STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM COURT OF APPEALS

CENTER WOODS, INC., a Michigan Nonprofit Corporation,

Plaintiff/Appellant,

v

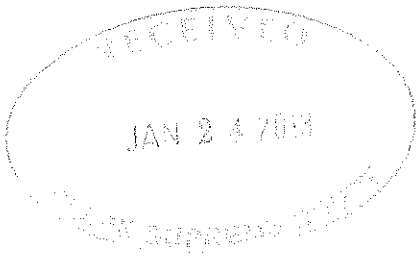
RES-CARE PREMIER, INC., a Delaware Corporation,

Defendant/Appellee.

Michigan Supreme Court No. 144721

**BRIEF ON APPEAL - Appellant**

**ORAL ARGUMENT REQUESTED**

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STATE OF MICHIGAN
IN THE SUPREME COURT

SCOTT and JEANNE WOODBURY,

Plaintiffs,
and

CENTER WOODS, INC., a Michigan Nonprofit Corporation,

Plaintiff/Appellant,

v

RES-CARE PREMIER, INC., a Delaware Corporation,

Defendant/Appellee
and

RUTH AVERILL,

Defendant.

Michigan Supreme Court No. 144721
COA Case No.: 297819
Saginaw CC No.: 09-006758-CH-4

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# PLAINTIFF/APPELLANT'S CENTER WOODS, INC.'s BRIEF ON APPEAL

## ORAL ARGUMENT REQUESTED

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## STATEMENT OF BASIS FOR JURISDICTION

Plaintiff/Appellant CENTER WOODS, INC., appeals from the Court of Appeals' published opinion of January 19, 2012, in favor of Defendant/Appellee RES-CARE PREMIER, INC, reversing the Saginaw County 10th Circuit Court's decision in favor of Plaintiff/Appellant.

On November 7, 2012, this Court granted Plaintiff/Appellant's Application for Leave to Appeal to address:

1. Whether the common law doctrines of *de facto* corporation and corporation by estoppel survived enactment of the Nonprofit Corporation Act, MCL 450.2101, *et seq.*;
2. If so, whether plaintiff corporation Center Woods, Inc., which was administratively dissolved in 1993 under §922 of the Nonprofit Corporation Act, but reinstated in 2009 under §925, continued to exist as a *de facto* corporation during the period of dissolution such that defendant Ruth Averill, a member and shareholder of the corporation, was required to provide notice to the corporation pursuant to its Articles of Agreement of the pending sale of her property; and
3. Whether defendant Averill is estopped to deny the existence of the corporation.

## STATEMENT OF QUESTIONS INVOLVED

I. Did the Common Law Doctrine of *De Facto* Corporation and Corporation by Estoppel Survive the Enactment of the Nonprofit Corporation Act, MCL 450.2101, *et seq.*?

| | |
|---|---|
| Plaintiff/Appellant Would Answer: | Yes |
| Trial Court Would Effectively Answer: | Yes |
| Court of Appeals Would Answer: | No |

II. Because the Nonprofit Corporation Act Drew so Heavily from the Business Corporation Act, did the Creation and Enactment of the Business Corporation Act Abolish Common Law?

| | |
|---|---|
| Plaintiff/Appellant Would Answer: | No |
| Trial Court Would Effectively Answer: | No |
| Court of Appeals Would Answer: | Yes |

III. Was Center Woods a *De Facto* Corporation?

| | |
|---|---|
| Plaintiff/Appellant Would Answer: | Yes |
| Trial Court Would Answer: | Yes |
| Court of Appeals Would Answer: | No |

IV. Is Ruth Averill Estopped From Denying the Existence of Center Woods?

| | |
|---|---|
| Plaintiff/Appellant Would Answer: | Yes |
| Trial Court Would Effectively Answer: | Yes |
| Court of Appeals Would Answer: | No |

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

### A. Introduction

This case arises out of a September 2009 sale of a house with a common address of #2 Center Woods, located in the Center Woods subdivision in Saginaw, Michigan. Plaintiff/ Appellant CENTER WOODS, INC. ("Center Woods") is a nonprofit corporation which was incorporated in 1941.

At issue in this case is the enforcement of building and use restrictions created in October 1941. The restrictions are contained in a document entitled, "Articles of Agreement", and pertain to "all land in Center Woods". The Articles of Agreement provide, among other things:

> These covenants are to run with the land and shall be binding on all parties and all persons claiming under them and shall remain in full force and effect until such time as they shall be modified or repealed by agreement entered into by the owners of at least seventy-five percent (75%) of the lots contained in said plat.
>
> If the parties hereto, or any of them, or their heirs or assigns shall violate or attempt to violate, any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated in Center Woods Subdivision to prosecute any proceedings at law or in equity against the person or persons violating, or attempting to violate, any such covenant.
>
> Invalidation of any one of these covenants, or any part of any covenant, by judgment or court order shall in no way invalidate any of the other provisions which shall remain in full force and effect.
>
> 1. Center Woods shall be maintained as residential property only and no property shall be used for any trade, commercial, industrial, or any other use whether or not herein specified, except for single family dwellings.
>
> * * *
>
> 12. All property owners in Center Woods shall be members of Center Woods, Inc., a non-profit corporation, organized to provide for the improvement and maintenance of Center Woods as a desirable residential community.

* * *

16. No property in Center Woods shall be sold without first giving Center Woods, Inc. thirty (30) days notice thereof and first opportunity to purchase said property at a price equal to a bonafide offer.

The Articles of Agreement were recorded in Saginaw County at Liber 634, pages 595-599, and are contained at **Appendix 31a**.

The building and use restrictions contained in the Articles of Agreement are specifically referenced in historical deeds to the house at #2 Center Woods issued in 1941 and 1948 (attached to Res-Care Premier, Inc.'s Brief on Appeal as Exhibits 16 and 17). Also, later deeds, from 1965, 1968, 1992, 1996, 1998, 2001, and 2009, refer to "building and use restrictions," or "restrictions," that are "of record" (*Id*). The circumstances of this case revolve around the sale of #2 Center Woods in 2009 by Ruth Averill ("Averill"). Averill's deed contains the following language:

". . . subject to the existing building and use restrictions, easements and zoning ordinances of record, if any."

Trial Court Plaintiffs SCOTT WOODBURY and JEANNE WOODBURY ("Woodburys") are residents of Center Woods subdivision. They purchased #3 Center Woods in 1999, which home is directly next door to the house at #2 Center Woods owned by Averill.

Averill purchased the house at #2 Center Woods in July 2001 (See **Averill deposition transcript**, contained at **Appendix 44a**). At that time, Center Woods was a nonprofit corporation in good standing. In 1993, Center Woods was administratively dissolved under MCL 450.2922 ("§922") of Michigan's Nonprofit Corporation Act for failing to file, for two consecutive years, the annual reports and pay the annual filing fee.

Center Woods subsequently followed the procedures set forth in MCL 450.2925 ("§925") for renewal of its corporate existence. Center Woods received a Certificate of Good Standing, **Appendix 137a**. The renewal provision of §925 contains the following language:

> "(2) Upon compliance with the provisions of this section, the rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable." MCL 450.2925(2).

This case arises as a result of contract and other rights which arose during the interval.

**B. Beginning in 2001**

Averill purchased her house for $239,900 in July of 2001 (**Averill Dep. Appendix 44a**). It is indisputable that, while Averill occupied the house at #2 Center Woods, Center Woods handled a variety of business and maintenance functions of the subdivision, in the ordinary course:

1. Maintained a bank account (**Averill Dep. Appendix 52a**);

2. Sent out an annual dues statements accounting for the expenditures in a given year, sent by Jack Short, acting as president of Center Woods (**Averill Dep. Appendix 55a-56a**);

3. Maintenance of the common area at the entryway of the neighborhood (**Averill Dep. Appendix 51a-52a**);

4. Street repairs for both the North and South streets as the roads were private and not maintained by a municipality (**Averill Dep. Appendix 53a-54a**);

5. Plowing of the streets as the roads were private and not plowed by the municipality (**Averill Dep. Appendix 54a-55a**);

6. Mowing and upkeep of the entrance and common areas (**Averill Dep. Appendix 55a**);

7. Maintenance of the signage at the front of the subdivision (**Averill Dep. Appendix 55a**);

8. Conducted at least one business meeting with Averill in attendance and conducting such business (**Averill Dep. Appendix 59a, 67a**);

9. Produced meeting minutes, distributing same (**Averill Dep. Appendix 59a, 67a**); and

10. While she did not specifically remember the extent to which Center Woods paid for items such as insurance, those were typically things set forth in the dues statement and handled by Center Woods (**Averill Dep. Appendix 58a-59a**).

With regard to the operation of the homeowners association generally, Averill paid her dues when they became due, was not in charge, and allowed others to handle the business of the association (**Averill Dep. Appendix 53a**). In her dealings with Center Woods, Averill knew and understood that Jack Short was the president. She identified and brought to her deposition her 2003 dues statement, sent from him.

**C. 2006 House Listed For Sale**

In 2006, Averill decided to sell her house, listing it for $249,900 (**Averill Dep. Appendix 62a**). When she initially listed the house for sale, Averill listed the property with realtor Jane Fowle. Averill received a copy of the Building and Use Restrictions from Ms. Fowle, at some point in 2006 (**Averill Dep., Appendix 61a**). Ms. Fowle died and the property was then listed with another realtor in the same office, realtor Mary Klein (**Averill Dep. Appendix 44a**).

At the point when Averill was ready to sell her house in 2006, she was provided with a copy of and had a conversation with her (then) realtor Jane Fowle, as to whether or not the thirty day notice contained in the recorded Articles of Agreement was still in effect (**Averill Dep. Appendix 76a-78a**).

Averill understood the significance and meaning of the building and use restrictions:

"Q. Yes, thanks. Can you read 16 for me.
A. No property in Center Woods shall be sold without first giving Center Woods, Inc. thirty (30) days notice thereof and first opportunity to purchase said property at a price equal to bonafide offer.
Q. Do you know what that means?
A. Well, I think there are two parts to it. The property should not be sold without giving 30 days notice and then also second part is giving them opportunity to purchase the property at a price equal. But it doesn't state any specific price, that you have to give any specific price."

(**Averill Dep. Appendix 93a**).

When Averill originally listed her house, she received no offers for three years. In approximately July of 2009, Averill received an offer from Moshen Zadeh to purchase the property for $160,000.00 (**Averill Dep. Appendix 72a-73a**). Averill counter-offered at $170,000, which was accepted on July 10, 2009 (see Purchase Agreement #1 which is contained in **Appendix 138a**).

Averill and her (then) realtor Mary Klein again discuss the thirty day notice prior to sale and Averill chose to send a notice (although arguably insufficient). (**Averill Dep. Appendix 76a-77a**).

On July 20, 2009, Averill sent Notice #1, **Appendix 147a**, to Jack Short because he was the president of Center Woods (**Averill Dep. Appendix 106a**). Notice #1 did not contain the price or the terms of sale.

The sale to Zadeh fell through and was never reinstated (**Averill Dep. Appendix 75a-76a**). At some point, the Zadeh sale was canceled. On September 1, 2009, Averill received a

second offer, this time from Defendant/Appellee RES-CARE PREMIER, INC. ("Res-Care") to purchase the property for $170,000.00 (Purchase Agreement #2, **Appendix 153a**). It is undisputed that Averill accepted that offer on September 3, 2009, and closed on the sale September 25, 2009, without sending a new notice of the price, nor terms of sale (Res-Care's Brief on Appeal, p 6). It is not in dispute that Averill sent no notice for Purchase Agreement #2 (although Averill and Res-Care argue that Notice #1 is sufficient notice, despite not containing a price and terms of sale and further sufficient notice, for both Purchase Agreements #1 and #2).

It was not until October 7, 2009, that Averill made Center Woods aware that she had already closed on the sale of her house. On that date, Averill sent another letter to Jack Short, president of Center Woods. In this letter, Averill stated that she planned on moving on October 12, 2009 and that she had already closed on the sale (see Notice #2, **Appendix 153a** ).

**D. Court Proceedings**

The events that followed the October 7, 2009 letter from Averill to Jack Short were accurately summarized by the Trial Court:

> "Upon receiving this information Center Woods alerted Mrs. Averill and Res-Care to the fact that they had no complied with applicable building and use restrictions, more particularly the 30 day notice of right of first refusal. Defendants were advised that any further work on the property should cease until Center Woods decided whether or not it would exercise its right to purchase the property. It became apparent that Res-Care did not intend to follow this advice and the instant action ensued." (Opinion and Order of Trial Court, attached to Amended Judgment ("Opinion & Order"), **Appendix 4a-5a**).

On October 13, 2009 Center Woods complied with MCL 450.2925 bringing the corporation into good standing with the state of Michigan. §925 states in pertinent part:

> "(2) Upon compliance with the provisions of this section, the rights of the corporation shall be the same as though a dissolution or revocation had not taken

place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable." MCL 450.2925(2).

Center Woods and Woodburys brought suit.

In the ensuing Complaint, Plaintiffs asserted three counts. Count I was titled, "Breach of Recorded Building and Use Restrictions - Right of First Refusal," and alleged that, in violation of the duly recorded Articles of Agreement, Defendants failed to provide the required "thirty (30) day right of first refusal for the purchase of #2 Center Woods, Saginaw, Michigan, prior to lawful transfer of the property". Count II was titled, "Breach of Recorded Building and Use Restrictions - Unlawful Commercial Operation", also alleged a violation of the Articles of Agreement; in particular, that "Res-Care seeks to use the home as a rehabilitation center inconsistent with the Building and Use Restrictions." In regard to all three counts, Plaintiffs requested that the Trial Court:

A. Enter a judgment in favor of Plaintiffs and against Defendants, jointly and severally, in an amount this Court determines appropriate, plus costs, interest, reasonable attorney fees, and such further relief this Court deems necessary and property;

B. Order a judgment in favor of Plaintiffs against Defendants for compensatory damage in an amount in excess of $25,000 that is sufficient to compensate Plaintiffs for their actual, consequential, and incidental losses, including lost profits, opportunity, and diminution in property values as a result of Defendants' wrongful actions, plus interest, costs, and reasonable attorney fees;

C. Permanently enjoin Defendant RES-CARE PREMIER, INC., from entering and continuing to own #2 Center Woods, Saginaw, Michigan and that it be restrained permanently from doing so;

D. Enter a judgment invalidating the transfer from Defendant RUTH AVERILL to Defendant RES-CARE PREMIER, INC., and

rescinding in its entirety, that transaction giving Plaintiffs a thirty (30) day opportunity for a right of first refusal pursuant to the recorded Building and Use Restrictions; and

E. Grant any relief this Court determines is available pursuant to its equitable powers.

Also, as stated by the Trial Court:

> "In conjunction with the filing of the complaint plaintiffs sought and were granted a temporary restraining order preventing Res-Care from occupying or using the property as a residence. Following a show cause hearing on November 9th, the court enjoined any occupation or further improvement of the premises pending trial on the merits. In response, Res-Care has filed a counterclaim alleging causes of action for tortious interference with a contract and business relationship or expectancy, abuse of process, and violation of the Fair Housing Amendments Act and the Americans with Disabilities Act." (**Opinion & Order, Appendix 1a**).

Soon thereafter, Plaintiffs and Res-Care filed competing motions for summary disposition.

Res-Care argued that the building and use restrictions have been extinguished by operation of the Marketable Record Title Act (MCL 565.101 *et seq*) since the Articles of Agreement had not been re-recorded in the forty years prior to the sale. Res-Care went on to argue, in the alternative, that since Center Woods had failed to file annual reports, it was automatically dissolved as of 1993 and only existed for a reasonable time thereafter for the sole purpose of winding up its affairs. Res-Care then argued, in essence, that Center Woods had ceased to exist for all purposes as of 2009 and therefore, there was no entity to which Averill could properly give notice of the sale as required by the right of first refusal provision (Res-Care's November 30, 2009 Motion for Summary Disposition).

In the Trial Court, Plaintiffs argued that because the building and use restrictions in the Articles of Agreement have been recorded, were intended to run with the land, and were referenced in the original deed to Averill and in the subsequent deed from Averill to Res-Care

(see Deed, **Appendix 154a**), those restrictions, including the right of first refusal, are valid and enforceable. Plaintiffs contended that the homeowners in Center Woods purchased their homes with notice of the recorded right of first refusal and have relied thereon, and their rights should be enforced. Plaintiffs went on to argue that, in this case, the right of first refusal was clearly violated because Averill did not provide thirty days notice that she was selling her house under Purchase Agreement #2, nor notice of the price and terms for which she was going to sell the house.

Plaintiffs also argued that, although Center Woods may have, at some point, been automatically dissolved for failure to file annual reports, Center Woods never completely ceased to exist and, since it complied with the reinstatement statute, it may enforce any rights acquired during the interim period of dissolution. Plaintiffs argued, alternatively, that even if Center Woods was an unincorporated homeowners' association, it was still entitled to notice (Plaintiffs' December 14, 2009 Motion for Summary Disposition).

Res-Care filed a second motion for summary disposition. In its motion, Res-Care argued that state and federal laws prohibit exercising a right of first refusal in a discriminatory manner and that, in this case, the actions and statements made by Center Woods' board members and others in the subdivision indicate that the right of first refusal was being exercised simply to preclude disabled persons from living in the home. Res-Care then argued that Count II of the Complaint (that Res-Care's use of the property was in violation of the commercial use restriction) must be dismissed because operating a group home is a recognized residential use of property and the residents in such a home are considered a single family (Res-Care's December 14, 2009 Motion for Summary Disposition).

Plaintiffs filed a combined response to Res-Care's motions and their own second motion for summary disposition. In this combined response/motion, Plaintiffs argued, that although the Articles of Agreement had not been re-recorded in the forty years prior, they need not have been since the restrictions with run the land and numerous deeds in Averill's chain of title referenced the restrictions on the property, such that the restrictions remained valid for purposes of the Marketable Record Title Act. Plaintiffs also noted that, at all times, regardless of any statutory dissolution, from a practical standpoint, Center Woods continued to operate, collect dues, maintain the roads, maintain a bank account, meet with local officials, contract for services, and otherwise do what was necessary to conduct the business of Center Woods. Consequently, Center Woods did not cease to exist and Averill actually knew as much, as evidenced by her Notice #1 to Jack Short, president, and the fact that she paid association dues, attended meetings, and otherwise participated in the Center Woods association as an owner (Plaintiffs' December 17, 2009 Combined Response/Second Motion for Summary Disposition). Res-Care responded to Plaintiffs' Motions.

Following a hearing on December 22, 2009, the Trial Court issued a written opinion on the motions for summary disposition (see **Opinion & Order, Appendix 1a** ). In that opinion, the Trial Court granted summary disposition in favor of Plaintiffs. The Trial Court ruled that Res-Care's interpretation of the Marketable Record Title Act "would make a complete muddle of Michigan real estate law," (**Opinion & Order, Appendix 10a**), that the right of first refusal has not expired (**Opinion & Order, Appendix 12a-13a**), that Averill failed to give proper notice of the Res-Care sale (**Opinion & Order, Appendix 13a-15a**), and that Averill "was required to give notice to whatever was left of Center Woods, regardless of its legal standing" (**Opinion &**

**Order, Appendix 15a-16a)**. Ultimately, the Trial Court "set aside and vacated" the sale of the property, and ruled that if Averill and Res-Care "decide to renew their agreement notice of the sale must be given to Center Woods, Inc.", which "in turn will have 30 days from receipt of that notice to exercise the right of first refusal" (**Opinion & Order, Appendix 16a**).

On April 12, 2010, an Amended Judgment was entered that incorporated the Trial Court's written opinion (see **Appendix 1a**). An appeal by Res-Care followed.

On January 19, 2012, the Michigan Court of Appeals rendered a published opinion, finding that the Articles of Agreement were enforceable as to Center Woods, Inc., only. The Court of Appeals found that Center Woods "did not exist at the time of the sale", equating Center Woods to a dead person. Because Center Woods did not exist at the time of the sale, there was no one to whom Averill could possibly have given a notice.

The Court of Appeals distinguished this case from *Stott v Stott Realty, Inc.*, 288 Mich 35; 284 NW 635 (1939), because in *Stott* it said the stockholder participated in corporation affairs after initiating the lawsuit. The Court of Appeals distinguished *Bergy Brothers v Zeeland Feeder Pig, Inc.*, 415 Mich 286; 327 NW2d 305 (1982) from the case at bar without clear explanation as to the difference, but indicated that the holding in *Bergy* was consistent with the language of MCL 450.2925(2) and avoided personal liability to shareholders.

The Court of Appeals further stated that it is not reasonable to require persons to give notice to a nonexistent corporation. The Court of Appeals denied Center Woods *de facto* existence and differentiated between a retroactive legal existence and something it called a past factual existence (here, a factual nonexistence). The Court of Appeals reiterated its conclusion that Averill had no obligation to provide notice of the pending sale to Center Woods because,

although Center Woods had obtained retroactive legal existence, it was, at the time of the pending sale, a nonexistent corporation. The Court of Appeals reversed the Trial Court's decision and remanded the case for entry of an order granting summary disposition to Defendants.

This Appeal followed. On November 7, 2012, this Court granted Center Woods' Application for Leave to Appeal.

## LAW AND ARGUMENT

### I. Did the Common Law Doctrine of *De Facto* Corporation and Corporation by Estoppel Survive the Enactment of the Nonprofit Corporation Act MCL 450.2101 *et seq*?

The question could be asked more broadly, did any common law survive the enactment of the Nonprofit Corporation Act ("NPCA")? The Legislature created the NPCA, MCL 450.2107, *et seq*., effective January 1, 1983. While the NPCA contains an introductory paragraph setting forth the purpose of the NPCA, it does not mention common law. It may therefore be helpful to look at the legislative intent of the NPCA. In creating the statute, the Legislature relied exclusively on the

State Bar of Michigan's

Corporation, Finance and Business Law Section's

Corporation Committee's

Nonprofit Corporation Subcommittee

for the language of the statute itself, as well as the reasoning behind its creation. The language of the committee was adopted in its entirety (with some non-substantive wording changes which occurred following the original submission). The subcommittee and the Legislature's rationale in the statute states (in pertinent part):

> "Basically, the aim was to do for non-profit corporations what the Business Corporation Act of 1972 had done for business corporation law: modernize, simplify, and clarify the confusing jumble of statutes." (April 15, 1982 First Analysis - Nonprofit Corporation Act - Senate and House Analysis Section ("**SAS**"), **Appendix 155a**)

Prior to its creation, there were dozens of special statutes, each dealing with a different aspect of nonprofits which, when taken together, made up a web of rules governing the nonprofit

corporation. The purpose of the NPCA was to compile those statutes, in one easy to ready, easy to understand spot[1].

The stated legislative intent continued:

> ". . . they have produced a new comprehensive enabling statute aimed at streamlining the laws governing non-profit organizations in order to clarify existing ambiguities and to make legal research simpler." **(SAS, Appendix 155a)**

> "It would repeal and replace the general provisions of existing non-profit law, as well as integrate provisions from various other acts relating to the subject. The bill would not replace the many special acts, those under which specific kinds of church and fraternal organizations have been incorporated, nor would it alter regulatory laws, such as those which deal with tax exemption, licensure for solicitation, and the dissolution of charitable corporations. **(The bill would provide, indeed, that regulatory laws would supercede the provisions of this bill in instances of conflict.)** In structure, the bill would parallel the Business Corporation Act of 1972; this means, for example, that chapter two of each is concerned with incorporation." (emphasis added, **SAS, Appendix 155a**)

The committee and then the Legislature further intended for the NPCA to use the Business Corporation Act ("BCA"), MCL 450.1101, *et seq.*, as its foundation.

> "Wherever applicable, provisions from the Business Corporation Act have been incorporated into this bill so that the bill does not need to cite the Business Corporation Act." **(SAS, Appendix 156a)**

The committee submitted to the Legislature two foundational documents and the Legislature incorporated by references these two documents:

> The bill was produced by the Nonprofit Corporation Subcommittee of the Corporation Committee of the Corporation, Finance and Business Law Section of the State Bar of Michigan. That subcommittee has produced a memorandum explaining the process by which the bill was produced and the effect the bill would have on the incorporation and operation of non-profit corporations. The subcommittee has also prepared a section-by-section analysis of the differences between existing provisions and the provisions contained in House Bill 4684.

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[1] Although one of the stated criticisms of the Act was that it did not go far enough in eliminating many special statutes. (see **SAS, Appendix 158a**, Opposing Argument)

(**SAS, Appendix 157a**, Background). One explaining the process by which the bill was produced and its effect ("**Committee Memo**" is contained at **Appendix 161a**)[2] and second, a section by section analysis of the differences between existing statute and the (at that time) proposed law. The Section by Section Analysis was created by Professor Ronald Trosty of Thomas Cooley Law School (see **Section by Section, Appendix 189a**). Committee Memo clarifies that the law was created as a means of modifying only statutory law:

> "It was originally prepared in 1980 as an introduction to the Act. This memorandum describes the process by which the Act was prepared, its scope, the extent to which it modifies present statutory law and the enabling premise upon which it has been based. A section by section analysis of the Act, which details the relationship of the Act to the present Michigan Business Corporation Act **and the Michigan statutory provisions governing nonprofit corporations which are repealed by the Act** is attached as Appendix A to this memorandum." **(Committee Memo, Appendix 165a)**

The Section by Section Analysis details all changes the new law would affect including single wording changes, statute by statute. Were the Act intended to supercede all common law, or any common law, one would expect to find reference to it in the legislative intent, in the Memo, and in the section by section analysis, however, none exists.

> ". . . the Subcommittee's purpose was to review Michigan nonprofit corporation **statutes** and, to the extent necessary, modernize, simplify and clarify them. In order to determine the scope of its task, the Subcommittee undertook first to prepare a compilation of Michigan laws applicable to nonprofit corporations, including (1) miscellaneous statutory provisions relating to securities, tax exemptions and the like; (2) statutes creating particular categories of nonprofit corporations; and (3) special acts providing for the incorporation of special purpose corporations. It also prepared a historical outline of the development of

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[2] Note the attached memo is a modified version of the original. Both the original and the attached version were prepared by Julia Darlow. The original version submitted to the Legislature, the attached referenced prepared for an ICLE Seminar put on by Darlow following enactment. This document was obtained from the current co-chair of the Nonprofit Corporation's Committee of the Business Law Section of the State Bar of Michigan and should be seen as a treatise. The original title of the ICLE Seminar was "Nonprofit Corporations: The New Michigan Statute (1982)".

the general statutory provisions applicable to nonprofit corporations in Michigan." **(Committee Memo, Appendix 166a)**

It is fair to say that the committee, and therefore the Legislature by extension, had an exclusively statutory focus for the creation of the NPCA. It is not fair to say, however, that the committee and the Legislature had not considered common law. In fact, one of the reasons for drawing from the BCA verbatim was to incorporate the better understanding practitioners and the public had (at that time) in the operations of corporations generally, under the BCA.

> "In addition, because most lawyers are far more familiar with the Business Corporation Act than with nonprofit corporation law, the organizational framework would likely provide greater clarity and convenience to practitioners. Moreover, the provisions of the Business Corporation Act relating to formation, structure, meetings and other operational matters would likely be familiar to many persons other than lawyers who serve nonprofit corporations or are members therein." **(Committee Memo, Appendix 176a)**

As well as unifying the rules and laws for both nonprofit and profit corporations.

> "2. Consistency.
> Within this framework, all provisions of the Business Corporation Act which are consistent with existing law pertaining to nonprofit corporations have been retained without change in wording or context.[4] Where changes have been required or deemed advisable, the wording and context of the Business Corporation Act have been retained as much as possible." **(Committee Memo, Appendix 176a-177a**, footnote omitted)

Put simply, the creators wanted statutory interpretation of the BCA to flow into the NPCA. They expected common law principles to follow as well.

> "Applicable nonprofit corporations provisions and applicable business corporation provisions are frequently incongruous, and the impact of judicial decisions and common law principles upon the inter-relationship of the two categories of statutory provisions has often been unclear.

> The subcommittee concluded that a separate act which followed as closely as possible the organizational framework of the Business Corporation Act would provide the most logical vehicle to integrate present nonprofit corporation provisions and applicable business corporation provisions." **(Committee Memo, Appendix 175a-176a)**

> "With respect to existing Michigan nonprofit corporation law, the Subcommittee's purpose was primarily to clarify the law rather than to make basic changes." **(Committee Memo, Appendix 180a)**

The goal of the committee, adopted by the Legislature, was to incorporate as much of the history, both statutorily and that of common law of the BCA into the new law (NPCA), going so far as to say that future changes in the BCA will require care in also changing the NPCA.

> "The Subcommittee also recognized that the Business Corporation Act framework would involve a lengthly [sic] statute and would require care in the future that any amendments to the Business Corporation Act be reflected in appropriate amendments to the Nonprofit Corporation Act." **(Committee Memo, Appendix 176a)**

The stated goal was statutory modification. Technically, modification is probably too strong a word. The stated goal was statutory clarification and simplification. The new law was in fact not really intended to change the existing law at all.

> "It is designed to integrate in a single act the numerous general statutory provisions which presently apply directly or indirectly to nonprofit corporations and to provide a comprehensive framework applicable to those nonprofit corporations which will remain subject to existing specific legislation not repealed by the proposed legislation. The Act is not intended substantially to change existing statutory law as set forth in present nonprofit corporation statutes and the Business Corporation Act. . . . The Act may best be understood and applied as enabling legislation." **(Committee Memo, Appendix 188a)**

Because the NPCA took so heavily from the BCA and since the statutory language at issue in this case mirrors that of language in the BCA[3], the question is not only did the Legislature intend to abolish common law when it created the NPCA (the answer to which is clearly, no); but in addition did the Legislature do away with common law ten years earlier in 1972 when it created the BCA? Fortunately, for Appellant the answer to that question is also no. Common law survived enactment of both the NPCA and the BCA.

## II Because the Nonprofit Corporation Act Drew so Heavily from the Business Corporation Act, did the Creation and Enactment of the Business Corporation Act Abolish Common Law?

Based on the legislative record, it is evident that the crafters of the NPCA had no eye to superceding common law. On the contrary, they wanted the statutory interpretations, as well as the foundational common law associated with the BCA as underpinnings for the NPCA. Nothing in the BCA, nor the legislative history for the BCA, suggest that common law would be abrogated, outside the general principle that where a statute is created and governs a given situation, that statute prevails over previously established common law, where the two are inconsistent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987).

Beyond that general principle, we get some insight as to legislative intent from the BCA's (and the NPCA's) specific references to common law. Common law is referenced ten times in the two statutory schemes, seven in the BCA and three in the NPCA each[4]. In each instance,

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[3] BCA provision MCL 450.1833 is operatively the same as NPCA provision MCL 450.2833. BCA provision MCL 450.1922 is operatively the same as NPCA provision MCL 450.2922. BCA provision MCL 450.1925(2) is exactly the same as NPCA provision MCL 450.2925(2).

[4] BCA 1) MCL 450.1343(4) - Preemptive Rights - one time; BCA 2) MCL 450.1548(4) - Loan, Guaranty, or Assistance by Corporate Director office or employee - one time; BCA 3) - MCL 450.1821(2) - Action by attorney general for dissolution, grounds - one time; BCA 4) MCL 450.2014(1)(c) - Applicability of MCL 450.2001-450.2055 - one time; BCA 5) MCL 450.2062(7)

(where relevant), the statement made is that common law is not overruled as it relates to this section. Nowhere does it appear that there was an intent that the BCA (nor then the NPCA) overrule any existing rules, common law, or otherwise. The Act, from the legislative intent, appears to be more in line with consolidation of existing statutory law.

### A. BCA Legislative History Speaks Only of Affecting Statutes

The Department of Education set forth succinctly the purposes stated, at that time, for the creation of the BCA:

> There are arguments for the bill from a corporation standpoint, in that the bill would in essence authorize very liberal corporation practices and procedures. It has been stated that this bill would be similar to the present corporation practices found in the state of Delaware, which are among the most liberal in the United States. The statement has been made that this bill would authorize similar corporation practices for profit-making institutions in the state of Michigan. (See April 10, 1972 correspondence from John W. Porter to Governor William G. Milliken regarding Analysis of Senate Bill No. 602)

Were there an intent to do away with years of established common law, that abolition would certainly be noted within the legislative papers and notes. It was not. Were there an intent to do away with any common law that would also have been noted. It was not. See April 10, 1972 correspondence from John W. Porter to Governor William G. Milliken regarding Analysis of Senate Bill No. 602, **Appendix 228a**.

The answer then to the questions, did the BCA (or the NPCA) do away with the common law doctrines of *de facto* corporation or corporation by estoppel, are both no. Neither law did away with any common law principal, as common law was not the focus of the enactments.

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- Organization and admission fee - two times; BCA 6) MCL 450.2064 - "Regulated Investment Company" defined; NCPA 7) MCL 450.2481(2) - Preemptive Rights - one time; NCPA 8) MCL 450.2548(3) - one time; NCPA 9) MCL 450.2821(2) - Action by attorney general for dissolution - one time.

Further, this Court recognized that the purpose of the statute requiring corporations to pay privilege taxes and suspending their right to do business for non payment is not primarily directed against the corporation, but is for the purpose of enabling the state to enforce payment of revenue. See *Stott, supra,* citing *State, ex rel Preston Mill C v Howell*, 67 Wash 377; 121 P 861 1912 Wash LEXIS 1187 (1912).

### B. The Statutory Scheme - How Do Sections 922, 833, and 925 Interrelate in the Nonprofit Corporation Act?

The legislative intent and the Act's impact on common law can be understood by examining the interplay between §§922, 833, and 925 of the NPCA and its impact on Center Woods and any corporation either nonprofit or for profit[5]. On the one hand, pursuant to §922, Center Woods in 1993 had been administratively dissolved. §922 states:

> "(1) If a domestic corporation neglects or refuses for 2 consecutive years to file the annual reports or pay the annual filing fee required by law, the corporation shall be automatically dissolved. The administrator shall notify the corporation of the impending dissolution not later than 90 days before the 2 years has expired. Until a corporation has been dissolved, it is entitled to issuance by the administrator, upon request, of a certificate of good standing setting forth that it has been validly incorporated as a domestic corporation and that it is validly in existence under the laws of this state."

The result of this would seem to be that Center Woods would then be bound by the provisions of §833 which mandate that a corporation "following dissolution shall not conduct affairs except for the purpose of winding up. . .". But, there is legislative recognition that corporations do continue to contract and do continue to acquire rights during periods of dissolution under administrative dissolutions. §925(1) states in pertinent part:

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5 In this instance, we are reviewing Sections 922, 833, and 925 of the NPCA. This same analysis holds true for the BCA, with the corresponding section numbers.

> "(1) A domestic corporation which has been dissolved pursuant to section 922(1), or a foreign corporation whose certificate of authority has been revoked pursuant to section 922(2) or section 1042, may renew its corporate existence or its certificate of authority by filing the reports for the last 5 years or any lesser number of years in which the reports were not filed and paying the annual filing fees for all the years for which they were not paid, together with a penalty of $5.00 for each delinquent report. Upon filing the reports and payment of the fees and penalties, the corporate existence or the certificate of authority is renewed."

And more specifically, upon reinstatement, §925(2) dictates that all rights are preserved:

> "Upon compliance with the provisions of this section, the rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable."

Theoretically then, when a corporation becomes dissolved under §922, it can only act in furtherance of winding up. But this interpretation of the statute ignores (in their entirety) neglectful failures under §922; instances in which there is a forgotten filing and a dissolution which, by definition, no one knew about or no one understood (the fact that a dissolution had occurred). Those corporations which "neglect", by definition, continue to act in the ordinary course of business. They were not, after all, aware of their corporate status and they continued to act in their corporate capacity, contracting and acquiring rights inconsistent with winding up.

In so acting they also seem to, by definition, violate §833 which bound them to act only in furtherance of winding up. This seeming violation occurs unless the *de facto* corporation exists to fill the gap, which it does. In fact, the only way §833 can be reconciled with §§922 and 925 is if the corporation which unintentionally failed to file (or more specifically "neglects") the Michigan Annual Reports and/or pay the fee to the State, continues to exist under the law for all purposes of ordinary and regular business. To consider otherwise ignores parts of the specific language of the statute, which the Court of Appeals ignored and which this Court should not

allow. *Metropolitan Counsel 23, AFSCME v Oakland County Prosecutor*, 409 Mich 299, 317-318; 294 NW2d 578 (1980).

§925 assumes that the corporation contracts and otherwise acquires rights. The Legislature is aware of events of inadvertent failures to file the Michigan Annual Report and pay the State's fee which is why it used the word "neglects"

The Court of Appeals equates a corporation which has been administratively dissolved by operation of law, as was Center Woods here, as a dead person. This interpretation of the statute cannot stand in the face of the plain meaning of the statutory language. Dead people cannot enter into contracts. They cannot negotiate for services. Dead people cannot provide accountings and cannot conduct meetings. All of which administratively dissolved companies can do, all of which *de facto* companies can do. All of which Center Woods did.

**C. §925 Recognizes Ordinary Course Dealings by Implication.**

Had the Legislature intended to limit the rights of corporations to act, following reinstatement under §925, to only those acts consistent with winding up, it could have done so. It did not. §925 speaks to all contracts entered into, not only those consistent with §833, nor only those in furtherance of winding up. It states "all" which cannot be interpreted as "some"; or "only those rights associated with winding up"; or "all but . . .". All means all no matter how or why they were acquired.

Finally, the only way to give meaning to: ". . . the corporation shall be the same as though a dissolution or revocation had not taken place. . ." is to acknowledge that the corporation was in existence during the period of dissolution, namely as a *de facto* corporation. The Legislature insisted in §925 that the rights of the company shall be the same as though a dissolution or

revocation had not taken place. The only way to effectuate that provision of the statute is to conclude that any right acquired, for any reason, and under any circumstance is validated upon reinstatement. This requires that something exist during the period of dissolution and incorporates, therefore, the idea of *de facto* corporations.

A corporation cannot "cease to exist", during the period of dissolution as that would render it incapable of contracting and, therefore, there would be no "contracts or other rights" to reinstate upon compliance with §925. It must be the case, then, that corporations exist during the period of dissolution. Specifically here, Center Woods existed following dissolution and during the period of dissolution for failing to file under §922.

It must also be the case that a corporation is capable of contracting and is capable of acquiring other rights, as that is the specific language of the statute, §925(2).

Were it the case that the Legislature intended to limit the types of contractual and other rights which are reinstated, it could have easily done so. Instead, the statute states that all rights are intact. Not only those contract and other rights related to winding up. Not only those rights related to §833. The statute uses the word "all". Center Woods' contract rights then are intact. It was entitled to notice of the sale of #2 Center Woods.

## III. Was Center Woods a *De Facto* Corporation?

The *de facto* corporation doctrine provides that a defectively formed corporation - one that fails to meet the technical requirements for forming a *de jure* corporation - may attain legal status if certain requirements are met. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 152; 792 NW2d 749, 755 (2010). Historically, Michigan courts have employed two sets of elements for determining whether a *de facto* corporation exists. The first set provides that a *de facto*

corporation is instantly created when: (1) the incorporators have proceed in good faith; (2) under a valid statute; (3) for an authorized purpose; and (4) have executed and acknowledged articles of association pursuant to that purpose. *Tisch Auto Supply Co. v Nelson*, 222 Mich 196, 200; 192 NW 600, 602 (1923) (quoting *Eaton v Walker*, 79 Mich 579; 43 NW 638 (1889); *Newcomb-Endicott Co. v Fee*, 167 Mich 547; 133 NW 540 (1911); see also *Duray, supra,* at 155. It is fair to say that this test applies where there is some irregularity in the formation of a corporation.

Michigan courts have also applied a three element test, providing that a *de facto* corporation exists when: "(1) a charter or statute under which a corporation with the power assumed might have been organized; (2) a bona fide attempt to organize a corporation under such charter or statute; and (3) an actual use of the corporate powers." *Model Board, LLC v Board Institute, Inc.*, 2009 US Dist LEXIS 19822 (ED Mich, 2009); see also *Newcomb-Endicott, supra,* at 580-81; *Duray, supra,* at 155. Once the elements are met, the *de facto* corporation is an actual corporation - meaning it can sue and be sued. *Tisch, supra,* at 200. Here again, the focus of the test is on formation of a corporation. In both instances, the participants have a belief that they are a corporation and act in accordance with that belief.

In *Tisch*, the defendant-incorporators executed and signed the articles of incorporation pursuant to Michigan law, assumed a corporate name, established a purpose and principal place of business, fixed a stock value, elected a board of directors, and held a board meeting to elect officers. *Id* at 197. But, the articles of association were mistakenly never filed with the Secretary of State and county clerk as required by Michigan law. This Court held that the defendants established a *de facto* corporation. *Id* at 201. Specifically, stating:

> "Provisions in general incorporation laws, as well as in special charters, must be distinguished from provisions merely prescribing conditions to be complied with after acquiring corporate existence. Noncompliance with such a condition subsequent does not affect the existence of the corporation, although it may be ground for a proceeding by the State to forfeit the charter." *Id* (emphasis added).

The failure by the defendant-president in *Tisch* to file the articles of association with the Secretary of State and the county clerk was not fatal to the corporation's existence. Of note is the second portion of this *Tisch* quote. This Court has long recognized that once formed, a failure to meet some technicality will not thwart the existence of a corporation. Further, that the only entity capable of challenging the existence of the corporation following formation is the state of Michigan.

This Court, in *Newcomb-Endicott, supra*, applied a different set of elements with similar results. In *Newcomb-Endicott*, a creditor brought an action against the corporate directors to recover a bill of goods sold to the corporation. *Id* at 575-77. During the trial, it was revealed that the articles of association were not filed in accordance with Michigan law requiring "that a corporation shall transact no business until its articles of association have been filed in the office of the [S]ecretary of State and with the clerk of the county where incorporation has its principal office -- in both places . . . ." *Id* at 578. The articles of association were filed with the Secretary of State on June 15, 1908, and with the county clerk's office in March, 1909; however, the bill of goods in dispute occurred in July 1908. The participants in *Newcomb-Endicott* seemed to act in violation of the statute which prohibited corporate action before filing of the articles. This would have been true but for the *de facto* corporation rule. Although the articles of association were not filed in accordance with state law, a *de facto* corporation nevertheless existed. *Id.*

The United States Supreme Court, as far back as 1902, recognized the general rules governing *de facto* corporations. *Tulare Irrigation District v Shepard*, 185 US 1; 22 S Ct 531; 46 L Ed 773; 1902 US LEXIS 2252 (1902).

The *Tulare* court was dealing with a California municipal corporation, a water district, which failed to properly incorporate, but that none the less issued bonds. After using the funds in the ordinary course of business, the corporation attempted to get out of repayment by claiming it was never properly incorporated. That court set forth the general principals governing *de facto* corporations.

> . . . it appears that the requisites to constitute a corporation *de facto* are three: (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. *Tulare, supra*, at 13.
>
> Being a *de facto* corporation, the general rule is that none but the State can call its existence in question. The courts of California agree that such is the rule. *People v Montecito Irrigation Company,* 97 California, 276; *Quint v Hoffman,* 103 California, *supra;* see also, Cooley on Constitutional Limitations, page 312, 4th ed.; *Swartwout v Michigan Air Line Railroad Co.*, 24 Michigan 389, 393. The rule as stated by Cooley in Constitutional Limitations, 6th edition, 309, is as follows:
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> > "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the State as such. . . . And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the State, and private parties could not enter upon any question of regularity. And the State itself may justly be precluded, on principles of estoppel, from raising any such objections, where there has been long acquiescence and recognition."

In reviewing the standard for a *de facto* corporation, we are again faced with an issue of formation in *Tulare*. The Supreme Court recognized that there is a difference between an irregularity in formation and an issue which arises after the corporation already exists. That court acknowledged that only the state may challenge the corporate status of a corporation, once properly formed. It also recognized that even the state could be estopped from challenging the corporate status where there had been long acquiescence and recognition.

**A. Center Woods**

Center Woods' original incorporation has never been at issue. It is undisputed that Center Woods was in good standing until approximately 1993 when it failed to file its Michigan Annual Report and pay its fee to the state of Michigan. Pursuant to §922, this administrative failure resulted in dissolution by operation of law. Beyond that, nothing changed. It cannot be disputed that Center Woods maintained the grounds, common areas, and signage. Center Woods contracted for services such as plowing and street repairs and held periodic meetings of which Averill and the Woodburys attended at least one together, along with the other members of the subdivision.

In short, following the administrative dissolution, Center Woods continued to conduct its business in the ordinary course, with the full knowledge and participation (although minimal by choice) of Averill. Center Woods was: validly formed in 1941; under a valid statute; for an authorized purpose; and executed and acknowledged appropriate articles. The corporation meets the standards set forth in *Tisch*.

Center Woods was organized under a statute in 1941 and since that time, used and acted as a corporation. Center Woods meets the standard set forth in *Model Board* and *Tulare*.

When Averill sold her house, she was aware of the existence of the recorded building and use restrictions. She knew who the president of the corporation was. She chose not to provide the notice in fear of upsetting the potential sale of her house. A house which had not sold in three years. A house which had only one other offer in three years time. A house which had just had the only other offer to purchase in three years, fall through weeks before.

Center Woods was a *de facto* corporation at the time, entitled to notice of sale from Averill.

When the state of Michigan provided Center Woods with its Certificate of Good Standing, pursuant to §925 (**Appendix 137a**), the rights of Center Woods became the same as though a dissolution or revocation had not taken place pursuant to §925. In other words, the right of first refusal, notice to which it was entitled, remained intact.

## IV. Is Ruth Averill Estopped From Denying the Existence of Center Woods?

### A. *De Facto* Corporation Doctrine

Unlike a *de facto* corporation, which is a status corporation, by estoppel is an equitable remedy and does not concern a legal status. *Duray, supra*, at 152. This Court in *Estey Mfg v Runnels*, 55 Mich 130, 133; 20 NW 823, 824 (1884), summarized the principle as "[w]here a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence." However, there are few cases in Michigan dealing with this doctrine.

In *Estey*, the plaintiffs filed an action to recover possession of land which the defendants were holding against the rights of Estey Manufacturing. The defendant argued that Estey Manufacturing was not duly incorporated under state law for failing to properly file articles of

association and therefore could not transact any business in the state. This Court held that the defendants were estopped from denying the corporate existence of Estey Manufacturing because the defendants had treated it as a corporation. *Id* at 133.

Similarly in *Lockwood v Wynkoop*, 178 Mich 388, 389; 144 NW 846, 847 (1914), the plaintiffs were co-partners conducting a banking business in Saginaw. Plaintiffs filed an action to recover a promissory note owed to them by the defendants. On December 10, 1910, the defendants signed articles of association forming the Valley Brokerage Company. The articles were received December 17, 1910 by the Secretary of State, but were returned for correction on the same day. The defendants filed the corrected articles of association on December 31, 1910, which were received by the Secretary of State on January 3, 1911. Prior to that time, the plaintiffs agreed to conduct the banking of the defendants' new enterprise, in which the promissory note in question arose. When the note was not paid, the plaintiffs filed an action against the shareholders of Valley Brokerage as partners. The court found that the plaintiffs believed they were dealing with a corporation and not individuals and further that the account was in the name of the corporation. The court concluded that "a person dealing with a corporation as such, is estopped from denying its corporate existence . . .". *Id* at 391.

A corporation by estoppel is a legal remedy - not a legal status - based in equitable principles. Corporation by estoppel will be applied where individuals have organized as a company and have presented themselves as such to a third party. This is to prevent either party from arguing against the existence of a corporation when the parties treated it as one at the time of the transaction.

Corporation by estoppel exists independent of both *de facto* corporations, as well as the corporate statutory framework. *Pim, Inc. v Steinbichler,* 2001 Mich App LEXIS 2600 (2001) set forth the history of both concepts:

> "At its very essence, corporation by estoppel is a concept conceived and applied in equity to avoid injustice and unfairness. *American Vending Services, Inc. v Morse,* 881 P2d 917 (Utah App. 1994). Corporation by estoppel "is . . . the result of applying the policy whereby private litigants may, by their agreements, admissions or conduct, place themselves in a position where they will not be permitted to deny the fact of the existence of a corporation. *Willis v City of Valdez,* 546 P2d 570, 574 (Alas, 1976)." *Id* at 12.

At all times relevant to this case, Averill dealt with Center Woods as a valid corporation. In fact, when she first moved in, Center Woods was in good standing and, from her perspective, nothing changed from the day she moved in to the day she left, from an administrative standpoint. Center Woods conducted its company affairs, maintained a bank account, provided accountings, conducted meetings, negotiated and contracted for services, and negotiated with Saginaw Township (the municipality in which it was located). Averill enjoyed the benefits of that business conduct and participated in it. It was not until this suit that any claim was made by Averill that Center Woods was anything but a corporation. Averill here does not even rise to the level of a third party, having participated in 2004 in a corporate meeting to conduct company business. Were that not the case, however, she would still be prohibited from challenging the existence of Center Woods. Under the concept of corporation by estoppel, she is estopped from denying the existence of the corporation under that longstanding Michigan common law theory.

**B. Once Established, Only the State May Challenge Corporate Existence.**

Pursuant to MCL 450.1221, this Court has established that only the Attorney General may attack the existence of a corporation. *Miller v Allstate,* 481 Mich 601; 751 NW2d 463

(2008). This Court opined that Michigan's courts have long held that the State, and the State alone, can challenge the existence of a corporation:

> Although our analysis rests solely on our interpretation of the relevant statutes, we note that MCL 450-1221 encapsulates at least 100 years of common-law practice in Michigan. (*Id* at 614)
>
> Indeed, Michigan courts have long held that the state possesses the sole authority to question whether a corporation has been properly incorporated under the relevant law. See, e.g., *Flueling v Goeringer,* 240 Mich 372, 375; 215 NW 294 (1927). (*Id* at 615)
>
> Indeed, if the legality of every Michigan corporation were subject to continual assault by any person, it would be difficult to see how a stable economic climate could ever exist. (*Id* at 616)

Public policy dictates that third parties should not be allowed to challenge the existence of a corporation. To allow collateral attack of a corporation inserts into every case involving a corporation a review of any potential irregularities in its formation or operation, as a shield against enforcement of the rights of every person or entity dealing with a corporation.

Currently, 654,168 for profit corporations are not in good standing in the state of Michigan. 81,615 nonprofit corporations are not in good standing. In fact, there are about three times more companies not in good standing than there are in good standing.[6] To allow a collateral attack on corporate existence calls into question the rights and potential rights of these entities. It weakens and confuses Michigan Corporate Law by blurring the rights of hundreds of thousands of corporations upon reinstatement under §925 (should they become reinstated) under either the NPCA or the BCA. Upholding the Court of Appeals' decision would add a defense, or a potential defense, to every lawsuit which includes any of these entities. This has the effect of

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[6] Statistics taken from State of Michigan, Department of Licensing and Regulatory Affairs, Departmental Statistics, LARA-Total Business Entities as of January 1, 2013, **Appendix 232a.**

diverting case resources, time, and effort spent not in litigation of underlying controversies, or settlement of those controversies, but instead requiring efforts to determine and defend an entity's very existence. This does not further the ends of resolving cases and controversies. It unnecessarily adds complexity to cases where none previously existed.

Now, as it relates to Averill, this same public policy consideration exists. Allowing Averill (or Res-Care) to challenge the existence of Center Woods, after having dealt with that corporation, would open this and every company (both profit and nonprofit), to attack by those seeking to avoid contractual and other obligations they had with a corporation if an irregularity in the company's background exists. It was this type of collateral attack on the validity of a corporation that this Court previously acknowledged as destabilizing the rights of corporations and undermining contract rights.

This Court recognized as much in *Miller, supra.* In *Miller*, this Court prohibited Allstate from challenging the existence of a corporation which had been arguably improperly incorporated under BCA as opposed to the Professional Service Corporation Act, MCL 450.221. This Court rendered its decision strictly upon the statutory authority and determined that only the Attorney General could challenge the legal existence of the corporation. This Court also went on to note that the statutory framework was consistent with "at least 100 years of common-law" (*Id* at 471). This Court did not state, but certainly implied, that common law was alive and well as it relates to corporate actions.

Averill is estopped because of her consistent dealings with Center Woods as an entity. Neither original Defendant is a state agent capable of challenging Center Woods pursuant to *Miller*.

### C. Right to Challenge Existence of Center Woods is Barred by Countersuit

As a third party, Res-Care is estopped from challenging the corporate existence of Center Woods, generally. Res-Care filed a counterclaim against Center Woods consistent with the events of *Flueling v Goeringer,* 240 Mich 372, 375; 215 NW 294 (1927). In *Flueling*, the plaintiff was struck by a Checker Cab and died as a result. His estate naturally sought to hold the Checker Cab Company responsible and sued the company, as well as the individual driver. The Checker Cab Company was a nonprofit corporation which did not operate any cabs, instead it was more of a cooperative of independent cab owners, which regulated dispatching of cabs, territories, uniformity of rates, and equipment safety. It could not, however, engage in for profit operations by virtue of its nonprofit status.

Checker Cab Company's purpose was strictly administrative. The company had no means of satisfying a judgment rendered against it. The trial court entered a judgment against the individual driver alone and not Checker Cab Company.

The *Flueling* court held and recognized two concepts important in this case. First, only the state of Michigan may question the existence of a corporation. Second, once the estate sued Checker Cab Company - as a corporation - and sought a judgment against it, as such, the plaintiff could not then attack the company's existence.

The basis for the decision is the idea that one cannot sue an entity in the capacity of a corporation and also challenge its existence. Such is the case before this Court. By virtue of its counterclaim filed against Center Woods, Res-Care is estopped from challenging the existence of Center Woods pursuant to *Flueling*.

## CONCLUSION

WHEREFORE, Plaintiff/Appellant CENTER WOODS, INC., requests this Honorable Court determine:

A. That the common law doctrines of *de facto* corporation and corporation by estoppel survived the enactment of the Nonprofit Corporation Act, MCL 450.2101 *et seq.*, as well as the Business Corporation Act, MCL 450.1101 (language of which is operatively the same);

B. That Center Woods was a *de facto* corporation during its administrative dissolution pursuant to §922 and prior to its reinstatement under §925;

C. That Ruth Averill, member and shareholder of the corporation, was required to provide notice to the corporation pursuant to the Articles of Agreement of the pending sale of her home and that she failed to do so;

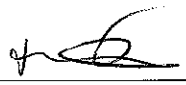
D. That all Defendants are estopped from denying the existence of the corporation;

E. Reinstating the Trial Court's decision; and

F. With costs and fees to Plaintiff/Appellant.

Dated: January 24, 2013

SHINNERS & COOK, P.C.



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