STATE OF MICHIGAN

COURT OF APPEALS

I-75 PARTNERS, LLC, Assignee of THE HUNTINGTON NATIONAL BANK, Plaintiff-Appellee, v OSCAR E. STEFANUTTI, WILLIAM D. WIGMYER, FRED GORDON, THE STEFANUTTI FAMILY LIMITED PARTNERSHIP and REFCO, INC., Defendants-Appellant.	UNPUBLISHED February 20, 2014 No. 310324 Oakland Circuit Court LC No. 09-103197-CK

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's March 21, 2012 final judgment in favor of plaintiff I-75 Partners, LLC (I-75), arguing that the trial court: (1) erred in granting summary disposition in favor of plaintiff on the issue of liability, (2) abused its discretion by allowing appellee to substitute in for Huntington National Bank (HNB) as plaintiff after the close of discovery and by denying appellants discovery regarding the new plaintiff, and, thus, erred in entering judgment in favor of I-75, (3) abused its discretion in denying defendants' motion to reopen the evidentiary hearing, (4) clearly erred in awarding the $20,508,941.32 judgment against defendants, and (5) abused its discretion by awarding attorney fees to I-75 in the amount of $78,085.24. We affirm.

I. FACTS

This case arises out of defaults on several loans owned originally by HNB. Dutton Corporation Centre LLC (Dutton Corp) and Dutton Retail Centre South LLC (Dutton Retail)[1]

[1] Dutton Investment LLC (Dutton Investment), an Indiana limited liability company, owns 50 percent of Dutton Corp, and John Urbahns is the sole member of Dutton Investment. An entity owned by defendants, BFO Investment, owns the other 50 percent of Dutton Corp. Similarly,

were involved in a construction and land remediation project, and as part of this project, entered various construction loan agreements and related agreements.

Specifically, Dutton Corp and Dutton Retail entered and defaulted on the following loan agreements with HNB: (1) the October 10, 2007 promissory note, which was one of three promissory notes collectively called the Dutton Corp Note, (2) the Dutton Retail Note, executed October 10, 2007, and (3) the 2004 Letter of Credit, executed and honored on June 4, 2004 and subsequently amended. HNB and defendants executed: (1) the Dutton Corp Guarantee in which defendants unconditionally guaranteed any and all indebtedness owed by Dutton Corp to HNB and (2) the Dutton Retail Guarantee in which defendants unconditionally guaranteed any and all indebtedness owed by Dutton Retail to HNB. John Urbahns also guaranteed these loans. According to defendant Fred Gordon, there was approximately $20,000,000 dollars in brownfield reimbursements at stake in the project over the course of 20 to 25 years, which would have paid off the loans from HNB to fund the project. According to Gordon, defendants had virtually nothing to do with the project on a daily basis, and the decision whether or not to pay or default on the loans was solely up to Urbahns.

HNB filed a complaint on August 18, 2009 and alleged that Dutton Corp and Dutton Retail had defaulted on their respective obligations to HNB, and because defendants signed guarantees, defendants were liable for the defaulted obligations. HNB alleged that Dutton Corp and Dutton Retail were liable for the following as a result of defaulting on their respective obligations: (1) $13,846,852.64 for the Dutton Corp Note, (2) $50,453.95 for the Letter of Credit Agreement, and (3) $5,426,204.34 for the Dutton Retail Note. In their answer, defendants admitted executing the loan documents and guaranties, but neither admitted nor denied HNB's allegations of default and liability.

HNB filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on August 13, 2010.[2] HNB argued there were no genuine issues of material fact that: (1) defendants executed the loan documents at issue, (2) defendants are bound by the terms and conditions of the loan documents, (3) defendants defaulted under the terms of the loan documents, and (4) the amounts HNB alleged defendants owed were correct. In response, defendants neither admitted nor denied the amounts owed and argued that they had "no knowledge as to whether the new owners of the notes and ancillary loan documents [have] released the loans."

On December 6, 2010, before the trial court ruled on HNB's summary disposition motion, I-75 purchased the loans between defendants and HNB from HNB. I-75 "is an Indiana limited liability company that is owned [and managed] by I-75 Investments LLC, an Indiana limited liability company, and [John Urbahns is] the manager and owner of I-75 Investments . . . ." As such, Urbahns was familiar with the assets of I-75. On the same day the loans were purchased, two Collateral Assignments of Mortgage documents (Collateral Assignments) were

Dutton Investment owns 50 percent of Dutton Retail, and defendants own the other 50 percent. Urbahns was in charge of the daily management of the project and the negotiations with HNB for the loans.

[2] HNB first filed a motion for summary disposition on October 23, 2009 pursuant to MCR 2.116(C)(10), but this initial motion was not resolved and the parties proceeded with discovery.

executed, which appear to assign two construction mortgages, which secured the loans sold to I-75, from I-75 back to HNB. One of the construction mortgages was for Dutton Retail Center South and the other was for Dutton Shoppes South; however, the Dutton Shoppes South property is not part of this litigation. HNB and I-75 filed a motion to substitute I-75 in for HNB as plaintiff on February 7, 2011, which was subsequently amended.

Defendants filed their response to HNB's motion for Summary Disposition on March 24, 2011, arguing inter alia that because HNB sold the loans to I-75, HNB was no longer a real party in interest and that defendants were entitled to judgment pursuant to 2.116(I)(2) and (C)(8). Defendants also questioned "whether the assignment from Huntington to I-75 Partners and then back from I-75 Partners to Huntington is an attempt to deny the Guarantors of affirmative defenses and causes of action against I-75 Partners and Urbahns."[3]

In an April 13, 2011 opinion and order, the trial court granted HNB's motion for summary disposition regarding liability, and denied defendants' request for summary disposition pursuant to MCR 2.116(I)(2) and (C)(8). The trial court also ordered an evidentiary hearing regarding damages only. On April 27, 2011, the trial court granted HNB's and I-75's motion for substitution of parties.

Defendants filed a motion to compel production of documents on May 3, 2011 regarding the sale of the loans from HNB to I-75. On May 4, 2013, I-75 filed a motion to quash defendants' subpoena that purported to require production of these documents. The trial court denied defendants' motion to compel production of documents and granted I-75's motion to quash the subpoena, finding that the documents requested were not relevant to the issue of damages. Defendants' motion for reconsideration was denied.

After the trial court held a two-day evidentiary hearing on damages, defendants filed a motion to reopen the evidentiary hearing, which the trial court denied. The trial court issued an opinion and order on March 6, 2012 in which the trial court found that I-75 was entitled to judgment in the amount of $20,508,991.32, which included attorney fees, and that defendants were entitled to a credit from the related foreclosure sale that was then pending in Oakland Circuit Court.

The trial court's March 21, 2012 final judgment, awarding: (1) $20,428,733.30 in favor of I-75, which included interest and late charges and provided for additional interest, (2) $80,208.02 in favor of I-75 for collection costs, including reasonable attorney fees, and provided for additional collection costs and reasonable attorney fees until the judgment was paid in full, and (3) credit to defendants if pending proceedings result in a foreclosure sale of real property covered by a mortgage securing payment on any of the loans the judgment was entered upon.

I. ANALYSIS

[3] At the same time that these proceedings were underway, a foreclosure proceeding regarding the property subject to the loans was occurring in the Oakland Circuit Court.

A. SUMMARY DISPOSITION

Defendants argue that the trial court erred in granting summary disposition in favor of I-75 regarding liability because I-75 had already reassigned all of its interest in the mortgages securing the loans and presumably the other loan documents back to HNB. However, I-75 correctly points out that the trial court granted summary disposition regarding liability before I-75 was substituted in for former plaintiff HNB.

We review a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10) de novo, and "[i]n reviewing a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence introduced by the parties to determine whether no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). This evidence "must be considered in the light most favorable to the opposing party." *Id.* at 73 (quotation marks and citation omitted). Discretionary decisions of the trial court are reviewed for an abuse of discretion. *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

MCR 2.201(B) requires, in relevant part, that "[a]n action must be prosecuted in the name of the real party in interest[.]" This Court has stated:

> A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. This standing doctrine recognizes that litigation should be *begun* only by a party having an interest that will assure sincere and vigorous advocacy. [*Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (quotation marks and citation omitted; emphasis added).]

MCR 2.202(B) governs the substitution of parties where there is a transfer or change of interest and provides: "If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity." Regarding this court rule, our Court has stated that "the use of the term 'may' instead of 'shall' . . . indicates discretionary rather than mandatory action." *Church & Church Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008).

At the time HNB filed its complaint, August 18, 2009, HNB was a real party in interest because HNB was a party to the loan agreements and guarantee agreements, and these loans were not sold to I-75 until December 6, 2010. See *Stephenson v Golden*, 279 Mich 710, 767; 276 NW 849 (1937) ("He was the party who made the contract. He was the real party in interest."). Because HNB was a real party in interest at the time it filed the complaint and because the language of MCR 2.202(B) indicates that the trial court may, in exercising its discretion, allow an original party to continue the action despite a change or transfer of interest,

defendants' arguments regarding the alleged subsequent transfer of ownership are irrelevant.[4] Regardless of whether HNB subsequently sold its interest to I-75 and whether I-75 immediately reassigned its entire interest back to HNB, we cannot conclude that the trial court abused its discretion in considering HNB's motion for summary disposition regarding liability only.

B. SUBSTITUTION AND DENIAL OF DISCOVERY REGARDING I-75

Defendants argue that the trial court abused its discretion by allowing I-75 to substitute into this case after discovery was closed, thus permitting I-75 to maintain its claim and obtain judgment against defendants, and denying defendants the opportunity to conduct discovery regarding I-75, which would have revealed that I-75 assigned all of its rights in the mortgages securing the loans and other loan documents back to HNB, such that HNB, rather than I-75, owned the loans. Defendants argue that by prohibiting discovery regarding I-75's acquisition of the loans from HNB, the trial court aided I-75 in concealing the true nature of the I-75/HNB transaction.

As discussed above, MCR 2.202(B) permits the substitution of parties where there is a transfer or change of interest, and a trial court's decision regarding substitution of parties is reviewed for an abuse of discretion. MCR 2.202(B); *Buie*, 491 Mich at 320; *Church & Church Inc*, 281 Mich App at 339. Similarly, "[a] trial court's ruling on a discovery motion is reviewed for an abuse of discretion." *Johnson v Detroit Medical Ctr*, 291 Mich App 165, 166; 804 NW2d 754 (2010). However, this Court reviews questions involving the interpretation of a contract de novo. *Northline Excavating, Inc v Livingston Co*, __ Mich App __; 839 NW2d 693 (Docket No. 304964, issued October 15, 2013), slip op at 5.

MCR 2.302(B)(1) permits "discovery of matter that is [(1)] 'relevant to the subject matter involved in the pending action' or that [(2)] 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Bauroth v Hammoud*, 465 Mich 375, 381; 632 NW2d 496 (2001), quoting MCR 2.302(B)(1). While trial courts "have the authority to limit discovery" pursuant to MCR 2.302(C), "[i]n the absence of good cause, a trial court abuses its discretion when it prevents the discovery of relevant evidence." *Thomai v Miba Hydamechanica Corp*, __ Mich App __; __ NW2d __ (Docket No. 310755, issued November 14, 2013), slip op at 10. However, if the information requested does not satisfy either "branch of MCR 2.302(B)(1)," then the information is not discoverable. See *Bauroth*, 465 Mich at 381.

In interpreting a contract, this Court looks to the plain and ordinary meaning of the words of the contract. *Northline Excavating, Inc*, slip op at 5. "We cannot read words into the plain language of a contract." *Id.* "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 374; 838 NW2d 720 (2013) (quotation marks and citation omitted). Additionally, "a contract is to be construed as a whole; . . . all its parts are to be harmonized so far as reasonably

[4] We find it curious that defendants fail to address MCR 2.202(B) in their brief on appeal, despite the fact that the trial court relied on this court rule to deny defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (I)(2).

possible; . . . every word in it is to be given effect, if possible; and . . . no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable." *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010). Thus, whether the Collateral Assignment documents transfer ownership or are instead intended to serve merely as security for an obligation can be determined by looking to the language of the Collateral Assignments. See *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 261; 761 NW2d 694 (2008).

"An assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liability secured. This is true even though the assignment is absolute on its face. 6A CJS Assignments § 82, pp 730-733. After the debt secured has been paid, the right to hold the assigned collateral ceases, and the assignee has no interest in the collateral." *Emmons v Lake States Ins Co*, 193 Mich App 460, 464; 484 NW2d 712 (1992); see also 6A CJS Assignments § 96.[5]

On appeal, defendants point to publicly available documents that allegedly reassigned the construction mortgages, which secured the loans I-75 purchased from HNB, from I-75 back to HNB, and argue that had they been able to conduct discovery, other documents relating to the sale of the loans from HNB to I-75 would have revealed that the other loan documents were also reassigned from I-75 back to HNB. These documents were first presented to the trial court as exhibits to defendants' reply to HNB's motion for summary disposition, and in their brief in support of their reply, they stated:

> Exhibit H [, HNB's and I-75's motion for substitution of parties with the bill of sale and Urbahns's affidavit attached,] conclusively demonstrates that Huntington is not the real party in interest. . . .
>
> There were multiple assignments of the loan documents. The Guarantors question whether the assignment from Huntington to I-75 Partners and then back from I-75 Partners to Huntington is an attempt to deny the Guarantors of affirmative defenses and causes of action against I-75 Partners and Urbahns.

However, the Collateral Assignment documents were not attached to defendants' reply to HNB's and I-75's motion for substitution of parties, and defendants did not argue in the motion hearing that these documents demonstrated that I-75 should not be substituted in for HNB.

We reject defendants' argument that the trial court abused its discretion in allowing I-75 to substitute in for HNB. First, defendants' position on appeal is inconsistent with their position before the trial court. In the motion hearing, defense counsel admitted the law was on HNB's and I-75's side, indicated to the court that "in some manner I do concur with the relief . . . they're seeking," but requested to see the documents pertaining to the HNB/I-75 transaction. "A party

[5] However, "[b]efore the debt secured is paid, the assignee is, to the extent of his or her interest, the owner of the collateral *as against* the assignor and creditors or others claiming under him or her." 6A CJS Assignments § 96. However, this would not include defendants, who became *debtors* of I-75 subsequent to I-75's purchase of the loans.

may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Second, the evidence presented to the trial court demonstrated that I-75 owned the loans. Specifically, HNB and I-75 attached to their motion for substitution of parties: (1) a bill of sale with an attachment detailing the loans purchased and (2) an affidavit of Urbahns, in which he asserted that I-75 purchased guarantees of defendants from HNB, which included the right to enforce those guarantees. Thus, we cannot conclude that the trial court abused its discretion in allowing I-75 to substitute in for HNB as plaintiff. MCR 2.202(B); *Buie*, 491 Mich at 320; *Church & Church Inc*, 281 Mich App at 339.

We now turn to the decision of the trial court regarding the motions to compel discovery of the documents relating to the I-75/HNB transaction and the related motion to quash the subpoena for this information. Urbahns's affidavit attached to I-75's response to the motion to compel indicated that HNB sold the right to enforce the guaranties, and the guaranties stated: "Guarantor hereby agrees that its obligations under this Guaranty shall not be released, diminished, impaired, reduced, or otherwise affected by the occurrence of any of the following events (or the fact that any of such events have occurred): (a) The . . . assignment of any part or all of the Guaranteed Obligations or any of the Plans, the Loan Documents, or other documents evidencing, securing, or pertaining thereto . . . ." The bill of sale for the loans from HNB to I-75 stated, "[HNB] . . . for value received and pursuant to the terms and conditions of that certain Loan Sale Agreement dated December 6, 2010 between [HNB and I-75], does hereby sell, assign, transfer and convey to [I-75], its heirs, administrators, representatives, successors and assigns, all rights, title and interests of the Seller, as of the date hereof, in, to and under the Loans and the Loan Documents described in the Loan Sale Agreement and listed on Exhibit A attached hereto." Thus, when HNB sold the loans to I-75, the right to enforce those loans was vested in I-75. The trial court had already found defendants liable and allowed I-75 to substitute in for HNB. The only remaining issue to be determined was the amount of damages resulting from the default on the loans. We cannot conclude that the trial court abused its discretion in denying defendants' motion to compel because the documents relating to the transaction between HNB and I-75 were not relevant to the issue of damages, nor were they reasonably calculated to lead to the discovery of admissible evidence regarding damages. See *Bauroth*, 465 Mich at 381.[6]

We next consider the documents that, according to defendants, reassign the two construction mortgages that secured the loans back to HNB and, as a result, whether the judgment should have been entered in I-75's favor. These documents are entitled, "Collateral

[6] On appeal, defendants argue in passing that the trial court's denial of the motion to compel discovery of the documents relating to the transaction between I-75 and HNB "left [defendants] with affirmative defenses at the evidentiary hearing—without the evidence to help prove them." Defendants fail to expound on this argument by specifying the affirmative defenses at issue and explaining how this evidence would have been critical to their ability to prove these defenses; therefore, we will not delve further into this issue. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Assignment of Mortgage" and state, "This assignment and the rights and obligations of the parties hereunder shall be governed by, and construed and interpreted in accordance with that certain Pledge, Control, and Security Agreement dated December 6, 2010 by and between Assignor and Assignee . . . , and the laws of the State of Indiana without regard to any conflict of laws provisions." This language indicates that these Collateral Assignments were part of an overall "Pledge, Control, and Security Agreement," which is not part of the lower court record. The Collateral Assignments provide in the first paragraph: "I-75 Partners, LLC (hereinafter "Assignor") . . . hereby assigns, transfers and sets over to The Huntington National Bank ("Assignee") *all of Assignor's right, title, and interest* in and to the following [construction mortgage] . . . ." (Emphasis added.) The Collateral Assignments go on to state:

> Upon the occurrence of a default by Assignor in the performance of its Obligations under the Security Agreement and/or any documents associated therewith (an "Event of Default"), Assignee *shall be entitled to exercise any and all rights and remedies conferred upon it by the terms of this Assignment and the Security Agreement*, including enforcing Assignor's rights, privileges, and remedies under the Mortgage. Assignor hereby irrevocably constitutes and appoints Assignee as its attorney-in-fact to demand, receive, and enforce Assignor's rights with respect to the Mortgage to do any and all acts in the name of Assignor or in the name of Assignor with the same force and effect as assignor could do if this assignment has not been made; *provided, however, that assignee shall do so only after the occurrence of any Event of Default*. Assignor agrees that Assignee does not assume any of Assignor's obligations or duties concerning the mortgage unless and until Assignee shall exercise its rights hereunder and expressly assumes in writing any of Assignor's obligations under the Mortgage.
>
> This Assignment *constitutes the granting by Assignor of a security interest* under the [UCC] as adopted in Indiana in all right, title, and interest of Assignor in, to, and under the Mortgage and Assignor agrees to execute [UCC] financing statements and other documents perfecting or evidencing such security interests as reasonably requested by Assignee. [Emphasis added.]

While the plain language in the first paragraphs of the Collateral Assignments indicates that "all of [I-75's] right, title, and interest in and to" the mortgages were assigned, transferred, and set over to HNB, the overall context of the short, two-page documents indicates that this assignment was intended to be "[c]ollateral," as indicated in its title; constitutes a "security interest," as indicated in the body of the document; and was part of an overarching security agreement that was made as part of the sale of the loans. *Radu*, 302 Mich App at 374; *Comerica Bank*, 291 Mich App at 46. Therefore, given the plain language of the Collateral Assignments, we cannot conclude that the parties intended for the mortgages to be assigned absolutely to HNB; instead, the plain language of the Collateral Assignments indicates that the intent of the parties was that the assignment of the mortgages serve as collateral for I-75's purchase of the loans from HNB. Therefore, defendants' argument that these Collateral Assignment documents prove that further discovery would have revealed that HNB actually owned the loans, rather than I-75, is unavailing. We disagree with defendants' assertion that these publicly recorded documents indicate that HNB actually owns these mortgages. Moreover, we cannot conclude that the trial court committed a "palpable error," as alleged by defendants, in awarding damages

against defendants after the Collateral Assignment documents were presented at the evidentiary hearing on damages.

C. DENIAL OF DEFENDANTS' MOTION TO REOPEN EVIDENITARY HEARING

Defendants argue that the trial court abused its discretion in denying defendants' motion to reopen proofs because defendants presented new evidence in the form of tax returns received after the close of the evidentiary hearing that, at a minimum, created a question of fact regarding whether $12,000,000 of debt was forgiven, which would affect the amount of damages to be awarded.

Whether to grant a motion to reopen proofs is within the sound judicial discretion of the trial court. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001); *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959). Discretionary decisions of the trial court are reviewed for an abuse of discretion. *Buie*, 491 Mich at 320. "When evaluating whether the trial court abused its discretion on a motion to reopen proofs, this Court will consider (1) the timing of the motion, (2) whether the adverse party would be surprised, deceived, or disadvantaged by reopening the proofs, and (3) whether there would be inconvenience to the court, parties, or counsel." *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 50-51; 709 NW2d 174 (2005) (opinion by SMOLENSKI, J.), rev'd in part on other grounds 479 Mich 280 (2007); see also *Bonner*, 356 Mich at 541. The party who requests reopening of the proofs has the burden to "sho[w] that the evidence was both newly discovered and material . . . ." *People v Van Camp*, 356 Mich 593, 602; 97 NW2d 726 (1959).

Defendants filed their motion to reopen the damages evidentiary hearing on October 4, 2011, two months after the close of the evidentiary hearing. Although the evidentiary hearing ended on August 2, 2011, the court did not issue its opinion on damages until March 6, 2012.

With their motion, defendants presented a 1065 IRS tax return of BFO Investment Company (BFO), owned by defendants, which is used to report tax information for partnerships and includes Schedule K-1 forms used to report partnership income. These documents indicated that BFO realized $6,302,425 in cancellation of debt income. Defendants argued that because BFO is a 50 percent owner of "Dutton," Dutton had $12,604,850.00 in income due to forgiveness of some of the loans to Dutton, and because I-75 can only sue on debt that has not been forgiven, this new evidence is material regarding the issue of damages. According to defendants, they did not receive the tax return until September 14, 2011—after the evidentiary hearing closed.

I-75 responded by arguing that under the Internal Revenue Code (IRC), a debt must be reported as cancellation of debt income if the debt is acquired by a person or entity "related" to the debtor, as defined under the IRC, and that, therefore, no cancellation of debt actually occurred. In support of this argument, I-75 attached an affidavit from its CPA Rosanne Ammirati, who explained:

> The [IRC], and regulations and requirements of the IRS, provide that a debt is considered to be cancelled for tax reporting purposes if the debt is acquired by a party that is "related" to the debtor, as defined under the [IRC]. . . . Under the

> [IRC], a debt acquirer can be "related" to a debtor for purposes of triggering the above rule where there is a commonality of ownership between the debtor and the debt acquirer. The requisite commonality is present with respect to I-75 Partners' acquisition of the debts of [Dutton Corp and Dutton Retail]. Specifically, John Urbahns, who is the sole member of I-75 Partners, is also the sole member of Dutton Investment, LLC, which owns 50% membership interests in [Dutton Corp and Dutton Retail], and holds more than 50% of the capital invested in those two companies.

Ammirati went on to state that the cancellation of debt income was reported "solely from the requirements of the IRC and the IRS described above[,]" and she and her firm had "not received any information indicating that the debts have been paid, forgiven or otherwise released by Huntington Bank, I-75 Partners or any other person or entity." I-75 also cited caselaw from other jurisdictions involving a different IRS form and asserted that it indicates that IRS reporting requirements triggering the reporting of a debt as cancelled does not prohibit a creditor from enforcing a debt. In their reply brief, defendants argued that the caselaw cited by I-75 is inapplicable and, regardless, even if I-75's explanation for the claimed cancelled debt income was true, I-75 did not explain why the debt forgiveness claimed in the returns totals $12 million rather than the roughly $20 million I-75 claimed during the evidentiary hearing.

In denying the motion, the trial court stated that it did "not find that it is new evidence, nor that it would be material."[7] On appeal, the parties raise essentially the same arguments, and again I-75 does not address why the debt forgiveness claimed did not total $20 million.

Defendants had the burden to show that the tax returns were newly-discovered and material. *Van Camp*, 356 Mich at 602. Given that Ammirati, who supervised the preparation of the K-1 forms, stated in her deposition that the K-1 forms were created "[i]n or around September of 2011[,]" it is unclear why the trial court found this evidence was not newly-discovered. Additionally, while the motion was made months after the end of the evidentiary hearing, it was made shortly after defendants claim that they received I-75's tax documents and well before the trial court issued its opinion and order and subsequent judgment regarding damages. Therefore, granting the motion would not have surprised, inconvenienced, or disadvantaged I-75, given that I-75 was aware of the content of these documents. See *Michigan Citizens for Water Conservation*, 269 Mich App at 51.

Regardless, we cannot conclude that the trial court abused its discretion based on its finding that the evidence was not material. The tax returns would constitute material evidence to support reopening the evidentiary hearing on damages only if they provided evidence that the damages were other than as represented during the evidentiary hearing.

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[7] Defendants argue that the trial court failed to provide a rationale for its denial of the motion. However, as I-75 aptly points out in their brief, pursuant to MCR 2.517(A)(4), the trial court was not required to provide findings of fact and conclusions of law on this motion.

Section 108(e)(4)(A), "Income of Discharge of Indebtedness," of the Internal Revenue Code, 26 USC 108(e)(4)(A) provides:

> **(4) Acquisition of indebtedness by person related to debtor. --**
>
> **(A) Treated as acquisition by debtor.**--*For purposes of determining income of the debtor* from discharge of indebtedness, to the extent provided in regulations prescribed by the Secretary, the acquisition of outstanding indebtedness by a person bearing a relationship to the debtor specified in section 267(b) or 707(b)(1) from a person who does not bear such a relationship to the debtor *shall be treated as* the acquisition of indebtedness by the debtor. Such regulations shall provide for such adjustments in the treatment of any subsequent transactions involving the indebtedness as may be appropriate by reason of the application of the preceding sentence. [Emphasis added.]

Under this provision, when determining cancellation of debt income, acquiring debt by a person related to the debtor from a person not related to the debtor results in cancellation of debt income. 33 Am Jur 2d, Federal Taxation, ¶ 12951. The language of this section does not indicate that the debt need actually have been paid, forgiven, or released; instead, when debt is acquired from a related person, this acquisition is "*treated* as the acquisition of indebtedness by the debtor[,]" "[f]or *purposes of determining income* of the debtor from discharge of indebtedness." § 108(e)(4)(A) (Emphasis added.)

I-75 relies on cases involving 1099-C IRS tax forms, which are filed by a creditor for each debtor for whom the creditor cancelled income, to argue that filing of tax forms for informational purposes does not, by operation of law, extinguish a debt. See, e.g., *In re Reed*, 492 BR 261, 268 (ED Tenn, 2013) (providing a list of such cases in various courts). However, a minority of other courts have concluded that while this may be true, "issuance of a Form 1099-C *reflects* that a financial institution has, in accordance with [IRC requirements], discharged an indebtedness, which must then be reported by the debtor as taxable income[,]" and, thus, the debtor is no longer indebted for the amount discharged. See *id.* at 272-273. I-75 argues that filing the Schedule K-1 form similarly does not, by operation of law, make the debt unenforceable or otherwise prove that the debt was actually discharged.

We first recognize the inherent differences between the Schedule K-1 form in this case and a 1099-C form. 1099-C forms are produced by the *creditor*, those in the position to cancel debt, whereas the Schedule K-1 forms in this case was created by the *debtors*, Dutton Retail and Dutton Corp, who were *not* in a position to cancel the debt. Additionally, Ammirati explained in her deposition that the cancellation of debt income was reported because of the IRC requirements and that she and her firm had not received information that the debt had "been paid, forgiven or otherwise released by [HNB], I-75 Partners or any other person or entity." Therefore, in this

context, we do not find the cases that conclude 1099-C forms demonstrate that debt has been cancelled to be persuasive.[8]

Additionally, defendants did not directly challenge below, or here on appeal, whether § 108(e)(4)(A) applies to Dutton Corp and Dutton Retail, requiring reporting of cancellation of debt income due to I-75's acquisition of the loans from HNB. Defendants also did not present any evidence that the claimed cancellation of debt income reflected debts actually forgiven, rather than merely being reported as required pursuant to § 108(e)(4)(A). Because defendants failed to provide evidence or caselaw to counter I-75's position that the debt had not actually been cancelled, the trial court did not abuse its discretion in denying the motion.

D. AMOUNT OF JUDGMENT

Defendants argue that the trial court clearly erred in awarding a $20,508,941.32[9] judgment to I-75 because it did not provide any evidence at the evidentiary hearing on damages regarding the actual amount defendants owed under the loan agreements. In particular, defendants assert that (1) Urbahns admitted in his testimony that he did not calculate the damages he testified regarding, (2) the deposition of Bradley Rust, a vice president of HNB assigned to work on the loans at issue, only revealed that Rust did not know the current amount owed, and (3) I-75 offered no testimony from someone with first hand knowledge of the actual amounts owed at the time of the hearing. Defendants argue that I-75 needed to have a witness testify who had first-hand knowledge of the calculation and payments so they could be cross-

[8] Defendants argue on appeal that cases involving 1099-C forms have held that "the tax benefits to a creditor of a cancellation of debt (and the associated consequences to a debtor) make it inequitable for a creditor to also attempt to enforce the underlying debt." One example is *In re Reed*, in which the court states, "It is inequitable to require a debtor to claim cancellation of debt income as a component of his or her gross income and subsequently pay taxes on it while still allowing the creditor, who has reported to the [IRS] and the debtor that the indebtedness was cancelled or discharged, to then collect it from the debtor." *In re Reed*, 492 BR at 271. However, other courts have disagreed. For example, in *In re Zilka*, 407 BR 684, 691 (WD Pa, 2009), the court stated, "This Court is aware that the Debtor also advances another argument as to why it would be inequitable to allow Bayer to enforce its four claims, namely that Bayer has already benefitted by the income tax deductions that it would have taken as a result of discharging the debts that constitute its four claims. Such argument is unavailing, however, because . . . even if, and to the extent that, Bayer has taken such prior income tax deductions, the same would then automatically be reversed if, and when, Bayer receives any recovery from the Debtor's bankruptcy estate regarding its four claims (i.e., Bayer's recovery by way of continued collection efforts)—such would be the case because, upon receipt of such recovery, the same would constitute fully taxable income to Bayer."

[9] Defendants inaccurately state that the trial court awarded I-75 $20,508,941.32, as it actually awarded defendants $20,428,733.30 and "additional interest as provided by under the parties' contracts pursuant to MCL 600.6013(7)."

examined regarding the accuracy of those figures, and because I-75 had the burden of proof and failed to do so, I-75 was not entitled to the judgment awarded.

"An award of damages following an evidentiary hearing is reviewed on appeal pursuant to the clearly erroneous standard." *Woodman v Miesel Sysco Food Service Co*, 254 Mich App 159, 190; 657 NW2d 122 (2002). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Hannay v Dep't of Transportation*, 299 Mich App 261, 271; 829 NW2d 883 (2013) (quotation marks and citation omitted). "A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty . . . ." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

At the evidentiary hearing, the entire *de bene esse* deposition of Rust along with the attached exhibits, which included bank documents of HNB regarding the loans at issue, was admitted over defense counsel's objection regarding admission of the exhibits. Rust, a vice president of HNB, was assigned to work on the loans and was given access and control to the files and records of these loans. Some of the exhibits discussed at Rust's deposition were invoices regarding the various loans and screen shots of the bank's commercial loan servicing system that displayed payoff balances for the various loans. Rust testified that the payoff balances on the loans as of the date the loans were assigned to I-75 were as follows: (1) $14,408,461.71 for the Dutton Corp Loan, $13,755,094.71 principle balance owed, (2) $5,634,317.27 for the Dutton Retail Loan, $5,393,225.15 principle balance owed, and (3) $54,057.72 for the letter of credit, $50,125 principle balance owed. Rust indicated in his deposition that he did not know the amount owed on the loans as of the date of the deposition, and that he could not determine the amount owed under the loan after HNB assigned the loans to I-75 because HNB no longer owned the loans.

During his testimony, Urbahns indicated that as part of his responsibilities as manager of I-75, he is responsible for keeping track of payments made on investments, and he (1) denied having knowledge of any payments being made on the three loans that I-75 purchased from HNB following I-75's purchase of the loans and (2) denied any change in the loan balances, aside from accrual of interest. Urbahns testified that the following amounts were due on the following loans: (1) $14,651,468.83 on the Dutton Corp Loan, (2) $5,721,657.03 on the Dutton Retail Loan, and (3) $55,607.44 on the letter of credit. Urbahns also confirmed that neither he nor any of the entities he is a part of made any payments on the loans since I-75 acquired them.

We cannot agree with defendants that I-75 was required to put someone on the stand who had personally calculated the amounts owed on the loans. First, defendants provided no citation to authority for this position. Second, defendants do not expressly challenge whether the HNB records attached to Rust's deposition were admissible[10]—instead, they argue these records and

[10] While defendants vaguely assert that I-75 "failed to submit any admissible evidence of the actual amount to damages owed[,]" defendants fail to actually argue this evidence was inadmissible. *Wilson*, 457 Mich at 243 (stating that it is not sufficient for a party to announce a

the testimony of Rust and Urbahns were not sufficient to prove damages. So long as testimony regarding how the evidence was created and maintained has been provided, it is not necessary to present a witness who performed the work to create the evidence (in this case the bank records and the calculations contained in them) to establish a proper foundation. *Lopez v Gen Motors Corp*, 224 Mich App 618, 627; 569 NW2d 861 (1997). Rust confirmed in his deposition that the documents were created in the ordinary course of business and generated through the bank's computer system, and he described the bank's standard process of record keeping and billing, which was followed regarding these loans. *Merrow v Bofferding*, 458 Mich 617, 627-628 n 8; 581 NW2d 696 (1998) ("[A] foundation must be laid establishing that the source of the statement was acting in the regular course of business when making the statement."); see also *Price v Long Realty*, Inc, 199 Mich App 461, 467-468; 502 NW2d 337 (1993). Thus, because (1) Rust, who was assigned to work on these loans at HNB, testified regarding the balance of the loans as of the date HNB sold the loans to I-75 based upon HNB business records for which he provided a proper foundation, and (2) Urbahns, who managed the company that managed I-75, testified that neither he nor the entities he was apart of made payments on the loans after that date, I-75 met its burden to prove damages with reasonable certainty. *Health Call of Detroit*, 268 Mich App at 96. We cannot conclude that the trial court clearly erred in awarding the $20,428,733.30 judgment to I-75.

E. ATTORNEY FEES

Defendants argue the trial court abused its discretion in awarding $80,208.02 in attorney fees to I-75, asserting that it is impossible for HNB's lawyers to have spent 390 hours on this case, given that all the material proceedings, including the court's ruling on the summary disposition ruling, occurred after HNB was substituted out. Defendants further argue that I-75 failed to present any evidence to demonstrate that these fees were accurate; instead, defendants had Steven Alexsy testify, who was not involved in the work of reviewing documents and had no actual knowledge of the accuracy of the hours. Defendants assert that the trial court should have held an evidentiary hearing to determine whether the amount of hours alleged was reasonable and required direct testimony from the attorneys who performed the work. Importantly, defendants do not challenge the reasonableness of the $200 hourly rate charged by the attorneys, or whether I-75 is entitled to attorney fees under the loan agreements and guarantees.

This Court reviews "a trial court's determination of the reasonableness of requested attorney fees for an abuse of discretion[,]" and a trial court does not abuse its discretion if its "decision results in an outcome within the range of principled outcomes[.]" *Speicher v Columbia Twp Bd of Election Com'rs*, 299 Mich App 86, 94; 832 NW2d 392 (2012) (quotation marks and citation omitted). "[T]he trial court's factual findings, if any, are reviewed for clear error[,]" and "[a] finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.* (quotation marks and citation omitted).

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position and leave it to this Court to unravel and search for authority to reject or support the position).

The attorney fees were awarded pursuant to the terms of the loan agreements and the guaranties, and "attorney fees awarded under . . . contractual provisions are considered damages, not costs." *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). Contractual provisions for attorney fees are construed as requiring those fees to be reasonable to avoid violating public policy. See *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 517; 686 NW2d 506 (2004).

> Pursuant to MRPC 1.5(a), "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." MRPC 1.5(a) also provides a nonexhaustive list of factors to consider when determining if a fee is unreasonable and, therefore, clearly excessive. These factors include:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. MRPC 1.5(a). [*Speicher*, 299 Mich App at 94-95 (quotation marks omitted).]

Alexsy testified at the evidentiary hearing regarding the attorney fees incurred with his law firm, Alexsy Law Group, by HNB prior to I-75 being substituted in as plaintiff. Exhibits consisting of billing invoices, which were prepared in the ordinary course of business, from Alexsy Law Group were admitted without objection, documenting HNB's attorney fees through April 25, 2011. These invoices included the hours incurred for each task performed and indicated the person responsible for the work. Alexsy explained that "[i]t was prepared primarily by Beth Desmond and [a paralegal], but I did review it and had some input as to time entries that should and should not be included." Alexsy testified that he and one other attorney, Beth Desmond, performed the work in this case, though Desmond performed the extensive document review work. Alexsy testified that Desmond has been practicing for 10 years and has experience working in commercial litigation matters involving banks. Alexsy's secretary prepares the client invoices, and Alexsy reviews them before they are sent to a client.

Alexsy's testimony indicated that extensive hours were spent reviewing documents in response to a request for documents, explaining, "The attorney for the guarantors at that time had

a request for production of documents[,] and it was very broad and it . . . asked about relationships . . . John Urbahns had with the bank on a lot of other loans . . . . It required us to go through a lot of emails[.]" Alexsy explained that the law firm used a program to try to reduce the time it took to review the large number of documents. Alexsy testified that defendants' attorney was advised that the documents were available for review, but he did not think that anyone came by to review the documents. Because of his concerns regarding the amount of time the document review was taking, Alexsy wrote off time to reduce the number of hours billed. Alexsy also testified that he discussed with defendants' attorney at the time whether he wanted Alexsy to proceed with the document production in light of its voluminous nature. In defense counsel's closing arguments, he argued that (1) the bills were "suspect as to perhaps being inflated" because hundreds of hours were spent on "documents that have never been produced" and (2) "the person who did the work that [could have testified that] the work could have been inflated wasn't testifying . . . ." However, defense counsel did not request a separate evidentiary hearing on attorney fees at the evidentiary hearing on damages.

In the trial court's March 6, 2012 opinion and order, the trial court granted I-75's request for attorney fees, explaining:

> Defendants made no specific objections to the attorney's fees and costs but merely stated a conclusory objection, which is not sufficient to dispute the affidavit offered by plaintiff. . . . [T]his Court finds that I-75 Partners' attorney's fees and costs are reasonable, necessary, and directly related to pursuing recovery on the Construction Loan Guaranty. Specifically, this Court reviewed the following factors to determine the reasonableness of the attorney's fees:
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> 1. The professional standing and experience of the attorney;
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> 2. The skill, time and labor involved;
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> 3. The amount in question and the results achieved;
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> 4. The difficulty of the case;
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> 5. The expenses incurred; and
>
> 6. The nature and length of the professional relationship with the client.
>
> *Wood v DAIIE*, 413 Mich 573, 588 (1982) (*quoting Crawley v Schick*, 48 Mich App 728, 737 (1973)); *Head v Phillips Camper Sales & Rentals, Inc*, 234 Mich App 94, 114 (1999). Having reviewed testimony on attorney's fees and the reasonableness factors cited above, this Court also finds that the attorney's fees are reasonable based on the hourly rate, time expended, and difficulty of the case as well as the remaining factors.

In its March 21, 2012 judgment, the trial court awarded I-75 "$80,208.02 for collection costs, including reasonable attorney fees, incurred through April 29, 2011."

The trial court found that there was no factual dispute regarding the reasonableness of the hours billed. Alexsy testified regarding the hours billed for document review, and he carefully reviewed the hours billed by his employees and wrote time off from HNB's bill for hours spent reviewing documents out of concern that the review was taking a great deal of time. Defense counsel argued in closing arguments that hundreds of hours were billed for documents that "have never been produced"; however, Alexsy testified that the documents were made available to defendants, but no one came to review them. Defense counsel also argued that the "bills are suspect as to perhaps being inflated[,]" but offered no factual support for this assertion, other than questioning the fact that one hour was billed to investigate the spelling of a party's name and draft an order to have the spelling changed. We cannot conclude that the trial court clearly erred in concluding that no factual dispute existed, such that a further evidentiary hearing was required, regarding the reasonableness of the hours billed because (1) I-75 adequately supported its request for attorney fees and (2) defendants did not adequately call into question the reasonableness of the fees billed. *Speicher*, 299 Mich App at 94.

Moreover, given that (1) these attorney fees were awarded pursuant to contract provisions and, as such, these fees are considered damages, *Fleet Business Credit*, 274 Mich App at 589, (2) the attorney fee issue was thoroughly covered in an evidentiary hearing to determine *damages*, and (3) defendants knew attorney fees were being requested pursuant to the loan agreements and guaranties because I-75 made the request in its motion for summary disposition, defendants had ample opportunity to present evidence opposing I-75's request for attorney fees and to challenge the requested fees in the evidentiary hearing on damages. Defendants had the opportunity to, and did, thoroughly cross-examine Alexsy. Given this record, we cannot conclude that the trial court abused its discretion in determining the fees billed were reasonable.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan