

STATE OF MICHIGAN
COURT OF APPEALS

LAURENCE G. WOLF CAPITAL
MANAGEMENT TRUST and LAURENCE
WOLF,

UNPUBLISHED
February 19, 2009

Plaintiffs-Appellants,

v

CITY OF FERNDALE, MARSHA SCHEER,
ROBERT G. PORTER, and THOMAS W.
BARWIN,

No. 282565
Oakland Circuit Court
LC No. 2003-051450-CK

Defendants-Appellees.

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal by right the circuit court's grant of summary disposition in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings on Count I of plaintiffs' complaint.

I

Plaintiff Laurence G. Wolf Capital Management Trust ("the Trust") owns a building ("the building") at the southeast corner of Woodward Avenue and Nine Mile Road in Ferndale. Sometime in 1999, plaintiff Laurence Wolf ("Wolf"), as trustee of the Trust, reached an agreement with AT&T Wireless ("AT&T") concerning the placement of a cellular antenna on the roof of the building, contingent on approval by the city of Ferndale. The building was located in Ferndale's C-4 zoning district.

There was already one preexisting cellular antenna on the roof of the building, and the Ferndale zoning ordinance in effect at the time did not allow for additional wireless communication facilities in the C-4 zoning district. Therefore, plaintiffs and AT&T applied for a variance for the proposed antenna. AT&T's representatives testified before the Ferndale Zoning Board of Appeals ("ZBA") that the roof of the building was the best location in Ferndale for the proposed cellular antenna. Nonetheless, the ZBA summarily denied the variance request in January 2000.

In February 2000, upon learning of the denial of the variance request, the Trust filed suit in the Oakland Circuit Court (hereinafter “the prior state court action”). The Trust alleged (1) that the action of the ZBA had been arbitrary, capricious, and ultra vires, and (2) that Ferndale had tortiously interfered with its business relationship with AT&T. The circuit court determined that the ZBA had not articulated sufficient reasons for denying the variance request, and remanded the matter to the ZBA to further explain its reasoning. In May 2000, the ZBA clarified its decision. Although no formal written order was issued, the following reasons, among others, were provided in the minutes of a ZBA meeting: (1) “there was no evidence brought forward that the property could not be reasonably used under the current zoning of C-4,” (2) the Trust had shown “no unique circumstances that would allow . . . this use in this particular area,” (3) the proposed AT&T antenna “would alter the character of the neighborhood, as the proposed site was located in the downtown Business District,” and (4) “the problem was self-created” because “there were numerous other areas in which [the antenna] could be placed and though this was the preferred site, the Board’s decision was based on zoning practices and the welfare of the community.”¹

After the ZBA had clarified its decision, the circuit court granted partial summary disposition in favor of the city of Ferndale, dismissing the Trust’s claim that the denial of the variance request had been arbitrary, capricious, and ultra vires. Thereafter, in June 2001, the circuit court granted summary disposition in favor of Ferndale on the Trust’s remaining claim of tortious interference with a business relationship. The circuit court ruled that Ferndale was entitled to governmental immunity with regard to the tortious interference claim. The Trust did not appeal either order.

Meanwhile, in June 2000, the Trust had filed a separate lawsuit against the city of Ferndale in federal court (hereinafter “the first federal court action”). The Trust argued that the city of Ferndale had violated § 332(c)(7)(B) of the Telecommunications Act of 1996, 47 USC 332(c)(7)(B), by failing to support its denial of the variance request with substantial evidence on the whole record, by effectively prohibiting or impeding the availability of personal wireless services, and by discriminating against providers of functionally equivalent wireless services. Following a bench trial in December 2000, the United States District Court found in favor of the city of Ferndale on all claims. *Laurence Wolf Capital Mgt Trust v Ferndale*, 128 F Supp 2d 441 (ED Mich, 2000), rev’d in part 61 Fed Appx 204 (CA 6, 2003). However, on appeal, the United States Court of Appeals for the Sixth Circuit reversed in part,² concluding that Ferndale’s denial

¹ In reality, AT&T’s representatives had testified before the ZBA that there *were not* numerous other areas where the proposed antenna could be located. In fact, much of the evidence presented to the ZBA suggested that the only other acceptable site for the proposed antenna was on city-owned property. The evidence also showed, however, that a much taller antenna would have been required on this city-owned property than on the roof of the building.

² The United States Court of Appeals for the Sixth Circuit agreed with the District Court that Ferndale’s zoning ordinance did not unreasonably discriminate among functionally equivalent wireless providers and did not effectively prohibit the availability of personal wireless services. *Laurence Wolf Capital Mgt Trust v Ferndale*, 61 Fed Appx 204 (CA 6, 2003).

of the variance request had violated 47 USC 332(c)(7)(B) because it was not properly issued in writing and was not supported by substantial evidence. *Laurence Wolf Capital Mgt Trust v Ferndale*, 61 Fed Appx 204 (CA 6, 2003). On remand, the District Court ordered the city of Ferndale to immediately issue the variance sought by the Trust. *Laurence Wolf Capital Mgt Trust v Ferndale*, 318 F Supp 2d 522 (ED Mich, 2004).

Despite the federal court's order, Ferndale never issued the variance sought by the Trust. This is because during the pendency of the Trust's appeal to the United States Court of Appeals for the Sixth Circuit, in November 2001, the city of Ferndale had amended its zoning ordinance with regard to the placement of wireless communication antennas. The amendments removed the prohibition on second antennas, but added a provision requiring property owners to obtain a special use permit.

After the city of Ferndale amended its zoning ordinance, Wolf again contacted AT&T on behalf of the Trust. According to an AT&T representative, AT&T "went back and . . . took another look at the site" and decided that it was still interested in locating its antenna on the roof of the building. AT&T determined that the building was still "absolutely" a suitable location for the antenna; therefore, Wolf and AT&T entered into renewed negotiations and "pretty much had [an agreement] worked out again . . ." According to its representative, AT&T was "cautiously optimistic that we could make this a go again."

However, before finalizing any agreement, AT&T met with the city of Ferndale to make sure that it could obtain approval for the antenna under the amended zoning ordinance. According to an AT&T representative, "someone at the City . . . told [AT&T that] this is not going to get approved" and that AT&T "should not go there." Thus, AT&T decided not to finalize its agreement with plaintiffs and began looking instead into the possibility of locating its antenna on a second, nearby building, which was also privately owned. AT&T had begun the process of applying to locate its antenna on this second building when representatives of the city of Ferndale again insinuated that the application would be denied. By this time, AT&T had become weary, and decided to abandon the application process altogether.

It was at that point that defendant Marsha Scheer, Ferndale's director of community development, approached AT&T and "mentioned that the city property option was still available and why don't we look at some of those properties." In the summer of 2002, prior to the ruling of the United States Court of Appeals for the Sixth Circuit in *Laurence Wolf Capital Mgt Trust*, AT&T reached an agreement with the city of Ferndale to locate its antenna on city-owned property. According to an AT&T representative, the city of Ferndale did not require AT&T to go through the zoning or planning process before constructing its antenna on the city-owned property, and the city council summarily approved the contract with AT&T without much debate or discussion.

Notwithstanding plaintiffs' loss of AT&T as a potential customer, Wolf was interested in constructing a "spec antenna"³ on the building. He applied for a special use permit under the

³ Wolf testified that a "spec antenna" is a cellular antenna that is constructed "speculatively,"
(continued...)

amended zoning ordinance for this purpose. However, after the city of Ferndale allegedly delayed and impeded the progress of the application process, Wolf abandoned his application and sued.

In May 2003, plaintiffs filed a second suit in federal court (hereinafter “the second federal court action”). Plaintiffs alleged (1) that by delaying and impeding their application for a special use permit, defendants had infringed upon their due process rights in violation of 28 USC 1983, (2) that defendants had tortiously interfered with plaintiffs’ *renewed* business relationship with AT&T, and (3) that defendants had tortiously interfered with plaintiffs’ prospective business relationships or expectancies by preventing them from constructing a “spec antenna.” Count I, alleging the violation of 28 USC 1983, was voluntarily dismissed with prejudice by stipulation of the parties in an order dated September 8, 2003. That order further provided that “this Order closes the case.” However, neither this final order nor any other order entered in the case addressed Counts II and III, which contained plaintiffs’ state-law tortious interference claims. Nor have the parties provided us any indication that the District Court otherwise disposed of plaintiffs’ state law claims. Accordingly, we presume that the District Court simply declined to retain supplemental jurisdiction over the state law claims upon dismissal of the § 1983 claim in Count I. See *United Mine Workers of America v Gibbs*, 383 US 715, 726-727; 86 S Ct 1130; 16 L Ed 2d 218 (1966) (noting that when federal claims are dismissed before trial, any pendant state law claims should generally be dismissed without prejudice).

II

In July 2003, plaintiffs filed the present case in the Oakland Circuit Court. In Count I of their complaint, plaintiffs alleged that when they renewed negotiations with AT&T following the amendment of Ferndale’s zoning ordinance, Ferndale again tortiously interfered with their business relationship with AT&T. In Count II of their complaint, plaintiffs alleged that Ferndale had also tortiously interfered with their plans to construct a “spec antenna” and to attract other wireless providers. In Count I, plaintiffs alleged that “[a]t all relevant times, Defendants were aware of the business relationship or expectancy between Plaintiffs and AT&T,” but that defendants had “intentionally, purposefully and willfully interfered with the business relationship or expectancy,” thereby “induc[ing] or caus[ing] AT&T to refuse to enter into an agreement with Plaintiffs.” Plaintiffs alleged that “[b]ut for Defendants’ improper interference, AT&T would have entered into [a] contract with Plaintiffs,” and that “[a]s a direct and proximate result of the Defendants’ tortious interference, Plaintiffs have been injured in an amount that exceeds \$300,000.” In Count II, plaintiffs alleged that they had “sought to construct an antenna structure that would have allowed the use by multiple cellular service providers,” but that defendants had “intentionally, purposefully and willfully interfered with the business expectancy between Plaintiffs and the additional cellular service providers.”

Defendants moved for summary disposition on the basis of governmental immunity. In December 2003, the circuit court granted in part and denied in part defendants’ motion for summary disposition. The court determined that plaintiffs had pleaded in avoidance of summary

(...continued)

based on the assumption that it will attract wireless communication companies as customers once it is built.

disposition by sufficiently alleging that defendants were engaged in a “proprietary function” within the meaning of MCL 691.1413. However, the court ruled that defendant Robert Porter, as the mayor, and therefore the highest elective official of the city of Ferndale, was entitled to absolute immunity under MCL 691.1407(5). The court determined that further factual development was necessary with respect to whether defendant Marsha Scheer, the director of community development, and defendant Thomas Barwin, the Ferndale city manager, were entitled to absolute immunity under MCL 691.1407(5).

In July 2004, after the commencement of discovery, defendants filed a second motion for summary disposition. Defendants argued (1) that it was beyond genuine factual dispute that they had not tortiously interfered with any business relationships or expectancies in this case, (2) that plaintiffs’ claims were barred by governmental immunity because defendants had been engaged in a purely governmental function, (3) that plaintiffs’ claims were barred by governmental immunity because, even if defendants had been engaged in a proprietary function, there had been no “property damage” within the meaning of MCL 691.1413, and (4) that plaintiffs’ claims were barred by the doctrine of res judicata. In January 2005, the circuit court ruled that there existed genuine issues of material fact with respect to whether defendants had tortiously interfered with plaintiffs’ business relationships or expectancies. However, although the circuit court did not definitively decide whether defendants had been involved in a proprietary function within the meaning of MCL 691.1413,⁴ it ruled that even if defendants had been involved in a proprietary function, the damages alleged by plaintiffs were neither “bodily injury” nor “property damage” within the meaning of MCL 691.1413. Therefore, because the proprietary function exception to governmental immunity applies only to “actions to recover for bodily injury or property damage arising out of the performance of a proprietary function,” MCL 691.1413, the circuit court granted defendants’ motion for summary disposition and dismissed plaintiffs’ claims.⁵ The circuit court did not address or decide defendants’ argument that plaintiffs’ claims were barred by the doctrine of res judicata. Plaintiffs timely filed a motion for reconsideration, which was denied.

⁴ The circuit court did observe, however, that it found persuasive the unpublished decision of this Court in *Eyde v Meridian Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 248312). The *Eyde* panel ruled that a township’s action of entering into an agreement with a wireless communications provider is “proprietary” within the meaning of MCL 691.1413, but that a township’s mere act of zoning or denying a special use permit or variance is a governmental function. Nonetheless, the *Eyde* panel concluded that the defendant township in that case was not entitled to summary disposition on governmental immunity grounds because there remained a genuine issue of material fact concerning whether it had “employed the otherwise legitimate governmental function of deciding whether to grant [a special use permit] for the improper purpose of advancing [its] own proprietary interests of having exclusive right to the financial benefit of an agreement to erect a communications tower.”

⁵ Curiously, the circuit court dismissed plaintiffs’ claims with respect to remaining individual defendants Marsha Scheer and Thomas Barwin on the ground that the alleged damages were neither “bodily injury” nor “property damage” within the meaning of MCL 691.1413, despite the fact that MCL 691.1413 expressly applies only to “[t]he immunity of the governmental agency.”

On appeal, this Court concluded that plaintiffs' tortious interference claims were, indeed, claims for "property damage" within the meaning of the proprietary function exception of MCL 691.1413. *Laurence G Wolf Capital Mgt Trust v Ferndale*, 269 Mich App 265, 269-274; 713 NW2d 274 (2005). As this Court noted, "Plaintiffs' alleged 'property damage' was the harm or injury to their right of lawful, unrestricted use of their res for the particular business purpose that they had negotiated. That the loss of the business deal resulted in lost income is relevant for the purpose of attempting to measure the resulting damages." *Id.* at 272. This Court then observed that "defendants wrongfully exercised their governmental power during the course of, and in furtherance of, performing a proprietary function, i.e., leasing space to AT&T for a cellular tower, which gave rise to plaintiffs' suffering property damage, including harm to their right of lawful and unrestricted use of their res, as well as harm to their right to enjoy income derived from their res." *Id.* at 273. Thus, although this Court "express[ed] no opinion on the merit or likely success of plaintiffs' claims [on remand]," it concluded that "under circumstances like those presented in this case, defendants cannot escape scrutiny for their governmental actions that have a direct and beneficial effect on their proprietary endeavors by hiding under the shelter of immunity." *Id.* at 273-274. The grant of summary disposition in favor of defendants was accordingly reversed. *Id.*

Defendants thereafter sought leave to appeal to the Michigan Supreme Court, but their application was denied. *Laurence G Wolf Capital Mgt Trust v Ferndale*, 477 Mich 938 (2006).

Upon remand to the circuit court, defendants filed a renewed motion for summary disposition in June 2007. Defendants again argued that plaintiffs' claims were barred by the doctrine of res judicata. Defendants argued that the claims were based on plaintiffs' relationship with AT&T *prior to* the amendment of the Ferndale zoning ordinance only,⁶ and that the claim had therefore already been litigated—or could have been litigated—in the prior state court action.⁷ According to defendants, "[t]o the extent that Plaintiffs rely on a relationship with AT&T that allegedly existed back in 1999 and 2000, Plaintiffs' claims of tortious interference have already been litigated. The [circuit] court in the first lawsuit found that there was no merit to Plaintiffs' claim against the Defendant, and dismissed the case with prejudice." Defendants argued that "Plaintiffs' claims relating to AT&T in this and all other litigation have the same origin: the 1999 Lease Agreement, submission of the site plan and review in 1999, and denial of

⁶ As will be seen *infra*, defendants' argument in this regard was clearly incorrect. Count I of plaintiffs' complaint in the present action was based on a *renewed* relationship with AT&T, which arose after the Ferndale zoning ordinance was amended in November 2001. Count II of plaintiffs' complaint in the present case was not based on a relationship with AT&T at all, but was rather based on prospective business relationships or expectancies with other, unidentified wireless carriers.

⁷ In ruling on the issue of res judicata, the circuit court considered only the prior state court action, and did not specifically address the possible preclusive effect of the first and second federal court actions. Nonetheless, although the issue was not decided by the circuit court, we will address the preclusive effect of the federal court actions, *infra*, for the sake of judicial economy. See *People v Booker*, 208 Mich App 163, 175 n 4; 527 NW2d 42 (1994).

the variance. Therefore, Plaintiffs' tortious interference claim relating to its relationship with AT&T is barred"

Defendants also argued that "[e]ven if . . . Plaintiffs' claims are not barred by res judicata, summary disposition should be granted in Defendants' favor because Plaintiffs cannot establish a claim for either tortious interference with a business relationship or a business expectancy." Defendants argued that they had properly denied plaintiffs' original variance request and had properly entered into their own negotiations with AT&T because, at the time, the United States Court of Appeals had not yet reversed the District Court in *Laurence Wolf Capital Mgt Trust*, and they were therefore entitled to rely on the District Court's ruling.

In August 2007, the circuit court issued an opinion and order granting defendants' motion for summary disposition. The circuit court opined that plaintiffs' complaint in the present case was based on the same 1999 business relationship with AT&T as had formed the basis of plaintiffs' tortious interference claim in the prior state court action. Therefore, the court observed that plaintiffs' present claims for tortious interference "could have been brought in [the prior state court action] and in fact similar claims . . . were brought in that case." The court ruled that plaintiffs' present claims were barred by the doctrine of res judicata. In addition, the circuit court ruled that even if the claims were not barred by res judicata, plaintiffs had not set forth cognizable claims of tortious interference with a business relationship or expectancy because they had shown, at most, that they were "merely outmaneuvered and outbid by the City. . . . [P]laintiff[s] have] not shown that the defendant[s] did anything more than successfully compete to provide the same service for the same profit-motivated reasons. This is not tortious, unlawful, or improper."⁸

III

Summary disposition is properly granted when a claim is barred by res judicata, MCR 2.116(C)(7); *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995), when the opposing party has failed to state a claim on which relief can be granted, MCR 2.116(C)(8), and when there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law, MCR 2.116(C)(10); *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). We review de novo the circuit court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

We review de novo whether the doctrine of res judicata bars a subsequent lawsuit, *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001), and whether the law of the case doctrine applies, *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich

⁸ Although both parties refer to the circuit court's alternative ruling in this regard as a determination under MCR 2.116(C)(8) that plaintiffs had failed to state legally cognizable claims of tortious interference, as explained in part VIII, *infra*, it appears that the circuit court looked to evidence outside the pleadings, and we will therefore review the ruling under the standards applicable to MCR 2.116(C)(10).

App 496, 522; 730 NW2d 481 (2007). We similarly review de novo all other questions of law. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006).

IV

Plaintiffs first argue that defendants were not permitted to file a renewed motion for summary disposition following remand of this matter to the circuit court. We disagree. Although this argument was not included in plaintiffs' statement of the questions presented, and therefore is not properly presented for review, MCR 7.212(C)(5); *Ypsilanti Fire Marshal*, 273 Mich App at 543, we will briefly address its merits.

Litigants are generally entitled to file renewed motions for summary disposition. Successive motions for summary disposition are specifically permitted under MCR 2.116(E)(3). Indeed, litigants in the courts of this state have frequently brought renewed motions for summary disposition after the denial of their first motion. See, e.g., *Brown v Brown*, 478 Mich 545, 550; 739 NW2d 313 (2007); *Michalski v Bar-Levav*, 463 Mich 723, 727 n 5; 625 NW2d 754 (2001). As this Court has stated previously, "While we certainly encourage parties to raise dispositive issues as soon as is practicable so as to avoid unnecessary litigation, the failure to do so is not grounds to thereafter deny the motion." *Alyas v Illinois Employers Ins of Wausau*, 208 Mich App 324, 329; 527 NW2d 548 (1995). The denial of a motion for summary disposition simply does not preclude a motion brought on the same ground from being granted at a later stage in the same proceedings. *Goodrich v Moore*, 8 Mich App 725, 728; 155 NW2d 247 (1967). We perceive no error in the circuit court's decision to consider defendants' renewed motion for summary disposition in this case.

V

Nor did the law of the case doctrine preclude the circuit court from revisiting its earlier ruling that plaintiffs had set forth legally cognizable claims of tortious interference. In general, "a trial court has unrestricted discretion to review its previous decision," and "the law of the case doctrine d[oes] not apply to decisions of a trial court . . ." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 52-53; 698 NW2d 900 (2005); see also *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 560; 692 NW2d 58 (2004). We acknowledge that plaintiffs successfully appealed to this Court and that defendants then sought leave to appeal in the Supreme Court. However, neither this Court nor the Supreme Court addressed whether plaintiffs had set legally cognizable claims of tortious interference. The law of the case doctrine does not bar a circuit court from altering or revisiting those portions of its own prior order that are unaffected by the judgment of the appellate court. See *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995); see also *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988), and *Garwood v Burton*, 274 Mich 219, 222; 264 NW 349 (1936). "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). In the instant case, because neither this Court nor the Supreme Court ever considered the legal sufficiency of plaintiffs' tortious interference claims, the circuit court was entitled to revisit this issue after the matter was remanded. *Meyering v Russell*, 85 Mich App 547, 552-553; 272 NW2d 131 (1978).

VI

Plaintiffs further argue that the law of the case doctrine precluded the circuit court from deciding whether their tortious interference claims were barred by res judicata. Although defendants had previously raised the issue of res judicata in an earlier motion for summary disposition, the circuit court never addressed the issue in its earlier order. Nor did this Court or our Supreme Court ever address the issue of res judicata on appeal. However, plaintiffs suggest that the appellate courts' silence on the issue of res judicata was tantamount to an implicit finding that res judicata did not apply in this case. Again, we disagree.

Because the issue of res judicata was never addressed or decided by the circuit court, it should come as no surprise to plaintiffs that this Court and our Supreme Court declined to consider it on appeal. See, e.g., *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999) (noting that “[a]ppellate review is generally limited to issues decided by the trial court”). We acknowledge that the law of the case doctrine applies “to issues actually decided, *either implicitly or explicitly*, in the prior appeal.” *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000) (emphasis added). However, it can hardly be said that this Court or our Supreme Court, through mere silence on the issue, “actually decided”—even *implicitly*—that res judicata did not apply in this case. It is axiomatic that the law of the case doctrine does not apply to issues raised before but not decided by the appellate court. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994). Nor does a denial of leave to appeal by our Supreme Court, without comment on the merits, constitute a substantive disposition that invokes the law of the case doctrine. *Grievance Administrator*, 462 Mich at 260; *People v Willis*, 182 Mich App 706, 708; 452 NW2d 888 (1990). It is well settled that the courts speak through their written orders and judgments. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999). Nothing in this Court’s opinion or our Supreme Court’s order indicates that either tribunal ever considered the issue of res judicata. See *Hansmann v Fidelity Investments Institutional Services Co*, 326 F3d 760, 766 (CA 6, 2003) (refusing to interpret the Michigan Supreme Court’s silence as an implicit rejection of a particular argument when there was no indication that the Supreme Court had even considered that argument in reaching its ultimate ruling). Because neither this Court nor our Supreme Court expressed any views concerning the applicability of res judicata, the law of the case doctrine did not preclude consideration of the issue below after this matter was remanded to the circuit court.

VII

Plaintiffs next argue that the circuit court erred by granting summary disposition on the ground that their tortious interference claims were barred by the doctrine of res judicata. We agree.

Defendants have argued throughout this case that the tortious interference claims at issue in the present case are based on the same business relationship that existed between plaintiffs and AT&T in 1999, prior to the amendment of the Ferndale zoning ordinance in November 2001. Accordingly, defendants contend that the present tortious interference claims were already decided, or alternatively could have been litigated, in the prior state court action or in the first or second federal court action. We conclude that the present tortious interference claims were not

decided—and could not have been litigated—in the prior state court action, the first federal court action, or the second federal court action.

Res judicata is a doctrine that “bars relitigation of claims that are based on the same transaction or events as a prior suit.” *Stoudemire*, 248 Mich App at 334. Under Michigan law, the doctrine of res judicata bars a subsequent action between the same parties when the evidence essential to the action is identical to that essential to a prior action. *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). The doctrine applies to both facts and law. *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). Res judicata requires that (1) the prior action was decided on the merits, (2) the judgment in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007); *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are the same for purposes of the doctrine of res judicata. *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988); see also *Adair v State*, 470 Mich 105, 123-124; 680 NW2d 386 (2004). If different facts or proofs would be required, however, res judicata does not apply. *PT Today, Inc v Comm’r of Financial & Ins Services*, 270 Mich App 110, 146-147; 715 NW2d 398 (2006). Res judicata bars litigation in the second action not only of those claims actually litigated in the first action, but claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not. *Adair*, 470 Mich at 121.

If the prior action occurred in federal court, the applicability of res judicata must be determined under federal law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999); *Beyer v Verizon North Inc*, 270 Mich App 424, 428-429; 715 NW2d 328 (2006). The federal doctrine of res judicata is substantially similar to the res judicata of Michigan law. *Pierson Sand & Gravel*, 460 Mich at 380. As the United States Court of Appeals for the Sixth Circuit has recognized, “res judicata has four elements: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.” *Kane v Magna Mixer Co*, 71 F3d 555, 560 (CA 6, 1995).

It is undisputed that the prior state court action, the first federal court action, and the second federal court action all involved the same parties or their privies. We recognize that only the Trust was a plaintiff in the prior state court action and the first federal court action, and that Wolf did not participate in his individual capacity. However, Wolf, as trustee, was a privy for purposes of res judicata because his interests in the litigation were essentially identical to those of the Trust. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003). Similarly, although Marsha Scheer, Robert Porter, and Thomas Barwin were apparently

not named as defendants in the prior state court action or the first federal court action, they were agents of the city of Ferndale and their interests in the litigation were sufficiently aligned with those of the city to make them privies. *Id.* Nor does any party dispute that the prior state court action and the first federal court action resulted in final judgments on the merits.⁹ Accordingly, the only question before us is whether the present tortious interference claims were litigated, or alternatively could have been litigated, in the previous actions.

A

We begin by considering whether the tortious interference claims at issue in this case were already litigated, or could have been litigated, in the prior state court action. We first conclude that the present claims were not litigated in the prior state court action. A comparison between the pleadings filed in the prior state court action and the pleadings filed in the present case reveals that plaintiffs are, indeed, asserting separate and distinct tortious interference claims here than were asserted in the prior state court action. See *Mazzola v Vineyard Homes, Inc*, 54 Mich App 608, 614; 221 NW2d 406 (1974). And as noted *infra*, because different factual evidence would be necessary to sustain the two present claims than was necessary to sustain the tortious interference claim asserted in the prior state court action, the claims are not the same for purposes of res judicata. *Adair*, 470 Mich at 123-124; *PT Today, Inc*, 270 Mich App at 146.

We also conclude that the present tortious interference claims could not have been litigated in the prior state court action, even with the exercise of reasonable diligence, because the facts underlying them had not yet arisen at the time. It is well settled that a subsequent proceeding is not barred if there are changed or new facts. *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997), overruled in part on other grounds *In re Trejo*, 462 Mich 341 (2000). The prior state court action, filed in February 2000, set forth two claims. First, the Trust alleged that Ferndale's denial of its variance request had been arbitrary, capricious, and ultra vires. Second, the Trust alleged that Ferndale had tortiously interfered with its business relationship with AT&T. With respect to this second claim, the Trust alleged that it had entered into negotiations with AT&T sometime in 1999 for the placement of a cellular antenna on the roof of its building, and that the city of Ferndale had been aware of the ongoing business relationship between the Trust and AT&T when it denied the variance application. The Trust alleged that Ferndale had tortiously interfered with this business relationship by using its zoning authority to deny the variance application, with the illegitimate intent of creating a pecuniary gain for the city and usurping the Trust's business opportunity.

In contrast, plaintiffs' tortious interference claims in the present case are quite different. In this case, Count I alleges that sometime after plaintiffs resumed negotiations with AT&T, following the amendment of the Ferndale zoning ordinance in November 2001, defendants engaged in a separate and distinct course of tortious interference with regard to plaintiffs' *renewed* business relationship with AT&T. In this case, Count I alleges that defendants informed AT&T after the zoning ordinance was amended that plaintiffs would never receive

⁹ As for whether the second federal court action resulted in a final judgment on the merits for res judicata purposes, we shall have more to say in part VII(C), *infra*.

permission to construct a cellular antenna on the building, and that defendants engaged in their own clandestine negotiations with AT&T for the purpose of securing placement of the antenna on city-owned property. Count II alleges that defendants engaged in yet another course of tortious interference by later delaying and impeding plaintiffs' application for a special use permit to construct a "spec antenna." As the record amply demonstrates, the facts on which the present Count I is based did not arise until sometime after the zoning ordinance was amended in November 2001. Nor did plaintiffs apply for the special use permit until after the zoning ordinance was amended.

As the facts of this case make clear, neither of plaintiffs' present tortious interference claims was decided in the prior state court action, and neither of the claims could have been litigated in the prior state court action. Count I of plaintiffs' complaint in the present case is based on facts that arose after the Ferndale zoning ordinance was amended in November 2001, when AT&T and plaintiffs *renewed* their negotiations and business relationship. Indeed, as plaintiffs aptly alleged in their complaint, the Trust's initial negotiations with AT&T, which had occurred "[i]n or around 1999," had fallen off after the initial variance request was denied. It was not until "[a]fter the adoption of the new ordinance[that] Mr. Wolf made contact with AT&T once again to determine whether [AT&T] still desired a cell phone antenna in the area." Likewise, Count II of plaintiffs' present complaint is based on facts that arose after the Ferndale zoning ordinance was amended in November 2001. Indeed, Count II is *not* based on the business relationship between plaintiffs and AT&T at all. Instead, it is based on defendants' alleged acts of delaying and impeding plaintiffs' application for a special use permit under the amended zoning ordinance. As noted previously, plaintiffs decided to apply for a special use permit for the purpose of constructing a "spec antenna" *only after* the zoning ordinance had been amended and their second round of negotiations with AT&T had broken down. Clearly, neither of the two present tortious interference claims, both of which are based on facts that arose after November 2001, could have been alleged or pursued in the prior state court action, which was litigated between February 2000 and June 2001. The doctrine of *res judicata* does not bar claims that could not have been brought in the earlier action. See *Lud v Howard*, 161 Mich App 603, 612-613; 411 NW2d 792 (1987); see also *Mazzola*, 54 Mich App at 614-615. We conclude that the present tortious interference claims are not barred by the prior state court action.

B

For the same reasons, we conclude that plaintiffs' present tortious interference claims are not barred by the first federal court action. It is clear that the present tortious interference claims were not actually brought or litigated in the first federal court action, which dealt with Ferndale's alleged violation of the Telecommunications Act of 1996. Nor could the present claims have been litigated in the first federal court action. The first federal court action was commenced in June 2000, and the District Court's bench trial was completed in December 2000, well before the Ferndale zoning ordinance was amended in November 2001. Although the federal case was still on appeal when the facts underlying the present claims arose, the bench trial had already concluded and it therefore would have been impracticable—if not impossible—for the Trust to assert the present claims in that action. We cannot conclude that the present tortious interference claims "should have been litigated in the prior action[.]" *Kane*, 71 F3d at 560; see also *Hatcher v Avis Rent-A-Car System, Inc*, 152 F3d 540, 543 (CA 6, 1998) (observing that "[u]nder the

doctrine of res judicata, an issue which was or *should have been litigated* in a prior action cannot be raised in a subsequent action”) (emphasis in original).¹⁰

C

Lastly, we conclude that plaintiffs’ present tortious interference claims are not barred by the second federal court action. As noted earlier, plaintiffs filed the second federal court action in May 2003. Count I alleged that by delaying and impeding the special use permit application, Ferndale had infringed upon plaintiffs’ due process rights in violation of 28 USC 1983. Count II alleged that defendants had tortiously interfered with plaintiffs’ *renewed* business relationship with AT&T, which arose after the Ferndale zoning ordinance was amended in November 2001. Count III alleged that defendants had tortiously interfered with plaintiffs’ prospective business expectancies by delaying and impeding their application for a special use permit, thereby preventing them from constructing their desired “spec antenna.”

It is undeniably true that the state law claims asserted in the second federal court action were essentially indistinguishable from the tortious interference claims asserted by plaintiffs in the present case. Moreover, the parties to the second federal court action were identical to the parties involved in this case. However, we nevertheless conclude that plaintiffs present tortious interference claims are not barred by the second federal court action because that action did not result in a final judgment on the merits with respect to the state law tortious interference claims.

We have no difficulty concluding that the parties’ stipulated dismissal with prejudice of Count I in the second federal court action was a judgment on the merits with respect to the § 1983 claim. *Lawlor v Nat’l Screen Service Corp*, 349 US 322, 327; 75 S Ct 865; 99 L Ed 1122 (1955); *United States v Parker*, 120 US 89, 95; 7 S Ct 454; 30 L Ed 601 (1887); see also *United States v One Tract of Real Property*, 95 F3d 422, 426 (CA 6, 1996), and *Larken, Inc v Wray*, 189 F3d 729, 732 (CA 8, 1999). However, it is not entirely clear what happened to the two remaining state law claims when the § 1983 claim was dismissed.

The § 1983 claim was dismissed with prejudice by stipulation of the parties in an order dated September 8, 2003. That order further provided that “this Order closes the case.” However, neither that order, nor any other order entered in the case, addressed the state law tortious interference claims. Nor have the parties provided us any indication that the District Court otherwise disposed of plaintiffs’ state law claims.

Nonetheless, we have reason to conclude that the District Court simply declined to retain supplemental jurisdiction over the state law claims upon entering the stipulated order of dismissal with respect to the § 1983 claim. As noted earlier, when a federal court dismisses a federal claim before trial, it should generally dismiss any pendant state law claims without prejudice. *United Mine Workers*, 383 US at 726-727; see also *Pierson Sand & Gravel*, 460 Mich

¹⁰ Recall that when the prior action occurred in federal court, we must determine the applicability of res judicata by looking to federal law. *Pierson Sand & Gravel*, 460 Mich at 381; *Beyer*, 270 Mich App at 428-429.

at 383. We presume that this is exactly what happened in the second federal court action. Although it seems unusual that the District Court never explained what it was doing with the pendant state law claims, *United Mine Workers* supports our conclusion that the state law claims were dismissed without prejudice upon dismissal of the § 1983 claim. When plaintiffs concomitantly bring state law claims and federal law claims in federal court, and the federal court then dismisses the federal counts and refuses to retain jurisdiction over the state law claims, the plaintiffs are not barred by res judicata from later bringing the same state law claims in state court. *Pierson Sand & Gravel*, 460 Mich at 382; *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 536; 442 NW2d 714 (1989) (holding that “[t]he federal court’s decision in declining to exercise jurisdiction over the pendent state law claims . . . did not constitute an adjudication on the merits and should not create a situation in which the . . . remanded state claims may be barred by the doctrine of res judicata”). On the basis of this foregoing authority, we conclude the present tortious interference claims are not barred by the second federal court action because that action did not result in a final judgment on the merits with respect to the pendant state law claims.

D

We take this opportunity to note that defendants’ apparent attempt to distort the facts of this case has not escaped our attention. Throughout their brief on appeal, as well as in the pleadings filed with the circuit court, defendants have argued that plaintiffs’ present tortious interference claims are based on the business relationship that existed between plaintiffs and AT&T in 1999. Defendants refuse to admit that there was any relationship between plaintiffs and AT&T after the Ferndale zoning ordinance was amended in late 2001, and baldly deny that plaintiffs entered into renewed negotiations with AT&T after their initial variance application was denied. Defendants have gone so far as to include a “timeline” in the argument section of their brief on appeal, which omits crucial dates and events.

The documentary evidence in this case belies defendants’ contentions. An AT&T representative clearly testified that AT&T had entered into renewed negotiations with plaintiffs after the initial variance request was denied. As explained previously, the representative testified that AT&T “went back and . . . took another look at the site,” and that AT&T was still interested in locating its antenna on the building. According to the representative, AT&T determined that the building was “absolutely” still a suitable location, even after the variance request was rejected, and plaintiffs and AT&T consequently entered into renewed negotiations and “pretty much had [an agreement] worked out again . . .” Despite defendants’ attempts to deny it, this *renewed* relationship between plaintiffs and AT&T, which arose after the Ferndale zoning ordinance was amended, is the business relationship that forms the factual underpinnings of plaintiffs’ Count I in this case.

E

In sum, we conclude that neither tortious interference claim asserted by plaintiffs in this case is barred by prior judgment. The circuit court erred by granting summary disposition in favor of defendants on the ground that plaintiffs’ tortious interference claims were barred by res judicata.

VIII

As an alternative ground for granting summary disposition in favor of defendants, the circuit court ruled that plaintiffs had failed to state cognizable claims of tortious interference with a business relationship or expectancy. Because the circuit court considered evidence outside the pleadings in making this determination, we review the court's ruling under the standards applicable to MCR 2.116(C)(10) rather than those applicable to MCR 2.116(C)(8). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). It is well settled that when summary disposition is granted under the wrong subrule, we will review the circuit court's decision pursuant to the correct subrule. *Spiek*, 456 Mich at 338 n 9.

With respect to Count II of plaintiffs' complaint, we conclude that defendants were entitled to judgment as a matter of law because plaintiffs could not establish the existence of a valid business relationship or expectancy. However, with respect to Count I, alleging tortious interference with the renewed business relationship between plaintiffs and AT&T, we conclude that plaintiffs stated a valid claim of tortious interference and that there remained genuine issues of material fact precluding summary disposition.

"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). "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another." *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994) (citations omitted).

A

In Count II, plaintiffs alleged that after their second round of negotiations with AT&T had fallen through, they applied for a special use permit for the purpose of constructing a "spec antenna" on the building. As previously noted, Wolf testified that a "spec antenna" is a cellular antenna that is constructed "speculatively," based on the assumption that it will attract wireless communication companies as customers once it is built. The problem with plaintiffs claim in this regard is that they did not—and could not—allege any specific and identifiable business relationships or expectancies that were damaged as a result of defendants allegedly wrongful actions. A thorough reading of the pleadings filed in this case reveals that it was merely plaintiffs' subjective hope that a "spec antenna" would attract wireless communication providers as business customers. But no business relationships were formed between plaintiffs and any wireless providers in anticipation of the desired "spec antenna." Further, plaintiffs have not identified a single wireless provider that wished to make use of their desired "spec antenna," and

have not even identified any wireless providers with whom they expected to enter into negotiations concerning the “spec antenna.”

We conclude that plaintiffs have failed to allege, and much less to factually support, “the existence of a valid business relationship or expectancy.” *Health Call of Detroit*, 268 Mich App at 90. In order to prevail on a claim of tortious interference with a business relationship or expectancy, a plaintiff must show more than a mere hope of establishing a business relationship in the future. The business relationship or expectancy “must be a reasonable likelihood or probability, not mere wishful thinking.” *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). ““This must be something more than a mere hope or the innate optimism of the salesman.”” *Schipani v Ford Motor Co*, 102 Mich App 606, 622; 302 NW2d 307 (1981) (citations omitted); see also Michigan Business Torts, Tortious Interference, § 2.3, p 2-4. With respect to Count II, plaintiffs have failed to allege or factually support the existence of any business relationships, future business relationships, or business expectancies with which defendants might possibly have interfered. There is simply no evidence that a “spec antenna” would have generated any business expectancies or attracted any future business customers for plaintiffs. The circuit court properly granted summary disposition in favor of defendants with respect to plaintiffs’ Count II.

B

With respect to Count I, however, we conclude that the circuit court erred by granting summary disposition in favor of defendants. As observed *supra*, the complaint in this case alleged that defendants had interfered with the renewed business relationship that existed between plaintiffs and AT&T following the amendment of the Ferndale zoning ordinance in November 2001. The existence of this relationship was confirmed by AT&T’s representative, who testified that after the initial variance request was rejected, plaintiffs and AT&T entered into renewed negotiations and “pretty much had [an agreement] worked out again” Moreover, contrary to defendants’ attempts to deny it, plaintiffs adequately alleged that defendants were aware of their renewed business relationship with AT&T, and the documentary evidence was sufficient to create a genuine issue of fact with respect to defendants’ knowledge on this point. See *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 497-498; 421 NW2d 213 (1988). It is true that plaintiffs and AT&T had not entered into any finalized contract or agreement. However, the tort of intentional interference with a business relationship or expectancy does not require the plaintiff to show the existence of a contract. *Woody v Tamer*, 158 Mich App 764, 777; 405 NW2d 213 (1987). In short, we conclude that plaintiffs sufficiently plead and factually supported the existence of a valid business relationship or expectancy with AT&T of which defendants were aware.¹¹

Therefore, the only question remaining is whether defendants’ conduct in this case was sufficiently wrongful to constitute actionable tortious interference. We conclude that there

¹¹ We also conclude that the pleadings sufficiently alleged, and the documentary evidence adequately supported, plaintiffs’ contention that they were damaged by defendants’ alleged tortious interference in this case. *Health Call of Detroit*, 268 Mich App at 90.

existed a genuine issue of material fact precluding summary disposition with respect to this question. As plaintiffs have alleged, and as the documentary evidence tended to show, after plaintiffs entered into renewed negotiations with AT&T, and just as they “pretty much had [an agreement] worked out again,” defendants informed AT&T that the deal would never be approved and that the only available option was for AT&T to construct its cellular antenna on city-owned property. Contrary to the circuit court’s ruling, the pleadings and documentary evidence did not definitively establish that plaintiffs were “merely outmaneuvered and outbid by the City” or that defendants simply “successfully compete[d] to provide the same service for the same profit-motivated reasons.” It is true that a plaintiff cannot state a cause of action for tortious interference with a business relationship “[w]here the defendant’s actions were motivated by legitimate business reasons” *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 699; 552 NW2d 919 (1996). But “[a] defendant’s cry that its actions were motivated by purely business interests cannot, standing alone, operate as a miracle cure making all that was wrong, right.” *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96; 443 NW2d 451 (1989).¹² “On the contrary, the defendant’s motive is but one of several factors which must be weighed in assessing the propriety of the defendant’s actions. Such factors include (1) the nature of the defendant’s conduct, (2) the nature of the plaintiff’s . . . interest, (3) the social utility of the plaintiff’s and the defendant’s respective interests, and (4) the proximity of the defendant’s conduct to the interference.” *Id.* at 96-97. Improper motives include motives that are illegal, unethical or fraudulent. *Dolenga v Aetna Cas & Sur Co*, 185 Mich App 620, 626; 463 NW2d 179 (1990). We conclude that there existed a genuine issue of material fact in this case concerning whether defendants were motivated by legitimate business reasons, or conversely, whether defendants acted wrongfully, illegally, fraudulently, or unethically to prevent AT&T from constructing its cellular antenna on the building and to usurp plaintiffs’ business opportunity. See *id.* at 628-629.

Further, a defendant cannot necessarily escape liability for tortious interference with a business relationship merely by claiming that it outbid or out-competed the plaintiff. We acknowledge the rule in some jurisdictions that a defendant generally does not tortiously interfere with a plaintiff’s business relationship by merely competing in the marketplace. See 44B Am Jur 2d, Interference, § 30, p 329. However, even these jurisdictions recognize that “if the manner of interference is improper, the interference will be actionable.” *Id.* In Michigan, a genuine issue of material fact is raised when a plaintiff demonstrates that the defendant’s alleged “competition” was merely a guise to interfere with a known business relationship and thereby secure an economic advantage over the plaintiff. *Feldman*, 138 Mich App at 376. We conclude that a genuine factual dispute remained in this case with respect to whether defendants’ alleged out-competing or outmaneuvering of plaintiffs was in reality a guise for interfering with plaintiffs’ business relationship and usurping plaintiffs’ business opportunity with AT&T. *Id.*

¹² We fully recognize the tort at issue in *Jim-Bob, Inc* was tortious interference with a contractual relationship rather than tortious interference with a business relationship or expectancy. However, we perceive no reason why these principles concerning the motivations of the defendant should not apply equally in the context of tortious interference with a business relationship or expectancy.

Plaintiffs sufficiently pled their claim of tortious interference in Count I, and the documentary evidence presented in this case sufficiently supported the allegations that defendants had tortiously interfered with the business relationship between plaintiffs and AT&T. We conclude that under either MCR 2.116(C)(8) or (C)(10), the circuit court erred by granting summary disposition in favor of defendants with respect to Count I of plaintiffs' complaint.

IX

For the foregoing reasons, we affirm the circuit court's grant of summary disposition in favor of defendants on Count II of plaintiffs' complaint. However, we reverse the circuit court's grant of summary disposition on Count I of plaintiffs' complaint and remand for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings on Count I of plaintiffs' complaint. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood