STATE OF MICHIGAN

COURT OF APPEALS

DETROIT INTERNATIONAL BRIDGE COMPANY, Plaintiff-Appellant,	UNPUBLISHED December 6, 2011
v	No. 298276 Wayne Circuit Court LC No. 09-030737-CK Court of Claims LC No. 09-000134-MK
MICHIGAN DEPARTMENT OF TRANSPORTATION and MICHIGAN STATE TRANSPORTATION COMMISSION, Defendants-Appellees.	

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff Detroit International Bridge Company (DIBC) appeals as of right the trial court's order granting summary disposition in favor of defendants Michigan Department of Transportation (MDOT) and State Transportation Commission (STC) with respect to DIBC's Court of Claims complaint. We affirm.

I. BACKGROUND

This Court of Claims action arose out of a variety of disputes associated with the Gateway Project, an ambitious construction plan intended to make more efficient use of, and improve access to, the Ambassador Bridge, and which originally also contemplated the building of a second span of the existing bridge. The Ambassador Bridge is owned by DIBC and provides travel between the United States and Canada across the Detroit River. In 1996, DIBC and MDOT had expressed their intentions with respect to the Gateway Project and related issues in a memorandum of understanding (MOU). A stated "legal effect" of the MOU was that it "serve only as a memoralization of the present understandings and intentions of the [parties] with respect to the [project], which shall not be binding but shall be subject to further agreement of the [parties]." In 2001, the Ontario-Michigan Border Transportation Partnership (OMBTP) was formed by the United States Federal Highway Administration, Transport Canada, the Ontario Ministry of Transportation, and MDOT "for the purpose of improving the safe and effective movement of people, goods and services across the U.S./Canadian border at the Detroit and St. Clair Rivers, including improved connections to national, provincial and regional transportation systems, such as I-75 and Highway 401." In support of its stated purpose, the OMBTP planned

to "evaluate and identify trans-border transportation infrastructure improvements" that met a litany of expressed objectives. MDOT had also performed the Gateway Study, which entailed formally determining the need for improvements.

The MOU, the formation of the OMBTP and its work, the Gateway Study, and other precipitating events ultimately resulted in a 2004 contract between MDOT and DIBC, titled the Ambassador Bridge Gateway Project Agreement. The contract was entered into "for the purpose of fixing the rights and obligations of the [parties as] to the design, construction, maintenance and operation of certain improvements to access between Highways I-75/I-96 and the Ambassador Bridge . . . and related matters." The contract indicated that the parties agreed on the design concept for the Gateway Project and that the project met the objectives of the Gateway Study to improve direct access between the Ambassador Bridge and the state trunkline system and to "[a]ccommodate a potential future second span" of the Ambassador Bridge.

Under the contract, DIBC was to design and construct Part A of the project in accordance with MDOT specifications and standards; plans and designs attached to the contract as exhibits were incorporated into the contract. Part A pertained to certain construction activities in a particular geographical area identified in the plans. DIBC was responsible for 100 percent of the costs associated with Part A, including construction and property acquisition costs. Parts B through F were designated as MDOT's portion of the project for which MDOT was financially responsible. With construction underway, the contract was amended in February 2006. The amendment indicated that DIBC had been unable to acquire all of the property interests needed to complete Part A of the project. The amendment further reflected that DIBC had requested MDOT "to move the point of delineation" between those parts of the project for which MDOT was responsible and the part of the project for which DIBC was responsible, i.e., Part A. Pursuant to the amendment, MDOT assumed responsibility to acquire, through the power of eminent domain if necessary, the property interests encompassed by a portion of Part A, identified in an attached exhibit, and to complete the associated construction work. MDOT would retain ownership of any acquired property, but DIBC was required to bear the costs of construction and property acquisition relative to that portion of Part A now falling under MDOT's sphere of responsibility. Furthermore, if MDOT determined that a remaining part or portion of any acquired property would no longer have reasonable access, DIBC was to convey an easement appurtenant to the property owner, extending to a reasonably convenient public highway. And even before any deprivation of access, DIBC, at its own cost, was required to construct and maintain a paved, two-lane driveway on contemplated easement areas, with the caveat being that if MDOT actually acquired the property that would benefit from the easement, MDOT would convey the property to DIBC at no cost. A condemnation action brought by MDOT pursuant to the amendment in which DIBC unsuccessfully sought to intervene is the subject of an appeal in Docket No. 297016, which has also been assigned to this panel for resolution.

In November 2005, the Federal Highway Administration, in connection with the OMBTP's evaluation and study of alternatives to locate a new international crossing in the Detroit-Windsor area, concluded that the "twinning alternative," i.e., a second span of the Ambassador Bridge, was "not a practical alternative for further study on the U.S. side." The report further indicated that "the range of alternatives remaining lie within the area upstream of Zug Island to just south of the Ambassador Bridge and bounded by I-75 as the places where

further analysis will be conducted to specify where the practical alternatives for bridges, plazas, and highway route connectors should be placed." Subsequently, MDOT announced its support to move forward with a new border crossing between Detroit and Windsor known as the Detroit River International Crossing (DRIC), as opposed to a second span of the Ambassador Bridge. The DRIC Bridge or Project was also supported by the United States Department of Transportation, Transport Canada, and the Ontario Ministry of Transportation, and DIBC refers to these supporting entities, including MDOT, as the DRIC Proponents or as having formed the DRIC Partnership. It was the removal from consideration of a second Ambassador Bridge span that ignited the contentiousness between MDOT and DIBC. This is reflected in the following allegations in DIBC's Court of Claims complaint:

> 11. MDOT and the other DRIC Proponents propose to build the DRIC Bridge less than two miles from the Ambassador Bridge in order to steal up to 75% of the truck traffic revenue currently collected by the Ambassador Bridge and a similarly large portion of the passenger car traffic revenue.
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> 12. The intended diversion by the DRIC Partnership of DIBC's primary revenue stream threatens the economic viability of the Ambassador Bridge, impairs DIBC's ability to satisfy its obligations as a limited federal instrumentality, and undermines DIBC's ability to obtain financing for the New Span.

We shall discuss in more detail below the Court of Claims complaint when we reach the date of filing in our chronological review of this case's development.

Despite the dispute regarding the location of a second bridge crossing, MDOT and DIBC remained contractually obligated to each other for purposes of the Ambassador Bridge access improvements encompassed by their 2004 contract and the 2006 amendment of that contract. In 2007, MDOT and DIBC executed a maintenance agreement that formalized their understanding of respective maintenance responsibilities pertaining to improvements. DIBC agreed to maintain and operate certain physical features or structures located on a portion of M-85, including pavement over a particular water main, a concrete barrier and attached chain link fence, other identified chain link fences, a truck road and related infrastructure, and a gate system. The maintenance agreement set forth particular requirements as to each feature and structure. The parties also agreed that in emergency situations DIBC could, with various conditions and limitations, utilize M-85, the I-75 off ramp, and an access easement road. Hereafter, we shall refer to the 2004 contract, 2006 amendment, and the 2007 maintenance agreement jointly as the "Gateway Contract."

In June 2009, MDOT filed an action in the Wayne Circuit Court to enforce DIBC's compliance with the Gateway Contract. Also named in the suit as a defendant was Safeco Insurance Company of America (Safeco), which, as surety, supplied a $34 million performance bond on behalf of DIBC and in favor of MDOT in March 2007, insuring DIBC's faithful execution and performance of the Gateway Contract. The focus of MDOT's complaint was that

DIBC was simply failing to abide by the provisions in the Gateway Contract, especially those pertaining to the designs and plans governing the project.[1] MDOT sought a cease and desist order regarding ongoing construction activities by DIBC, reimbursement for costs associated with contractual breaches, an order of specific performance forcing DIBC to engage in construction consistent with the Gateway Project, damages incurred as a result of DIBC's actions, and any other appropriate equitable and monetary relief.

In the circuit court action, MDOT filed two motions for summary disposition and DIBC filed a competing motion for summary disposition. The circuit court issued an extensive written opinion and order on February 1, 2010, granting relief in favor of MDOT, while denying DIBC's motion for summary disposition. The circuit court found that MDOT and DIBC had "agreed on a design for DIBC's Part A of the project,"[2] as reflected in the Gateway Contract and incorporated into the Safeco performance bond. The circuit court further ruled that DIBC had not constructed its portion of the Gateway Project – Part A – according to the agreed upon design and that the refusal to comply jeopardized completion of the Gateway Project. The circuit court rejected DIBC's arguments that it was not restricted by the contract to a particular design and that it could unilaterally substitute different access routes. The court noted that "DIBC ha[d] constructed permanent structures and facilities in conflict with the designs for the easement, road, and ramps." The circuit court also found that "MDOT ha[d] performed its obligations under the [Gateway Contract] to the extent possible given the refusal of DIBC to perform the agreement in conformity with the approved design." The court further rejected standing, ripeness, and laches arguments proffered by DIBC, as well as DIBC's assertion that MDOT failed to state claims upon which relief could be granted. DIBC was ordered to construct a two-lane access road, to complete construction as to Part A in compliance with the agreed-upon design and plans, to remove certain structures that conflicted with the designs and plans, and to submit a detailed timetable for completing the court-ordered measurements. The circuit court

[1] MDOT's complaint alleged the following claims: breach of a contractual obligation to honor a recorded easement to landlocked property; breach of a contractual obligation to construct an elevated roadway over 23rd Street and improper unilateral occupancy of 23rd Street to the deprivation of others; breach of contract for failure to construct a required two-lane road and for constructing Pier 19 in the path of the roadway and special return route; breach of contract by failing to construct Part A of the Gateway Project in accordance with the Gateway Contract and, instead, constructing a conflicting design; violation of the terms of MDOT's permit for DIBC's use of a portion of the Fort Street right of way; breach of the 2006 amendment and 2007 maintenance agreement for failure to construct the special return route; breach of the 2006 amendment by failing to reimburse MDOT for over $500,000 in costs incurred in acquiring property through condemnation; and breach of agreement for failure to comply with the law and city resolutions regarding the vacation of public streets and alleys. MDOT asserted that DIBC's failure to comply with its contractual obligations delayed completion of the Gateway Project and exposed MDOT to liability for paying additional costs to its highway contractor.

[2] As indicated above, the 2006 amendment only impacted a portion and not all of Part A.

indicated that a monitor would be appointed to administer implementation of the schedule. This Court denied DIBC's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." *Michigan Dep't of Transport v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered March 17, 2010 (Docket No. 296567). Our Supreme Court then denied DIBC's application for leave to appeal. *Michigan Dep't of Transport v Detroit Int'l Bridge Co*, 486 Mich 937; 782 NW2d 199 (2010).

In November 2009, before the circuit court's summary disposition opinion and order on MDOT's action was issued and four days after the circuit court granted an adjournment relative to the hearing on the summary disposition motions so that DIBC's new counsel could familiarize himself with the case, DIBC filed its own suit in the Court of Claims. DIBC's 18-count, 398-paragraph complaint contained allegations pertaining to the Gateway Project and the DRIC Project, raising contract, tort, partnership, joint venture, and fiduciary claims against MDOT and the STC.[3] In December 2009, the 30th Circuit Court (Court of Claims) judge assigned to the Court of Claims case entered an order joining the case with MDOT's related circuit court action, which, at the time, was still awaiting the circuit court's entry of the written opinion and order on the competing motions for summary disposition that we discussed above. DIBC's motion for reconsideration of the joinder order was denied. The State Court Administrative Office (SCAO) assigned the circuit court judge, who was handling MDOT's circuit court action against DIBC, to also serve as a Court of Claims judge for purposes of presiding over and addressing DIBC's joined claims. We shall hereafter refer to the judge, serving as a circuit court and assigned Court of Claims judge, as the "trial court." Prior to the deadline to file an answer to DIBC's Court of Claims complaint, MDOT and the STC (hereafter "defendants") filed a motion for an extension of time to file a response to the complaint. And in January 2010, after DIBC had pursued and supposedly obtained an entry of default despite defendants' pending motion, the trial court granted the motion for an extension of time to respond and struck the default.

In lieu of filing an answer to the Court of Claims complaint, defendants filed two motions for partial summary disposition, which, together, effectively covered each and every count in DIBC's complaint. One motion addressed counts II to VI, which had alleged, respectively, breach of partnership, breach of fiduciary duty arising from partnership, breach of fiduciary duty arising from joint venture, promissory estoppel, and liability of the STC as a necessary party.[4] All of these claims were essentially predicated on MDOT's support for the DRIC Bridge and withdrawal of support for a second span of the Ambassador Bridge. On these counts, defendants moved for summary disposition on the basis that DIBC failed to plead facts in avoidance of sovereign immunity, that MDOT enjoyed immunity granted by law, that the action was time-barred, that the counts violated the statute of frauds, and that DIBC failed to state claims upon

[3] In the circuit court's opinion and order on summary disposition, the court commented on the Court of Claims case, stating that "[t]he issues in that case appear to be indistinguishable from the issues raised in the present case; specifically what are the rights and obligations of the parties in connection with the Gateway Project."

[4] The alleged partnership and joint venture was between MDOT and DIBC.

which relief could be granted.[5] In defendants' second motion for partial summary disposition, they addressed the remaining counts in DIBC's complaint,[6] arguing that those counts should be dismissed pursuant to MCR 2.116(C)(4), (6), (7), and (8).

DIBC, along with filing general responses to defendants' motions for summary disposition, moved to strike the motions on the ground that the trial court lacked the authority and jurisdiction to hear and rule on pretrial matters, in relationship to DIBC's Court of Claims counts, given that MCL 600.6421 only permitted joinder "for trial." The trial court rejected DIBC's challenge to its authority and jurisdiction to hear pretrial matters. With respect to summary disposition on counts II through VI, which were DRIC related, the trial court granted the motion under MCR 2.116(C)(4), finding that the notice requirements of MCL 600.6431 were not satisfied. With respect to the remaining claims, the trial court ruled as follows:

> [A]ll of these issues were addressed in the Opinion that the Court entered in February . . . of this year [circuit court opinion and order entered in favor of MDOT]. All these claims have been decided and [DIBC] is simply seeking in this lawsuit to change that Opinion, change that Order. The lawsuit is seeking

[5] Part of the immunity argument was that DIBC, while filing a notice of intention to file a claim against the state defendants, failed to adequately set forth the information required by the notice statute, MCL 600.6431(1).

[6] These counts sought: an order for specific performance forcing MDOT to open exit and entrance ramps constructed to completion by MDOT; alleged breach of the Gateway Contract for MDOT's failure to open the ramps, failure to approve DIBC's requested changes relative to Part A, and MDOT's improper invocation of Detroit's nonexistent rights under the Gateway Contract; claimed promissory estoppel for MDOT's alleged attempt to avoid consequences of its prior approval of Part A changes requested by DIBC; declaratory relief recognizing that DIBC was not absolutely mandated to construct Part A in accordance with the alleged Part A design and plans; declaratory relief indicating that MDOT was improperly and illegally diverting traffic from M-85 onto DIBC's property; declaratory relief finding that DIBC is not liable to MDOT for costs associated with condemning property located in Part A where there was no necessity for condemnation; damages for fraud and negligent misrepresentation relative to unspecified misrepresentations made by MDOT (general reference to the prior 300 plus paragraphs in the complaint); damages for silent fraud where MDOT failed to disclose the filing of a necessity appeal to this Court by a property owner in the condemnation action; declaratory relief ruling that DIBC need not build a multimillion dollar ramp to cross over former 23rd Street where there is no reason to do so; declaratory relief finding that DIBC was relieved of any duty to construct Part A in accordance with designs and plans, assuming rejection of the argument that no duty existed, where MDOT had committed material breaches of the Gateway Contract; injunctive relief preventing the circuit court action to proceed absent consideration of DIBC's claims; and declaratory relief indicating that, assuming the effectiveness of an easement granted to parties in the condemnation action as to remaining property, the easement is not a public road, nor can it be used by MDOT.

> relief that is in opposition to the Opinion and Order that this Court has already given.
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> (C)(6) provides that an action may be dismissed because another action has been initiated between the same parties involving the same claim, and that is exactly what has happened here, between the same parties, the same issues. This [is] the flip side. This is the defense that, that [DIBC] raised in the matter that was decided on February 1st.
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> The Court grants the Motion for Summary Disposition under (C)(6). And further, looking at the pleadings, given the decisions that have been made and incorporated or included in the Order of 2-1, February 1-10, [DIBC] has failed to state a claim for which relief may be granted[7] because the Court has already decided the claims, that those claims are clearly unenforceable. That's the decision of the Court.

As evident in this passage, the heart of the trial court's ruling was simply that the court had already decided in the circuit court action the issues now being raised in the relevant counts in DIBC's Court of Claims complaint. DIBC appeals as of right, challenging the dismissal of its Court of Claims complaint on a variety of grounds.

II. ANALYSIS

A. JURISDICTION UNDER JOINDER STATUTE, MCL 600.6421

DIBC argues that the Court of Claims judge erred in failing to retain jurisdiction over all of the pretrial proceedings relative to DIBC's Court of Claims complaint and that the trial court lacked jurisdiction over the pretrial proceedings, including defendants' motions for summary disposition, where MCL 600.6421 only allowed joinder for trial. MCL 600.6421 provides:

> Cases in the court of claims may be *joined for trial* with cases arising out of the same transaction or series of transactions which are pending in any of the various trial courts of the state. A case in the court of claims shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge. [Emphasis added.]

DIBC argues that the plain language of the statute only permitted joinder for trial, depriving the trial court of jurisdiction to hear and decide the motions for summary disposition; therefore, the order granting the motions must be vacated for lack of subject-matter jurisdiction. We hold that the words "joined for trial," as used in MCL 600.6421, necessarily encompass

[7] This language is consistent with MCR 2.116(C)(8) ("party has failed to state a claim on which relief can be granted").

pretrial, trial, and posttrial matters when the statutory provision is considered in conjunction with MCL 600.6404.[8]

The issue whether subject-matter jurisdiction existed is a question of law that this Court reviews de novo on appeal. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). An issue of subject-matter jurisdiction that turns on the interpretation of a statutory provision is also reviewed de novo. *Cairns v City of East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). In *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010), the Michigan Supreme Court recited the familiar principles of statutory construction:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme.

Statutes that share a common purpose or relate to the same subject are *in pari materia* and must be read together as one law, even if the statutes contain no reference to one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). If two statutory provisions lend themselves to a construction that is harmonious and avoids conflict, such a construction controls. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009); *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). "The object of the *in pari materia* rule is to effectuate the legislative purpose as found in harmonious statutes." *Id.*

Subject-matter jurisdiction concerns "a court's power to act and its authority to hear and decide a case." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 636; 716 NW2d 615 (2006). If subject-matter jurisdiction is lacking, the court's acts and proceedings are invalid. *Id.* Jurisdiction is conferred upon a court by the power that creates it. *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973); *Todd v Dep't of Corrections*, 232 Mich App 623, 628; 591 NW2d 375 (1998). Const 1963, art 6, § 1, provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial

[8] We note that, while DIBC focuses on jurisdiction over pretrial matters, its argument would also preclude a circuit judge appointed to the Court of Claims from hearing posttrial matters. DIBC acknowledges that no appellate court has ever construed MCL 600.6421 in the manner argued by DIBC and that it has been standard practice to have circuit judges, sitting as Court of Claims judges, address pretrial matters.

> court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Legislation established the Court of Claims Act, MCL 600.6401 *et seq*., and in MCL 600.6404(1), the Legislature proclaimed that "[t]he court of claims is created as a function of the circuit court for the thirtieth judicial circuit." Additionally, on the subject of judicial assignments and jurisdiction, "[a] circuit judge of the thirtieth judicial circuit and any judge assigned into the thirtieth judicial circuit by the state court administrator may exercise the jurisdiction of the court of claims as provided by law." *Id.* (emphasis added).[9] The Court of Claims possesses exclusive jurisdiction over all tort-based and contract-based claims against the state, regardless of whether the complaint requests money damages or solely declaratory relief. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 768-775; 664 NW2d 185 (2003); see also MCL 600.6419 and MCL 600.6419a. Once again, MCL 600.6421 provides that "[c]ases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are pending in any of the various trial courts of the state." "The purpose of the joinder statute is to permit joinder of actions arising out of the same transaction in order to ensure their speedy and efficient resolution." *Todd*, 232 Mich App at 628-629. "MCL 600.6421 provides for the administrative consolidation of cases[.]" *Chen v Wayne State Univ*, 284 Mich App 172, 199; 771 NW2d 820 (2009). While the statute refers to joining cases, "it does not provide for their complete merger;" "both cases retain[] their separate identities." *Id.* at 198-199. "[T]he case in the circuit court must be treated as separate from that in the Court of Claims even though the same trial court presides over each." *Id.* at 198.

We find that the "joined for trial" language in MCL 600.6421 envisions entry of a joinder order for purposes of a future trial, which ultimately may or may not come to fruition, with all proceedings between the date of the order's entry and the trial, as well as posttrial proceedings, falling within the jurisdiction of the circuit court judge serving as an appointed Court of Claims judge. That being said, in examining the "joinder for trial" language in MCL 600.6421 in isolation, DIBC's construction is not entirely unreasonable. However, such an interpretation would run afoul of MCL 600.6404. As indicated earlier, under MCL 600.6404(1), a "judge assigned into the thirtieth judicial circuit by the state court administrator," which occurred here, "may exercise the jurisdiction of the court of claims as provided by law." There is no dispute that a Court of Claims judge generally has jurisdiction to hear pretrial as well as posttrial matters

[9] "The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." Const 1963, art 6, § 23. "The supreme court shall appoint an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state. The administrator shall perform administrative duties assigned by the court." Const 1963, art 6, § 3. Under MCL 600.6404, 600.6407, and 600.6410, "[t]he assignment of the trial judge, place of trial, designation of the court stenographer, and related matters remain the province of the Supreme Court Administrator[.]" *Freissler v State Highway Comm*, 53 Mich App 530, 540; 220 NW2d 141 (1974).

relative to contract and tort actions brought against the state. See MCL 600.6419; *Parkwood Ltd Dividend*, 468 Mich at 768-775. MCL 600.6404(1) does not limit an assigned judge's jurisdiction to a trial only. To the extent that it can be argued that the jurisdiction conferred under MCL 600.6404(1) cannot go beyond or is limited by MCL 600.6421 and the "joinder for trial" language, as construed by DIBC, MCL 600.6404(2) and (3) weigh against and circumvent that argument. Subsection (2) of MCL 600.6421 provides as follows:

> In case of the disability or absence from the place of holding court of a circuit judge before whom while sitting as the judge of the court of claims a case has been tried ***or*** *motion heard*, another circuit judge designated to sit as the judge of the court of claims to may continue, hear, determine, and sign all matters that his or her predecessor could have continued, heard, determined, and signed. [Emphasis added.]

This language reflects the Legislature's acknowledgement that an assigned judge has the authority to hear and decide motions separate and apart from the authority to preside over trials. The provision indicates that the Legislature clearly contemplated situations where an assigned judge would address posttrial and pretrial motions, such as a motion for summary disposition, and not merely trials. Further, as noted above, DIBC's theory, taken to its logical extent, would preclude the assigned judge from handling posttrial matters. Subsection (3) of MCL 600.6421 provides:

> In case a circuit judge designated to sit as the judge of the court of claims dies *before signing a judgment and after filing a finding of fact or rendering an opinion* upon proof submitted and argument of counsel disposing of all or part of the issues in the case involved, a successor as judge of the court of claims *may proceed with that action* in a manner consistent with the finding or opinion and the judge is given the same powers as if the finding of fact had been made or the opinion had been rendered by the successor judge. [Emphasis added.]

The issuance of a judgment, the filing of a finding of fact, and the rendering of an opinion take place *after* a trial has been completed, as do, of course, proceedings in the action following judgment, so plainly the Legislature contemplated an assigned judge addressing posttrial matters.

MCL 600.6404 and MCL 600.6421 are clearly *in pari materia*, and in order to read the statutes in harmony and without conflict, we hold that the language "joined for trial," as used in MCL 600.6421, necessarily encompasses pretrial, trial, and posttrial matters. Our interpretation is consistent with the purpose of MCL 600.6421 to ensure the speedy and efficient resolution of joined actions arising out of the same transaction. Indeed, it would be inefficient, slow, tedious, impractical, and illogical to have an original Court of Claims judge preside over scheduling and settlement conferences, pretrial motions in limine, and similar matters, where that judge will not preside over the actual trial. Equally problematic would be a Court of Claims judge presiding over posttrial proceedings when that judge did not conduct the trial.

Finally, we reject DIBC's argument that MCL 600.225(1) prevented the trial court – a circuit judge from Wayne County – to sit as an Ingham (30th) Circuit Court, Court of Claims judge. MCL 600.225 provides in pertinent part:

> (1) The supreme court may assign an elected judge of any court to serve as a judge in any other court in this state, except as provided in subsection (3). The assignment of a judge under this subsection shall be for a limited period or specific assignment.
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> * * *
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> (3) All assignments and reassignments of cases filed in any court in a county shall be made among the judges of that county, unless no trial court judge in that county is qualified and able to undertake a particular case. A judge of 1 county shall not be assigned to serve as a judge in another county unless no other trial court judge in the county needing assistance is able to render that assistance.

MCL 600.225(3), examined in context, clearly does not apply to circumstances where a Court of Claims case is being joined with a circuit court action from another county under MCL 600.6421. To hold otherwise would render MCL 600.6404 and MCL 600.6421 meaningless and nugatory, given that MCL 600.6421 contemplates one judge supervising both the circuit court and Court of Claims cases and MCL 600.6404(1) expressly authorizes SCAO to assign a judge from outside the 30th Circuit Court to simultaneously serve as both a county circuit judge and a Court of Claims judge. *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 279; 597 NW2d 235 (1999) ("When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory"). Additionally, MCL 600.225 is the more general statute, while MCL 600.6404 and MCL 600.6421 are specific to Court of Claims actions and the joinder of such actions with circuit court suits; therefore, MCL 600.6404 and MCL 600.6421 control in the context of any statutory conflict. *Frame v Nehls*, 452 Mich 171, 176 n 3; 550 NW2d 739 (1996) ("When two legislative enactments seemingly conflict, the specific provision prevails over the more general provision"). Accordingly, reversal is unwarranted.

B. DISMISSAL OF COUNTS II THROUGH VI – THE DRIC CLAIMS

The causes of action in DIBC's complaint that related to the DRIC Bridge, counts II through VI, were summarily dismissed on the basis that DIBC failed to comply with the requirements of the notice statute, MCL 600.6431. DIBC argues that the trial court erred in its ruling where the notice provided by DIBC amply served the purpose of the notice statute, particularly given the context of the claims. We hold that DIBC's notice of intention to file a claim, as required by MCL 600.6431, was woefully inadequate, that the issue of prejudice and substantial compliance are irrelevant under binding caselaw, and that the trial court did not err in granting summary disposition as to counts II through VI for failure to comply with MCL 600.6431. Moreover, assuming compliance with MCL 600.6431, we agree with defendants' alternate argument in support of summary disposition that MDOT and DIBC did not form a partnership, they were not joint venturers, and that there was no "promise" sufficient to support the promissory estoppel claim.

MCL 600.6431(1) provides:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, *stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained*, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. [Emphasis added.]

"This filing requirement is a condition precedent to sue the state." *McCahan v Brennan*, ___ Mich App ___; ___ NW2d ___, issued February 1, 2011 (Docket No. 292379), slip op at 2, lv gtd 489 Mich 985 (2011).[10] Substantial compliance does not suffice, nor must prejudice be shown, and "[t]he filing requirement must be applied as it is written." *Id.* at 2-3.

Here, in its August 14, 2009, notice, DIBC provided a singular date of August 15, 2008, as the date on which the claims arose, alleged that defendants were "involved in connection with the claims," asserted simply that damages arising from the claims were sustained, and DIBC indicated that

> [t]he nature of the claims include breach of partnership agreement, breach of fiduciary duty arising from a joint venture, breach of fiduciary duty arising from a partnership, promissory estoppel, fraud and misrepresentation, misappropriation of trade secrets, together with such other claims arising from the breach of the partnership agreement between Detroit International Bridge Company and the Michigan Department of Transportation and breach of contract.[11]

DIBC's notice was insufficient as a matter of law to satisfy MCL 600.6431(1). The notice did not identify the place where the claim arose, it did not state in detail the nature of the claim, and the notice did not indicate in detail the items of damage alleged or claimed to have been sustained. It cannot even be concluded that there was substantial compliance, assuming

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[10] *McCahan* focused on subsection (3) of MCL 600.6431, which provides that "[i]n all actions for property damage or personal injuries, [a] claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." Given the mandatory language in subsection (1) of the statute, which is even more precise than subsection (3) that the filing of notice is a condition precedent to commence a claim, i.e., "[n]o claim may be maintained," we find it appropriate to apply *McCahan.*

[11] The claims listed by DIBC in the notice go beyond the DRIC-based causes of action in counts II through VI and cover most if not all of the complaint. Defendants did not pursue summary disposition on the basis of failure to file a proper notice with respect to the counts outside of II through VI, nor is such an argument made on appeal. Perhaps this was because MDOT had already sued DIBC over various Gateway Project claims; regardless, we shall not *sua sponte* address the notice failure as to the remaining counts.

that substantial compliance could suffice. DIBC presents arguments that, at their core, support a conclusion that defendants were not prejudiced by any shortcomings in the notice; however, as indicated above, whether prejudice was incurred is immaterial.[12]

Moreover, DIBC failed, as a matter of law, to establish that a partnership existed between DIBC and MDOT or that the two parties formed a joint venture, where there was no showing of co-ownership of a business for profit, a joint undertaking or association to carry out a single enterprise or project for profit, or planned sharing of profits and losses. MCL 449.6(1); MCL 449.7; *Byker v Mannes*, 465 Mich 637, 652; 641 NW2d 210 (2002); *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 437; 731 NW2d 777 (2006). This holding effectively defeats counts II through IV, regardless of the notice issue. With respect to promissory estoppel, count V, there was never a clear and definite promise of a second span of the Ambassador Bridge, the MOU expressly indicated that it was not binding, and the Gateway Contract did not obligate defendants to promote or pursue a second span. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008); *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993) ("[p]romissory estoppel requires an actual, clear, and definite promise"). At most, there were expressions of contingency and desire, which do not suffice to support a claim of promissory estoppel. *State Bank of Standish v Curry*, 442 Mich 76, 87; 500 NW2d 104 (1993). Count VI pertained to the STC, simply indicating that it was a necessary party, and thus, the failure of counts II through V, necessarily results in the failure of count VI. Reversal is unwarranted.

C. DISMISSAL OF COUNTS I AND VII THROUGH XIX – THE GATEWAY CLAIMS

DIBC argues that the trial court erred in granting summary disposition in favor of defendants on the Gateway Project claims, count I and VII through XIX,[13] under MCR 2.116(C)(6), where DIBC's claims were broader than the claims asserted by MDOT in the circuit court action, and where DIBC's claims could not have been asserted anywhere but in the Court of Claims action.

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[12] DIBC states that the notice also advised that there was a pending action in the Macomb Circuit Court. In June 2009, DIBC had filed an action against MDOT in the Macomb Circuit Court, raising DRIC-related claims. MDOT moved to dismiss the action, arguing that the Court of Claims had exclusive jurisdiction. The action was apparently dismissed in September 2009, with DIBC filing its Court of Claims complaint in November 2009. The August 2009 notice of intention to file a claim simply indicated that the notice was provided without prejudice to DIBC's assertion that the Macomb Circuit Court had jurisdiction over DIBC's complaint filed a couple of months earlier in Macomb County. In no form or manner did DIBC suggest in the notice that it was adopting or incorporating the complaint for purposes of the notice and notice requirements in MCL 600.6431(1). The Macomb Circuit Court complaint itself could not serve as the written notice of intention to file a claim or the written claim under MCL 600.6431(1), given that MCL 600.6431(1) requires the notice or claim to be filed "in the office of the clerk of the court of claims[.]"

[13] The complaint only had 18 counts; DIBC skipped from count XVI to XVIII.

While the trial court couched its ruling under MCR 2.116(C)(6) and (8), the gist or gravamen of the court's decision was that it had already rendered a decision on the issues in question, which is more akin to invoking the doctrine of collateral estoppel.[14] Collateral estoppel implicates MCR 2.116(C)(7). *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Collateral estoppel concerns "issue" preclusion. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). The doctrine of collateral estoppel bars relitigation of issues where "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). "A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on relitigation, even if the action has been resolved by a summary disposition." *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).[15] The applicability of collateral estoppel is a question of law subject to de novo review. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996).

The trial court essentially reached the conclusion that the pertinent counts in the Court of Claims complaint were not viable given its resolution of the issues presented in the circuit court action and the similarity in the evidence and arguments posed in both actions. There certainly is

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[14] Given that the circuit court action was effectively concluded and no longer pending upon entry of the summary disposition opinion and order *with respect to all of the claims and issues addressed by the court*, which was prior to the trial court's summary disposition ruling here on DIBC's Court of Claims complaint, MCR 2.116(C)(6) would appear to have been rendered inapplicable under the circumstances. This Court has found that "summary disposition cannot be granted under MCR 2.116(C)(6) unless there is another action between the same parties involving the same claims *currently initiated and pending* at the time of the decision regarding the motion for summary disposition." *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (emphasis added); see also MCR 2.116(C)(6) ("Another action has been initiated between the same parties involving the same claim"). The trial court's ruling here was not that the same issues were already pending in the circuit court case, but that the same issues had already been *resolved* in the circuit court action. Moreover, considering that DIBC was required to file its claims in the Court of Claims and could not raise them as counterclaims in the circuit court action, with MDOT's action remaining in the circuit court, the applicability of MCR 2.116(C)(6) would appear to be questionable.

[15] For purposes of the "final judgment" component of collateral estoppel, it is not abundantly clear whether any claims remained pending after entry of the summary disposition ruling. It appears that only enforcement matters and possibly a question of damage amounts remained. We take judicial notice that DIBC has recently been held in contempt for violating the summary disposition ruling. It has been nearly two years since the judgment was entered, and we are not aware of any appeals, other than the rejected applications for leave mentioned above. "The rule in Michigan is that a judgment pending on appeal is deemed res judicata." *City of Troy v Hershberger*, 27 Mich App 123, 127; 183 NW2d 430 (1970). The summary disposition ruling was certainly final and conclusive on all of the matters addressed by the court, and we find it appropriate to apply the doctrine of collateral estoppel under the circumstances presented.

logic in the trial court's approach, where it would have been inconsistent for the court to render different findings on the same issues. The question that arises here is whether the determination of particular issues actually litigated in the circuit court action brought by MDOT against DIBC and Safeco, as set forth in the circuit court summary disposition ruling, effectively defeated the various causes of action alleged by DIBC in the Court of Claims complaint. In other words, accepting the resolution of a certain issue in the circuit court case and carrying that resolution over to the Court of Claims action, could the counts in the Court of Claims complaint survive, considering that the evidence and arguments on the issues were essentially the same in both cases. For example, in the circuit court ruling, the court, after entertaining the parties' arguments, found that there was indeed a particular agreed upon design with respect to Part A of the project and that DIBC engaged in construction that was not in accordance with that design. Keeping this legal-factual resolution in mind, the question becomes whether DIBC could nonetheless be successful in the Court of Claims action given the nature of the cause of action being considered. The analysis requires identifying every issue that was actually litigated and determined in the summary disposition opinion and order in the circuit court action and then examining the elements necessary to establish entitlement to relief as to the pertinent counts in the Court of Claims complaint to see if the elements can be established, accepting as a matter of law, the findings and conclusions made in the circuit court action.

DIBC, however, makes no attempt whatsoever to discuss the nature and elements of counts I, VII-XIX, and then explore the impact of the circuit court summary disposition findings and rulings on those counts. We recognize that DIBC focused on MCR 2.116(C)(6), but even in the context of that argument, DIBC simply proffers the conclusory statement that the claims in the two actions were not the same, "nor [were DIBC's] claims 'mirror-image' assertions of the claims MDOT is asserting." There is no briefing, analysis, or discussion regarding the actual claims, nor is any comparison made between the claims and issues in the circuit court action and those at stake in the Court of Claims action. It is not our job to examine each relevant cause of action in the Court of Claims complaint, of which there are many, and compare them against the claims in the circuit court action and the issues resolved in the summary disposition ruling. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

Defendants, on the other hand, carefully and properly examine each of the pertinent counts in DIBC's complaint and then point to a particular issue resolved in the circuit court action that undermines the viability of each count, none of which can survive after consideration

of the court's earlier ruling. On review, we agree with defendants' assessment; therefore, DIBC's argument fails not only for inadequate briefing, but substantively.[16]

DIBC argues that its claims could not have been brought as counterclaims in the circuit court action because the Court of Claims had exclusive jurisdiction over DIBC's claims; therefore, its claims could not have been resolved in the circuit court action. DIBC is essentially arguing that any matters or issues decided by the trial court in the circuit court action could have absolutely no bearing whatsoever, as a matter of law, on resolution of the Court of Claims complaint. Stated otherwise, DIBC is contending that the trial court was required to take a fresh look at issues previously decided by the court and to render a new ruling thereon. This argument ignores the fact that the same judge, while wearing different hats, was rendering the rulings in both cases.

In *Stolaruk Corp v Dep't of Transp*, 114 Mich App 357, 359-360; 319 NW2d 581 (1982), this Court, reciting the relevant facts, stated:

> Plaintiff bid on certain highway construction projects planned by defendant and was declared the apparent second lowest bidder. However, an initial review of the bids showed that the lowest bidder had failed to conform with the projects' specifications, so the defendant informed plaintiff that defendant would recommend to the Michigan State Transportation Commission that plaintiff's bid be accepted. Subsequently, the Commission decided that the lowest bid did conform with the requisite specifications, and plaintiff was not awarded the contract.
>
> Plaintiff sued in the Ingham County Circuit Court for temporary and permanent injunctions to prevent defendant from awarding the contract to the lowest bidder. Plaintiff's request for a temporary restraining order was granted. After a hearing on the issuance of a permanent injunction, the court concluded that the defendant had legitimately accepted the lowest bid and ordered the temporary restraining order to be dissolved. Plaintiff moved to stay the order pending an evidentiary hearing to determine whether the lowest bid was valid. Plaintiff's motion was denied, and a final order was entered dissolving the temporary restraining order and denying plaintiff's request for an injunction. Plaintiff's application for leave to appeal to this Court was denied.
>
> Plaintiff then filed suit in the Court of Claims seeking damages for defendant's alleged breach of contract on the basis that defendant had accepted plaintiff's bid first. Defendant moved for accelerated judgment on the grounds of res judicata and collateral estoppel, arguing that the adjudication in circuit court precluded plaintiff from bringing a separate action in the Court of Claims and

[16] We also note that the fraud and negligent misrepresentation claims fail under MCR 2.116(C)(8), where DIBC provides no specifics and simply refers back to 300 paragraphs of allegations.

> precluded reconsideration of any issues previously decided by the circuit court. Defendant's motion for accelerated judgment was granted, and this appeal followed.

The *Stolaruk* panel rejected the argument that res judicata barred the plaintiff's Court of Claims action, where the plaintiff "was forced by the Court of Claims Act to split its cause of action between the Court of Claims and the circuit court." *Id.* at 360. Accordingly, the "plaintiff's action in the Court of Claims for money damages was not barred by the doctrine of res judicata on the basis that plaintiff had previously brought an action for equitable relief in the circuit court." *Id.* at 361. This Court, however, held that the defendant was entitled to summary disposition with respect to the Court of Claims action on the basis of collateral estoppel. *Id.* at 363. The Court, after reciting the requirements to invoke collateral estoppel, reasoned:

> Applying the foregoing requirements to the present case, there is no question that the same parties were involved in the circuit court action as are involved in the present action, *and the same ultimate issues underlying the circuit court action are involved in the present Court of Claims action.* The parties do not dispute that mutuality of estoppel was present. If the circuit court had determined that the lowest bid was invalid, defendant would have been bound by that result. Plaintiff does not contest that the foregoing requirements for the application of collateral estoppel were fulfilled. Plaintiff contends only that it did not have a full and fair opportunity in the circuit court to litigate the issue of the validity of the lowest bid because plaintiff's request for an evidentiary hearing on the issue was denied by the circuit court. We disagree.
>
> After plaintiff had obtained the temporary restraining order, a show cause hearing was held to determine whether a permanent injunction should be issued to prevent defendant from awarding the contract to the lowest bidder. The issuance of the injunction depended upon the court's interpretation of whether the lowest bid was valid. Both parties presented arguments on the issue. Plaintiff did not offer to present any additional evidence at that time. After the court had determined that the lowest bid was valid, plaintiff belatedly attempted to offer an affidavit of an alleged expert to support plaintiff's position. This does not remove the court's disposition of the issue from the operation of collateral estoppel. We find plaintiff had a fair opportunity in the circuit court to litigate the issue of the validity of the lowest bid. Since all of the requirements for the application of the doctrine of collateral estoppel were fulfilled, we hold that plaintiff is precluded from a reconsideration of these issues in the Court of Claims and that the Court of Claims could have properly based its decision granting defendant's motion for accelerated judgment on collateral estoppel. [*Id.* at 362-363 (emphasis added).]

We find that *Stolaruk* is applicable here and that collateral estoppel principles were actually relied on by the trial court in dismissing DIBC's complaint.[17] We do find it necessary to discuss and distinguish *Lumley v Bd of Regents for the Univ of Michigan*, 215 Mich App 125; 544 NW2d 692 (1996). In *Lumley*, a circuit court medical malpractice action was brought by the plaintiff against a doctor and two state defendants, including a state university hospital. The part of the lawsuit aimed against the two state defendants was transferred to a judge on the Court of Claims. Thereafter, pursuant to MCL 600.6421, the Court of Claims action was joined with the circuit court action against the doctor. There was a single trial, with a jury resolving the question of the doctor's negligence and the assigned Court of Claims judge resolving the vicarious liability of the state defendants. The jury in the circuit court action returned a verdict in favor of the doctor, but the assigned Court of Claims judge found that the doctor was negligent, entering judgment in favor of the plaintiff and against the vicariously-liable state defendants. *Id.* at 127-129. The state defendants appealed, arguing in part that the judge was collaterally estopped from reaching a conclusion that was contrary to the jury verdict in the circuit court action. *Id.* at 131-132.

The *Lumley* panel held that the assigned Court of Claims judge was not collaterally estopped by the jury's verdict from determining that the doctor was negligent. *Id.* at 132-134. The Court reasoned:

> The Legislature is free to modify strict application of the [collateral estoppel] doctrine in any given statutory scheme. Plaintiff was forced by the Court of Claims Act to split her cause of action between the Court of Claims and the circuit court. The Court of Claims Act confers on the Court of Claims exclusive jurisdiction over claims for money damages against state agencies. The clear intent of the Legislature in creating the Court of Claims is that parties to an action against the state will have their respective rights and liabilities determined by a judge and not a jury. Consequently, neither plaintiff nor defendants had any right to a jury trial in the Court of Claims action against defendants.
>
> The combining of the Court of Claims action with the circuit court action for trial pursuant to MCL 600.6421 did not permit the circuit court, or any jury empaneled by it, to exercise subject-matter jurisdiction over the claim against the state. Under this statutory scheme, it can be inferred that the Legislature did not intend traditional preclusion rules to apply. To hold otherwise would effectively give the circuit court jurisdiction to decide an action against the state. Clearly, such a result would be contrary to the Legislature's express intent in granting the

[17] The trial court's ruling also suggests that, for purposes of resolving the Court of Claims complaint, the court may have been adopting or incorporating by reference its decisions on the myriad issues in the circuit court action. On such a theory, collateral estoppel would not have to be employed, leaving only the question, as with collateral estoppel, whether the nature of the resolved issues precluded the viability of the causes of action in DIBC's complaint. We have resolved that issue in favor of defendants.

> Court of Claims exclusive jurisdiction over claims against the state. [*Id.* at 133-134 (citations omitted).]

At first glance, *Lumley* would appear to preclude application of collateral estoppel in the case at bar. However, the *Lumley* panel found it necessary to distinguish *Stolaruk*, stating, importantly, that "unlike the present case, *Stolaruk* did not involve two cases against two different defendants tried in a single trial before *two different triers of fact*[;] [t]he circuit court action in *Stolaruk* was decided by the *same judge* who presided over the Court of Claims action." *Lumley*, 215 Mich App at 134 n 2 (emphasis added). Here, the cases and the parties were essentially the same, i.e., a dispute between MDOT and DIBC over the Gateway Contract/Project, and the same judge who decided the issues in the circuit court action decided the issues in the Court of Claims action. Accordingly, collateral estoppel applied to bar the relitigation of issues relevant to the viability of DIBC's claims, and given that DIBC fails entirely to set forth the reasons why a particular count remains viable despite and regardless of the trial court's resolution of certain issues in the circuit court action, and considering our agreement with defendants that the counts did not remain viable, reversal is unwarranted.

D. ENTRY OF DEFAULT

Finally, DIBC argues that the trial court erred in setting aside or disregarding the entry of default, where defendants failed to timely file an answer to the complaint, and where defendants' motion for additional time to file a response to the complaint did not extend the time to file an answer. In considering this argument, we note that the trial court did not resolve the parties' dispute concerning whether the court clerk actually entered the default, but rather determined that, if a default was entered, it constituted a clerical error because there was no foundation for DIBC to request the default.

The Court of Claims complaint was filed on November 24, 2009. On December 3, 2009, the original Court of Claims judge entered the order of joinder under MCL 600.6421. On December 14, 2009, the Court of Claims judge entered an order denying DIBC's motion for reconsideration of the joinder order. On December 15, 2009, SCAO authorized the circuit court judge (trial court) to serve as a Court of Claims judge. Also on December 15, 2009, defendants filed a motion seeking an extension of time to respond to the complaint. Under MCR 2.108(A), "[a] defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint in Michigan[.]" The record on appeal does not indicate when defendants were served, but even assuming that they were served on the date the complaint was filed, November 24, 2009, the filing of the motion for an extension of time on December 15, 2009, was timely and constituted "other action permitted by law" under MCR 2.108(A). See *Huntington Nat'l Bank v Ristoch*, ___ Mich App ___; ___ NW2d ___, issued April 26, 2011 (Docket No. 297151), slip op at 6 (a motion to

extend the time for filing an answer has been recognized as constituting an "other action permitted by law" that can alter the time for filing an answer under MCR 2.108).[18]

DIBC asserted that a default was entered against defendants on January 6, 2010, for failure to answer the complaint. The record on appeal does not contain a default, but the register of actions indicates that a default was filed against defendants on January 6, 2010. On January 15, 2010, a hearing was held on defendants' motion for an extension of time to respond, and the trial court granted an extension, finding that, assuming a default had actually been entered, it was a clerical error subject to correction under MCR 2.612(A).

An affidavit of default that lacks foundation in the record is fatally defective. *Hosner v Brown*, 40 Mich App 515, 533-534; 199 NW2d 295 (1972). As such, even where a default has been entered by a trial court, "[t]here are no mental acrobatics by which the plaintiff could shift the burden to the defendants requiring any affidavit of merit or accompanying of the motion to set aside default with a sworn answer or any other technical requirement since the plaintiff's order of default was fatally defective and void from its very beginning." *Id.* at 534. MCR 2.108 provides in pertinent part:

> (E) Extension of Time. *A court may, with notice to the other parties who have appeared, extend the time for serving and filing a pleading or motion or the doing of another act, if the request is made before the expiration of the period originally prescribed.* After the expiration of the original period, the court may, on motion, permit a party to act if the failure to act was the result of excusable neglect. However, if a rule governing a particular act limits the authority to extend the time, those limitations must be observed. MCR 2.603(D) applies if a default has been entered. [Emphasis added.]

Here, defendants made their request for an extension of time before the expiration of the period originally prescribed. It is entirely irrelevant that a ruling on the motion was not made before the 21-day period to answer had elapsed. Given defendants' pending motion, it was improper for DIBC to seek a default, and the default, if actually entered, was improvidently entered and cannot be sustained. MCR 2.612(A)(1) provides that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it." Under the court rule governing defaults, "the court may set aside a default and a default judgment in accordance with MCR 2.612." MCR 2.603(D)(3). The trial court's ruling was consistent with MCR 2.612(A)(1) and MCR 2.603(D)(3). We agree with DIBC that defendants' motion for an extension of time did not, in and of itself, provide defendants with more time to answer, but the trial court's ruling on the motion in favor of defendants certainly extended the timeframe. Accordingly, we find no basis for disturbing the

[18] At the hearing on the motion, defendants' counsel stated that MDOT was never properly served with the complaint, but, to be on the safe side, counsel filed the motion for an extension of time within 21 days of DIBC's filing of the complaint.

trial court's decision to strike the entry of default and to grant an extension of time to respond to DIBC's exhaustive complaint.

III. CONCLUSION

The trial court properly concluded that it had subject-matter jurisdiction to entertain pretrial matters, including defendants' motions for summary disposition, with respect to DIBC's Court of Claims action. Additionally, the trial court properly granted summary disposition in favor of defendants on the DRIC claims, counts II through VI, given that DIBC's notice of intention to file a claim failed to satisfy the requirements of the Court of Claims notice statute, MCL 600.6431(1), and that substantively the counts could not be sustained. Furthermore, DIBC's Gateway Project claims fail on collateral estoppel, adoption-by-reference, and inadequate briefing grounds. Finally, the trial court properly struck any assumed default where defendants timely and properly filed a motion for an extension of time to respond to the complaint, which was ultimately granted.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause