

STATE OF MICHIGAN
IN THE SUPREME COURT

DEAN ALTOBELLI,
Plaintiff/Appellee/Cross-Appellant

Supreme Court No. 150656
Court of Appeals No. 313470
Ingham County Circuit Court
Case No. 12-635-CZ

v

MICHAEL W. HARTMANN, MICHAEL P.
COAKLEY, ANNA M. MAIURI, JOSEPH M.
FAZIO, DOUGLAS M. KILBOURNE, JOHN D.
LESLIE, and JEROME R. WATSON,

Defendants/Appellants/Cross-Appellees.

_____ /

PLAINTIFF-APPELLEE'S BRIEF SUBMITTED
PURSUANT TO THE COURT'S NOVEMBER 13, 2015 ORDER

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STATEMENT OF FACTS

In December 2014, the seven defendants filed an application for leave to appeal in this Court, seeking review of that portion of the Court of Appeals November 4, 2014 decision which concluded that this dispute was not covered by the arbitration clause in the operating agreement that Mr. Altobelli and each of the defendants signed.

On November 13, 2015, the Court issued an order directing the Clerk to schedule oral argument on defendants' application for leave. *Altobelli v Hartmann*, ___ Mich ___, 871 NW2d 150 (2015). The Court's November 13, 2015 order also instructed the parties to file supplemental briefs "addressing whether the Court of Appeals correctly affirmed the trial court's denial of the defendants' motion to dismiss based on the operating agreement's mandatory arbitration provision because the plaintiff's claims are directed at the individual defendants, rather than the law firm." The Court's November 13, 2015 order further indicated that the parties may address in their supplemental briefs the applicability of two legal theories, agency or equitable estoppel, to the arbitration issue presented in this case.¹

ARGUMENT

In its November 13, 2015 order, the Court has advised against restatements of the parties' previously filed briefs. There are, however, certain fundamentals of Michigan law pertaining to arbitration that must be stressed. Arbitration agreements and their enforcement are grounded in contract. *Miller v Miller*, 474 Mich 27, 32; 707 NW2d 341 (2005); *Wold Architects and Engineers*

¹Mr. Altobelli filed an application for leave to appeal raising a significant question as to the appropriate interpretation of the provision in Michigan's Limited Liability Company Act, MCL 450.4101, *et seq*, pertaining to a member's withdrawal from a limited liability company. In its November 13, 2015 order, the Court indicated that Mr. Altobelli's application for leave "remains pending."

v Strat, 474 Mich 223, 248; 713 NW2d 750 (2006) (J. Corrigan, concurring). Arbitration is, therefore, consensual and “a party cannot be required to submit to arbitration any dispute that he has not agreed to submit.” *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982).

A. Freedom Of Contract

Perhaps the single most important theme of this Court’s contract law jurisprudence over the last fifteen years has been the primacy of freedom of contract. Freedom of contract has been described by this Court as “deeply entrenched in the common law of Michigan,” *Terrien v Zwit*, 467 Mich 56, 71, n. 19; 648 NW2d 602 (2002), and it has been characterized as “an unmistakable and ineradicable part of the legal fabric of our society,” *Wilke v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003), and as “among those fundamental rights which are the essence of civil freedom.” *Bloomfield Estates Improvement Ass’n, Inc. v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007), quoting *United States v Stanley*, 109 US 3, 22 (1883).

This Court has stressed that the fundamental principle of freedom of contract not only provides individuals with wide latitude to order their affairs by mutual agreement, but it also imposes on the courts an obligation to strictly adhere to and enforce those agreements. As expressed by the Court in *Terrien* and repeated numerous times since, “the general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.” 467 Mich at 71; *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005); *Quality Products & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 370; 666 NW2d 251 (2003); *Wilkie*, 469 Mich at 62.

The two components of freedom of contract discussed in these various precedents are directly

in play in this case. First, the parties in this case had the freedom to draft the arbitration clause in their own Operating Agreement as broadly or as narrowly as they chose. *See Port Huron School District v Port Huron Education Ass'n*, 426 Mich 143, 151, n. 6; 393 NW2d 811 (1986). They had the freedom to select which disputes they would resolve through arbitration, *cf Volt Information Sciences, Inc. v Bd of Trustees of Leland Stanford Junior University*, 489 US 468, 478 (1989) (recognizing that federal law does not “prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement”). They also had the freedom to limit the scope of arbitrable disputes by specifying the identity of the parties whose differences would be decided through arbitration. *American Express Co v Italian Colors Restaurant*, ___ US ___; 133 S Ct 2304, 2308 (2013); *A T & T Mobility LLC v Concepcion*, 563 US 333, 344 (2011) (“parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes”) (emphasis in original); *Stolt-Nielson S.A. v AnimalFeeds Int'l Corp*, 559 US 662, 683 (2010).

Second, and most important for purposes of the legal issue that defendants have raised in their application for leave, once the parties signed the Operating Agreement and its arbitration provision, it becomes the duty of the courts to enforce that contract precisely the way it is written. *Rory*, 473 Mich at 468 (“A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*”) (emphasis in original); *Defrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 365; 817 NW2d 504 (2012).

The beginning and, ultimately, the end of the legal analysis of the issue that defendants raise in their application is to be found in the actual wording of the arbitration clause that all of the parties to this case agreed to. This is how that clause is written:

Any dispute, controversy or claim . . . between the Firm . . . and any current or former Principal or Principals of the Firm . . . of any kind or nature whatsoever . . . shall be solely and conclusively resolved according to the following procedure . . .

Operating Agreement (Defendants' Application Exhibit D), §3.6.

The wording of the arbitration clause is explicit. In signing the operating agreement, the defendants and Mr. Altobelli agreed that any dispute *between the firm and any current or former principal* would be resolved through arbitration. The circuit court and the Court of Appeals, guided by this Court's unbroken line of recent decisions governing the interpretation of contracts, applied this arbitration provision precisely as it was written. The parties chose to enter into an agreement that limited arbitration to disputes between the firm and a present or former principal. Since this case is something different - a dispute between principals - the arbitration agreement does not cover this dispute.

The parties to this case had the freedom to draft the Operating Agreement and its arbitration provision as they saw fit. What they chose to do was to create an arbitration agreement with one significant limitation - arbitration was reserved for disputes between the firm and its principals.² The parties having agreed upon an arbitration provision containing this limitation on its scope, it is the unquestioned role of the courts of this state to enforce that agreement precisely as it was written. No

²The unambiguous language in the arbitration provision is reinforced by the provision calling for the selection of arbitrators to resolve any disputes. The arbitration clause provides that disputes between the firm and any of its Principals shall be *solely* resolved according to a specific procedure. That procedure includes the manner in which arbitrators are selected. The Operating Agreement calls for three arbitrators to resolve any such dispute. One of these arbitrators is to be appointed by the present or former principal engaged in the dispute with the firm. A second arbitrator is to be appointed *by the firm*. These two arbitrators would then select a third arbitrator. The fact that one of the three arbitrators was to be selected by the firm provides further emphasis of the language contained in the arbitration clause – that it was reserved for disputes between the firm and one of its Principals.

matter how defendants attempt to package their position, the fact remains that, to prevail in this case, they must somehow convince this Court to ignore the fact that they agreed to limit arbitration to disputes “between the firm . . . and any current or former Principal. . .” *Cf Klapp v United Insurance Group Agency, Inc.*, 469 Mich 459; 663 NW2d 447 (2003)(“courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.”)

B. Defendants’ Diversions

In both their original application for leave and the reply brief in support of that application, the defendants have attempted to divert the Court’s attention away from this explicit limiting language in the arbitration provision of the Operating Agreement. One of the methods by which defendants have attempted to deflect the Court’s attention is by introducing various cases dealing with the situation in which a nonsignatory to a contract containing an arbitration clause may be able to enforce that clause against a signatory.³

There is a substantial body of federal and state law addressing the question of whether and under what circumstances a nonsignatory to an arbitration agreement may seek to enforce the terms of such an agreement against a signatory. *See e.g.* 39 ALR Fed 2nd 17; 43 ALR Fed 2nd 275, 43

³Thus, in their original application, defendants relied on a number of federal cases, *e.g.* *Arnold v Arnold*, 920 F2d 1267 (6th Cir 1990), *Pritzker v Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F3d 1110 (3d Cir 1990), and *Roby v Corporation of Lloyd’s*, 996 F2d 1353 (2nd Cir 1993), as well as a published decision of the Michigan Court of Appeals, *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), and several unpublished decisions of that Court. *See e.g.* *Beaver v Cosmetic Dermatology & Vein Centers of Downriver, PC*, Court of Appeals No. 253568; *Vanderckhove v Scarfone*, Court of Appeals No. 303130; *Cullen v Klein*, Court of Appeals No. 291810. Each of these cases presented the question of whether a party who had not signed the contract containing an arbitration provision could invoke such a clause in a suit filed by a person who was a signatory to that agreement.

ALR 6th 387. This significant body of law is of absolutely no relevance to this case for a very simple reason. This case is not a suit between a signatory and nonsignatories to the Operating Agreement. Rather, Mr. Altobelli and each of the defendants are parties to that agreement.⁴

Thus, unlike the nonsignatory cases that defendants have cited in their briefs to date, the question presented in this case does not involve a determination of whether the defendants can enforce the arbitration clause that they and Mr. Altobelli signed. Mr. Altobelli, therefore, does not dispute the fact that the defendants have the right to enforce that provision of the Operating Agreement in the appropriate circumstances since they, like Mr. Altobelli, are parties to that agreement. Each defendant certainly has the right to invoke the arbitration agreement to compel arbitration of a dispute that they might have with the firm.

The problem for the defendants in this case is not whether they have the right to enforce the arbitration clause. The problem for the defendants is that the arbitration clause that they have the right to enforce *unequivocally excludes this case from its coverage*. This case between Principals of the firm is not within the scope of the disputes subject to mandatory arbitration under the parties' agreement.

In comparison to the nonsignatory cases that have been presented to this Court, the defendants in this case do not need a judicial determination as to whether they may claim the benefit of the arbitration clause that they and Mr. Altobelli signed; they unquestionably have such a right

⁴By definition, an operating agreement is a written agreement between the members of a limited liability company. *See* MCL 450.4102(2)(r). In accord with this statutory provision, the first paragraph of the Miller Canfield Operating Agreement states that it is an agreement, "by and between the Members . . . of Miller Canfield . . .". All principals of Miller Canfield are parties to the Operating Agreement. This includes all persons who serve as managing directors or as Chief Executive Officer because, by the terms of the Operating Agreement, only those persons who are senior principals of the firm may serve as a managing director or as CEO. *Id.*, at §§2.8. 2.14.

as signatories to that agreement. What defendants actually require to prevail in their arbitration argument is a judicial reworking of the substance of the arbitration provision in the Operating Agreement. They must somehow secure from this Court, which has so consistently held that “unambiguous contracts must be enforced as written,” *Rory*, 473 Mich at 468, a judicial rewrite of the agreement so that it encompasses a dispute such as this one between Principals of the firm. The defendants have come to the wrong court for such a ruling in light of the fact that “it has long been the law in this state that courts are not to rewrite the express terms of contracts.” *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008); *Urlick v Burge*, 350 Mich 165, 169; 85 NW2d 543 (1957); *Goldberg v Cities Service Oil Co*, 275 Mich 199, 211; 266 NW 321 (1936).⁵

Despite the fact that the nonsignatory cases from around the country have no application to the facts of this particular case, this Court in its November 13, 2015 order made express reference to two methods by which various courts have found nonsignatories bound by the terms of an arbitration clause. Federal courts have identified several theories on which an arbitration provision may be invoked by a nonsignatory.⁶ Among these various theories are equitable estoppel and

⁵Another demonstration of the critical difference between defendants’ right to *invoke* the arbitration provision of the Operating Agreement and their ability to *alter* the language of that agreement is reflected in Michigan’s third party beneficiary statute, MCL 600.1405. That statute provides that “any person for whose benefit a promise is made by way of contract” has the right to enforce that promise. Thus, the statute provides the specific circumstances in which a third party beneficiary may *invoke* the promises contained in a contract. But, at the same time, this statute expressly specifies that, in invoking the promises of a contract, a third party beneficiary’s rights are “subject always to such express or implied conditions, limitations or infirmities of the contract to which the rights of the promisee or the promisor are subject.” MCL 600.1405(2)(a). Thus, MCL 600.1405 makes it clear that, while a third party may be able to enforce a contract signed by others, what that third party cannot do is to alter in any way the terms of the contract that the parties signed.

⁶Among the diversions that defendants have raised in their reply brief is the suggestion that the Federal Arbitration Act, 9 USC 1, *et seq*, may have some impact on the arbitration issue

agency. See *Arthur Andersen LLP v Carlisle*, 556 US 624, 631 (2009); *Thomson-CSF, S.A. v American Arbitration Association*, 64 F3d 773, 777-780 (2nd Cir 1995). In its November 13, 2015 order, the Court invited the parties to address whether under equitable estoppel or agency principles the arbitration clause that the parties each signed “may properly be invoked to resolve disputes between managing principals and a former principal.”

C. Equitable Estoppel.

As discussed previously, some courts have allowed nonsignatories to an agreement to use a theory at least nominally labeled equitable estoppel to enforce an arbitration promise made by a signatory to the agreement. The question posed by this Court in its November 13, 2015 order is whether under a theory of equitable estoppel the arbitration agreement the parties each signed “may properly be invoked to resolve disputes between managing principals and a former principal.” The answer to this question is rather simple. Since this Court cannot rewrite the parties’ agreement under a theory of equitable estoppel, even if that theory applied in these circumstances, the Court cannot employ such an equitable doctrine to alter the parties’ own arbitration agreement.

In *Al-Shimmari v Detroit Medical Center*, 477 Mich 280; 731 NW2d 29 (2007), this Court rejected the plaintiff’s invocation of equitable estoppel as a basis for altering the effect of a court rule. In reaching this result, the Court observed, “equity cannot ‘trump an unambiguous and

before this Court. Defendants suggest that the federal “policy” favoring arbitration has some role to play in this case. Defendants’ argument, however, is directly at odds with the Supreme Court’s determination in *Granite Rock Co v International Brotherhood of Teamsters*, 561 US 287 (2010), where the Court explicitly noted that “we have never held that this policy [favoring arbitration] overrides the principle that a court may submit to arbitration “only those disputes . . . that the parties have agreed to submit.” *Id.*, at 302. The defendants’ reference to federal law also overlooks that the fundamental question of arbitrability is governed by state law. *First Options of Chicago v Kaplan*, 514 US 938, 944 (1995); *Arthur Anderson LLP v Carlisle*, 556 US 624, 631 (2009).

constitutionally valid statutory enactment.” *Id.*, at 293, n. 9, quoting *Devillers v Auto-Club Ins Ass’n*, 473 Mich 562, 591; 702 NW2d 539 (2005). Just as equitable estoppel cannot be interposed to alter the meaning of an unambiguous statute, it cannot be claimed as a basis for the judicial rewriting of the parties’ unambiguous arbitration agreement. *Cf. Sprague v General Motors*, 133 F3d 388, 403 (6th Cir 1998) (equitable estoppel cannot be applied to vary the terms of unambiguous ERISA plan documents). As the Court has recognized, “[i]t is simply inappropriate for an appellate court to invalidate the unambiguous terms of these contracts made between competent parties . . . in the guise of equity.” *Christner v Anderson, Nietzsche & Co, PC*, 433 Mich 1, 13-14; 444 NW2d 779 (1989).

Application of estoppel principles to effectuate a substantive change in the contract that the parties signed would be a blatant contradiction of the freedom of contract ideals that this Court has espoused so consistently in recent years. If a court had the authority to rewrite the agreement that the parties signed simply on the basis of its individual assessment of what is “equitable” under the circumstances, the parties’ freedom of contract would be severely jeopardized. *Cf. Rory*, 473 Mich at 468-469 (“When a court abrogates unambiguous contractual provisions based on its own independent assessment of ‘reasonableness,’ the court undermines the parties’ freedom of contract.”); *Wilkie*, 469 Mich at 51-52.⁷

⁷Any reliance that defendants might place on equitable estoppel principles also runs afoul of another basic principle of contract law. Despite explicit language in the arbitration clause limiting its reach to disputes between the firm and its Principals, to the extent defendants rely on equitable estoppel to expand the scope of the arbitration clause, they will be relying on a implied agreement. But, this Court has repeatedly held that “[a]n implied contract cannot be enforced where the parties have made an express contract covering the same subject matter.” *Scholz v Montgomery Ward & Co*, 437 Mich 83, 93; 468 NW2d 845 (1991); *In re De Hann Estate*, 169 Mich 146, 149; 134 NW 983 (1912).

Thus, even if defendants could establish the elements of equitable estoppel it would do them no good. But, the fact is that this is not a case in which the defendants could even make a claim to such an equitable defense. In the contract setting, “estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract.” *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1996); *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 203-204, 222; 582 NW2d 776 (1998) (Opinions by Cavanagh, J. and Young, J.). Obviously, in this case defendants do not seek to *preclude* enforcement of the arbitration provision in the contract that they signed. Rather, they seek to *enforce* an arbitration provision in a form that they did not agree to, so that it encompasses disputes between Principals of the firm.

In any event, the facts necessary to invoke an equitable estoppel defense simply do not exist here. This Court described the necessary elements of equitable estoppel in *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999):

Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.

Id., at 22.

Equitable estoppel, therefore, requires some sort of extra-contractual representation or action on the part of Mr. Altobelli on which the defendants justifiably relied to their detriment. *McDonald*, 480 Mich at 204-205; *Lothian v City of Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982); *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 70; 562 NW2d 648 (1997). In this case, none of the elements of an equitable estoppel defense can be established. As it pertains to the arbitration agreement, there

are no representations attributable to Mr. Altobelli on which the defendants justifiably relied to their detriment. The facts of this case, therefore, provide none of the proofs necessary to make out an equitable estoppel defense.⁸

Finally, plaintiff anticipates that defendants will continue to rely on those federal or state cases that have used some version of the term “equitable estoppel” to allow nonsignatories to enforce an arbitration agreement signed by other parties. These cases have employed a form of equitable estoppel that has no resemblance whatsoever to that described by this Court in *Van, Lothian* or *Cincinnati Ins.* Yet, even the highly liberalized version of equitable estoppel adopted in the federal and out-of-state cases involving nonsignatories to an arbitration agreement has no application under the facts of this case.

This point is aptly demonstrated in one of the more influential federal court decisions on the enforcement of an arbitration provision by a nonsignatory based on estoppel principles, *Grigson v Creative Artists Agency, LLC*, 210 F3d 524 (5th Cir 2000). In *Grigson*, the plaintiff was the owner of a motion picture who signed an agreement for the distribution of the film. That distribution agreement contained a broadly written arbitration provision in which the parties agreed to arbitrate “any dispute or controversy relating to any of the matters referred to” in certain clauses of the agreement.

⁸Defendants have made much of the fact that Mr. Altobelli initially filed a demand for arbitration against the firm relating to the events underlying this case. Defendants were not parties to the demand, they could not have relied on the demand against the firm and they were not legally prejudiced in any way. Mr. Altobelli withdrew his demand before an arbitration panel was even selected. A party may withdraw a demand before participating in substantial arbitration proceedings. *Arrow Overall*, 414 Mich at 99-100. Moreover, Mr. Altobelli’s conduct in first requesting arbitration against the firm cannot transform the language of the arbitration agreement that he signed. *Wold Architects*, 474 Mich at 237-238.

Several years after this agreement was signed, the plaintiff brought suit against two defendants, neither of whom had signed the distribution agreement. The plaintiff in *Grigson* claimed that the defendants had tortiously interfered with the distribution agreement. The defendants argued that, under a theory of “equitable estoppel,” they could compel arbitration despite the fact that they were not parties to the contract containing the arbitration clause. The Fifth Circuit agreed with the defendants and upheld a district court ruling requiring the case to proceed to arbitration.

The Fifth Circuit concluded in *Grigson* that application of equitable estoppel was appropriate because the plaintiff was attempting to “have it both ways.” According to the *Grigson* Court, the plaintiff was attempting to sue under the terms of the distribution agreement that contained an arbitration provision, while attempting to deny that provision’s applicability to the dispute only because the defendants were not parties to the agreement. *Id.* at 528.

Thus, what has proved significant in *Grigson* and other cases in which the courts outside Michigan have used an equitable concept to allow a nonsignatory to claim the arbitration provision of a contract is that the party who is resisting arbitration signed a contract that contained an arbitration provision broad enough to cover the dispute against the non-signatory. The plaintiff in *Grigson* signed an agreement calling for the arbitration of “any dispute or controversy relating to” the distribution agreement that it had signed and the suit that plaintiff later filed against the nonsignatory defendants fit within that same clause.

This case, however, is fundamentally different. Here, Mr. Altobelli did *not* enter into an agreement containing an arbitration clause that encompassed this dispute with other Principals of the firm. What Mr. Altobelli promised in signing the Operating Agreement was that he would arbitrate any claim *between himself and the firm*. In signing the Operating Agreement, Mr. Altobelli

made no promise that he would arbitrate any claims that he might later have against his fellow Principals. As noted previously, there is no principle of equity that can modify the arbitration promise that Mr. Altobelli made since the courts of this state “enforce only those obligations actually assented to by the parties.” *Wilkie*, 469 Mich at 63.

Mr. Altobelli has the right to expect that the contract that he signed would be enforced exactly as it was written, without judicial modification. Under the principles of freedom of contract that this Court has championed in recent years, Mr. Altobelli was entitled to rely on the limitation on the arbitration promise that he and the other Principals of Miller Canfield actually made - that arbitration would be confined solely to disputes between the firm and one of its Principals.

For all of these reasons, the concept of equitable estoppel has no role in this case. It is the agreement that all eight of the parties to this case signed, not a nebulous principle of equity, that controls whether arbitration is required in this case.

D. Agency Principles.

In its November 13, 2015 order, the Court also indicated that the parties might address in their supplemental briefs the potential impact of agency principles on the arbitration issues raised in defendants’ application. As noted previously, a number of courts outside Michigan have relied on agency principles to allow a nonsignatory agent to enforce a contractual arbitration provision signed by his/her principal. *See e.g. Grand Wireless, Inc. v Verizon Wireless, Inc.*, 748 F3d 1, 9-12 (1st Cir 2014). But, since the defendants here are, like Mr. Altobelli, parties to the Operating Agreement, these nonsignatory cases and the principles discussed in them are of no relevance to the issues presented in this case.

Moreover, even if those cases were in some way relevant to the issue before this Court, they

would not assist the defendants' cause. The First Circuit's decision in *Grand Wireless* illustrates why this is so. In *Grand Wireless*, the plaintiff entered into a contract with Verizon Wireless (Verizon), which contained a broadly written arbitration provision.⁹ Plaintiff later filed suit against both Verizon and one of its agents, Erin McCahill. The First Circuit in *Grand Wireless* first considered the question of whether the claim plaintiff raised against Verizon fell within the scope of the arbitration provision of their contract. The Court held that the clause was expansive enough to encompass that dispute. *Id.*, at 6-9.

After reaching this result, the First Circuit turned to the plaintiff's claim against McCahill and her ability to invoke the arbitration clause of her employer's contract with the plaintiff. The First Circuit noted that "the arbitration clause is written in broad language to encompass any controversy or claim arising out of or relating to the Agreement." The First Circuit then asserted in *Grand Wireless* that when "a principal is bound under the terms of a valid arbitration clause, its agents, employees and representatives are also covered *under the terms of each agreement.*" (emphasis added). *Id.*, at 11, quoting *Pritzker v Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F3d 1110, 1121 (3rd Cir 1993).

At most, what *Grand Wireless* stands for is the principle that a nonsignatory agent may be able to *invoke* the arbitration agreement signed by its principal if the arbitration agreement is broad

⁹The arbitration agreement in *Grand Wireless* called for arbitration of "any controversy or claim arising out of or relating to this agreement." As discussed in Mr. Altobelli's original brief in response to defendants' application for leave, the arbitration provision in the contract that Mr. Altobelli and the defendants each signed differs from this broad language in two significant respects. First, the arbitration provision of the Miller Canfield Operating Agreement does not call for the arbitration of all controversies or claims arising out of the agreement. Second, the arbitration provision that all of the parties to this suit agreed to called only for the arbitration of claims between the firm and present or former Principals.

enough to encompass a suit brought against the nonsignatory. *Cf Carlisle*, 596 US at 631 (discussing the ability of a nonsignatory to *enforce* an arbitration clause in an agreement signed by another party). There is, however, nothing in the *Grand Wireless* decision or any other decisions on nonsignatories and agency supporting the view that an agent who may enforce a principal's arbitration provision is somehow free to rewrite that provision to expand the scope of disputes that must be arbitrated. The First Circuit in *Grand Wireless* relied on the fact that the arbitration agreement was broad enough to cover the dispute against the agent because that provision covered "any controversy or claim arising out of or relating to" the agreement regardless of the parties to the dispute. In the end, the First Circuit in *Grand Wireless* held the plaintiff to the terms of the arbitration agreement that it signed and no more.

As explained earlier in this brief, there is no question that each defendant in this case may *invoke* the arbitration clause in the Operating Agreement to compel arbitration of their disputes with the firm since they are parties to that agreement. But, where the defendants' argument fails is that, while they are each free to *invoke* that clause to arbitrate disputes with the firm, what they cannot do is *alter* the language of that clause; they cannot change the fact that this arbitration clause has one explicit limitation on its reach - it only extends to disputes *between the firm and the firm's* past or present Principals.

In the reply brief they have submitted with their application, defendants explicitly urge the Court to adopt as new law in Michigan the principle that a person's mere status as the agent of a principal automatically entitles him/her to compel arbitration of a personal liability dispute brought against the agent. Defendants ask the Court to adopt such a broad abstract rule without regard to the arbitration promise that the parties actually made and they rely on nonsignatory cases such as *Grand*

Wireless to push that theory on the Court.

None of the federal cases on the subject of nonsignatory agents, however, do the defendants any good. At most, these cases stand for the proposition that a nonsignatory agent may enforce an arbitration agreement signed by his/her principal. Not a single one of these cases suggests that principles of agency law could ever alter the terms of the arbitration agreement itself. But, that is precisely what defendants must argue for in this case. They ask the Court to adopt a principal of agency law that does not merely *apply* the arbitration agreement, but rather fundamentally amends the scope of that agreement to cover disputes that are not encompassed by that provision's explicit language.

The defendants have in the briefs that they have filed in this Court relied on federal court decisions involving nonsignatories to suggest that adoption of Mr. Altobelli's position in this case would serve to "nullify" the effect of the parties' arbitration agreement. *See e.g. Arnold v Arnold*, 920 F2d 1269, 1281 - 1282 (6th Cir 1990). There is, in plaintiff's view, an extraordinary amount of irony in the defendants' reliance on these federal precedents and the suggestion that Mr. Altobelli is attempting to "nullify" the effects of the arbitration agreement that he (and the defendants) signed. In this case, it is the defendants who, in a suit involving *only* signatories to an arbitration agreement, are citing these completely inapplicable federal court precedents in their own attempt to nullify the arbitration provision that they chose to sign. It is the defendants who come before this Court seeking a judicial nullification of what they agreed to when they signed the Operating Agreement and its arbitration provision.

One other agency issue that has surfaced in defendants' briefs is the intimation that this suit is actually one against the firm based on the fact that the individual defendants were purportedly

acting within the scope of their authority as agents of the firm when they committed the wrongful conduct alleged in Mr. Altobelli's complaint.

The simple response to this simplistic analysis is that, whether the defendants were or were not acting as agents of the firm when they committed the tortious acts that are the subject of this case is absolutely irrelevant. As this Court has recognized, "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." *Department of Agriculture v Appletree Marketing, LLC*, 485 Mich 1, 17; 779 NW2d 237 (2010); *Wines v Crosby & Co.*, 169 Mich 210, 215; 135 NW 96 (1912); *see also* Restatement (Third) of Agency, §7.01. Thus, regardless of the defendants' relationship to the firm, the fact is that they have under Michigan law personal liability for their tortious conduct and Mr. Altobelli was free to sue them individually for their misconduct.¹⁰

Both the drafters of the Operating Agreement and the firm Principals who signed it were sophisticated lawyers. Both the drafters and the Principals who signed it had to be aware of basic Michigan law that makes all firm Principals, including managing Principals, individually liable for

¹⁰Contrary to the defendants' assertions that Mr. Altobelli "recast" his claims to avoid arbitration, the fact is that Mr. Altobelli has always contended that the harm he has suffered was the result of the individual defendants' bad faith or ultra vires misconduct. It is, therefore, at least arguable, based on several recent decisions of this Court addressing the potential vicarious liability of an employer for an agent's intentional misconduct, that the firm could not be held responsible for the tortious conduct alleged by Mr. Altobelli. *See Hamed v Wayne County*, 490 Mich 1; 803 NW2d 237 (2011); *Brown v Brown*, 478 Mich 545; 739 NW2d 313 (2007); *Zsigo v Hurley Medical Center*, 475 Mich 215; 716 NW2d 220 (2006). Moreover, the central component of Mr. Altobelli's claim is that each defendant participated in an unauthorized deprivation of his ownership rights for which the firm may not be held liable. *See* MCL 450.4406 (a manager is not deemed to be acting as an agent for a limited liability company when the manager acts beyond his/her authority and the person with whom the manager is dealing knows that the manager lacks authority to act for the company on the matter).

their own tortious conduct even while acting as an agent of the firm. Despite that understanding of the applicable law, the drafters and the signers chose to limit arbitration solely to disputes between the firm and its Principals.¹¹

The fact that the arbitration provision as written does not encompass disputes between Principals is particularly notable in light of the fact that the Operating Agreement fully contemplates direct actions against Principals and managers of the firm. *See* Operating Agreement §2.7(B)(recognizing that managers or Principals may be subject to direct causes of action filed by another Principal for violations of the law or other bad faith conduct.) Thus, despite the fact that the Operating Agreement expressly contemplated causes of action between Principals, the parties to this case all agreed upon an arbitration provision that limited its reach solely to disputes between the firm

¹¹As lawyers, the parties knew what they were doing when they limited mandatory arbitration to disputes with the “firm.” The parties knew that the firm is a legal entity separate from its members and that the firm may sue or be sued in its own name. Indeed, a limited liability company is defined as an “entity that is an unincorporated membership organization” formed under the LLCA, MCL 450.4102(2)(k). A limited liability company generally has all powers granted to a corporation, including the power to buy, own, and sell property, make contracts, and sue or be sued. *See* MCL 450.4210 and MCL 450.1261(b).

Moreover, the Operating Agreement uses the word “Firm” to refer to the professional limited liability company itself. *See* Operating Agreement, §§2.1, 2.2, 2.3. The Operating Agreement does not state that reference to the “Firm” includes its directors, officers, members or agents. In addition, the Operating Agreement throughout distinguishes the Firm as an entity from its Principals, including the Principals serving as managing directors. Since a word is presumed to have the same meaning throughout a legal document, the reference to the “Firm” in §3.6 is a reference to the company only. In contrast, when the drafters of the Operating Agreement wanted a term to refer to more than one thing, they used the common contract drafting technique of defining the scope of the term to mean multiple things. *See e. g.* Operating Agreement §2.5. defining the terms “Principals” to include both “Senior Principals, Other Principals and International Principals.”“.

and its Principals.¹²

Quite obviously, the means by which to include this particular dispute within the ambit of the Operating Agreement's arbitration clause were readily available to the drafters of this agreement. This provision could have been drafted in such a way that any claim or controversy of whatever nature arising out of or related to this agreement would be subject to arbitration. Alternatively, the Principals could have been required to sign an arbitration provision in which each agreed to arbitrate any dispute they might have either with the firm or with any other Principal of the firm. Despite these available options, the Principals knowingly chose otherwise.

A court deciding whether to order arbitration must determine whether the parties agreed to arbitrate "the case at hand." *Russell v Citigroup, Inc.*, 748 F3d 677, 681-682 (6th Cir 2014). The sole question presented in defendants' application for leave is whether the eight parties to this case agreed to arbitrate this particular dispute. Because they each signed an agreement that expressly limits mandatory arbitration to disputes between the firm and its Principals, both the circuit court and the Court of Appeals were correct in concluding that this dispute could not be sent to arbitration.

Miller Canfield is not and has never been a party to this case. Indeed, in the circuit court Miller Canfield filed various documents in which it specifically identified itself as a non-party in this case and it argued that its non-party status entitled it to certain protections from Mr. Altobelli's

¹²The Michigan Limited Liability Company Act also provides for direct causes of action against company managers. MCL 450.4515 provides a statutory cause of action against managers for illegal, fraudulent or willfully unfair conduct toward a member. Additionally, MCL 450.4216 contemplates direct actions against members or managers by providing that a limited liability company may indemnify a member or a manager for losses sustained as a result of claims made against such person and allowing a limited liability company to purchase insurance to insure a member or manager from losses arising out of a direct action against them.

discovery requests.¹³ The defendants are seven individuals who are, under long-established Michigan law, personally liable for the tortious acts alleged in this case.

E. Conclusion

In the reply brief in support of their application for leave, defendants argued that it “belies belief” that the Principals intended to arbitrate disputes against the firm, but not disputes between each other. Reply Brief, at 3. This argument fundamentally misapprehends the last fifteen years of this Court’s law on the subject of contract interpretation. What this Court has indicated repeatedly and emphatically is that *the intent of the parties is to be found in the words they chose to incorporate into their contract*. See *Quality Products*, 469 Mich at 375 (“an unambiguous contractual provision is reflective of the parties’ intent as a matter of law”); *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) . This Court has, therefore, rejected an approach to contract interpretation “where judges divine the parties’ reasonable expectations and then rewrite the contract accordingly” because it “is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit.” *Wilkie, supra*, at 51-52.

There are undoubtedly competing views on whether or not it is prudent for members of a limited liability company to agree to mandate arbitration of personal liability disputes between members or between a member and the company’s managers. The prudence of such a provision is not the province of this Court to decide. The indisputable fact is that the Principals of Miller Canfield agreed upon an arbitration provision that was limited solely to disputes between the firm

¹³For example, in July 2012, Miller Canfield filed a motion in the circuit court to quash subpoenas or for a protective order. The title to that motion specifically identified Miller Canfield as a non-party to the case. Approximately four months later, Miller Canfield filed another document, responding to Mr. Altobelli’s motion for entry of an order. Once again, in that response Miller Canfield identified itself as a non-party to this suit.

and its past or former principals. That contractual provision must be enforced.

When Mr. Altobelli signed the Operating Agreement, he promised to arbitrate disputes between himself and the firm, and no more. In objecting to arbitration in this case, Mr. Altobelli has not breached the promise that he made. The case at hand is an individual liability dispute between Mr. Altobelli and the seven individual defendants. It is not a dispute between Mr. Altobelli and the firm.

In an attempt to nullify the limits of their own arbitration agreement, defendants ask this Court to rewrite it for them on grounds of policy or equity. This Court, however, is not in the business of rewriting and expanding contractual promises. The defendants are bound by the contract language that they agreed to.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee Dean Altobelli respectfully requests that this Court deny defendants' application for leave to appeal in its entirety. Plaintiff further requests that this Court grant the application for leave to appeal that he has filed in this court and give full consideration to the legal issue presented in that application.

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