

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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T&S DISTRIBUTORS, L.L.C., CUSTOM  
SOFTWARE, INC., ARQ, INC., ABSOLUTE  
INTERNET, INC., CAC MEDIANET, INC., and  
TELNET WORLDWIDE, INC.,

Plaintiffs,

and

ACD TELECOM, INC.,

Plaintiff-Appellant,

v

MICHIGAN BELL TELEPHONE COMPANY  
d/b/a AT&T MICHIGAN,

Defendant-Appellee.

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UNPUBLISHED  
March 18, 2008

No. 274767  
Ingham Circuit Court  
LC No. 04-000689-CK

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Plaintiff ACD Telecom, Inc. (“ACD”) appeals by right the trial court’s orders denying plaintiffs’ motion for partial summary disposition and granting summary disposition in favor of defendant Michigan Bell Telephone Company (“AT&T”). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion on ACD’s breach of contract claim.

I

ACD and AT&T are both telecommunication companies that conduct business in the state of Michigan. AT&T had entered into a variety of long-term contracts with plaintiffs Custom Software, ARQ, Absolute Internet, and CAC MediaNet (collectively referred to as the

“ISP plaintiffs”).<sup>1</sup> AT&T’s long-term contracts with the ISP plaintiffs contained substantial early termination penalties. At some point, ACD became aware that several businesses, including the ISP plaintiffs, wished to switch their telecommunication services away from AT&T. However, those businesses had not done so because of the substantial early termination penalties contained in their long-term contracts.

In January 2003, AT&T sent an “Accessible Letter” to its competitors, including ACD. The letter advised the competitors that “[AT&T] is willing to enter into agreements with [its competitors] under which the parties will mutually agree to waive early termination fees, as set forth herein . . . for the provision of local exchange service, toll service or both when an end-user switches local exchange service, toll service or both to the other carrier.” The Accessible Letter provided that the agreements would apply to “term contracts with Michigan end-users for certain telecommunication services, including toll service, local exchange service, and associated features . . . .”

After the Accessible Letter was issued, AT&T entered into a Mutual Waiver of Early Termination Fees Agreement (“MWA”) with ACD.<sup>2</sup> Under the MWA, AT&T agreed with ACD to mutually waive the early termination fees otherwise applicable to long-term customers if those customers switched their telecommunication services to the other party. The MWA provided in relevant part:

WHEREAS, [AT&T] and [competitor] have entered into term contracts with certain end-user subscribers for telecommunication services in the State of Michigan which include intraLATA and/or interLATA toll service, local exchange service, and/or associated features, under which such subscribers may receive discounts based upon the volume of services used or agreed to be used, length of term and other factors (“Term Contracts”); and

WHEREAS, the Term Contracts may contain provisions obligating subscribers to pay certain charges, in the event they terminate the Term Contract before its stated expiration date, (“Early Termination Fees”); and

\* \* \*

WHEREAS, the parties desire to mutually waive certain Early Termination Fees in the event a subscriber terminates a Term Contract before its stated expiration date in order to subscribe to telecommunication services provided by the other party;

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<sup>1</sup> Plaintiffs Custom Software, ARQ, Absolute Internet, and CAC MediaNet are Internet service providers (“ISPs”). Although the ISP plaintiffs are not parties to this appeal, we will discuss them to some degree in this opinion. However, plaintiff T&S Distributors is not an ISP and did not assert the same legal claims as the ISP plaintiffs; thus, it will not be discussed in this opinion.

<sup>2</sup> AT&T entered into an identical MWA with plaintiff TelNet Worldwide. TelNet is not a party to this appeal.

THE PARTIES AGREE AS FOLLOWS:

1. [AT&T] and [competitor] agree that they will waive applicable Early Termination Fees under Term Contracts described in the Recitals above, said descriptions incorporated herein, in the event an end-user terminates the Term Contract before its stated expiration date in order to subscribe to telecommunication services in the State of Michigan provided by the other party. This waiver is applicable to all Term Contracts, rather than on a case-by-case basis.
2. In order to facilitate implementation, and avoid billing end-users for termination charges subject to this agreement, each party shall provide written notice to the other party not less than seven (7) days before switching the local or toll service of an end-user having a Term Contract with the other party.
3. This agreement is terminable upon thirty (30) days written notice.

The MWA was in effect for less than one year. In November 2003, AT&T notified all competitors in writing that it would be terminating all MWAs within 30 days.

After the MWA was executed, ACD began to solicit business from existing AT&T customers. Several businesses, including the ISP plaintiffs, switched their telecommunication services away from AT&T in the belief that AT&T would waive any early termination fees that would otherwise apply. However, AT&T refused to waive the ISP plaintiffs' early termination fees, and plaintiffs sued. Among other things, plaintiffs set forth claims alleging breach of contract and tortious interference with contractual relations and with a business relation or expectancy.

Each of the ISP plaintiffs had previously subscribed to ISDN Prime or ADTS-E service<sup>3</sup> from AT&T. AT&T asserted that ISDN Prime and ADTS-E were not covered by the MWA because they were not "intraLATA and/or interLATA toll service, local exchange service, and/or associated features." AT&T also asserted that the ISP plaintiffs were not covered by the MWA because they were not "end-user subscribers."

After discovery, AT&T moved for summary disposition. AT&T argued that "the services that were switched from [AT&T] . . . by the ISP Plaintiffs did not include toll service or local exchange service, and the ISP Plaintiffs are not 'end-user subscribers' in the use of the services they purchased under the contract[s]. Consequently, [AT&T's] imposition of

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<sup>3</sup> "ISDN Prime," also known as "ISDN PRI," stands for "Integrated Services Digital Network Primary Rate Interface." "ADTS-E" stands for "Ameritech Digital Transport Service-Enhanced." Both services provide the customer the ability to manage a wide variety of switched services in a bulk manner and may be used for voice services, data services, or both. Neither ISDN Prime nor ADTS-E is regulated by the Michigan Public Service Commission ("MPSC").

termination fees on the ISP Plaintiffs was not a breach of the Agreement.” AT&T also argued that none of the ISP plaintiffs had purchased ISDN Prime and ADTS-E for their own local or long-distance use, and that the ISP plaintiffs were therefore “not end-users of the services.” Instead, AT&T argued that the ISP plaintiffs “used the services to provide unregulated internet access to *their* end-user customers,” and that, “[i]n fact, all of the ISP Plaintiffs had separate business phones that they used for local/toll calls.”

AT&T contended that the term “local exchange service” in the MWA meant only “basic local exchange service” or “plain old telephone service”—also known as “POTS.” AT&T argued that the contractual term “local exchange service” should be interpreted exclusively according to the definition of that term set forth in Michigan law. See MCL 484.2102(b); see also *In re Procedure and Format for Filing Tariffs*, 210 Mich App 533; 534 NW2d 194 (1995). AT&T argued that “[t]he ISP plaintiffs’ term contracts did not include ‘basic’ local exchange service” because “[t]he services covered by their contracts were high speed, sophisticated services that were used to provide internet access to their dial-up internet subscribers.” AT&T also pointed out that ISDN Prime and ADTS-E services are “unregulated” services, and argued that the contractual term “local exchange service” only included services regulated by the MPSC.

Plaintiffs then moved for partial summary disposition with respect to their breach of contract claim. Plaintiffs asserted that the MWA unambiguously covered *all* “telecommunication services,” and that the contractual phrase “which include intraLATA and/or interLATA toll service, local exchange service, and/or associated features” merely provided a non-exhaustive list of types of services to which the MWA applied.

Plaintiffs also asserted that even assuming arguendo that the MWA applied only to “toll service, local exchange service, and/or associated features,” the services purchased from AT&T by the ISP plaintiffs fell within the definition of “local exchange service” because it was possible to place and receive local calls with ISDN Prime and ADTS-E. Plaintiffs also pointed out that features traditionally associated with basic local exchange service, such as caller ID, call waiting, and voicemail, can be associated with ISDN Prime and ADTS-E.

Finally, plaintiffs argued that AT&T had implicitly recognized ISDN Prime and ADTS-E as types of “local exchange service” because AT&T had imposed federal “end user common line” or “EUCL” charges on its ISDN Prime and ADTS-E customers, including the ISP plaintiffs. For this same reason, plaintiffs contended that AT&T had implicitly recognized the ISP plaintiffs as “end users.” Plaintiffs maintained that AT&T could have defined the terms “local exchange service” and “end-user subscriber” in the MWA if it had wanted the terms to have special or restrictive meanings.

The trial court ruled that the MWA was unambiguous as a matter of law, that it applied only to “local exchange service” and “toll service,” that ISDN Prime and ADTS-E were not “local exchange service,”<sup>4</sup> and that the ISP plaintiffs were not “end-user subscribers.” The trial

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<sup>4</sup> Although ACD’s telecommunications expert opined that ISDN Prime and ADTS-E services can be used to place and receive long-distance calls if configured properly, ACD has never  
(continued...)

court also found that AT&T had not tortiously interfered with ACD's business relations or expectancies. Thus, the court denied plaintiffs' motion for partial summary disposition and granted summary disposition in favor of AT&T.

## II

We review de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The pleadings, affidavits, depositions, admissions, and other admissible documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Id.*

The construction of a contract presents a question of law subject to de novo review. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). We review de novo whether the language of a contract is ambiguous and requires resolution by the trier of fact, *DaimlerChrysler Corp v G Tech Pro Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003), and whether extrinsic evidence should be used to interpret the contract, *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005).

## III

ACD argues that the trial court should have granted summary disposition in its favor on the breach of contract claim, or in the alternative, that the trial court improperly granted summary disposition in favor of AT&T on the breach of contract claim. We find that neither party was entitled to summary disposition with respect to ACD's breach of contract claim.

The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. *Klapp, supra* at 473. A contract is clear and unambiguous if, however inartfully worded or clumsily arranged, it fairly admits of but one interpretation. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original). Accordingly, when the language of a contract is unambiguous, construction of the contract is a question of law for the court, and no factual development is necessary to determine the intent of the parties. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). When a contractual provision is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, summary disposition should be granted to the proper party. *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

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(...continued)

argued that ISDN Prime and ADTS-E are "toll service."

On the other hand, the trier of fact must determine the meaning of an ambiguous contract. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). “In resolving . . . the interpretation of a contract whose language is ambiguous, the jury is to consider relevant extrinsic evidence.” *Klapp, supra* at 469. To determine whether a contract provision is ambiguous, the court must give the language its ordinary and plain meaning to see if the words may reasonably be understood in different ways. *Rossow, supra* at 658. The fact that a contract does not define a relevant term does not render the contract ambiguous. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Nor is a contractual word or phrase rendered ambiguous merely because the parties ascribe different meanings to it, *id.* at 355 n 3, or because it has more than one dictionary definition, *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 54; 723 NW2d 922 (2006). However, a contract is ambiguous “when its words may reasonably be understood in different ways,” *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982), or when its language “is subject to two or more reasonable interpretations or is inconsistent on its face,” *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). If a contract is ambiguous, “factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Meagher, supra* at 722; see also *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991).

#### A

First, as the parties suggest, it is not initially clear whether the phrase “which include . . . toll service, local exchange service, and/or associated features” was intended to modify the compound noun “term contracts” or the compound noun “telecommunication services.” However, after applying two fundamental rules of construction, it becomes evident that the phrase was intended to modify “telecommunication services.” It is a general rule of grammar that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Under this rule, the phrase “which include . . . toll service, local exchange service, and/or associated features” modifies only the compound noun “telecommunication services,” which is the last noun preceding the phrase in question. Indeed, this conclusion is further supported by the doctrine *noscitur a sociis*, which states that a word or phrase is given meaning by its context or setting. *Bloomfield Estates Improvement Ass’n, Inc v Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007). Read in context with its surrounding language, the phrase “which include . . . toll service, local exchange service, and/or associated features” more closely harmonizes with the compound noun “telecommunication services” than with “term contracts” because the phrase “toll service, local exchange service, and/or associated features” describes types of *services* rather than types of *term contracts*. We conclude that the modifying phrase “which include . . . toll service, local exchange service, and/or associated features” was intended to modify the compound noun “telecommunication services” only.

#### B

The MWA, by its own language, was applicable only to “telecommunication services . . . which include . . . toll service, local exchange service, and/or associated features.” Because the phrase “telecommunication services . . . which include . . . toll service, local exchange service, and/or associated features” can be reasonably understood in several different ways, the trial court erred by concluding that it was unambiguous.

The word “include” has several distinct meanings. The word “include” can be either a term of limitation or enlargement. *Belanger v Warren Consolidated School Dist*, 432 Mich 575, 587 n 25; 443 NW2d 372 (1989). The word “include” can also mean “to contain, as a whole does parts or any part or element,” or “to contain as a subordinate element; involve as a factor.” *Random House Webster’s Unabridged Dictionary* (1998). AT&T argues that the phrase “which include . . . toll service, local exchange service, and/or associated features” is a phrase of limitation, and that it restricts the telecommunication services covered by the MWA to “toll service, local exchange service, and/or associated features” only. ACD responds by arguing that the phrase “which include . . . toll service, local exchange service, and/or associated features” is a phrase of enlargement, that it merely provides a non-exhaustive list of types of services that are covered by the MWA, and that the MWA therefore applies to *all* “telecommunication services.” In the alternative, ACD argues that even if the MWA does not apply to *all* telecommunication services, it applies to any telecommunication services that contain “toll service, local exchange service, and/or associated features” as a subordinate element or part.

“The word ‘include’ can be used as a term of enlargement and of limitation, and the word in and of itself is not determinative of how it is intended to be used.” *Belanger, supra* at 587 n 25. As AT&T observes, the word “includes” has at times been interpreted as a term of limitation. AT&T argues that because the phrase “including, but not limited to,”—which is necessarily a phrase of enlargement—is used in another part of the MWA, the phrase “which include . . . toll service, local exchange service, and/or associated features” must have been intended as a phrase of limitation. AT&T notes that courts in other jurisdictions have held that the word “include” should be read as a term of limitation where the phrase “including but not limited to” is used in another part of the same document. See, e.g., *Coast Oyster Co v Perluss*, 218 Cal App 2d 492, 501-502; 32 Cal Rptr 740 (Cal App, 1963).

We acknowledge that the phrase “including, but not limited to” is used in another part of the MWA and that the drafters of the document therefore certainly knew how to craft clear language of enlargement. See *In re Forfeiture of \$5,264*, 432 Mich 242, 255; 439 NW2d 246 (1989) (the phrase “including but not limited to” “connotes an illustrative listing, one purposefully capable of enlargement”). We also acknowledge that under the doctrines *expressio unius est exclusio alterius* and *expressum facit cessare tacitum*, it might be reasonable to conclude that the parties intended the express mention of “toll service, local exchange service, and/or associated features” to be exhaustive and to exclude other types of telecommunications services. See *Grinnell Bros v Brown*, 205 Mich 134, 137; 171 NW 399 (1919); see also 5 Corbin, Contracts, § 24.28, pp 315-316.

However, the fact that the phrase “including, but not limited to” is used in a completely separate part of the MWA does not unequivocally prove that the phrase “which include . . . toll service, local exchange service, and/or associated features” was intended as a phrase of limitation. “[T]he word ‘include’ is not ordinarily a word of limitation, but, rather, of enlargement . . .” *Skillman v Abruzzo*, 352 Mich 29, 33; 88 NW2d 420 (1958). The word “includes” is typically viewed as a term of enlargement because, in many cases, it “conveys the conclusion that there are other items includable, though not specifically enumerated . . .” *Michigan Bell Tel Co v Dep’t of Treasury*, 445 Mich 470, 479; 518 NW2d 808 (1994) (citation omitted). In such cases, the word “includes” lends support to “a construction broad enough to encompass other items not explicitly mentioned.” *Id.*

Moreover, we cannot omit mention of ACD's alternative argument that even if the MWA does not apply to *all* telecommunication services, it applies to any telecommunication service that contains "toll service, local exchange service, and/or associated features" as a "part," "subordinate element," or "factor." This alternative argument is clearly supported by the dictionary definition of the word "include." See *Random House Webster's Unabridged Dictionary* (1998).

AT&T argues that the trial court was correct to rely heavily on the United States District Court's decision in *TDS Metrocom, LLC v Michigan Bell Tel Co*, unpublished opinion of the United States District Court for the Western District of Michigan (File No. 5:05-CV-31; released December 22, 2005). In *TDS Metrocom*, the court interpreted an identical MWA entered into between AT&T and TDS Metrocom, LLC. The United States District Court concluded that the phrase "which include . . . toll service, local exchange service, and/or associated features" was unequivocally a phrase of limitation. The court relied on the notice provision of the MWA, which stated, "[E]ach party shall provide written notice to the other party not less than seven (7) days before switching the local or toll service of an end-user having a Term Contract with the other party." Based on the language of this provision, the court ruled that the phrase "which include . . . toll service, local exchange service, and/or associated features" was unambiguous and clearly limited the scope of the MWA to local service and toll service only.

The decisions of lower federal courts are not binding on Michigan state courts. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Moreover, the *TDS Metrocom* may have improperly relied on the contractual notice provision to conclude that the MWA unambiguously applied to local exchange service and toll service only. It is true that although the MWA's initial recital stated that the agreement applied to "telecommunication services . . . which include . . . toll service, local exchange service, and/or associated features," the MWA's seven-day notice provision mentioned only "local or toll service." However, contrary to the holding of the federal court, this internal inconsistency did not resolve the meaning of the potentially ambiguous language. Instead, this internal inconsistency may have been the very definition of contractual ambiguity. See *Petovello, supra* at 642 (noting that a contract is ambiguous when its language "is inconsistent on its face").

AT&T also points to its own Accessible Letter as evidence that the parties intended the phrase "which include . . . toll service, local exchange service, and/or associated features" to include toll service and local service only. AT&T argues that the trial court properly relied on the Accessible Letter in determining that the phrase "which include . . . toll service, local exchange service, and/or associated features" was unambiguously a phrase of limitation. The problem with AT&T's argument in this regard is that the Accessible Letter was just as ambiguous as the MWA itself. Indeed, the Accessible Letter stated in one place that the forthcoming MWAs would be applicable "when an end-user switches local exchange service, toll service or both . . .," but stated in another place that the forthcoming MWAs would be applicable to "certain telecommunication services, including toll service, local exchange service, and associated features." Because it was inconsistent on its face, the Accessible Letter was itself ambiguous and susceptible to differing reasonable interpretations. *Id.* Accordingly, the Accessible Letter was of little or no use in resolving the ambiguity contained in the language of the MWA.

We conclude that the phrase “which include . . . toll service, local exchange service, and/or associated features” was reasonably susceptible to different meanings. Reading the MWA as a whole and giving its words and phrases their ordinary and plain meaning, *Rossow, supra* at 658, it is simply not clear whether the agreement was intended to encompass (1) only “toll service, local exchange service, and/or associated features,” (2) all “telecommunication services,” or (3) “telecommunication services” that contain “toll service, local exchange service, and/or associated features” as a subordinate element or part. Because the phrase “which include . . . toll service, local exchange service, and/or associated features” was reasonably susceptible to more than one meaning, the trial court erred by concluding that it was unambiguous and that it limited the scope of the MWA to “toll service, local exchange service, and/or associated features” only. A genuine issue of material fact necessarily remained with respect to the phrase’s meaning, and factual development was necessary to determine the parties’ intent. *Meagher, supra* at 722.

### C

Even assuming arguendo that the MWA applied only to “toll service, local exchange service, and/or associated features,” the trial court erred by concluding as a matter of law that the term “local exchange service” unambiguously excluded ISDN Prime and ADTS-E service.

AT&T argues that the term “local exchange service,” as used in the MWA, unambiguously encompassed only “basic local exchange service,” also known as “plain old telephone service” or “POTS.” AT&T points out that the terms “local exchange service” and “basic local exchange service” have a unique statutory meaning and are defined as synonyms by the Michigan Telecommunications Act. See MCL 484.2102(b). Relying on *Ryant v Cleveland Twp*, 239 Mich App 430, 433-434; 608 NW2d 101 (2000), AT&T maintains that each word in the MWA must be accorded its unique statutory meaning under Michigan law.

In contrast, ACD argues that the term “local exchange service” was reasonably susceptible to multiple meanings and that it was not limited to “basic local exchange service.” In support of this argument, ACD points to extrinsic evidence of the meaning of the term “local exchange service” in the telecommunications industry. ACD also notes that the terms “basic” and “POTS” do not appear in the language of the MWA, and that AT&T could have included the terms “basic local exchange service” or “POTS” if it had desired to do so.

Contrary to AT&T’s argument, *Ryant, supra*, does not stand for the proposition that contractual words and phrases must be defined according to their unique statutory meanings. Instead, *Ryant* states only that *statutory* words and phrases must be defined by their unique statutory definitions. *Id.* In short, AT&T has incorrectly argued that Michigan law requires application of the unique statutory definition of “local exchange service” in the context of interpreting the parties’ private contractual agreement.

We find persuasive the New Jersey appellate court’s decision in *Deerhurst Estates v Meadow Homes, Inc*, 64 NJ Super 134, 152; 165 A2d 543 (NJ App, 1960):

It is true that parties in [this state] are presumed to contract with reference to existing law. But reference to such law is generally effected in cases of contract “construction,” i.e., determination of the unexpressed implications of

what is written, rather than in instances of “interpretation” of the written language. [State statutory law] is not a silent factor in every contract executed in this State in the sense that the statutory definitions . . . govern the interpretation of every ambiguous phrase in a private agreement. With respect to the process of interpreting contractual language, statutes and common law principles are only part of the surrounding circumstances, and should be so considered.

Contrary to AT&T’s argument on appeal, we conclude that Michigan statutory law “is not a silent factor in every contract executed in this State in the sense that the statutory definitions . . . govern the interpretation of every ambiguous phrase in a private agreement.” See *id.* The state statutory definition of “local exchange service” was “only part of the surrounding circumstances,” and was only one of the several pieces of extrinsic evidence that should have been considered in resolving the meaning of the term “local exchange service.”

AT&T also contends that the parties either contemplated the unique statutory definition of “local exchange service” at the time of contracting, or that they intended to incorporate the Michigan Telecommunication Act’s definitions into the MWA. It is true that courts in some jurisdictions have held that the parties to a contract “are presumed or deemed to have contracted with reference to existing principles of law.” 11 Williston, Contracts, § 30:19, pp 203-204. Under such a presumption, applicable statutes existing at the time of contracting enter into and form part of the contract as though fully and expressly incorporated in the writing itself. 11 Williston, Contracts, § 30:19, pp 205-206. However, “[t]o assume . . . that everybody makes his contract with reference to the law and adopts its provisions as terms of the agreement is to pile a fiction upon a fiction, and certainly without any necessity.” 11 Williston, Contracts, § 30:21, p 221. Indeed, “the rule of incorporation [is] subject to qualification” and “a number of courts have recognized an opposing principle which cautions against distorting a contract by reading into it terms which were not placed there by the parties.” 11 Williston, Contracts, § 30:21, p 223. Michigan courts recognize just such a principle, and will not read into an agreement terms that have not been placed there by the parties. *Cottrill v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2d 179 (1960) (observing that courts must refrain from “reading into the contract a provision not contained therein”); *Trimble v Metropolitan Life Ins Co*, 305 Mich 172, 175; 9 NW2d 49 (1943) (noting that “we may not read into the contract terms not agreed upon by the parties”).

In general, “[t]he determination as to whether ambiguity exists must be made without reference to any source other than the contract itself.” 5 Corbin, Contracts, § 24.7, p 33. However, in some cases the court must provisionally receive parol evidence concerning the meaning of a word or phrase in order to determine whether that word or phrase is truly susceptible to only one meaning. 11 Williston, Contracts, § 30:5, pp 67-68. This is especially true in the context of technical words or phrases, where evidence of trade usage “may be admissible to give meaning to apparently unambiguous terms of a contract” even though other parol evidence would generally be inadmissible. 12 Williston, Contracts, § 34:5, p 28. Indeed, our Supreme Court has held that extrinsic evidence is admissible to prove the existence of a latent ambiguity “[s]ince the detection of a latent ambiguity requires a consideration of factors outside the instrument itself . . .” *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964). Similarly, this Court has stated:

“Parol evidence is always receivable to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. Similarly, where a new and unusual word or phrase is used in a written instrument, or where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase.” [*Moraine Products, Inc v Parke, Davis & Co*, 43 Mich App 210, 213; 203 NW2d 917 (1972) (citation omitted).]

“A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning.” *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992). Even when contractual language appears clear and intelligible and suggests but a single meaning on its face, extrinsic or parol evidence may be used to show a latent ambiguity and therefore create “a necessity for interpretation.” *Kramek Estate*, *supra* at 574-575.

Turning back to the present case, the face of the MWA reveals no clear indication that the parties contemplated the unique statutory definition of “local exchange service” at the time of contracting or that they intended to incorporate the Michigan Telecommunication Act’s particular statutory definition of that term into the MWA. We do not deny that contracting parties may provide their own particular definitions for words and phrases used in their agreements. 5 Corbin, Contracts, § 24.8, pp 54-58; see also *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002). Nor do we deny that contracting parties are free to incorporate unique statutory or legal definitions into their contracts by reference. See *Gosnick v Wolff*, 366 Mich 573, 579; 115 NW2d 396 (1962) (noting that a contract includes “provisions which [are] incorporated therein by reference”); see also *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922) (noting that outside materials may be incorporated by reference into a contract and that such outside materials are to be taken as a part of the contract just as though their contents had been repeated in the contract itself); and see *Hughes v White*, 5 Mich App 666, 671; 147 NW2d 710 (1967) (noting that “the statute cited above may be considered to be incorporated by reference into [the parties’] contractual undertaking). However, the MWA does not contain its own glossary and does not define its own terms. Nor is there any mention of the Michigan Telecommunications Act or Michigan law in general in the language of the MWA. The parties evidently saw fit to refrain from defining the term “local exchange service” in their agreement. We will not read into the agreement statutory or legal definitions that have not been placed there by the parties. *Cottrill*, *supra* at 476; *Trimble*, *supra* at 175.

The documentary evidence submitted in this case suggested the possibility that the term “local exchange service” was susceptible to more than one meaning. *In re Woodworth Trust*, *supra* at 328. The statutory definition of the term was certainly one piece of evidence that the trial court was free to consider. However, the trial court should have examined *all* the extrinsic evidence—in addition to the statutory definition—to determine whether the term “local exchange service” was latently ambiguous. *McCarty*, *supra* at 575.

The term “local exchange service” can be defined in several ways. Undoubtedly, the statutory definition of “local exchange service,” MCL 484.2102(b), is one of those ways. However, as ACD points out, AT&T has variably referred to ISDN Prime and ADTS-E in its

internal documents, contracts, and FCC tariffs as “Ameritech Local Service,” “SBC Local Service,” “local service,” “local usage,” “Resale Local Exchange Service,” and “ISDN PRI local exchange service.”

Moreover, the documentary evidence tended to show that the statutory definition of “local exchange service” is narrower than the definition that is often used in the telecommunications industry. Telecommunications expert Joseph Gillan testified that “the term local exchange service” is generally used to refer to an entire “category of services,” and that “POTS” or “basic local exchange service” is only one type of “local exchange service” as that term is commonly used in the industry. He explained that “local exchange service” is a broader category, whereas “basic local exchange service” is a narrower category. Gillan believed that the phrase “local exchange service” in the MWA described the broad category of local services rather than the narrow category typically described as “basic” or “POTS.” Gillan testified that ISDN Prime “is a local exchange service, and, therefore, a telecommunication service,” and accordingly opined that ISDN Prime service was included within the scope of the MWA. According to Gillan, “[L]ocal exchange services generally are viewed as services that are used for the origination and termination of calls that are local. ISDN [Prime] is a service that is used in that way.”

Similarly, both Mark Iannuzzi and Kevin Schoen testified that “local exchange service” means nothing more than the ability to make and receive telephone calls in a local area. Several of the witnesses testified that ISDN Prime and ADTS-E are services that provide the user with a dial tone and a telephone number, and which are capable of being used to place and receive local calls. Even AT&T’s expert Thomas Lonergan confirmed that “local exchange service [can] be provided over [ISDN Prime and ADTS] pipes,” and that ISDN Prime and ADTS-E can be used to make and receive local calls if configured properly. This extrinsic evidence established that the phrase “local exchange service” can be understood in different ways, and that it is not unreasonable to consider the phrase as including services such as ISDN Prime and ADTS-E.

AT&T relies on the United States District Court’s decision in *TDS Metrocom, supra*, in which the United States District Court concluded that the MWA’s contractual phrase “local exchange service” included only “basic local exchange service” or “POTS.” The federal court relied on the definitions of “local exchange service” and “basic local exchange service” contained in the Michigan Telecommunications Act and in *In re Procedure & Format for Filing Tariffs, supra* at 543. However, as noted above, there is no mention of the Michigan Telecommunications Act or Michigan case law in the language of the MWA, there is no indication that the parties intended to incorporate the unique statutory definition of the term “local exchange service” into the MWA, and there is no evidence that the parties intended at the time of contracting that the Michigan Telecommunications Act’s statutory definitions would control the interpretation of their contract. It appears that the *TDS Metrocom* court may have misinterpreted Michigan law when it held that the statutory definition of “local exchange service” should exclusively control the interpretation of the parties’ private agreement.

AT&T also points out that although “basic local exchange service” and “POTS” are regulated by the MPSC, services such as ISDN Prime and ADTS-E are not. AT&T argues that the MWA was intended to apply to regulated services only. We cannot agree with this contention. Again, there is no mention of the Michigan Telecommunications Act or its unique statutory definitions in the language of the MWA. Nor is there any mention of the MPSC in the

MWA, and nowhere does the MWA contain the words “regulated,” “unregulated,” or “basic.” In short, there is simply no indication that the parties intended the MWA to apply to regulated services only.

The trial court should have considered the extrinsic evidence before ruling that the MWA’s term “local exchange service” was unambiguous as a matter of law. *McCarty, supra* at 575. The statutory definition of “local exchange service” and the interpretation of the term in *TDS Metrocom, supra*, were but two of the several reasonable meanings of the phrase “local exchange service.” Had the court properly considered all the evidence, it would have realized that the extrinsic evidence presented in this case “resulted in a latent ambiguity in that the language employed [was] clear and intelligible and suggest[ed] but a single meaning, but extrinsic factors created a necessity for interpretation.” *Kramek Estate, supra* at 574-575. On de novo review, *G Tech Pro Staffing, supra* at 185, we conclude that the contractual term “local exchange service” was ambiguous and that a genuine issue of material fact necessarily remained with respect to its meaning. Factual development was therefore necessary to determine the intent of the parties. *Meagher, supra* at 722.<sup>5</sup>

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<sup>5</sup> Even assuming arguendo that the Michigan Telecommunication Act’s statutory definition of “local exchange service” did control the interpretation of the MWA, we find that there would still have been a question of fact concerning whether the MWA encompassed ISDN Prime and ADTS-E service. MCL 484.2102(b) provides: “‘Basic local exchange service’ or ‘local exchange service’ means the provision of an access line and usage within a local calling area for the transmission of high-quality 2-way interactive switched voice or data communication.” The evidence showed that ISDN Prime is a switched service. AT&T Regulatory Director Kelly Ann Fennell testified at her deposition that ISDN Prime can be used for both voice and data services and can be configured to make calls within a local calling area. Fennell also testified that ISDN Prime is a “telecommunication service,” that it can be configured to make and receive local calls, and that it provides its users with a dial tone and a telephone number. TelNet President Mark Iannuzzi conceded that ISDN Prime and ADTS-E are generally provided with digital signals as opposed to analog signals because “[d]igital services are more conducive to carrying data than are analog services.” However, Iannuzzi averred that “[v]oice and data can coexist on ISDN-Prime or ADTS-E lines,” that “ISDN Prime and ADTS-E provides the end user with dial tone and a telephone number,” that “ISDN Prime and ADTS-E enables customers to make and receive local calls,” that “ISDN Prime and ADTS-E may be a customer’s only connection to the Public Switched Telephone Network,” and that ISDN Prime and ADTS-E can be carried over a “4-wire copper line.” Plaintiffs’ telecommunications expert Joseph Gillan testified that “ISDN Prime is a local exchange service, and, therefore, a telecommunication service,” and that ISDN Prime and ADTS-E services can be “used for the origination and termination of calls that are local.” Even AT&T’s own telecommunications expert, Thomas Lonergan, testified that “local exchange service” can “be provided over [ISDN Prime and ADTS] pipes,” and that ISDN Prime and ADTS-E can be used to make and receive local calls if configured properly. Lonergan also testified that “[t]he physical characteristics of ISDN Prime . . . can meet [the statutory] definition” of local exchange service because ISDN Prime “provide[s] for the transmission of high-quality, two-way interactive switch voice or data communication.” Viewing this documentary evidence in a light most favorable to ACD, we conclude that there was a genuine issue of material fact with respect to whether the statutory definition of “local exchange service”

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## D

We conclude that there also remained a genuine issue of material fact with respect to whether the ISP plaintiffs were “end-user subscribers” within the meaning of the MWA.

MCL 484.2102(h) defines an “[e]nd user” as “the retail subscriber of a telecommunication service.” However, as noted above, the parties did not expressly incorporate the Michigan Telecommunication Act’s definitions into the MWA. Nor is there any indication that the parties contemplated the unique statutory definition of “end user” at the time of contracting or that they entered into the MWA with the intention that the statutory definition of “end user” would govern the interpretation of their agreement. See 5 Corbin, Contracts, § 24.8, pp 54-58; see also *Deerhurst Estates*, *supra* at 152-153.

By its own language, the MWA applied only to telecommunication services that had been purchased by “end-user subscribers.” As stated earlier, in determining whether an ambiguity exists, the court should give contractual words and phrases their ordinary and plain meaning. *Rossow*, *supra* at 658. The term “end user” is commonly defined as “the ultimate user for whom a machine . . . or product . . . is designed”; the word “subscriber” is commonly defined as “a person, company, etc., that subscribes . . .” or “a homeowner, apartment dweller, business, etc., that pays a monthly charge to be connected to a . . . service.” *Random House Webster’s Unabridged Dictionary* (1998). Accordingly, an “end-user subscriber” of telecommunication services is nothing more than an ultimate user who subscribes to, or who pays a regular charge to be connected to, telecommunication services.

But these dictionary definitions are not overly helpful in interpreting the phrase “end-user subscribers” as used in the MWA. Nonetheless, to the extent that an “end-user subscriber” is merely someone who subscribes to telecommunication services or who pays a regular charge to be connected to telecommunication services, even AT&T’s own expert Thomas Lonergan admitted that ISPs purchase retail telecommunications services from AT&T no differently than any other subscriber.

AT&T admittedly assesses “end user common line,” or “EUCL” charges against ISPs. ACD argues that this proves that AT&T considers ISPs to be “end-user subscribers.” In response, AT&T contends that the Federal Communications Commission (“FCC”) allows it to treat ISPs as “end users” for charging purposes. AT&T asserts that the FCC specifically allows the collection of EUCL fees from ISPs even though ISPs are not actually “end users” within the technical meaning of that term. Further, AT&T points to Lonergan’s testimony that an ISP is not an “end user” because an ISP is “sort of an intermediary.” Indeed, Lonergan opined that an ISP “requires connection to the Internet via telecom provider but then it turns around and sells services to customers . . . typically Internet dial-up service,” and that “the end users . . . are the customers of the Internet service provider. An ISP is not the end user.”

AT&T’s assertion that the FCC often treats ISPs as “end users” for pricing purposes but not for other purposes is supported by the federal case law. See, e.g., *Southwestern Bell Tel Co v*

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encompassed ISDN Prime and ADTS-E services.

*Texas Pub Utility Comm*, 208 F3d 475, 486 (CA 5, 2000); *Bell Atlantic Tel Cos v FCC*, 206 F3d 1, 7 (CA DC, 2000). However, at least one United States Court of Appeals panel has ruled that it was reasonable, when interpreting a private agreement under state law, for a state agency to conclude that ISPs were end users within the meaning of the agreement because “the point of termination of calls to ISPs is the location of the ISP.” *Southwestern Bell Tel Co v Brooks Fiber Communications of Oklahoma, Inc*, 235 F3d 493, 499 (CA 10, 2000).

We recognize that the FCC does not treat ISPs as “end users” for all purposes. However, we also recognize that the FCC treats ISPs as “end users” for at least *some* purposes. Moreover, at least one court has determined that ISPs qualify as end users because “the point of termination of calls to ISPs is the location of the ISP.” *Id.* Because “some extrinsic fact” in this case “create[d] the possibility of more than one meaning,” *In re Woodworth Trust*, *supra* at 328, the trial court should have examined the available extrinsic evidence in order to determine whether the term “end-user subscribers” was ambiguous as used in the MWA, *McCarty*, *supra* at 575. After considering the available extrinsic evidence, we conclude that the term “end-user subscribers,” as used in the MWA, was reasonably susceptible to multiple meanings. *In re Woodworth Trust*, *supra* at 328. We find that there remained a genuine issue of fact concerning the meaning of the term “end-user subscribers” and that factual development was necessary to determine whether the parties intended the term to include ISPs. *Meagher*, *supra* at 722.

### III

ACD argues that the trial court erred by granting summary disposition in favor of AT&T with respect to its claim alleging tortious interference with a business relation or expectancy. We find that the trial court properly dismissed this claim.

“The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.” *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 90; 706 NW2d 843 (2005). The intentional interference must be improper, involving “a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the . . . business relationship of another.” *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1985). In this context, “[a] ‘per se wrongful act’ is an act that is inherently wrongful or one that is never justified under any circumstances.” *Formall, Inc v Community Nat Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988).

ACD first claims that AT&T acted tortiously when it entered into the MWA without any intention of actually honoring the agreement. ACD contends that AT&T’s suspect motives are proven by the fact that AT&T failed to establish standardized procedures for switching the telecommunication services of AT&T’s customers to ACD. However, ACD has quite simply failed to explain how it was actually damaged as a result of AT&T’s purportedly suspect motives. See *Health Call of Detroit*, *supra* at 90.

ACD also argues that AT&T acted tortiously when it refused to waive its customers’ early termination penalties. However, ACD has not explained how AT&T committed a “per se

wrongful act” that was “inherently wrongful or . . . never justified under any circumstances.” *Formall, supra* at 780. At most, ACD has shown that AT&T may have improperly interpreted the MWA, thereby incorrectly refusing to waive the early termination penalties and breaching the contract. However, as demonstrated above, several provisions of the MWA were ambiguous and susceptible to multiple reasonable interpretations. The fact that AT&T chose one of these reasonable interpretations over other conflicting reasonable interpretations can hardly be described as “per se wrongful” and “never justified under any circumstances.” *Id.* The evidence presented in this case failed to establish that AT&T committed a per se wrongful act by failing to waive the customers’ early termination penalties. The trial court did not err by granting summary disposition in favor of AT&T on ACD’s tortious interference claim.<sup>6</sup>

#### IV

In light of our resolution of the issues, we decline to consider ACD’s alternative argument that ISDN Prime and ADTS-E services were included within the scope of the MWA because they included “associated features” such as caller ID, voicemail, and call waiting. Contrary to AT&T’s argument, although the trial court never decided this issue, it was raised below and preserved for appellate review. *Peterman v Dep’t of Nat Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). ACD may pursue this issue on remand if it so chooses.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion on ACD’s breach of contract claim. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Kathleen Jansen  
/s/ Alton T. Davis

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<sup>6</sup> ACD also appears to argue that the trial court improperly dismissed its claim of tortious interference with contractual relations. As an initial matter, this argument has not been properly presented because was not raised in ACD’s statement of the questions presented. MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). It is true that count II of the complaint was based on both tortious interference with contractual relations and tortious interference with a business relation or expectancy. “[T]ortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy.” *Health Call of Detroit, supra* at 89. However, ACD’s claim of tortious interference with contractual relations was properly dismissed because the evidence failed to show that AT&T had wrongfully instigated a breach of contract by any of ACD’s customers. *Id.* at 90.