission of an ex parte pleading by Morris and MSG Properties in December 2008.

> The elements of fraud have been stated as follows:
>
> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that [it] was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 161; 742 NW2d 409 (2007) (citation omitted).]

The fraud alleged by Morris and MSG Properties is concomitant with the action of Charron in violating the injunctive order imposed by the trial court and for which liability has been imposed. When the alleged fraud occurred, Morris and MSG Properties already suspected an improper or unauthorized transfer of the assets and, despite Charron's statements, learned shortly thereafter that the transfer had already occurred. Consequently, any harm incurred by the transfer is not attributable to the false and belated representation, but rather to the violation of the injunctive order. As such, the trial court's election to hold Charron in contempt of court adequately addresses the concerns of Morris and MSG Properties and provides compensation.

D. MONETARY SANCTION ENTITLEMENT

Morris and MSG Properties also contend error regarding the trial court's failure to impose monetary sanctions against Charron & Hanisch and MSG for violation of the UFTA.

This Court reviews a lower court's decision to impose sanctions for clear error. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008); see also *Scott v Allen Bradley Co*, 139 Mich App 665, 672; 362 NW2d 734 (1984) ("The clearly erroneous standard of review applies to a damage award rendered in a bench trial."). Issues of statutory interpretation are reviewed de novo. *Dressel*, 468 Mich at 561.

In asserting error, Morris and MSG Properties impliedly suggest that MSG, despite findings of wrongdoing, was alleviated of any liability for its actions. In actuality, the trial court explained that it did "not believe that . . . judgment should be entered against . . . MSG because, in violating the UFTA, MSG dispossessed itself of all of its assets." Therefore, the trial court found it necessary to implement the UFTA's "clawback approach" to "follow MSG's assets downstream to affix financial responsibility where those assets came to rest." We note that MSG did not avoid all liability. In the 2007 contempt action, the trial court imposed liability in the amount of $1,368,000 against MSG and in favor of Morris for violation of the injunctive order. As noted by the trial court, "MSG has not gone unpunished for its misdeeds. The court has simply chosen to punish MSG in the contempt matter (where its actions directly violated a court order), as opposed to the UFTA matters (where its assets were seized and passed along to others who benefitted from the fraudulent transfer), not only because this approach comports with the clawback theory of the UFTA, but also because it will enable Glenn Morris – the person most aggrieved by MSG's conduct – to obtain the full measure of relief available from MSG."

Similarly, the trial court determined Charron & Hanisch would not be liable under the UFTA, "notwithstanding the participation of C&H in the UFTA violations." Noting Charron & Hanisch's position as a secured creditor and its priority over unsecured creditors such as Morris and MSG Properties, the trial court focused on its determination that "none of the value of [MSG's] assets came to rest improperly with C&H." Rather, Charron & Hanisch recovered only the amount of attorney fees that they were owed. Contrary to the implication by Morris and MSG Properties, Charron & Hanisch did not avoid liability. In the contempt action, Charron & Hanisch was found to be jointly and severally liable with MSG to Morris for $1,368,000.

The transfer of all of MSG's assets and its subsequent cease of business renders any judgment entered against it ineffectual. "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." *Ziegler v Witherspoon*, 331 Mich 337, 353; 49 NW2d 318 (1951). The trial court determined that MSG did violate the UFTA, but acknowledged that because of the loss of all assets due to that violation, it was necessary to impose liability through the UFTA's clawback provision, MCL 566.38(2)(b), in order to afford Morris and MSG Properties any relief. This is consistent with the purpose of the UFTA to provide a means to undo fraudulent transfers. Specifically:

> The UFTA . . . provides for avoiding a fraudulent transfer or attaching a particular fraudulently transferred asset. Relief under the UFTA determines only the creditor's right to fraudulently transferred property. The court in a UFTA

> action would transfer directly to the creditor any property interest that would have been awarded . . . but for the parties' fraud. [*Estes*, 481 Mich at 586-587, citing MCL 566.37 and *Ocwen Fed Bank, FSB v Int'l Christian Music Ministry*, 472 Mich 923; 697 NW2d 155 (2005).]

In seeking to undo the transfer, no benefit is realized by imposing liability against MSG. The only means of recovery was to follow the assets downstream to NYPIA. This is consistent with the precept, "It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008) (citation omitted).

To the extent Morris and MSG Properties assert that the UFTA recognizes and approves the imposition of an equitable remedy, MCL 566.37(1)(c), it seeks to ignore that the existence of a sufficient legal remedy renders it unnecessary and inappropriate to impose an equitable remedy. *Everett v Nickola*, 234 Mich App 632, 637; 599 NW2d 732 (1999). Given the absence of any proof that NYPIA had inadequate resources to fulfill the judgment, there was no basis for the trial court to impose an equitable remedy.

The same reasoning is generally applicable to the trial court's ruling regarding Charron & Hanisch. The trial court indicated that Charron & Hanisch violated the UFTA, but did not impose judgment under the UFTA. As noted by the trial court, the initial creation of the security interest in May 2008 by Charron & Hanisch was not violative of the UFTA. Charron & Hanisch had an outstanding debt owed to it by MSG. As such, it was not improper for Charron & Hanisch to take a secured interest in MSG's assets to assure its collection of payment of the obligations owed. Rather, it is the later use of that secured interest by Charron & Hanisch, and the various negotiations and dealings in transferring the secured interest, that gave rise to a UFTA violation.

The trial court determined that the purpose of the UFTA was to avoid a fraudulent transfer and permit a creditor to attach or obtain the converted asset. Charron & Hanisch was not shown to have retained any monies or assets beyond the amount owed to it. Hence, the purpose of the UFTA was effectuated by the trial court's following of the assets transferred to the downstream purchaser and imposing recovery at that level from NYPIA. *Estes*, 481 Mich at 586-587; MCL 566.38(2)(b). Morris and MSG are to be compensated by Charron & Hanisch for the value of the assets through the contempt proceedings. While originally set forth in a different context, the precept, "It seems reasonable to hold that the injured party should be entitled to one compensation. . . ." is applicable in the circumstances herein. *Verhoeks v Gillivan*, 244 Mich 367, 372; 221 NW 287 (1928).

E. UNSECURED CREDITORS

Morris and MSG Properties also contend on cross-appeal that the trial court erred in dismissing their claims of conversion, fraud, and commercially unreasonable sale based on their status as unsecured creditors. It is argued that Morris and MSG Properties would have been entitled to any surplus realized from the sale of MSG's assets, had the assets been sold for a commercially reasonable amount. Morris and MSG Properties alternatively contend that, should this Court find NYPIA was deprived of due process, then the trial court's prior ruling that

NYPIA be dismissed from the UFTA litigation should be reversed and NYPIA made a party to that claim.

"We review de novo a trial court's ruling on a motion for summary disposition and consider the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine whether there exists any genuine issue of material fact." *Alfieri v Bertorelli*, 295 Mich App 189, 192; 813 NW2d 772 (2012). This Court applies a de novo standard of review in determining whether a litigant has standing to pursue a claim. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). Issues of statutory interpretation are also reviewed de novo. *Dressel*, 468 Mich at 561.

At the outset, we note that the argument pertaining to the improper dismissal of the conversion claim is only one paragraph in length in the cross-appeal brief and provides no citation to statutory or case law. "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Further, "this Court need not address an issue that is given only cursory consideration by a party on appeal." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Regardless, Morris and MSG Properties' assertion of error in the dismissal of the claim of conversion is without merit.

1. CONVERSION

Conversion is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co*, 439 Mich at 391. In support of their contention of error, it is suggested that any surplus that should have existed, given the disparity between the amounts owed for the secured interest and actual value of the assets pledged, constituted an improper conversion. As recognized by this Court in *Prime Finan Servs LLC*, 279 Mich App at 276 (citations and quotation marks omitted), "A person may be liable for conversion by actively aiding or abetting or conniving with another in such an act. Indeed, one may be liable for assisting another in a conversion though acting innocently." However, a claim of conversion cannot be sustained in the circumstances of this case because MSG owned the assets at the time it granted a security interest to Charron & Hanisch and "could not convert its own property." *Id.*, citing *Foremost Ins Co*, 439 Mich at 391. As such, MSG was authorized to pledge the assets, and the grant of a security interest in those assets to Charron & Hanisch cannot constitute a wrongful act or "support a claim for conversion." *Prime Finan Servs*, 279 Mich App at 277. Contrary to the assertion by Morris and MSG Properties implying that Charron & Hanisch was unjustifiably enriched by the transfer of the security interest, Charron & Hanisch was paid only what it was due. As such, no benefit arose from MSG that was inappropriately or illegally transferred to Charron & Hanisch to support a claim of unjust enrichment. See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

2. EQUITABLE RELIEF

Contrary to the argument of Morris and MSG Properties regarding the propriety of equitable relief, courts have historically and uniformly interpreted the UCC and determined that principles of equity are not to be used to replace or modify the provisions of the UCC which

govern the creation, perfection, and priority of secured interests. See *Security Nat'l Bank and Trust Co v Dentsply Prof Plan*, 617 P2d 1340 (Okla, 1980); *In re Oriental Rug Warehouse Club, Inc*, 205 BR 407, 414 (D Minn, 1997). Specifically:

> Although strict adherence to the [UCC] requirements may at times lead to harsh results, efforts by courts to fashion equitable solutions for mitigation of hardships experienced by creditors in the literal application of statutory filing requirements may have the undesirable effect of reducing the degree of reliance the market place should be able to place on the [UCC] provisions. The inevitable harm doubtless would be more serious to commerce than the occasional harshness from strict obedience. [*Security Nat'l Bank and Trust Co*, 617 P2d at 1343.]

This is consistent with "[t]he central purpose of Article 9 of the UCC . . . to regulate *secured* transactions." *In re Thompson Boat Co*, 230 BR 815, 825 (ED Mich, 1995) (emphasis added), citing MCL 440.9101 and MCL 440.9102. It is well-recognized that "[t]he UCC is to be liberally construed and applied to promote its underlying purposes and policies." *Shurlow v Bonthuis*, 456 Mich 730, 737; 576 NW2d 159 (1998) (citation omitted). The concept of "commercial reasonableness" is addressed in Article 9 of the UCC. Specifically, MCL 440.9627 provides, in pertinent part:

> (1) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

The trial court never reached a conclusion on the issue of "commercial reasonableness" because it determined that Charron & Hanisch had a perfected security interest and was entitled to payment.

"A disparity between the price received and the estimated value of the asset is relevant to a determination of commercial reasonableness. A gross disparity between the sale price and a reasonable measure of collateral value may be sufficient to show commercial unreasonableness absent evidence that adequate steps were taken to ensure a fair price was received." *In re Massaquoi*, 412 BR 702, 709 (ED Pa, 2008). MCL 440.9322(1)(b) provides: "A perfected security interest . . . has priority over a conflicting unperfected security interest. . . ." The rights of a secured party as delineated in MCL 440.9601(1) include:

> After default, a secured party has the rights provided in this part and, except as otherwise provided in section 9602, those provided by agreement of the parties. A secured party may do 1 or more of the following:
>
> (a) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure.
>
> (b) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

In addition, Article 9 of the UCC provides that following a secured creditor's taking possession of the collateral, it is entitled to sell, lease, or dispose of the collateral. MCL 440.9510 (1). Once the collateral is sold, the proceeds are to be applied in accordance with MCL 440.9615. Under the language of this statutory provision, Charron & Hanisch would incur an obligation only to MSG or another secured creditor for any surplus, not Morris and MSG Properties as unsecured creditors.

3. SUCCESSOR LIABILITY

In actuality, Morris and MSG Properties are asserting a claim consistent with the theory of successor liability. See *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999). Successor liability has been explained as encompassing two theories: "defacto merger" and "mere continuation." *Milliken & Co v Duro Textiles, LLC*, 451 Mass 547, 556; 887 NE2d 244 (2008). Specifically, "[t]he 'de facto merger' theory of successor liability 'has usually been applied to situations in which the ownership, assets and management of one corporation are combined with those of another, preexisting entity.'" *Id.* at 557 (citation and quotation marks omitted). In contrast, "[t]he mere continuation theory of successor liability envisions a reorganization transforming a single company from one corporate entity into another. [T]he indices of a continuation are, at a minimum: continuity of directors, officers, and stockholders; and the continued existence of only one corporation after the sale of the assets." *Id.* (citations and quotation marks omitted). In other words, "the purchasing corporation is merely a new hat for the seller," and "imposition or liability on the purchaser is justified on the theory that, in substance if not in form, the purchasing corporation is the same company as the selling corporation." *Id.* at 557-558 (citations and quotation marks omitted).

However, the doctrine of successor liability need not be evaluated, as it serves as an alternative theory of liability and not an additional means to impose judgment. Specifically, "The doctrine of successor liability is equitable in both origin and nature." *Milliken & Co*, 451 Mass at 559-560. In accordance with the "principles of equity, a court will consider a transaction according to its real nature, looking through its form to its substance and intent." *Id.* at 560. Although remedies in equity "are flexible tools to be applied with the focus on fairness and justice," *id.*, they do not supplant available legal remedies. See *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010) (citation omitted) (Equitable relief may be granted "where a legal remedy is not available.").

In addition, we note that a claim of successor liability was not explicitly pled, but rather implied in the claims of fraud, conversion, and commercial unreasonableness. Neither of the cases filed in 2009 contained a count labeled "successor liability." Although, as the proceedings progressed and the parties further refined and modified their arguments before the trial court, the arguments and allegations that subsequently arose might be sufficient to have reasonably informed MSG, Charron & Hanisch, and NYPIA of a successor liability claim in accordance with MCR 2.111(B)(1), such a claim was not, however, set forth "in a separately numbered count." MCR 2.113(E)(3).

4. ALTERNATIVE THEORIES

Morris and MSG Properties additionally assert as error the trial court's summary dismissal of the claims against NYPIA under the UFTA. Morris and MSG Properties raise this issue as an alternative means to affirm the trial court's ruling. Based on our affirmance of the trial court's ruling, the issue is rendered moot and need not be addressed.[12] In addition, Morris and MSG Properties provide only cursory treatment of this issue. This Court "will not search for authority to sustain a party's position." *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993). "An appellant may not . . . give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id*. at 339-340.

F. BADGES OF FRAUD

Next, in the statement of the issue on cross-appeal, Charron & Hanisch assert error in the trial court's determination that it and NYPIA were debtors to Morris and MSG Properties under the UFTA. In the argument set forth, however, Charron & Hanisch contend that the trial court erroneously determined that the selective payment of some of MSG's creditors by NYPIA did not comprise a badge of fraud, and that the validity of its security interest belied any fraudulent intent on the part of MSG in the transfer of assets.

Charron & Hanisch misconstrue the trial court's ruling with regard to NYPIA's status as a debtor of Morris and MSG Properties. Contrary to the assertion on appeal, the trial court clearly and unequivocally determined that Morris and MSG Properties' UFTA claim could not be maintained against NYPIA because it was not a debtor under the relevant statutory provisions. NYPIA's liability under the UFTA was imposed premised on the voidability of the transfer in accordance with MCL 566.38(2). Because the trial court's imposition of liability was not reliant on NYPIA's status as a debtor under the UFTA, Charron & Hanisch's claim of error is without merit.

Charron & Hanisch further assert that NYPIA's prioritization and election to pay certain creditors, but to not continue to remit payments to Morris or MSG Properties, does not comprise a badge of fraud. It also contends the decision to remit certain payments and to not assume certain debts comprised a valid business decision on the part of NYPIA. A review of the trial court's ruling demonstrates that in evaluating the applicable badges of fraud delineated in MCL 566.34(1)(a), the trial court did not identify the selective payment of certain creditors as a badge of fraud. The trial court did discuss the selective payment of creditors in addressing arguments by MSG and Charron & Hanisch asserting a lack of evidence to demonstrate the intent to defraud James Morris or MSG Properties. In that context, the trial court, in addition to the badges of fraud identified, noted that Fett had testified to receiving instructions from both MSG and NYPIA to withhold payments to James Morris and MSG Properties. The trial court noted the relevance of this information, stating:

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[12] "As a general rule, an appellate court will not decide moot issues." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *Id*.

> The consistency in this approach from MSG to NYPIA illustrates two significant points. First, management may have changed hands during the transition, but the operating philosophy remained the same. Second, James Morris and MSG Properties were denied payments by MSG and NYPIA alike, while all other creditors of MSG were paid in full after the asset transfer to NYPIA.

Taking the evidence of selective payment, in conjunction with the identified badges of fraud, the trial court concluded that "MSG and C&H cannot plausibly assert that they lacked 'actual intent to hinder, delay, or defraud' James Morris and MSG Properties." Given the context of the trial court's use of this evidence, the allegation of error as presented by Charron & Hanisch is without merit. Further, whether NYPIA's election to pay certain creditors and omit payments to others comprised a valid business decision is functionally irrelevant in the analysis of whether the transfer from Charron & Hanisch of the assets to NYPIA constituted a fraudulent transfer, which is the basis for the trial court's ruling on violation of the UFTA.

Charron & Hanisch also assert error by arguing that because MSG's property was encumbered by a valid lien, its intent as a transferor is irrelevant because MSG could not, therefore, avoid the legitimate transfer of assets. In support of this argument, Charron & Hanisch refer only to the initial transfer of the security interest in May 2008, and perfected in June 2008, and not the subsequent sale of assets to NYPIA in November 2008. Charron & Hanisch elect to focus on the wrong point in time for the determination of liability under the UFTA. As determined by the trial court, "The UFTA violation here turns upon the unorthodox nature and subsequent uncommon use of the secured interest by C&H, as opposed to the negotiation of a security interest to protect C&H's ability to recover attorney fees from its client, MSG."

G. TIMING OF TRANSFER NEGATING CLAIM UNDER UFTA

On cross-appeal, Charron & Hanisch again challenge the trial court's determination that Morris had status as a creditor to initiate a claim under the UFTA based on the timing of the allegedly fraudulent transfer in November 2008 and Morris's assignment of the James Morris promissory note in February 2009. Simply put, Charron & Hanisch assert Morris was not a creditor of MSG at the relevant time to raise a claim under the UFTA.

When interpreting a statutory provision, this Court is required to give effect to the intent of the Legislature. *Tellin v Forsyth Twp*, 291 Mich App 692, 700; 806 NW2d 359 (2011). This Court will preliminarily look to the language of the statute in order to ascertain the Legislature's intent. *Id*. at 701. "The Court gives the words of the statutes their plain and ordinary meaning and will look outside the statutory language only if it is ambiguous." *Id*. "[W]here that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed — no further judicial construction is required or permitted, and the statute must be enforced as written." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005) (original citation omitted).

Under the UFTA, MCL 566.34(1) governs the determination of actual intent and specifies: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose *before or after* the transfer was made or the obligation was incurred. . . ." (Emphasis added.) A "transfer" is defined in MCL 566.31(*l*) to include "every

mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance."

The fraudulent transfer that is the subject of the UFTA violation occurred in November 2008 with the sale of MSG's assets by Charron & Hanisch to NYPIA. James Morris did not assign his right to payment of his promissory note with MSG to Glenn Morris until February 2009. MSG, despite the existence of an outstanding balance, discontinued payments on the promissory note on August 23, 2008. Both James Morris and Laura Fett testified that Fett had been instructed to stop payments on the note to James Morris while she was an employee of MSG and that those instructions continued when she became an employee of NYPIA. As such, the "intent to hinder, delay, or defraud" could be construed to have initiated before the transfer of the assets in November 2008 and to have continued unabated after the transfer. MCL 566.34(1)(a). Because MCL 566.34(1) does not require a specific timeframe for the occurrence of a fraudulent transfer, permitting it to transpire "before or after the transfer was made," the reliance of Charron & Hanisch on the timing of the transfer is without merit. Further, this Court has recognized in *Prof Rehab Assoc*, 228 Mich App at 177, "[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." As such, Glenn Morris had standing to assert a claim under MCL 566.34(1)(a) for payment of the promissory note assigned to him by James Morris.

We would note that Morris asserted his claim regarding the avoidance of payment on the James Morris promissory note in an amended verified complaint on February 26, 2010, following the assignment of the promissory note. To have standing, "a party must have a legally protected interest that is in jeopardy of being adversely affected." *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997). To assert a claim, a party must have "'some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.'" *Id*., quoting *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992). "At the core of the standing doctrine is the requirement that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Co of Riverside v McLaughlin*, 500 US 44, 51; 111 S Ct 1661; 114 L Ed 2d 49 (1981) (citations and quotation marks omitted). At the time Morris filed his second verified complaint, he had been assigned James Morris's interest in the promissory note, thereby establishing the requisite basis for standing.

MadCap (after substituting for MSG) also argued in the lower court that Morris was not entitled to relief premised on his wrongdoing by soliciting clients away from MSG, which resulted in the reduction of income to MSG and the concomitant inability to pay its debt to Morris. On June 24, 2011, the trial court granted Morris's request for summary disposition on the counterclaims, stating:

> Now, at the end of this saga that entailed years – rather than months – of wide-ranging discovery, the record reveals that the claims asserted in the counter-complaint are allegations full of sound and fury, signifying nothing.
>
> * * *

> Whether MadCap's theories are framed as a breach of a fiduciary duty, tortious interference with a business relationship or expectancy of MSG, breach of an implied covenant precluding Mr. Morris from soliciting MSG business that he transferred to Mr. Schnoor, or frustration of purpose, the *sine qua non* of Madcap's legal claims is improper behavior by Mr. Morris flowing from his prior relationship with MSG. [Emphasis in original.]

Finding that MadCap offered mere supposition of wrongdoing by Morris insufficient to create a material issue of fact, the trial court concluded:

> Mr. Morris's departure from MSG was acrimonious, and Mr. Morris achieved extraordinary success in obtaining clients upon his departure from MSG. This surely was galling to Mr. Schnoor, whom the Court cannot begrudge suspicions about the reasons for Mr. Morris's success. But there is no evidence – either direct or circumstantial – to support the theory that Mr. Morris achieved this success by impermissible means. Thus, the Court must grant summary disposition to Mr. Morris and his trust on MadCap's claims in counts two through five of the First Amended Counterclaim.

In denying MadCap's motion for reconsideration, the trial court explained its ruling, stating in relevant part:

> In the final analysis, the Court was – and remains – satisfied that the eyes-only access that was granted to MSG's counsel afforded MSG a full and fair opportunity to unearth all information that might lend credence to MSG's claim that Glenn Morris used improper methods to steal clients from MSG. The mere fact that that remarkably intrusive discovery yielded no evidence whatsoever of improper conduct means precisely what it appears to mean: There is no evidence to support the claims of MadCap that Glenn Morris acted improperly in building his client base at his new agency. Accordingly, the motion for reconsideration filed by MadCap must be denied.

MadCap did not seek interlocutory review of this ruling and has not properly presented it as an issue for this Court's review within the statement of questions presented. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Because this contention of error has not been included in the statement of issues presented on appeal, it is deemed waived. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003).

Further, we would observe that the standing of Charron & Hanisch as a proper party to raise this as an issue on appeal is suspect, given that the trial court's ruling was on a counterclaim raised by MadCap. As discussed by our Supreme Court:

> The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to "ensure sincere and vigorous advocacy." Thus, the standing inquiry focuses on whether a litigant "is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." [*Lansing Schools*

Ed Ass'n v Lansing Bd of Ed, 487 Mich 349, 355; 792 NW2d 686 (2010) (citations omitted).]

Any assertion of error by Charron & Hanisch is tenuous to its claims in the lower court regarding fraudulent transfer.

H. ATTORNEY'S LIEN AND ROLE OF COUNSEL

On cross-appeal, Charron & Hanisch also contend error by the trial court in its determination that Morris had standing to assert a claim under the UFTA and the assignability of an UFTA claim. These issues were raised on appeal by NYPIA and have been fully addressed and need not be revisited herein. To the extent that Charron & Hanisch on cross-appeal also assert error pertaining to the timing of the assignment of the promissory note precluding Morris from having standing to assert a claim under the UFTA, this argument was already addressed and it need not be reexamined again.

Finally, Charron & Hanisch contend error by the trial court in determining that the assignment of all assets by MSG to its attorney to assure payment of fees incurred during litigation comprised a badge of fraud, pursuant to MCL 366.34(d). It argues that the grant of a security interest by a client to their legal counsel is acceptable and standard practice and, therefore, cannot be construed to fall within the ambit of the badge of fraud, especially because there is an absolute right to grant certain creditors preference or priority in payment. Charron & Hanisch further contend that the transfer of all assets is irrelevant, premised on the transfer occurring in May 2008 when Morris's claims against MSG had been dismissed, and that the trial court improperly interchanged the financial problems and obligations of Schnoor with those of MSG.

Charron & Hanisch also assert error in the trial court's finding that its recommendation to MSG to obtain a friendly purchaser constituted evidence of fraud. Execution of its duties as counsel to MSG, coupled with compliance with the requirements of notice under the UCC (MCL 440.9611), cannot be construed as evidence of fraud or a badge of fraud. Charron & Hanisch also take issue with the trial court's use and interpretation of various e-mails produced at trial in determining that a preconceived plan existed to defraud creditors.

MCL 566.34 of the UFTA identifies 11 badges of fraud to be used "[i]n determining actual intent" in evaluating whether a transfer was undertaken "to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a), (2). In making this determination, pursuant to the statutory language, "consideration may be given, among other factors, to whether 1 or more" of the 11 identified factors occurred. MCL 566.34(2). Specifically, MCL 566.34(2)(d) identifies as a factor for consideration of a party's intent whether, "[b]efore the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit." The contention of Charron & Hanisch that the trial court's use of this factor in determining that the transfer was with the "actual intent to hinder, delay, or defraud" Morris and MSG Properties is without merit for three reasons.

First, the trial court did not rely solely on MCL 566.34(2)(d) in evaluating intent. Rather, the trial court found that "[s]everal badges of fraud fit this case like a glove," including, but not

limited to MCL 566.34(2)(d) [litigation "sued or threatened" before transfer], (e) [encompasses "substantially all of the debtor's assets"], and (i) [transfer resulted in debtor insolvency]. Other factors, such as the close relationship between MSG and Charron & Hanisch, even though Charron & Hanisch did not technically qualify as an "insider" under MCL 566.34(2)(a), and the subsequent transfer to another related party, Hiestand, under MCL 566.34(2)(k), were deemed suspect. Second, the trial court unequivocally recognized the right of an attorney to obtain a security interest for fees owed. The trial court did not find fraud premised solely on the use of an attorney lien. The trial court noted, in conjunction with its discussion of transfers to "insiders":

> The Court must note in passing that a client's decision to grant a security interest in some of its property in favor of its law firm ordinarily constitutes an unremarkable act that surely does not run afoul of the UFTA. Many law firms ensure payment through such an arrangement, and many clients secure representation from a desirable law firm by such an arrangement. But the arrangement here – which provided C&H with a secured interest in all of the assets of MSG – is so atypical in so many ways that it cannot be described as the sort of garden-variety fee-protection device that easily escapes UFTA liability.

It was not the grant of the security interest, per se, that raised a red flag for the trial court. Rather, it was the transfer of all assets of MSG, which were determined to exceed in value the amount owed in fees, coupled with the efforts of Charron & Hanisch to go beyond mere foreclosure of the security interest but to also insinuate itself in seeking to procure a friendly buyer for the assets for MSG. Third, just as Charron & Hanisch assert that it cannot be assumed that any grant of a security interest to an attorney for services rendered is suspect as a fraudulent transfer, neither should the existence of litigation, which results in the incurrence of attorney fees, automatically require an assumption of propriety. While the ruling in *Robinson v Hawes*, 56 Mich 135, 139; 22 NW 222 (1885), involved the wrongful retention of a client's funds in excess of the amount owed to the attorney, it provides some guidance in this matter. Specifically:

> An attorney has an undoubted right to a lien upon the money or papers of his client which have come to his possession, derived from, or pertaining to, the suit in which his legal services were rendered, to secure payment, not only for his services in that suit, but also for all professional services rendered his client in other suits; but where he receives money, he has no lien upon or right to retain any sum beyond the amount owing him from his client for professional services, and it is clearly his duty to pay over . . . any sum he has received beyond what his client owes him for such services. [*Id*.]

Charron & Hanisch took a lien in all of MSG's assets, the value of which exceeded the amount owed to it in fees. While Charron & Hanisch did not retain monies in excess of their fees, it is certainly questionable and a disservice to the client to take all of the assets and dissipate any overage or surplus. "The relation of attorney and client is one of confidence, based upon the ability, honesty, and integrity of the attorney; and he cannot be justified in retaining in his hands money belonging to the client. . . ." *Id.* at 139-140. Given the context of the grant of the security interest and the subsequent sale for less than value of the assets, the trial court properly evaluated and applied the badges of fraud as delineated in MCL 566.34(2).

Charron & Hanisch argue that the timing of the transfer did not meet the requirements of MCL 566.34(d), because it occurred in May 2008 and after Morris's counterclaims had been dismissed in the 2007 litigation. This argument constitutes a red herring, as the trial court's determination of the occurrence of a fraudulent transfer was premised on the November 2008 sale of the assets and not the initial grant of the security interest in May 2008. At that relevant point in time, the 2007 case had not been concluded and remained pending. In addition, issues continued to arise, which unsurprisingly led to the 2009 litigation. The involvement of MSG and Morris in the 2007 litigation was sufficient to meet the criteria of MCL 566.34(2)(d).

Charron & Hanisch contend that their compliance with notification provisions under Article 9 of the UCC (MCL 440.9611) demonstrates a lack of intent to commit fraud. While Charron & Hanisch may have technically been in compliance with this statutory provision, it conveniently ignores the full context of the events, which included an August 2008 injunctive order precluding the disposal of assets without the trial court's authorization. It is the contempt for this order that implies the intent to defraud.

It is also suggested by Charron & Hanisch that its assistance in procuring a friendly buyer for the assets was simply within the realm of its duties as counsel for MSG and cannot be construed as comprising evidence of an intent to hinder or defraud creditors. Charron & Hanisch seeks to oversimplify the events that led to the trial court's decision and view them in isolation. There was nothing inherently wrong in Charron & Hanisch seeking to assist its client in obtaining a solution to its financial and legal problems. The issue arises in the law firm concurrently functioning as both counsel and creditor and in ignoring and purposefully evading the trial court's legitimate injunctive order to preclude the transfer of MSG's assets without the court's authorization. As historically recognized:

> Defendants herein, concurrently with their professional obligations to their clients, were and will continue to be required by the mandate of the Code of Professional Responsibility and the Court Rules to temper their zeal in fulfilling their obligation as officers of the court. The Code explicitly recognizes that an attorney has a dual obligation to his client and all others involved in the legal process. [*Schunk v Zeff & Zeff, PC*, 109 Mich App 163, 185-186; 311 NW2d 322 (1981).]

Further:

> All attorneys, as "officers of the court," owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself. In England, the first licensed practitioners were called "Servants at law of our lord, the King" and were absolutely forbidden to "decei[ve] or beguile the Court." In the United States, the first Code of Ethics, in 1887, included one canon providing that "the attorney's office does not destroy . . . accountability to the Creator," and another entitled "Client is not the Keeper of the Attorney's Conscience."

> Unfortunately, the American Bar Association's current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. As a result, too many attorneys have forgotten the exhortations of these century-old canons. Too many attorneys, like defense counsel in this case, have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client.
>
> We must return to the original principle that, as officers of the court, attorneys are servants of the law rather than servants of the highest bidder. We must rediscover the old values of our profession. The integrity of our justice system depends on it. [*Malautea v Suzuki Motor Co, Ltd*, 987 F2d 1536, 1546-1547 (CA 11, 1993).]

I. USE OF DOCUMENTARY EVIDENCE

Charron & Hanisch also take issue with the trial court's use and interpretation of certain documentary evidence, arguing the four referenced e-mails do not demonstrate an attempt to defraud the court or creditors. First, the trial court referenced the four e-mails as part of a plethora of "e-mail traffic" demonstrating a pattern of behavior and did not rely solely, as implied by Charron & Hanisch, on the cited documents for its conclusion. Second, trial encompassed 23 days, and approximately 1,000 exhibits were submitted; this does not include the preceding years of litigation and multitude of hearings. The four e-mails cited by Charron & Hanisch comprise merely .004 percent of the exhibits before the trial court. "Because this case was heard as a bench trial, the court was obligated to determine the weight and credibility of the evidence presented." *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). "[A] . . . court's credibility determinations in a bench trial, like a jury's credibility determinations in a jury trial, are 'virtually unassailable' on appeal." *Wright v St Vincent Health Sys*, 730 F3d 732, 739 (CA 8, 2013) (citations omitted). Further, "[i]n cases in which a . . . court's factual findings turn on assessments of witness credibility or the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference." *Helton v AT&T, Inc*, 709 F3d 343, 350 (CA 4, 2013). As such, the assertion of Charron & Hanisch that the trial court misinterpreted the evidence is without merit, given the deference afforded to the trial court in making determinations of credibility and ascertaining the weight of the evidence presented.

IV. APPELLATE SANCTIONS

Given the disrespectful and blatantly contemptuous statements made by attorney Charron in his appellate briefs regarding the trial court, we find the imposition of sanctions in accordance with MCR 7.216(C)(1)(b) (permitting actual or punitive damages or other disciplinary actions when a brief is "grossly lacking in the requirements of propriety") to be appropriate. See also *Grievance Administrator v Fieger*, 476 Mich 231, 250-252; 719 NW2d 123 (2006). Specifically, this determination is premised on the numerous ad homenem and pejorative comments made and endorsed by Charron as the signatory on his appellate briefs, which include but are not limited to such outrageous and unprofessional statements as, "*When the judiciary acts as the bitch for complainant, we get rulings like this.*" (Emphasis added.) Such derogatory and undeserved comments serve no legitimate purpose, as they fail to advance Charron's legal theories and

violate MCR 7.212(C)(6), which requires an appellant's brief to contain "[a]ll material facts, both favorable and unfavorable, [to be] fairly stated *without argument or bias*." (Emphasis added.)

Therefore, and in accordance with the authority granted by MCL 600.2445(1), we sanction attorney Charron one thousand dollars ($1,000) for his failure to abide by the rules established for this Court and the civility expected by practitioners of the law. See MRPC 3.5(d) (barring "undignified or discourteous conduct toward the tribunal"). Attorney Charron's privilege to file any further pleadings in this Court is suspended until such time as the imposed sanction is satisfied.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly