MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

January 1, 2021 through July 27, 2021

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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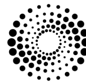
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2023

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SUPREME COURT

June 21, 2021

Back row left to right: Justices MEGAN K. CAVANAGH, RICHARD H. BERNSTEIN, ELIZABETH T. CLEMENT, and ELIZABETH M. WELCH.

Front row left to right: Justice BRIAN K. ZAHRA, Chief Justice BRIDGET M. MCCORMACK, and Justice DAVID F. VIVIANO.

SUPREME COURT

	TERM EXPIRES JANUARY 1 OF
CHIEF JUSTICE	
BRIDGET M. McCORMACK	2029
JUSTICES	
STEPHEN J. MARKMAN	2021[1]
BRIAN K. ZAHRA	2023
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
ELIZABETH T. CLEMENT	2027
MEGAN K. CAVANAGH	2027
ELIZABETH M. WELCH	2029[2]

COMMISSIONERS

DANIEL C. BRUBAKER, CHIEF COMMISSIONER

TIMOTHY J. RAUBINGER
SHARI M. OBERG
DEBRA A. GUTIERREZ-McGUIRE
MICHAEL S. WELLMAN
GARY L. ROGERS
ANNE E. ALBERS[3]
STACI STODDARD
MARK E. PLAZA
MOLLY E. HENNESSEY
REGINA T. DELMASTRO
CHRISTOPHER M. THOMPSON
CHRISTOPHER M. SMITH
JONATHAN S. LUDWIG
LIZA C. MOORE
KAREN A. KOSTBADE
CHERYL L. NOWAK[4]

STATE COURT ADMINISTRATOR
THOMAS P. BOYD

CLERK: LARRY S. ROYSTER
REPORTER OF DECISIONS: KATHRYN L. LOOMIS
CRIER: JEFFREY A. MILLS

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[1] To January 1, 2021.

[2] From January 1, 2021.

[3] To April 16, 2021.

[4] From January 4, 2021.

COURT OF APPEALS

	TERM EXPIRES JANUARY 1 OF
CHIEF JUDGE	
CHRISTOPHER M. MURRAY	2027
CHIEF JUDGE PRO TEM	
JANE M. BECKERING	2025
JUDGES	
DAVID SAWYER	2023
MARK J. CAVANAGH	2027
KATHLEEN JANSEN	2025
JANE E. MARKEY	2027
PATRICK M. METER	2021[1]
KIRSTEN FRANK KELLY	2025
KAREN FORT HOOD	2027
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2027
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2027
MARK T. BOONSTRA	2027
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2027
ANICA LETICA	2023
JAMES R. REDFORD	2023
MICHELLE M. RICK	2027[2]

CHIEF CLERK: JEROME W. ZIMMER, JR.

RESEARCH DIRECTOR: JULIE ISOLA RUECKE

[1] To January 1, 2021.

[2] From January 1, 2021.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	SARA S. LISZNYAI	2027[1]
2.	DONNA B. HOWARD	2021
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	JENNIFER L. SMITH	2021
3.	YVONNA C. ABRAHAM	2023[2]
	DAVID J. ALLEN	2021
	CHANDRA W. BAKER	2027[3]
	MARIAM BAZZI	2021
	ANNETTE J. BERRY	2025
	GREGORY D. BILL	2025
	KAREN Y. BRAXTON	2025
	JEROME C. CAVANAGH	2025
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	KEVIN J. COX	2025
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2025
	CHRISTOPHER D. DINGELL	2021
	PRENTIS EDWARDS, Jr.	2025
	CHARLENE M. ELDER	2021
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2025
	HELAL A. FARHAT	2021
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2021
	ALEXIS GLENDENING	2023
	TRACY E. GREEN	2025
	DAVID ALAN GRONER	2023
	ADEL A. HARB	2025
	BRIDGET MARY HATHAWAY	2025
	DANA MARGARET HATHAWAY	2025
	THOMAS M.J. HATHAWAY	2023
	CHARLES S. HEGARTY	2025
	CATHERINE HEISE	2025
	NOAH P. HOOD	2021

[1] From January 1, 2021.

[2] From July 19, 2021.

[3] From January 1, 2021.

		Term Expires January 1 of
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023
	EDWARD JOSEPH	2021
	MARY BETH KELLY	2027[4]
	TIMOTHY M. KENNY	2023
	DONALD KNAPP	2021
	QIANA D. LILLARD	2025
	KATHLEEN M. McCARTHY	2025
	CYLENTHIA LaTOYE MILLER	2021
	BRUCE U. MORROW	2023
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2023[5]
	KELLY RAMSEY	2023
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2025
	MARTHA M. SNOW	2023
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2021
	CARLA TESTANI	2021
	DEBORAH A. THOMAS	2025
	REGINA DANIELS THOMAS	2025
	MARGARET M. Van HOUTEN	2021
	SHANNON N. WALKER	2021
	DARNELLA DENISE WILLIAMS-CLAYBOURN	2021
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LaFLAMME	2023
	JOHN G. McBAIN, Jr.	2021
	THOMAS D. WILSON	2025
5.	VICKY ALSPAUGH	2021
6.	MARTHA ANDERSON	2021
	LEO BOWMAN	2025[6]
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023
	JACOB JAMES CUNNINGHAM	2025
	KAMESHIA D. GANT	2021
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021

[4] From January 1, 2021.

[5] To March 12, 2021.

[6] To April 30, 2021.

		Term Expires January 1 of
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2025
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	JULIE A. McDONALD	2025
	PHYLLIS C. McMILLEN	2025
	DANIEL PATRICK O'BRIEN	2023
	YASMINE ISSHAK POLES	2023
	LORIE N. SAVIN	2027[7]
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2025
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2025
	B. CHRIS CHRISTENSON	2027[8]
	JOSEPH J. FARAH	2023
	JOHN A. GADOLA	2021
	ELIZABETH ANNE KELLY	2025
	MARK W. LATCHANA	2021
	DAVID J. NEWBLATT	2023
	BRIAN S. PICKELL	2025
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2025
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2025
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2025
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2025
	MANVEL TRICE, III	2021
11.	BRIAN DANIEL RAHILLY	2027[9]
12.	CHARLES R. GOODMAN	2021
13.	KEVIN A. ELSENHEIMER	2021
	THOMAS G. POWER	2023
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021

[7] From January 1, 2021.

[8] From January 1, 2021.

[9] From January 1, 2021.

		Term Expires January 1 of
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2025
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2025
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2025
	JULIE GATTI	2027
	JAMES M. MACERONI	2021
	CARL J. MARLINGA	2023
	RACHEL RANCILIO	2023
	EDWARD A. SERVITTO, Jr.	2025
	MICHAEL E. SERVITTO	2023
	MARK S. SWITALSKI	2025
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2025
17.	CURT A. BENSON	2025
	PAUL J. DENENFELD	2023
	CHRISTINA ELMORE	2025
	KATHLEEN A. FEENEY	2021
	MAUREEN GOTTLIEB	2027[10]
	DEBORAH McNABB	2023
	SCOTT A. NOTO	2027[11]
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	MARK A. TRUSOCK	2025
	CHRISTOPHER P. YATES	2025
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021
	KAREN J. MIEDEMA	2023
	JON VAN ALLSBURG	2025
21.	MARK H. DUTHIE	2025
	SARA SPENCER-NOGGLE	2021
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021

[10] From January 1, 2021.

[11] From January 1, 2021.

		Term Expires January 1 of
	TIMOTHY P. CONNORS	2025
	CAROL A. KUHNKE	2025
	TRACY ELISABETH VAN DEN BERGH	2027[12]
23.	DAVID C. RIFFEL	2023
24.	TIMOTHY C. WRATHELL	2027[13]
25.	JENNIFER A. MAZZUCHI	2021
26.	KEITH EDWARD BLACK	2021
27.	ROBERT D. SPRINGSTEAD	2025
28.	JASON J. ELMORE	2027[14]
29.	CORI E. BARKMAN	2023[15]
	SHANNON L.W. SCHLEGEL	2027[16]
30.	ROSEMARIE E. AQUILINA	2021
	CLINTON CANADY, III	2023
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2025
	CAROLYN N. KOENIG	2027[17]
	LISA K. McCORMICK	2021
	WANDA M. STOKES	2021
31.	DANIEL A. DAMMAN	2027[18]
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2025
32.	MICHAEL K. POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN M. BRICKLEY	2025
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2025
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
38.	MARK S. BRAUNLICH	2025
	MICHAEL A. WEIPERT	2023

[12] From January 1, 2021.

[13] From January 1, 2021.

[14] From January 1, 2021.

[15] From April 12, 2021.

[16] From January 1, 2021.

[17] From January 1, 2021.

[18] From January 1, 2021.

		Term Expires January 1 of
	DANIEL S. WHITE	2021
39.	ANNA MARIE ANZALONE	2025
	MICHAEL R. OLSAVER	2021
40.	MICHAEL D. HODGES	2027[19]
	NICK O. HOLOWKA	2023
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2025
43.	MARK A. HERMAN	2023
44.	L. SUZANNE GEDDIS	2027
	MICHAEL P. HATTY	2025
	MATTHEW J. McGIVNEY	2021
45.	PAUL E. STUTESMAN	2025
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2021
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET ZUZICH BAKKER	2023
	ROBERTS KENGIS	2021
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2025
50.	JAMES P. LAMBROS	2025
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	AARON J. GAUTHIER	2021
54.	AMY G. GIERHART	2025
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2025
56.	JANICE K. CUNNINGHAM	2025
	JOHN DOUGLAS MAURER	2021
57.	JENNIFER E. DEEGAN	2025[20]
	CHARLES W. JOHNSON	2025[21]

[19] From January 1, 2021.

[20] From April 19, 2021.

[21] To January 1, 2021.

DISTRICT JUDGES

		TERM EXPIRES JANUARY 1 OF
1.	MICHAEL C. BROWN	2021
	WILLIAM PAUL NICHOLS	2025
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	MEGAN STIVERSON	2027[1]
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	GORDON GARY HOSBEIN	2021
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2025[2]
	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	JASON C. BOMIA	2021
	MICHELLE L. RICHARDSON.	2027[3]
	TRACIE L. TOMAK	2025
12.	ALLISON BATES	2027[4]
	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2021
14A.	ANNA M. FRUSHOUR	2021
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	ERANE C. WASHINGTON	2027[5]
15.	JOSEPH F. BURKE	2025

[1] From January 1, 2021.

[2] To June 30, 2021.

[3] From January 1, 2021.

[4] From January 1, 2021.

[5] From January 1, 2021.

		Term Expires January 1 of
	MIRIAM A. PERRY	2023[6]
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2025
17.	KRISTA LICATA HAROUTUNIAN	2021
	KAREN S. KHALIL	2023
18.	SANDRA A. FERENCE CICIRELLI	2025
	MARK A. McCONNELL	2021
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2025
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2025
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA L. JOHNSON	2025
23.	GENO D. SALOMONE	2025
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	ELIZABETH L. DISANTO	2025
28.	ELISABETH MIMI MULLINS	2027[7]
29.	BREEDA K. O'LEARY	2021
30.	BRIGETTE OFFICER HOLLEY	2023
31.	ALEXIS G. KROT	2021
32A.	REBEKAH RUTH COLEMAN	2027[8]
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021[9]
	MICHAEL K. McNALLY	2025
34.	TINA BROOKS GREEN	2025
	LISA MARIE ROBINSON MARTIN	2027[10]
	BRIAN A. OAKLEY	2023
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2025
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2025
	CHRISTOPHER MICHAEL BLOUNT	2025

[6] From January 4, 2021.

[7] From January 1, 2021.

[8] From January 1, 2021.

[9] To February 28, 2021.

[10] From January 1, 2021.

		Term Expires January 1 of
	NANCY McCAUGHAN BLOUNT	2021[11]
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT	2021
	DONALD COLEMAN	2025
	KAHLILIA YVETTE DAVIS	2023
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2025
	KRISTINA ROBINSON GARRETT	2023
	AUSTIN WILLIAM GARRETT	2023
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2025
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2025[12]
	JACQUELYN A. McCLINTON	2021
	WILLIAM C. McCONICO	2025
	DONNA R. MILHOUSE	2025
	B. PENNIE MILLENDER	2023[13]
	SEAN B. PERKINS	2023[14]
	KEVIN F. ROBBINS	2025
	DAVID S. ROBINSON, Jr.	2025
	ALIYAH SABREE	2025
	MILLICENT D. SHERMAN	2027[15]
	MARLENA E. TAYLOR	2025[16]
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2025
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2025
38.	KATHLEEN G. GALEN	2027[17]
39.	JOSEPH F. BOEDEKER	2021
	ALYIA MARIE HAKIM	2021
	KATHLEEN E. TOCCO	2025
40.	MARK A. FRATARCANGELI	2025

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[11] To February 23, 2021.

[12] To June 30, 2021.

[13] To January 16, 2021.

[14] From May 17, 2021.

[15] From May 17, 2021.

[16] From July 26, 2021.

[17] From January 1, 2021.

		Term Expires January 1 of
	JOSEPH CRAIGEN OSTER	2021
41A.	ANNEMARIE M. LEPORE	2021
	DOUGLAS P. SHEPHERD	2025
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY ANNE WIEGAND	2025
41B.	JACOB M. FEMMININEO, Jr	2021
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2025
42-1.	JENNIFER ANDARY	2027[18]
42-2.	WILLIAM H. HACKEL, III	2025
43.	BRIAN C. HARTWELL	2021
	KEITH P. HUNT	2025
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2025
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	JAIMIE POWELL HOROWITZ	2027[19]
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2025
47.	JAMES B. BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2025
	KIMBERLY F. SMALL	2021
50.	RONDA FOWLKES GROSS	2025
	MICHAEL C. MARTINEZ	2021
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2025
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2025
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2025
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2021
53.	DANIEL B. BAIN	2021
	SHAUNA MURPHY	2023
54A.	LOUISE ALDERSON	2023
	STACIA J. BUCHANAN	2021
	KRISTEN D. SIMMONS	2021
	CYNTHIA M. WARD	2025

[18] From January 1, 2021.

[19] From January 1, 2021.

		TERM EXPIRES JANUARY 1 OF
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2025[20]
55.	DONALD L. ALLEN	2023
	RICHARD L. HILLMAN	2021
56A.	KELLY E. MORTON	2027[21]
	JULIE O'NEILL	2023
56B.	MICHAEL LEE SCHIPPER	2025
57.	WILLIAM A. BAILLARGEON	2025
	JOSEPH S. SKOCELAS	2021
58.	JUANITA F. BOCANEGRA	2027[22]
	CRAIG E. BUNCE	2025
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA JR.	2025
	PAULA BAKER MATHES	2027[23]
	GEOFFREY THOMAS NOLAN	2023
61.	NICHOLAS S. AYOUB	2023
	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2025
	JENNIFER FABER	2023
	JEANINE NEMESI LAVILLE	2025
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2025
62B.	AMANDA J. STERKENBURG	2027[24]
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	ADAM EGGLESTON	2027[25]
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. MCDONALD	2021
66.	WARD L. CLARKSON	2025
67-1.	DAVID J. GOGGINS	2021
67-2.	JESSICA J. HAMMON	2021
	JENNIFER J. MANLEY	2021

[20] To May 31, 2021.

[21] From January 1, 2021.

[22] From January 1, 2021.

[23] From January 1, 2021.

[24] From January 1, 2021.

[25] From January 21, 2021.

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67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER R. ODETTE	2025
67-5.	WILLIAM H. CRAWFORD, II	2025
	G. DAVID GUINN	2021
	HERMAN MARABLE, JR.	2025
	TABITHA M. MARSH	2027[26]
70-1.	TERRY L. CLARK	2025
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2021
	ALFRED T. FRANK	2021
	DAVID D. HOFFMAN	2025
71A.	LAURA CHEGER BARNARD	2021
71B.	JASON ERIC BITZER	2021
72.	MONA S. ARMSTRONG	2021
	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2025
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2025
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC R. JANES	2021
77.	PETER M. JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	JOHN DAVID MIDDLEBROOK	2027[27]
80.	JOSHUA M. FARRELL	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	ROBERT A. COONEY	2025
	MICHAEL S. STEPKA	2023
89.	MARIA I. BARTON	2021
90.	ANGELA LASHER	2021
92.	BETH A. GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	ROBERT J. JAMO	2021
95B.	JULIE A. LaCOST	2021
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	NICHOLAS J. DAAVETTILA	2021

[26] From January 1, 2021.

[27] From January 1, 2021.

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	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2024
CARL F. JARBOE	2022
THEODORE A. METRY	2024
MATTHEW R. RUMORA	2022

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2025
Alger/Schoolcraft	CHARLES C. NEBEL	2025
Allegan	MICHAEL L. BUCK	2025
Alpena	THOMAS J. LaCROSS	2025
Antrim	NORMAN R. HAYES	2025
Arenac	RICHARD E. VOLLBACH, Jr.	2025
Baraga	TIMOTHY S. BRENNAN	2025
Barry	WILLIAM M. DOHERTY	2025
Bay	JAN A. MINER	2025
Benzie	JOHN D. MEAD	2025
Berrien	BRIAN BERGER	2025
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2025
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2025
Cheboygan	DARYL P. VIZINA	2025
Chippewa	ERIC BLUBAUGH	2021
Clare/Gladwin	MARCY A. KLAUS	2025
Clinton	LISA SULLIVAN	2025
Crawford	MONTE J. BURMEISTER	2025
Delta	PERRY R. LUND	2025
Dickinson	THOMAS D. SLAGLE	2025
Eaton	THOMAS K. BYERLEY	2025
Emmet/Charlevoix	VALERIE K. SNYDER	2025
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2025
Gogebic	ANNA ROSE TALASKA	2025
Grand Traverse	MELANIE STANTON	2025
Gratiot	KRISTIN M. BAKKER	2025
Hillsdale	MICHELLE SNELL BIANCHI	2025
Houghton	FRASER T. STROME	2025
Huron	DAVID L. CLABUESCH	2025
Huron	DAVID B. HERRINGTON	2021
Ingham	SHAUNA DUNNINGS	2025
Ingham	RICHARD J. GARCIA	2021
Ionia	ROBERT S. SYKES, Jr.	2025
Iosco	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025
Isabella	STUART BLACK	2025
Jackson	DIANE M. RAPPLEYE	2025
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2025

County		Term Expires January 1 of
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE M. BUDAY	2025
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2025
Kent	G. PATRICK HILLARY	2025
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	KEITH WAREN DeFORGE	2025
Lake	MARK S. WICKENS	2025
Lapeer	JUSTUS C. SCOTT	2025
Leelanau	MARIAN F. KROMKOWSKI	2025
Lenawee	CATHERINE ANN SALA	2025
Livingston	MIRIAM A. CAVANAUGH	2025
Luce/Mackinac	W. CLAYTON GRAHAM	2025
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2025
Manistee	THOMAS N. BRUNNER	2025
Marquette	CHERYL L. HILL	2025
Mason	JEFFREY C. NELLIS	2025
Mecosta/Osceola	TYLER O. THOMPSON	2025
Menominee	DANIEL E. HASS	2025
Midland	DORENE S. ALLEN	2025
Missaukee	MELISSA J. RANSOM	2025
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	BENJAMIN T. BOLSER	2025[1]
Montmorency	LORA E. GREENE	2025[2]
Muskegon	GREGORY C. PITTMAN	2025
Muskegon	BRENDA E. SPRADER	2023
Newaygo	MELISSA K. DYKMAN	2025
Oakland	JENNIFER S. CALLAGHAN	2023
Oakland	LINDA S. HALLMARK	2025
Oakland	DANIEL A. O'BRIEN	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SCOTT M. WILLIAMS	2023
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025
Otsego	MICHAEL K. COOPER	2025
Ottawa	MARK A. FEYEN	2025

[1] To May 1, 2021.

[2] From June 4, 2021.

County		Term Expires January 1 of
Presque Isle	ERIK J. STONE	2025
Roscommon	MARK JERNIGAN	2025
Saginaw	PATRICK J. McGRAW	2025
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2021
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

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Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	23
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	56
Emmet	Petoskey	57
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Suttons Bay	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
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AMENDED ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS

Entered January 5, 2021, effective immediately (File No. 2020-08)—REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-21 is adopted, effective immediately.

> [Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court adopts the following alternative

procedure for inmates who seek to file appeals with the Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1. An incarcerated individual who is acting *in propria persona* (*in pro per*) and who intends to file an application for leave to appeal in the Michigan Supreme Court or a claim of appeal or an application for leave in the Michigan Court of Appeals shall file a letter with the Supreme Court or Court of Appeals notifying it of that intent. The letter shall identify the trial court case number and, if applicable, the Court of Appeals case number that is the subject of the intended appeal, shall state that the incarcerated person is unable to complete and submit the necessary materials because of restrictions in place due to COVID-19, and shall be filed within the time for filing the application or claim of appeal under MCR 7.305(C)(2), MCR 7.204, or MCR 7.205. The letter will have the effect of tolling the filing deadline as of the date the letter was mailed from the correctional facility.

2. When the tolling period ends, an incarcerated person who submitted a timely notice letter to the Supreme Court or Court of Appeals will have the same number of days to file the claim of appeal or application that remained when the tolling period began. An incarcerated person who submitted a timely notice letter during the initial tolling period is not required to file a new notice during the extended period.

3. The tolling period established by this order shall expire on February 1~~January 4~~, 2021, unless it is extended by further order of the Court.

ADMINISTRATIVE ORDER
No. 2021-1

CREATION OF THE JUSTICE FOR ALL COMMISSION

Entered January 26, 2021, effective immediately (File No. 2020-32) —REPORTER.

In May 2019, the Court appointed a Justice For All Task Force to evaluate the civil justice system in Michigan and develop a strategic plan to ensure 100 percent access to justice. That plan was finalized in December 2020, and includes a provision that recommends the Michigan Supreme Court adopt an order creating an ongoing Justice For All Commission to continue and build on the work that has been done to date. Therefore, on order of the Court, the Michigan Justice For All Commission is created, effective immediately.

I. Purpose

The purpose of the Michigan Justice For All Commission is to expand access to and enhance the quality of the civil legal justice system in Michigan. The goal of the Commission is to achieve 100% access to Michigan's civil justice system. The Commission will promote, facilitate, and provide leadership to achieve this goal.

II. Duties

The Commission shall develop, coordinate, and implement initiatives to improve the civil legal justice

system. Toward this end, the Strategic Plan developed by the Justice For All Task Force will guide the initial work of the Commission. The Commission will continue identifying and assessing gaps, barriers, and strategies to further improve access to Michigan's civil justice system, especially for low- and moderate-income Michigan residents.

III. Commission Leadership

A. Executive Team — The leadership, direction, and administrative support for the Commission activities is provided collaboratively by the State Court Administrative Office, State Bar of Michigan, and the Michigan State Bar Foundation. The State Court Administrator, and the executive directors of the State Bar of Michigan and the Michigan State Bar Foundation, or their designees, constitute the Executive Team. Duties of the Executive team include:

1. Preparing meeting agendas

2. Providing data required for commission deliberations

3. Identifying and pursuing third party funding sources for commission initiatives

4. Accounting for the expenses of the commission

5. Preparing an annual report for the Supreme Court

B. Chair and Vice-Chair — A chair and vice-chair are appointed for two-year terms and may be reappointed.

1. Initial appointments — The first chair and vice-chair are appointed by the Supreme Court.

2. After the initial selection, the chair and vice-chair are appointed by the Supreme Court upon recommendation from the Executive Team.

3. Duties of Chair include:

a. Presiding at all meetings of the commission

b. Approving draft agenda for commission meetings

c. Serving as the official spokesperson of the commission

4. The vice-chair will perform the duties of the chair in the chair's absence.

IV. Commission Membership

A. Membership shall be comprised of the following 30 members:

1. A sitting justice of the Michigan Supreme Court

2. The State Court Administrator, or his or her designee

3. The executive director of the State Bar of Michigan, or his or her designee

4. The executive director of the Michigan State Bar Foundation, or his or her designee

5. A member of the Michigan House of Representatives, designated by the Speaker of the House

6. A member of the Michigan Senate, designated by the Senate Majority leader

7. Three members designated by the governor:

a. an executive branch representative

b. a representative of the Michigan Department of Health and Human Services

c. a representative of the Michigan State Housing Development Authority

8. The director of the Michigan Legal Help Program, or his or her designee

9. The director of the Michigan Indigent Defense Commission, or his or her designee

10. One member each, appointed by the Supreme Court, from the following bodies/stakeholder groups:

a. the State Bar of Michigan

b. the Michigan District Judges Association

c. the Michigan Judges Association

d. the Michigan Probate Judges Association

e. the tribal courts in Michigan

f. Prosecuting Attorneys Association of Michigan

g. the State Planning Body

h. Legal Services Association of Michigan

i. Michigan Roundtable for Diversity and Inclusion

j. Association of Black Judges

k. Court Administrators/Probate registers

l. Education community

m. Michigan libraries

n. Health care community

o. Self Help Centers

11. Four members appointed by the Supreme Court from nonprofit faith-based, business and professional, civic, and community organizations, and the public.

B. Appointments — The Executive Team will recommend appointment of the 19 at large positions of the commission. After initial appointments, the Executive Team will develop a process for appointment based on dedication to the purpose and goals of the Commission and to ensure diversity in membership.

C. Terms — With the exception of the State Bar of Michigan President appointment, members of the Commission shall be appointed for three year terms and shall be limited to three full terms. The State Bar of Michigan President term shall be one year. Terms commence January 1st of each calendar year. A stand-

ing member may be eligible for re-appointment. Initial terms may be less than three years to ensure that the terms are staggered, so that no more than one third of the members' terms expire in any given year.

Effective January 1, 2021, the following persons are appointed to the Justice For All Commission:

For terms ending December 31, 2023:

SBM Executive Director Janet Welch (or designee)

State Court Administrator Thomas Boyd (or designee)

Supreme Court Justice Brian K. Zahra

Michigan State Bar Foundation Executive Director Jennifer Bentley

Michigan Legal Help Executive Director Angela Tripp

Michigan Indigent Defense Commission Director Loren Khogali (or designee)

Hon. Timothy Kelly (on behalf of the Michigan District Judges Association)

Hon. Margaret Zuzich Bakker (on behalf of the Michigan Judges Association)

Hon. Mabel Mayfield (on behalf of the Michigan Probate Judges Association)

Hon. Allie Maldonado (on behalf of Michigan Tribal Courts)

For terms ending December 31, 2022:

Rep. TC Clements (designated by the Speaker of the House)

Sen. XXXXX (designated by the Senate Majority Leader) (To be determined)

Joshua Rivera (MDHHS representative) (designated by the Governor)

Clarence Stone (MSHDA representative) (designated by the Governor)

Alicia Moon (designated by the Governor)

Carol Siemon (on behalf of the Prosecuting Attorneys Association of Michigan)

Bonsitu Kitaba (on behalf of the State Planning Body)

Ashley Lowe (on behalf of Legal Services Association of Michigan)

Yusef Shakur (on behalf of the Michigan Roundtable for Diversity and Inclusion)

Hon. Cynthia Ward (on behalf of the Association of Black Judges)

For terms ending December 31, 2021:

SBM President Rob Buchanan (or designee)

Kevin Bowling (on behalf of Court Administrators/Probate Registers)

Michelle Williams (Michigan Department of Education, on behalf of the education community)

Samantha Ashby (on behalf of Michigan libraries)

Lynda Zeller (Michigan Health Care Endowment, on behalf of the health care community)

Deborah Hughes (on behalf of self-help centers)

Bianca McQueen (on behalf of the public)

Nicole Huddleston (on behalf of nonprofit local community organizations)

Elly Jordan (on behalf of nonprofit local community organizations)

Brittany Schultz (on behalf of the business community)

Justice Brian Zahra shall serve as chair, and Angela Tripp shall serve as vice-chair.

D. Vacancy — The appointing entity shall fill a vacancy among the commissioners to serve the remainder of the unexpired term. The Executive Team shall declare a vacancy exists if a commissioner resigns from his position or moves outside of Michigan or a commissioner does not attend two consecutive meetings, without being excused by the Executive Team because of a personal or professional emergency.

E. Ad Hoc Committee Participation — The Executive Team may invite individuals whose particular experience and perspective are needed to assist with the Commission's work, including participation in Work Groups.

V. Meetings, Committees and Work Groups

A. The Commission will establish operating procedures for conducting meetings. The procedures will be available to the public.

B. The Executive Team may establish and dissolve standing Committees and Work Groups to accomplish Commission goals.

VI. Staffing and Administration

A. The State Court Administrative Office will provide administrative support to the Commission.

B. If funding is received by the Commission, the Michigan State Bar Foundation may serve as fiscal agent for the funds.

VII. Reporting Requirement

The Commission will file an annual report with the Michigan Supreme Court about the Commission's activities and progress during the previous 12 months and its goals for the next 12 months.

AMENDED ADMINISTRATIVE ORDER No. 2020-17

PRIORITY TREATMENT AND NEW PROCEDURE FOR LANDLORD/TENANT CASES

Entered January 30, 2021, effective immediately (File No. 2020-08) —REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(10) [Unchanged.]

(11) A court shall discontinue prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19—issued by the Centers for Disease Control and Pre-

vention~~;~~ <u>and </u>published at 85 FR 55292<u>, and extended by order dated January 29, 2021</u>~~; and extended under the Consolidated Appropriations Act, 2021 (HR 133), Division N, §502~~—is in effect.

(12)-(13) [Unchanged.]

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to extend its previous order administratively suspending the operation of certain laws governing summary landlord-tenant proceedings. When the Court first suspended these laws in October 2020, I dissented because the order was premised solely on an order from the Centers for Disease Control and Prevention (CDC) that relied on dubious legal authority. Administrative Order No. 2020-17, 506 Mich lxxiv, lxxvii (October 22, 2020) (VIVIANO, J., dissenting), citing CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020). Legislation was subsequently enacted by Congress that specifically referenced and extended the CDC order through January 31, 2021. Consolidated Appropriations Act, 2021 (HR 133), Division N, § 502. When the Court extended this order in December 2020, I concurred because the order then "rest[ed] on a statute duly enacted by Congress and signed by the President . . . ." Amendment of Administrative Order No. 2020-17, 506 Mich xcviii, ciii (December 29, 2020) (VIVIANO, J., concurring). On January 29, 2021, the CDC issued an order extending its eviction moratorium through March 31, 2021. CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 8020 (February 3, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-01292021.pdf>. Congress, however, has not authorized such an extension. Because our order once again rests solely on the CDC order, I dissent for the reasons stated in my initial dissent.

AMENDED ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS, AND EXTENDING REQUEST FOR APPELLATE COUNSEL DEADLINE

Entered January 30, 2021, effective immediately (File No. 2020-08) —REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. And due to the prevalence of remote sentencing proceedings, some defendants face difficulty and delay in obtaining and submitting forms to request appellate counsel. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court adopts the following alternative

procedure for inmates who seek to file appeals with the Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1-2 [Unchanged.]

3. If the defendant is indigent, a request for the appointment of appellate counsel under MCR 6.425(F)(3) must be granted if it is received by the trial court or the Michigan Appellate Assigned Counsel System (MAACS) within 6 months after sentencing. See MCR 6.425(G)(1)(d). This provision applies to all cases in which sentencing took place between March 24, 2020 and the end of the tolling period.

~~3~~4. The tolling period established by this order shall expire on March~~February~~ 1, 2021, unless it is extended by further order of the Court.

AMENDED ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS

Entered February 26, 2021, effective immediately (File No. 2020-08) —REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. And due to the prevalence of remote sentencing proceedings, some defendants face difficulty and delay in obtaining and submitting forms to request appellate counsel. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court adopts the following alternative procedure for inmates who seek to file appeals with the

Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1-3 [Unchanged].

4. The tolling period established by this order shall expire on ~~March 1~~April 1, 2021, unless it is extended by further order of the Court.

AMENDED ADMINISTRATIVE ORDER No. 2020-17

PRIORITY TREATMENT AND NEW PROCEDURE FOR LANDLORD/TENANT CASES

Entered March 22, 2021, effective immediately (File No. 2020-08—REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 2020-17 — Priority Treatment and New Procedure for Landlord/Tenant Cases.

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14,

which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(9) [Unchanged.]

(10) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:

a. An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;

b. The defendant is eligible to receive rental assistance for all rent owed; and

c. The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.

If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings.

(10)-(13) [Renumbered (11)-(14) but otherwise unchanged.]

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

ZAHRA, J. (*dissenting*). In response to the backlog of landlord-tenant cases likely to be caused by the federal Coronavirus Aid, Relief, and Economic Security Act, 15 USC 116 *et seq*.—which imposed a moratorium on evictions from March 27, 2020, when the act was enacted, through July 25, 2020, for certain rental properties whose dwellings are supported by federal programs—and several executive orders imposing a moratorium on evictions for all renters issued by Governor Whitmer (e.g., Executive Order No. 2020-118), this Court on June 9, 2020, issued this administrative order setting forth procedures for courts to follow in actions filed under the summary proceedings act, MCL 600.5701 *et seq*. Further, noting that the Legislature approved 2020 SB 690 (now 2020 PA 123), which earmarked $50 million for direct payments to landlords for rent arrearages and $10 million to support legal services and administration to reduce the number of evictions, this administrative order required a one-week adjournment to allow litigants the opportunity to access any resources that might help defray the rent due or to enter into agreements to

resolve the dispute privately. This one-week adjournment was consistent with the one-week adjournment already provided for at the court's discretion under MCR 4.201(F)(4)(c), and arguably did not represent a new, unreasonable delay, even though it is a procedure that is not commonly exercised by the courts.

This administrative order has since been amended four times and extended three times. In amending this order today for a fifth time, this Court *requires* all actions for nonpayment of rent to be stayed for at least 30 days after a pretrial hearing is conducted if the tenant applies for COVID Emergency Rental Assistance (CERA) relief. The stay may be extended an additional 15 days if the tenant becomes eligible for such relief and is awaiting payment, and it may be extended further if any "delays attributable to the [landlord]" occur. I conclude it is an abuse of this Court's authority to exercise general superintending control over all state courts under Const 1963, art 6, § 4 to modify the statutory framework in which a landlord may obtain a judgment against a defaulting tenant. Preliminarily, it should not be lost on anyone that if landlords and tenants wish to delay summary proceedings in actions for nonpayment of rent pending CERA eligibility determinations and payment, they may do so on their own accord; there is no need for a Court mandate to accomplish this. Why must—and on what authority may—this Court strip litigants of their ability to resolve their disputes privately and force these delays in the process where none exist by statute? Indeed, there is no guarantee that every tenant who applies for CERA relief will obtain it. Yet by requiring the stay of all proceedings for at least 30 days, this Court shelters tenants, many of whom ultimately will not qualify for these funds, at the expense of *all* landlords, whose own financial struggles

appear to be lost on this Court. Moreover, why does this Court only extend the stay for delays caused by the landlord? Is it not conceivable a tenant may cause delays in the process to extend the life of the stay? Do delays caused by the tenant not warrant an immediate lift of the stay and a continuation of the proceedings?

This raw exercise of judicial power violates a fundamental tenet of our democracy: the separation of powers.[1] The Legislature, not the judiciary, possesses the exclusive power to make laws. "Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law."[2] "In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore the Legislature's product and still be true to our responsibilities that give our branch only the judicial power."[3] Because I would not abuse this Court's general superintending authority over all state courts to judicially modify the framework governing actions for nonpayment of rent, a framework enacted by this state's sole legislative body, I dissent from this Court's order.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to further administratively suspend the operation of certain laws governing summary landlord-tenant proceedings.[1] Today's amendments impose an

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[1] Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

[2] *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 161 (2004).

[3] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98 (2008) (quotation marks, citation, and brackets omitted).

[1] To the extent that this administrative order continues to rely on the eviction moratorium order issued by the Centers for Disease Control

automatic stay on all cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent if the tenant has applied for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The changes, although perhaps well-intentioned, upend the statutory scheme the Legislature created for landlord-tenant proceedings and deprive district court judges of discretion that they have been granted by the Legislature and this Court. I believe that changes to our state's laws should be made by the Legislature, not this Court, and that amendments to the court rules and administrative orders governing the procedural aspects of landlord-tenant proceedings should be made through our regular and public amendment process rather than by emergency orders.

As noted above, this amendment to Administrative Order No. 2020-17 provides for a stay in all cases in which a tenant has applied for the CERA program and notified the court of the application. The stay is supposedly subject to a number of conditions; it is "contingent upon": (1) an eligibility determination being made by the appropriate agency within 30 days of the pretrial hearing, (2) the tenant being eligible for rental assistance for all rent owed, and (3) the landlord receiving full payment within 45 days of the pretrial hearing. However, there is no mechanism for the district court to determine the tenant's eligibility;

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and Prevention (CDC), I continue to object for the reasons I have stated previously. Administrative Order No. 2020-17, 506 Mich lxxiv, lxxvii (October 22, 2020) (VIVIANO, J., dissenting) (questioning the constitutionality of the CDC's order and criticizing the Court's reliance on it as a basis to suspend the operation of certain laws governing summary landlord-tenant proceedings), citing CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020); Amendment of Administrative Order 2020-17, 507 Mich xcii, xciv (January 30, 2021) (VIVIANO, J., dissenting) (same), citing CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 8,020 (February 3, 2021).

rather, the eligibility determination is made by the Housing Assessment and Resource Agency. Thus, although the maximum duration of the stay absent delays attributable to the landlord will be 45 days, it appears as a practical matter that today's amendment will result in an automatic 30-day stay since the stay must be entered even before these determinations by an outside agency are made, and the district court will have no power over how long they take to be made.

The Legislature established a scheme for summary proceedings to recover possession of premises. MCL 600.5701 *et seq*. When a tenant fails to pay rent, a landlord may recover possession of the premises by summary proceedings if the tenant fails to move out or pay the rent due under the lease within seven days of being served with a written demand for possession for nonpayment of rent. MCL 600.5714(1)(a). This seven-day time frame between when notice is given and when summary proceedings can commence is shorter than other notice time frames that govern landlord-tenant relationships, such as the 30-day notice to quit required when a landlord wishes to evict a holdover tenant. MCL 554.134(1). There are also shorter time frames, such as the 24-hour notice required for tenants involved in illegal drug activity. MCL 554.134(4). Thus, the Legislature established different notice periods in landlord-tenant proceedings depending on why the landlord is seeking to recover possession. The automatic-stay requirement imposed by this Court does not respect these legislative choices. Landlords who wish to exercise their statutory right to recover

possession of their premises are now forced to wait until the stay is lifted if a tenant applies for the CERA program.[2]

Today's amendments to the administrative order further strip district court judges of their discretion to adjourn landlord-tenant proceedings, enter a default, or proceed immediately to trial. MCL 600.5732 states, in relevant part, "Pursuant to applicable court rules, a court having jurisdiction over summary proceedings *may* . . . order adjournments and continuances . . . ." (Emphasis added.) Under MCR 4.201, the district court "*may* adjourn" proceedings for up to seven days if a party fails to appear or up to 56 days if the tenant appears. MCR 4.201(F)(4)(c), (J)(1) (emphasis added). Use of the word "may" indicates that the district court has discretion to adjourn the proceedings. See *People v Grant*, 445 Mich 535, 542 (1994); *Mull v Equitable Life Assurance Society of the US*, 444 Mich 508, 519 (1994). The court also has discretion to enter a default if the tenant does not appear, MCR 4.201(F)(4)(a), or proceed to trial if the tenant appears, MCR 4.201(J)(1). The Court previously divested district court judges of their discretion to enter a default or proceed to trial at the

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[2] The Court's continued interference with the statutes and rules governing summary proceedings appears to be based on the assumption that landlords and tenants alike will enthusiastically embrace the CERA program because both parties will immediately benefit from the large influx of federal aid. However, as with most government programs, not every potential recipient is interested in accepting federal dollars with all the inevitable strings attached. See Parker, *Why Some Landlords Don't Want Any of the $50 Billion in Rent Assistance*, Wall Street Journal (March 19, 2021) <https://www.wsj.com/articles/why-some-landlords-dont-want-any-of-the-50-billion-in-rent-assistance-11616155203> [https://perma.cc/YA3X-DZZ9] (noting that Congress has appropriated $50 billion for rental assistance, "[b]ut thousands of building owners across the country are rejecting the government offer . . . [because] the aid often has too many strings attached").

initial court date, requiring that all landlord-tenant proceedings be adjourned for seven days, with a limited number of exceptions. Administrative Order No. 2020-17(8). Today's amendments go even further. Not only must district court judges adjourn all cases for seven days; they must also stay proceedings in all nonpayment of rent cases in which the tenant has applied for CERA.[3] I agree with Justice ZAHRA that this raises yet another significant question about today's order: where does this Court derive its authority to dictate in advance how a trial court must exercise its discretion in a particular case?[4]

We are now over a year into the COVID-19 pandemic, and the Court has made numerous changes to landlord-tenant proceedings without providing stakeholders any opportunity for public comment. We have the power to "establish, modify, amend and simplify the practice and procedure in all courts of this state" through our court rules. Const 1963, art 6, § 5. But we are not permitted to "establish, abrogate, or modify the substantive law." *McDougall v Schanz*, 461 Mich 15, 27 (1999). Additionally, to amend the Michigan Court Rules or other sets of rules, we have established procedures that generally require notice and administrative public hearings unless the Court "determines

[3] Under MCR 4.201(H)(2) and (J)(1), the trial court may order the defendant to pay rent into escrow if the trial is adjourned more than seven days. Although not mentioned in the administrative order, the conditional-stay provision would presumably prevent such an escrow order from being enforced—effectively divesting district court judges of another act of discretion provided for in the court rules.

[4] The Court's order claims the power to require adjournments and stays as part of our "general superintending control over all courts" established in Const 1963, art 6, § 4. But if the Court has the power to broadly stay an entire class of cases for at least 30 days, what is the extent of this power? Does the Court have the power to indefinitely stay all landlord-tenant cases?

that there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice." MCR 1.201(D). Rather than continue to adopt emergency orders, changes to our landlord-tenant laws should be made by the Legislature and changes to the related court procedures should be made utilizing our normal, transparent amendment processes.

To the extent the Court today is attempting to facilitate voluntary participation by landlords and tenants in the CERA program, our current statutes and court rules already allow them to do so. In cases in which an adjournment is necessary to provide additional time to pursue rental assistance, the parties can request an adjournment and the district court has discretion to grant such requests in appropriate cases. I do not believe that we should circumvent our laws and court rule amendment processes in order to coerce landlords to participate in the program. In my opinion, district court judges are in the best position to decide, on a case-by-case basis, when adjournments in landlord-tenant proceedings are necessary or appropriate.

* * *

In my view, we should return our trial courts to regular order and stop micromanaging them to coerce participation in governmental programs and directives that are of questionable constitutional validity.

AMENDED ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS

Entered March 29, 2021, effective immediately (File No. 2020-08)—REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-21 is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. And due to the prevalence of remote sentencing proceedings, some defendants face difficulty and delay in obtaining and submitting forms to request appellate counsel. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme

Court's general superintending control over all state courts, the Court adopts the following alternative procedure for inmates who seek to file appeals with the Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1-3 [Unchanged.]

4. The tolling period established by this order shall expire on ~~April 1~~May 3, 2021, unless it is extended by further order of the Court.

AMENDED ADMINISTRATIVE ORDER No. 2020-17

PRIORITY TREATMENT AND NEW PROCEDURE FOR LANDLORD/TENANT CASES

Entered April 9, 2021, effective immediately (File No. 2020-08)—REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 2020-17 — Priority Treatment and New Procedure for Landlord/Tenant Cases.

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may

also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(11) [Unchanged.]

(12) A court shall discontinue prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evic-

tions to Prevent the Further Spread of COVID-19—issued by the Centers for Disease Control and Prevention and published at 85 FR 55292, and extended by order dated March 28~~January 29~~, 2021—is in effect.

(13)-(14) [Unchanged.]

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to quietly extend our previous order administratively suspending our state's laws governing landlord-tenant proceedings. The Court has no authority to dispense with duly enacted laws by administrative veto. That we are doing so, at least in part, to enforce a constitutionally suspect eviction moratorium order issued by the Centers for Disease Control and Prevention (CDC) only makes matters worse.[1] And that we continue to issue such directives—this is our seventh order on this topic in the last 12 months—without utilizing our normal and transparent court rule amendment process only serves to further undermine the public's confidence in the institutions of our government.

I have discussed my objections to the Court's staggering assertion of power to suspend duly enacted laws at some length in my prior dissenting statements. I incorporate those objections here for the sake of brev-

[1] See CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020); CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 16,731 (March 31, 2021).

ity.[2] Suffice it to say that I continue to find it alarming that a Court whose job is to interpret our state's laws and apply them faithfully to the cases that come before it can so easily switch gears and become a Court that dispenses with laws on the basis of administrative convenience. That power is not available (or should not be) to the judiciary in a system of separated powers.

One would think that recent legal developments might give the Court pause. Several lower federal courts, including the United States Court of Appeals for the Sixth Circuit, have now weighed in on the constitutionality of the CDC's eviction moratorium. A federal eviction moratorium has now been in effect, in one form or another, for most of the time since March 27, 2020—meaning that, during that time, landlords have not been able to recover possession of their property for nonpayment of rent by tenants who have met the various moratorium requirements.[3] A

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[2] See Administrative Order No. 2020-17, 506 Mich lxxiv, lxxvii (October 22, 2020) (VIVIANO, J., dissenting); Administrative Order No. 2020-17, 507 Mich xciii, xcv (January 30, 2021) (VIVIANO, J., dissenting); Administrative Order No. 2020-17, 507 Mich xcix, ciii (March 22, 2021) (VIVIANO, J., dissenting).

[3] Less than half of the period of the moratorium has been authorized by Congress. See Coronavirus Aid, Relief, and Economic Security Act, 15 USC 9058(b) (establishing a 120-day moratorium from March 27 to July 24, 2020); Consolidated Appropriations Act, 2021, PL 116-260, Title V, § 502 (extending the CDC's unilateral moratorium order from December 31, 2020 to January 31, 2021).

As I noted in a previous concurring statement, when the eviction moratorium was authorized by Congress, I believed our administrative order was justified and that any challenges to it could be resolved in the normal course of litigation. Administrative Order No. 2020-17, 506 Mich xcviii, cii (December 29, 2020) (VIVIANO, J., concurring). It is one thing to defer in this manner to a law duly enacted by the Congress and signed by the President. However, it is quite another to continue blind adherence to an administrative agency's directive that (1) on its face, raises serious questions about its constitutional validity; (2) has been subject to

number of federal district court judges have recently held that the CDC's eviction moratorium is unconstitutional on various grounds.[4] The first federal circuit court to opine on the merits of the matter has rejected the CDC's defenses of the order, recognizing that the statute does not appear to give such sweeping power and that, if it did, the statute would be vulnerable on separation-of-powers grounds. See *Tiger Lily, LLC v US Dep't of Housing & Urban Dev*, order of the United States Court of Appeals for the Sixth Circuit, entered March 29, 2021 (Case No. 21-5256), p 7 (denying the government's motion for a stay pending appeal of the

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numerous court challenges; and (3) has been ruled unconstitutional by numerous courts, including a well-reasoned finding by a federal appellate court that the government is unlikely to succeed on the merits of its appeal because of these constitutional infirmities.

[4] See *Tiger Lily, LLC v US Dep't of Housing & Urban Dev*, 525 F Supp 3d 850, 864 (WD Tenn, 2021) (concluding that the CDC's eviction moratorium "exceeds the statutory authority of the Public Health Act, 42 USC § 264" and is "unenforceable"); *Skyworks, LTD v Ctrs for Disease Control & Prevention*, opinion and order of the United States District Court for the Northern District of Ohio, issued March 10, 2021 (Case No. 5:20-cv-2407) (determining that the CDC's orders establishing and extending the eviction moratorium "exceed the agency's statutory authority provided in Section 361 of the Public Health Service Act, 42 USC § 264(a), and the regulation at 42 CFR § 70.2 promulgated pursuant to the statute, and are, therefore, invalid"); *Terkel v Ctrs for Disease Control & Prevention*, 521 F Supp 3d 662, 676 (ED Tex, 2021) (determining that the CDC's eviction moratorium "exceeds the power granted to the federal government to 'regulate Commerce . . . among the several States' and to 'make all Laws which shall be necessary and proper for carrying into Execution' that power" and holding that it is "unlawful as 'contrary to constitutional . . . power' "), quoting US Const, art I, § 8, and 5 USC 706(2)(B). But see *Chambless Enterprises, LLC v Redfield*, 508 F Supp 3d 101 (WD La, 2020) (denying the landlord-plaintiffs' motion for a preliminary injunction after finding that the plaintiffs had not satisfied any of the four prerequisites for a preliminary injunction, including substantial likelihood of success on the merits); *Brown v Azar*, 497 F Supp 3d 1270 (ND Ga, 2020) (same).

district court's declaratory judgment that the CDC's eviction moratorium is unenforceable on the ground that "the government is unlikely to succeed on the merits"). As the court noted, the CDC's interpretation of its statutory authority could be used to justify "any number of regulatory actions . . . ." *Id*. at 6.

Unfazed by these federal court rulings, our Court presses forward with its administrative suspension of statutory law. And it does so outside the normal procedures for promulgating rules, thus shielding the order from any public input. See Administrative Order No. 2020-17, 507 Mich xcix, ciii (March 22, 2021) (VIVIANO, J., dissenting). At an earlier stage of the COVID-19 pandemic, I wondered whether the rule of law would itself become yet another casualty of this dreadful disease. See *Dep't of Health & Human Servs v Manke*, 505 Mich 1110 (2020) (VIVIANO, J., concurring). Some courts have stood firm. See *South Bay United Pentecostal Church v Newsom*, 592 US ___, ___; 141 S Ct 716, 718 (2021) (statement of Gorsuch, J.) ("Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution."). Unfortunately, this Court continues to choose a different path.

For these reasons, I dissent.

ADMINISTRATIVE ORDER
No. 2021-2

REMOTE ONLINE FORMAT FOR JULY 2021 MICHIGAN BAR EXAMINATION

Entered April 21, 2021, effective immediately (File No. 2020-08)—REPORTER.

In recognition of the continuing COVID-19 pandemic, in light of current and anticipated pandemic-related restrictions, and in consultation with the Board of Law Examiners (Board), the Court orders, pursuant to the Court's constitutional and statutory authority to supervise and regulate the practice of law, 1963 Const, art 6, § 5, and MCL 600.904, that the July 2021 Michigan bar examination be conducted online. The examination will be administered on July 27 and 28, 2021, and will follow the traditional format, consisting of an essay portion and the full 200 question Multistate Bar Examination (MBE).

The Board will inform applicants of the specific instructions for completing the online examination no later than July 1, 2021. Any applicant receiving accommodations under the Americans with Disabilities Act that would preclude remote testing will be allowed to test in person at a location to be determined, assuming that federal and state restrictions permit such examination. Any applicant who did not register to use a

laptop to complete the examination must contact the Board if the applicant is unable to use a computer to do so.

Applicants who complete the test in person will be required to adhere to federal and state health recommendations and requirements. Such requirements will, at a minimum, likely require the applicant to answer health-related screening questions, undergo a temperature check, use personal protective equipment, and comply with staggered test times to ensure social distancing mandates.

For applicants who do not wish to test in July 2021, applications to sit for the July 2021 bar examination will automatically be transferred to the February 2022 bar examination. In addition, applicants who wish to transfer their application to the next available examination should notify the Board of that decision no later than July 1, 2021, by email at BLE-Info@courts.mi.gov. Transfer fees will not be charged. Applicants who wish to withdraw entirely from the bar admission process and notify the Board of that withdrawal by email, no later than July 1, 2021, will have their examination fees refunded by the Board and their character and fitness fees refunded by the State Bar of Michigan.

Applicants have the affirmative obligation to frequently check the Board's website, where updates, instructions, and other vital information will be provided.

RESCINDED ADMINISTRATIVE ORDER No. 1997-9 ADOPTED ADMINISTRATIVE ORDER No. 2021-3

RESCISSION OF ADMINISTRATIVE ORDER NO. 1997-9 AND ADDITION OF ADMINISTRATIVE ORDER NO. 2021-3

Entered April 27, 2021, effective immediately (File No. 2020-25)—REPORTER.

Administrative Order No. 2021-3 — Allocation of Funds from Lawyer Trust Account Program.

On order of the Court, effective immediately, Administrative Order No. 1997-9 is rescinded and replaced with Administrative Order No. 2021-3 to provide that funds to be distributed by the Board of Trustees of the Michigan State Bar Foundation shall be disbursed as follows:

1. Seventy percent of the net proceeds of the Lawyer Trust Account Program to support the delivery of civil legal services to the poor;

2. Fifteen percent of the net proceeds of the Lawyer Trust Account Program to support programs to promote improvements in the administration of justice;

3. Ten percent of the net proceeds of the Lawyer Trust Account Program to support increased access to justice, including matters relating to gender, racial, and ethnic equality. In disbursing the funds, the Bar

Foundation shall consider and prioritize recommendations from the State Court Administrator; and

4. Five percent of the net proceeds not to exceed a maximum of $50,000 of the Lawyer Trust Account Program to support the activities of the Michigan Supreme Court Historical Society plus an amount computed annually by the State Court Administrative Office to equal the cumulative, compounded increase to date in the Consumer Price Index for All Urban Consumers since 2022. Any funds in excess of the maximum amount shall be divided evenly among programming described in paragraph 1 through 3.

Staff Comment: The administrative order replaces the current administrative order regarding distribution of funds from the Lawyer Trust Account Program. The distribution remains largely the same as it is now for access to justice programming: 70 percent to support delivery of civil legal services to the poor, 15 percent to promote improvements in the administration of justice, and 10 percent to support increased access to justice (including racial, ethnic, and gender equality) prioritized by the State Court Administrator. It also continues the distribution of 5 percent for support of the activities of the Michigan Supreme Court Historical Society up to a cap of $50,000, along with an inflation increase; any remainder would be split among the remaining recipients.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

AMENDED ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS

Entered May 3, 2021, effective immediately (File No. 2020-08)—REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-21 is adopted, effective immediately.

> [Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. And due to the prevalence of remote sentencing proceedings, some defendants face difficulty and delay in obtaining and submitting forms to request appellate counsel. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme

Court's general superintending control over all state courts, the Court adopts the following alternative procedure for inmates who seek to file appeals with the Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1-3 [Unchanged.]

4. The tolling period established by this order shall expire on June 1~~May 3~~, 2021, unless it is extended by further order of the Court.

AMENDED ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS, AND EXTENDING REQUEST FOR APPELLATE COUNSEL DEADLINE

Entered June 9, 2021, effective immediately (File No. 2020-08)—REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. And due to the prevalence of remote sentencing proceedings, some defendants face difficulty and delay in obtaining and submitting forms to request appellate counsel. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court adopts the following alternative procedure for inmates who seek to file appeals with the

Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1.-2. [Unchanged.]

3. If the defendant is indigent, a request for the appointment of appellate counsel under MCR 6.425(F)(3) must be granted if it is received by the trial court or the Michigan Appellate Assigned Counsel System (MAACS) within 6 months after sentencing. See MCR 6.425(G)(1)(d). This provision applies to all cases in which sentencing took place between March 24, 2020 and until further order of the Court~~the end of the tolling period~~.

4. The tolling period established by this order shall expire on June 15~~May 3~~, 2021, unless it is extended by further order of the Court, and is retroactive to June 1, 2021.

AMENDED ADMINISTRATIVE ORDER No. 2019-4

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2019-4

Entered June 30, 2021, effective immediately (File No. 2017-28)—REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 2019-4 — Electronic Filing in the 3rd, 6th, 13th, 16th, and 20th Circuit Courts.

On order of the Court, the 3rd, 6th, 13th, 16th, and 20th Circuit Courts are authorized to continue their e-Filing programs in accordance with this order while the State Court Administrative Office develops and implements a statewide e-Filing system (known as MiFILE). This order rescinds and replaces Michigan Supreme Court Administrative Orders 2007-3 (Oakland County), 2010-4 (the 13th Judicial Circuit), 2010-6 (the 16th Judicial Circuit), 2011-1 (the 3rd Circuit Court), and 2011-4 (Ottawa County).

(1)-(3) [Unchanged.]

(4) Personal Identifying Information

(a)-(d) [Unchanged.]

(e) These rules regarding personal information will remain in effect until they are superseded by amendments of MCR 1.109, MCR 8.119, and Administrative

Order 1999-4. Those amendments, adopted by the Court on May 22, 2019, are effective on January 1, 2022~~July 1, 2021~~.

AMENDED ADMINISTRATIVE ORDER No. 1999-4

ESTABLISHMENT OF MICHIGAN TRIAL COURT RECORDS MANAGEMENT STANDARDS

Entered June 30, 2021, effective immediately (File Nos. 2017-28 and 2020-26)—REPORTER.

On order of the Court, the effective date of the May 22, 2019 and June 9, 2021 orders amending Administrative Order No. 1999-4 (Establishment of Michigan Trial Court Records Management Standards) is extended from July 1, 2021 to January 1, 2022.

AMENDED ADMINISTRATIVE ORDER No. 2020-17

CONTINUATION OF ALTERNATIVE PROCEDURES FOR LANDLORD/TENANT CASES

Entered July 2, 2021, effective immediately (File No. 2020-08)—REPORTER.

On order of the Court, Administrative Order No. 2020-17 is hereby amended and replaced with the following new language, effective immediately.

The number of new COVID-19 cases in Michigan has dropped dramatically in recent weeks and many people believe that our state is finally at the end of the pandemic. Still, the court system will long be dealing with the effects brought about by the greatest health crisis in our generation. One of those effects is a prolonged period of housing insecurity experienced by those most affected by the pandemic's nearly instantaneous and extensive job reductions — the 30 to 40 million people nationally who rent their housing.

Federal response to this problem has taken two forms: eviction moratoria and direct state aid. Several eviction moratoria have been imposed, both by Congress (Pub L. 116-136) and by the CDC (published at 85 FR 55292 and extended by Order dated March 28, 2021), prohibiting evictions for tenants in certain types of government-supported housing or who meet certain income restrictions. The most recently-extended CDC

order is slated to expire July 31, 2021 unless extended further. In addition, challenges to these CDC orders have been working their way through the courts, with conflicting opinions as a result.

However, the second type of federal response continues to be relevant regardless of the status of the CDC order—direct aid to states to provide for rental assistance programs. In 2021 PA 2, the Michigan Legislature appropriated $220 million (of the total of $600 million in federal money designated for Michigan) to provide rental assistance to tenants and landlords. Section 301(2) states that "[t]he department of labor and economic opportunity shall collaborate with the department of health and human services, the judiciary, local community action agencies, local nonprofit agencies, and legal aid organizations to create a rental and utility assistance program." This Court has done so in previous iterations of Administrative Order No. 2020-17 by working with those agencies to establish a procedure that ensures landlords and tenants are able to benefit from those dollars. The need for that programming continues, even assuming the health risks associated with the typical manner of processing eviction proceedings has eased.

In addition, the mandate for courts to continue to use remote technology to the greatest extent possible is as fully in place today as it was a year ago. We anticipate this fall will be the appropriate time to consider what changes in procedure, adopted with as much speed and thought as possible in the midst of a pandemic, should be retained or changed before becoming permanent practices in our state courts. This effort will be based on input from state court stakeholders, but early data shows that expanded use of technology has improved rates of participation and been a boon to

issues related to access to justice. We do not intend to squander the gains hard-won when all judges, court staff, attorneys, and individuals were forced to change their practices with little advance notice and training and in doing so, created a footprint for a new way to work that serves the needs of court users in novel and innovative ways.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases following the procedures outlined in this order. Courts are expected to proceed with guidelines referenced in Administrative Order No. 2020-14 (Return to Full Capacity).

(A) All local administrative orders requiring a written answer pursuant to MCL 600.5735(4) are temporarily suspended.[1] Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

(B) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

(1) Defendant has the right to counsel. MCR 4.201(F)(2).

(2) The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry

[1] The local administrative orders include: 1st District Court (Monroe County); 2A District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95B District Court (Dickinson and Iron Counties).

Agency (CEA), Housing Assessment and Resource Agency (HARA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

(3) Defendants DO NOT need a judgment to receive assistance from MDHHS, the HARA, or the local CEA. The Summons and Complaint from the court case are sufficient for MDHHS.

(4) The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

(5) The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(C) The pretrial required under subsection (B) may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer), or a CDRP mediator.

(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. Administrative Order No. 2020-6 requires that the court scheduling a remote hearing must “verify that all participants are able to proceed in this manner.” Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing. In addition, the summons must be accompanied by any written information about the availability of counsel

and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(E) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing in subsection (B) is conducted. Nothing in this order limits the statutory authority of a judge to adjourn for a longer period. MCL 600.5732. Any party who does not appear at the hearing scheduled for the adjourned date will be defaulted. Cases need not be adjourned for seven days if: the plaintiff dismisses the complaint, with or without prejudice, and without any conditions, if defendant was personally served under MCR 2.105(A) and fails to appear, or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing.

(F) The court may require remote participation in the second, and any subsequent, proceedings, and the

court must verify that participants are able to proceed in that manner under Administrative Order No. 2020-6.

(G) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:

(1) An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;

(2) The defendant is eligible to receive rental assistance for all rent owed; and

(3) The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.

If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings. Nothing in this order limits the statutory authority of a judge to adjourn a Summary Proceedings case. MCL 600.5732.

(H) In cases filed before this administrative order was amended to include procedure related to the CERA program (i.e., before March 22, 2021), if a party notifies the court that it has applied for CERA at any point prior to issuance of a writ, the court shall stay the proceeding as provided under subsection (G) of this order.

(I) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO

forms) within the statutory period (MCL 600.5744) or after the expiration of the CDC order, whichever date is later. MCL 600.5744(5), which provides a 10 day minimum statutory period to pay or move, is tolled until expiration of the CDC order. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence on the first day after the expiration of the CDC order for those cases.

This order is effective immediately until further order of the Court.

ZAHRA, J. (*dissenting*). I dissent from this Court's amended order that extends the mandatory stay of all actions for nonpayment of rent if a tenant applies for COVID Emergency Rental Assistance relief. For the reasons stated in my prior dissenting statement, I disagree that this Court's authority to exercise general superintending control over all state courts under Const 1963, art 6, § 4 permits it to modify the statutory framework set forth in the summary proceedings act, MCL 600.5701 *et seq*., in which a landlord may obtain a judgment against a defaulting tenant. See Amended Administrative Order No. 2020-17, 507 Mich xcix, ci (March 22, 2021) (ZAHRA, J., dissenting). That this Court extends these provisions despite the impending expiration of the eviction moratorium order issued by the Centers for Disease Control and Prevention, which itself was grounded on dubious constitutional authority, exacerbates this Court's abuse of authority and the separation-of-powers violation apparent in taking such action. While the majority no doubt has good intentions in extending this mandatory stay order, I would not further encroach on the Legislature's exclusive

authority to enact laws that modify the statutory framework governing actions for nonpayment of rent. This is particularly true where the parties are perfectly capable of resolving their disputes without the need for mandatory judicial intervention. See *id*. at cii ("Why must—and on what authority may—this Court strip litigants of their ability to resolve their disputes privately and force these delays in the process where none exist by statute?"). Because this Court continues to do so, I dissent.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to amend our previous order administratively suspending our state's laws governing landlord-tenant proceedings.[1] Today's amendments take some steps in the right direction, such as removing the prioritization of landlord-tenant cases. However, I would return all landlord-tenant cases to the procedures established by our statutes and court rules. Today's order continues to impose stay and adjournment requirements on many landlord-tenant cases. In doing so, the order continues to upend the statutory scheme that the Legislature created for summary landlord-tenant proceedings and deprives district court judges of discretion that they have been granted by the Legislature and this Court. As I have indicated previously, I believe that changes

[1] To the extent that this administrative order continues to rely on the eviction moratorium order issued by the Centers for Disease Control and Prevention (CDC), I continue to object for the reasons I have stated previously. Amendment of Administrative Order No. 2020-17, 506 Mich lxxiv, lxxvii (October 22, 2020) (VIVIANO, J., dissenting) (questioning the constitutionality of the CDC's order and criticizing the Court's reliance on it as a basis to suspend the operation of certain laws governing summary landlord-tenant proceedings); Amendment of Administrative Order No. 2020-17, 507 Mich xcii, xciv (January 30, 2021) (VIVIANO, J., dissenting) (same); Amendment of Administrative Order No. 2020-17, 507 Mich xcix, ciii (March 22, 2021) (VIVIANO, J., dissenting); Amendment of Administrative Order No. 2020-17, 507 Mich cxi, cxiii (April 9, 2021) (VIVIANO, J., dissenting).

to our state's laws should be made by the Legislature, not this Court, and that amendments to the court rules and administrative orders governing the procedural aspects of landlord/tenant proceedings should be made through our regular and public amendment process rather than by emergency orders.[2] For these reasons, I dissent.

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[2] Amendment of Administrative Order No. 2020-17, 507 Mich xcix, ciii (March 22, 2021) (VIVIANO, J., dissenting).

MICHIGAN RULE CHANGES

Adopted January 20, 2021, effective May 1, 2021 (File No. 2002-37) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following addition of Rule 2.226 of the Michigan Court Rules is adopted, effective May 1, 2021.

RULE 2.226. CHANGE OF VENUE; TRANSFER OF JURISDICTION; ORDERS.

(A) The court ordering a change of venue or transfer of jurisdiction shall enter all necessary orders pertaining to the certification and transfer of the action to the court to which the action is transferred on a form approved by the State Court Administrative Office.

(B) If a change of venue or transfer of jurisdiction order is not prepared as required under subrule (A), and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the State Court Administrative Office and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order.

(C) If a transferring court receives a refusal to accept a transferred case under subrule (B), the transferring court shall prepare a proper order in accordance with subrule (A) and retransfer the case within seven business days.

Staff comment: The addition of MCR 2.226 would clarify the process for change of venue and transfer orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted January 20, 2021, effective May 1, 2021 (File No. 2019-36) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 16 and addition of Rule 20 of the Rules Concerning the State Bar of Michigan are adopted, effective May 1, 2021.

[Rule 20 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 16. UNAUTHORIZED PRACTICE OF THE LAW.

<u>Sec. 1.</u> The State Bar of Michigan is hereby authorized and empowered to investigate matters pertaining to the unauthorized practice of law and, with the authority of its Board of Commissioners, to file and prosecute actions and proceedings with regard to such matters.

<u>Sec. 2. The State Bar of Michigan has the power to issue subpoenas to require the appearance of a witness</u>

or the production of documents or other tangible things concerning its investigation of an unauthorized practice of law complaint. Subpoenas may be prepared by the investigative staff of the State Bar of Michigan and served after approval by the Chairperson of the Standing Committee on Unauthorized Practice of Law. The subpoena may be served by certified mail, return receipt requested, and delivery restricted to the addressee or via hand delivery. The subpoena may also be served by e-mail, if the person to be served agrees.

A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or produce documents or tangible things after being ordered to do so is in contempt. The State Bar of Michigan may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

A subpoena issued pursuant to this rule shall be sufficient authorization for seeking the production of documents or other tangible things outside the State of Michigan. If the deponent or the person possessing the subpoenaed information will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(C) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

Sec. 3. A complainant or witness is absolutely immune from suit for statements and communications transmitted solely to State Bar staff and their agents, the Standing Committee on the Unauthorized Practice of Law or the State Bar of Michigan Board of Commissioners or given in the course of an investigation of an unauthorized practice of law complaint. State Bar staff and their agents, the Standing Committee on the Unauthorized Practice of Law, and the State Bar of

Michigan Board of Commissioners are absolutely immune from suit for conduct arising out of the performance of their duties concerning unauthorized practice of law complaints.

Sec. 4. Notwithstanding the confidentiality provisions of SBR 19, the State Bar of Michigan may disclose information concerning an unauthorized practice of law complaint and information obtained during the investigation of an unauthorized practice of law complaint to persons and entities authorized and empowered to investigate and prosecute unauthorized practice of law complaints in other states.

RULE 20. CLIENT PROTECTION FUND.

Sec. 1. The State Bar of Michigan, through its Board of Commissioners, is authorized and empowered to administer and investigate Client Protection Fund claims and to supervise the Client Protection Fund, which shall include, but not be limited to, receiving, holding, managing, disbursing monies from, and recouping monies paid by the Client Protection Fund.

The Client Protection Fund is a program established to reimburse clients who have been victimized by lawyers who violate the profession's ethical standards and misappropriate funds entrusted to them.

Sec 2. All members are bound by the Client Protection Fund Rules.

Sec. 3. The State Bar of Michigan has the power to issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning its administration and investigation of Client Protection Fund claims. The subpoena may be served by certified mail, return receipt requested, and delivery restricted to the addressee or via hand deliv-

ery. The subpoena may also be served by e-mail or other electronic form, if the person to be served agrees.

A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or produce documents or tangible things, after being ordered to do so is in contempt. The State Bar of Michigan may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

A subpoena issued pursuant to this rule shall be sufficient authorization for seeking the production of documents or other tangible things outside the State of Michigan. If the deponent or the person possessing the subpoenaed information will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(C) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

Sec. 4. A complainant or witness is absolutely immune from suit for statements and communications transmitted solely to State Bar staff and their agents, the Standing Committee on the Client Protection Fund or the State Bar of Michigan Board of Commissioners or given in the course of an investigation of a Client Protection Fund claim. State Bar staff and their agents, the Standing Committee on the Client Protection Fund, and the State Bar of Michigan Board of Commissioners are absolutely immune from suit for conduct arising out of the performance of their duties and responsibilities regarding the Client Protection Fund.

Sec. 5. Notwithstanding the confidentiality provisions of SBR 19, the State Bar of Michigan may disclose information concerning Client Protection Fund claims and information obtained during the

investigation of Client Protection Fund claims to persons and entities authorized and empowered to investigate and administer Client Protection Fund claims in other states.

Staff Comment: The amendment of Rule 16 and addition of Rule 20 of the Rules Concerning the State Bar of Michigan clarify the process of investigation of unauthorized practice of law claims, and codifies procedures for the Client Protection Fund. These amendments were requested by the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted January 20, 2021, effective May 1, 2021 (File No. 2019-41) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 4.201 of the Michigan Court Rules is adopted, effective May 1, 2021.

> [Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(B) [Unchanged.]

(C) Summons.

(1) [Unchanged.]

<u>(2) The summons must state whether or not the action is brought in the county or district in which the premises or any part of the premises is situated.</u>

(3~~2~~) The summons must also include the following advice to the defendant:

(a)-(d) [Unchanged.]

(e) The defendant has a right to have the case tried in the proper county, district, or court. The case will be transferred to the proper county, district, or court if the defendant moves the court for such transfer.

(D)-(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1)-(2) [Unchanged.]

(3) Right to Proper Venue. If the plaintiff has indicated on the summons that the premises or any part of the premises is situated in a different county or district, the court must inform the defendant, at the hearing scheduled pursuant to section (C)(1) of this rule, of the right to motion the court to transfer the case to the county or district where the premises or any part of the premises is situated and that such a motion will be granted.

(a) The court may order change of venue on its own motion.

(b) A motion to change venue pursuant to this subrule and MCL 600.5706(4) may be made in writing before the date listed on the summons, pursuant to section (C)(1) of this rule, or orally in response to the court's advisement in this subrule.

(c) Transfer of the case shall be pursuant to MCR 2.223.

(3)-(5) [Renumbered (4)-(6) but otherwise unchanged.]

(G)-(O) [Unchanged.]

Staff comment: The amendment of MCR 4.201 requires disclosure of the right to object to venue in actions brought under the Summary Proceedings Act for landlord/tenant proceedings in district court, consistent with MCL 600.5706.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

VIVIANO, J., opposes adoption of this amendment.

Adopted January 20, 2021, effective May 1, 2021 (File No. 2019-47) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.804, 5.140, and 5.404 and addition of MCR 3.811 of the Michigan Court Rules are adopted, effective May 1, 2021.

[Rule 3.811 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.804. CONSENT AND RELEASE.

(A) [Unchanged.]

(B) Hearing on Consent to Adopt.

(1)-(2) [Unchanged.]

(3) Use of Videoconferencing Technology. Videoconferencing technology may not be used~~Except~~ for a consent hearing under this subrule involving an Indian child pursuant to MCL 712B.13~~, the court may allow the use of videoconferencing technology under this subchapter in accordance with MCR 2.407~~.

(C)-(D) [Unchanged.]

RULE 3.811. USE OF VIDEOCONFERENCING TECHNOLOGY.

Except as otherwise provided, the court may allow the use of videoconferencing technology for proceedings under this subchapter in accordance with MCR 2.407.

RULE 5.140. USE OF VIDEOCONFERENCING TECHNOLOGY.

(A)-(C) [Unchanged.]

~~(D) The court may not use videoconferencing technology for a consent hearing required to be held pursuant to the Michigan Indian Family Preservation Act and MCR 5.404(B).~~

(~~E~~D) [Relettered but otherwise unchanged.]

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) [Unchanged.]

(B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was inter-

preted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid. The court may ~~not~~ use videoconferencing technology for the guardianship consent hearing required to be held under MCL 712B.13(1)~~the Michigan Indian Family Preservation Act~~ and this subrule.

(2)-(3) [Unchanged.]

(C)-(H) [Unchanged.]

Staff comment: The amendments of MCR 3.804, 5.140, and 5.404 and addition of MCR 3.811 allow greater use of videoconferencing equipment in cases involving Indian children.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted January 20, 2021, effective May 1, 2021 (File No. 2020-04) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 4 of the Rules for the Board of Law Examiners is adopted, effective May 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 4. POST-EXAMINATION PROCEDURES.

(A)-(C) [Unchanged.]

(D) A passing bar examination score is valid for three years.

Staff comment: The amendment of BLE Rule 4 explicitly states that a passing bar exam score is valid for three years, which is consistent with the character and fitness clearance expiration and the BLE's longstanding policy.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted January 20, 2021, effective May 1, 2021 (File No. 2020-11) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.108 of the Michigan Court Rules is adopted, effective May 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.108. TIME.

(A)-(B) [Unchanged.]

(C) Effect of Particular Motions and Amendments. When a motion or an amended pleading is filed, the time for pleading set in subrule (A) is altered as follows, unless a different time is set by the court:

(1) If a motion under <u>MCR 2.115(A) or </u>MCR 2.116 made before filing a responsive pleading is denied, the moving party must serve and file a responsive pleading within 21 days after notice of the denial. However, if the moving party, within 21 days, files an application for leave to appeal from the order, the time is extended until 21 days after the denial of the application unless the appellate court orders otherwise.

(2)-(4) [Unchanged.]

(D)-(F) [Unchanged.]

Staff comment: The amendment of MCR 2.108 provides a timeframe for a responsive pleading when a motion for more definite statement is denied.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted January 20, 2021, effective immediately (File No. 2020-14) —REPORTER.

On order of the Court, notice and an opportunity for comment having been provided, the June 10, 2020 amendment of Rule 4.202 of the Michigan Court Rules is retained.

Adopted March 10, 2021, effective immediately (File No. 2021-03)— REPORTER.

On order of the Court, Local Court Rule 3.206 for the Allegan County Circuit Court is rescinded, effective immediately.

Adopted March 10, 2021, effective March 24, 2021 (File No. 2021-09) —REPORTER.

On order of the Court, this is to advise that the amendments of Rules 3.903 and 3.925 of the Michigan Court Rules are adopted, effective March 24, 2021. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [http://courts.mi.gov/courts/michigan supremecourt/rules/pages/default.aspx].

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2) [Unchanged.]

(3) "Confidential file" means

(a) records of a case brought before the court under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq.*~~that part of a file made confidential by statute or court rule~~, including, but not limited to,

(i)-(vii) [Unchanged.]

(b) [Unchanged.]

(4)-(8) [Unchanged.]

(9) A~~n authorized~~ petition is deemed "filed" when it is delivered to, and accepted by, the clerk of the court.

(10)-(20) [Unchanged.]

(21) "Petition authorized to be filed" refers to written permission given by the court to proceed with placement on the formal calendar~~file the petition among the court's public records as permitted by MCR 3.925~~. Until a petition is authorized, it remains on the informal calendar~~must be filed with the clerk and maintained as a nonpublic record, accessible only by the court and parties. After authorization, a petition and any associated records may be made nonpublic only as permitted by rule or statute~~.

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT RECORDS; SETTING ASIDE ADJUDICATIONS.

(A)-(C) [Unchanged.]

(D) Public Access to Case File Records; Social~~Confidential~~ File.

(1) General. ~~Except as otherwise required by MCR 3.903(A)(21), case file records maintained~~Records of a case brought before the court under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq.*, are only open to persons having a legitimate interest~~other than confidential files, must be open to the general public~~. "Persons having a legitimate interest" includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under 1984 PA 422, MCL 722.131 to 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state.

(2) Social~~Confidential~~ Files. Confidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order. Only persons who are found by the court to have a legitimate interest may be allowed access to the confidential files. In determining whether a person has a legitimate interest, the court shall consider the nature of the

proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law.

(E) [Unchanged.]

(F) Setting Aside Adjudications and Convictions.

(1) Adjudications. The setting aside of juvenile adjudications is governed by MCL 712A.18e and MCL 712A.18t.

(2) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The amendments of MCR 3.903 and 3.925 make the rules consistent with MCL 712A.28(5)(d) by requiring that previously-public juvenile case records be made nonpublic and accessible only to those with a legitimate interest. The effective date makes the rule change consistent with the statutory revision effective date in 2020 PA 362.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted March 10, 2021, effective April 4, 2021 (File No. 2021-09)—REPORTER.

On order of the Court, this is to advise that the amendment of Rule 3.944 of the Michigan Court Rules is adopted, effective April 4, 2021. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment

period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.944. PROBATION VIOLATION.

(A) [Unchanged.]

(B) Detention Hearing; Procedure. At the detention hearing:

(1)-(4) [Unchanged.]

(5) The juvenile must be allowed an opportunity to deny or otherwise plead to the probation violation. If the juvenile wishes to admit the probation violation or plead no contest, the court must comply with subrule (D) before accepting the plea.

(a)-(b) [Unchanged.]

(c) If the juvenile is taken into custody for violating a court order under MCL 712A.2(a)(2) to (4) and is detained in a secure facility, the petitioner shall ensure that an appropriately trained, licensed, or certified mental health or substance abuse professional interviews the juvenile in person within 24 hours to assess the immediate mental health and substance abuse needs of the juvenile. The assessment may alternatively be done upon filing of the petition, prior to any order for placement in a secure facility. The completed assessment shall be provided to the court within 48 hours of the placement and the court shall conduct a hearing to determine all of the following:

(i) If there is reasonable cause to believe that the juvenile violated the court order.

(ii) The appropriate placement of the juvenile pending the disposition of the alleged violation, including if the juvenile should be placed in a secure facility.

(C)-(D) [Unchanged.]

(E) Disposition of Probation Violation; Reporting.

(1) [Unchanged.]

(2) If, after hearing, the court finds that the juvenile has violated a court order under MCL 712A.2(a)(2) to (4), and the juvenile is ordered to be placed in a secure facility, the order shall include all of the following individualized findings by the court:

(a) The court order the juvenile violated;

(b) The factual basis for determining that there was a reasonable cause to believe that the juvenile violated the court order;

(c) The court's finding of fact to support a determination that there is no appropriate less restrictive alternative placement available considering the best interests of the juvenile;

(d) The length of time, not to exceed 7 days, that the juvenile may remain in the secure facility and the plan for the juvenile's release from the facility; and

(e) The order may not be renewed or extended.

(3~~2~~) [Renumbered but otherwise unchanged.]

(F) [Unchanged.]

Staff Comment: The amendment of MCR 3.944 incorporates new requirements for courts that detain juvenile status offender violators in secure facilities, in accordance with MCL 712A.15(3) and MCL 712A.18(1)(k). The effective date of these amendments is consistent with the effective date of the new statutory provisions included in 2020 PA 389.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted March 24, 2021, effective May 1, 2021 (File No. 2019-48)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of MCR 1.109 of the Michigan Court Rules is adopted, effective May 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(D) [Unchanged.]

(E) Signatures.

(1) [Unchanged.]

(2) Requirement. ~~Every document filed shall be signed by the person filing it or by at least one attorney of record.~~ Every document of a party represented by an attorney shall be signed by at least one attorney of

record. A party who is not represented by an attorney must sign the document. In probate proceedings the following also applies:

(a)-(b) [Unchanged.]

(3)-(7) [Unchanged.]

(F)-(G) [Unchanged.]

Staff comment: The amendment of MCR 1.109 requires a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109 as part of the eFiling rule changes.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 24, 2021, effective May 1, 2021 (File No. 2020-07)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.502 of the Michigan Court Rules is adopted, effective May 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(C) [Unchanged.]

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the

appropriate form, or adjudicate the motion under the provisions of these rules. When a *pro se* defendant files his or her first motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall promptly notify the defendant of its intention to recharacterize the pleading as a motion for relief from judgment; inform the defendant of any effects this might have on subsequent motions for relief, see MCR 6.502(B), (G); and provide the defendant 90 days to withdraw or amend his or her motion before the court recharacterizes the motion. If the court fails to provide this notice and opportunity for withdrawal or amendment, or the defendant establishes that notice was not actually received, the defendant's motion cannot be considered a motion for relief from judgment for purposes of MCR 6.502(B), (G). The clerk of the court shall retain a copy of the motion.

(E)-(G) [Unchanged.]

Staff comment: The amendment of MCR 6.502 addresses the issue of a court's recharacterization of a defendant's motion for relief from judgment that is styled as something other than a motion for relief from judgment. The court is required to notify the defendant of its intent to recharacterize the motion and allow the defendant an opportunity to withdraw or amend the motion.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 24, 2021, effective May 1, 2021 (File No. 2020-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments re-

ceived, the following amendment of Rule 2.105 of the Michigan Court Rules is adopted, effective May 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.105. PROCESS; MANNER OF SERVICE.

(A)-(G) [Unchanged.]

(H) Limited Liability Company. Service of process on a limited liability company may be made by:

(1) serving a summons and a copy of the complaint on the managing member, the non-member manager, or the resident agent;

(2) serving a summons and a copy of the complaint on a member or other person in charge of an office or business establishment of the limited liability company and sending a summons and a copy of the complaint by registered mail, addressed to the registered office of the limited liability company.

(3) If a limited liability company fails to appoint or maintain an agent for service of process, or service under subsections (1) and (2) cannot be accomplished through the exercise of reasonable diligence, service of process may be made by delivering or mailing by registered mail to the administrator (pursuant to MCL 450.4102[2][a]) a summons and copy of the complaint.

(H)-(K) [Relettered (I)-(L) but otherwise unchanged.]

Staff comment: The amendment of MCR 2.105 establishes the manner of service on limited liability companies.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 24, 2021, effective immediately (File No. 2020-22—REPORTER.

On order of the Court, notice and an opportunity for comment having been provided, the November 18, 2020 amendment of Rule 6.110 of the Michigan Court Rules is retained.

Adopted March 24, 2021, effective May 1, 2021 (File No. 2020-24)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7 of the Rules Concerning the State Bar of Michigan is adopted, effective May 1, 2021.

> [Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7. OFFICERS.

Section 1. President, President-elect, Vice-president, Secretary, and Treasurer.

The officers of the Board of Commissioners of the State Bar of Michigan are the president, the president-elect, the vice-president, the secretary, and the treasurer. The officers serve for the year beginning with the adjournment of the annual meeting following their election and ending with the adjournment of the next annual meeting. A person may serve as president only once.

After the election of board members but before the annual meeting each year, the Board of Commissioners

shall elect from among its members, by majority vote of those present and voting, if a quorum is present:

(1)-(3) [Unchanged.]

If a vice-president is not able to assume the duties of president-elect, the Board of Commissioners also shall elect from among its members, by majority vote of those present and voting, if a quorum is present, a president-elect who becomes president on the adjournment of the next succeeding annual meeting.

A commissioner whose term expires at the next annual meeting is not eligible for election as an officer unless the commissioner has been reelected or reappointed for another term as a commissioner. If the remaining term of a commissioner elected treasurer, secretary, vice-president~~,~~ or president-elect will expire before the commissioner completes a term as president, the term shall be extended for an additional year or years to allow the commissioner to serve consecutive terms in each successive office through the completion of the commissioner's~~complete the~~ term as president~~,~~ provided that the commissioner is elected by the Board of Commissioners to serve in each successive office. If the term of an elected commissioner is so extended, the authorized membership of the board is increased by one for that period; a vacancy in the district the treasurer, secretary, vice-president~~,~~ or president-elect represents exists when the term as a commissioner would normally expire, and an election to choose a successor is to be held in the usual manner.

No person holding judicial office may be elected or appointed an officer of the Board of Commissioners. A judge presently serving as an officer may complete that term but may not thereafter, while holding judicial office, be elected or appointed an officer. A person serving as an officer who, after the effective date of this

amendment, is elected or appointed to a judicial office, must resign as an officer of the board on or before the date that person assumes judicial office.

Section 2 — Section 4 [Unchanged.]

Staff Comment: The amendment of Rule 7 of the Rules Concerning the State Bar of Michigan ensures that all main officers (president, vice-president, treasurer, and secretary) can move sequentially through the leadership roles of the Board of Commissioners, as long as the extension of terms is approved by the Bar's Board of Commissioners. The proposal was submitted by the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 25, 2021, effective March 24, 2021 (File No. 2019-09) —REPORTER.

On order of the Court, the following amendments are adopted, effective March 24, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.223. CHANGE OF VENUE; VENUE IMPROPER.

(A) [Unchanged.]

(B) Order for Change of Venue; Case Records.

(1)-(2) [Unchanged.]

(3) The receiving court must~~shall~~ temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(C) [Unchanged.]

RULE 2.305. DISCOVERY SUBPOENA TO A NON-PARTY.

(A) General Provisions

(1) A represented party may issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A). An unrepresented party may move the court for issuance of non-party discovery subpoenas. MCR 2.306(B)(1)-(2) and (C)-(G) apply to a subpoena under this rule. This rule governs discovery from a non-party under MCR 2.303(A)(4), 2.307, 2.310(B~~D~~)(2) or 2.315. MCR 2.506(A)(2) and (3) apply to any request for production of ESI. A subpoena for hospital records is governed by MCR 2.506(I).

(2)-(7) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 2.314. DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY.

(A)-(C) [Unchanged.]

(D) Release of Medical Information by Custodian.

(1)-(5) [Unchanged.]

(6) If a custodian does not respond within the time permitted by subrule (D)(1) to a party's authorized request for medical information, a subpoena may be issued under MCR 2.305(A)(1~~2~~), directing that the custodian present the information for examination and copying at the time and place stated in the subpoena.

(E) [Unchanged.]

RULE 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs

(1)-(8) [Unchanged.]

(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(4~~5~~).

(10)-(11) [Unchanged.]

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A) Attendance of Party or Witness.

(1)-(4) [Unchanged.]

(5) A subpoena may be issued only in accordance with this rule or MCR 2.305, 2.621(C), 9.112(D), 9.115(I)(1), or 9.221~~12~~ and 9.234.

(B)-(I) [Unchanged.]

RULE 3.206. INITIATING A CASE.

(A)-(B) [Unchanged.]

(C) Verified Statement and Verified Financial Information Form.

(1)-(5) [Unchanged.]

(6) When the action is to establish paternity or child support and the pleadings are generated from Michigan's automated child support enforcement system, the party is not required to comply with subrule (C)(1), ~~or~~ (C)(2), or MCR 3.211(F)(2). However, the party may comply with subrule (C)(1), ~~and~~ (C)(2), or

MCR 3.211(F)(2) to provide the other party an opportunity to supply any omissions or correct any inaccuracies.

(D) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(E) [Unchanged.]

(F) Entry of Judgment or Order

(1)-(4) [Unchanged.]

(5) Except as otherwise provided in MCR 3.206(C), t~~T~~he Domestic Relations Judgment Information form must be submitted to the friend of the court in addition to the verified statement that is required by MCR 3.206(C).

(G)-(H) [Unchanged.]

RULE 3.229. FILING CONFIDENTIAL MATERIALS.

(A) If a party or interested party files any of the following items with the court, the party shall identify the document as a confidential document and the items shall be served on the other parties in the case and maintained in a nonpublic file in accordance with subrule (B):

(1) verified statements and disclosure forms under MCR 3.206(C~~B~~);

(2)-(8) [Unchanged.]

(B) [Unchanged.]

RULE 3.606. CONTEMPTS OUTSIDE IMMEDIATE PRESENCE OF COURT.

(A)-(E) [Unchanged.]

(F) The court shall not sentence a person to a term of incarceration for nonpayment unless the court has

complied with the provisions of MCR 6.425(D~~E~~)(3). Proceedings to which the Child Support and Parenting Time Enforcement Act, MCL 552.602 *et seq.*, applies are subject to the requirements of that act.

RULE 3.618. EMANCIPATION OF MINOR.

(A)-(G) [Unchanged.]

(H) A minor's birth certificate filed with the court as required by MCL 722.4a must be maintained confidentially.

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(25) [Unchanged.]

(26) "Register of actions" means the case history of all cases, as defined in subrule (A)(1), maintained in accordance with Michigan Supreme Court Records ~~Case File~~ Management Standards. See MCR 8.119(D)(1)(a).

(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.920. SERVICE OF PROCESS.

(A) [Unchanged.]

(B) Summons.

(1)-(2) [Unchanged.]

(3) Content. The summons must direct the person to whom it is addressed to appear at a time and place specified by the court and must:

(a)-(c) [Unchanged.]

(d) have a copy of the petition attached. The confidential case inventory required by MCR 3.931(A) and MCR 3.961(A) shall not be served on any party.

(4)-(5) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 3.922. PRETRIAL PROCEDURES IN DELINQUENCY AND CHILD PROTECTION PROCEEDINGS.

(A) [Unchanged.]

(B) Discovery and Disclosure in Delinquency Matters.

(1)-(2) [Unchanged.]

(3) In delinquency matters, if a respondent demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the court shall conduct an in camera inspection of the records.

(a)-(d) [Unchanged.]

(e) Records disclosed under this subrule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.

(f) [Unchanged.]

(4)-(5) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Notice of Intent.

(1)-(2) [Unchanged.]

(3) The court may shorten the time periods provided in this subrule (E) if good cause is shown.

RULE 3.936. BIOMETRIC DATA.

(A) [Unchanged.]

(B) Order for Biometric Data. At the time that the court authorizes the filing of a petition alleging a juvenile offense and before the court enters an order of disposition on a juvenile offense or places the case on the consent calendar, the court shall examine the confidential files and verify that the juvenile has had biometric data collected. If it appears to the court that the juvenile has not had biometric data collected, the court must:

(1) direct the juvenile to go to the law enforcement agency involved in the apprehension of the juvenile, or to the sheriff's department, so biometric data may be collected~~taken~~; or

(2) issue an order to the sheriff's department to apprehend the juvenile and to collect~~take~~ the biometric data of the juvenile.

(C) Notice of Disposition. The court shall notify the Department of State Police in writing:

(1) of any juvenile who had ~~had~~ biometric data collected for a juvenile offense and who was found not to be within the jurisdiction of the court under MCL 712A.2(a)(1); or

(2) [Unchanged.]

(D) Order for Destruction of Biometric Data. The court, on motion filed pursuant to MCL 28.243(10~~8~~), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the biometric data and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(14~~2~~), when a juvenile has had biometric data collected for a juvenile offense and no petition on the offense is submitted to the court,

the court does not authorize the petition, or the court has neither placed the case on the consent calendar nor taken jurisdiction of the juvenile under MCL 712A.2(a)(1).

RULE 3.943. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(3) [Unchanged.]

(4) The court shall not enter an order of disposition for a juvenile offense until the court verifies that the juvenile has had biometric data collected. If the juvenile has not had biometric data collected~~been fingerprinted~~, the court shall proceed as provided by MCR 3.936.

(5)-(7) [Unchanged.]

RULE 3.972. TRIAL.

(A)-(B) [Unchanged.]

(C) Evidentiary Matters.

(1) [Unchanged.]

(2) Child's Statement. Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(26~~5~~) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (g), (k), (z), or (aa), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a)-(c) [Unchanged.]

(D)-(G) [Unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(I) [Unchanged.]

(J) Allegations of Additional Abuse or Neglect.

(1) Proceedings on a supplemental petition seeking termination of parental rights on the basis of allegations of additional abuse or neglect, as defined in MCL 722.622(g~~f~~) and (k~~j~~), of a child who is under the jurisdiction of the court are governed by MCR 3.977.

(2) Where there is no request for termination of parental rights, proceedings regarding allegations of additional abuse or neglect, as defined in MCL 722.622(g~~f~~) and (k~~j~~), of a child who is under the jurisdiction of the court, including those made under MCL 712A.19(1), are governed by MCR 3.974 for a child who is at home or MCR 3.975 for a child who is in foster care.

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D~~E~~)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district court~~s~~.

(C)-(E) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(C) [Unchanged.]

(D) Sentencing Procedure

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict

unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a) [Unchanged.]

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D~~E~~)(2),

(c)-(f) [Unchanged.]

(2)-(3) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 6.430. POSTJUDGMENT MOTION TO AMEND RESTITUTION.

(A) The court may amend an order of restitution entered under the Crime Victim's Rights Act~~this section~~ on a motion filed by the prosecuting attorney, the victim, or the defendant based upon new or updated information related to the injury, damages, or loss for which the restitution was ordered.

(B)-(F) [Unchanged.]

RULE 6.445. PROBATION REVOCATION.

(A)-(F) [Unchanged.]

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other finan-

cial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) and (D~~E~~).

(H) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1)-(3) [Unchanged.]

(4) A defendant or defendants may be informed of the trial rights listed in subrule (3)(b) as follows:

(a)-(c) [Unchanged.]

Except as provided in subrule (F~~E~~)(7), if the court uses a writing pursuant to subrule (F~~E~~)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5)-(9) [Unchanged.]

(G) Sentencing.

(1) [Unchanged.]

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(D~~E~~)(3).

(3)-(4) [Unchanged.]

(H)-(I) [Unchanged.]

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(D) [Unchanged.]

(E) Late Application. A late application for leave to appeal may be filed under MCR 7.105(G~~F~~).

(F)-(G) [Unchanged.]

(H) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(E~~D~~)(4) applies along with the following:

(1)-(4) [Unchanged.]

(I) Subsequent Appeal to the Court of Appeals. An appeal of a circuit court decision is by motion for immediate consideration in~~emergency application for leave to appeal to~~ the Court of Appeals under MCR 7.205(F), and the Court of Appeals shall expedite the matter.

(J) [Unchanged.]

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;~~,~~

(ii) [Unchanged.]

(iii) in a domestic relations action, a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile;~~,~~

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule; or~~,~~

(v) an order denying governmental immunity to a governmental party, including a governmental agency,

official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.~~;~~

(b) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court in an estate or trust proceeding, an adult or minor guardianship proceeding under the Estates and Protected Individuals Code, or a proceeding under the Mental Health C~~c~~ode, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.993~~77~~(E~~J~~)~~(3)~~ or MCR 6.425(G), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.303. JURISDICTION OF THE SUPREME COURT.

(A) Mandatory Review. The Supreme Court shall review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.250~~23~~ to 9.253~~26~~).

(B) [Unchanged.]

RULE 8.120. LAW STUDENTS AND RECENT GRADUATES; PARTICIPATION IN LEGAL AID CLINICS, DEFENDER OFFICES, AND LEGAL TRAINING PROGRAMS.

(A) [Unchanged.]

(B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, municipal/township attorneys, the Attorney Grievance Commission, and the Attorney General.

(C)-(D) [Unchanged.]

RULE 9.116. JUDGES; FORMER JUDGES.

(A) Judges. The administrator or commission may not take action against an incumbent judge, except that this rule does not prohibit an action by the administrator or commission against:

(1) [Unchanged.]

(2) a visiting judge as provided in MCR 9.211~~03~~(E). If the Judicial Tenure Commission receives a request for investigation of a magistrate or referee or visiting judge arising from the practice of law, the Judicial Tenure Commission shall refer the matter to the ad-

ministrator or commission for investigation in the first instance. If the administrator or the commission dismisses the request for investigation referred by the Judicial Tenure Commission, or a request for investigation of a magistrate, referee or visiting judge submitted directly to the commission by a complainant, the administrator or commission shall notify the Judicial Tenure Commission, which may take action as it deems appropriate.

(B) Former Judges. The administrator or commission may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court. The administrator or commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.223~~07~~(A~~B~~)(1)-(5).

(C) [Unchanged.]

RULE 9.118. REVIEW OF ORDER OF HEARING PANEL.

(A) Review of Order; Time.

(1)-(2) [Unchanged.]

(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(A~~G~~)(4). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted.

(B)-(F) [Unchanged.]

RESCISSION OF ADMINISTRATIVE ORDER NO. 1999-3 — DISCOVERY IN MISDEMEANOR CASES.

On order of the Court, Administrative Order No. 1999-3 is rescinded, effective immediately.

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2020-20 — ELECTION RELATED LITIGATION PROCEDURES.

(1) [Unchanged.]

(2) Upon the filing of a complaint regarding an election matter, the following persons must be notified of the lawsuit as soon as practicable:

(a) Supreme Court Clerk

(b) State Director of Elections

(c) Attorney General Civil Litigation, Employment, & Elections Division (if the complaint is against the state or one of its subdivisions).

(d) The Governor's Chief Legal Counsel (on behalf of the Governor)

The State Court Administrator will circulate a memo before each election that identifies the names and contact information for the individuals and offices listed above.

(2)-(4) [Unchanged.]

MRPC RULE 1.4. COMMUNICATION.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, case~~mediation~~ evaluations, and proposed plea bargains.

(b) [Unchanged.]

Staff Comment: These amendments update cross-references and make other nonsubstantive revisions to clarify the rules.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted April 1, 2021, effective May 1, 2021 (File No. 2019-35)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of MCR 6.502 of the Michigan Court Rules is adopted, effective May 1, 2021.

> [Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. ~~The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.~~

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment was filed or a claim of new evidence that was not

discovered before the first such motion was filed. The clerk shall refer a successive motion ~~that asserts that one of these exceptions is applicable~~ to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime. For motions filed under both (G)(1) and (G)(2), the court shall enter an appropriate order disposing of the motion.

(3) [Unchanged.]

Staff comment: The amendment of MCR 6.502 eliminates the requirement to return successive motions to the filer and eliminates the prohibition on appeal of a decision made on a motion for relief from judgment. Further, it requires all such motions to be submitted to the assigned judge, and requires a trial court to issue an order when it rejects or denies relief.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted April 14, 2021, effective immediately (File No. 2021-15)—REPORTER.

On order of the Court, this is to advise that the addition of Rule 8.128 of the Michigan Court Rules is adopted, effectively immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual public comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

RULE 8.128. MICHIGAN JUDICIAL COUNCIL.

(A) Duties. There shall be a Judicial Council to plan strategically for the Michigan judicial branch, to enhance the work of the courts, and to make recommendations to the Supreme Court on matters pertinent to the administration of justice.

(B) Diversity and Inclusion. The Judicial Council shall be representative of Michigan's diverse population and regions, ensuring and advancing diversity, equity, and inclusion.

(C) Membership

(1) The membership of the Judicial Council shall consist of 29 members as follows:

(a) The Chief Justice of the Michigan Supreme Court, who shall preside over the council as chairperson;

(b) A Justice of the Michigan Supreme Court, nominated by the Chief Justice;

(c) The State Court Administrator;

(d) The Chief Judge of the Court of Appeals or designee;

(e) Two judges nominated by the Michigan Judges Association;

(f) Two judges nominated by the Michigan Probate Judges Association;

(g) Two judges nominated by the Michigan District Judges Association;

(h) Two judges nominated by the Association of Black Judges of Michigan;

(i) A judge nominated by the Michigan Tribal State Federal Judicial Forum;

(j) Four at-large judges;

(k) Four trial court administrators, probate or juvenile registers;

(l) Two county clerks;

(m) Three attorneys licensed to practice law in the State of Michigan;

(n) A member of the Michigan Justice for All Commission;

(o) Two members of the public who are not attorneys.

(2) All members shall be appointed by the Supreme Court. Members serving on the Judicial Council by nature of their positions designated in subparagraphs (C)(1)(a), (c) and (d) shall serve on the Judicial Council so long as they hold that position. Of the remaining members appointed by the Supreme Court, one-third shall initially be appointed to a two-year term, one-third appointed to a three-year term and one-third appointed to a four-year term. All members appointed or reappointed following these inaugural terms shall serve three-year terms. Terms commence January 1st of each calendar year. No member may serve more than two consecutive terms.

(D) Other Committees, Task Forces, and Work Groups. The Judicial Council will establish such other committees, task forces, and work groups as are necessary to further the work of the Judicial Council.

(E) Meetings of Council. The Judicial Council shall meet regularly as needed to accomplish its work, but at least quarterly, at a place and on a date designated by the Chief Justice.

(F) Administration. The State Court Administrative Office shall staff the Judicial Council.

(G) Deliberations. In all of their deliberations and decisions, members of the Judicial Council shall place

the welfare of the public and the judicial branch as a whole above the individual interests of a judicial district, court organization, or class of judge or employee.

(H) Vacancies. In the event of a vacancy on the Judicial Council, a replacement member shall be appointed by the Supreme Court for the remainder of the term of the former incumbent. After serving the remainder of the term, the new member may be reappointed to two full consecutive terms.

(I) Annual Report. The Judicial Council shall prepare an annual report on the status of judicial administration in the courts and the work of the Judicial Council.

(J) Compensation. Judicial Council members shall serve without compensation.

(K) Removal of a Member. The Supreme Court has authority to remove a Judicial Council member. The vacancy created when a member is removed shall be filled in accordance with subrule (H).

Staff comment: The addition of MCR 8.128 establishes the Michigan Judicial Council to strategically plan for Michigan's Judiciary.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-15. Your comments and the comments of others will be posted under the chapter affected by this proposal [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Entered April 14, 2021, effective immediately (File No. 2020-36)—REPORTER.

On order of the Court, the orders entered on March 10, 2021 (Proposed Amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules) and April 1, 2021 (Proposed Amendment of Rule 3.945 and Proposed Addition of Rule 3.947 of the Michigan Court Rules) in ADM File No. 2020-36 are now effective immediately. The comment period will continue to run through July 1, 2021, and August 1, 2021, respectively, as previously ordered.

Adopted May 5, 2021, effective September 1, 2021 (File Nos. 2018-33 and 2019-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.310, 6.429, 6.431, 7.204, 7.205, and 7.305, and new Rule 1.112 of the Michigan Court Rules are adopted, effective September 1, 2021.

[Rule 1.112 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.112. FILINGS BY INCARCERATED INDIVIDUALS.

If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a

receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid.

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1)-(3) [Unchanged.]

~~(4) If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.~~

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(4) [Unchanged.]

~~(5) If a motion to correct an invalid sentence is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a judgment of conviction and sentence is entered on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to correct an invalid sentence in a Michigan court.~~

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(4) [Unchanged.]

~~(5) If a motion for new trial is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which the trial court rendered its~~

~~decision on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks a new trial in a Michigan court.~~

(B)-(D) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a)-(d) [Unchanged.]

~~(e) If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to claims of appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed~~

~~in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42-day period.

(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B). The provisions of MCR 1.108 regarding computation of time apply. For purposes of this subrule, "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1)-(4) [Unchanged.]

~~(5) In a criminal case, if an inmate in the custody of the Michigan Department of Corrections, or in the custody of another state or federal penal institution, submits an application or delayed application for leave to appeal as a pro per party that is received by the court after the expiration of the periods set forth in this rule, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution where the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid.~~

(6) [Renumbered (5) but otherwise unchanged.]

(B)-(F) [Unchanged.]

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to File.

(1)-(4) [Unchanged.]

~~(5) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrules (C)(1) or (2), and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage was prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.~~

(6)-(8) [Renumbered (5)-(7) but otherwise unchanged.]

(D)-(I) [Unchanged.]

Staff comment: These amendments relate to expansion of the prison mailbox rule. Under the new MCR 1.112, the prison mailbox rule applies to any pleading or other document deposited in a prison or jail's mail system (i.e., not limited only to claims under criminal proceedings). The specific references to situations where that rule now applies (MCR 6.310, 6.429, 6.431, 7.204, 7.205 and 7.305) are eliminated.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

VIVIANO, J. (*dissenting*). This amendment significantly expands the scope of the "prison mailbox rule." While I am not unsympathetic to the challenges unrepresented inmates face when filing legal pleadings, I dissent from the Court's decision because I believe that it is unnecessary and will impair the efficient and effective administration of justice in our courts.

As the United States Supreme Court has observed, "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v Locke*, 471 US 84, 101 (1985).

In general, the prison mailbox rule provides that "a pro se inmate's motion is considered filed on the date he or she provides it to prison officials for mailing." 86 CJS, Time, § 15, pp 564-565. In other words, the motion "is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state." 5 Am Jur 2d, Appellate Review, § 302, p 122. See also 39A CJS, Habeas Corpus, § 484, p 233. The traditional rationale for the rule is that it is unfair to hold such pro se prisoners accountable for mail delays not attributable to them and that an inmate's punctual filing should not be rejected simply because of the tardiness of prison officials who may have an incentive to delay. 5 Am Jur 2d, Appellate Review, § 302, p 122; see also 3 Mushlin, Rights of Prisoners (5th ed), § 12:38.

Until today, application of the prison mailbox rule in our state was limited to claims of appeal and applications for leave to appeal in criminal cases, see MCR 7.204(A)(2)(e), MCR 7.205(A)(5), and MCR 7.305(C)(5), and other postjudgment motions in criminal matters, see MCR 6.310(C)(4), MCR 6.429(B)(5), and MCR 6.431(A)(5). And it was limited to prisoners in the custody of the Michigan Department of Corrections (MDOC). The court rule changes reflected in today's order expand the prison mailbox rule in two significant ways. First, the rule is expanded to cover all pleadings submitted by pro se inmates, not just criminal claims of appeal, applications for leave to appeal, and postjudgment motions. Second, the rule is no longer limited to pleadings submitted by individuals in the custody of the MDOC, but now also encompasses pleadings submitted by inmates lodged in county jails.

These changes may appear simple and straightforward, but they will create a host of practical problems—none of which the amendment attempts to address. Perhaps most glaringly, it appears that most if not all county jails do not have a system in place to log prisoner mail.[1] *Houston v Lack*, 487 US 266, 275-276 (1988), the seminal case recognizing the prison mailbox rule, relied heavily on the existence of such a system in adopting what it described as a "bright-line rule":

> [T]he rejection of the mailbox rule in other contexts has been based in part on concerns that it would increase disputes and uncertainty over when a filing occurred and that it would put all the evidence about the date of filing in the hands of one party. See, *e. g., United States* v.

[1] The Michigan Sheriffs' Association reported to the Court that outgoing mail in jails is not logged or time-stamped, and the State Appellate Defender Office recognized this practical limitation as well.

> *Lombardo,* 241 U.S. 73, 78 (1916). These administrative concerns lead to the opposite conclusion here. The *pro se* prisoner does not anonymously drop his notice of appeal in a public mailbox—he hands it over to prison authorities ***who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily dispute a prisoner's assertions that he delivered the paper on a different date***. Because reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the *pro se* prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one. [*Id*. at 275 (emphasis added).]

In *Lombardo*, in the context of a venue challenge, the Court described the problems that would arise with a regime like the one our new rule creates:

> A court is constrained by the meaning of the words of a statute. They mark the extent of its power, and our attention has not been called to any case which decides that the requirement of a statute, whether to secure or preserve a right or to avoid the guilt of a crime, that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place. To so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files. We hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion. And would it not, besides, in particular cases preclude the possibility of a conviction, putting evidence entirely in the hands of the defendant? [*Lombardo*, 241 US at 78.]

The discussion in these cases highlights the problems with our new mailbox rule: at least as it relates to county jails that do not maintain prisoner mail logs, it is not a bright-line rule and risks "putting evidence entirely in the hands of the defendant." *Id*. The new

rule states: "Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." Left unsaid is whether a litigant is entitled to an evidentiary hearing to contest a clerical determination of untimeliness, where the burden of proof lies in such circumstances, whether there is a presumption in favor of one party or the other, and, if so, what amount of evidence is needed to overcome it. Much confusion, and litigation, will ensue to answer these questions. And where no log is maintained, only the pro se inmate (i.e., the person presumably with the most at stake in the outcome) will be in a position to validate his or her own filing—an outcome our new rule appears to invite by allowing a defendant's sworn statement to be submitted as proof of filing. How is a trial judge to know whether to credit the defendant's testimony or to rely on the file stamp on the pleading?[2]

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[2] Some courts have applied the prison mailbox rule even in the absence of a prison mail log. See *Setala v JC Penney Co*, 97 Hawaii 484, 488 (2002) ("[T]he absence of a prison log detailing when mail was received is not fatal to 'constructive filing.' "), and cases cited. But those cases do not provide satisfactory answers to these questions when the jail lacks standard procedures for processing legal mail that could ensure an objective determination of timeliness. Cf. *Caldwell v Amend*, 30 F3d 1199, 1202 (CA 9, 1994) (noting the prison's standard procedure for collecting legal mail, which allowed the court to determine that the defendant's filing was timely if that procedure was followed). Instead, they suggest a roadmap for defendants who wish to avoid filing deadlines: simply indicate on the filing that it was submitted timely and make a similar claim in an affidavit. See *Veteto v Yocum*, 793 So 2d 814, 816 (Ala Civ App, 2001). See also *Commonwealth v Jones*, 549 Pa 58, 64 (1997) (discussing that a prisoner need only provide "reasonably verifiable evidence" of the date of filing, including an "affidavit attesting to the date of deposit with the prison officials"). But this seems only to validate the concerns raised over 100 years ago in *Lombardo*.

That this new rule now applies to all pleadings will only multiply these practical concerns.[3] Now, it seems, there will be at least the potential for litigation every time a pro se inmate misses a filing deadline. One might wonder whether it is worth having deadlines at all if they are so easily trifled with.

I certainly do not mean to suggest that county jailers should be permitted to purposely or even negligently impede an inmate's ability to file pleadings with the courts. It is important to emphasize that even without the Court's far-reaching extension of our rule, inmates are not without recourse if the jail staff fails to process the mail in a timely manner. For example, the United States Supreme Court has established that access to the courts is a constitutional right applicable to prisoners. See *Christopher v Harbury*, 536 US 403, 412-414 (2002). Such a claim can be brought to challenge either a current bar to accessing the courts or to seek redress for past "specific cases that cannot now be tried (or tried with all material evidence)" as the result of state interference with access. *Id*. at 413-414. Other arguments might also be available to criminal defendant inmates in these circumstances. See, e.g., *Houston*, 487 US at 281 (Scalia, J., dissenting) (noting caselaw permitting equitable tolling for prisoners, although rejecting its application in the civil context). I

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[3] See, e.g., MCR 2.108(A)(1) (requiring an answer to a pleading to be filed within 21 days after service); MCR 2.508(B)(1) (requiring a demand for a jury trial to be filed within 28 days after the filing of the answer to the complaint); MCR 2.611(B) (requiring a motion for a new trial to be filed and served within 21 days after the entry of judgment); MCR 2.003(D)(1)(a) and (b) (requiring motions for disqualification of a judge to be filed within 14 days after discovery of the grounds for disqualification); MCR 6.429(B) (requiring motions to correct a sentence to be filed within a specific time depending on the appeal taken); MCR 7.104(A)(1) (requiring appeals to circuit courts to be taken within 21 days after the entry of judgment).

believe that, in the absence of evidence of frequent or widespread abuses of an inmate's right to access the courts by county jailers—evidence not present here—the existing safeguards are adequate.

Because I believe this amendment is a solution in search of a problem and will impair the administration of justice in our courts, I dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

Adopted June 9, 2021, effective July 1, 2021 (File Nos. 2018-33 and 2019-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.109 and 8.119 of the Michigan Court Rules and Administrative Order No. 1999-4 are adopted, effective July 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) The following personal identifying information is protected and shall not be included in any public

document or attachment filed with the court on or after July 1, 2021, except as provided by these rules:

(i)-(v) [Unchanged.]

(b) Filing, Accessing, and Serving Personal Identifying Information

(i)-(ii) [Unchanged.]

(iii) If a party is required to include protected personal identifying information in a public document filed with the court, the party shall file the document with the protected personal identifying information redacted, along with a personal identifying information form approved by the State Court Administrative Office under subrule (i). The personal identifying information form must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers listed in the personal identifying information form will be understood to refer to the corresponding complete identifier. A party may amend the personal identifying information form as of right. Fields for protected personal identifying information may~~will not~~ be included in SCAO-approved court forms, and the information will be protected, in the form and manner established by the State Court Administrative Office.

(iv)-(vii) [Unchanged.]

(c)-(e) [Unchanged.]

(10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.

(a) The responsibility for excluding or redacting personal identifying information listed in subrule (9)

from all documents filed with or offered to the court rests solely with the parties and their attorneys. The clerk of the court is not required to review, redact, or screen documents at time of filing for personal identifying information, protected or otherwise, whether filed electronically or on paper. For a document filed with or offered to the court, except as otherwise provided in these rules, the clerk of the court is not required to redact protected personal identifying information from that document, regardless of whether filed before or after July 1, 2021, before providing a requested copy of the document (whether requested in person or via the internet) or before providing direct access to the document via a publicly accessible computer at the courthouse.

(b)-(e) [Unchanged.]

(E)-(H) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039. If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record.~~;~~ H~~h~~owever, the documents cannot be provided through a publicly accessible website if protected personal

identifying information has not been redacted from those documents. If a public document prepared or issued by the court, on or after July 1, 2021, contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided upon request via a paper or electronic copy, or direct access via a publicly accessible computer at the courthouse. The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1)-(2) [Unchanged.]

(I)-(L) [Unchanged.]

Administrative Order No. 1999-4 — Establishment of Michigan Trial Court Records Management Standards.

In order to improve the administration of justice; to improve the service to the public, other agencies, and the judiciary; to improve the performance and efficiency of Michigan trial court operations; to enhance the trial courts' ability to create and maintain an accurate record of the trial courts' proceedings, decisions, orders, and judgments pursuant to statute and court rule, it is ordered that the State Court Administrator establish Michigan Trial Court Records Management Standards for data, case records, and other court records and that trial courts conform to those stan-

dards. The State Court Administrative Office must enforce the standards and assist courts in adopting practices to conform to those standards.

Case records maintained under MCR 8.119(D) must be made available electronically to the same extent they are available at the courthouse, provided that certain personal data identifiers are not available to the public. In order to protect privacy and address security concerns, it is ordered that ~~protected personal identifying information, as defined in court rule, filed with the state courts of Michigan in any form or manner and for any purpose must be nonpublic. T~~the State Court Administrative Office must establish standards and develop court forms that ensure all protected personal identifying information necessary to a given court case is provided to the court separately from filed documents except as otherwise required by law.

Staff comment: The amendments of MCR 1.109 and 8.119 and Administrative Order No. 1999-4 allow SCAO flexibility in protecting an individual's personal identifying information and clarify when a court is and is not required to redact protected personal identifying information.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Entered June 30, 2021, effective immediately (File No. 2017-28)—REPORTER.

On order of the Court, the effective date of the May 22, 2019 order amending MCR 1.109 and MCR 8.119 is extended from July 1, 2021 to January 1, 2022.

Staff Comment: The extension of the effective date of this order is intended to allow for additional programming changes and other changes required by trial courts and court users to implement the rule changes.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Entered June 30, 2021, effective immediately (File No. 2020-26)—REPORTER.

On order of the Court, the effective date of the June 9, 2021 order amending MCR 1.109 and MCR 8.119 is extended from July 1, 2021 to January 1, 2022.

Staff Comment: The extension of the effective date of this order is intended to allow for additional programming changes and other changes required by trial courts and court users to implement the rule changes.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Entered July 26, 2021, effective immediately (File No. 2020-08)—REPORTER.

On order of the Court, the following administrative orders are rescinded, effective immediately: AO No. 2020-1, AO No. 2020-6, AO No. 2020-9, AO No. 2020-13, AO No. 2020-14, AO No. 2020-19, and AO No. 2020-21.

On further order of the Court, finding that immediate effect is necessary, the following amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17 are adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at

[https://courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.002. WAIVER OF FEES FOR INDIGENT PERSONS.

(A)-(K) [Unchanged.]

(L) Notwithstanding any other provision of this rule, until further order of the Court, courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process.

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS.

(A)-(F) [Unchanged.]

(G) Notwithstanding any other provision of this rule, until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of subsection (C)(4).

RULE 2.305. DISCOVERY SUBPOENA TO A NON-PARTY.

(A)-(E) [Unchanged.]

(F) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

RULE 2.407. VIDEOCONFERENCING.

(A)-(F) [Unchanged.]

(G) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:

(1) Verify that participants are able to proceed remotely, and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.

(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.

(3) Ensure that any such proceedings are consistent with a party's Constitutional rights, and allow confidential communication between a party and the party's counsel.

(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.

(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.

(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.

(7) Waive any fees currently charged to allow parties to participate remotely.

Courts may collect contact information, including mobile phone number(s) and email address(es) from any party or witness to a case to facilitate scheduling of and participation in remote hearings or to otherwise facilitate case processing. A court may collect the contact information using a SCAO-approved form. The contact information form used under this provision to collect the information shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A)-(I) [Unchanged.]

(J) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

RULE 2.621. PROCEEDINGS SUPPLEMENTARY TO JUDGMENT.

(A)-(B) [Unchanged.]

(C) Subpoenas and Orders. A subpoena or order to enjoin the transfer of assets pursuant to MCL 600.6119 must be served under MCR 2.105. The subpoena must

specify the amount claimed by the judgment creditor. The court shall endorse its approval of the issuance of the subpoena on the original subpoena, which must be filed in the action. The subrule does not apply to subpoenas for ordinary witnesses. Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

(D)-(H) [Unchanged.]

RULE 3.904. USE OF VIDEOCONFERENCING TECHNOLOGY.

(A) Delinquency, Designated, and Personal Protection Violation Proceedings. Court may use videoconferencing technology in delinquency, designated, and personal protection violations proceedings as follows:

(1)-(2) [Unchanged.]

(3) Notwithstanding any other provision of this rule, until further order of the Court, courts may use two-way videoconferencing technology or other remote participation tools where the court orders a more restrictive placement or more restrictive treatment.

(B)-(C) [Unchanged.]

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A)-(D) [Unchanged.]

(E) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR

2.406) to the greatest extent possible. Any such proceedings shall comply with the requirements set forth in MCR 2.407(G).

RULE 6.106. PRETRIAL RELEASE.

(A) In general. At the defendant's arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1)-(3) [Unchanged.]

(4) Notwithstanding any other provision in this rule, until further order of the Court, in addition to giving consideration to other obligations imposed by law, trial courts are urged to take into careful consideration local public health factors in making pretrial release decisions, including determining any conditions of release, and in determining any conditions of probation.

(B)-(I) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(G) [Unchanged.]

(H) Notwithstanding any other provision in this rule, until further order of the Court, if the defendant is indigent, a request for the appointment of appellate counsel under MCR 6.425(F)(3) must be granted if it is received by the trial court or the Michigan Appellate Assigned Counsel System (MAACS) within six months after sentencing. This provision applies to all cases in which sentencing took place between March 24, 2020 and June 15, 2021.

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(2) [Unchanged.]

(3) As director of the administration of the court, a chief judge shall have administrative superintending power and control over the judges of the court and all court personnel with authority and responsibility to:

(a)-(h) [Unchanged.]

(i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule. As part of this obligation, the court shall continue to take reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to COVID-19. Such measures include continuing to providing a method or methods for filers to submit pleadings and other filings other than by personal appearance at the court. In addition, courts may waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements as necessary.

To evaluate the effectiveness of the practices adopted by the Supreme Court as emergency measures during the recent pandemic, and consistent with the advisement under (C)(1) to solicit input from other judges in the jurisdiction, each court's leadership team (including the chief judge(s) and court administrator(s)) shall convene a meeting to discuss the court's ability to manage operations during the pandemic and also identify potential permanent changes that might improve court processes. The State Court Administrative Office will provide guidance regarding the meet-

ings to be held. The meeting shall include (but not be limited to) representatives from the following stakeholders:

(i) court funding unit

(ii) local bar association

(iii) local legal aid organization

(iv) regional administrator

(v) state and local government agencies active in the court (e.g., Michigan Department of Health and Human Services, law enforcement, friend of the court, etc.)

(vi) nongovernment agencies with interests in court proceedings, such as crime victim advocacy organizations, nonprofit safety net entities, including the local Housing Assessment Resource Agency, and others as reflective of the local community.

This meeting shall be held by September 17, 2021, and a summary of the discussion and proposed recommendations shall be transmitted to the regional office within two weeks after the meeting. Courts must accept written comments submitted by any of the entities listed above, and include those comments as an appendix to its summary.

(4)-(9) [Unchanged.]

(D) [Unchanged.]

RULE 9.112. REQUESTS FOR INVESTIGATION.

(A)-(C) [Unchanged.]

(D) Subpoenas.

(1)-(4) [Unchanged.]

(5) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness

to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

RULE 9.115. HEARING PANEL PROCEDURE.

(A)-(H) [Unchanged.]

(I) Hearing; Contempt.

(1)-(3) [Unchanged.]

(4) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

(J)-(M) [Unchanged.]

RULE 9.221. EVIDENCE.

(A)-(B) [Unchanged.]

(C) Issuance of Subpoenas. The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a respondent under investigation. Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

(D)-(E) [Unchanged.]

Administrative Order No. 2020-17 is amended as follows:

[First five paragraphs: unchanged.]

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases following the procedures outlined in this order.~~ Courts are expected to proceed with guidelines referenced in Administrative Order No. 2020-14 (Return to Full Capacity).~~

(A)-(C) [Unchanged.]

(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. ~~Administrative Order No. 2020-6 requires that t~~The court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing~~,~~ if applicable. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is suffi-

cient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(E) [Unchanged.]

(F) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner~~ under Administrative Order No. 2020-6~~.

(G)-(I) [Unchanged.]

Staff Comment: These amendments largely reflect the substantive provisions of the remaining administrative orders adopted by the Court during the COVID-19 pandemic. Many of the orders have been rescinded or expired by their own terms. In this order, the Court rescinds all remaining active administrative orders entered during the pandemic except for the order regarding procedures specific to landlord/tenant actions (AO No. 2020-17, which is slightly modified as shown above to reflect the rescissions) and the order establishing a wholly online procedure for those taking the Michigan Bar Examination in July 2021 (AO No. 2021-2). Moving the substance of these provisions into a court rule amendment format returns the Court's procedure to the typical court rule revision procedure. The intent of these amendments is to retain the existing practices courts have been operating under for an interim period while inviting public comment. The Court also anticipates comments in response to the reports of two groups of volunteers organized by the State Court Administrative Office (the Lessons Learned Committee and the Task Force on Open Courts, Media, and Privacy). Within the next several months, it is anticipated that the Court will consider further proposals for refinements of these and other new proposals to guide courts going forward.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-08. Your comments and the comments of others will be posted under the chapter

affected by this proposal at [https://courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules].

MCCORMACK, C.J. (*concurring*). Michigan courts and the people they serve have a lot to be proud of in the lessons they have learned and what has been accomplished over the past 16 months. Instead of being paralyzed by the global pandemic, judges and court administrators rose to overcome the challenges that delivering justice required. Judges, magistrates, and referees have presided over more than 3.5 million hours of online court proceedings, which were broadcast so the public had access. The State Court Administrative Office's Virtual Courtroom Directory has been used by the public to access live virtual proceedings more than 325,000 times. Local trial court YouTube channels have nearly 135,000 subscribers and trial court videos have millions of views.

The benefits of these changes are vast and undeniable. First and foremost, they have made people safer during the global pandemic. But the improvements in transparency and access to justice are also staggering; remote access has greatly increased court visibility, allowed more people to get legal representation, and reduced the number of cases defaulted because litigants couldn't make it to court. People who would have missed a court date because they didn't have bus fare or couldn't afford to miss work have been spared the consequences of failing to appear (time in jail and accumulated debt).

Equal access to justice is an ongoing concern for the fair administration of our courts. Pre-pandemic, "[c]ourts were falling short in meeting their mission to provide access to justice for all, and particularly so when it comes to addressing the needs of lower-income and minority commu-

nities." Michigan Justice For All Task Force, *Strategic Plan and Inventory Report* (December 2020), p 2, available at <https://courts.michigan.gov/News-Events/JusticeForAll/Final%20JFA%20Report%20121420.pdf> (accessed July 23, 2021) [https://perma.cc/74UE-V9WN]. Indeed, surveys showed that "nearly nine in ten low-income individuals with a civil legal problem receive little or no legal help" in trying to navigate the justice system. *Id*. Unequal access to justice has worrisome consequences for the public's confidence in our courts, and therefore in the rule of law.

The benefits of remote options for people who have historically been excluded from our justice system is lemonade. Interviews of judges who oversee child welfare courts conducted by the National Center for State Courts found that parents, foster parents, and kinship caregivers appeared more often at virtual proceedings than live, and they attributed that increase in part to not having to travel, find parking, or miss work. See National Center for State Courts, *Study of Virtual Child Welfare Hearings: Impressions From Judicial Interviews* (June 2021), available at https://www.ncsc.org/__data/assets/pdf_file/0018/65520/Study-of-Virtual-Child-Welfare-Hearings-Judicial-Interviews-Brief.pdf> (accessed July 23, 2021) [https://perma.cc/AVX8-WCNZ]. Other sources have shown that participation in eviction cases skyrocketed after virtual proceedings began, resulting in lower default rates. See Joint Technology Committee, *Judicial Perspectives on ODR and Other Virtual Court Processes* (May 18, 2020), available at <https://www.ncsc.org/__data/assets/pdf_file/0023/34871/20-05-18-Judicial-Perspectives.pdf> (accessed July 23, 2021) [https://perma.cc/T2MY-6DTZ].

Virtual proceedings have had enormous efficiency benefits too. By reducing travel time and time spent in

the courthouse waiting for hearings to begin, attorneys can appear in courts in multiple counties on the same day. And lawyers benefit too when courts around the state have the same processes for appearing. Having to negotiate vastly different rules from court to court around the state is a cost lawyers and their clients would bear.

Of course there are proceedings that cannot be conducted remotely unless the parties consent. *People v Jemison*, 505 Mich 352 (2020). And there are others that are simply better suited for physical courtrooms. This interim order will allow us to hear from the bench, the bar, and the public about all of this, so that we can take advantage of all the benefits we have gained and make informed decisions about how to best use remote platforms going forward. And in the meantime, we won't lose ground. Our choice is not between smartphones and barristers' wigs.

Justices VIVIANO and BERNSTEIN would disregard all this progress for the people most historically excluded from our justice system in the name of "we should go back to the way we've always done it." That approach would needlessly hurt the many litigants who have gained the most from our new pandemic practices, as well as the many lawyers (and their clients) who have seen efficiencies otherwise not possible. Litigants who might have failed to appear because they will lose their job if they miss work, or who have no access to transportation or no one to care for their children or physical difficulty getting to court, are the ones who would pay the cost if the ability to participate virtually is not an option anymore and instead put off until some future unspecified time when we get around to consid-

ering it.[1] Today's interim step avoids asking those least positioned to bear those costs to do so—it continues robust remote access while we take in the lessons we have all learned.

It's time to move forward, not back. We should look at what we have learned from our collective experiences during the pandemic and continue to use practices that have worked while discarding practices that have not. Every other institution and industry is doing exactly that—changing their practices for the better based on lessons learned this past 16 months. The modern workforce will never return to its February 2020 norms. Business travel, education, and healthcare will never be the same.

Why should courts be the one institution that doesn't benefit from the lessons learned from the accelerated innovation that COVID-19 brought?[2] More importantly, the public traditionally excluded from those courts should not lose a valuable new tool for access and transparency. Today's order makes certain they won't, and I am therefore pleased to support it.

ZAHRA, J. (*concurring in part and dissenting in part*). Faced with the COVID-19 pandemic, this Court used its equitable powers to employ emergency measures we hoped would respond to a health crisis not seen by this

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[1] I am not sure I understand what my colleagues believe regular process should require here—we have given rule changes immediate effect while taking public comment before. And we don't have a regular process for a global pandemic that forced us to quickly change our processes and then serendipitously learn that our new approach boosted access to justice and transparency.

[2] Continued remote hearings are part of the solution to backlogs because they increase capacity: visiting judges can conduct remote proceedings for matters that are suited for them, freeing up physical courtrooms for jury trials and other proceedings that are not suited for them.

state in more than one hundred years. We could only surmise whether these procedures would adequately address the emergency we faced, and we exercised our best effort to respond appropriately. Today, it appears that the health crisis we faced is now behind us, and the Court lifts most of its emergency orders. I concur in the portion of today's order that rescinds most of these emergency orders. I, however, dissent from the implementation of these emergency procedures through court rules that are given immediate effect, a process that is imprudent and wholly inconsistent with the traditional process of this Court.

The Court, no doubt, has good intentions in implementing these emergency measures through court rules having immediate effect. But summary implementation of new court rules is rarely employed and occurs only when immediate action is required, such as when an immediate response is needed to address legislative changes in the law or our caselaw renders a rule obsolete. No such circumstances are present here.

A perfect solution is not at hand. Like most matters that end up in this tribunal, there are competing interests at stake, and we should not treat this as an all-or-nothing proposition. Remote hearings provide an opportunity to increase access to justice. This is no small matter. At the same time, remote hearings deny trial courts their full authority to maintain the dignity and proper decorum of the court. The courtroom—with the judge perched on a bench, the call of the court crier to open court and call cases, and the ceremony and ritual of live court proceedings—affords trial courts with authority that is conspicuously absent from video proceedings. It cannot be denied that there is an increased risk that litigants participating remotely will make a mockery of court proceedings, with the

court having little to no remedy available to sanction such disruptive conduct. These concerns merit public attention before considering even interim court rules, which, more often than not, load the dice toward their later adoption as permanent court rules.

Video court served its purpose during the state of emergency, but this emergency has, for the most part, passed. It is simply not appropriate for this Court to administer the Michigan court system as though this emergency continues. The better approach, in my view, is to trust our trial courts. The trial courts of this state have the authority to implement video proceedings under our current rules. I would leave it to the discretion of our trial courts to determine when and where best to use these tools. I trust our trial courts to implement these procedures as needed and where such proceedings benefit our judicial process. I would not implement these rules with immediate effect. The Court should instead publish these proposed changes for public comment and conduct a public hearing before imposing on our trial courts a process that was put in place on an emergency basis. In short, we should follow our standard process and promulgate changes to our court rules in due course based on the lessons learned from this crisis, not by imposing procedures that represented our best efforts in responding to it.

VIVIANO and BERNSTEIN, JJ. (*concurring in part and dissenting in part*). We write this joint statement because we strongly believe it is time for this Court to stop administering the state courts by issuing emergency orders and we share a deeply held conviction that our state courts should return to in-person proceedings as much and as quickly as possible. We recognize that there are continued public health challenges due to the COVID-19 pandemic, but we have

practiced law and managed courts long enough to know that our chief judges in Michigan are up to the task of managing their own court facilities in a safe, responsible, and efficient manner. We also have great confidence in the ability of our trial judges to manage their dockets and their courtrooms, keeping a keen eye on the safety of their staff, attorneys, litigants, and the public.

We agree with the Court's order today to the extent it rescinds many of our COVID-19-related administrative orders, but we dissent to the extent that the Court continues to require expanded use of remote proceedings.[1] The administrative orders that we issued since the start of the COVID-19 pandemic represented our best efforts to address a complex problem that affected numerous facets of our court system. But they, along with the return to full capacity directives issued by the State Court Administrative Office, have prevented large-scale, in-person judicial proceedings across most of the state for the past 18 months. This has contributed to a massive backlog of in-person proceedings that simply cannot be alleviated by the use of more remote proceedings.[2] We believe, however, that the time has

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[1] We agree with the Court's rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, and 2020-19 and the retention of Administrative Order No. 2021-2. We also agree with imposing the conditions previously found in AO 2020-6 on any remote hearings that are conducted. But, for the reasons discussed in this statement, we strongly disagree with the requirement that courts use remote participation technology "to the greatest extent possible," MCR 2.407(G); MCR 6.006(E); and with the court rule amendment permitting judges to preside over cases from a location other than the judge's courtroom by suspending Administrative Order No. 2012-7.

[2] See Brand-Williams, The Detroit News, *Michigan Courts Face Massive Backlog of Felony Cases Awaiting Trial* (July 4, 2021) <https://www.detroitnews.com/story/news/local/michigan/2021/07/04/michigan-courts-face-massive-backlog-felony-cases-awaiting-trial/7787034002/> (ac-

come to end these emergency measures and restore normal operating procedures.[3]

Those procedures reflect centuries of tradition that have placed courtrooms and courthouses at the center of the judicial process. There is a reason that our taxpayers have provided each judge in Michigan with a separate courtroom. They represent more than just physical structures.[4] Courthouses hold "symbolic importance" in our society, and their presence "affirm[s] the presence of a community, of a society, by reflecting its values back to itself."[5] The courthouse itself rein-

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cessed July 20, 2021) [https://perma.cc/68GH-VW2Y]. The backlog consists of jury trials, preliminary examinations, and other hearings that must be conducted in person. To answer this docket crisis with a renewed emphasis on remote hearings seems to us at best misguided.

[3] In making these court rule changes, the Court again deviates from our general practice of first providing notice and an opportunity to comment, and conducting a public hearing on proposed rule changes prior to adopting them, see MCR 1.201(A) through (C), (E). Although we have the ability to dispense with the notice requirements if "there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice," MCR 1.201(D), neither of these conditions is met here. Nor are these changes of the sort that would typically be placed in permanent court rules, since the language is vague and aspirational.

[4] We emphasize the importance of the courthouse and courtroom to acknowledge the authority and significance that these spaces have persistently held in our society. Despite that, we continue to acknowledge that courthouses may present accessibility concerns for certain populations. See Pant, McAnnany, and Belluscio, New York Lawyers for the Public Interest, *Accessible Justice: Ensuring Equal Access to Courthouses for People with Disabilities* (March 2015) <https://www.nylpi.org/wp-content/uploads/2015/03/Accessible-Justice-NYLPI-3-23-15.pdf> (accessed July 20, 2021) [https://perma.cc/8H4F-7DJX].

[5] Rowden & Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 Int'l J L Context 504, 518 (2018).

forces the importance of what occurs within its walls.[6] Suffice it to say that this symbolism can be lost during remote hearings.[7]

The overemphasis on remote hearings reflected in today's court rule amendments risks—in a very real way—depriving people of their day in court. Even prior to the COVID-19 pandemic, research revealed concerns about the impacts caused by holding proceedings remotely.[8] Remote proceedings may "make it more

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[6] See Haldar, *In and Out of Court: On Topographies of Law and the Architecture of Court Buildings*, 7 Int'l J for Semiotics L 185, 189 (June 1994) ("Architecture marks off and signifies that authority-to-judge which can only be found inside a court of law and nowhere else[;] it assigns legal discourse to a proper place.").

[7] See Wolfson, Louisville Courier Journal, *Think a Court Cat Filter Is Weird? Try Virtual Court with Beer, Bikinis and Clients in Bed* (December 18, 2020) <https://www.courier-journal.com/story/news/2020/12/18/amid-covid-19-pandemic-remote-court-hearings-bare-naked-truth/3932436001/> (accessed July 20, 2021) [https://perma.cc/X8GJ-F62G] (providing examples of parties and attorneys taking remote court appearances less seriously than warranted).

[8] "Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s. The use of videoconferencing, even without the petitioner's consent, is specifically authorized by statute." Bannon & Adelstein, Brennan Center for Justice, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (September 10, 2020) <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>, p 4 (accessed July 17, 2021) [https://perma.cc/68JE-5TPV]. The American Bar Association has previously recommended that the use of video hearings "be limited to procedural (as opposed to substantive) hearings and that respondents should be entitled to knowing and voluntary consent to proceeding" via video, given the due-process concerns that were raised by the use of such technology. American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System* (March 2019) <https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf>, p 18 (accessed July 21, 2021) [https://perma.cc/W3TW-RRL3]. See also Eagly, *Remote Adjudication in Immigration*, 109 Nw U L Rev 933, 941 (2015) ("Detainees and their attorneys are frequently discouraged by

difficult for the judge to both embody and maintain the authority of the court," and appearance via video may not "adequately convey the authority of the court," which can affect the solemnity of the proceedings.[9] Well-settled caselaw holds that, in the context of criminal trials, in-person testimony can be essential to a defendant's constitutional rights.[10] Even commentators who support expansion of videoconferencing technologies in judicial proceedings advise proceeding with

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the numerous logistical and technical difficulties associated with litigating televideo cases, such as unpredictable interruptions in the video feed, challenges in communicating with interpreters not physically present in the same room, and the impossibility of confidential attorney-client communication over a public courtroom screen. Detainees removed from the courtroom by the video procedure may be less likely to understand their rights in the removal process, less likely to request a court continuance to find a lawyer, and, especially for those who cannot find or afford an attorney, less equipped to assert their claims and file the required paperwork.").

[9] *Remote Judging*, 14 Int'l J L Context at 515-516.

[10] The Sixth Amendment of the United States Constitution states, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" See also Const 1963, art 1, § 20. In *People v Jemison*, 505 Mich 352, 356 (2020), we unanimously adopted the Supreme Court's position in *Crawford v Washington*, 541 US 36, 68 (2004), that the Confrontation Clause requires face-to-face in-person cross-examination of witnesses providing testimonial evidence in criminal matters unless a witness is unavailable and the defendant had a prior opportunity for cross-examination.

"The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' *Pointer v. Texas*, 380 U.S. 400, 404 (1965)." *Coy v Iowa*, 487 US 1012, 1017 (1988). Noting the differences between face-to-face testimony versus even two-way video testimony, the Ninth Circuit has held that "the use of a remote video procedure must be reserved for rare cases in which it is 'necessary.' " *United States v Carter*, 907 F3d 1199, 1206 (2018), quoting *Maryland v Craig*, 497 US 836, 850 (1990).

caution before adopting radical changes that risk impinging on litigants' rights and access to justice more broadly.[11] Indeed, the benefits of remote proceedings are often more apparent than their costs, but there is a risk that judges and judicial policymakers may "face pressure to overemphasize values such as speed, cost savings, and reduced workloads at the cost of fair proceedings."[12]

Michigan trial judges already have the authority and discretion to allow videoconferencing and other means of remote participation when appropriate.[13] We, of course, should carefully consider any lessons learned during the pandemic and whether any new remote participation or other procedures should be formally adopted in the future.[14] However, any changes we

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[11] *Impact of Video Proceedings*, p 2 (noting that the expanded use of remote technology "raises critical questions about how litigants' rights and their access to justice may be impacted").

[12] Bannon & Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw U L Rev 1875, 1909 (2021).

[13] See, e.g., MCR 2.004; MCR 2.407; MCR 3.904; MCR 6.006.

[14] In 2001, the Florida Supreme Court repealed a rule that had been adopted on an interim basis in 1999, which allowed for juvenile detention hearings to be conducted by video. *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So 2d 470 (2001). In lieu of adopting a permanent rule change, a pilot program had been initiated and later adopted on an interim basis. *Id*. at 472. More studies were conducted, and the Florida Supreme Court revisited the proposed amendment upon the expiration of a 90-day period. *Id*. at 473. The Florida Supreme Court found that, although the proposed amendment allowed for the exercise of judicial discretion, "[i]n practical operation, the electronic proceeding became mandatory, and not merely an option to be implemented as appropriate." *Id*. at 472. The Florida Supreme Court highlighted the concerns raised by the Florida Public Defender Association: "Specifically, many observed that there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at

might make should be considered through our normal administrative process, after giving notice to the public and an opportunity for all stakeholders to comment on any changes that we are considering. Instead, the Court converts its emergency orders into permanent modifications to the court rules and gives them immediate effect—a process that may result in more confusion, delays, and distrust in the court system.

To have any legitimacy, emergency orders should come to an end once the emergency has subsided. We believe it is imperative for this Court to return to our prepandemic practices and procedures, bearing in mind that any permanent changes to the court rules could and should first be considered through the normal administrative process. Access to the courts is vital, and we believe we should offer an opportunity to hear from anyone who may be affected by sweeping changes to courtroom procedures before making them permanent. It is also important for us to allow our chief judges and other trial court judges the discretion they have always had to manage their facilities, courtrooms, and dockets. They have their work cut out for them in confronting the massive backlog caused by the pandemic. We should get out of their way and let them go to work. We have confidence that our trial judges and their staffers will get the job done. We respectfully dissent.

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the detention center, and between a public defender at the detention center and a public defender in the courtroom." *Id*. at 473. Although the Florida Supreme Court noted that the proposed amendment had some benefits, "our youth must never take a second position to institutional convenience and economy." *Id*. at 474. We find it particularly noteworthy both that the Florida Supreme Court utilized a process that allowed it to collect data and input from key stakeholders *before* committing to a permanent rule change and that, upon further reflection, the Florida Supreme Court decided *against* adopting a rule change expanding the use of video for these hearings.

Supreme Court Cases

2 CROOKED CREEK, LLC v CASS COUNTY TREASURER

Docket No. 159856. Argued on application for leave to appeal October 7, 2020. Decided March 16, 2021.

2 Crooked Creek, LLC (2CC) and Russian Ferro Alloys, Inc. (RFA) filed an action in the Court of Claims against the Cass County Treasurer, seeking to recover monetary damages under MCL 211.78*l* of the General Property Tax Act (the GPTA), MCL 211.1 *et seq*., in connection with defendant's foreclosure of certain property. In 2010, 2CC purchased property for development in Cass County. 2CC failed to pay the 2011 real-property taxes and, in 2013, forfeited the property to defendant. From January through May 2013, defendant's agent, Title Check, LLC (Title Check), mailed via first-class and certified mail a series of notices to the address listed in the deed. These notices apprised 2CC of the unpaid property taxes, forfeiture, and possibility of foreclosure. The certified mail was returned as "Unclaimed—Unable to Forward," but the first-class mail was not returned. Meanwhile, 2CC constructed a home on the property, obtaining a mortgage for the construction from RFA. On June 18, 2013, Katelin MaKay, a land examiner working for Title Check, visited the property; determined it to be occupied; and being unable to personally meet with any occupant, posted notice of the show-cause hearing and judicial-foreclosure hearing on a window next to the front door of the newly constructed home. Title Check continued its notice efforts through the rest of 2013 and into 2014, mailing various notices as well as publishing notice in a local newspaper for three consecutive weeks. After no one appeared on 2CC's behalf at the January 15, 2014 show-cause hearing or the February 18, 2014 judicial-foreclosure hearing, the Cass Circuit Court, Michael E. Dodge, J., entered the judgment of foreclosure. The property was not redeemed by the March 31, 2014 deadline, and fee simple title vested with defendant. 2CC learned of the foreclosure a few weeks later. In July 2014, 2CC moved to set aside the foreclosure judgment on due-process grounds. These efforts failed, however, because the circuit court concluded that defendant's combined efforts of mailing, posting, and publishing notice under the GPTA provided 2CC with notice sufficient to satisfy the requirements of due process. 2CC appealed. In an unpublished per curiam opinion

issued on March 8, 2016 (Docket No. 324519), the Court of Appeals, METER, P.J., and BOONSTRA and RIORDAN, JJ., affirmed. At the same time 2CC moved to set aside the foreclosure judgment, it filed a separate action in the Court of Claims for monetary damages under MCL 211.78*l*(1), alleging that it had not received any notice required under the GPTA. Defendant moved for summary disposition under MCR 2.116(C)(7). The Court of Claims, MICHAEL J. TALBOT, J., denied the motion and held a bench trial. At the close of 2CC's proofs, the court granted an involuntary dismissal in favor of defendant, holding, in relevant part, that 2CC had received at least constructive notice of the foreclosure proceedings when MaKay posted notice on the home at a time when 2CC "was exercising dominion and control over the property by contracting for the construction of a home on the property." 2CC appealed as of right, and the Court of Appeals, SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., affirmed. 329 Mich App 22 (2019). 2CC sought leave to appeal in the Supreme Court, and the Supreme Court ordered oral argument on the application limited to 2CC's claim for monetary damages under MCL 211.78*l*(1). 505 Mich 865 (2019).

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCL 211.78*l*(1) provided that if a judgment for foreclosure was entered under MCL 211.78k of the GPTA and all existing recorded and unrecorded interests in a parcel of property were extinguished as provided in MCL 211.78k, the owner of any extinguished recorded or unrecorded interest in that property who claimed that he or she did not receive any notice required under the GPTA was not permitted to bring an action for possession of the property against any subsequent owner but could only bring an action to recover monetary damages. By using the term "any," the Legislature intended to encompass all types of notice required under the GPTA, not just actual notice. The use of "actual notice" in other provisions as opposed to the use of "any notice" in MCL 211.78*l*(1) indicated that the Legislature likely intended to differentiate between "actual notice" and "any notice." Further, the legal definition of "notice" is not constrained to situations in which a person receives actual notice; a person may be deemed to have received notice regardless of whether actual awareness exists. The Court of Appeals erred by suggesting that the remedy recognized in *In re Treasurer of Wayne Co for Foreclosure (Perfecting Church)*, 478 Mich 1 (2007), of setting aside a foreclosure judgment on due-process grounds was mutu-

ally exclusive from the monetary-damages remedy provided in MCL 211.78*l*(1). MCL 211.78(2) specifically sets forth the Legislature's intent to comply with the minimum requirements of due process without granting additional rights that might interfere with the foreclosure process, while MCL 211.78*l*(1) represented the Legislature's attempt to limit all remedies available under the GPTA to monetary damages. Reading these two provisions together, the Legislature, in enacting the 1999 amendments of the GPTA, intended to provide monetary damages under MCL 211.78*l*(1) only to those former property owners who did not receive constitutionally adequate notice. Although MCL 211.78*l*(1) provided "a damages remedy that [was] not constitutionally required," a due-process violation for lack of notice still served as a necessary predicate for such a claim. Accordingly, property owners who received constitutionally adequate notice sufficient to satisfy the minimum requirements of due process under the GPTA would have necessarily received the notice required under the GPTA and, thus, could not sustain an action for monetary damages under MCL 211.78*l*(1). In this case, because 2CC had already been adjudicated to have received such notice, 2CC could not establish that it did not receive any notice required under the GPTA. Accordingly, the Court of Appeals correctly dismissed 2CC's action for monetary damages under MCL 211.78*l*(1), albeit for the wrong reasons.

Affirmed.

Justice VIVIANO, concurring in the judgment, agreed with the majority that plaintiffs could not invoke MCL 211.78*1*(1), but he would not have decided the question whether a plaintiff who received constitutionally sufficient notice has thereby received "any notice required under this act" for purposes of MCL 211.78*1*(1). To decide whether plaintiffs failed to receive "any notice required under this act" would involve determining whether plaintiffs received the notice required under the GPTA's numerous notice provisions, and if any of those provisions required actual notice and that notice was not received, then the failure to receive actual notice might have satisfied MCL 211.78*1*(1), enabling a monetary-damages claim. However, plaintiffs did not present that argument. Plaintiffs therefore failed to show that MCL 211.78*1*(1) allowed claims whenever taxpayers did not receive "actual notice."

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

Kus Ryan, PLLC (by *Cindy Rhodes Victor*) and *Barnes & Thornburg LLP* (by *Tracy D. Knox* and *Aaron D. Lindstrom*) for plaintiffs.

Kreis, Enderle, Hudgins & Borsos, PC (by *Thomas G. King*, *Nicholas J. Spigiel*, and *Charles L. Bogren*) for defendant.

Amici Curiae:

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Matthew B. Hodges*, Assistant Attorney General, for the people.

Dykema Gossett PLLC (by *Theodore W. Seitz*, *Steven C. Liedel*, and *Kyle M. Asher*) and *Kevin T. Smith* for the Michigan Association of County Treasurers.

ZAHRA, J. In this appeal, we address the monetary-damages provision of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., which, until recently, permitted an owner of an interest in real property extinguished by tax foreclosure to recover monetary damages upon a showing "that he or she did not receive any notice required under [the GPTA] . . . ."[1] Plaintiff 2 Crooked Creek, LLC (2CC) contends that the phrase "any notice" means "actual notice" and that the statute permitted recovery of monetary damages for anything short of receiving actual notice.[2] We conclude that the

[1] MCL 211.78*l*(1). The Legislature recently amended the GPTA and, in doing so, eliminated the relevant language at issue in this appeal. See 2020 PA 256, effective December 22, 2020. This opinion only interprets the preamendment version of the GPTA, and all citations of the GPTA are to the former version of the act.

[2] We limit our review in this case to 2CC's claim for monetary damages under MCL 211.78*l*(1). *2 Crooked Creek LLC v Cass Co*

phrase "any notice" as it was used in MCL 211.78*l*(1) was not limited to actual notice but, instead, encompassed all constitutionally sufficient notice. Thus, while we affirm the result reached by the Court of Appeals, we clarify that the monetary-damages remedy in MCL 211.78*l*(1) provided an alternative avenue of relief available *only* to those former property owners and interest holders who did not receive constitutionally adequate notice of the foreclosure proceedings as required under the GPTA.[3] Therefore, in order to bring a claim for monetary damages under MCL 211.78*l*(1) for not having received "any notice" under the GPTA, the claimant must first establish that notice did not satisfy the minimum requirements of due process.

I. BASIC FACTS AND PROCEEDINGS

In 2010, 2CC purchased property for development in Cass County. 2CC failed to pay the 2011 real-property taxes and, in 2013, forfeited the property to defendant, the Cass County Treasurer. From January through May 2013, defendant's agent, Title Check, LLC (Title Check), mailed via first-class and certified mail a series of notices to the address listed in the deed. These notices apprised 2CC of the unpaid property taxes, forfeiture, and possibility of foreclosure. The certified

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Treasurer, 505 Mich 865 (2019). We agree with the lower courts' resolution of the claim for monetary damages advanced by plaintiff Russian Ferro Alloys, Inc. (RFA), the holder of a mortgage on the property recorded after the certificate of forfeiture was recorded, and we decline to address it further.

[3] We recognize that this remedy was not exclusive to the former owner of the tax-foreclosed property but also included "the owner of any extinguished recorded or unrecorded interest in that property . . . ." MCL 211.78*l*(1). For ease of reference, however, we refer to a person bringing a claim for monetary damages under MCL 211.78*l*(1) as a claimant.

mail was returned as "Unclaimed—Unable to Forward," but the first-class mail was not returned.[4] Meanwhile, 2CC constructed a home on the property, obtaining a mortgage for the construction from Russian Ferro Alloys, Inc.[5]

On June 18, 2013, Katelin MaKay, a land examiner working for Title Check, visited the property; determined it to be occupied; and being unable to personally meet with any occupant, posted notice of the show-cause hearing and judicial-foreclosure hearing on a window next to the front door of the newly constructed home.[6] Title Check continued its notice efforts through

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[4] The address listed on the property's deed is the resident address of 2CC's representative, Sergei Antipov. 2CC is managed by KAVA Management Company, LLC, which is, in turn, managed by Antipov. The recorded deed listed 2CC's address as 36 Bradford Lane, Chicago, IL 60523. Although this zip code is correct, the city should have been identified as Oak Brook, not Chicago. Title Check mailed the first notice to the Chicago address, but it was later delivered to the correct address in Oak Brook. All subsequently mailed notices were sent to the correct address in Oak Brook. Antipov, however, had apparently moved in June 2011, and he claims that he never received the mailed notices.

[5] While RFA obtained its mortgage on May 28, 2013, it did not record that mortgage until July 10, 2013—after defendant recorded the certificate of forfeiture on April 12, 2013, and after Title Check completed its title search on June 3, 2013. Title Check's title search revealed only the deed, the real estate agreement, an easement, and the certificate of forfeiture.

[6] MaKay took a photograph of the posted notice and attached the photograph to her inspection worksheet. James Frye, the president of the development company working on the home, later submitted an affidavit stating that he had seen the notice and had contacted a representative of 2CC. Antipov and Douglas Anderson, 2CC's registered agent and president of RFA, filed affidavits refuting Frye's affidavit. Each averred that Frye knew Antipov and Anderson were 2CC's only representatives and that Frye never contacted either of them about the posted notice. Further, 2CC filed a lawsuit against Frye, alleging that he removed the posted foreclosure notice and failed to inform 2CC of the foreclosure. Frye was granted summary disposition in that case.

the rest of 2013 and into 2014, mailing various notices as well as publishing notice in a local newspaper for three consecutive weeks. After no one appeared on 2CC's behalf at the January 15, 2014 show-cause hearing or the February 18, 2014 judicial-foreclosure hearing, the Cass Circuit Court entered the judgment of foreclosure. The property was not redeemed by the March 31, 2014 deadline, and fee simple title vested with defendant. 2CC learned of the foreclosure a few weeks later.

In July 2014, 2CC moved to set aside the foreclosure judgment on due-process grounds. These efforts failed, however, because the circuit court concluded, and the Court of Appeals agreed, that defendant's combined efforts of mailing, posting, and publishing notice under the GPTA provided 2CC with notice sufficient to satisfy the requirements of due process.[7] At the same time 2CC moved to set aside the foreclosure judgment, it filed this separate action in the Court of Claims for monetary damages under MCL 211.78*l*(1), alleging that it had not received any notice required under the GPTA. After denying defendant's motion for summary disposition under MCR 2.116(C)(7) (prior judgment),[8]

See *2 Crooked Creek LLC v Frye*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2020 (Docket No. 341274) (affirming the trial court's grant of summary disposition in favor of Frye and the company that constructed the home for 2CC).

[7] *In re Petition of Cass Co Treasurer for Foreclosure*, unpublished per curiam opinion of the Court of Appeals, issued March 8, 2016 (Docket No. 324519), pp 1, 8-9, lv den 500 Mich 882 (2016), cert den ___ US ___; 138 S Ct 422 (2017).

[8] The Court of Claims concluded that 2CC's action was not barred by principles of res judicata and collateral estoppel because whether a claimant seeking monetary damages under MCL 211.78*l*(1) received any notice required under the GPTA was a "separate inquiry from whether the foreclosing governmental unit satisfied due process in giving notice of the foreclosure." *2 Crooked Creek, LLC v Cass Co Treasurer*, unpub-

the Court of Claims held a bench trial. At the close of 2CC's proofs, the court granted an involuntary dismissal in favor of defendant, holding, in relevant part, that 2CC had received at least constructive notice of the foreclosure proceedings when MaKay posted notice on the home at a time when 2CC "was exercising dominion and control over the property by contracting for the construction of a home on the property."[9] 2CC appealed as of right, and the Court of Appeals affirmed in an opinion later approved for publication.[10] 2CC filed an application for leave to appeal in this Court. In lieu of granting leave, we ordered oral argument on the application limited to the issue of

> whether [2CC] (an owner of a property interest that was extinguished by tax foreclosure after being accorded notice sufficient to satisfy minimum due process requirements) can sustain an action to recover monetary damages pursuant to MCL 211.78*l*(1) by claiming that it "did not receive any notice required under this act" due to a lack of actual notice and, specifically, whether constructive notice is sufficient to fall within the confines of "any notice" under MCL 211.78*l*(1) such that 2CC can be charged with knowledge of the notice that was posted to the subject property during a time when 2CC was exercising control

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lished opinion of the Court of Claims, issued June 29, 2017 (Docket No. 14-000181-MZ), pp 3-5. Defendant appealed that decision to the Court of Appeals, which declined to address it. *2 Crooked Creek, LLC v Cass Co Treasurer*, 329 Mich App 22, 27 n 1, 57; 941 NW2d 88 (2019). For the reasons stated in this opinion, we conclude that defendant was entitled to summary disposition under MCR 2.116(C)(7). See p 18 & note 47 of this opinion.

[9] *2 Crooked Creek, LLC v Cass Co Treasurer*, unpublished opinion of the Court of Claims, issued January 22, 2018 (Docket No. 14-000181-MZ), p 16. The Court of Claims found incredible Antipov's claim that he did not receive any of the mailed notices. The court also concluded that 2CC provided no evidence of its damages. The Court of Appeals did not address these alternative grounds for dismissal, and neither do we.

[10] *2 Crooked Creek*, 329 Mich App 22.

and dominion over it. See *In re Treasurer of Wayne Co for Foreclosure (Perfecting Church)*, 478 Mich 1[; 732 NW2d 458] (2007).[11]

II. STANDARD OF REVIEW AND APPLICABLE RULES OF STATUTORY INTERPRETATION

The issue presented in this case is one of pure statutory interpretation, which this Court reviews de novo.[12] This Court's role in interpreting statutory language is to "ascertain the legislative intent that may reasonably be inferred from the words in a statute."[13] "In doing so, courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."[14] "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used."[15] "When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written."[16]

III. ANALYSIS

A. THE GPTA AND MCL 211.78*l*

The GPTA authorizes a foreclosing governmental unit to seize tax-delinquent property through foreclo-

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[11] *2 Crooked Creek*, 505 Mich at 865.

[12] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

[13] *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[14] *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (quotation marks, citation, and brackets omitted).

[15] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (citations omitted).

[16] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 199; 895 NW2d 490 (2017).

sure and to then sell it to recoup unpaid real-property taxes, penalties, interest, and fees. Before the foreclosure judgment is entered, the GPTA provides various procedural safeguards to afford those with an interest in the property notice of the foreclosure by mail, by publication, and by a personal visit to the property,[17] and it provides an opportunity to be heard via a show-cause hearing and a judicial-foreclosure hearing.[18] Once the foreclosure judgment enters and the redemption and appeal periods expire, fee simple title to the property vests in the foreclosing governmental unit.[19] Once entered, circuit courts generally may not alter a judgment of foreclosure. Nonetheless, MCL 211.78*l*(1) provided divested property owners and interest holders who claim they did not receive any notice required under the GPTA an action for monetary damages:

> If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against

[17] See MCL 211.78i. Of course, the GPTA also requires that various notices be sent to the property owner when taxes are returned as delinquent and when the property is forfeited to the county treasurer. See MCL 211.78a through MCL 211.78c; MCL 211.78f.

[18] See MCL 211.78j; MCL 211.78k. See also MCL 211.78k(5)(f) (requiring the circuit court to make "[a] finding that all persons entitled to notice and an opportunity to be heard have been provided that notice and opportunity").

[19] MCL 211.78k(6).

> any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.[20]

2CC argues that it is entitled to monetary damages under MCL 211.78*l*(1) because "any notice" means "actual notice," such that the statute provided relief when a claimant received anything less than actual notice of the foreclosure proceedings. By using the term "any," however, it is clear that the Legislature intended to encompass all types of notice required under the GPTA, not just actual notice.[21] Indeed, a review of other provisions of the GPTA demonstrates that the Legislature did refer to "actual notice" in some instances.[22] The use of "actual notice" in other provisions as opposed to the use of "any notice" in MCL 211.78*l*(1) indicates that the Legislature likely intended to differentiate between "actual notice" and

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[20] MCL 211.78*l*(2) provided the Court of Claims with original and exclusive jurisdiction for a claim of monetary damages. MCL 211.78*l*(3) set out a two-year statutory period of limitations after the foreclosure judgment is entered. MCL 211.78*l*(4) limited the amount of monetary damages recoverable to the fair market value of the interest held in the property as of the date the judgment of foreclosure is entered, less any taxes, interest, penalties, and fees owed on the property as of that date. Finally, MCL 211.78*l*(5) prohibited the transfer of the right to sue for monetary damages except by testate or intestate succession.

[21] See *Random House Webster's College Dictionary* (1999) (defining "any" as "**1.** one, a, an, or some; one or more without specification or identification[.] . . . **2.** whatever or whichever it may be[.] . . . **3.** in whatever quantity or number, great or small; some[.] **4.** every; all[.])"; *People v Harris*, 495 Mich 120, 131; 845 NW2d 477 (2014) (explaining that " 'any' is commonly understood to encompass a wide range of things" such that "it is difficult to imagine how the Legislature could have cast a broader net given the use of the word[] 'any' "), citing *People v Lively*, 470 Mich 248, 253-254; 680 NW2d 878 (2004).

[22] See, e.g., MCL 211.78k(5)(f)(*i*) and (*iii*) (specifically using the terms "actual notice" and "constructive notice" in describing when a person is considered to have been provided notice and an opportunity to be heard).

"any notice."[23] Further, the legal definition of "notice" is not constrained to situations in which a person receives actual notice; a person may be deemed to have received notice regardless of whether actual awareness exists.[24]

2CC tries to rebut these commonsense conclusions by focusing on the word "receive," arguing that because other forms of notice act as a substitute for actual notice, only actual notice can be *received*.[25] The word "receive" is defined as follows:

> **1.** to take into one's possession (something offered or delivered) . . . . **2.** to have (something) bestowed, con-

[23] "When the Legislature uses different words, the words are generally intended to connote different meanings. . . . If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009).

[24] *Black's Law Dictionary* (11th ed) (defining "notice" as "**1.** Legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); definite legal cognizance, *actual or constructive*, of an existing right or title . . . . **2.** *The condition of being so notified, whether or not actual awareness exists* . . . . **3.** A written or printed announcement") (emphasis added). Resort to a legal dictionary is appropriate when the term in need of interpretation is "a legal term of art . . . that has acquired a peculiar and appropriate meaning in the law." *Hannay*, 497 Mich at 68-69, citing MCL 8.3a. In any event, we recognize the lay definition of "notice" tracks its legal definition. See *Random House Webster's College Dictionary* (1999) (defining "notice" as "**1.** information, warning, or announcement of something impending; notification . . . . **2.** a written or printed statement conveying such information or warning[.] . . . **7.** to become aware of or pay attention to; take notice of; observe").

[25] See *Black's Law Dictionary* (11th ed), p 1277 (defining "actual notice" as "**1.** Notice given directly to, or received personally by, a party. . . . **2.** *Property*. Notice given by open possession and occupancy of real property," while defining "constructive notice" as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . ; notice presumed by law to have been acquired by a person and thus imputed to that person").

> ferred, etc. . . . . **3.** to have delivered or brought to one . . . . **4.** to get or be informed of . . . . **5.** to be burdened with; sustain . . . . **6.** to hold, bear, or contain . . . . **7.** to take into the mind; apprehend mentally . . . . **8.** to accept from another, as by hearing . . . .[26]

Clearly then, the plain meaning of "receive" is not limited to actual, physical possession as 2CC suggests; a person can be said to "receive" notice when he or she is "informed of" or "apprehend[s]" the notice.[27] Accordingly, we agree with the Court of Appeals that 2CC's interpretation of MCL 211.78*l*(1) conflicts with the plain language of the statute.

B. *PERFECTING CHURCH*

2CC contends that this Court's decision in *Perfecting Church*[28] supports its position that MCL 211.78*l*(1) permitted recovery of monetary damages for anything less than actual notice. MCL 211.78*l* was enacted as part of the 1999 amendments of the GPTA.[29] These amendments reflect a legislative effort to streamline the tax-foreclosure process, "to provide finality to foreclosure judgments and to quickly return property to the tax rolls."[30] Two provisions of the GPTA were key in

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[26] *Random House Webster's College Dictionary* (1999).

[27] *Id*. See also *Black's Law Dictionary* (11th ed) (defining "notice") ("A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording.").

[28] *Perfecting Church,* 478 Mich 1.

[29] 1999 PA 123.

[30] *Perfecting Church*, 478 Mich at 4; MCL 211.78(1) ("The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encourag-

effectuating this scheme: MCL 211.78k(6), which deprives the circuit court of jurisdiction to set aside a foreclosure judgment after the redemption and appeal periods expire, and MCL 211.78*l*, which limited all aggrieved property owners and interest holders to the single remedy of monetary damages. In *Perfecting Church*, we explained how these provisions worked together:

> If a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, then MCL 211.78k(6) deprives the circuit court of jurisdiction to alter the judgment of foreclosure. MCL 211.78k(6) vests absolute title in the foreclosing governmental unit, and if the taxpayer does not redeem the property or avail itself of the appeal process in [MCL 211.78k(7)], then title "shall not be stayed or held invalid . . . ." *This language reflects a clear effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA. The only possible remedy for such a property owner would be an action for monetary damages based on a claim that the property owner did not receive any notice* [*under MCL 211.78*l]. In the majority of cases, this regime provides an appropriate procedure for foreclosing property because the statute requires notices that are consistent with minimum due process standards.[31]

We further recognized that the monetary-damages remedy in MCL 211.78*l* was the only remedy available

ing the efficient and expeditious return to productive use of property returned for delinquent taxes."). See also *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 442 n 10; 952 NW2d 434 (2020) ("The former foreclosure process could extend many years, causing properties to deteriorate and become clouded with poor title, which often led to title-insurance companies refusing to insure these properties. As a result, the Legislature overhauled the GPTA in 1999. The current scheme expedites the foreclosure process, thereby reducing the amount of abandoned, tax-delinquent properties within the state.") (citation omitted).

[31] *Perfecting Church*, 478 Mich at 8 (emphasis altered).

to property owners after the redemption and appeal periods expired and that the GPTA did not provide an exception for property owners deprived of notice sufficient to satisfy due process.

Through these provisions, the Legislature attempted to insulate foreclosure judgments from becoming undone by eliminating a property owner's ability to recoup the property after the judgment was finalized and by limiting the owner's remedy to monetary damages. Our decision in *Perfecting Church* held that this attempt was unconstitutional as applied to those property owners deprived of due process, explaining:

> [T]he statute permits a foreclosing governmental unit to ignore completely the mandatory notice provisions of the GPTA, seize absolute title to a taxpayer's property, and sell the property, leaving the circuit court impotent to provide a remedy for the blatant deprivation of due process. That interpretation, allowing for the deprivation of due process without any redress would be patently unconstitutional. Unfortunately, as noted above, the plain language of the statute simply does not permit a construction that renders the statute constitutional because the statute's jurisdictional limitation encompasses all foreclosures, including those where there has been a failure to satisfy minimum due process requirements, *as well as those situations in which constitutional notice is provided, but the property owner does not receive actual notice*. In cases where the foreclosing governmental unit complies with the GPTA notice provisions, MCL 211.78k is not problematic. Indeed, MCL 211.78*l* provides in such cases a damages remedy that is not constitutionally required. However, in cases where the foreclosing entity fails to provide *constitutionally adequate notice*, MCL 211.78k permits a property owner to be deprived of the property without due process of law. Because the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that portion of the statute purporting to limit the circuit court's jurisdiction to

> modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process.[32]

While our analysis in *Perfecting Church* described the GPTA's constitutional infirmity only in terms of the jurisdictional limitation on circuit courts provided in MCL 211.78k(6), the limited monetary-damages remedy provided in MCL 211.78*l*(1) was an indispensable part of the Legislature's unconstitutional scheme.[33]

Citing *Perfecting Church*, 2CC argues that this Court has previously recognized that a former property owner who receives constitutionally adequate notice, but not actual notice, may sustain an action for monetary damages under MCL 211.78*l*(1) for not having received "any notice" under the GPTA. Admittedly, *Perfecting Church* is not a model of clarity as to when an owner could have made a claim for those monetary damages. But that issue was not squarely before us in *Perfecting Church*. Unlike 2CC, the property owner in

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[32] *Id*. at 10-11 (emphasis added).

[33] See *Rafaeli*, 505 Mich at 452-453 n 50 ("The GPTA, at one point, limited property owners to a damages action under MCL 211.78*l* . . . . Once the judgment of foreclosure was entered and the former property owner's interest in the property was extinguished, the former owner could not bring an action for possession. But, in [*Perfecting Church*], this Court held that limitation unconstitutional. Thus, property owners can now file a motion to set aside their judgment of foreclosure if the foreclosing governmental unit failed to comply with due process when providing notice to owners."). See also Smith, *Foreclosure of Real Property Tax Liens Under Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev 51, 52 (2002) ("The legislature sought to address th[e] problem [created by the former tax-foreclosure process] by limiting the remedy available to former owners who lost property through tax foreclosure to an action for money damages in the Court of Claims. This remedy is at the heart of the legislative plan to make title to foreclosed property insurable by eliminating the possibility of foreclosed property being reacquired by the delinquent former owners or interest holders through the courts.").

Perfecting Church only sought the return of its property by filing a motion for relief from the foreclosure judgment entered in the circuit court; it did not file an action in the Court of Claims seeking monetary damages under MCL 211.78*l*(1). The sine qua non of our holding in *Perfecting Church* was that the jurisdictional limitation on a circuit court's ability to set aside finalized foreclosure judgments in MCL 211.78k(6), together with the GPTA's limited avenue of relief in the form of monetary damages in MCL 211.78*l*(1), rendered these provisions unconstitutional as applied to those property owners deprived of due process. Because the property owner in *Perfecting Church* was deprived of notice sufficient to satisfy due process, it was permitted to set aside the foreclosure judgment.[34] Thus, our brief discussion in *Perfecting Church* regarding the type of notice required to sustain an action for monetary damages under MCL 211.78*l*(1) is obiter dicta.[35] To the extent this Court in *Perfecting Church* opined on the meaning of "any notice" in MCL 211.78*l*(1), it was unnecessary to the determination of the matter at hand.

C. ALTERNATIVE REMEDY

Having clarified that the phrase "any notice" as it was used in MCL 211.78*l*(1) was not limited to actual notice, we further specify when a claimant may sustain an action for monetary damages under the GPTA for not having received "any notice." As an initial matter, the Court of Appeals below erred by suggesting that

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[34] *Perfecting Church*, 478 Mich at 8-11.

[35] *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") (quotation marks and citation omitted).

the remedy recognized in *Perfecting Church* of setting aside a foreclosure judgment on due-process grounds is mutually exclusive from the monetary-damages remedy provided in MCL 211.78*l*(1).[36] This Court in *Perfecting Church* did not find the GPTA's scheme unconstitutional as a whole, and we did not strike MCL 211.78*l*(1) as an available remedy. Instead, former property owners and interest holders who did not receive constitutionally adequate notice of a foreclosure had two alternative remedies available to them after the judgment of foreclosure entered and the redemption and appeal periods expired: they could either (1) bring an action in the circuit court to set aside the judgment of foreclosure according to *Perfecting Church*[37] or (2) bring an action for monetary damages under MCL 211.78*l* to recover "the fair market value of the property" as of the date the judgment of foreclosure was entered, "less any taxes, interest, penalties, and fees owed on the property as of that date."[38]

For either remedy to apply, however, the former property owner must have established that he or she did not receive constitutionally adequate notice sufficient to satisfy the minimum requirements of due process. Again, to sustain an action for monetary damages under MCL 211.78*l*(1), the claimant was required to show "that he or she did not receive any

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[36] See *2 Crooked Creek*, 329 Mich App at 49 ("Plaintiffs received due process; had they not, they would not be proceeding for a claim of damages under MCL 211.78*l*. The only issue is whether 2CC received *any* notice.").

[37] *Perfecting Church*, 478 Mich at 10-11. Of course, the remedy recognized in *Perfecting Church*, which is one of constitutional dimensions, remains available to those property owners and interest holders deprived of constitutionally adequate notice. *Id*.

[38] MCL 211.78*l*(4).

notice required under [the GPTA] . . . ." A plain reading of the phrase "any notice" certainly encompasses notice sufficient to satisfy due process.[39] This understanding is entirely consistent with MCL 211.78(2), which provides:

> It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated.

"As an overall principle, MCL 211.78(2) provides that the adequacy of notice under the [GPTA] is governed by state and federal due process standards, rather than by specific provisions of the act."[40] Indeed,

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[39] See pp 8-10 & notes 21-27 of this opinion. See also *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008) ("A fundamental requirement of due process in [tax-foreclosure] proceedings is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [T]he means employed to notify interested parties must be . . . means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice. However, due process does not require that a property owner receive actual notice . . . .") (quotation marks, citations, and brackets omitted).

[40] *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 737; 690 NW2d 917 (2005).

we have declined to address a plaintiff's allegations that a foreclosing governmental unit violated specific provisions of the GPTA because, "[a]s a practical matter, any remedies available to [a] plaintiff are contingent on her constitutional claim."[41] 2CC dismisses the significance of MCL 211.78(2), arguing that because MCL 211.78*l*(1) provided a postforeclosure cause of action separate from "the provisions of [the GPTA] relating to the return, forfeiture, and foreclosure of property for delinquent taxes,"[42] a claim for monetary damages under the GPTA was not limited to claims of a lack of minimum due process. 2CC's interpretation of these provisions is overly broad. MCL 211.78(2) specifically sets forth the Legislature's intent to comply with the minimum requirements of due process without granting additional rights that may interfere with the foreclosure process,[43] while MCL 211.78*l*(1) repre-

[41] *Sidun*, 481 Mich at 510 n 4, citing MCL 211.78(2). See also *Sidun*, 481 Mich at 510 n 4 (" 'The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.' "), quoting MCL 211.78i(10). Given the statement in *Sidun* that any remedies are contingent on the plaintiff's constitutional claim and given our holding today, we disavow the Court of Appeals' statement in *Gillie v Genesee Co Treasurer* that "statutory notice rights can be violated, giving rise to an action for money damages, yet minimum due process may have been satisfied." *Gillie*, 277 Mich App 333, 353 n 10; 745 NW2d 137 (2007), citing *Perfecting Church*, 478 Mich at 10. And given the foregoing, we disagree with the concurrence's suggestion that a claimant could sustain an action for monetary damages under MCL 211.78*l*(1) by showing that any of the GPTA provisions require actual notice and that the claimant failed to receive such notice.

[42] MCL 211.78(2).

[43] See *Republic Bank*, 471 Mich at 737. See also *Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev at 59-60 (explaining that in

sented the Legislature's attempt to limit all remedies available under the GPTA to monetary damages.[44] Reading these two provisions together, it is clear that the Legislature, in enacting the 1999 amendments of the GPTA, intended to provide monetary damages under MCL 211.78*l*(1) only to those former property owners who did not receive constitutionally adequate notice. Although MCL 211.78*l*(1) provided "a damages remedy that [was] not constitutionally required,"[45] a due-process violation for lack of notice still served as necessary predicate for such a claim.[46]

Accordingly, property owners who received constitutionally adequate notice sufficient to satisfy the minimum requirements of due process under the GPTA would have necessarily received notice required under the GPTA and, thus, could not sustain an action for monetary damages under MCL 211.78*l*(1). In this case, because 2CC has already been adjudicated to have received such notice, 2CC cannot establish that it did

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enacting the 1999 amendments of the GPTA, the Legislature "specifically stated that its intent was to require compliance with the minimum requirements of due process for interest holders of tax delinquent property without creating any additional rights that may interfere with the foreclosure process").

[44] See *Perfecting Church*, 478 Mich at 8; *Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev at 52.

[45] *Perfecting Church*, 478 Mich at 10.

[46] 2CC argues that this conclusion renders MCL 211.78*l* a dead letter because former property owners deprived of due process will always move to set aside the foreclosure judgment rather than make a claim for monetary damages. Yet there may be instances in which an event occurs on the property after foreclosure, such as a flood, fire, or unforeseen circumstance, that causes the property's value to decrease. In that case, a former property owner denied constitutionally adequate notice may wish to cut his or her losses and seek monetary relief. Thus, returning the property to the former owner is not always a superior remedy to monetary damages as 2CC suggests.

not receive any notice required under the GPTA. Accordingly, the Court of Appeals correctly dismissed 2CC's action for monetary damages under MCL 211.78*l*(1), albeit for the wrong reasons.[47]

IV. CONCLUSION

We affirm the judgment of the Court of Appeals but clarify that the monetary-damages provision of the GPTA provided a remedy available only to former property owners and interest holders who did not receive constitutionally adequate notice sufficient to satisfy the minimum requirements of due process.

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[47] Our holding today implicates principles of res judicata and collateral estoppel. See *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004) ("The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. . . . [The doctrine] bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not."); *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004) ("Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.") (quotation marks, citations, and brackets omitted). As stated earlier, in *In re Cass Co Treasurer*, unpub op at 1, 8-9, the Court of Appeals held that defendant's efforts to notify 2CC of the foreclosure under the GPTA were sufficient to satisfy the minimum requirements of due process. See p 4 & note 7 of this opinion. Therefore, because we conclude that the phrase "any notice" as it was used in MCL 211.78*l*(1) encompassed all constitutionally sufficient notice and that the statute provided relief only if a property holder's due-process rights were violated, defendant was entitled to summary disposition under MCR 2.116(C)(7) (prior judgment).

Because 2CC received such notice, it cannot sustain an action under MCL 211.78*l*(1).

MCCORMACK, C.J., and BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with ZAHRA, J.

VIVIANO, J. (*concurring in judgment*). I concur in the judgment. The only question we must answer in this case is whether plaintiffs, 2 Crooked Creek, LLC, and Russian Ferro Alloys, Inc., are correct that MCL 211.78*l*(1) allowed them to bring a claim for monetary damages if they failed to receive "actual notice."[1] They assert, in essence, that defendant, the Cass County Treasurer, was obligated under this statutory provision to provide them with "actual notice." The majority rejects this argument, concluding that the statute allowed monetary claims only if the plaintiffs failed to receive constitutionally adequate notice. That is, the majority concludes that if the plaintiffs received all the notice our federal and state Constitutions require, they cannot sue for monetary damages even if they did not receive all the notice the statute required.

While I harbor doubts the majority is correct that the version of the statute applicable to this case permitted monetary-damages claims only when the notice was constitutionally insufficient, I believe it is unnecessary to resolve that question here. Even assuming plaintiffs are correct that MCL 211.78*l*(1) allowed claims to be brought when constitutionally adequate notice has been given, plaintiffs have failed to show that the provision allowed claims whenever tax-

[1] Amendments of the statute in 2020 removed the "actual notice" language at issue here. See 2020 PA 256. All references in this opinion to MCL 211.78*l*(1) are to the version in effect before the 2020 amendment of the statute.

payers did not receive "actual notice." This is because MCL 211.78*l*(1) did not establish a separate notice requirement but instead simply incorporated the notice provisions set forth elsewhere in the General Property Tax Act, MCL 211.1 *et seq*. A plaintiff could sue for monetary damages if "he or she did not receive any notice *required under this act* . . . ." MCL 211.78*l*(1) (emphasis added). Thus, to determine whether plaintiffs failed to receive "any notice required under this act," we would need to examine what notice the act required. This would involve determining whether plaintiffs received the notice required under the act's numerous notice provisions. See, e.g., MCL 211.78i(3) (requiring, in certain circumstances, that the occupant be personally served with notice of the foreclosure or verbally informed of it or that notice be placed in a conspicuous manner on the property). If any of these provisions require actual notice and that notice was not received, then the failure to receive actual notice might have satisfied MCL 211.78*l*(1), enabling a monetary-damages claim.[2]

This is not, however, the argument plaintiffs have presented to this Court. Instead of identifying what notice required by the act they did not receive, plaintiffs broadly contend that MCL 211.78*l*(1) imposed a separate "actual notice" requirement. Plaintiffs' failure to address the act's relevant notice provisions means they have fallen short of showing they did not receive "any notice required under this act . . . ." *Id*. Thus, even assuming that MCL 211.78*l*(1) permitted monetary-damages claims for statutory violations that did not

[2] For this reason, *In re Wayne Co Treasurer Petition*, 478 Mich 1, 10; 732 NW2d 458 (2007), may have been at least partially correct in suggesting that the failure to receive actual notice could lead to a damages claim. But this question need not be decided in this case because plaintiffs have not raised this argument.

amount to constitutional violations, plaintiffs would still lose because they have failed to argue that any of the act's actual-notice provisions were violated. I therefore agree with the majority that plaintiffs cannot invoke MCL 211.78*1*(1), but I would not decide, as the majority does, whether a plaintiff who received constitutionally sufficient notice has thereby received "any notice required under this act" for purposes of MCL 211.78*1*(1). Accordingly, I concur in the judgment.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE v PAGANO

Docket No. 159981. Argued November 10, 2020 (Calendar No. 4). Decided April 22, 2021.

Victoria C. Pagano was charged in the 73B District Court with operating a motor vehicle while intoxicated with a child as a passenger, MCL 257.625(7)(a)(*i*), and having an open container in a vehicle, MCL 257.624a. An anonymous caller phoned 911, alleging that defendant was driving while intoxicated. Central dispatch informed a police officer of the call, and within 30 minutes, the officer observed defendant's vehicle but did not see defendant commit any traffic violations. Although it appeared that a copy of the 911 call might have been preserved, a recording was not introduced into evidence, and the caller was not identified. According to the officer's testimony, the anonymous caller informed dispatch that defendant was out of the vehicle, yelling at children, and appeared to be obnoxious. The anonymous caller believed that defendant's alleged intoxication was the cause of her behavior with the children. The caller further provided the vehicle's license plate number; the direction in which the vehicle was traveling; and the vehicle's make, model, and color. The officer pulled defendant over strictly on the basis of the information relayed in the 911 call. Defendant was arrested and subsequently charged. Defendant moved for dismissal of the charges, arguing that the investigatory stop was unlawful and that, as a result, any evidence obtained pursuant to the stop should be suppressed. The district court, David B. Herrington, J., held a hearing on defendant's motion and granted the motion, holding that there was no probable cause to stop defendant's vehicle because the 911 call was not reliable. The district court dismissed the case without prejudice. The prosecution moved for reconsideration, and the district court denied the motion. The prosecution appealed in the Huron Circuit Court, and the circuit court, Gerald M. Prill, J., held a hearing, noting that defendant's motion to dismiss was better understood as a motion to suppress evidence and recognizing that the applicable legal standard was not whether there was probable cause to stop the vehicle; however, the circuit court affirmed the district court's ruling. The prosecution sought leave to appeal in the Court of Appeals, and the Court

of Appeals granted the application. In an unpublished per curiam opinion issued on May 28, 2019 (Docket No. 340859), the Court of Appeals, MURRAY, C.J., and GADOLA and TUKEL, JJ., reversed and remanded for reinstatement of the charges, concluding that the officer had a reasonable and articulable suspicion of criminal activity sufficient to justify an investigative stop of defendant's vehicle. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 505 Mich 938 (2019).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justices VIVIANO, CLEMENT, and CAVANAGH, the Supreme Court *held*:

Under the totality of the circumstances, the stop of defendant's vehicle did not comply with the Fourth Amendment because the police officer did not have a reasonable and articulable suspicion that defendant was engaged in criminal activity.

1. Both the United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. Even a brief traffic stop constitutes a seizure of a vehicle's occupants. However, under *Terry v Ohio*, 392 US 1 (1968), a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. A brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention. Colloquially, a brief detention of this sort is referred to as a *Terry* stop. Whether an officer has a reasonable and articulable suspicion to briefly detain an individual is a fact-specific inquiry that is determined on a case-by-case basis, using commonsense judgments and inferences about human behavior. Although reasonable and articulable suspicion is a lesser showing than probable cause, it still entails something more than an inchoate or unparticularized suspicion or hunch, because an officer must have had a particularized and objective basis for the suspicion of criminal activity.

2. The anonymous tip from the 911 caller did not give rise to a reasonable and articulable suspicion that defendant was engaged in a traffic violation, much less criminal activity. An anonymous tip, when sufficiently corroborated, can exhibit sufficient indicia of reliability to justify a *Terry* stop. However, that a tipster has reliably identified a particular individual does not necessarily mean that information contained in a tip gives rise to anything more than an inchoate or unparticularized suspicion of

criminal activity. Assuming that the tipster here was reliable would lead only to the conclusion that defendant appeared to be "obnoxious" and was yelling at her children in a parking lot, as there were no other details in the record that would corroborate the tipster's mere assertion that defendant was drunk. While the Supreme Court of the United States did hold in *Navarette v California*, 572 US 393 (2014), that certain driving behaviors are so strongly correlated with drunk driving that, when reported to the police by anonymous callers, the totality of the circumstances may give rise to a reasonable and articulable suspicion of criminal activity, the Court cautioned that not all traffic violations imply intoxication and that some behaviors are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect. In this case, there was no report of even a minor traffic infraction, and there was no support for the conclusion that "appearing to be obnoxious" and yelling at children creates a reasonable and articulable suspicion that one is intoxicated. The tipster's information was little more than a conclusory allegation of drunk driving, which was insufficient to pass constitutional muster.

Reversed and remanded to the Huron Circuit Court for further proceedings.

Justice VIVIANO, joined by Chief Justice MCCORMACK, concurring, agreed with the majority's application of *Navarette* to defendant's Fourth Amendment claim and believed that the majority reached the correct result. He wrote separately to explain his misgivings about *Navarette* and to suggest that the Court consider, in an appropriate future case, whether to interpret Const 1963, art 1, § 11 as providing more protection regarding anonymous tips than the Fourth Amendment as interpreted by *Navarette*, given Michigan's historical requirement that an anonymous tip be reliable both in its assertion of illegality and in its tendency to identify a particular person.

Justice ZAHRA, concurring, agreed with the result reached by the majority, and he concluded that the 911 caller's conclusory allegation that defendant drove while intoxicated, absent further record evidence leading to an inference of an actual traffic violation, was insufficient to provide the arresting officer with the requisite reasonable suspicion to justify the traffic stop under *Navarette*. He wrote separately to emphasize that his conclusion was driven largely by the limited factual record and that nothing in the majority opinion should be read to discourage citizen reports or police investigations of drunk or impaired driving.

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Timothy J. Rutkowski*, Prosecuting Attorney, and *David Wallace*, Assistant Prosecuting Attorney, for the people.

Law Office of Michael Horowitz (by *Michael Horowitz*) for defendant.

BERNSTEIN, J. This case presents a question concerning the Fourth Amendment and investigatory stops pursuant to *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). After an anonymous caller alleged that defendant was driving while intoxicated, a police officer located and stopped defendant's vehicle. We hold that, under the totality of the circumstances, the stop did not comply with the Fourth Amendment because the police officer did not have a reasonable and articulable suspicion that defendant was engaged in criminal activity. Accordingly, we reverse the judgment of the Court of Appeals and remand to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On July 31, 2016, a Huron County police officer was informed by central dispatch of a 911 call that had been made. Although it appears that a copy of the 911 call might have been preserved, a recording was not introduced into evidence. The caller was not identified. The officer would later testify as follows:

> Um the information that our dispatch had given us is that she was out of the vehicle at that location at the time. The caller was concerned because she had ah children with her and she was yelling; appearing to be obnoxious;

> and appeared to be intoxicated um that was causing her behavior ah with the children. And then had left is why the caller thought she was intoxicated.

The caller also relayed the vehicle's license plate number and the direction in which it was traveling, as well as the vehicle's make, model, and color.

Within 30 minutes of the 911 call, the officer observed defendant's vehicle, which matched the caller's description. The officer followed the vehicle for a short time to corroborate the identifying information. During this period, the officer did not see defendant commit any traffic violations. When the officer subsequently pulled defendant over, the officer was doing so "based strictly on the information" relayed in the 911 call. Defendant was then arrested for and subsequently charged with operating a motor vehicle while intoxicated with a child as a passenger, MCL 257.625(7)(a)(*i*), and open container in a vehicle, MCL 257.624a.

Defendant moved for dismissal of the charges, arguing that the investigatory stop was unlawful and that, as a result, any evidence obtained pursuant to the stop should be suppressed. On March 21, 2017, a hearing was held in district court on defendant's motion. Although the officer was called as a witness, no other evidence was entered into the record. The district court granted defendant's motion, holding that there was no probable cause to stop defendant's vehicle because the 911 call was not reliable. Accordingly, the district court dismissed the case without prejudice. The prosecution moved for reconsideration, which was denied; the order denying the motion for reconsideration again referred to probable cause as the applicable standard for evaluating the lawfulness of the stop.

The prosecution appealed, and on September 27, 2017, a hearing was held in circuit court. The circuit court noted that defendant's motion to dismiss was better understood as a motion to suppress evidence and recognized that the applicable legal standard was not probable cause. Nevertheless, the circuit court affirmed the district court's ruling.

The prosecution sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application. On May 28, 2019, the Court of Appeals reversed and remanded for the reinstatement of charges. *People v Pagano*, unpublished per curiam opinion of the Court of Appeals, issued May 28, 2019 (Docket No. 340859). Specifically, the Court of Appeals concluded that the officer had reasonable and articulable suspicion of criminal activity sufficient to justify an investigative stop of defendant's vehicle.

Defendant timely sought leave to appeal in this Court. On December 23, 2019, this Court granted leave to appeal. *People v Pagano*, 505 Mich 938 (2019).

II. STANDARD OF REVIEW

We review a lower court's factual findings in a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). However, because the application of constitutional standards presents a question of law, a lower court's ultimate ruling at a suppression hearing is reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

III. ANALYSIS

Both the United States Constitution and the Michigan Constitution guarantee the right of persons to be

secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Even a brief traffic stop constitutes a seizure of a vehicle's occupants. *Brendlin v California*, 551 US 249, 255; 127 S Ct 2400; 168 L Ed 2d 132 (2007). However, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 US at 22. "A brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention." *Custer*, 465 Mich at 327. Colloquially, a brief detention of this sort is referred to as a *Terry* stop. Whether an officer has reasonable and articulable suspicion to briefly detain an individual is a fact-specific inquiry that is determined on a case-by-case basis. *Jenkins*, 472 Mich at 32. "A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior." *Id*. (quotation marks and citation omitted). Although reasonable and articulable suspicion is a lesser showing than probable cause, it still "entails something more than an inchoate or unparticularized suspicion or 'hunch,' " because an officer "must have had a particularized and objective basis for the suspicion of criminal activity." *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996).

The facts before us are undisputed. No information is known about the 911 caller, and the prosecution concedes that the caller should be treated as anonymous. The officer testified that defendant was detained solely on the basis of the information presented in that anonymous 911 call. Because the 911 call was not made part of the record, we only have the officer's summary of the information relayed to him by central dispatch.

The question before us, then, is whether this information presented the officer with the reasonable and articulable suspicion necessary to justify a *Terry* stop. An anonymous tip, when sufficiently corroborated, can exhibit sufficient indicia of reliability to justify a *Terry* stop. *Florida v J L*, 529 US 266, 270; 120 S Ct 1375; 146 L Ed 2d 254 (2000). The Court of Appeals analysis here focused almost exclusively on the reliability of the anonymous tip, concluding that "the informant's tip provided accurate details that were corroborated by the officer, making it sufficiently reliable, and also conveyed information related to contemporaneous and ongoing potential criminal activity." *Pagano*, unpub op at 4. However, the Court of Appeals failed to explain how the reliability of the anonymous tip alone rendered "the quantity of the tip information . . . sufficient to identify the vehicle and *to support an inference of a traffic violation* . . . ." *Id*. at 3 (emphasis added).

Under the circumstances presented here, we hold that the anonymous tip did not give rise to a reasonable and articulable suspicion that defendant was engaged in a traffic violation, much less criminal activity. It is true that the officer was able to corroborate information regarding the identification of the vehicle. However, that a tipster has reliably identified a particular individual does not necessarily mean that information contained in a tip gives rise to anything more than an inchoate or unparticularized suspicion of criminal activity. See *J L*, 529 US at 272 ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."). Assuming that the tipster here was reliable leads only to the conclusion that defendant "appear[ed] to be obnoxious" and was yelling at her children in a parking lot, as there are no other details in the record that would

otherwise corroborate the tipster's mere assertion that defendant was drunk. Certainly, commonsense judgments and inferences about human behavior lead one to conclude that many parents yell at their children, even without the aid of intoxicants.

The Supreme Court of the United States has held that certain driving behaviors are so strongly correlated with drunk driving that, when reported to the police by anonymous callers, the totality of the circumstances may give rise to a reasonable and articulable suspicion of criminal activity. *Navarette v California*, 572 US 393, 402; 134 S Ct 1683; 188 L Ed 2d 680 (2014) (noting that such behaviors include "weaving all over the roadway," "crossing over the center line" and "almost causing several head-on collisions," "driving all over the road and weaving back and forth," and "driving in the median") (quotation marks, citations, and brackets omitted). But the *Navarette* Court cautioned that not all traffic violations imply intoxication and that "[u]nconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect." *Id*. at 402. Critical to the Supreme Court's decision in *Navarette* was the anonymous caller's claim that another vehicle had run her off the road. The *Navarette* Court distinguished this from other scenarios in which a tipster might suspect a driver is intoxicated, explaining that "[t]he 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving." *Id*. at 403. To the extent that even *Navarette* was considered to be a "close case," *id*. at 404 (quotation marks omitted), this case is clearly not. Again, there was no report of even a minor traffic infraction in this case, and there is no support for the conclusion

that "appearing to be obnoxious" and yelling at one's children creates a reasonable and articulable suspicion that one is intoxicated. All we have here is little more than a conclusory allegation of drunk driving, which is insufficient to pass constitutional muster.

IV. CONCLUSION

Because we conclude that the officer did not have the reasonable and articulable suspicion necessary to justify an investigatory stop, we hold that the stop violated the Fourth Amendment. Accordingly, we reverse the judgment of the Court of Appeals and remand to the circuit court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

MCCORMACK, C.J., and VIVIANO, CLEMENT, and CAVANAGH, JJ., concurred with BERNSTEIN, J.

VIVIANO, J. (*concurring*). I concur in full with the majority opinion and its application of *Navarette v California*, 572 US 393; 134 S Ct 1683; 188 L Ed 2d 680 (2014), to resolve defendant's Fourth Amendment claim. But I write separately to explain my misgivings about *Navarette* and why I believe this Court should consider, in an appropriate future case, whether to interpret our state Constitution as providing more protection regarding anonymous tips than the Fourth Amendment as interpreted by *Navarette*.[1]

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[1] Although defendant cited both the Fourth Amendment and Const 1963, art 1, § 11 in her briefs in the Court of Appeals and this Court, defendant focused her argument on the Fourth Amendment and did not argue that *Navarette* should be rejected under our state Constitution. In light of this, and because her claim can be fully resolved under the Fourth Amendment, I agree with the majority's decision to decide the case on that basis.

In *Navarette*, the United States Supreme Court addressed when a police officer may perform a traffic stop based solely on an anonymous 911 call. The tipster in that case informed authorities of a possible drunk driver who had run the reporting party off the road. *Id*. at 395. The police officers spotted the vehicle and trailed it for about five minutes before pulling it over. *Id*. They smelled marijuana, approached the vehicle, and, upon searching the vehicle, found marijuana. *Id*. The driver and passenger were arrested and argued in court that the traffic stop violated the Fourth Amendment because the officers did not have reasonable suspicion of criminal activity. *Id*. at 395-396.

The Court determined that the anonymous call at issue had "adequate indicia of reliability for the officer to credit the caller's account." *Id*. at 398-399. The report of being run off the road by a specific vehicle showed that the caller was claiming eyewitness knowledge of alleged dangerous driving, which supported the report's reliability and also gave reasonable grounds to suspect drunk driving, given that the alleged conduct was more akin to classic indicia of drunk driving than a mere instance of recklessness. *Id*. at 399-401, 403. Furthermore, use of the 911 emergency system was an additional indicator of veracity because the calls are recorded and allow law enforcement to verify information about callers. *Id*. at 400-401.

Justice Scalia dissented, characterizing the majority's rule as allowing the police to stop a vehicle whenever a 911 call reports "a single instance of possibly careless or reckless driving" as long as the caller also gives the location of the vehicle. *Id*. at 405 (Scalia, J., dissenting). Justice Scalia noted that the tipster was a completely unknown person who could " 'lie with impunity.' " *Id*. at 406, quoting *Florida v J L*,

529 US 266, 275; 120 S Ct 1375; 146 L Ed 2d 254 (2000) (Kennedy, J., concurring). The accusation that the caller had been run off the road did not support an inference of drunk driving because the driver could have been swerving to avoid an animal, a pothole, or a pedestrian. *Navarette*, 572 US at 409-410 (Scalia, J., dissenting). Even if the driver had been careless, reckless, or intentional in forcing the tipster off the road, Justice Scalia did not believe that "reasonable suspicion of a *discrete instance* of irregular or hazardous driving generates a reasonable suspicion of *ongoing intoxicated driving*." *Id*. at 410. And the fact that the police had followed the driver for five minutes without observing any signs of drunkenness or incapacitation gave them good reason to doubt that the driver was drunk. *Id*. at 411. Justice Scalia rejected the majority's speculation that a drunk driver who sees a marked police car would drive " 'more careful[ly],' " instead adhering to the "traditional view that the dangers of intoxicated driving are the intoxicant's impairing effects on the body—effects that no mere act of the will can resist." *Id*. at 413. Regarding the majority's rule, Justice Scalia warned:

> All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police. If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim's. [*Id*. at 413-414.][2]

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[2] Recent advances in technology appear only to reinforce Justice Scalia's concerns that *Navarette* further opened the 911 system to abuse by weakening the requirement that a tipster's assertion of illegality be reliable. Those advances have made it even easier for bad actors to exploit the 911 system by "spoofing" a phone number so that the 911

But alas, Justice Scalia's opinion did not carry the day, so we are bound to follow the majority opinion in *Navarette* for purposes of interpreting the Fourth Amendment. Doing so, I agree with the majority's application of *Navarette* to defendant's Fourth Amendment claim and believe that the majority reached the correct result. However, we are not required to follow *Navarette* for purposes of interpreting our state constitutional protection from unreasonable searches and seizures in Const 1963, art 1, § 11. For the reasons stated in this opinion, I question whether we should follow *Navarette* as a guide if we are asked in the future to interpret Article 1, § 11 of our state Constitution.

When construing a provision of the Michigan Constitution, our ultimate responsibility is to give meaning to the specific provision at issue. While looking at United States Supreme Court caselaw interpreting

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dispatcher thinks the call is coming from a different phone number, providing even more cover for malevolent tipsters. See Brumfield, *Chapter 284: Deterring and Paying for Prank 911 Calls That Generate a SWAT Team Response*, 45 McGeorge L Rev 585, 586 (2014) (explaining the process of spoofing a phone number); Kenyon, *FTC Issues Warning of Social Security Scams*, CQ Roll Call Washington Data Privacy Briefing (April 16, 2019) [2019 CQDPRPT 0288], available at <https:/perma.cc/WG42-A242> ("[T]he FTC recommends consumers to not trust caller ID systems because it is easy for official-seeming phone numbers to be spoofed . . . ."). In recent years, individuals have used spoofing technology to make fake 911 calls in order to prank or harass individuals. See *Chapter 284*, 45 McGeorge L Rev at 585; Jaffe, *Swatting: The New Cyberbullying Frontier After* Elonis v. United States, 64 Drake L Rev 455, 456 (2016). After *Navarette*, some commentators have cited spoofing as one reason why 911 calls may not be sufficiently reliable—specifically in the context of the *Navarette* decision. See, e.g., Gelb, *How Reliable Is an Anonymous Call?*, 31 Crim Just 60, 61 (2016) ("At the federal level, *Navarette v. California* controls, but may arguably not provide the heightened safeguards against improper intrusion on one's right not to be stopped in a motor vehicle due to a fabricated anonymous call to law enforcement.").

analogous federal constitutional provisions might be—and often is—helpful, we cannot delegate our duty to interpret our Constitution to the United States Supreme Court. See *People v Tanner*, 496 Mich 199, 222 n 16; 853 NW2d 653 (2014); see also *Sitz v Dep't of State Police*, 443 Mich 744, 758-759; 506 NW2d 209 (1993); Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018), p 174 (criticizing the practice of "lockstepping," "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution," and providing "unreasonable searches and seizures" as an example). We "are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so." *Sitz*, 443 Mich at 763.

But on a number of occasions we have stated that Const 1963, art 1, § 11 is to be construed as providing the same protections found in the Fourth Amendment unless there is a "compelling reason" to interpret it differently. See, e.g., *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991); *People v Perlos*, 436 Mich 305, 313 n 7; 462 NW2d 310 (1990). The idea that Const 1963, art 1, § 11 must be interpreted the same as the Fourth Amendment absent a compelling reason not to do so can be traced back to *People v Smith*, 420 Mich 1; 360 NW2d 841 (1984), in which we stated "that we will *only* accord defendants greater rights 'where there is compelling reason.' " *Smith*, 420 Mich at 20, quoting *People v Nash*, 418 Mich 196, 215; 341 NW2d 439 (1983) (emphasis added).[3]

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[3] I would also reconsider in a future case whether *Smith*'s compelling-reason presumption is correct. As we more recently stated in *Tanner*,

We have articulated some helpful factors to consider in determining whether to apply federal precedent to analogous provisions of our state Constitution:

> "1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest." [*Tanner*, 496 Mich at 223 n 17, quoting *Collins*, 438 Mich at 31 n 39, in turn citing *People v Catania*, 427 Mich 447, 466 n 12; 398 NW2d 343 (1986).]

In terms of language and structure, Const 1963, art 1, § 11 does not meaningfully differ from the Fourth Amendment in a way that would support interpreting the provisions differently for purposes of this case. However, "it is not necessary that the wording of the Michigan Constitution be different from that of the United States Constitution in order for this Court to interpret our constitution more liberally than the

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496 Mich at 222 n 16, "this Court need not apply that presumption, and it need not defer to an interpretation of the United States Supreme Court, unless we are persuaded that such an interpretation is also most faithful to the state constitutional provision." Additionally, to the extent that there might be a presumption against interpreting Const 1963, art 1, § 11 differently than the Fourth Amendment, it is just that—a presumption. As with any interpretive principle, a presumption is a "guide[] to solving the puzzle of textual meaning," Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 59, and the provision should ultimately be given a "fair reading," *id*. at 33. Additionally, some scholars have criticized this presumption in particular. See, e.g., Williams, *The Law of American State Constitutions* (New York: Oxford University Press, 2009), p 135 (characterizing the idea "that U.S. Supreme court [sic] interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions" as "simply wrong" and a "mistaken premise"). Nevertheless, because *Navarette* fully resolves this case, there is no need to reconsider the presumption here.

United States Supreme Court interprets the language of the federal constitution." *Smith*, 420 Mich at 7 n 2.

Our search-and-seizure caselaw concerning anonymous tips, in which we have applied both the federal and state Constitutions, leads me to question whether we should adopt *Navarette* for purposes of interpreting our state constitutional protection against unreasonable searches and seizures. In particular, we have required greater corroboration of anonymous tips than is required by *Navarette*. Adopting *Navarette* would therefore represent a departure from our caselaw. Historically, in Michigan an anonymous tip alone was insufficient to give a police officer the requisite cause to make a warrantless search, seizure, or arrest. *People v Younger*, 327 Mich 410, 423-425; 42 NW2d 120 (1950) (explaining that "[a]nonymous information does not meet the test" for determining whether a warrantless search was reasonable under Const 1908, art 2, § 10); *People v Guertins*, 224 Mich 8, 9-10; 194 NW 561 (1923) ("[I]f the officer arrested the respondent solely upon the information which he received over the telephone, the arrest was not lawful, for the reason that an officer has not the right to arrest a person, without a warrant and upon information which is given anonymously, without the discloser of the information and the source of his information. The officer cannot base a reasonable belief upon information which is secured in that way.").[4]

[4] The relevant standard in *Younger* was probable cause, because it was decided prior to *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Additionally, both *Younger* and *Guertins* discussed the search-and-seizure provision of our 1908 Constitution, which stated, in relevant part, "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures." Const 1908, art 2, § 10. This sentence was changed slightly in the ratified version of our 1963 Constitution: "The person, houses, papers and possessions of every person shall be secure from

Our own development of the law regarding anonymous tips largely ceased after the United States Supreme Court held that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to the states. See *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). Subsequently, Michigan courts applied the United States Supreme Court's *Aguilar-Spinelli* test for evaluating tips from informants. See *People v Sherbine*, 421 Mich 502, 505 n 3; 364 NW2d 658 (1974) (noting Michigan cases applying the *Aguilar-Spinelli* test), citing *Aguilar v Texas*, 378 US 108; 84 S Ct 1509; 12 L Ed 2d 723 (1964), abrogated by *Illinois v Gates*, 462 US 213 (1983), and *Spinelli v United States*, 393 US 410; 89 S Ct 584; 21 L Ed 2d 637 (1969), abrogated by *Illinois v Gates*, 462 US 213 (1983); *Sherbine* overruled by *People v Hawkins*, 468 Mich 488 (2003). During this period, we observed that "[f]rom both the Michigan and federal cases, it is clear that while police officers may proceed upon the basis of information received from an informer and need not disclose the identity of the informer, in order to establish probable cause there must be a showing that the information was something more than a mere suspicion, a tip, or anonymous telephone call, and that it came from a source upon which the officers had a right to rely." *People v Walker*, 385 Mich 565, 575; 189 NW2d 234 (1971), overruled on other grounds by *People v Hall*, 435 Mich 599 (1990).

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unreasonable searches and seizures." The changes were not substantive and were intended only to improve the phraseology. 2 Official Record, Constitutional Convention 1961, p 3364. Const 1963, art 1, § 11 has since been amended to also protect electronic data and electronic communications from unreasonable searches and seizures; however, that change was effective after the events giving rise to the present case. 2019 SJR G.

The United States Supreme Court later abandoned the "rigid" *Aguilar-Spinelli* test and adopted a "flexible" "totality-of-the-circumstances" test in *Illinois v Gates*, 462 US 213, 230-231, 238-239; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Shortly after that decision, we raised the possibility—but did not resolve—whether our constitutional provision, Const 1963, art 1, § 11, would retain the *Aguilar-Spinelli* test rather than the new totality-of-the-circumstances test. *Sherbine*, 421 Mich at 506.

In *People v Faucett*, 442 Mich 153; 499 NW2d 764 (1993), however, we applied the totality-of-the-circumstances test from *Gates* and held that an anonymous tip can be sufficiently reliable to give rise to a reasonable suspicion of criminality if the tip is corroborated by independent police investigation. While we primarily focused on the Fourth Amendment, we briefly addressed Const 1963, art 1, § 11, opining that "[b]ecause the Michigan Constitution does not provide more protection than its federal counterpart, under the circumstances of this case, federal law controls our inquiry." *Faucett*, 422 Mich at 158.[5] We went on to discuss *Alabama v White*, 496 US 325; 110 S Ct 2412; 110 L Ed 2d 301 (1990), which we characterized as "stand[ing] for the premise that anonymous tips, where corroborated by independent police investigation, may be sufficiently reliable to create a reasonable suspicion of criminality under the totality of the circumstances so that an investigative stop is warranted," *Faucett*, 442 Mich at 155 n 1, and applied it to the case. *Faucett*, 442 Mich at 166-172.[6] *Faucett* and *White* required indepen-

[5] Although the Court did not provide a citation for this statement, it appears that we were relying on the questionable presumption that we derived from *Nash*. See note 3 of this opinion.

[6] In *White*, the police received an anonymous tip that the respondent would leave her apartment at a particular time in a brown Plymouth

dent corroboration by the police in order for a tip to be considered reliable, which is consistent with our earlier holdings in *Younger* and *Guertins* that information from an anonymous tip alone is insufficient to support a warrantless search, seizure, or arrest.

More recently, the Court of Appeals addressed a Fourth Amendment argument about an anonymous tip in *People v Horton*, 283 Mich App 105; 767 NW2d 672 (2009). In *Horton*, the Court of Appeals relied on *J L*, 529 US 266, for the proposition " 'that a tip [must] be reliable in its assertion of illegality, not just in its tendency to identify a determinate person' " in order to give rise to reasonable suspicion. *Horton*, 283 Mich App at 112, quoting *J L*, 529 US at 272.[7] Once again, this decision was consistent with *Younger* and *Guertins*.

Accordingly, through *Guertins* and up until *Navarette*, Michigan caselaw (applying both our Constitution and the federal Constitution) and the United States Supreme Court's caselaw were both consistent in disallowing searches or seizures based solely on anonymous informa-

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station wagon with a broken right taillight and that she would be going to a particular motel with an ounce of cocaine in a brown case. *White*, 496 US at 327. Officers confirmed the innocent details of the tip, followed the vehicle as it drove to the motel, and initiated a stop just short of the motel. *Id*. During a search of the vehicle, the officers found marijuana. *Id*. The United States Supreme Court determined that the tip was sufficiently reliable to justify the stop, explaining that police corroboration of "significant aspects" of the tipster's predictions "imparted some degree of reliability to the other allegations made by the caller." *Id*. at 331-332.

[7] In *J L*, an anonymous caller told the police that a young, black male in a plaid shirt was at a bus stop and carrying a gun. *J L*, 529 US at 268. Responding officers corroborated only the identifying details of the defendant; they had no other reason to suspect him of illegal conduct, and they did not see a firearm. *Id*. Upon frisking the defendant, the officers found a gun. *Id*. The United States Supreme Court concluded that the officers lacked a reasonable basis for stopping the defendant. *Id*. at 271.

tion. But by weakening the requirement "that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person," *J L*, 529 US at 272, the *Navarette* Court moved its Fourth Amendment jurisprudence out of alignment with our cases. The United States Supreme Court based its conclusion that the tip was reliable on the fact that the caller had reported being run off the road by a specific vehicle and had identified the make, model, color, and license plate of the vehicle. *Navarette*, 572 US at 399. But anyone who observed the vehicle could have provided this information. The tip was only reliable in its tendency to identify the vehicle at issue, not in its assertion of illegality. Therefore, I agree with the *Navarette* dissenters that the *Navarette* majority opinion represents a departure from the "normal Fourth Amendment requirement that anonymous tips must be corroborated[.]" *Navarette*, 572 US at 405 (Scalia, J., dissenting). And, as a result, an argument can be made that adopting its reasoning would result in a major contraction of the protections against unreasonable searches and seizures in our state Constitution.[8]

At least one other court has declined to adopt *Navarette*'s reasoning when interpreting the protections available under its own state constitution. See *Commonwealth v Depiero*, 473 Mass 450, 455; 42 NE3d 1123 (2016) (citing Justice Scalia's dissent in declining to adopt *Navarette* under the state constitution and declining to rely on the mere fact that the 911 call at issue was recorded as indicia of reliability). See also *Washington v ZUE*, 183 Wash 2d 610, 625-630; 352 P3d 796 (2015)

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[8] Indeed, in his characteristically vivid prose, Justice Scalia described the majority opinion as "serv[ing] up a freedom-destroying cocktail . . . ." *Navarette*, 572 US at 413 (Scalia, J., dissenting).

(McCloud, J., concurring) (advocating for the adoption of Justice Scalia's approach under state law).[9]

For these reasons, this Court should consider, in an appropriate future case, whether to interpret our state Constitution as providing more protection regarding anonymous tips than the Fourth Amendment as interpreted by *Navarette*, i.e., whether to retain the requirement that an anonymous tip be reliable *both* in its assertion of illegality *and* in its tendency to identify a determinate person for purposes of our state Constitution.

MCCORMACK, C.J., concurred with VIVIANO, J.

ZAHRA, J. (*concurring*). I concur with the result reached by the majority. Applying the United States Supreme Court's decision in *Navarette v California*,[1] I conclude that the 911 caller's conclusory allegation that defendant drove while intoxicated, absent further record evidence leading to an inference of an actual traffic violation, was insufficient to provide the arresting officer with the requisite reasonable suspicion to justify the traffic stop. I write separately, however, to

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[9] Even if this Court were to reject anonymous tips alone as a basis for justifying a stop, i.e., tips not corroborated by police investigation, this would not leave law enforcement without at least some recourse when an anonymous caller reports an alleged drunk driver. A 911 dispatcher can always ask a caller for his or her name and is free to advise an anonymous caller that responding officers may not be able to stop the vehicle if the caller is unwilling to provide his or her identity. And even if attempts to gather more information from the caller are not fruitful, responding officers can investigate further by following the vehicle to see if the driver commits a civil infraction or if there is independent evidence of intoxication sufficient to justify an investigatory stop under *Terry*.

[1] *Navarette v California*, 572 US 393; 134 S Ct 1683; 188 L Ed 2d 680 (2014).

emphasize that my conclusion is driven largely by the limited, seemingly incomplete, factual record before us and that nothing in the majority opinion should be read to discourage citizen reports or police investigations of drunk or impaired driving.

As is evident from the majority opinion's recounting of the facts, the record before us is quite bare. According to the arresting officer's testimony at the hearing to dismiss defendant's charges, the officer received a call from central dispatch "about a female driver that was possibly intoxicated" leaving a public-access area on M-25 near Port Crescent State Park. The officer testified that the public-access area was near the Buccaneer Den—a local tavern. He further testified that the caller informed dispatch that she had observed defendant outside her vehicle, yelling at her children, "appearing to be obnoxious," and "appear[ing] to be intoxicated," and that the caller believed defendant's intoxication "was causing her behavior . . . with the children." The caller provided the make, model, color, and license plate number of defendant's vehicle, and less than 30 minutes after the call, the officer located defendant's vehicle and initiated a traffic stop "based strictly on the information [he] received from [the] 9-1-1 dispatch." Beyond these facts, the officer's testimony tells us nothing more about why the caller or the officer suspected that defendant was driving while intoxicated.

Yet not only is the record sparse, it is seemingly incomplete. The 911 tape was not admitted into evidence, and review of the entire transcript from the motion hearing suggests that the 911 caller gave additional information about defendant's behavior and level of impairment. Specifically, in advocating for a dismissal of the charges, defense counsel repeatedly

emphasized defendant's "speech patterns" as the basis for the 911 caller's observations, even stating that defendant has a "speech impediment." Further, defense counsel twice noted that the 911 caller described defendant as "wasted." Slurred or stammered speech is a classic sign of intoxication,[2] and the caller's use of the term "wasted" suggests a high level of impairment beyond merely acting obnoxious. Had this additional evidence been made part of the record, along with any other evidence that might have been included in the 911 tape, it very well might have established sufficient indicia of intoxication under *Navarette* to support a reasonable and articulable suspicion of criminal activity once defendant began to operate her vehicle.[3] The Court of Appeals in this case was not prepared "to draw a fine distinction between slurred speech and stumbling versus yelling and acting obnoxious as indicia of intoxication."[4] Perhaps if the full record had been provided, we would not have to draw one here.

We must remember that "the ultimate touchstone of the Fourth Amendment is reasonableness."[5] At its core, the Fourth Amendment "balances the governmental

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[2] See *Birchfield v North Dakota*, 579 US ___, ___; 136 S Ct 2160, 2167; 195 L Ed 2d 560 (2016) (noting that "outward signs of intoxication . . . [include] imbalance or slurred speech"); *People v Hammerlund*, 504 Mich 442, 453 n 5; 939 NW2d 129 (2019) ("[T]hat defendant was slurring her speech and unstable on her feet could possibly provide probable cause to believe that she was under the influence when the crash occurred[.]").

[3] See *Navarette*, 572 US at 401-402 & 402 n 2 (holding that the 911 caller's tip regarding the defendant's reckless driving supplied the police with reasonable suspicion of the ongoing criminal activity—drunk driving—to justify the traffic stop).

[4] *People v Pagano*, unpublished per curiam opinion of the Court of Appeals, issued May 28, 2019 (Docket No. 340859), p 5.

[5] *Heien v North Carolina*, 574 US 54, 60; 135 S Ct 530; 190 L Ed 2d 475 (2014) (quotation marks and citation omitted).

interest that justifies the intrusion against an individual's right to be free of arbitrary police interference."[6] The more minimal the intrusion, the less information necessary to justify it for Fourth Amendment purposes. This is particularly true in the context of automobiles, in which we have recognized that "[f]ewer foundation[al] facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved."[7]

In weighing citizens' diminished expectation of privacy in their motor vehicles[8] against the minimally invasive nature of a traffic stop, it is questionable whether the officer's actions in this case were wholly unreasonable. As the Court of Appeals recognized, the officer faced a difficult choice: conduct a minimally invasive investigatory stop on "a vehicle that potentially was being piloted by an intoxicated driver with two children as passengers" solely on the basis of a

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[6] *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993), citing *Terry v Ohio*, 392 US 1, 20-21; 88 S Ct 1868; 20 L Ed 2d 889 (1968). See also *Brown v Texas*, 443 US 47, 50-51; 99 S Ct 2637; 61 L Ed 2d 357 (1979) ("The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.") (quotation marks and citations omitted).

[7] *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973).

[8] The "ready mobility" and "pervasive regulation" of motor vehicles serve as the two core rationales for "treating automobiles differently from houses as a constitutional matter." *Collins v Virginia*, 584 US ___, ___; 138 S Ct 1663, 1669-1670; 201 L Ed 2d 9 (2018) (quotation marks and citations omitted). See also *South Dakota v Opperman*, 428 US 364, 367; 96 S Ct 3092; 49 L Ed 2d 1000 (1976) ("[T]he expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.").

citizen's anonymous tip, or "wait and see whether the driver would reveal her lack of sobriety by violating traffic laws or, worse, becoming involved in a car accident . . . ."[9] Indeed, five years before the Supreme Court's decision in *Navarette*, Chief Justice John Roberts discussed the sobering implications of today's ruling:

> The effect of the rule [barring police from acting on anonymous tips of drunk driving unless they can verify each tip] will be to grant drunk drivers "one free swerve" before they can legally be pulled over by police. It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check.[10]

We have also recognized that "the Fourth Amendment does not require a policeman to simply shrug his shoulders and allow a crime to occur or a criminal escape."[11]

Unlike the majority, I do see this as a close case. But given the lack of *record* evidence supporting an inference of an actual traffic violation and the 911 caller's conclusory allegation of drunk driving, I conclude that this case falls on the other side of *Navarette*. Even so, I encourage citizens to continue to report their suspicions of drunk or impaired driving, urge police officers to remain vigilant in protecting our state's highways, and implore prosecutors to use all available evidence to ensure that an accurate and complete record is developed.

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[9] *Pagano*, unpub op at 5.

[10] *Virginia v Harris*, 558 US 978; 130 S Ct 10, 12; 175 L Ed 2d 322 (2009) (Roberts, C.J., dissenting).

[11] *Whalen*, 390 Mich at 682.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

LAKESHORE GROUP v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket Nos. 159524 and 159525. Argued on application for leave to appeal October 7, 2020. Decided May 20, 2021.

Lakeshore Camping, Gary Medler, and Shorewood Association petitioned for contested case hearings before an administrative-law judge (ALJ), challenging permits and a special exception granted by the Michigan Department of Environmental Quality (now the Michigan Department of Environment, Great Lakes, and Energy (EGLE)) to Dune Ridge SA LP. The petitions were consolidated, but Medler's and Shorewood's petitions were subsequently dismissed pursuant to a settlement agreement. Lakeshore Group, Jane Underwood, Charles Zolper, Lucie Hoyt, William Reininga, Kenneth Altman, and others moved to intervene. The ALJ denied intervention to some of these parties and ultimately dismissed the matter, concluding that the remaining petitioners and intervenors lacked standing. In February 2014, Dune Ridge, a real estate developer, had purchased a 130-acre plot of land along the shore of Lake Michigan. The property was located in a critical dune area and therefore was subject to certain regulations under the sand dunes protection and management act (SDPMA), MCL 324.35301 *et seq*. EGLE issued the requisite permits and special exceptions needed for development of the property to Dune Ridge, and in October 2014, Lakeshore Camping, Medler, and Shorewood filed their petitions under MCL 324.35305(1), which allows certain aggrieved parties to challenge the grant or denial of a permit or special exception and to request a contested case hearing on the permitting decision. Around September 2015, Underwood and Zolper moved to intervene in the case as aggrieved adjacent property owners. The ALJ also allowed Lakeshore Group, an unincorporated nonprofit association, to intervene after determining that it had "representational standing" through Zolper, one of its members. Lakeshore Camping and other petitioners were eventually dismissed from the case, leaving Underwood, Zolper, and Lakeshore Group as the sole remaining petitioners. In December 2015, Dune Ridge conveyed about 20 acres of its property that was immediately adjacent to Underwood's property to a nature conservancy, the

Oval Beach Preservation Society. Dune Ridge then moved for partial summary disposition, seeking to dismiss Underwood because she no longer owned property immediately adjacent to Dune Ridge's property. In July 2016, the ALJ granted the motion. In September 2016, Dune Ridge sold 15 acres of its property, including the land immediately adjacent to Zolper's property, to Vine Street Cottages, LLC. Dune Ridge then moved for summary disposition as to Zolper, and the ALJ dismissed Zolper and Lakeshore Group, finding that they no longer had standing because Zolper was no longer an immediately adjacent property owner. Underwood, Zolper, Lakeshore Group, and others appealed the decision of the ALJ in the Ingham Circuit Court. On appeal in the circuit court, Rosemarie E. Aquilina, J., reversed the ALJ's orders dismissing Underwood, Zolper, and Lakeshore Group, concluding that the ALJ made an error of law when he determined that petitioners "lost" standing when Dune Ridge conveyed to others the portions of its property that were adjacent to the land owned by Underwood and Zolper. EGLE appealed, and the Court of Appeals, SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., reversed the circuit court's decision in an unpublished per curiam opinion, concluding that although Underwood and Zolper were immediately adjacent property owners when they intervened in the case, they lost this status when Dune Ridge conveyed its property to Oval Beach and Vine Street and consequently they had lost their rights to challenge the permitting decision. Underwood, Zolper, and others sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether Underwood and Zolper satisfied the statutory standard for standing under MCL 324.35305(1) notwithstanding Dune Ridge's land sales. 505 Mich 875 (2019).

In an opinion by Chief Justice MCCORMACK, joined by Justices BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court *held*:

MCL 324.35305(1) balances the need to preserve critical dune areas with the benefits of economic development and human uses of the dunes by allowing two specified groups to request a contested hearing when a permit is issued to develop land on critical dune areas: (1) aggrieved applicants for a permit or special exception and (2) aggrieved owners of the property immediately adjacent to the proposed use. Although there is no dispute that Underwood and Zolper had petition rights under MCL 324.35305(1) when they moved to intervene, the question was whether the subsequent sale by Dune Ridge of slivers of its property extinguished those petition rights. The statute does not provide that a party who has exercised its petition rights may

later be divested of those rights. MCL 324.35305(1) outlines a two-step process: an aggrieved permit applicant or immediately adjacent land owner may request a formal hearing, and once an eligible party requests a hearing, the hearing shall be conducted by the department as a contested case hearing under the Administrative Procedures Act, MCL 24.201 *et seq*. Although the parties disputed whether the statute's use of the mandatory term "shall" requires EGLE to hold a hearing or whether it merely mandates how a hearing would take place, this dispute missed the larger point: MCL 324.35305(1) does not include any intermediary step between an eligible party's request and the hearing. In other words, no statutory language empowers EGLE to deny a hearing to a petitioner who qualified as an eligible party under the statute when the hearing was requested and who continues to desire a hearing. Therefore, under the statute, specific aggrieved parties may file a petition and then the department must hold a contested case hearing in conformity with the Administrative Procedures Act. The Court of Appeals erred by holding that Underwood and Zolper lost their petition rights under the statute when Dune Ridge sold parcels of its land because they no longer fit the statutory criteria laid out in MCL 324.35305(1). The statute does not allow for forced forfeiture. The requirements that MCL 324.35305(1) imposes on a petitioner are threshold requirements for requesting a hearing, and there is no basis for imposing an additional requirement that a petitioner must maintain their original status throughout the proceedings.

Reversed.

Justice ZAHRA, dissenting, noted that before the 2012 amendment of MCL 324.35305(1), the statute provided that anyone aggrieved by a decision of the department could request a formal hearing. Following the amendment, however, only an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use has the right to request a formal hearing if they are aggrieved by a decision of the department. Justice ZAHRA opined that under the amended language, petitioners did not have a statutory right to a formal hearing because although when they petitioned for a hearing at least one of the petitioners owned property immediately adjacent to the property owned by Dune Ridge, none of them owned property immediately adjacent to the *proposed use* by Dune Ridge. MCL 324.35305(1) does not provide the owner of the immediately adjacent property the right to a contested case, but only the owner of the property immediately adjacent to the proposed use. Because the SDPMA does not suggest that the

proposed use extends to the entire parcel of property in which the use is sought, and all of the permits at issue concerned proposed uses within the interior of the property, none of the proposed uses was immediately adjacent to petitioners' properties. Justice ZAHRA also disagreed that EGLE was obligated under the statute to hold a hearing upon request by an eligible party. Rather, the lack of an intermediary step in the statute between a party's request and the hearing should not be filled by inappropriately inserting a requirement that EGLE must hold a hearing upon a party's request. Discretion is inherent in the act of considering a request, and the majority opinion improperly removed discretion from the department to grant or deny a request for a hearing.

Justice VIVIANO, dissenting, agreed with Justice ZAHRA that petitioners had failed to establish that they had the right to a formal hearing under MCL 324.35305(1) because their property did not have a common border directly connected with the proposed use. However, Justice VIVIANO concluded that it was not necessary to reach the issue of whether EGLE otherwise has discretion under the statute to grant or deny a hearing to an aggrieved party.

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

ENVIRONMENTAL LAW — SAND DUNES PROTECTION AND MANAGEMENT ACT — CRITICAL DUNE AREAS — PROPERTY DEVELOPMENT — RIGHTS OF AGGRIEVED PARTIES.

Under MCL 324.35305(1) of the sand dunes protection and management act, MCL 324.35301 *et seq*., when a permit is issued to develop land on critical dune areas, aggrieved applicants for a permit or special exception and owners of the property immediately adjacent to the proposed use may request a contested case hearing; a party who has exercised their petition rights may not later be divested of those rights or lose their status under the statute after requesting a hearing; the Department of Environment, Great Lakes, and Energy must hold a hearing upon the request of a qualified aggrieved petitioner under the statute.

Ordway Law Firm, PLLC (by *Dustin P. Ordway*) for Lakeshore Group, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn Schumann, George Schumann, Marjorie Schuham, and Lakeshore Camping.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Daniel P. Bock*, Assistant Attorney General, for the Department of Environmental Quality.

Varnum LLP (by *Kyle P. Konwinski* and *Herman D. Hofman*) for Dune Ridge, SA LP.

Amici Curiae:

Environmental Law and Policy Center (by *Margrethe Kearney*) for the Environmental Law and Policy Center, the Michigan League of Conservation Voters, and the Michigan Environmental Council.

MCCORMACK, C.J. Under the sand dunes protection and management act (SDPMA), MCL 324.35301 *et seq.*,[1] when the government grants a development permit or special exception for a protected sand dune area, aggrieved owners of land immediately adjacent to the proposed use may request a contested case hearing to challenge the permitting decision. The petitioners Charles Zolper and Jane Underwood were aggrieved owners of property adjacent to the defendant Dune Ridge development project when they requested such a hearing—that is, they were eligible for a hearing. But before the hearing was conducted, Dune Ridge sold a strip of land between the proposed development and each petitioner's property, making them no longer adjacent property owners.

We must now determine whether these petitioners lost their eligibility for a contested hearing after properly requesting it. We answer no: Because the statute provides no means to deprive an eligible petitioner of a

[1] The SDPMA is Part 353 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*.

contested hearing, we hold that the petitioners are entitled to a contested case hearing. We reverse the judgment of the Court of Appeals and remand to the administrative tribunal to conduct a formal contested case hearing.

I. FACTS AND PROCEDURAL HISTORY

In February 2014, real estate developer Dune Ridge purchased a 130-acre plot of land in Saugatuck, Michigan. The property, located along the shore of Lake Michigan, had been developed and used by a church camp for approximately 100 years. Dune Ridge proposed to transform the area by tearing down old campground structures, widening and paving roads, constructing more than 20 luxury homes with paved driveways and septic-disposal and drain-field systems, and building a marina, along with other permanent site alterations.

Dune Ridge's newly acquired property was located in a state-designated critical dune area,[2] which meant that Dune Ridge needed to secure permits from the local unit of government or the Department of Environment, Great Lakes, and Energy (EGLE)[3] in order to proceed with its proposed development project. MCL 324.35304(1)(a). Dune Ridge complied with that re-

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[2] There are approximately 70,000 acres of protected critical dune areas in Michigan extending along much of Lake Michigan's shoreline and the shores of Lake Superior. A map of the critical dune areas is available online. See Michigan Department of Environment, Great Lakes, and Energy, *Atlas of Critical Dunes — Township Maps of Critical Dune Areas*, available at <https://www.michigan.gov/egle/0,9429,7-135-3311_4114-70207--,00.html> (accessed November 12, 2020) [https://perma.cc/E4XQ-LWSN].

[3] The Department is listed as a defendant, but under its former name, the Department of Environmental Quality. See Executive Order No. 2019-02.

quirement, and in August 2014, EGLE approved and issued Dune Ridge's first set of requested permits and special exceptions. Not everyone was pleased about this development, and in October 2014, Lakeshore Camping, Gary Medler, and Shorewood Association filed three separate petitions requesting contested case hearings, which were consolidated.

They requested these hearings pursuant to § 35305(1) of the SDPMA, which allows certain aggrieved parties to challenge the grant (or denial) of a permit or special exception. That statute allows applicants for permits or special exceptions, as well as aggrieved "owner[s] of the property immediately adjacent to the proposed use" to request a formal hearing on a permitting decision. MCL 324.35305(1). The hearings are conducted as a contested case, which the Administrative Procedures Act[4] defines as "a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3).

By mid-September 2015, nearly a year after the parties had filed their initial requests for contested case hearings, the consolidated case was still pending. But it was no longer much of a consolidated case: Medler and Shorewood Association had been dismissed with prejudice under the terms of settlement agreements they entered into with Dune Ridge. This left only Lakeshore Camping.

It was around this time that appellants Underwood and Zolper, alongside six of their neighbors and Lakeshore Group, moved to intervene. See Mich Admin Code, R 792.10306. Both Underwood and Zolper owned

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[4] MCL 24.201 *et seq*.

property bordering Dune Ridge's 130-acre development property and claimed that they were aggrieved by the natural destruction posed by Dune Ridge's development project. EGLE did not object to the motion to intervene. Dune Ridge did, arguing that the petitioners did not live "immediately adjacent" to the proposed use, because the proposed development was to take place in the *interior* of the Dune Ridge property. The administrative law judge (ALJ) dismissed this argument, finding that Dune Ridge's construction of § 35305(1) would impermissibly narrow its application to circumstances where the proposed development takes place on the border of parcels owned by the permit applicant. The ALJ allowed Underwood, Zolper, and two of their neighbors who also lived immediately adjacent to the proposed development to intervene. The ALJ denied the motion as to the other would-be intervenors who lived near, but not immediately adjacent to, the Dune Ridge property. For reasons not relevant to this appeal, Underwood and Zolper soon found themselves as the only remaining individual petitioners.[5]

On December 14, 2015, Dune Ridge conveyed 20.6 acres of its property to the Oval Beach Preservation

[5] Lakeshore Camping, one of the original petitioners, was dismissed because it did not own property immediately adjacent to the development. The other two neighbors were also dismissed because while they lived on property adjacent to the development, they did not *own* the property, which belonged to Shorewood Association. Lakeshore Group, an unincorporated nonprofit association, was initially denied the right to intervene. Later in the proceedings, however, the ALJ determined that the group had "representational standing" because Zolper was one of its members. See *Trout Unlimited, Muskegon White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992) ("A nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse and real interests in the matter being litigated.").

Society, a nature conservancy organization, to preserve the property in its undeveloped state. The location of the conveyed property was significant: It was immediately adjacent to Underwood's property, effectively creating an Oval Beach Preservation Society-owned buffer between the properties owned by Underwood and Dune Ridge. Shortly thereafter, Dune Ridge filed a motion for partial summary disposition to dismiss Underwood from the contested case, arguing that Underwood no longer owned property immediately adjacent to Dune Ridge's property. The ALJ granted the motion in a July 7, 2016 order.

On September 30, 2016, Dune Ridge sold 15 acres of its property to an organization called Vine Street Cottages, LLC. The parcel included the land immediately adjacent to the land owned by Zolper, and Dune Ridge again moved for summary disposition. The ALJ found that Zolper, like Underwood before him, was no longer able to contest Dune Ridge's proposed development. Lakeshore Group, which had enjoyed representational standing through Zolper, was also dismissed.

On appeal, the Ingham Circuit Court reversed the ALJ's orders. Applying the principle of legal standing to this administrative-hearing process, the circuit court held that while jurisdictional challenges may be raised at any time, a court determines standing when the suit is filed. Therefore, the circuit court concluded, the ALJ committed a substantial and material error of law when he ruled that the petitioners "lost" standing following Dune Ridge's conveyance of portions of its property to the Oval Beach Preservation Society and Vine Street Cottages, LLC.

EGLE appealed. In a March 21, 2019 per curiam opinion, the Court of Appeals reversed the circuit court and held that while Zolper and Underwood were "im-

mediately adjacent" property owners when they intervened in the case, they later lost their right to challenge the permitting decision. *Lakeshore Group v Dep't of Environmental Quality*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket Nos. 340623 and 340647), pp 11-12. The panel, like the circuit court, applied the justiciability doctrine of standing to the statutory hearing process but reached the opposite conclusion. Because standing is jurisdictional, the panel reasoned, a party's "lack of standing may be raised at any time." *Id*. at 10. As a result, Zolper and Underwood had lost the right to a contested case hearing because they had lost their status as owners of " 'the property immediately adjacent to the proposed use.' " *Id*. at 11, quoting MCL 324.35305(1).

The petitioners appealed, arguing that the Court of Appeals erred by reversing the circuit court. We directed briefing and oral argument on the following question:

> [W]hether appellants Jane Underwood and Charles Zolper, as "owner[s] of [] property immediately adjacent to the proposed use" at the time of their intervention in these contested cases, satisfy the statutory standard for standing under MCL 324.35305(1), notwithstanding the developer's subsequent sales of land located between each appellant's respective property and the property being developed. [*Lakeshore Group v Dep't of Environmental Quality*, 505 Mich 875, 875 (2019) (second and third alterations in original).]

II. STANDARD OF REVIEW

This case involves an issue of statutory interpretation, which we review de novo. *Whitman v City of*

Burton, 493 Mich 303, 311; 831 NW2d 223 (2013).[6] This means that we review the issue independently, without any required deference to the lower court. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

III. ANALYSIS

The SDPMA built a regulatory infrastructure around the state's critical dune areas—"unique, irreplaceable, and fragile resource[s] that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits." MCL 324.35302(a). The SDPMA balances the need to preserve the dunes with "the benefits of economic development and multiple human uses of the critical dunes." MCL 324.35302(b). The statutory provision at issue, § 35305(1), reflects this goal:

> If an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use is aggrieved by a decision of the department in regard to the issuance or denial of a permit or special exception under this part, the applicant or owner may request a formal hearing on the matter involved. The hearing shall be conducted by the department as a contested case hearing in the manner provided for in the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

Section 35305(1) limits who can request a contested hearing to two categories of potential petitioners: "applicant[s] for a permit or a special exception" and

[6] Vacated in part on other grounds 497 Mich 896 (2014).

"owner[s] of the property immediately adjacent to the proposed use . . . aggrieved by a decision of the department."[7]

The question is not whether Underwood and Zolper had § 35305(1) petition rights in September 2015 when they moved to intervene. We agree with the Court of Appeals that they did.[8] See *Lakeshore*, unpub op at 9. The question is rather whether Dune Ridge's subsequent sale of slivers of its property to third parties extinguished Underwood's and Zolper's petition rights.

No text in MCL 324.35305 provides that a party that has exercised its petition rights may later be divested of those rights. ALJs derive their authority from the Legislature; they may not exercise powers not expressly granted through statute. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 736; 330 NW2d 346 (1982) ("It is beyond debate that the sole source of an agency's power is the statute creating it."); *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951) ("Administra-

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[7] The statute once allowed any "person [who] is aggrieved by a decision of the department" to request a formal hearing, but a 2012 amendment narrowed the language to its present form. Compare MCL 324.35305(1), as enacted by 1995 PA 59, with MCL 324.35305(1), as amended by 2012 PA 297.

[8] The dissent disagrees. It embraces Dune Ridge's view that Underwood and Zolper *never* had a statutory right to challenge EGLE's determination because "proposed use" in MCL 324.35305(1) refers narrowly to only the specific section of the parcel of land being developed. That interpretation—which would allow adjoining property owners to petition a local unit of government for a hearing only when the proposed development takes place on the literal border between the properties—is not a reasonable reading of the statutory language. It would likely insulate all sand dune development from review—how often do people build on the border of their property? It's no wonder that such an interpretation has not been embraced by EGLE or any tribunal. Indeed, Dune Ridge opted not to appeal the ALJ's decision rejecting this interpretation and instead made the property transfers that led us here.

tive boards, commissions, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication."), quoting 42 Am Jur, § 26, p 316. The statute at issue here outlines a straightforward two-step (and only two-step) process: an aggrieved permit applicant or immediately adjacent land owner "may request a formal hearing." MCL 324.35305(1). If an eligible party requests a hearing, "[t]he hearing shall be conducted by the department as a contested case hearing in the manner provided for in the administrative procedures act of 1969." *Id*. The term "shall" indicates that conduct is mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008).

The parties dispute whether "shall" imposes an obligation on EGLE to hold a hearing or whether it merely mandates how a hearing would take place (i.e., in conformity with the Administrative Procedures Act). The dispute over this single word misses the larger point: MCL 324.35305(1) includes no intermediary step between the request and the hearing. No statutory language empowers EGLE to deny a hearing to a petitioner who satisfied the statute's requirement when the hearing was requested and who continues to desire a hearing. The statutory algorithm is straightforward: specific aggrieved parties may file a petition and then the department must hold a contested case hearing in conformity with the Administrative Procedures Act. Cf. *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 258, 264-265; 477 NW2d 138 (1991) (affirming an Insurance Commissioner's denial of a petition for a contested case hearing because the relevant statute's statement that the Commissioner "may" hold a hearing was not "a mandatory decree," meaning the denial was within the Commis-

sioner's discretion). If an eligible party requests a hearing, EGLE must hold one.[9]

The statute provides no off-ramp, and the Court of Appeals erred by creating one. The panel concluded that Dune Ridge's sale of parcels of its land meant that Zolper and Underwood "no longer fit the statutory criteria" laid out in MCL 324.35305(1). *Lakeshore*, unpub op at 12. In other words, the Court of Appeals understood Dune Ridge's unilateral actions, undertaken after Zolper and Underwood properly intervened but before a contested case hearing took place, to have forfeited Zolper's and Underwood's rights to challenge the permitting decision. See *id*.

But § 35305(1) does not allow for forced forfeiture. The requirements that the statute imposes on the petitioners—that they be either aggrieved permit applicants or aggrieved immediately adjacent land owners—are threshold requirements for requesting a hearing. There is no basis for imposing an additional requirement that a petitioner maintain that status throughout the proceedings.[10]

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[9] The dissent believes that the agency enjoys the discretion to deny a hearing even to aggrieved owners of immediately adjacent property. But the statute's text is plain: the discretion rests with aggrieved owners of immediately adjacent property, who *may* request a hearing, not the department, which *must* comply with the statute's requirement that "[t]he hearing shall be conducted . . . as a contested case hearing in the manner provided for in the administrative procedures act . . . ." MCL 324.35305(1). The dissent's concern about the potential for gamesmanship by adjacent property owners who sell their property is hard to follow. A no-longer-adjacent property owner who wants to participate in a contested hearing requested when she was an adjacent property owner is an unlikely hypothetical. But if it presents itself, this hypothetical claimant will have an uphill battle establishing that she is aggrieved by the proposed development.

[10] Though the ALJ and the courts below have largely addressed this dispute under the justiciability doctrines of standing and mootness, the

We therefore reverse the Court of Appeals. The Legislature enacted the SDPMA to balance the preservation of critical dune areas with the need for economic development. To achieve that balance, the Legislature determined that only specific people may request an administrative contested case hearing. But for those limited qualifying parties, the hearing must occur. The statute simply does not create any process for divesting a qualified petitioner of their right to a hearing. Nor does it import principles of legal standing or mootness into this specific contested hearing process. Courts can't add requirements to the text of the statute.

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language of MCL 324.35305(1) is dispositive. We also question, though reserve for another day, whether nonjudicial officers like ALJs should invoke such traditional justiciability doctrines when a statute does not. These doctrines narrow the types of cases that *courts* may decide. Underpinning these doctrines is the idea that the scope of *judicial power* is limited and that certain disputes may be inappropriate for judicial adjudication. See *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 372; 716 NW2d 561 (2006), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 352-353, 371 n 18, 372 (2010). Justiciability doctrines are guardrails for the judiciary, preventing courts from encroaching on the other branches and encouraging judicial restraint. Administrative agencies like EGLE do not possess the judicial power. "In other words, administrative agencies are not bound by the same justiciability limitations that affect the authority of the judiciary." *Mich Chiropractic Council*, 475 Mich at 372 n 18. This makes sense in light of the principles that animate justiciability doctrines: a legislatively created hearing process (unlike a proceeding in a Michigan court) need not be concerned about encroaching on the Legislature's power. In the present case, Zolper and Underwood's complaint is that they were unlawfully deprived of a statutorily created contested hearing before a nonjudicial hearing officer, not that they should have access to a hearing in court. The Legislature created this hearing right, and the Legislature's statute governs this dispute. Cf. *Huffman v Indiana Office of Environmental Adjudication*, 811 NE2d 806, 812-813 (Ind, 2004) (finding that an Indiana ALJ should not have invoked the judicial doctrine of standing because "the statute, and only the statute, defines the class of persons who can seek administrative review of agency action").

This dispute is a simple one. As EGLE admits, the petitioners satisfied this particular statute's strict requirements for requesting a contested hearing when they filed their petitions. The statute requires that they get that hearing and leaves no room for the respondent to forfeit it for them.

IV. CONCLUSION

When EGLE grants a permit or special exception to allow development in a protected sand dune area, under MCL 324.35305, aggrieved owners of land immediately adjacent to the proposed development have a statutory right to request a contested case hearing. That is precisely what Zolper and Underwood did. The statute then requires EGLE to conduct a contested case hearing pursuant to the Administrative Procedures Act. No hearing took place; instead, years of litigation ensued over whether Dune Ridge's conveyance of land could deprive Zolper and Underwood of their statutory right to a hearing. The text of the statute says no.

BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

ZAHRA, J. (*dissenting*). I respectfully dissent. Petitioners were never eligible to request a formal hearing because they have never owned property immediately adjacent to the proposed use. But even if petitioners had met the statutory requirements when they requested a formal hearing, respondent Department of Environment, Great Lakes, and Energy (EGLE)[1] re-

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[1] See note 3 of the majority opinion.

tained implicit discretion under MCL 324.35305(1) to grant or deny petitioners a contested hearing.

I have no quarrel with the "facts and procedural history" of this case as presented in the majority opinion. But I take exception to the majority's terse treatment of respondent Dune Ridge's view that Jane Underwood and Charles Zolper "never had a statutory right to challenge EGLE's determination because 'proposed use' in MCL 324.35305 refers narrowly to only the specific section of the parcel of land being developed . . . ."[2]

The majority acknowledges that the Legislature in 2012 "narrowed the language" of MCL 324.35305(1),[3] but it does not acknowledge the effect of this "narrowing" of language on a person's right to request a formal hearing under the sand dunes protection and management act, MCL 324.35301 *et seq*. (the Act). Formerly, MCL 324.35305(1) provided that anyone "aggrieved by a decision of the department" was permitted to request a formal hearing.[4] This language was revised, however, and under the current version of MCL 324.35305(1), aside from "an applicant for a permit or a special exception," only "the owner of the property immediately adjacent to the proposed use" has the right to request a formal hearing if they are aggrieved by a decision of the department.[5]

The significance of the amendment as applied to this case cannot be ignored. While petitioners would have been able to request a formal hearing under the previous version of the statute, the plain and clear

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[2] *Ante* at 63 n 8 (emphasis omitted).

[3] *Ante* at 63 n 7.

[4] MCL 324.35305(1), as enacted by 1995 PA 59.

[5] MCL 324.35305(1), as amended by 2012 PA 297.

language of the current version of MCL 324.35305(1) does not provide petitioners a statutory right to request a formal hearing. The majority's opinion does not meaningfully examine the history and language of MCL 324.35305(1) to resolve the threshold question squarely presented: whether petitioners are "the owner[s] of the property immediately adjacent to the proposed use."

There is no dispute that at least one petitioner, at some point, owned the property "immediately adjacent" to the property owned by Dune Ridge. Likewise, there is no dispute that Dune Ridge applied for several permits, as defined by the Act, "for a use within a critical dune area" on its property.[6] The proposal for "use" "means a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change done or caused to be done by a person."[7]

In this case, the permits did not pertain to any proposed use that was immediately adjacent to petitioners' property. The administrative-law judge (ALJ)

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[6] MCL 342.35301(g).

[7] MCL 324.35301(k). Before deciding on Dune Ridge's application for a permit, EGLE conducted public hearings on June 3, 2014, and June 30, 2014. Note that in contrast to MCL 324.35305(1), which allows the "*owner of the property immediately adjacent* to the proposed use" to request a formal hearing, a public hearing is provided "[u]pon the written request of *2 or more persons who own real property within 2 miles of the project*," MCL 324.35304(1)(c). (Emphasis added.) The 2012 amendment of the Act likewise restricted a person's ability to request a public hearing. Before the 2012 amendment, MCL 324.35304(4)(c) required a public hearing "[u]pon the written request of 2 or more persons that own real property within the local unit of government or an adjacent local unit of government, or that reside within the local unit of government or an adjacent local unit of government . . . ." MCL 342.35304(4)(c), as enacted by 1995 PA 59.

addressed this question and summarized Dune Ridge's argument as "advancing a construction of § 35305(1) that only confers standing to adjoining property owners if the proposed use is on the border of parcels owned by the applicant." The ALJ rejected Dune Ridge's argument, concluding that

> [t]o accept this construction would impermissibly limit an adjoining property owner's right to a contested case. By its terms, § 35305(1) provides both the applicant and the owner of the immediately adjacent property the right to a contested case. In this case, Ms. Hoyt, Mr. Reininga Jr., Ms. Underwood, and Mr. Zolper are owners of the immediately adjacent property, and thus have standing to challenge the issuance of permits and/or special exception issued to Dune Ridge.[8]

The ALJ's reasoning runs contrary to the pertinent statutory language. MCL 324.35305(1) does not provide the owner of the immediately adjacent property the right to a contested case. The statute only provides the right to "request a formal hearing on the matter involved" to "the owner of the property immediately adjacent *to the proposed use*." Nothing in the Act remotely suggests that the proposed use extends to the entire parcel of property in which the use is sought. This conclusion is particularly unremarkable given that Dune Ridge applied for multiple permits for proposed uses on the same parcel of property. These permits all concerned proposed uses situated within

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[8] The Court of Appeals did not actually decide the statutory question squarely presented: whether "the property" is "immediately adjacent" to "the proposed use." *Lakeshore Group v Dep't of Environmental Quality*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket Nos. 340643 and 340647).

the interior of its property and none of the proposed uses was "immediately adjacent" to petitioners' properties.[9]

The majority likewise dismisses Dune Ridge's view that petitioners "never had a statutory right to challenge EGLE's determination because 'proposed use' in MCL 324.35305(1) refers narrowly to only the specific section of the parcel of land being developed."[10] The majority asserts without explanation that this "is not a reasonable reading of the statutory language."[11] I disagree. Not only is this understanding of MCL 324.35305(1) reasonable, but it is the only way that MCL 324.35305 can plainly be understood and applied.

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[9] Any suggestion that Dune Ridge acted nefariously in proposing use only within the interior of its property is belied by EGLE's approval of the permits along with the city of Saugatuck's blessing. Indeed, MCL 324.35304(1)(g) provides that

> permit shall be approved *unless the local unit of government* or the department determines that the use will significantly damage the public interest on the privately owned land, or, if the land is publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of any of the following:
>
> (*i*) The diversity of the critical dune areas within the local unit of government.
>
> (*ii*) The quality of the critical dune areas within the local unit of government.
>
> (*iii*) The functions of the critical dune areas within the local unit of government. [Emphasis added.]

Here, petitioners clearly advocated that the proposed uses "will significantly damage the public interest on the privately owned land," but the city was simply not persuaded.

[10] *Ante* at 63 n 8 (emphasis omitted).

[11] *Ante* at 63 n 8.

This is particularly so when considered in light of the legislative changes to this statute.[12]

MCL 324.35305(1) states, in relevant part:

> If an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use is aggrieved by a decision of the department in regard to the issuance or denial of a permit or special exception under this part, the applicant or owner may request a [contested] hearing on the matter involved.

The statute does not define the words "immediately" or "adjacent," so we turn to a dictionary to shed light on their ordinary meanings.[13] "Adjacent" can mean either "having a common endpoint or border" or "not distant[;] nearby."[14] The Legislature took the guesswork out of picking the applicable definition here by modifying "adjacent" with the word "immediately," which is relevantly defined as "in direct connection or relation."[15] Thus, the only fair reading of the statutory text is that eligibility for requesting a contested hearing is limited to owners of property having a common border in direct connection with the proposed use.

MCL 324.35305(1) also refers to "the owner of the property," which clearly means a parcel of property. The statute, however, does not then refer to "the

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[12] "Unlike legislative history, statutory history—the narrative of the 'statutes repealed or amended by the statute under consideration'—properly 'form[s] part of the context of the statute[.]' " See *People v Pinkney*, 501 Mich 259, 276 n 41; 912 NW2d 535 (2018), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256.

[13] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) ("We may consult dictionary definitions to give words their common and ordinary meaning.").

[14] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[15] *Id*.

property" again, but rather, to "the proposed use." By using these distinct terms, the Legislature indicated that "the property" should not be substituted for "the proposed use" when this term is used later in the statute. Had the Legislature wanted "the proposed use" to be considered coextensive with "the property," it readily could have said so by, for example, referring to "the owner of the property immediately adjacent to the [property of the] proposed use." But the Legislature did not do so.

To interpret the term "the property" to have the same meaning as "the proposed use" violates the presumption against consistent usage. "A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning."[16] For example, if a document says "*land* in one place and *real estate* later, the second provision presumably includes improvements as well as raw land."[17] Clearly, this presumption applies to this text: the statute uses the term "the property" in one place and the term "the proposed use" later, so the second term refers to something different than the first. Yet, the majority treats them the same. In sum, I conclude that the Legislature clearly understood the meaning of "the property" and did not use that same meaning when it referred to "the proposed use" later in the statute.[18] Petitioners have therefore failed to establish their right to request a formal hearing.

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[16] *Reading Law*, p 170.

[17] *Id*.

[18] Indeed, the Legislature showed that it was capable of expressing a more relaxed proximity requirement in another section of Part 353. See note 7 of this opinion.

I also take exception to the majority's conclusion that "[i]f an eligible party requests a hearing, EGLE must hold one."[19] MCL 324.35305(1) provides:

> If an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use is aggrieved by a decision of the department in regard to the issuance or denial of a permit or special exception under this part, the applicant or owner may request a formal hearing on the matter involved. The hearing shall be conducted by the department as a contested case hearing in the manner provided for in the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

As noted in the majority opinion, "[t]he parties dispute whether 'shall' imposes an obligation on EGLE to hold a hearing or whether it merely mandates how a hearing would take place (i.e., in conformity with the Administrative Procedures Act)."[20] Rather than resolving this dispute by parsing the words of the statute, the majority chooses to focus on what is not in the statute. Specifically, the majority finds a gap in the statutory language in that "MCL 324.35305(1) includes no intermediary step between the request and the hearing."[21] The majority therefore concludes that the absence of this "intermediary step" automatically entitles petitioner to a hearing. The majority's construction plainly runs afoul of the "omitted-case canon" of statutory interpretation, which provides that "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered."[22]

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[19] *Ante* at 65.

[20] *Ante* at 64.

[21] *Ante* at 64.

[22] *Reading Law*, p 93.

Here, the majority improperly fills the gap between what is in the statute—that "the applicant or owner may request a formal hearing on the matter involved" and that "[t]he hearing shall be conducted by the department as a contested case hearing in the manner provided for in the administrative procedures act"—by inappropriately inserting "[i]f an eligible party requests a hearing, EGLE must hold one." Further, the majority's gap-filler is not even reasonably implied by the statute. Common sense and experience caution that requests are not always granted. The above statute simply cannot be read as providing petitioners a right to a contested hearing merely upon their request for a formal hearing.

In addition, the Legislature has made very clear in other statutes concerning administrative proceedings when a request for a contested hearing is not within an agency's discretion to grant, and it did not do so here. For instance, under the Social Welfare Act,[23] "the provider upon request shall be *entitled* to an immediate hearing held in conformity with chapter 4 and chapter 6 of the administrative procedures act of 1969 . . . ."[24] Under the Public Health Code,[25] "[a]n applicant, licensee, or other person whose legal rights, duties, or privileges are required by this code to be determined by the department, after an opportunity for a hearing, *has the right* to a contested case hearing in the matter, which shall be conducted pursuant to the administrative procedures act of 1969."[26] The Mental

[23] MCL 400.1 *et seq.*

[24] MCL 400.111a(8) (emphasis added).

[25] MCL 333.1101 *et seq.*

[26] MCL 333.1205(1) (emphasis added).

Health Code[27] provides that "[a]n administrative hearing shall be held and the department . . . shall make a redetermination of ability to pay."[28]

That said, "[t]he omitted-case canon . . . must sometimes be reconciled with the principle that a text does include not only what is express but also what is implicit. For example, when a text authorizes a certain act, it implicitly authorizes whatever is the necessary predicate of that act."[29] For example, "[a]uthorization to harvest wheat genuinely implies authority to enter the land for that purpose."[30] But a "request" need not necessarily be granted; in fact, the very nature of a request is that the outcome is uncertain, so the required, genuine implication from the text cannot be that the request will be granted absent language, which is not present here, to remove the discretion inherent in the act of considering a request.

Moreover, by removing discretion from EGLE to grant a formal hearing, the majority simultaneously creates a problematic statutory regime that, in its words, "provides no off-ramp"[31] or procedure by which the permit applicant can avoid a formal hearing after it has been requested by the owner of immediately adjacent property. Simply because the statute does not expressly provide for, in the majority's terminology, "forced forfeiture,"[32] does not mean that the agency is precluded from exercising its implicit discretion to grant —and by necessary extension, to deny—petitioner a

[27] MCL 330.1001 *et seq.*

[28] MCL 330.1834(b).

[29] *Reading Law*, p 96.

[30] *Id*. at 96-97.

[31] *Ante* at 65.

[32] *Ante* at 65.

contested hearing. Otherwise, EGLE is without discretion to refuse a request for a contested hearing by a petitioner who has since sold the parcel of the property that actually was immediately adjacent to the proposed use. An interpretation of a statute, such as the majority's in this case, that would permit a sham contested hearing should be viewed with great skepticism.

For the above-stated reasons, I would deny the application for leave to appeal and order that the case be dismissed with prejudice.

VIVIANO, J. (*dissenting*). I join Justice ZAHRA's dissent to the extent it would hold that petitioners failed to establish that they have the right to request a formal hearing under MCL 324.35305(1) because their property does not have a common border in direct connection with the proposed use. I do not join in the dissent's second point—i.e., that the Department of Environment, Great Lakes, and Energy otherwise has discretion to grant or deny a contested hearing to an aggrieved party—because it is unnecessary for us to reach that issue.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE v KABONGO

Docket No. 159346. Argued November 10, 2020 (Calendar No. 3). Decided May 20, 2021.

Jacques J. Kabongo was convicted of carrying a concealed weapon, MCL 750.227, following a jury trial in the Wayne Circuit Court. Two police officers testified that they had seen defendant cover a holstered handgun with his shirt and that defendant's license to carry a concealed weapon had expired. The trial court, Catherine L. Heise, J., sentenced defendant to one year of probation and 50 hours of community service. Defendant appealed by right, arguing, among other things, that the trial court had erred by overruling his objections to the prosecutor's use of peremptory challenges to excuse Prospective Jurors 2(a), 3(a), and 14(a), all of whom were Black, and by disallowing defendant's use of a peremptory challenge to excuse Prospective Juror 5(a), who was white. The Court of Appeals, MURRAY, C.J., and METER and GLEICHER, JJ., affirmed in an unpublished per curiam opinion issued December 27, 2018 (Docket No. 338733). Defendant sought leave to appeal in the Supreme Court, which granted the application with respect to (1) whether the prosecution's exercise of a peremptory challenge against Prospective Juror 2(a) violated *Batson v Kentucky*, 476 US 79 (1986), which prohibits the prosecution from using a peremptory challenge to remove a prospective juror solely on the basis of race; (2) whether the trial court erroneously precluded defendant from exercising a peremptory challenge against Prospective Juror 5(a), given that the same analytical framework from *Batson* applies when the prosecution opposes a defendant's use of a peremptory challenge on the basis of alleged racial discrimination; (3) if so, whether such an error should be subject to automatic reversal or harmless-error review; and (4) if so, whether reversal was warranted. 505 Mich 999 (2020).

The judgment of the Court of Appeals was affirmed by equal division.

Justice ZAHRA, joined by Justices VIVIANO and CLEMENT, writing for affirmance, concluded that although the evidence was open to interpretation, the trial court had not clearly erred by finding

that the prosecution's race-neutral explanation for using a peremptory challenge to excuse Prospective Juror 2(a) was not a pretext for improper purposeful discrimination. However, Justice ZAHRA concluded that the trial court did clearly err by determining that defense counsel's race-neutral explanation for seeking to excuse Prospective Juror 5(a) was a pretext for discrimination. While defense counsel's comments may have suggested an intent to discriminate against white prospective jurors during voir dire, the record did not reflect that defense counsel actually engaged in purposeful discrimination against this particular prospective white juror, given that she had extensive familial ties to law enforcement and the sole evidence against defendant was to be the testimony of law enforcement officers. Nevertheless, Justice ZAHRA would have held that the court's denial of defendant's peremptory challenge was not a structural error requiring automatic reversal under Michigan law. He noted that the Supreme Court of the United States has recognized that states need not even provide peremptory challenges, and if a state does so, then the state is free to decide the remedy available for a trial court's mistaken denial of a peremptory challenge. He stated that Michigan law provides no basis for a rule that would require automatic reversal when a trial court denies a peremptory challenge on the basis of an improperly granted *Batson* challenge, because Michigan law generally views peremptory challenges as a nonconstitutional right that is provided to both parties as one of the many optional means to secure the constitutional guarantee of an impartial jury. Accordingly, he would have held that a trial court's erroneous denial of a defendant's peremptory challenge is subject to harmless-error review and that under this standard, reversal was not warranted in this case given the lack of record evidence that any juror, let alone the juror whom defendant had hoped to excuse, harbored any bias against defendant. Justice ZAHRA would have affirmed the Court of Appeals judgment for these reasons.

Chief Justice MCCORMACK, joined by Justices BERNSTEIN and CAVANAGH, writing for reversal, concurred with the lead opinion that the trial court clearly erred by denying defense counsel's request to exercise a peremptory challenge to remove Prospective Juror 5(a) but disagreed with the rest of the lead opinion's conclusions. Specifically, Chief Justice MCCORMACK concluded that the trial court violated *Batson* by misapplying its three-part test and by accepting the prosecution's race-neutral reasons for excusing Prospective Juror 2(a), which were not supported by the record. She also disagreed with the lead opinion's conclusion that the error of refusing to remove Prospective Juror 5(a) was subject

to harmless-error review, stating that such a rule effectively would lead to automatic affirmance. Because a *Batson* violation requires automatic reversal, she would have reversed the Court of Appeals judgment and remanded for a new trial.

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jon P. Wojtala*, Chief of Research, Training, and Appeals, and *Deborah K. Blair*, Assistant Prosecuting Attorney, for the people.

Sheldon Halpern, PC (by *Sheldon Halpern*) for defendant.

Amicus Curiae:

William J. Vailliencourt, Jr., *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

ZAHRA, J. (*for affirmance*). In this case, we granted leave to appeal to address the trial court's resolution of a pair of *Batson*[1] challenges, each concerning the others' use of peremptory challenges to remove prospective jurors on the basis of race. The prosecution first exercised its statutory right to remove a white prospective juror from the panel, and then exercised the same right to consecutively remove three black prospective jurors from the panel.[2] At this point, defen-

[1] *Batson v Kentucky*, 476 US 79; 106 Ct 1712; 90 L Ed 2d 69 (1986).

[2] Ordinarily, jury selection involves a group of citizens in the community randomly summoned to the courthouse on a particular day for potential jury service, often referred to as the "jury pool." Then, a subgroup of these citizens are called into a courtroom, and this subgroup is known as the jury venire. From this venire, prospective jurors are drawn to a panel of 14 that constitutes a prospective jury. In this opinion, we

dant asserted a *Batson* challenge to the prosecution's removal of the three black prospective jurors. The trial court rejected this challenge. We conclude that the trial court did not clearly err by finding that the prosecution's race-neutral explanation was not a pretext for improper purposeful discrimination. The record evidence before us is open to interpretation regarding defendant's *Batson* challenge. Though some trial courts may have reached a different conclusion, our deferential review of the trial court's decision in this case does not leave us with a definite and firm conviction that the trial court erred.

The second *Batson* challenge at issue was raised by the prosecution upon the exercise of defendant's third peremptory challenge. The prosecution noted that all the peremptory challenges asserted by defendant excused white prospective jurors. Defendant explained that his most recent peremptory challenge was directed toward a prospective juror with extensive familial ties to law enforcement. The trial court sustained the prosecution's *Batson* challenge, leaving on the prospective jury panel a prospective juror whom defendant preferred to remove. We conclude that the trial court clearly erred by determining that defense counsel's race-neutral explanation was a pretext to discrimination such that defense counsel engaged in purposeful discrimination by exercising a peremptory challenge of this prospective juror. While defense counsel's comments may have suggested that he was previously engaged in purposeful discrimination against white prospective jurors during voir dire and that defense counsel perhaps even intimated an intent to

describe these prospective jurors as Prospective Juror(s) 1 through 14(a). Replacements to any of these prospective jurors drawn from the venire are described as Prospective Jurors 1 through 14(b), and so on.

continue to do so, the record does not reflect that defense counsel actually engaged in purposeful discrimination against this particular prospective white juror. This prospective juror had extensive familial ties to law enforcement, and the sole evidence against defendant was to be the testimony of law enforcement officers.

Having concluded that the trial court clearly erred by granting the prosecution's *Batson* challenge, we must determine whether the court's denial of defendant's peremptory challenge is a structural error under Michigan law requiring automatic reversal, or whether the error is subject to harmless-error review. A trial court's erroneous denial of a defendant's peremptory challenge is not a constitutional error, let alone a structural error requiring automatic reversal, under the federal Constitution. The Supreme Court of the United States has repeatedly recognized that states need not even provide peremptory challenges. The Sixth Amendment guarantees a right to an "impartial jury," not a right to the jury of one's choosing. The Court has explained that if a state does provide peremptory challenges, then the state is free to decide, as a matter of state law, the remedy available for a trial court's mistaken denial of a peremptory challenge.[3] Michigan law provides no basis for a rule that would require automatic reversal when a trial court denies a peremptory challenge on the basis of an improperly granted *Batson* challenge or otherwise. Rather, Michigan law generally views peremptory challenges as a nonconstitutional right that is provided to both parties as one of the many optional *means* to secure the constitutional guarantee of an impartial jury. For rea-

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[3] *Rivera v Illinois*, 556 US 148, 152; 129 S Ct 1446; 173 L Ed 2d 320 (2009).

sons more fully discussed below, we conclude that a trial court's erroneous denial of a defendant's peremptory challenge is not a structural error that requires automatic reversal under Michigan law. Instead, the trial court's error is subject to harmless-error review.

Applying harmless-error review, we conclude that reversal is not warranted in this case. There is no record evidence that the trial court's denial of defendant's peremptory challenge resulted in a miscarriage of justice. There is no evidence that any juror, let alone the juror whom defendant hoped to excuse, harbored any bias against defendant. Because defendant received a trial from an impartial jury, no harm resulted from the trial court's erroneous denial of defendant's peremptory challenge. We would therefore affirm the Court of Appeals' judgment holding that defendant is not entitled to a new trial.

I. BASIC FACTS AND PROCEEDINGS

On October 15, 2016, defendant was working on a rental property he owned on Monte Vista Avenue in Detroit. Two Detroit police officers, Royer Hernandez and Alexander Collrin, saw defendant openly carrying a holstered handgun outside the house as they drove by on patrol. Officer Hernandez looked in his rearview mirror as he passed and saw defendant walk to the rear door on the driver's side of a pickup truck parked in the street. Officer Hernandez testified that while defendant appeared to be taking tools from the back seat of the truck, he covered the gun with a blue shirt he was wearing. Officer Collrin also saw defendant conceal the weapon. The officers returned to the property to ask defendant if he had a concealed pistol license (CPL). Defendant produced an expired CPL.

The officers immediately arrested defendant for unlawfully carrying a concealed weapon, a felony.

After a somewhat contentious jury-selection process, defendant was tried and convicted on the sole count of carrying a concealed weapon. The trial court later sentenced him to nonreporting probation for one year and 50 hours' community service. Defendant appealed by right. The Court of Appeals affirmed in an unpublished per curiam opinion.[4] Defendant sought leave to appeal in this Court, and we granted the application with respect to the following issues:

> (1) whether the prosecution's exercise of a peremptory challenge against prospective juror no. 2 violated *Batson v Kentucky*, 476 US 79 (1986); (2) whether the trial court erroneously precluded the defendant from exercising a peremptory challenge against prospective juror no. 5; (3) if so, whether such an error should be subject to automatic reversal or harmless error review . . . ; and (4) if so, whether reversal is warranted in this case.[5]

II. ANALYSIS

A. *BATSON* CHALLENGES

The Fourteenth Amendment of the United States Constitution provides that no state shall deny "any person within its jurisdiction the equal protection of the laws."[6] The Michigan Constitution provides the

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[4] *People v Kabongo*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2018 (Docket No. 338733). Defendant's motion for reconsideration was denied on February 20, 2019.

[5] *People v Kabongo*, 505 Mich 999 (2020).

[6] US Const, Am XIV. Two decades before *Batson*, the United States Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, a party may not remove a prospective juror solely on the basis of a person's race. *Swain v Alabama*, 380 US 202, 203-204; 85 S Ct 824; 13 L Ed 2d 759 (1965), overruled in part by *Batson*,

same protection.[7] In *Batson*, the Supreme Court of the Unites States held that a "State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause."[8] Specifically, the Supreme Court held:

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.[9]

To assist courts in resolving *Batson* challenges, the Supreme Court implemented a three-part burden-shifting analysis to be used in resolving *Batson* challenges. The process starts with the assertion of a challenge under *Batson*. The party bringing the *Batson* challenge must first "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[10] Upon an initial showing of a

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476 US 79. As we explained in *People v Knight*, 473 Mich 324, 336 n 9; 701 NW2d 715 (2005), the Court in *Batson*, 476 US at 92-93, eliminated the requirement in *Swain*, 380 US at 223-224, that the defendant must show that the prosecution had a practice or pattern of using peremptory challenges in other cases.

[7] Const 1963, art 1, § 2 provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

[8] *Batson*, 476 US at 89 (comma omitted).

[9] *Id*. (quotation marks and citation omitted).

[10] *Id*. at 93-94.

prima facie case of purposeful discrimination, the burden then shifts to the proponent of the peremptory challenge " 'to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strike[]."[11] Once the proponent of the peremptory challenge articulates a race-neutral explanation, the trial court must determine whether it was more likely than not that the challenge was improperly motivated;[12] that is, whether the proponent's "race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination."[13]

Moreover, while the facts of *Batson* were limited to a criminal defendant's challenge to the prosecution's use of a peremptory challenge to remove a juror on the basis of race, the United States Supreme Court has also held that the prosecution may challenge a defendant's use of a peremptory challenge for the same reason. In *Georgia v McCollum*, the Supreme Court held that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory

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[11] *Johnson v California*, 545 US 162, 168; 125 S Ct 2410; 162 L Ed 2d 129 (2005), quoting *Batson*, 476 US at 94.

[12] *Johnson*, 545 US at 170 ("[I]n describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated.").

[13] *Knight*, 473 Mich at 338, citing *Batson*, 476 US at 98. Also, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

challenges."[14] Notably, the same framework from *Batson* applies to cases in which the prosecution opposes a defendant's use of a peremptory challenge on the basis of racial discrimination.[15]

1. A PRIMA FACIE CASE OF PURPOSEFUL DISCRIMINATION

To establish a prima facie case of purposeful discrimination in the exercise of a peremptory challenge, the opponent of the challenge must show: (1) the defendant is a member of a cognizable racial group; (2) the exercise of a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) circumstantial evidence that raises an inference that the peremptory challenge was exercised on the basis of race.[16]

Courts have described what evidence may be useful in showing the "inference" of purposeful discrimination. Often, those bringing a *Batson* challenge have relied solely on a "numbers" argument (i.e., how many times the opposing party has struck members of a particular race). As noted in several federal circuit courts of appeals, the use of numbers alone generally does not establish a prima facie case. The United States Court of Appeals for the First Circuit has stated

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[14] *Georgia v McCollum*, 505 US 42, 59; 112 S Ct 2348; 120 L Ed 2d 33 (1992). The Court explained that the constitutionally significant harm related to this error concerned jurors and the justice system more than a defendant's exercise of a discriminatory peremptory challenge. *Id*. at 49-50.

[15] *Id*. at 59 ("Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges."). Because *McCollum* held that *Batson* applies to a defendant's peremptory challenges, the prosecution in this case was permitted to challenge defendant's peremptory challenges of white jurors.

[16] *Knight*, 473 Mich at 336, citing *Batson*, 476 US at 96.

that, while the particular number of challenges exercised against a particular class of people is relevant, "a party who advances a *Batson* argument ordinarily should come forward with facts, not just numbers alone."[17] The court explained that "[r]elevant numeric evidence includes the percentage of strikes directed against members of a particular group,"[18] "the percentage of a particular group removed from the venire by the challenged strikes,"[19] and "a comparison of the percentage of a group's representation in the venire to its representation on the jury."[20]

Relevant nonnumeric evidence may also include "a pattern of strikes against members of the racial group, as well as the types of questions the prosecutor asks in his voir dire examination."[21] Other relevant nonnumeric evidence is whether similarly situated jurors from outside the allegedly targeted group were permitted to serve.[22]

These factors give effect to *Batson*'s statement that a " 'pattern' of strikes . . . might give rise to an inference of discrimination."[23] We therefore conclude that when a

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[17] *Aspen v Bissonnette*, 480 F3d 571, 577 (CA 1, 2007) (quotation marks and citation omitted).

[18] *Id*., citing *Paulino v Castro*, 371 F3d 1083, 1091 (CA 9, 2014).

[19] *Aspen*, 480 F3d at 577, citing *Turner v Marshall*, 63 F3d 807, 813 (CA 9, 1995), overruled on other grounds by *Tolbert v Page*, 182 F3d 677, 684 (CA 9, 1999).

[20] *Aspen*, 480 F3d at 577, citing *United States v Sangineto-Miranda*, 859 F2d 1501, 1521-1522 (CA 6, 1988).

[21] *McCain v Gramley*, 96 F3d 288, 290 (CA 7, 1996).

[22] *Boyd v Newland*, 467 F3d 1139, 1148-1150 (CA 9, 2006).

[23] *Batson*, 476 US at 97. Of course, we acknowledge that "statistical evidence about the prosecutor's use of peremptory strikes" is relevant evidence of a prima facie case. *Flowers v Mississippi*, 588 US ___, ___; 139 S Ct 2228, 2243; 204 L Ed 2d 638 (2019). Nothing in our conclusion

party raises a "numbers" argument in a *Batson* challenge, those numbers, by themselves, are insufficient to establish a prima facie case. In sum, a prima facie case of discrimination under *Batson* should be premised on facts over and above the *number* of individuals excused. The number of jurors excused (or not excused) is important only to the extent that it demonstrates a *pattern* of discrimination.

2. OFFERING A NEUTRAL EXPLANATION IN SUPPORT OF THE PEREMPTORY CHALLENGE

If the trial court is satisfied that a prima facie showing of discrimination has been made, the burden shifts to the party exercising the peremptory challenge to come forward with a neutral explanation" to support the challenge.[24] This second step "does not demand an explanation that is persuasive, or even plausible."[25] The issue is the " 'facial validity of the . . . explanation. Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral.' "[26] While the explanation "need not rise to the level justifying exercise of a challenge for cause," the proponent of the peremptory challenge must do more than state that the challenged juror would be biased because of race.[27]

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would diminish a party's ability to raise this statistical evidence. We would simply conclude that a party must use this evidence to argue a pattern of discrimination. See *id*. at ___; 139 S Ct at 2246 (analyzing the statistical evidence in light of *Batson*'s endorsement to show a "pattern" of discrimination).

[24] *Batson*, 476 US at 97.

[25] *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995).

[26] *Id*., quoting *Hernandez*, 500 US at 360.

[27] *Batson*, 476 US at 97.

3. RESOLVING A *BATSON* CHALLENGE

If the proponent of the peremptory challenge provides a race-neutral explanation, the trial court must determine whether this explanation is a pretext to improper discrimination and whether the opponent of the challenge has proved purposeful discrimination.[28] This third step "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."[29] The "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."[30]

Batson cautions that a trial court's "findings in the context under consideration here largely will turn on evaluation of credibility," and thus "a reviewing court ordinarily should give those findings great deference."[31] This directive was subsequently reaffirmed in *Hernandez v New York*, in which the Supreme Court noted that this deference "makes particular sense in th[e] context" of the third *Batson* step because of the importance of credibility.[32] "In the typical peremptory-challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."[33] An evaluation of the attorney's state of mind, demeanor, and credibil-

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[28] *Knight*, 473 Mich at 337-338, citing *Batson*, 476 US at 98.

[29] *Miller-El v Dretke*, 545 US 231, 252; 125 S Ct 2317; 162 L Ed 2d 196 (2005).

[30] *Purkett*, 514 US at 768.

[31] *Batson*, 476 US at 98 n 21.

[32] *Hernandez*, 500 US at 365.

[33] *Id*.

ity lies "peculiarly within [the] trial judge's province."[34] Likewise, the trial court must also evaluate "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror . . . ."[35] This deference is necessary "because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations."[36] Consequently, "in the absence of exceptional circumstances," an appellate court should defer to the trial court's determination in this regard.[37]

B. APPLICABLE STANDARDS OF REVIEW

The proper standard of review for a *Batson* challenge depends on which of the *Batson* steps the Court is reviewing:

> If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has

[34] *Id*. (quotation marks and citation omitted).

[35] *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008).

[36] *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

[37] *Snyder*, 552 US at 477 (quotation marks and citation omitted).

> proved purposeful discrimination), we review the trial court's ruling for clear error.[38]

"Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[39]

C. REVIEW OF VOIR DIRE PROCEEDINGS

The trial court began voir dire by questioning each of the initial 14 prospective jurors on the panel randomly selected from the venire to ensure that each was qualified and competent to serve as a juror. The court then turned voir dire questioning over to the parties. After the parties had questioned the prospective jurors and passed on challenges for cause, the prosecution exercised two peremptory challenges and removed Prospective Juror 3(a), who was black, and Prospective Juror 13(a), who was white. Next, defense counsel was offered an opportunity to exercise peremptory challenges but declined to do so. The trial court questioned the replacement venire jurors, found Prospective Jurors 3(b) and 13(b) qualified and competent, and allowed the parties to question the new prospective jurors. The parties passed again on challenges for cause. Thereafter, defense counsel exercised a peremptory challenge and removed Prospective Juror 11(a), who was white. The prosecution then exercised a third peremptory challenge and removed Prospective Juror 2(a), who was black.[40]

A replacement was chosen for Juror 2(a), and the court repeated its voir dire process. The prosecution

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[38] *Knight*, 473 Mich at 345.

[39] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[40] The court on its own removed for cause the replacement Prospective Juror 11(b) because he answered "no" to the question whether he could

then exercised its fourth peremptory challenge and removed Prospective Juror 14(a), who was black. Juror 14(b) was removed for cause[41] and replaced by Juror 14(c).[42] At this point, the court sent the venire and the 13 prospective jurors seated in the jury box to lunch.

After the venire and prospective jurors had left the courtroom, defense counsel raised the following concern regarding the prosecution's use of its peremptory challenges:

> [*Defense Counsel*]: The prosecution has excused four people and I can't—I can't recall whether or not the fourth person was an African American but three of them were. And I believe that this Court needs to at least attempt to get a definitive answer from the prosecutor about dismissing at least three, and I'm not sure of myself, the four people that she has excused . . . .

"listen to the evidence that's presented and base [his] verdict on the evidence[.]" Specifically, Prospective Juror 11(b) claimed he had previously been

> arrested and the officer made statements in the report which were false. My attorney brought this up with the prosecutor. The prosecutor had this officer brought up in front of the judge to discuss but beyond that I don't recall or I don't know but . . . I pled guilty.

Neither party objected to the removal of Prospective Juror 11(b) for cause, nor did either party challenge for cause Prospective Juror 11(c).

[41] The court excused Prospective Juror 14(b) after he gave varying answers regarding whether he would be able to return a guilty verdict because of his religious beliefs.

[42] Defense counsel challenged Prospective Juror 14(c) for cause because she stated, "I just don't think people should be visibly displaying guns [regardless] whether they're legally car[ry]ing unless they're in a safety position[.]" When pressed, however, Prospective Juror 14(c) asserted that while it was her "feeling" that people should not visibly be carrying guns, she would "uphold the law so I'll set [my personal views] aside." The court denied defendant's challenge for cause, and defense counsel exercised a peremptory challenge to remove Prospective Juror 14(c).

> *The Court*: The fourth was juror number 13[(a)] and that was a Caucasian person.
>
> [*Defense Counsel*]: Yes.
>
> *The Court*: And, currently, our jury panel has one, two, three, African Americans.

The prosecution offered justifications for each of its peremptory challenges of black jurors. In regard to Prospective Juror 3(a), the prosecution cited several examples in which the juror showed a lack of interest in serving on a jury, stating:

> As it relates to juror number three who I believe was the first juror that I struck, Ms. Whitford. She clearly did not want to be here. She was refusing to make eye contact with myself asking her questions, she was sitting down rolling her eyes, she had her arms crossed [at] a number of points. When the Court asked about real hardships it was my job, it was my kids. The Court asked about medical reasons, oh, I have arthritis. And then also she said she had a torn ligament in her leg and she said it made it difficult for her to sit stand [sic] and then she said she had a broken—and then didn't even tell us what the broken part of her body was. And the People would like jurors that—I know everyone doesn't necessarily want to be here, it's not their favorite thing, but people that are going to be attentive jurors. And based on her body language and her lack of interaction with me when I was trying to interact with her as well as the multitude of excuses she gave[,] that is the reason that the People excused her.[43]

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[43] In response, defense counsel argued:

> That's the usual responses about the lack of contact, and she didn't look at me, and her body language, and she really didn't want to be here. She didn't tell us what part of her body was ever broken as if, I don't know what that means, but that somehow is further justification so to speak. I just don't believe we've heard anything other than the usual excuses that cover up a use of a peremptory for racial reasons.

In regard to Prospective Juror 14(a), the prosecution noted she was pregnant and having trouble paying attention because she did not feel well, explaining:

> With regard to juror 14[(a)], Ms. Reynolds, it's not on record but Ms. Reynolds was clearly quite pregnant. She indicated that she had gone to the doctor the day before for severe pain. As she's sitting in the jury seat her head was in her hand and she also just appeared to be in extreme pain. It did not appear to the People that she was going to be necessarily inattentive or trying to off the jury [sic] but based on her quite extreme pregnancy and the fact that she said she was having sever [sic] pains the day before the People had a concern both with her being able to sit through today as well as possibly losing her over the weekend if she has to keep going back to the doctor. But, again, the head in her hands, her eyes are closing and she's clearly in distress. The People excused juror number 14[(a)].[44]

The trial court permitted the prosecution's use of a peremptory challenge to Juror 3(a), ruling:

> [T]he prosecution provided several reasons, and I would concur with her, because the first question out the box with juror number [3(a)] was is a one to two day trial a genuine hardship and she was the first person to raise her hand. She then did sit with her arms crossed. I did notice the eyes rolling. She proffered her reasons for not wanting to be on the jury; her job, her children, and physical condition.
>
> So I'm going to find that there has been a reason offered that is not inherently discriminatory.

[44] In response, defense counsel argued:

> Yeah. I mean, there' [sic] was one juror sitting there, juror number eight, who was taking a quick snooze. I mean, the point being that other than the fact that she was pregnant there was absolutely nothing whatsoever—and that didn't disable her in anyway, you don't become disabled, generally speaking, by being pregnant. I can't speak, I'm a guy. But that's no basis to excuse somebody because they're pregnant. And other than that there wasn't anything that this witness exhibited that wasn't exhibited by other jurors as well.

In regard to the prosecution's peremptory challenge as to Prospective Juror 2(a), one of two peremptory challenges this Court expressly granted leave to address, the prosecution cited concerns with the juror's memory as the basis for its challenge, explaining:

> With regards to juror number two she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was, and she couldn't remember any of the additional questions after that. She had to ask a few times. Also, she indicated having a senior moment here and there. She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn't remember any sort [of] specifics. Same with whether herself or her family were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can't remember, I can't remember, I don't remember how long ago, I don't remember anything. So she had a problem with memory and it's the People's concern for her that if we're going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she would forget testimony seemed fairly probable and the People were concerned about that.

In response, defense counsel disputed the veracity of the prosecutor's assertions, stating:

> There's absolutely no validity to what was just stated. That witness indicated only a difficulty in remembering whether something happened 10 years ago. And if the

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The trial court ruled, under the third *Batson* step:

> [T]here is a race neutral explanation for the peremptory challenge. This lady is pregnant, she did have her head in her hand, she testified to having a doctor's appointment, she was clearly not feeling well. She testified she has flexible work hours, she has children at home, she [was] depend[e]nt upon her mother for childcare assistance.

> Court wants us to review anything I'm sure the court reporter could do so if the Court wished the exact word back and forth. Just repeating memory, memory, by the prosecutor is not reflective of what that p[ro]spective juror indicated. There was no memory problem whatsoever.

The trial court rejected defendant's *Batson* challenge, beginning its analysis at *Batson*'s second step:

> [S]tep two of the *Batson* framework is that the prosecutor must articulate a neutral explanation related to the particular case to be tried. . . . [T]he Court is only concerned with whether the proffered reasons violate[] the Equal Protection Clause and that's, again, part of the *Batson* case.
>
> I'm going to find in this case that the prosecutor as to juror number two has offered a race neutral explanation for the peremptory challenge and further has articulated a neutral explanation for the dismissal. Juror number two did indeed have a difficult time with memory[;] she did discuss senior moments. She had to kind of . . . step back and reach back in her memory to recall things such as whether or not she had been the victim of a crime, such as—there were some other specific ones. But I do remember she did seem to have a problem keeping up with this case.
>
> And *Batson*'s second step does not require[] articulation of [a] persuasive reason or even a plausible one[;] so long as the reason is not inherently discriminatory[,] it suffices. . . .
>
> So here the prosecutor has provided a race neutral explanation for her peremptory challenges to number two so I'm going to then deny the *Batson* challenge as to juror number two.
>
> * * *
>
> . . . [T]he third step [of the *Batson* analysis] . . . requires that the trial [c]ourt make a final determination of whether the challenger of the strike, which would be the

defense, has established purposeful discrimination. And whether there is purposeful discrimination is the persuasiveness of the prosecutor's justification for the peremptory strike. It comes down to whether the trial [c]ourt finds the prosecutor's race neutral explanations to be creditable [sic]. And in this case I will find that it was reasonable, her explanation is not improbable, there was a rationale that had some basis in accepted trial strategy. And so I'm going to deny the *Batson* challenge as to juror number two.[45] [Italics added.]

After the lunch break, jury selection continued by seating a prospective juror to replace Prospective Juror 14(c), who was excused for cause. After voir dire by the trial court, the parties passed on any challenges for cause. After consulting with his client, defense counsel exercised a peremptory challenge to remove Prospective Juror 5(a)—counsel's third consecutive peremptory challenge of a white prospective juror and the other peremptory challenge this Court expressly granted leave to address. The prosecution immediately objected, and the trial court excused the jury pool and prospective jurors from the courtroom to review the prosecution's objection. The following discussion took place:

[*The Prosecutor*]: Your Honor, the People are concerned that the defense has excused three jurors, they are all

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[45] Almost immediately after the trial court denied defense counsel's *Batson* challenges, the prosecution stated:

With regard to *Batson*, your Honor, I just, for the record the, two jurors that defense counsel have excused have both been Caucasian I did make note of that. I am not raising [a] *Batson* challenge at this time I just want the Court to be on notice that is a potential issue coming up.

Defense counsel retorted, "Well, in terms of potential issue[s] let's see how many more black people the prosecutor excuses." The trial court admonished defendant, stating, "[W]e don't need that. That was an unnecessary remark."

Caucasian, and based on, especially, the third challenge . . . , the People didn't see any reason the defense would want to excuse her and are asking for a race neutral reason for excusing all three of the white jurors[.]

The Court: Well, let's start with juror number five because jurors numbers 11 and 14 were excused a while ago.

[*The Prosecutor*]: They were.

The Court: So let's talk about juror number five. Mr. Halpern?

[*Defense Counsel*]: Juror number five's father is or was a police officer. Juror number five indicated that she had a felony conviction, although apparently nothing seemed to showup, but I would think the People know what they have a conviction of. There was real closeness—

The Court: I'm sorry, Mr. Halpern, I can't hear you[.]

[*Defense Counsel*]: Father and brother I think were somehow connected with law enforcement. And there were some personal feelings back and forth that I had when I was questioning her that . . . seemed to me to be negative.

The Court: Such as what?

[*Defense Counsel*]: Just my feelings, my feelings of exchange of words that I felt were unfriendly, somewhat antagonistic I felt. So all of those reasons.

The Court: Ms. Posigian?

[*The Prosecutor*]: Your Honor, that juror, juror number five, ha[s] been on the panel, I think she was on the initial panel. And there are several people that have friends or family members that are in law enforcement. With regard to her felony conviction the officer-in-charge did run her name and her date of birth over the break that we had and she had no record.

The Court: And that was placed on the record, too, as I recall.

[*The Prosecutor*]: Yes. And feelings aren't anything that really had been articulated. The people are concerned that there's not a race neutral reason for excusing juror number five.

[*Defense Counsel*]: I've used the same reasons . . . that the prosecutor used in terms of exchange of feelings, and the looks of somebody, the responses that were made. And number five also didn't really recall things so maybe she has a real problem remembering—

The Court: I don't recall that at all, Mr. Halpern. We haven't spoken to juror number five since we had our first round of dismissals. Juror number five has been just sitting there.

[*Defense Counsel*]: Right. But my concern—

The Court: So I'm confused. I don't remember her saying she couldn't remember anything.

[*Defense Counsel*]: Yeah, she couldn't remember—First of all, the conviction was out of state so I don't know whether or not the officer was able to check—

At this point the court swore in the officer, who confirmed that Juror 5(a) did not have a criminal record. The court then asked:

The Court: So your objection to her criminal record—

[*Defense Counsel*]: Well, then, my position is that she's lying. If they didn't find it, and according to the officer, then she wasn't telling the truth and I certainly don't want my client to be judged by someone who isn't telling the truth either way.

The trial court sustained the prosecution's *Batson* challenge, reasoning:

[S]tep two is to articulate a neutral explanation related to the particular case to be tried. And in this particular case Mr. Halpern articulates the fact that she has police officers in her family. But during the voir dire of number five I did not hear any additional voir dire directed to her about her relationships with police officers. She testified

clearly to me during the voir dire that her relationships would not affect her ability to be a fair and impartial juror and she understood that the testimony of a police officer is to be put to the same challenges of weight and credibility as that of any other witness.

As far as any—as far as the fact that she didn't have a conviction or couldn't remember a conviction I'd far rather a juror disclose that she thinks that she may have a conviction and we investigate it and find out that she doesn't rather than a juror lie and say I don't have one when in reality they do. I don't feel it's appropriate to kick juror number five because she raised a concern which the Court was able to address.

Finally, when we talk about evaluating the plausibility of a race neutral explanation for a strike in light of[] all the evidence with a bearing on it[,] this inquiry, according to the Tennielle [sic][46] case[,] necessarily includes careful consideration of relevant, direct, and circumstantial evidence of intent to discriminate. And, also, in this case I have asked the defense very specifically what problems they have with juror number five considering the fact she has been seated on this jury since the original 14 jurors were impanelled. What I'm hearing is feelings. There is—I have to—I'm charged as the judge . . . to probe more deeply when someone just talks about feelings. And there's not sufficient facts here. I'm not hearing about somebody that's sleeping, somebody nervous, preoccupied, angry, disrespectful or agitated. I'm just hearing about feelings. I'm tasked with engaging in a more penetrating analysis focus[]ing on ascertaining whether the proffered race neutral reason is pretext intended to mask a discrimination. Evaluation of the central question requires the Court to permit argument by the opposing counsel who bears the burden of persuading the Court that the—that there was purposeful discrimination here. This record lacks any objective indicia of concern—concerning the impartiality of juror number five or that she is otherwise unfit to serve as a juror in this case. So I'm going to

[46] *People v Tennille*, 315 Mich App 51; 888 NW2d 278 (2016).

> find . . . that the reason offered is insufficient and I am going to find that the challenger has established purposeful discrimination. So I'm going to keep juror number five on the jury . . . .

The venire jurors and prospective jurors then returned to the courtroom. Defense counsel exercised a peremptory challenge to Prospective Juror 8(a), who was of Middle Eastern descent. Following a lengthy voir dire, the trial court dismissed Prospective Juror 8(b) for cause.[47] A replacement juror, Prospective Juror 8(c), was chosen and subjected to voir dire. After the parties passed on challenges for cause on Prospective Juror 8(c) and passed on additional peremptory challenges, the jury was empaneled.

In sum, the prosecution exercised peremptory challenges to remove three black prospective jurors and one white prospective juror. Defense counsel exercised peremptory challenges to remove two white prospective jurors and was denied a third consecutive challenge to a white prospective juror, but later exercised a peremptory challenge to excuse one prospective juror of Middle Eastern descent. The jury that was empaneled had at least three black jurors.[48]

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[47] At the end of the trial court's voir dire, the following was revealed by Prospective Juror 8(b):

> [*Defense Counsel*]: You wouldn't accept uncontradicted testimony of the two police officers that said they have a concealed weapon; wouldn't be enough for you?
>
> [*Prospective Juror 8(b)*]: No, I wouldn't.
>
> *The Court*: I think it's very clear juror number eight would not follow the law. He just simply would not follow the law no matter what I told him the law was. So as disappointed as I am and juror number eight['s] stated determination not to follow the law I'm going to dismiss him from the jury panel regretfully.

[48] Absent from the record is a demographic breakdown of the empaneled jury. We know, however, that at least three black jurors were on the

1. *BATSON* CHALLENGE TO PROSPECTIVE JUROR 2(a)

With this background, we address defendant's *Batson* challenge to the removal of Prospective Juror 2(a). Although the three-prong burden-shifting analysis from *Batson* requires defendant to first establish a prima facie case of discrimination based on race, we note that the trial court began its analysis with the second prong because the prosecution immediately offered a race-neutral explanation for the peremptory challenges. While we question whether defendant satisfied his initial burden of proving a prima facie case of racial discrimination, we will proceed as if he did.[49]

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jury before Prospective Juror 8(c) was empaneled. The record is silent as to the race of Prospective Juror 8(c).

[49] The Prosecuting Attorneys Association of Michigan (PAAM), as amicus curiae, presents a cogent and credible argument that it is questionable whether defendant established a prima facie case of purposeful discrimination. Defense counsel's objection was based solely on the prosecution's exercise of three out of four peremptory challenges on prospective black jurors. Defense counsel only requested to "get a definitive answer from the prosecution" about those challenges.

In order to establish a prima facie case, defendant was required to show that he is a member of a cognizable racial group, that the prosecution challenged one or more members of that group, and "all the relevant circumstances raise an inference" that the challenges were made on the basis of race. *Knight*, 473 Mich at 336. The first two requirements are clearly met, and, as for the third, it is true that a numbers-based showing may be relevant to raising an inference that the challenges were based on race. See *Aspen*, 480 F3d at 577. However, defendant did not attempt to show that those numbers showed a pattern of discrimination by, for instance, highlighting the number of peremptory strikes against prospective jurors of one race in comparison to the remaining prospective jurors of that same race. See, e.g., *McCain*, 96 F3d at 290; *Walker*, 490 F3d at 1291. Here, at the point of the jury-selection process when the prosecution exercised its peremptory challenge on Juror 2(a), the prosecution had only excused one black prospective juror, Juror 3(a), and one white prospective juror, Juror 13(a). Thus, because the trial court commenced its review of the jury-selection proceedings at Step Two of the three-prong *Batson* analy-

Turning to the second step of the *Batson* analysis, the prosecution offered a race-neutral reason for removing Prospective Juror 2(a): short-term memory problems. This reason for requesting removal does not need to be persuasive or even plausible; as long as a discriminatory intent is not inherent in the explanation, it will be deemed race-neutral.[50] Here, the proffered explanation was certainly race-neutral. Memory problems do not give rise to any inherent discriminatory intent by themselves. Rather, they have been repeatedly held as constituting a valid, race-neutral reason for a peremptory challenge.[51] Therefore, the trial court did not err by ruling that the prosecution offered a race-neutral reason for dismissing Prospective Juror 2(a).

Turning to Step Three, we find no clear error in the trial court's rejection of defendant's *Batson* challenge. We are guided by the principle that a trial court's finding that no *Batson* violation occurred is entitled to "great deference."[52] Here, defendant challenged the prosecution's peremptory strike of three prospective jurors: 2(a), 3(a), and 14(a). Even viewing defendant's challenge to Prospective Juror 2(a) in isolation, the record supports the trial court's conclusion that Prospective Juror 2(a) did have some memory problems. When asked about her qualifications, she had no

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sis, we decline to consider whether defendant established a prima facie case. Nonetheless, we recognize there are cogent arguments to support the conclusion that defendant failed to satisfy his initial burden of proving a prima facie case of racial discrimination under the first prong of the *Batson* analysis.

[50] *Purkett*, 514 US at 768.

[51] See *People v Armstrong*, 6 Cal 5th 735, 774; 433 P3d 987 (2019); *State v Toliver*, 205 So 3d 948, 955; 2015-1959 (La App 1 Cir 9/19/16); *Woolf v State*, 220 So 3d 338, 372 (Ala Crim App, 2014).

[52] *Hernandez*, 500 US at 364, citing *Batson*, 476 US at 98 n 21.

problem remembering that she was retired from counseling, divorced, and had a bachelor's degree in criminal justice administration. But when asked if she had served on a jury before, she replied that she had "years and years ago but we didn't have to serve because the defendant pled or something and then we left." Further, when asked if she knew someone who had been a victim of a crime, she responded, "[y]eah, we have been—our family has been but it was a long time ago. I can't remember the years and stuff. Senior moment. I'm 64 so . . . ." When asked if she ever had a bad experience with a police officer, she responded, "I'm sure I have been pulled over and stuff like that before but I don't remember how long ago that was."

Although the evidence supporting the prosecution's nonracial reasons for removing Prospective Juror 2(a) is not as clear and decisive as the reasons offered in support of the removal of Prospective Jurors 3(a) and 14(a), we conclude the challenge to Juror 2(a) cannot be reviewed in isolation. Counsel's exercise of other peremptory challenges is relevant evidence in assessing whether counsel exercised a particular peremptory challenge with improper motives.[53] Reviewing the to-

[53] The evidence that the prosecution's proffered reasons were credible goes far beyond the specific evidence pertaining to Prospective Juror 2(a). Defendant's *Batson* challenge concerned challenges to two other prospective jurors: 3(a) and 14(a). In each instance, the prosecution's race-neutral reasons were found to be credible based on strong record evidence. In context, the most relevant challenge would be the prosecution's peremptory challenge to Prospective Juror 3(a), as that strike was the only peremptory challenge of a black juror exercised by the prosecution before the peremptory challenge to Prospective Juror 2(a).

In regard to Prospective Juror 3(a), the prosecution argued that she had medical reasons that made it difficult for her to sit for long periods of time and it was clear that she was antagonistic to participating in the trial. These arguments are race-neutral and, if supported by the record, credible. See *United States v Garrison*, 849 F2d 103, 106 (CA 4, 1988) ("A

tality of the proceedings, we conclude the trial court

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prosecutor is justified in striking jurors that he or she perceives to be inattentive or uninterested."). Here, the prosecution's arguments were supported by the record. When asked what hardship jury service would present, Prospective Juror 3(a) answered, "my job and get[ting] my kids to school." She agreed with the trial court that she had not sought any deferment or excuse on the basis of hardship. Immediately after, the trial court asked the prospective jurors whether they had any health problems that would make jury service difficult. Prospective Juror 3(a) alone responded and said she had a "torn ligament" and "arthritis bad in my knee so I can't sit or stand at periods of time." Further, the record supports the prosecution's contention that Prospective Juror 3(a) appeared antagonistic to the prosecution. The trial court confirmed having seen Prospective Juror 3(a) sit with her arms crossed and roll her eyes during voir dire. She also admitted that her "cousin . . . went to jail for armed robbery" and that three years ago she was convicted of third-degree retail fraud, a misdemeanor. Accordingly, the prosecution's history of peremptory challenges before the peremptory challenge of Prospective Juror 2(a) revealed no suggestion of discrimination on the basis of race. See, e.g., *Flowers*, 588 US at ___; 139 S Ct at 2243 (noting that a prosecutor's history of peremptory strikes is relevant evidence).

In regard to Prospective Juror 14(a), the prosecution highlighted that she was pregnant and was in "extreme pain." Consequently, the prosecution was concerned with whether Prospective Juror 14(a) would make it through trial, especially given that trial was expected to continue the following week. Again, these are race-neutral reasons to excuse a juror. See *State v Bell*, 359 NC 1, 15; 603 SE2d 93 (2004) (holding that a concern that a juror would "suffer so much pain [from medical issues] that she would be unable to participate in the proceedings" was a "valid and race-neutral reason" to excuse the juror). They were also supported by the record. Prospective Juror 14(a) stated that she was having trouble sleeping and caring for her children and that she had recently gone to the doctor for pain that was still persisting. The trial court also observed that "[t]his lady is pregnant, she did have her head in her hand, she testified to having a doctor's appointment, [and] she was clearly not feeling well." Thus, similar to Prospective Juror 3(a), the prosecution's reasons for using a peremptory challenge as to Prospective Juror 14(a) in no way suggest racial discrimination. The prosecutor's reasons for excusing both challenged jurors were credible and clearly supported by the record. While this reasoning is not dispositive as to Prospective Juror 2(a), it suggests that the prosecution's use of its challenges throughout voir dire was not motivated by race.

did not clearly err by accepting the prosecution's nonracial reasons for excusing Prospective Juror 2(a) peremptorily. This record sufficiently supports the conclusion that, perhaps because of her age, Prospective Juror 2(a) had trouble remembering details. While she did not have trouble remembering some basic information such as her age, educational background, and career history, she was unable to remember certain events that occurred in her life, some of which were significant and were relevant to her candidacy as a juror. For example, she claimed that her family had been the victim of a robbery, perhaps even an armed robbery—something most people would consider to be a very traumatic and memorable event. When asked if she or her family had been the victim of a crime, she offered within that response that she could not "remember the years and stuff." She was briefly interrupted but continued to answer, stating "[w]e have had, you know, robbery and stuff like that but it was, like, a long time ago nothing recent." When viewed in context, we conclude it was reasonable that the prosecution believed this exchange called for Prospective Juror 2(a) to provide a more detailed and robust answer, and the absence of such left an impression that Prospective Juror 2(a) was unable to recall any details of this crime.[54] Further, the trial court, in ruling on

[54] The opinion supporting reversal suggests the prosecution should have probed more deeply into whether Juror 2(a) could recall specific details of crimes committed against her and her family. We disagree. Litigation is an art, and counsel should be ever mindful that every action one takes leave an impression on the jurors. It was enough that Juror 2(a)'s responses during voir dire caused counsel to question whether she would be able to recall details of evidence presented at trial. It was not the duty of counsel to prove Juror 2(a) actually lacked capacity to serve. Such action could leave an unfavorable impression of the prosecution with the other jurors; e.g., probing more deeply into Juror 2(a)'s memory might have given the impression that the prosecu-

defendant's *Batson* challenge, referred to the fact that Prospective Juror 2(a) repeatedly needed to "reach back into her memory to recall things" and that she "did seem to have a problem keeping up with this case." Those references pertain directly to the trial court's assessment and evaluation of Prospective Juror 2(a)'s demeanor and courtroom presence—information that is permissible to consider, but impossible to assess from a cold reading of the transcript.[55]

While the prosecutor inaccurately described the nature and extent of Prospective Juror 2(a)'s memory problems, those inaccuracies, by themselves, are not demonstrative of an underlying discriminatory motivation to dismiss Prospective Juror 2(a) on the basis of race. The prosecutor characterized Prospective Juror 2(a)'s memory issues as "short term," yet all of her proofs related to long-term memory issues. Further, the prosecutor mentioned that Prospective Juror 2(a) had multiple "senior moments," even though she actually only mentioned such a moment once. The prosecutor also argued that Prospective Juror 2(a) could not remember her level of education, but it is clear that she did. While these inaccuracies, by themselves, could be

tion was picking on one of the older jurors. It bears repeating that the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 US at 768.

[55] See *Hernandez*, 500 US at 365; *Cockrell*, 537 US at 341. Because the record shows that the trial court actually assessed the demeanor and relied on its personal observations of Juror 2(a) when it overruled defendant's *Batson* challenge, we strongly disagree with the proposition taken in the opinion to reverse: that we can ignore the deferential standard of review appellate courts have long given to trial court findings on the issue of discriminatory intent in the context of a *Batson* challenge.

evidence of discrimination,[56] the prosecutor's reasons for exercising a peremptory challenge as to Prospective Juror 2(a), taken as a whole, support the trial court's finding that the prosecution did not operate with a discriminatory motive. As mentioned above, Prospective Juror 2(a)'s responses were not altogether responsive to the questions posed to her during voir dire, and it is not unreasonable that the trial court shared the prosecution's impression that she had memory problems. Further, the record does not contradict the prosecution's assessment that this prospective juror had trouble recalling the details of past events. At best, the record evidence is mixed with regard to the prosecution's motives in removing Prospective Juror 2(a). But when we are not left with a definite and firm conviction that the trial court made a mistake, a mixed record is insufficient to support a finding of clear error. That a reviewing court might have acted differently is not a basis on which to find clear error in the trial court.[57]

Here, the record clearly establishes that Prospective Juror 2(a) had difficulty recalling some of the topics discussed during voir dire and had trouble remembering basic details of life events, which was relevant to her ability to consider all the evidence presented in a criminal jury trial and render a verdict on defendant's

[56] See *Miller-El*, 545 US at 244 (explaining that considerations applicable to this fact-finding process include statements by the prosecutor that "mischaracterized [the] testimony" regarding the excused prospective juror's views).

[57] Trial court proceedings often move at an expeditious and unscripted pace that can impose stress on counsel and the court. Nonetheless, trial courts are presumed to understand the nature of their acts and to carry out their duties with proper preparation and knowledge. *Bishop v Hartman*, 325 Mich 115, 125; 37 NW2d 885 (1949). This presumption cannot be maintained if appellate courts review such proceedings with an expectation of perfection, viewed with the benefit of 20/20 hindsight.

guilt. The trial court observed the demeanor of Prospective Juror 2(a) during the selection process, as well as the demeanor of the prosecutor in challenging Prospective Juror 2(a). In light of these courtroom observations, the trial court found that the prosecutor's reason for peremptorily removing Prospective Juror 2(a) was credible. The evidence contrary to the trial court's findings does not rise to the level of an "exceptional circumstance" justifying an appellate court's departure from the "great deference" given to the trial court.[58] Consequently, we conclude that the trial court did not clearly err by rejecting defendant's *Batson* challenge as to Juror 2(a).

2. *BATSON* CHALLEGE TO PROSPECTIVE JUROR 5(a)

As earlier explained, *Batson* also applies to a defendant's peremptory challenge of jurors, and, "if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges."[59]

Once again, the trial court did not immediately address whether *Batson*'s first step was satisfied, turning instead to defendant's proffered race-neutral reason for the challenge to Prospective Juror 5(a). But, unlike the court's *Batson* analysis in regard to Prospective Juror 2(a), the court here later readdressed whether the prosecution established a prima facie case. The court concluded, "I think in this case the prosecution, as to juror number five, has established a prima facie case because this is the third peremptory challenge which the defendant has raised." Moreover,

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[58] *Snyder*, 552 US at 477; *Batson*, 476 US at 98 n 21.

[59] *McCollum*, 505 US at 59.

this aspect of the issue is reviewed de novo because whether the facts on which the prosecution's argument relies constitute a prima facie case is a question of law.[60] In other words, this Court need not give deference to either the trial court's conclusions or the Court of Appeals' conclusions in regard to our treatment of this issue. Thus, while the parties do not raise the issue, we address whether the prosecution established a prima facie case raising an inference of racial discrimination as to Prospective Juror 5(a). The prosecution's argument regarding Prospective Juror 5(a) was nearly as perfunctory as defendant's argument regarding Prospective Juror 2(a). The prosecution stated that "the defense has excused three jurors, they are all Caucasian, and based on, especially, the third challenge[d] witness[']s reasons, the People didn't see any reason the defense would want to excuse her and are asking for a race neutral reason . . . ."

Like defendant's argument regarding Prospective Juror 2(a), the prosecution's argument was based on numbers alone, focusing only on the fact that defendant had excused three white jurors without placing those numbers in meaningful context. The trial court was persuaded by this argument, concluding that the prosecutor's citation of the numbers of peremptory challenges against white prospective jurors established a prima facie case.[61] But the prosecution did not attempt to translate these numbers into an argument

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[60] *Knight*, 473 Mich at 342, 345.

[61] The record indeed shows that defendant exercised peremptory challenges only against three white jurors, and the number of peremptory challenges used against a particular racial group is somewhat relevant. See *Aspen*, 480 F3d at 577. But, given that white jurors made up a majority of the jury venire and prospective jurors, it is not surprising that defendant's challenges had only been directed toward white individuals.

that there was a pattern of racial discrimination. Again, it is a pattern, not just numbers, that can establish a prima facie case.[62]

Further, the crux of the prosecution's prima facie argument was not just that defendant had excused three white jurors, but rather that it did not "see any reason the defense would want to excuse her," referring to Juror 5(a). This statement does not raise any inference that defendant was engaging in purposeful discrimination. A party need not have a strong legal reason for excusing a particular juror.[63] Indeed, the concept of peremptory challenges rests on the notion that one need not have *any* reason to dismiss a prospective juror. *Batson*'s only restriction on this otherwise unfettered right to strike prospective jurors is that one cannot be motivated by race.[64]

Thus, as with defendant's prima facie case regarding Prospective Juror 2(a), we again question whether a prima facie case was made, this time by the prosecution. The prosecution's reliance on the number of peremptory challenges to remove white jurors alone does not show any pattern of discrimination. Defendant's challenges were not against a minority ethnic group, so, presumably, there were plenty of white individuals left both on the prospective panel and in the venire. And the prosecution was not necessarily entitled to "ask for" a reason for the peremptory

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[62] See, e.g., *McCain*, 96 F3d at 290; *Walker*, 490 F3d at 1291.

[63] See *Hayes v Missouri*, 120 US 68, 70; 7 S Ct 350; 30 L Ed 578 (1887) ("The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him.").

[64] See *Batson*, 476 US at 85-86.

challenge. Even though no party has raised the argument that the prosecution's prima facie case failed, we would conclude that it did.

Even assuming that the prosecution did establish a prima facie case, we would also conclude that the trial court erred by sustaining the prosecution's *Batson* challenge. Moving to the second *Batson* step, defense counsel offered several race-neutral reasons for challenging Prospective Juror 5(a). Specifically, he stated that Juror 5(a) had family connections to law enforcement, that she purported to have a felony conviction that did not show up on her record, and that she appeared "antagonistic" and "unfriendly."[65] Each of these reasons is, on its face, valid and race-neutral. That family connections to law enforcement constitute a race-neutral reason to strike a juror is an unremarkable concept. Indeed, the parties themselves do not challenge the proposition. Accordingly, defendant's primary reason for striking Juror 5(a)—her familial connection to law enforcement—was a valid, nondiscriminatory reason to exercise a peremptory challenge. Additionally, striking an antagonistic or hostile juror is a race-neutral reason to exercise a peremptory challenge. The parties do not challenge that proposition, and we have no reason to disagree. Therefore, defendant proffered at least two race-neutral reasons for his challenge.

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[65] Defense counsel did little to nothing to support his claim that Prospective Juror 5(a) was "antagonistic" and "unfriendly." In fact, his initial articulation suggested he was exercising this peremptory challenge on the basis of his gut feelings, something inherently suspect when reviewing a challenge under *Batson*. It was only in response to the trial court's questioning that defense counsel supplemented his argument to assert that this prospective juror was "antagonistic" and "unfriendly."

As with Prospective Juror 2(a), the ultimate question we must consider is whether the trial court's decision to sustain the *Batson* challenge was clearly erroneous, i.e., the third *Batson* step. Again, there must be an "exceptional circumstance" justifying an appellate court's departure from the "great deference" given to the trial court.[66] This is a very close and narrow question, but we ultimately conclude that the trial court clearly erred by upholding the prosecution's challenge. While the record does not significantly support the prosecution's argument that defendant was engaging in a pattern of racial discrimination by exercising a peremptory challenge on Prospective Juror 5(a), the record does reflect that the trial court was inclined to agree with the prosecution's earlier stated suspicions (following the denial of defendant's *Batson* challenge) that defense counsel had previously exercised peremptory challenges on Prospective Jurors 13(a) and 14(c) on the basis of race and that a peremptory challenge to *any* white juror by defendant should be viewed as highly suspect. Perhaps the trial court's disposition was justified given that when the prosecution initially stated its concern with defendant's use of peremptory challenges, defense counsel improvidently responded, "Well, in terms of potential issue[s] let's see how many more black people the prosecutor excuses." This remark did not go unnoticed by the trial judge, who admonished defense counsel for his unprofessionalism.

But a trial court cannot preclude the exercise of a peremptory challenge merely because the court suspects that a party has previously engaged in purposeful discrimination in the exercise of one or more peremptory challenges. Rather, each and every pe-

[66] *Snyder*, 552 US at 477; *Batson*, 476 US at 98 n 21.

remptory challenge must be weighed on its own merit.[67] In this case, defense counsel gave the court every reason to closely scrutinize his use of peremptory challenges after defense counsel gratuitously intimated on the record that he would continue to peremp-

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[67] This Court has previously addressed a similar issue, albeit in a civil context. In *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 334; 785 NW2d 45 (2010), the trial court expressed the "goal" that the jury composition would "represent[] the racial composition of [Wayne] county." The defendant attempted to peremptorily excuse a black woman, and the plaintiff raised a *Batson* objection. The trial court sustained the challenge, even though the defendant offered a valid race-neutral reason (she had recently been widowed and the facts of the case involved a widower). Despite the defendant's argument that the *Batson* issue was a red herring, the court commented that it would not "indulge in . . . race baiting . . . ." *Id*. at 335. This Court held that the trial court clearly erred by disallowing the peremptory challenge, explaining that denying a peremptory challenge in order to "attain a racially proportionate jury" violates the "rule of *Batson* that jurors must be indifferently chosen." *Id*. at 333 (quotation marks omitted). This Court further held that the trial court's actions violated the race-neutral requirements of both the state and federal Constitutions and MCR 2.511. The trial court's denial of the peremptory challenge expressly took the juror's race into account, leading this Court to state that it was "hard to conceive of a more flagrant and unambiguous violation of the court rule." *Id*. at 343. Further, the trial court's decision contravened caselaw from the United States Supreme Court, which holds that juries do not need to " 'mirror the community . . . .' " *Id*., quoting *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). Moreover, this Court observed that the Constitution requires an impartial jury, not a representative one. *Pellegrino*, 486 Mich at 344, citing *Holland v Illinois*, 493 US 474, 480; 110 S Ct 803; 107 L Ed 2d 905 (1990).

The facts in this case are distinguishable from the facts in *Pellegrino.* Simply put, the trial court's actions in this case cannot be likened to the defiant and egregious actions of the trial court in *Pellegrino*. There, the trial court not only knowingly violated *Batson* and Michigan caselaw by actually influencing the racial composition of the jury, but in doing so, the court apparently sought to subvert all the relevant law to promote its own version of the "right" jury for a particular trial. Here, by contrast, it is very evident that the trial court exercised a sincere and genuine effort to select the jury in conformity with the law established in *Batson*.

torily challenge white jurors as long as the prosecutor challenged black jurors. For this reason, we believe the trial court is aptly described by the following appraisal:

> [T]he trial judge's conduct reflected a good-faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of our *Batson*-related precedents. To hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff.[68]

But defense counsel's imprudent remark, standing alone, was not a sufficient reason for the court to find that defense counsel's third peremptory challenge of a white juror was racially motivated.

We are not persuaded that the prosecution's prima facie argument provided substantial, let alone strong or compelling, evidence that defendant had engaged in a pattern of striking members of a different racial group. The prosecution's argument, at most, revealed a *correlation* between defendant's challenges and racial discrimination. The record concerning Prospective Juror 5(a)'s peremptory challenge did not establish a purposeful discrimination on any improper basis, let alone race. Defense counsel's questioning of Juror 5(a) could have readily been the same as to any prospective juror, and it would have provided a legitimate excuse to exercise a statutorily provided peremptory challenge. Juror 5(a) stated that she had extensive ties to law enforcement, including "[m]y father, my brother, stepmother all deputy sheriffs, and military police in my family, nephew and brother." She agreed to assess the police officer's testimony without assigning it greater weight than other witnesses' testimony, but defense

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[68] *Rivera*, 556 US at 160.

counsel's wariness of her extensive ties to law enforcement (particularly in this case, which turns on the credibility of law enforcement officers' testimony) would reasonably lead defense counsel to exercise a preemptory challenge and excuse Juror 5(a) regardless of race. The prosecution points out that other prospective jurors had ties to law enforcement[69] and offers a few examples: one prospective juror had a brother who was a parole officer, another had a cousin who was a Wayne County Sheriff, and another had an uncle who was a police officer in Canton. While such comparisons may assist the trial court in determining whether a race-neutral reason in support of a peremptory challenge is a pretext for discrimination, the trial court here made no such finding with regard to Prospective Juror 5(a)'s ties to law enforcement.[70] Rather, the trial court merely concluded that it appeared this prospective juror could set aside these familial ties in assessing the credibility of police testimony. This is insufficient reason to deny the exercise of a peremptory challenge under *Batson*. *Batson* only requires the proponent of a peremptory challenge to articulate a race-neutral reason for exercising the challenge.[71]

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[69] See *Flowers*, 588 US at ___; 139 S Ct at 2243 (noting that a defendant may present other evidence showing that peremptory strikes were made on the basis of race, including "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case" and "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case").

[70] The record reflects these jurors' ties to law enforcement were not as extensive as the ties to law enforcement established by Prospective Juror 5(a). Strong familial ties to law enforcement alone may provide a valid reason for a peremptory challenge in response to a *Batson* claim.

[71] The record also reflects that defense counsel asked Prospective Juror 5(a) about issues relating to race. Defense counsel asked her if she would be concerned about sitting on an all-black jury, and she re-

We conclude that the trial court clearly erred by precluding defense counsel from peremptorily striking Prospective Juror 5(a). We do not arrive at this determination lightly. We acknowledge that the trial court is in the best position to consider not only the demeanor of the prospective juror, but also the "demeanor of the attorney who exercises the challenge."[72] But the record reflects that the trial court disregarded defendant's validly stated concerns relating to Juror 5(a)'s extensive ties to law enforcement. While Juror 5(a) did say she could be impartial, nothing from *Batson* or its progeny informs us that a trial court can use this expression of impartiality to overcome the race-neutral concerns expressed by defense counsel.

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sponded: "I hope that I'm a person that looks beyond that. I work for [a school district in which] there's a lot of different culture." Defense counsel interjected "I hope," suggesting that Prospective Juror 5(a) might have reservations about her ability to set aside matters relating to race. But she clarified and stated, "I enjoy meeting other cultures and working with people getting to know people. I hope I don't look at people's skin color. I don't believe I do. It's their actions." This exchange between Prospective Juror 5(a) and defense counsel, while not antagonistic, may have nonetheless left defense counsel with a concern that Prospective Juror 5(a) would be antagonistic to defendant's case, such that a peremptory challenge of her would be in order.

Instead of accepting defense counsel's concerns about Juror 5(a)'s potential antagonism, the trial court took a highly skeptical view of the challenge, stating, "I'm not hearing about somebody that's sleeping, somebody nervous, preoccupied, angry, disrespectful or agitated. I'm just hearing about feelings." Further, the court dismissed defendant's argument that Prospective Juror 5(a) had a prior conviction because the officer in charge testified that she had no record. But defense counsel's concern that a prospective juror would claim to have a criminal record only to discover during jury service that the juror had no criminal record is not unreasonable. Frankly, had the prosecution proffered this reason to peremptorily challenge a prospective juror, it likely would have gone unnoticed, as it would have called into question whether the juror appreciated the gravity of the matter yet to be decided.

[72] *Hernandez*, 500 US at 365.

In sum, the prosecution's prima facie case was weak. It did not offer evidence or an argument that showed a pattern of discrimination, and defendant offered valid race-neutral reasons that were supported by the record. The trial court disregarded those reasons because of one imprudent remark that, standing alone, was insufficient for the court to find a racial motivation. While the trial court's findings are entitled to great deference, we conclude that, in this instance, the court clearly erred by sustaining the prosecution's *Batson* challenge as to Prospective Juror 5(a).

D. REMEDY

A plurality of this Court, in *People v Bell*, "recogniz[ed] the distinction between a *Batson* error and a denial of a peremptory challenge."[73] Namely, "[a] *Batson* error occurs when a juror is actually dismissed on the basis of race or gender."[74] "In contrast, a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors."[75] The *Bell* plurality concluded that "[a]n improper denial of such a peremptory challenge is not of constitutional dimension."[76]

A few years later, the United States Supreme Court granted the petition for writ of certiorari in *Rivera v Illinois*[77] "to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge requires automatic reversal of a

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[73] *People v Bell*, 473 Mich 275, 293; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005).

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *Rivera v Illinois*, 556 US 148; 129 S Ct 1446; 173 L Ed 2d 320 (2009).

defendant's conviction as a matter of federal law."[78] The Supreme Court cited this Court's plurality opinion in *Bell* and identified it as one of those "rejecting [the] automatic reversal rule and looking to state law to determine the consequences of an erroneous denial of a peremptory challenge[.]"[79] Ultimately, the *Rivera* Court, in an opinion issued by a unanimous Court, agreed with the plurality in *Bell* and stated:

> Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a [jury] of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*.[80]

In reaching this holding, *Rivera* first iterated that "[t]his Court has 'long recognized' that 'peremptory challenges are not of federal constitutional dimension.' "[81] Indeed, "[s]tates may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.' "[82] But "[w]hen States provide peremptory challenges (as all do in some form), they confer a benefit 'beyond the minimum requirements of fair [jury] selection,' . . . and thus retain discretion to design and implement their own systems[.]"[83]

In this state, the statutory right to peremptory challenges is found in MCL 768.12, which provides, in

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[78] *Id*. at 156.

[79] *Id*., citing *Bell*, 473 Mich at 292-299.

[80] *Rivera*, 556 US at 161-162.

[81] *Id*. at 152, quoting *United States v Martinez-Salazar*, 528 US 304, 311; 120 S Ct 774; 145 L Ed 2d 792 (2000).

[82] *Rivera*, 556 US at 152, quoting *McCollum*, 505 US at 57.

[83] *Rivera*, 556 US at 157-158 (citations omitted).

pertinent part, that "[a] person who is put on trial for an offense that is not punishable by death or life imprisonment shall be allowed to challenge peremptorily 5 of the persons drawn to serve as jurors."[84] "The prosecuting officers on behalf of the people shall be allowed to challenge 5 jurors peremptorily if a defendant is being tried alone . . . ."[85] "On motion and a showing of good cause, the court may grant 1 or more of the parties an increased number of peremptory challenges. The number of additional peremptory challenges the court grants may cause the various parties to have unequal numbers of peremptory challenges."[86] This statutory provision is reflected in the court rules.[87] Since Juror 5(a) was not dismissed from the jury, the trial court's decision denying defendant's peremptory challenge of Juror 5(a), even though predicated on the trial court's improper resolution of the prosecution's *Batson* challenge, only amounted to a partial denial of defendant's statutory right to peremptory challenges. Defendant was not in this case entirely deprived of his right "to challenge peremptorily 5 of the persons drawn to serve as jurors." After his peremptory challenge on Juror 5(a) was rejected, defendant did exercise a fourth peremptory challenge on Juror 8(a).[88]

Significantly, state law also provides a standard for reviewing procedural errors in criminal cases. The Michigan Legislature, which granted defendant the

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[84] MCL 768.12(1).

[85] *Id*.

[86] MCL 768.12(2).

[87] See MCR 6.412(E)(1).

[88] This appears to be the prospective juror earlier described by defense counsel as "snoozing" and the same prospective juror the trial court believed to be of Middle Eastern descent.

right to peremptory challenges, has also stated that a criminal conviction ought not be set aside for a procedural error except where, "after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."[89] The statutory provision granting peremptory challenges must be read in context with the statutory directive on procedural error in a criminal case. It is apparent that, to the extent the statutory right to peremptory challenges is impaired, MCL 769.26 guarantees that a criminal conviction will only be set aside where the error results in a miscarriage of justice.[90] This Court has interpreted the statutory phrase "mis-

[89] MCL 769.26.

[90] The opinion for reversal suggests that our interpretation of MCL 769.26 ignores a portion of the statutory text, "which provides that an error on any matter of pleading or procedure shall not be a basis for reversal 'unless *in the opinion of the court*' the error has led to a miscarriage of justice." *Post* at 155. But as the opinion for reversal itself notes, a miscarriage of justice "means that the error more probably than not was outcome-determinative . . . ." *Post* at 155, citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). And as the opinion for reversal further observes, defendant here cannot show that the error was outcome-determinative because there is no record evidence that Juror 5(a) was biased.

The opinion for reversal also criticizes our analysis of this case because it results in "automatic affirmance." *Post* at 142. We believe the error in this case is more properly characterized as error that was not outcome-determinative. In the heat of a contentious trial presented by zealous advocates before an impartial jurist, there are bound to be occasional errors in procedure or substance. Some of these errors materially affect the proceedings, but most do not. Our criminal justice system guarantees an accused the right to a fair trial, not a perfect one. Accordingly, convictions should be reversed only when trial error results in material harm to the criminal proceedings. This is the policy of the state of Michigan—a policy enacted into law, MCL 769.26. We disagree with the opinion for reversal, which posits that any *Batson* error categorically requires reversal. Instead we find guidance from the United States Supreme Court opinion in *Rivera*, which holds that "a

carriage of justice" to require reversal of a criminal conviction only where, " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."[91] Thus, the Michigan Legislature has, as recognized in *Rivera*, "designed" a system to review the erroneous denial of the statutory right to remove a

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one-time, good-faith misapplication of *Batson*" does not violate due process, *Rivera*, 556 US at 160, let alone amount to a "miscarriage of justice."

The opinion for reversal takes issue with our treatment of *Rivera*'s rejection of the assertion that "[t]he improper seating of a juror . . . is not amenable to harmless-error analysis," *id*. at 157, given that "[t]he *Rivera* Court did not offer any explanation for *how* such errors could be reviewed for harmfulness," *post* at 153. The opinion for reversal also claims our opinion "distracts from the ramifications of its remedy holding—a rule of automatic affirmance—with the irrelevant statement (with which none of us would disagree) that a defendant is entitled to a fair trial, not a perfect one." *Post* at 154 n 4. These criticisms lose all force given the *Rivera* Court's conclusion that "Rivera received precisely what due process required: a fair trial before an impartial and properly instructed jury, which found him guilty of every element of the charged offense." *Rivera*, 556 US at 162. Thus, regardless whether *Rivera* did not articulate "*how* such errors could be reviewed for harmfulness," *post* at 153, the Court was clearly satisfied that Rivera received, in its understanding, a "fair trial." The opinion for reversal makes no attempt to distinguish how its understanding of a "fair trial" differs from ours or that of the *Rivera* Court. Further, the opinion for reversal's criticisms are misplaced given that it highlights that *Rivera* did not provide any "merits argument" yet fails in every respect to take up the mantle and itself provide a "merits argument" to support its position that defendant received an unfair trial.

[91] *Lukity*, 460 Mich at 495-496, quoting MCL 769.26. Note that Michigan's standard in this regard appears less onerous than the Illinois standard upheld in *Rivera*, which required a court to consider whether it was "clear beyond a reasonable doubt that a rational jury would have found [the defendant] guilty absent the error." *Rivera*, 556 US at 155 (quotation marks and citations omitted).

particular juror peremptorily, and this Court is obliged to "implement" that design.[92]

Nonetheless, defendant argues that the denial of a peremptory challenge under these circumstances may be a structural error under Michigan law, even though peremptory challenges are not of federal constitutional dimension. As *Rivera* suggested, structural errors are constitutional errors that require automatic reversal.[93] Structural errors are those "structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[94] The United States Supreme Court has found structural errors in "a very limited class of cases[.]"[95] "Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair."[96]

The United States Supreme Court has not found structural error from error that is not of constitutional dimension; indeed, the category of errors that require automatic reversal, i.e., "structural errors," has only been applied to certain constitutional errors in a "lim-

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[92] *Rivera*, 556 US at 158.

[93] *Id*. at 161.

[94] *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

[95] *Johnson v United States*, 520 US 461, 468; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[96] *Neder v United States*, 527 US 1, 8-9; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (quotation marks and citations omitted).

ited class" of cases.[97] Because it is a statutory right, the denial of the right to peremptory challenge has yet to fall under the "limited class of constitutional errors [that] are structural and subject to automatic reversal."[98] This Court has been similarly reluctant to find structural error when there is no federal constitutional violation. Indeed, this Court has only once before—arguably, under Michigan law alone—found a "structural error requiring automatic reversal" that was not squarely within this limited class of constitutional errors.[99] In *People v Duncan*, this Court held that automatic reversal is required when a jury is allowed "to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution

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[97] *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000), citing *Neder*, 527 US at 8. As the *Duncan* Court noted, the Court in *Neder* identified "several examples of structural error":

> "Indeed, we have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' " *Johnson v United States*, 520 US 461, 468; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (complete denial of counsel); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927) (biased trial judge); *Vasquez v Hillery*, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986) (racial discrimination in selection of grand jury [i.e., systematic exclusion of black jurors]); *McKaskle v Wiggins*, 465 US 168; 104 S Ct 944; 79 L Ed 2d 122 (1984) (denial of self-representation at trial); *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (denial of public trial); *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993) (defective reasonable-doubt instruction). [*Duncan*, 462 Mich at 52, quoting *Neder*, 527 US at 8.]

[98] *Duncan*, 462 Mich at 51.

[99] *Id*. (explaining that *constitutional* errors may be structural in nature).

has proven the charge beyond a reasonable doubt."[100] While *Duncan* cites an abundance of federal caselaw, the crux of *Duncan*'s analysis turns only on cited Michigan caselaw to extend a remedy of this magnitude, regardless of preservation, despite no definitive ruling from the United States Supreme Court on the issue.[101]

Under *Rivera*, an erroneous denial of a peremptory challenge is not of federal constitutional dimension; therefore, there can be no structural error arising out of a violation of the US Constitution. However, that does not end the inquiry. *Rivera* provided that state courts may determine as a matter of state law whether to review the wrongful denial of peremptory challenge for harmless error or, alternatively, to remedy such errors by automatic reversal.[102] Therefore, even though there may not be a federal constitutional violation, we must determine whether there is an independent state ground for concluding that there is a structural error that mandates automatic reversal.

In ascertaining whether there are independent state grounds for finding structural error under the Michigan Constitution, our responsibility is to give meaning to the specific provision at issue, Const 1963, art 1,

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[100] *Id*. at 52-53, citing *People v Lambert*, 395 Mich 296, 304; 235 NW2d 338 (1975), and noting *People v Newland*, 459 Mich 985 (1999). See also 2A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 24:16, p 148 (citing only *Duncan* as an example of the Michigan Supreme Court's finding "structural error not subject to review for prejudice").

[101] See *Duncan*, 462 Mich at 51-56. See also 7 LaFave et al, Criminal Procedure (4th ed), § 27.6(d), p 158 ("With a few exceptions, lower courts also have not hesitated to find harmless incomplete jury instructions omitting other elements, at least when proof of the element was introduced and uncontested at trial.") (citations omitted).

[102] *Rivera*, 556 US at 158.

§ 20.[103] We are not obligated to follow the Supreme Court's interpretation of the United States Constitution.[104] Several factors are relevant to determine whether the Michigan Constitution supports an interpretation different from that of the federal Constitution, including the language of the provision at issue, the history of the constitutional provision, and our common-law history.[105]

Beginning with the text of the Michigan Constitution itself, it guarantees that "the accused shall have the right to a speedy and public trial by an impartial jury by an impartial trial . . . ." Const 1963, art 1, § 20. This language is not materially different from that provided in the United States Constitution.[106] Because the pertinent language of the Michigan Constitution is materially similar to that of the Sixth Amendment, the plain language of our Michigan Constitution manifests an intent to provide the same guarantees as those in the United States Constitution. Michigan law, like

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[103] *People v Tanner*, 496 Mich 199, 233 n 16; 853 NW2d 653 (2014).

[104] *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993).

[105] These factors are:

> 1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest. [*People v Tanner*, 496 Mich 199, 233 n 17; 853 NW2d 653 (2014), quoting *People v Collins*, 438 Mich 8, 31 n 39; 475 NW2d 684 (1991).]

[106] The operative language of Const 1963, art 1, § 20, which provides that "[i]n every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury," is materially similar to that of US Const, Am VI, which states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

federal law, has steadfastly recognized that a peremptory challenge is a right given by statute, not by the Constitution. As the United States Supreme Court has repeatedly noted, peremptory challenges are not guaranteed by the Constitution and may be withheld entirely without violating the Constitution.[107] The language of the Michigan Constitution provides no textual reason why the Court should interpret Const 1963, art 1, § 20 in any way other than as consistent with the Sixth Amendment, which, as previously noted, is not implicated when a defendant's peremptory challenge is erroneously denied.[108]

Similarly, review of our common-law history does not suggest otherwise.[109] Most recently, in *People v*

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[107] See *Martinez-Salazar*, 528 US at 311; *Rivera*, 556 US at 152.

[108] Michigan's constitutional history supports this conclusion as well. The operative language from Const 1963, art 1, § 20 is nearly identical to the applicable provisions in prior Michigan Constitutions. See Const 1835, art 1, § 10 ("In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the vicinage . . . ."); Const 1850, art 1, § 28 ("In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury . . . ."); Const 1908, art 1, § 19 ("In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury . . . .").

[109] This Court's order granting leave cited a plurality opinion in *Hardison v State*, 94 So 3d 1092, 1101 & n 37 (Miss, 2012), which identified "[a]t least five states" that have adopted an automatic-reversal rule as a matter of state law and followed those states. Two of these cases, however, were decided pre-*Rivera* and are therefore of limited value. See *Angus v State*, 695 NW2d 109 (Minn, 2005), and *State v Vreen*, 26 P3d 236 (Wash, 2001), both abrogated by *Rivera*, 556 US 148.

The New York Court of Appeals in *People v Hecker*, 15 NY3d 625, 661; 942 NE2d 248 (2010), "look[ed] to our precedents and [held] that [a *Batson* error] under New York law mandates automatic reversal." The court recognized that although they are "not a trial tool of constitutional magnitude, peremptory challenges are a mainstay in a litigant's strategic arsenal . . . ." *Id*. at 662 (quotation marks and citation omitted). As

amicus PAAM pointed out, the dissent in *Hecker* contended that "[t]he majority offers no reasoned justification for this holding [of automatic reversal], merely relying on pre-*Rivera* precedents," and that the rule of automatic reversal is unwise, as it "load[s] the dice against the People" because a "defendant, who need not fear an appeal by the People, can and generally will vigorously contest any prosecution use of a peremptory challenge that might raise *Batson* problems," while "the People will be reluctant to do the same thing, lest they lead the trial judge into an error that would upset a conviction." *Id*. at 667-668 (Smith, J., dissenting). As the *Hecker* dissent observed, the *Rivera* Court itself had expressed this concern, stating that automatic reversal would " 'likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges.' " *Id*. at 668, quoting *Rivera*, 556 US at 160.

The Supreme Court of Iowa in *State v Mootz*, 808 NW2d 207 (Iowa, 2012), held that automatic reversal was required because a defendant tried by an impartial jury cannot show prejudice from the loss of a peremptory challenge. The court then stated that "[a]ny other conclusion would leave the defendant without a remedy. We do not think this is the result intended when [Iowa Rule of Criminal Procedure] 2.18(9) was drafted." *Id*. at 225-226. So, the court interpreted Rule 2.18(9)—which guarantees a defendant four peremptory strikes of prospective jurors, *id*. at 220—to require "automatic reversal of a defendant's conviction when the trial court's erroneous ruling on a reverse-*Batson* challenge leads to the denial of one of the defendant's peremptory challenges." *Id*. at 226.

Finally, the Massachusetts Supreme Court in *Commonwealth v Hampton*, 457 Mass 152; 928 NE2d 917 (2010), "continued to adhere" to its pre-*Rivera* precedent that "the erroneous denial of a peremptory challenge requires automatic reversal, without a showing of prejudice." *Id*. at 164. This precedent established that "the right to be tried by an impartial jury is so basic to a fair trial that an infraction can never be treated as harmless error. Thus, . . . the erroneous denial of the right to exercise a proper peremptory challenge is reversible error without a showing of prejudice." *Commonwealth v Wood*, 389 Mass 552, 564; 451 NE2d 714 (1983), citing *Commonwealth v Soares*, 377 Mass 461, 492 (1979).

In an additional case of note, the Delaware Supreme Court in *McCoy v State*, 112 A3d 239 (Del, 2015), recognized that peremptory challenges are "one of the most important of the rights" for an accused." *Id*. at 255 (quotation marks and citation omitted). Noting that *Rivera* held that a denial of a peremptory challenge does not violate the Constitution, the

Miller, this Court addressed whether a defendant was entitled to a new trial when a convicted felon sat on the

McCoy court relied on a provision in the Delaware Constitution that had been interpreted to include the right to exercise peremptory challenges. *Id*. at 255-256. Accordingly, the court held that the erroneous denial of a peremptory challenge requires automatic reversal. *Id*. at 255.

On the other hand, many states have concluded that review for harmless error, not automatic reversal, applies as the remedy for a loss of a peremptory challenge, with some states even going so far as to overrule their precedent after the *Rivera* decision.

For instance, in *State v Carr*, 300 Kan 1; 331 P3d 544 (2014), rev'd on other grounds 577 US 108 (2016), a Kansas trial court erroneously sustained the prosecution's *Batson* challenge to a defendant's peremptory strike. *Id*. at 130. On appeal in the Kansas Supreme Court, the defendant argued that the error was structural, while the state contended that harmless-error review applied. *Id*. The court discussed *Rivera* and noted that the first issue to be decided was whether the judge acted in good faith. *Id*. at 130-131. Citing our decision in *Pellegrino*, the court concluded that the judge did not deliberately misapply *Batson* (as was true in *Pellegrino*); rather, the trial court's *Batson* examination was incomplete. *Id*. at 132-133. The court then outlined the differing caselaw addressing the remedy for a good-faith mistake for an erroneous denial of a peremptory challenge, primarily discussing the Iowa decision in *Mootz*. *Id*. at 134-136. The court then analyzed the split among the states on this question and observed that since *Rivera*, the trend among the federal circuits has been to apply harmless-error review instead of automatic reversal. *Id*. at 136-138, citing *United States v Gonzalez-Melendez*, 594 F3d 28 (CA 1, 2010); *Jimenez v Chicago*, 732 F3d 710 (CA 7, 2013); *Avichail ex rel TA v St John's Mercy Health Sys*, 686 F3d 548 (CA 8, 2012). See also *United States v Lindsey*, 634 F3d 541 (CA 9, 2011); *United States v Williams*, 731 F3d 1222 (CA 11, 2013). The court had not previously addressed the question but noted that a prior Kansas Court of Appeals case had suggested that the denial of a valid peremptory challenge is prejudicial. *Carr*, 300 Kan at 138. However, other Kansas Supreme Court decisions noted that peremptory challenges were viewed as "little more than a procedural device to ensure compliance with a defendant's constitutional right to trial by a fair and impartial jury[.]" *Id*. The Kansas Supreme Court concluded that harmless-error analysis applied and that such errors are not structural, because "[t]he mistake was made in good faith, and our Kansas precedent, although sparse, favors the view that a peremptory challenge is simply a procedural vehicle for vindication of a defendant's right to an impartial jury." *Id*. at 139.

jury.[110] To qualify as a juror under Michigan law, "a person shall" "[n]ot have been convicted of a felony."[111] Defendant had the right to challenge a prospective juror who "is not qualified to be a juror" for cause.[112] The Court held that the "the presence of a convicted felon on defendant's jury did not constitute structural error."[113] There was no constitutional error because "there is no constitutional right to have a jury free of convicted felons."[114] Further, " 'not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury[.]' "[115] "The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had[.]"[116] Significantly, there was no evidence that

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A number of other states have relied on a similar rationale as that in *Carr*, i.e., that the error is not of federal constitutional dimension and there is no independent state law supporting a finding of structural error. See *People v Singh*, 234 Cal App 4th 1319; 184 Cal Rptr 3d 790 (2015); *People v Novotny*, 320 P3d 1194; 2014 CO 18 (Colo, 2014); *Robinson v State*, 255 P3d 425; 2011 OK CR 15 (Okla Crim App, 2011); *State v Lindell*, 245 Wis 2d 689; 629 NW2d 223 (2001); *In re LDB*, 454 P3d 908; 2019 WY 127 (2019); *State v Hickman*, 205 Ariz 192; 68 P3d 418 (2003); *People v Rivera*, 227 Ill 2d 1; 879 NE2d 876 (2007).

[110] *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008).

[111] MCL 600.1307a(1)(e).

[112] MCR 2.511(D)(1).

[113] *Miller*, 482 Mich at 556.

[114] *Id*.

[115] *Id*. at 551, quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960) (quotation marks and citation omitted). While *Miller* focused on the misconduct of a juror that allowed the juror to be improperly seated, the rule from *Miller* applies in the context of reviewing a verdict rendered by a jury that included an improperly seated juror.

[116] *Miller*, 482 Mich at 551, quoting *Nick*, 360 Mich at 230.

the juror was actually partial or biased.[117] Thus, even though the defendant was improperly denied a challenge for cause, a new trial was not required.[118] "[T]he proper inquiry is whether the defendant was denied his right to an impartial jury. If he was not, there is no need for a new trial."[119]

In *People v DeHaven*,[120] the Court addressed whether a defendant who was charged with rape was entitled to a new trial when two jurors failed to disclose that a family member had also been convicted of rape. The Court reasoned that the "[t]he right to be tried by an impartial jury is a constitutional guaranty."[121] Such a jury must "consist[] of twelve impartial [people]."[122] The examination of those jurors during voir dire is "to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law."[123] The challenged jurors said that they could fairly and impartially try the case, but they did not disclose their familial connection.[124] This Court held "that the relationship of these two jurors to one who had committed a similar crime was such that it deprived them of the capacity to act impartially. Defendant has the right to a trial by an impartial jury. We cannot say that he had such a trial."[125] As recognized in *Miller*, "the crux of *DeHaven*'s holding was that a

[117] *Miller*, 482 Mich at 552.

[118] *Id*. at 561.

[119] *Id*.

[120] *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948).

[121] *Id*. at 334.

[122] *Id*. (quotation marks and citations omitted).

[123] *Id*. at 332 (quotation marks and citation omitted).

[124] *Id*. at 334.

[125] *Id*.

defendant has a constitutional right to an impartial jury and, because the jurors at issue in *DeHaven* lacked the capacity to act impartially, the defendant was entitled to a new trial."[126]

Those cases demonstrate that the Court has long held that a criminal defendant has only the right to an impartial jury. Denials of peremptory challenges or even denials of challenges for cause do not necessarily violate that right. If a challenge is denied, only a showing of prejudice demonstrates that the Michigan Constitution has been violated.[127] The denial of the right to challenge jurors peremptorily does not, by itself, deprive a criminal defendant of the right to an impartial jury.[128] Further, MCL 768.12(2) recognizes that the number of peremptory challenges may not be equal between the two parties, as a judge may give one party more than the other. All of this provides solid support for the conclusion that peremptory challenges in Michigan have long been considered part of the means to the end of an impartial jury, rather than part of that end itself.

Our conclusion promotes consistency within our caselaw. First, it holds that the same remedy applies to erroneous denials of peremptory challenges and challenges for cause. Under *Miller*, challenges for cause are

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[126] *Miller*, 482 Mich at 560, citing *DeHaven*, 321 Mich at 334. Other cases hold similarly in both the criminal and civil context. See *People v Mullane*, 256 Mich 54; 239 NW 282 (1931) (holding that a defendant's right to an impartial jury was not violated when his counsel exercised all peremptory challenges to which he was entitled); *O'Neil*, 67 Mich at 561 (holding that the right to a "fair, impartial, and qualified jury" was unimpaired when a party exhausted his peremptory challenges).

[127] See *Miller*, 482 Mich at 561; *Pearce v Quincy Mining Co*, 149 Mich 112, 116-117; 112 NW 739 (1907).

[128] See *People v Mullane*, 256 Mich 54, 56-57; 239 NW 282 (1931).

subject to harmless-error review.[129] Under Michigan law, only a denial of a challenge for cause that results in an impartial jury requires reversal. If the Court holds here that denials of peremptory challenges are subject to automatic reversal, this would create a significant and illogical discrepancy in Michigan law. Specifically, it would create a situation in which the denial of peremptory challenges would require automatic reversal, but challenges for cause would be subject to harmless-error review, where reversal is only required if a biased jury actually sits. This situation would be untenable, given that challenges for cause are typically granted greater protection.[130] Our conclusion also maintains consistency with the Court's recent caselaw discussing preserved constitutional error. A decision holding that peremptory challenges are subject to automatic reversal would create a peculiar scenario in which automatic reversal applies to a denial of a statutory right, while other nonconstitutional errors are still subject only to harmless-error review. In sum, we find no historical or textual reason to interpret the right to an impartial jury under the Michigan Constitution in the context of erroneous denials of peremptory challenges in a way different than that of the federal Constitution.

As presented in the opinion for reversal, the argument commonly made in support of the position that an improper denial of a peremptory challenge following a successful *Batson* challenge should be deemed a

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[129] *Miller*, 482 Mich at 556, 561.

[130] See *Martinez-Salazar*, 528 US at 316. In addition, amicus PAAM persuasively argues that, if automatic reversal applies in this situation, "even the legislature could not alter the number of peremptory challenges, or abolish them, which is to give [peremptory challenges] constitutional status though the law is clear that they are a statutory creation."

structural error is that the error is simply too hard to measure; or, as more aptly argued by the defendant in *Rivera*: "The improper seating of a juror . . . is not amenable to harmless-error analysis because it is impossible to ascertain how a properly constituted jury—here, one without [the improperly seated juror] —would have decided his case."[131] Justice MARILYN KELLY elaborated on this argument in her dissenting opinion in *Bell*:

> Although no constitutional guarantee exists with regard to them, *Batson* errors resulting in a denial of the use of peremptory challenges must be structural. They attack the fundamental framework of the trial proceeding. They change the very makeup of the jury. And they do not occur during the presentation of evidence. Given that they do not involve evidence, they cannot be quantitatively assessed in the context of other evidence. This fact is a further indicator that they are not in the nature of trial errors.[132]

Ubi jus, ibi remedium, "the principle that where one's right is invaded or destroyed, the law gives a remedy to protect it or damages for its loss,"[133] "is indeed a deep-seated principle of Anglo-American law . . . ."[134] But then again, "[t]he Due Process Clause does not require states to provide effective remedies for every state-created right."[135] Indeed, *Rivera* high-

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[131] *Rivera*, 556 US at 157.

[132] *Bell*, 473 Mich at 311-312 (KELLY, J., dissenting).

[133] *Oxford Dictionary of Law* (8th ed).

[134] The Supreme Court 2008 Term, *Leading Cases—Constitutional Law, Due Process*, 123 Harv L Rev 212, 219 (2009).

[135] *Id*. at 218-219; see also *id*. at 219 n 63, citing *Webster v Doe*, 486 US 592, 613; 108 S Ct 2047; 100 L Ed 2d 632 (1988) (Scalia, J., dissenting) (arguing that "it is simply untenable [to suggest] that there must be a judicial remedy for every constitutional violation" in light of the

lighted that "[t]he Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.' "[136] " '[A] principal reason for peremptories' . . . is *'to help secure* the constitutional guarantee of trial by an impartial jury.' "[137] And when presented with a variant of Justice KELLY's argument that *Batson* errors "attack the fundamental framework of the trial proceeding" and "change the very makeup of the jury,"[138] the *Rivera* Court dispatched it, stating that it did not "withstand scrutiny."[139] Further, while the *Rivera* Court readily acknowledged that an error involving peremptory challenges " 'may . . . result[] in a jury panel different from that which would otherwise have decided [the] case,' " it was not at all persuaded this fact alone transformed an aspirational and prophylactic procedural rule into a violation of the Sixth Amendment right to an impartial jury or the Fourteenth Amendment right to due process, let alone structural error.[140] Accordingly, just as *Rivera* dispatched with the argument that a *Batson* error "is not amenable to harmless-error analysis because it is impossible to ascertain how a properly constituted jury—here, one without [the improperly seated juror]

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sovereign-immunity, political-question, and equitable-discretion doctrines), and Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731, 1786 (1991) (describing rights without "individually effective remedies" as a "fact of our legal tradition").

[136] *Rivera*, 556 US at 158, quoting *Spencer v Texas*, 385 US 554, 563-564; 87 S Ct 648; 17 L Ed 2d 606 (1967).

[137] *Rivera*, 556 US at 159, quoting *Martinez-Salazar*, 528 US at 316 (emphasis added).

[138] *Bell*, 473 Mich at 312 (KELLY, J., dissenting).

[139] *Rivera*, 556 US at 157.

[140] *Id*. at 158 (citations omitted).

—would have decided his case," we too reject this same unpersuasive argument that is set forth in the opinion for reversal in this case.

We do not take lightly that, for all intents and purposes, harmless-error review will almost always result in automatic affirmance.[141] This, however, does not mean *Batson* and its progeny are rendered ineffective. Courts must strike a balance between defendant's right to fully participate in the jury-selection process and the trial court's duty to police that process to insure against invidious discrimination. As the United States Supreme Court observed: "To hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff."[142]

The above quotation from *Rivera* represents the only guiding statement of law offered by the Supreme Court of the United States to assist state courts in determining "whether [*Batson*] errors deprive a tribunal of its lawful authority and thus require automatic reversal." Yet, the opinion for reversal in this case does not heed this guidance; in fact, it would hold the opposite and conclude that the trial court's "one-time, good-faith misapplication of *Batson* violates due process."

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[141] Exceptions may be rare but not impossible. For instance, in this case, had the trial court sua sponte rejected defense counsel's last peremptory challenge based on *Batson* as to Juror 8(a), who the court had mentioned was a person of Middle Eastern descent who was snoozing during voir dire, reversal may have been required because the trial court had no legal basis at all to justify an arbitrary decision, perhaps even under an unpreserved-plain-error standard.

[142] *Id*. at 160.

The opinion for reversal offers no reasoned justification to support a rule of automatic reversal for *Batson* errors. And we find such a rule would be unwise, as it "load[s] the dice against the People" because a "defendant, who need not fear an appeal by the People, can and generally will vigorously contest any prosecution use of a peremptory challenge that might raise *Batson* problems," while "the People will be reluctant to do the same thing, lest they lead the trial judge into an error that would upset a conviction."[143] In our view, a rule of automatic reversal for *Batson* error may incentivize tactics that undermine the aspirations of *Batson* itself and would also "undermine public confidence in the fairness of our system of justice."[144]

E. APPLICATION OF HARMLESS-ERROR REVIEW

We conclude that the outcome of this case would not have been any different had defendant been allowed the peremptory challenge on Prospective Juror 5(a). Prospective Juror 5(a) acknowledged during the voir dire, "My father, my brother, stepmother all deputy sheriffs, and military police in my family, nephew and brother. My grandfather was an attorney who passed away but I think that's it." The trial court then responded, "All right. Juror number five, you heard what I said to juror number four which is that the law states that a police officer's testimony is to be weighed the same way you weigh the testimony of any other witness[;] they don't come in with an advantage [and] they don't come in with a disadvantage. Given the extensive law enforcement connections in your

[143] *Hecker*, 15 NY3d at 667-668 (Smith, J., dissenting).

[144] *Batson*, 476 US at 87.

family will you be able to [do] that in this case?" Prospective Juror 5(a) replied, "Yes."

During voir dire, when defense counsel was afforded the opportunity to question the prospective jurors, he asked Prospective Juror 5(a) to assume he was representing her in a criminal trial, stating: "And so we're sitting at the table, and I'm doing this kind of thing sitting at the table, and I turn to you and I say this is—I'm taking this jury. I'm accepting this jury. And you look up and you see 12, 14, whatever, you see 12 or 14 people and they're all African-American the People who are going to sit in judgment of you. Would you be concerned?" She replied, "I hope that I'm a person that looks beyond that. I work for the Dearborn School District and there's a lot of different culture. . . . I enjoy meeting other cultures and working with people getting to know people. I hope I don't look at people's skin color. I don't believe I do. It's their actions." Later, when defense counsel questioned Prospective Juror 5(a) in regard to openly carried firearms, she asked defense counsel for clarification, stating, "Just to be clear you're only asking if we have an opinion about open carry? If that's the case then that's okay. If it's open carry it's not a drawn weapon. That's a right. But being a police officer's daughter it's not going to concern me unless the gun is raised. There's two different things here. I'm trying to follow what you're asking. And you're only asking the opinion of whether or not if the gun is in use; is that correct?" Defense counsel responded, "I may be clearer so if I'm understanding what you're saying. When a person does an open carry, as the daughter of a police officer, do you have an opinion about that person doing an open carry?" She answered, "It's the law. They're allowed to have it. And I see they have it and it's not in use or being misused there's no problem." As is clear, the record reflects that

Juror(5)(a) expressed that she would have no difficultly in following the law, even as explained by defense counsel.

Further, there is no indication on the record that Juror (5)(a) was biased such that defendant was denied his right to an impartial jury. Juror 5(a)'s statement that she could be impartial supports not only a conclusion that Juror (5)(a) was actually impartial but also that she was not actually biased. Other statements from voir dire make this clear. When asked if she would be concerned about being tried by an all-black jury, Juror (5)(a) also clarified that she "hope[d]" that she was a person that "looks beyond [race]" and noted that she worked for the Dearborn School District where she encountered a lot of different people and cultures. She clarified that she "[didn't] believe" she looked at people's skin color; rather, "[i]t's their actions." That testimony does not show that it was more probable than not that Juror 5(a) was biased. She used the word "hope" in response to a hypothetical question about being tried by an all-black jury. Just as defense counsel asked Juror 5(a) about a hypothetical scenario, Juror 5(a) used language, i.e., "hope," that reflected the hypothetical nature of her answer. But she then clarified that, after thinking for another second, that she did not believe that such a situation would concern her. That testimony does not demonstrate a miscarriage of justice or demonstrate that it is more probable than not that the trial court's erroneous denial of a peremptory challenge on Juror 5(a) prejudiced defendant. For those reasons, defendant has not demonstrated that Juror (5)(a) was biased against him.

III. CONCLUSION

With respect to defendant's *Batson* challenge, we conclude that the trial court did not clearly err by finding that the prosecution's race-neutral explanation was not a pretext to improper purposeful discrimination. We further conclude that the trial court erroneously denied defendant's peremptory challenge to Prospective Juror 5(a) based on the court's clear error in granting the prosecution's *Batson* challenge. However, because there is no evidence that Juror 5(a) was actually biased against defendant, we conclude that defendant is not entitled to relief.

VIVIANO and CLEMENT, JJ., concurred with ZAHRA, J.

MCCORMACK, C.J. (*for reversal*). I concur with the lead opinion that the trial court clearly erred by denying defense counsel's request to exercise a peremptory challenge to remove Prospective Juror 5 (Juror 5). But I disagree with the rest of the lead opinion's conclusions. I would hold that the trial court violated *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), by accepting the prosecution's race-neutral reasons for excusing Prospective Juror 2 (Juror 2). Because a *Batson* violation requires automatic reversal, *People v Bell*, 473 Mich 275, 293; 702 NW2d 128 (2005), I would reverse the Court of Appeals and remand for a new trial on that basis. Had my view prevailed, it would have been unnecessary to reach the appropriate remedy for the erroneous failure to dismiss Juror 5. But because it has not, I must disagree with the lead opinion's conclusion that the error of refusing to remove Juror 5 is subject to harmless-error

review. As many courts have concluded and the majority all but concedes, such a rule effectively would lead to automatic affirmance.

I. JUROR 2

A *Batson* claim that a prosecutor is using a peremptory challenge based on race is subject to the following three-part inquiry: "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v Louisiana*, 552 US 472, 476-477; 128 S Ct 1203; 170 L Ed 2d 175 (2008) (cleaned up).

I agree with the lead opinion that the trial court correctly concluded that the prosecutor offered a race-neutral reason for removing Juror 2. But unlike the lead opinion, I conclude that the trial court clearly erred in applying Step Three of *Batson*. When the defendant raised his *Batson* challenge, the prosecutor gave the following explanation for her decision to use a peremptory challenge to remove Juror 2:

> With regards to juror number two she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that. She had to ask a few times. Also, she indicated she's having a senior moment here and there. She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn't remember any sort [of] specifics. Same with whether herself or her family

> were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can't remember, I can't remember, I don't remember how long ago, I don't remember anything. So she had a problem with memory and it's the People[']s concern for her that if we're going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she would forget testimony seemed fairly probable and the People were concerned about that.

The trial court accepted the prosecutor's reason:

> I'm going to find in this case that the prosecutor as to juror number two has offered a race neutral explanation for the peremptory challenge and further has articulated a neutral explanation for the dismissal. Juror number two did indeed have a difficult time with memory she did discuss senior moments. She had to kind of had to step back and reach back in her memory to recall things such as whether or not she had been the victim of a crime, such as—there were some other specific ones. But I do remember she did seem to have a problem keeping up with this case.
>
> And Batson's second step does not required [sic] articulation of [a] persuasive reason or even a plausible one[;] so long as the reason is not inherently discriminatory it suffices. And that's the case of Rice versus Collings, 546 U.S. 333 which is a (2006) case.
>
> So here the prosecutor has provided a race neutral explanation for her peremptory challenges to number two so I'm going to then deny the Batson challenge as to juror number two.
>
> And I'll even go to the third step which requires that the trial Court make a final determination of whether the challenger of the strike, which would be the defense, has established purposeful discrimination. And whether there is purposeful discrimination is the persuasiveness of the prosecutor's justification for the peremptory strike. It comes down to whether the trial Court finds the prosecutor's race neutral explanations to be creditable [sic]. And

> in this case I will find that it was reasonable, her explanation is not improbable, there was a rationale that had some basis in accepted trial strategy. And so I'm going to deny the Batson challenge as to juror number two.

First, the trial court clearly erred in applying *Batson* because it concluded that once the prosecutor offered a race-neutral reason for dismissing Juror 2, the defendant's *Batson* challenge could be denied. The court stated, "I'll even go to the third step" and determine whether the defendant has established purposeful discrimination, as if it didn't have to. This procedural misstep reveals that the trial court misunderstood the *Batson* inquiry and applied it incorrectly.

Second, to substance: the trial court clearly erred by concluding that the prosecutor's race-neutral explanation for dismissing Juror 2 was not pretext for purposeful discrimination. The lead opinion emphasizes that our review of the trial court's ruling on *Batson* Step Three is entitled to great deference and reviewed only for clear error. True enough. In a typical case, where "[t]here will seldom be much evidence bearing on that issue, . . . the best evidence often will be the demeanor of the attorney who exercises the challenge," so "[d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context . . . ." *Hernandez v New York*, 500 US 352, 365; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

Not so here. Unlike the prosecutor's reasons for excusing Prospective Jurors 3 and 14, the prosecutor's reason for dismissing Juror 2 is not grounded in demeanor evidence or based in personal observations uncaptured by a cold record.[1] No, the question of Juror

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[1] The lead opinion asserts otherwise, citing the trial court's statements that Juror 2 had to "reach back into her memory to recall things" and "did seem to have a problem keeping up with this case." Neither of

2's alleged "difficult time with memory" is one related to the substance of the juror's answers, and therefore one we easily can review.

The record doesn't support the trial court's conclusion that the prosecution's race-neutral reason for excusing Juror 2 was credible. The court accepted the prosecutor's exaggeration about Juror 2's memory; the prosecutor claimed that the juror mentioned "a senior moment here and there." But that was not correct. When asked about whether the jurors, their families, or their close friends had been the victim of a crime, Juror 2 answered that her family had been, but "I can't remember the years and stuff. Senior moment. I'm 64 so . . . ." Thus, Juror 2 mentioned one "[s]enior moment" related to recalling the specific year of an event in her past. The court, however, accepted the prosecutor's misstatement: "Juror number two did indeed have a difficult time with memory she did discuss senior *moments*." (Emphasis added.)

The prosecutor also erroneously stated that Juror 2 couldn't remember the court's question when asked what her occupation was "and she couldn't remember any of the additional questions after that." To the contrary, Juror 2 quickly answered the prosecutor's remaining questions without prompting and without the prosecutor reminding her what those questions were. This is that exchange between the prosecutor and Juror 2 on those points:

Potential Juror Two: Good morning.

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these observations suggests it is grounded in anything the trial court purportedly observed rather than Juror 2's answers to questions. A clear contrast is the trial court's ruling on Juror 3, whom it dismissed after agreeing with the prosecutor that she sat with her arms crossed and rolled her eyes. *That* is a quintessential demeanor/credibility finding on which we should be most deferential to the trial court.

The Court: I'm going to ask you your occupation, your marital status, and if you are married what your spouse does and your highest level of education?

Potential Juror Two: I'm retired.

The Court: And what are you retired from?

Potential Juror Two: Counseling.

The Court: Okay.

Potential Juror Two: I was a counselor and I retired a year ago.

The Court: Are you enjoying your retirement?

Potential Juror Two: Yeah. I'm divorced. Level of education Bachelors in Criminal Justice Administration.

The Court: Thank you, juror number two.

The prosecutor erroneously characterized Juror 2's answers as "I don't remember anything" when she stated only that she couldn't remember the specific timing of events that happened long ago. Although Juror 2 stated that she "can't remember the years and stuff" when her family had been victims of crime, she did say that it had involved "robbery and stuff like that" but had occurred "a long time ago nothing recent." The prosecutor made no attempt to ask the juror for additional information to test the extent of her perceived memory lapse.

While the prosecutor correctly stated that the juror couldn't remember specifics about her prior contact with police and being a victim of a crime, I find these failures unremarkable when weighed against the prosecutor's mischaracterization of Juror 2's answers. Nor do I credit the lead opinion's reference to Juror 2's vague response about her prior jury service in which she couldn't recall specifically why she didn't have to serve ("the defendant pled or something and then we left"). The failure to remember details from long-ago

events is not unusual. Nor does it suggest memory problems that someone would not remember a fact of so little consequence, such as the reason she didn't have to serve on a jury previously.

Juror 2's alleged failure to recall details about being a crime victim and her experience with the police (beyond just the years involved) provide the strongest support for the trial court's finding. But standing alone, Juror 2's statements that she couldn't remember "the years and stuff" about her family having been victims of a crime and that she had "been pulled over and stuff like that before" is not enough to uphold the trial court's basis for allowing her to be dismissed. The lead opinion characterizes the former response as evidencing that Juror 2 was unable to recall "any details" of the crime, but that is another exaggeration —that Juror 2 said she couldn't remember "stuff" about having been a crime victim does not mean she couldn't remember any details. The prosecutor never *asked* her for details. The juror's general statements with no request for follow-up do not support the lead opinion's characterization.

Because I believe the trial court committed a *Batson* error in accepting the prosecutor's race-neutral reason for dismissing Juror 2, I would reverse the Court of Appeals on this basis and remand for a new trial.

II. JUROR 5

The trial court's treatment of the prosecution's *Batson* challenge to Juror 5 confirms its error in denying the defendant's *Batson* challenge to Juror 2. The court's application of *Batson*'s third step to the defendant's peremptory challenge to dismiss Juror 5 stands in sharp contrast to its deferential treatment of the prosecutor's proffered reason for dismissing Juror 2. As

to the former, the trial court twice explained that it had a duty to "probe" the defense's reasons for excusing Juror 5 and apply a "more penetrating analysis" to those reasons:

> *The Court*: First of all, again, with Batson the first step is whether the facts and circumstances of the voir dire suggests that racial discrimination motivated a strike. Evidence raising merely an inference of discrimination surmounts the first Batson test creating a prima facie case. I think in this case the prosecution, as to juror number five, has established a prima facia [sic] case because this is the third peremptory challenge which the defense has raised. The other two were Mr. Trueblood, juror number 11, and Ms. Lori Monkaba who was juror number 14.
>
> The step two is to articulate a neutral explanation related to the particular case to be tried. And in this particular case Mr. Halpern articulates the fact that she has police officers in her family. But during the voir dire of number five I did not hear any additional voir dire directed to her about her relationships with police officers. She testified clearly to me during the voir dire that her relationships would not affect her ability to be a fair and impartial juror and she understood that the testimony of a police officer is to be put to the same challenges of weight and credibility as that of any other witness.
>
> As far as any—as far as the fact that she didn't have a conviction or couldn't remember a conviction I'd far rather a juror disclose that she thinks that she may have a conviction and we investigate it and find out that she doesn't rather than a juror lie and say I don't have one when in reality they do. I don't feel it's appropriate to kick juror number five because she's raised a concern which the Court was able to address.
>
> Finally, when we talk about evaluating the plausibility of a race neutral explanation for a strike in light off [sic] all the evidence with a bearing on it this inquiry, according to the Tennielle case necessarily includes careful consideration of relevant, direct, and circumstantial evidence of

> intent to discriminate. And, also, in this case I have asked the defense very specifically what problems they have with juror number five considering the fact that she has been seated on this jury since the original 14 jurors were impanelled. What I'm hearing is feelings. There is—I have to—I'm charged as the judge—I'm charged as the judge to probe more deeply when someone just talks about feelings. And there's not sufficient facts here. I'm not hearing about somebody that's sleeping, somebody nervous, preoccupied, angry, disrespectful or agitated. I'm just hearing about feelings. I'm tasked with engaging in a more penetrating analysis focussing on ascertaining whether the proffered race neutral reason is pretext intended to mask a discrimination. Evaluation of the central question requires the Court to permit argument by the opposing counsel who bears the burden of persuading the Court that the—that there was purposeful discrimination here. This record lacks any objective indicia of concern—concerning the impartiality of juror number five or that she is otherwise unfit to serve as a juror in this case. So I'm going to find—I'm sorry, let me just double check. I'm going to find that the reason offered is insufficient and I am going to find that the challenger has established purposeful discrimination. So I'm going to keep juror number five on the jury . . . .

Juror 5's strong ties to law enforcement provided a valid race-neutral reason for her removal; given that this case involved a pure credibility contest between the defendant and two police officers, those ties provided an obvious basis for defense counsel to exclude her. Yet the trial court parsed defense counsel's other reasons for asking that Juror 5 be excused and denied that request because those other reasons were unsupported by the record or insufficient. Had the court engaged in the same "more penetrating analysis" of the prosecutor's reason for excusing Juror 2, it would have

recognized the prosecutor's mischaracterizations of the record and, I believe, could not have reached the conclusion it did.

III. REMEDY

Because I agree with the lead opinion that the trial court clearly erred by denying defense counsel's request to remove Juror 5, the question becomes what remedy, if any, is required. Contrary to the lead opinion, and consistent with many other state courts that have answered this question, I would hold that the erroneous denial of a defendant's peremptory challenge requires automatic reversal.

Bell doesn't settle the matter. Although *Bell* purported to decide that harmless-error review applies to erroneous denials of a defendant's peremptory challenges, only three justices signed that portion of the lead opinion. That statement was also dictum because a majority of the justices concluded that no error had occurred. See *Bell*, 473 Mich at 292-293 (opinion by CORRIGAN, J.) (stating that "[i]n light of our conclusion that the trial court's initial error was cured, we need not address whether a denial of a peremptory challenge is subject to automatic reversal" and noting that *had it concluded* that error occurred, it "*would have* applied a harmless error standard to the error") (emphasis added); *id*. at 300 (WEAVER, J., concurring) (joining the portions of the lead opinion finding no error). Only then-Chief Justice TAYLOR concluded that error had occurred and would have applied harmless-error review. *Id*. at 302 (TAYLOR, C.J., concurring in part and dissenting in part). Indeed, this Court has acknowledged that that portion of the *Bell* lead opinion both lacked majority support and constituted dictum. See *Pellegrino v Ampco Sys Parking*, 486 Mich 330,

340 n 5; 785 NW2d 45 (2010) ("Only parts I through III of the lead opinion in *Bell* garnered majority support."); *id*. at 348 n 12 (stating that "[t]he lead opinion [in *Bell*] stated in dictum that the improper denial of a peremptory challenge on a basis *other* than race is subject to [harmless-error] analysis").

And, of course, the justices in *Bell* never conducted a harmless-error analysis or concluded that any error in that case was harmless—more evidence that the Court did not decide this question. The Court's statement that harmless-error review applies to erroneous denials of peremptory challenges was unnecessary to the disposition of the case (or even to any alternate holding) and is obiter dictum. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication[.]" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985). Thus, the remedy issue remains an open question.

The lead opinion acknowledges that state courts post-*Rivera* have divided on the appropriate remedy for the erroneous denial of a peremptory challenge.[2] But despite concluding that application of a harmless-error analysis to such errors "will result in almost automatic affirmance," it purports to adopt such a rule.

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[2] Of course federal courts have applied harmless-error review post-*Rivera*—they are bound by its holding. See, e.g., *United States v Lindsey*, 634 F3d 541, 550 (CA 9, 2011) ("[A]lthough *Rivera* left the states free to decide the proper remedy for the error at issue, we cannot in good faith apply [the holding in *United States v Annigoni*, 96 F3d 1132 (CA 9, 1996)] here. We are not a separate sovereign that may freely prescribe remedies to our own laws absent a federal constitutional violation. Instead, we are an intermediate court within the federal system, and as such, we must take our cue from the Supreme Court."). States, by contrast, are separate sovereigns, and state courts have an independent duty to ensure that their systems operate fairly.

Of course, the issue remains an unsettled one in Michigan law because the lead opinion commands the votes of only three justices.[3] "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of *stare decisis*." *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

I would adopt an automatic-reversal rule. I agree with the Iowa Supreme Court in *State v Mootz*, 808 NW2d 207, 225 (Iowa, 2012):

> In support of an automatic reversal rule, Mootz argues that the erroneous denial of a peremptory strike is not amenable to harmless error analysis because of the difficulty in showing actual prejudice. This argument has merit. The State has not provided, nor can we conceive of, any situation in which a defendant could ever show prejudice arising out of the wrongful denial of a peremptory challenge where, as is the case here, the juror was not also removable by a challenge for cause. A defendant could only show prejudice by showing that the juror he sought to remove was biased. However, if the juror were biased, then the juror would be removable for cause, and the question regarding the *peremptory* challenge would become moot. [Citations omitted.]

The dissent in *Bell* made a similar point, and the majority offered no response: "Because we have no tools to gauge the effect of errors in denying peremptory challenges, a harmless error analysis of them is simply unworkable." *Bell*, 473 Mich at 317 (KELLY, J., dissenting). And given the "fundamental role" of the

[3] Indeed, the lead opinion goes out of its way to purportedly resolve issues that remain unresolved because it has the support of only three justices. See, e.g., *ante* at 88-89 (a "numbers" argument is insufficient to establish a prima facie case of purposeful discrimination under *Batson*); *ante* at 112 (same).

peremptory challenge (although it is not of constitutional dimension), *Mootz*, 808 NW2d at 224, a balancing of the interests involved favors an automatic-reversal rule over the speculative concern that such a rule will discourage trial courts and prosecutors from policing a defendant's discriminatory use of peremptory challenges.

The rationale underlying an automatic-reversal rule in this context is precisely the same as one that drives the structural-error doctrine—the difficulty or impossibility of determining prejudice to the defendant as a result of the error. See *United States v Gonzales-Lopez*, 548 US 140, 149 n 4; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (stating that "here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error"); see also *State v Campbell*, 772 NW2d 858, 862 (Minn App, 2009) ("automatic reversal remains the appropriate remedy when a trial court erroneously denies a defendant's peremptory challenge, even after . . . *Rivera*," because an " 'erroneous denial of a peremptory challenge . . . does not lend itself to harmless error analysis' "), quoting *State v Reiners*, 664 NW2d 826, 835 (Minn, 2003). The lead opinion correctly notes that in *Rivera*, the United States Supreme Court asserted that the defendant's argument that "[t]he improper seating of a juror . . . is not amenable to harmless-error analysis" did "not withstand scrutiny." *Rivera*, 556 US at 157. But the lead opinion misleadingly characterizes that statement as having dispatched the merits argument that the erroneous denial of a peremptory challenge isn't amenable to harmless-error review. The *Rivera* Court did not offer any explanation for *how* such errors could be reviewed for harmfulness; it simply determined that the loss of a peremptory challenge due to a state court's good-faith error could not be

a matter of federal constitutional concern. *Id*. That does not "dispatch" the question whether harmless-error review of such errors is impossible.

The lead opinion's primary counterargument to a rule of automatic reversal is that the United States Supreme Court in *Rivera* and other cases has said that the erroneous denial of peremptory challenges is not an error of constitutional dimension.[4] So goes the argument—because only structural errors are subject to automatic reversal, and structural errors are constitutional errors, the erroneous denial of peremptory challenges cannot be structural error and therefore cannot be subject to automatic reversal. But that conclusion ignores the Supreme Court's contrary invitation to states in *Rivera*, 556 US at 161-162:

> Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*.[5]

See also *People v Novotny*, 320 P3d 1194, 1206; 2014 CO 18 (Colo, 2014) (Hood, J., concurring in part and dissenting in part) (stating that "even if we were bound by the Supreme Court's interpretation of the federal

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[4] The lead opinion also repeatedly distracts from the ramifications of its remedy holding—a rule of automatic affirmance—with the irrelevant statement (with which none of us would disagree) that a defendant is entitled to a fair trial, not a perfect one. It's a fair trial, not a perfect one, the defendant wants. An imperfect trial can become an unfair trial—the question is whether the erroneous denial of a peremptory challenge causes that.

[5] Confronted with this point, the lead opinion inexplicably doubles down on it. See *ante* at 137 (criticizing this opinion for ignoring "the only guiding statement of law offered by the Supreme Court of the United States to assist state courts" on this point).

harmless error standard when interpreting our own, which we are not, its interpretation 'does not mean that all nonconstitutional errors must be subject to harmless-error analysis' "), quoting *United States v Lane*, 474 US 438, 472; 106 S Ct 725; 88 L Ed 2d 814 (1986) (Stevens, J., concurring in part and dissenting in part).

The lead opinion also cites MCL 769.26 in support of its conclusion. It reasons that automatic reversal can't be the rule because that statute requires a court to find that it "affirmatively appear[s] that the error complained of has resulted in a miscarriage of justice"— which means that the error more probably than not was outcome-determinative, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999)—before setting aside a conviction. This reasoning is unhelpful because it's virtually impossible to discern whether this error is outcome-determinative. It also neglects additional important statutory text, which provides that an error on any matter of pleading or procedure shall not be a basis for reversal "unless *in the opinion of the court*" the error has led to a miscarriage of justice. MCL 769.26. The statute leaves it to the court's discretion to find a miscarriage of justice, or not. Because a harmless-error rule is unworkable in this context, leaving defendants who are erroneously denied a peremptory challenge without a remedy is a miscarriage of justice.

Finally, this conclusion is also informed and supported by the real-world harm at stake with these errors. It is no secret that people, including prospective jurors, have unconscious biases. See, e.g., Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 UC Davis L Rev 1563, 1577-1578 (2013) (noting "court decisions [that] have recognized that unconscious bias has the potential to impact

jurors' perceptions, assessments, and ultimately, their verdicts"). Peremptory challenges—though not constitutionally required—are an important tool for maintaining fair trials by allowing prosecutors and defendants to remove jurors they perceive as being likely to be sympathetic to the other side. See *People v Luciano*, 10 NY3d 499, 502; 890 NE2d 214 (2008) ("Though not a trial tool of constitutional magnitude, peremptory challenges are a mainstay in a litigant's strategic arsenal."). Indeed, here is precisely such a case: despite Juror 5's assertion that she could treat a police officer's testimony the same as any other witness, defense counsel might have reasonably believed her family background would (consciously or not) cause her to be unable to do so.

When a trial court unjustly hampers a defendant's ability to strike a juror without cause—and if that error can never be corrected on appeal—it erodes public trust in the jury system. The lead opinion's approach would give prosecutors free rein to raise frivolous challenges to defendants' use of peremptory challenges to strike jurors who might not be able to decide a case fairly, because if the trial court erroneously grants such a challenge, it won't matter. The lead opinion's approach raises the specter of less fair trials. To me, that would be a disservice to the rule of law, which is sustained by the public's confidence in it.

IV. CONCLUSION

I would hold that the trial court committed a *Batson* error when it accepted the prosecutor's race-neutral reason for dismissing Juror 2, and I would reverse the Court of Appeals judgment and remand for a new trial on that basis. While I concur with the lead opinion that the trial court erred by refusing to dismiss Juror 5, I

disagree with its conclusion that the remedy for the error is to review it using harmless-error analysis. Automatic reversal is appropriate.

BERNSTEIN and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

BRONNER v DETROIT

Docket No. 160242. Argued on application for leave to appeal January 7, 2021. Decided May 27, 2021.

Keith Bronner sued the city of Detroit in the Wayne Circuit Court seeking no-fault benefits. Bronner was a passenger on a city-operated bus when the bus was involved in an accident with a garbage truck operated by GFL Environmental USA Inc. The city self-insured its buses under MCL 500.3101(5) of the no-fault act, MCL 500.3101 *et seq*. Under the city's contract with GFL, GFL agreed to indemnify the city against any liabilities or other expenses incurred by or asserted against the city because of a negligent or tortious act or omission attributable to GFL. Following the accident, Bronner initially filed a claim with the city for personal protection insurance (PIP) benefits under MCL 500.3107. The city paid Bronner about $58,000 in benefits before the relationship broke down and Bronner sued the city. Shortly after Bronner sued the city, the city filed a third-party complaint against GFL pursuant to the indemnification agreement in their contract. GFL moved for summary disposition, arguing that the city was attempting to improperly shift its burden under the no-fault act to GFL contrary to public policy. The circuit court, Edward Ewell, Jr., J., denied GFL's motion and granted summary disposition for the city. The city later reached a settlement with Bronner, and the trial court ordered GFL to pay the city $107,529.29 to cover the PIP benefits the city had paid and certain other expenses. GFL appealed as of right, arguing that the indemnification agreement was void because it circumvented the no-fault act. The Court of Appeals, MURRAY, C.J., and RIORDAN and CAMERON, JJ., agreed with GFL and reversed in an unpublished opinion, citing the comprehensive nature of the no-fault act and concluding that the act outlined the only mechanisms by which a no-fault insurer could recover the cost of benefits paid to beneficiaries. The city filed an application for leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other action. 505 Mich 1139 (2020).

In an opinion by Justice CLEMENT, joined by Chief Justice MCCORMACK and Justices ZAHRA, BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

An agreement between an insurer and a vendor that requires the vendor to reimburse the insurer for the cost of mandatory benefits the insurer had to pay out as a result of the vendor's negligence is not void as contrary to the no-fault act because such an agreement does not relate to the availability of applicable insurance or the payment of benefits.

1. The general rule of contracts is that when voluntarily and fairly made by competent persons they shall be held valid and enforceable in the courts. However, when there are definite indications in the law that a contractual provision conflicts with public policy, the contractual provision must yield to the public policy. In this case, the Insurance Code, MCL 500.100 *et seq*., did not expressly prohibit the parties' indemnification agreement. Nonetheless, the Court of Appeals panel construed the indemnification provision as a variation on contractual provisions that purport to shift liability for payment of no-fault benefits in a manner that does not comport with the no-fault act and that the Supreme Court has struck down in previous cases. For instance, in *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225 (1995), the Supreme Court held that a car dealership could not unilaterally shift liability for no-fault benefits to fully insured borrowers of loaner vehicles because doing so violated MCL 500.3101(1), which requires the owner of a vehicle to maintain security for residual liability insurance. And in *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25 (1996), the Court held that when a vehicle was rented, the lessor of the vehicle could not enforce a lease condition that shifted responsibility to the lessee's no-fault insurer to provide mandatory benefits in the event of an accident. In *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491 (2001), on the other hand, the Court upheld a contract provision obligating a customer who borrowed a vehicle from a car dealership to assume all responsibility for damages sustained by the vehicle while it was in her possession. The Court held that the contract in *Kneeland* sought nonmandatory collision coverage and, therefore, the contract provision did not improperly shift damages that were not legally able to be reallocated under the Insurance Code. The Court of Appeals panel concluded in this case that under *Kneeland*, the existence in the no-fault act of various reimbursement mechanisms for no-fault insurers implicitly precluded the enforceability of the indemnification agreement. However, this analysis failed to con-

sider *Kneeland* in the context of *Citizens Ins Co* and *State Farm*. This context was demonstrated by the Court's decision in *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588 (2002). In *Cruz*, the insurance policy made payment of no-fault benefits contingent on the injured person submitting to an examination under oath, which potentially conflicted with the Insurance Code's requirement that no-fault insurers pay benefits within 30 days of receiving proof of fact and the amount of the loss. The Court in *Cruz* sought to harmonize the contract provision with the Insurance Code, holding that examinations under oath were permissible when used to facilitate the goals of the no-fault act and when harmonious with the no-fault insurance regime. When *Citizens Ins Co*, *State Farm*, *Kneeland*, and *Cruz* are read together, it is apparent that the comprehensive nature of the Insurance Code's regulation of no-fault insurance serves to ensure that there is applicable insurance for accidents and that benefits are paid. The indemnification provision in this case did not implicate the same concerns as the provision in *Cruz*; in order to do so, a contractual provision must, at minimum, relate to the insurance of motor vehicles or the payment of benefits resulting from motor vehicle accidents. The indemnification agreement did neither and so did not jeopardize the availability of applicable insurance or the payment of mandatory benefits. As a result, no improper shifting of liability contemplated by *Kneeland* was implicated in this case.

2. The Court of Appeals misconstrued provisions of the Insurance Code that permit no-fault insurers to seek reimbursement for payment of some benefits as implicitly excluding any other reimbursement mechanism, such as the indemnification provision that was at issue in this case. In doing so, the Court of Appeals effectively relied on the *expressio unius est exclusio alterius* canon, that in stating some options, other options must not exist. The Court of Appeals identified the Michigan Catastrophic Claims Association (MCCA), MCL 500.3104; the Michigan Assigned Claims Plan (MACP), MCL 500.3171; and MCL 500.3116, which allows insurers to impose a lien on tort damages recovered by some no-fault beneficiaries, as the exclusive reimbursement opportunities for no-fault insurers under the act. Rather than representing the exclusive means for reimbursements, these statutory provisions respond to specific problems, unrelated to the issue that was presented in this case. For instance, the purpose of the MCCA is to spread the cost of catastrophic claims across all no-fault insurers in Michigan and to equalize competitive imbalances between larger and smaller insurers. Rather than being a substitute for reimbursement, it is effectively an entitlement for insurers. The MACP is a benefit to

persons injured in motor vehicle accidents who otherwise do not have applicable insurance benefits. In other words, the MACP is a mechanism created by the Insurance Code through which the Legislature carries out a scheme of general welfare by obliging insurers to act as insurers of last resort for injured persons with whom the insurer does not have an existing insurance relationship. This does not affect an insurer's ability to freely enter into contracts with vendors that may include indemnification provisions. Finally, MCL 500.3116 allows an insurer to recover from its beneficiaries by reducing PIP benefits to the extent that the insured has received equivalent compensation from tort judgments arising from out-of-state accidents, accidents with uninsured motorists, and from intentionally caused harm. MCL 500.3116 does not prevent an insurer from contracting with a vendor to reach an indemnity agreement. In *Cruz*, the Court observed that the provision of *some* discovery tools in the no-fault act did not necessarily preclude the parties from contracting for the use of other discovery tools, such as examinations under oath. Similarly, the no-fault act's reimbursement options are not comprehensive and do not preclude parties from contracting for other reimbursement methods. In this case, the indemnification agreement did not relate to the insurance of motor vehicles or the payment of benefits resulting from accidents involving motor vehicles, did not alter the relationship between the insurer and its insured or beneficiaries, and did not transform the nature of benefits paid by the insurer to beneficiaries into something else. It therefore did not conflict with the Insurance Code.

Reversed.

Justice VIVIANO, concurring, agreed with the result reached by the majority for many but not all of the reasons stated in that opinion and wrote separately to highlight the issue of the appropriate analytical framework for addressing whether the no-fault act precluded enforcement of the indemnification agreement and his conclusion that the majority opinion relied too heavily on ascertaining the broad purposes of the no-fault act. The core issue was whether the parties' contractual indemnification agreement was unenforceable because it violated public policy as represented by the no-fault act. Justice VIVIANO noted that caselaw contained various standards for determining whether certain provisions of the no-fault act had abrogated the common law; some cases held that the intent to abrogate must be clearly stated in the statute, while others indicated that the comprehensiveness of the statutory scheme can indicate abrogation (an approach that resembles a field-preemption analysis). He stated that the major-

ity adopted the latter methodology in this case without expressly examining whether it was appropriate. Under a field-preemption analysis, a court would examine whether the no-fault act has impliedly preempted parties from contracting for indemnification via a provision like the one in this case. To the extent that a field-preemption analysis was applicable in this case, Justice VIVIANO disagreed with the manner in which the majority applied the analysis. He noted the ease with which extratextual purpose can be impermissibly exalted above statutory text. In addition, choosing the correct field is critical because defining the field at a certain level of generality becomes determinative. Justice VIVIANO stated that it was therefore important for a court to stick to the text of the statute when defining the field, and one way to do this is to recognize that a statute's occupation of one area of the law does not necessarily mean that it occupies adjacent areas as well. The majority demonstrated this by examining the no-fault act's few scattered provisions concerning reimbursement, thereby showing that the statute did not occupy this area of the law and that the indemnification agreement did not directly conflict with any provision in the act. Justice VIVIANO would have allowed this analysis to dispose of the case without considering whether the enforceability of the indemnification agreement turned on whether a court considered it to be consistent with the broadly characterized goals of the no-fault act, i.e., regulating the insurance of motor vehicles and requiring payment of benefits, or whether the agreement "implicated" or "related to" these goals. The majority's use of these statutory purposes further aggrandizes the purposes the Court had attributed to the no-fault act in past cases and made it uncertain when a contractual provision would be precluded from enforcement due to implicating or relating to the statutory purposes.

CONTRACTS — NO-FAULT ACT — INDEMNIFICATION AGREEMENTS — ENFORCEABILITY.

An insurer may legally contract with a vendor for indemnification of the insurer for the cost of no-fault benefits that the insurer is obliged by law to pay when the vendor's negligence caused the injury for which the benefits are compensation (MCL 500.3101 *et seq.*).

Charles N. Raimi for the city of Detroit.

Cardelli Lanfear, PC (by *Anthony F. Caffrey III* and *Thomas G. Cardelli*) for GFL Environmental USA Inc.

CLEMENT, J. In this case, we consider whether a no-fault insurer—or, as here, a self-insurer—may legally contract with a vendor for indemnification of the no-fault insurer for the cost of no-fault benefits that the insurer is obliged by law to pay when the vendor's negligence caused the injury for which the benefits are compensation. We conclude that such an agreement is legal and reverse the contrary conclusion of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

On September 25, 2014, Keith Bronner was a passenger on a bus operated by the City of Detroit. The bus was in an accident with a garbage truck operated by GFL Environmental USA Inc.[1] The city self-insures its fleet of buses under MCL 500.3101(5),[2] and Bronner consequently made a claim with the city for personal protection insurance (PIP) benefits under MCL 500.3107. The city initially paid about $58,000 in benefits to Bronner; but eventually the relationship broke down, and Bronner sued the city in September 2015.

GFL's garbage truck was operating under a contract that GFL had signed with the city in February 2014. Section 9.01(a) of that agreement provided that GFL

> agree[d] to indemnify, defend, and hold the City harmless against and from any and all liabilities, obligations, damages, penalties, claims, costs, charges, losses and expenses . . . that may be imposed upon, incurred by, or

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[1] At the time of the accident, GFL was known as Rizzo Environmental Services, Inc.

[2] At the time of these events, the relevant provision was found at MCL 500.3101(4); it was renumbered with the enactment of 2019 PA 21. Because 2019 PA 21 does not affect this dispute, references in this opinion are to the current version of the statute.

> asserted against the City . . . to the extent caused by . . . [a]ny negligent or tortious act, error, or omission attributable in whole or in part to [GFL] or any of its Associates[.]

Shortly after Bronner sued the city, the city filed a third-party complaint against GFL, invoking this indemnification agreement. In June 2016, GFL moved for summary disposition, arguing that the city was "attempting to circumvent the explicit requirements of the No-Fault Act[3] by improperly shifting its burden onto [GFL] through language found in an unrelated service contract between Detroit and [GFL], which clearly violates public policy and the legislative intent behind the No-Fault Statute." The trial court denied this motion and instead granted summary disposition in favor of the city. In February 2017, the city reached a settlement with Bronner, and the trial court then ordered GFL to pay the city $107,529.29 to cover the PIP benefits paid by the city,[4] plus certain other expenses.

In the Court of Appeals, GFL renewed its argument that the indemnification agreement circumvented the Insurance Code's[5] no-fault rules and was therefore void. The Court of Appeals agreed and reversed in an unpublished opinion.[6] The Court of Appeals panel emphasized the comprehensive nature of the no-fault system, which includes only a few explicit mechanisms

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[3] MCL 500.3101 *et seq*.

[4] This sum included both the city's settlement with Bronner and its settlement with Angels with Wings Transport, LLC, which had provided transportation services to Bronner and intervened as a plaintiff to make its own recovery.

[5] MCL 500.100 *et seq*.

[6] *Bronner v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued July 9, 2019 (Docket No. 340930).

by which a no-fault insurer may recover the cost of benefits paid out. The Court accepted the negative implication that, by stating these options in the no-fault act, the Legislature had denied the availability of any other options. The panel therefore concluded that the indemnification agreement was unenforceable. The city then filed an application for leave to appeal in our Court, and we ordered argument on that application. *Bronner v Detroit*, 505 Mich 1139 (2020).

II. STANDARD OF REVIEW

The question before the Court is not the meaning of the indemnification agreement between the city and GFL as such. GFL's argument in this Court does not concern the proper interpretation of the parties' contract, and GFL does not argue that the indemnification sought by the city is beyond the scope of that contract. Rather, the question is whether the Insurance Code precludes the contract provision at issue. In other words, the question is whether the provision "runs afoul of the public policy of the state" in the form of "the policies that . . . are reflected in . . . our statutes," *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002), such as the Insurance Code. Whether a contract provision is invalid on these grounds is a question of law subject to de novo review. *Id*. at 61. "This Court [also] reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. ANALYSIS

We have held that " '[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily

and fairly made shall be held valid and enforced in the courts.' " *Terrien*, 467 Mich at 71, quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931). Of course, where there are " 'definite indications in the law' " of some contrary public policy, *Terrien*, 467 Mich at 68, quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945), the contract provision must yield to public policy. As the Court of Appeals noted here, however, there is no provision of the Insurance Code which expressly prohibits the sort of indemnification agreement at issue. Even so, the Court of Appeals drew inferences from the comprehensive nature of the no-fault system that we must assess.

No-fault insurance in Michigan is "a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents." *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 240; 293 NW2d 594 (1980). "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). Although *Millross* was a case about the dramshop act, we have applied this same principle in the no-fault context. In particular, the Court of Appeals drew upon our line of cases construing the comprehensive nature of the no-fault law as prohibiting certain shifts of liability for no-fault benefits to invalidate the indemnification agreement at issue.

The first case in this line is *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225; 531 NW2d 138 (1995). In that case, a car dealership gave a customer a "loaner" automobile while the dealership was working on the customer's own vehicle.[7] The customer was later in a serious accident. On appeal in this Court, the legal question was which insurer was responsible under MCL 500.3131 to pay residual personal injury benefits: the insurer of the car dealership (as the owner of the vehicle) or the customer (as the operator of the vehicle). The insurance policy issued to the car dealership by its insurer stated that the insurer would not consider as an "insured" anyone to whom the dealership had loaned the vehicle unless that individual was uninsured or underinsured. We held that the dealership's insurer could not, in its policy, unilaterally shift liability for no-fault benefits to fully insured borrowers of the dealership's vehicle because it violated MCL 500.3101(1), which requires the *owner* of a vehicle to maintain security for residual liability insurance. The policy exclusion was therefore void, and the dealership's insurer had to pay benefits.

We extended *Citizens Ins Co* in *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25; 549 NW2d 345 (1996). There, we held that when an automobile is rented out, the lessor of the vehicle may not enforce a lease condition shifting responsibility to the lessee's no-fault insurer to provide mandatory no-fault benefits if an accident occurs—even if the lessee agreed to this lease condition. *Id*. at 27-28, 35. We offered various reasons for this conclusion, but one, which the

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[7] The facts of *Citizens* appear in neither this Court's opinion nor the majority opinion in the Court of Appeals, but rather the dissenting opinion in the Court of Appeals. See *Citizens Ins Co v Federated Mut Ins Co*, 199 Mich App 345, 348; 500 NW2d 773 (1993) (NEFF, J., dissenting).

Court of Appeals referred to here, was that the intent of the no-fault system is to hold the *owner* rather than the *operator* of a vehicle primarily responsible for paying no-fault benefits, and it would subvert that intent to switch that responsibility:

> The driver cannot defeat the provisions of the no-fault act by stating that the owner need not pay insurance. Because the driver cannot bind the driver's insurer, a driver who agreed to shift coverage would remain solely liable for damages caused by use of the vehicle. The rental car would be left uninsured under the terms of the rental agreement stating that the owner provides no insurance. This lack of coverage violates the no-fault act. Even though an injured party could attempt to obtain compensation from the driver, the no-fault act is intended to protect injured parties from having to pursue such suits. Even if the driver qualified as self-insured, we would not allow the rental car companies to avoid the Legislature's intent that a vehicle owner be primarily responsible for providing coverage. Just as the car rental company cannot shift liability to a driver's insurer, it cannot shift liability to a driver personally. Either shift of responsibility away from the owner would violate the act because it requires owners to provide primary coverage. [*Id*. at 35-36.]

On the other hand, we gestured toward a limit to the principle established in *Citizens Ins Co* and *State Farm* in *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491; 628 NW2d 491 (2001). In *Kneeland*, as in *Citizens Ins Co*, a car dealership loaned an automobile to a customer while it was working on her vehicle. *Id*. at 493. The customer signed an agreement when she borrowed the vehicle in which she "agree[d] to assume all responsibility for damages while [the] vehicle [was] in h[er] possession." *Id*. (emphasis omitted). While she was driving the vehicle, she was in an accident causing more than $3,700 in damage to the vehicle. *Id*. The dealership and its insurer paid for appropriate repairs

but then sued the customer to enforce the agreement she had made when she borrowed the vehicle, seeking compensation for the cost of the repairs. *Id*. We expressed concern that the term "damages" in the agreement "could refer to *any* harm caused to a third party's person or property, i.e., it could reach damages for which no-fault insurance coverage is mandatory." *Id*. at 496. Citing *State Farm*, we acknowledged that "[a] shift of liability to that extent might contravene the no-fault act." *Id*. at 496-497. That said, what was sought under the contract in *Kneeland* was nonmandatory collision coverage, which took *Kneeland* outside the rule from *Citizens Ins Co* and *State Farm*, and we therefore concluded that "the contract thus does not shift liability for damages that may not legally be reallocated." *Id*. at 498.

The Court of Appeals panel here construed the indemnification provision at issue as a variation on the sort of liability-shifting that these cases have prohibited. In particular, it emphasized certain hedging language from our *Kneeland* opinion.[8] In interpreting the word "damages," which the vehicle borrower agreed to accept responsibility for in the *Kneeland* contract, we observed that it could encompass mandatory no-fault benefits and, citing *State Farm*, we noted that such a shift of liability *might* violate the Insurance Code. *Id*. at 496-498. We stated:

> We express no view regarding whether *State Farm* would control the legality of the contract [in *Kneeland*]. Th[e] agreement and the one addressed in *State Farm* are arguably different in scope and effect. We merely observe that an argument is available that the parties' agreement, if it reaches beyond optional collision damages, is illegal. [*Id*. at 497 n 3.]

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[8] See *Bronner*, unpub op at 5-6.

The Court of Appeals panel concluded that this left open whether benefits that the no-fault law requires to be paid out could be shifted and that the existence of various reimbursement mechanisms for no-fault insurers under the statute implicitly precluded the enforceability of an indemnification agreement such as the one at issue.[9]

The Court of Appeals' analysis of *Kneeland* is flawed, however, as it does not read *Kneeland* in the context of *Citizens Ins Co* and *State Farm*, which came before *Kneeland*. This is best demonstrated by reviewing *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588; 648 NW2d 591 (2002). The insurance policy in *Cruz* made payment of no-fault benefits contingent on the injured person submitting to an "examination under oath" (EUO), *id*. at 590, and the question was whether this provision was compatible with the Insurance Code's requirement that no-fault insurers pay benefits "within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained," MCL 500.3142(2). See *Cruz*, 466 Mich at 593-594, 596. Because "the no-fault act contains no reference either allowing or prohibiting examinations under oath," we had to "determine whether, given this silence, the inclusion of examination under oath provisions in no-fault automobile insurance policies is allowed." *Id*. at 594. We held that the parties could not "contract out of the statutory duty imposed on the insurer to pay benefits within thirty days of receipt of the fact and of the amount of the loss sustained by agreeing that no benefits are due until an EUO is given by the insured[.]" *Id*. at 595. Drawing on *Kneeland*, we sought to harmonize the EUO requirement in *Cruz* with the Insurance Code and declined to hold that EUOs *intrin-*

[9] *Bronner*, unpub op at 6.

sically violate it. Instead, we held that EUOs are permissible "when used to facilitate the goals of the [no-fault] act and when they are harmonious with the Legislature's no-fault insurance regime," such as if they are "designed only to ensure that the insurer is provided with information relating to proof of the fact and of the amount of the loss sustained—i.e., the statutorily required information on the part of the insured." *Id*. at 598. As the insurer in *Cruz* conceded that it had been provided with the requisite information without the EUO, we held that the contract provision requiring an EUO was unenforceable on *Cruz*'s facts. *Id*. at 590 n 1, 600-601.

Cruz's analysis offers critical insight into the nature of what the no-fault law comprehensively regulates. It described the no-fault system as "a comprehensive legislative enactment *designed to regulate the insurance of motor vehicles in this state and the payment of benefits resulting from accidents involving those motor vehicles*." *Id*. at 595 (emphasis added). When *Citizens Ins Co*, *State Farm*, *Kneeland*, and *Cruz* are read together, it becomes apparent that the comprehensive nature of the Insurance Code's regulation of no-fault insurance functions to ensure that there is applicable insurance for accidents and that benefits get paid. *Citizens* and *State Farm* both struck down agreements that purported to rearrange which insurer had to pay benefits, while *Cruz* struck down a policy provision that interfered with the payment of benefits. *State Farm* also noted that agreements that purport to rearrange *which* insurer is supposed to pay benefits also run the risk of leaving *no* insurer available to pay benefits. Meanwhile, *Kneeland* upheld an agreement that did not relate to the payment of mandatory benefits.

The indemnification agreement at issue does not implicate the *Cruz* concerns. There is no dispute that the bus was "insured" (inasmuch as the city had satisfied the Secretary of State it could self-insure under MCL 500.3101(5)), and there is no dispute that the benefits required by statute to be paid to Bronner and his caregivers were paid. *Cruz* clearly acknowledges that the Insurance Code's silence about a particular contractual provision may pose interpretive challenges in the right circumstances; but to implicate *Cruz*'s concern, the contractual provision must, at minimum, relate to the insurance of motor vehicles or the payment of benefits resulting from motor vehicle accidents. This agreement implicates neither, but rather requires a vendor to *reimburse* the insurer for the cost of benefits compensating for an injury caused by the vendor's negligence. Where, as here, the agreement does not jeopardize the availability of applicable insurance or the payment of mandatory benefits, it falls outside our anti-shifting rule. As a result, no improper shift of liability as contemplated by *Kneeland* is implicated in this case,[10] because a vendor reimbursing the insurer for the cost of mandatory benefits the

[10] It is not clear in hindsight why we performed the textual analysis of the meaning of "damages" in *Kneeland* to begin with. Even if the word "damages" could have been understood to include mandatory no-fault benefits, all that was at issue in *Kneeland* were nonmandatory collision benefits. Even if the *Kneeland* agreement had expressly stated that the borrower of the vehicle was accepting liability for both mandatory no-fault benefits and other nonmandatory damages, it is difficult to imagine we would have disallowed recovery of the nonmandatory damages simply because the agreement improperly shifted liability for mandatory benefits. We would presumably have construed the contract "to harmonize [it] with the statute," *Cruz*, 466 Mich at 599, and enforced it to the extent that it was enforceable, but no further. This counsels further against overreliance on *Kneeland*.

vendor caused the insurer to pay out does not relate to either the availability of insurance or the payment of benefits.

The Court of Appeals similarly misconstrued the portions of the Insurance Code allowing no-fault insurers to seek reimbursement for payment of some benefits as implicitly excluding any other reimbursement mechanism (such as the indemnification provision at issue). It identified the Michigan Catastrophic Claims Association (the MCCA), MCL 500.3104, the Michigan Assigned Claims Plan (the MACP), MCL 500.3171, and the ability for no-fault insurers to impose a lien on tort damages recovered by some no-fault beneficiaries, MCL 500.3116, as the stated reimbursement opportunities for no-fault insurers under the Insurance Code. In other words, it effectively relied on the negative-implication canon, *expressio unius est exclusio alterius*,[11] that in stating some options, other options must not exist. However, this "doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 107. "Common sense often suggests when this is or is not so," *id*., and this is such a case: we do not believe these options can be construed as "an expression of all that shares in the grant" of avenues for reimbursement. Rather, each of them responds to specific problems unrelated to the issue presented.

First, the MCCA "was created by the Legislature in 1978 in response to concerns that Michigan's no-fault

[11] *Expressio unius est exclusio alterius* means "[e]xpress mention in a statute of one thing implies the exclusion of other similar things." *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931).

law . . . placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims." *In re Certified Question*, 433 Mich 710, 714; 449 NW2d 660 (1989). "Its primary purpose is to indemnify member insurers for losses sustained as a result of the payment of personal protection insurance benefits beyond the 'catastrophic' level . . . ." *Id.* at 714-715. The MCCA spreads the cost of these catastrophic claims across all no-fault insurers in Michigan to equalize competitive imbalances between larger and smaller insurers and make the amount of cash on hand needed more predictable for insurers. See *id.* at 714 n 2. Rather than being a *substitute* for reimbursement, it is, in effect, an *entitlement* for insurers—a cumulative remedy they enjoy above and beyond any other opportunities they may have to recoup the cost of benefits paid.[12]

Second, the MACP is a benefit to persons injured in motor vehicle accidents who otherwise do not have applicable insurance benefits. It imposes, by statute, the obligation of providing no-fault benefits to persons injured in motor vehicle accidents if an applicable no-fault policy cannot be identified, MCL 500.3172(1), on all no-fault insurers licensed to do business in Michigan. In other words, the MACP obliges them to

[12] Indeed, if the MCCA is merely "a set security meant to assist against certain circumstances," which is to say, "when the PIP amount contracted by the insurer exceeds the statutory threshold," *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 17-18; 795 NW2d 101 (2009), then the extent of the MCCA's obligation to its members may well be informed by the extent to which those members might be able to recoup such costs. If the MCCA "shall provide . . . indemnification for 100% of the amount of ultimate loss sustained under [PIP] coverages in excess of" $580,000, MCL 500.3104(2)(o), then the degree to which insurers can be indemnified for their PIP losses before looking to the MCCA may affect the size of the "ultimate loss sustained."

function as insurers of last resort even as to some injured persons with whom the insurer does not have an existing insurance relationship, making "insurance companies . . . the instruments through which the Legislature carries out a scheme of general welfare." *Shavers v Attorney General*, 402 Mich 554, 597; 267 NW2d 72 (1978). That the Insurance Code creates a mechanism in MCL 500.3385 by which insurers may pass on to their customers the cost of benefits the insurers must pay out by statutory fiat does not derogate from the insurers' prerogative at common law to freely enter into contracts with vendors which may include indemnification provisions.

Finally, the limited opportunity under MCL 500.3116 to recover certain benefits paid out does not imply the inability of an insurer to reach an indemnity agreement with a vendor. The statute allows "personal injury protection no-fault benefits [to] be reduced to the extent the insured has received equivalent compensation from tort judgments arising from accidents outside of the state, from accidents with uninsured motorists, and from intentionally caused harm." *Tebo v Havlik*, 418 Mich 350, 367; 343 NW2d 181 (1984). In such cases, the insurer is reducing its liability to (or recovering from) *its beneficiaries*. Section 3116 is, in effect, an exception that proves a rule: by providing a limited avenue by which a no-fault insurer can offset its liability to its own beneficiary, it implicitly denies other options at recovering from a beneficiary and confirms the no-fault system's focus on the relationship between insurers and their insureds and beneficiaries —*not* the relationship between insurers and their vendors.[13]

[13] Section 3116 may also address GFL's concerns that a ruling in the city's favor here could validate other cost-recovery agreements that

When we upheld the theoretical viability of EUOs in no-fault policies, we observed that "[t]he discovery tools provided in the [no-fault law] are not comprehensive" and rejected the argument that "the provision of *some* discovery tools by the act—tools that address limited aspects of the insurer's postclaim information needs—precludes the parties from contracting for the use of other discovery tools including those such as EUOs that enable insurers to directly gather information from the insured." *Cruz*, 466 Mich at 598 n 14. Much the same can be said about the no-fault law's reimbursement options. They are not comprehensive, and the fact that they are offered does not preclude the parties from contracting for other reimbursement methods. This is all the more apparent when the indemnification agreement at issue does not relate to "the insurance of motor vehicles in this state [or] the payment of benefits resulting from accidents involving those motor vehicles." *Id*. at 595. It does not alter the relationship between the insurer and its insured or its beneficiaries, and it does not transform the nature of benefits paid by the insurer to its beneficiaries into something else. It therefore does not conflict with the Insurance Code.

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might be offensive to the no-fault system. A reimbursement clause that effectively changed an insurer's relationship *with its insureds or beneficiaries*—such as an agreement that the insurer would pay out benefits but asserted a right to subsequent reimbursement from the beneficiary—would presumably fall within the comprehensive scope of the statute and not be permitted. Transforming *insurance benefits* into the functional equivalent of a *loan* would change the character of the payments being made. By allowing a limited ability to claw back benefits from a beneficiary, § 3116 could certainly be read as implicitly precluding other such arrangements.

IV. CONCLUSION

GFL argues that the city should not be treated any differently than more traditional no-fault insurers. We agree. If an ordinary insurance company reached an agreement with the vendor it hired to plow its parking lot in the winter that the plower would reimburse the insurer for accidents caused by the plower's negligence, such an agreement would be enforceable under today's ruling. That the city has far more opportunities to reach such agreements—and traditional insurers far fewer—is presumably offset by the fact that insurers are in the *business* of issuing no-fault insurance, while the city is in the business of providing a full panoply of municipal services and self-insures incidentally to that role. Regardless of the differing opportunities for an insurer to reach an indemnification agreement with a vendor, we conclude that such agreements are enforceable, and the contrary decision of the Court of Appeals is reversed.

MCCORMACK, C.J., and ZAHRA, BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with CLEMENT, J.

VIVIANO, J. (*concurring*). I agree with the result reached by the majority for many but not all of the reasons given in its opinion. I write separately to again highlight one larger issue that has escaped sustained attention in this area of the law: the appropriate analytical framework for addressing the vendor's claim that the no-fault act precludes enforcement of the contractual indemnity provision at issue. See *Meemic Ins Co v Fortson*, 506 Mich 287, 300-301 n 7; 954 NW2d 115 (2020) (noting the unsettled state of the interpretive framework in this area). Whatever approach we may decide to adopt in a future case, I believe the

majority's approach here relies too heavily on ascertaining the statute's broad purposes.

The core issue, as the majority states, is whether the parties' contractual indemnity agreement is unenforceable because it violates public policy as represented by the no-fault act. In our most recent opinion addressing this general topic, we observed that our caselaw contains various standards for determining whether the no-fault act, or various provisions of it, has abrogated the common law and thereby precludes the parties from incorporating certain common-law defenses in their insurance contracts. *Id*. at 300-301 n 7. Some of our cases hold that the intent to abrogate must be clearly stated in the statute, whereas other cases indicate that the comprehensiveness of the statutory scheme can indicate abrogation. *Id*.

The majority today opts for the latter standard, which is how the case was argued and decided below, although no one—including the majority—has expressly examined whether this is the appropriate interpretive methodology for assessing this issue. In adopting this approach, the majority's framework resembles a field-preemption analysis by asking whether the no-fault act has impliedly preempted parties from contracting for indemnification. See generally *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702-708; 918 NW2d 756 (2018) (discussing preemption in general and field preemption specifically). Some support exists for this approach. For example, we have often used the term "preemption" when discussing abrogation. See, e.g., *Kyser v Kasson Twp*, 486 Mich 514, 539; 786 NW2d 543 (2010). More directly, the Delaware Supreme Court has held that because these concepts are so similar, a preemption-like analysis is applicable to resolve questions of abrogation. See *AW*

Fin Servs, SA v Empire Resources, Inc, 981 A2d 1114, 1122 (Del, 2009) ("Although preemption and superseder [i.e., common-law abrogation] are analytically distinct concepts, they both involve the same inquiry: has one body of law replaced another? For that reason, the preemption analytical framework is a useful tool to conduct our analysis of whether the Escheat Statute has superseded common law claims.").

To the extent that a field-preemption analysis applies here—and I would take the opportunity in a future case to more closely analyze this question—my only significant disagreement with the majority is how it applied that analysis. It is difficult to determine when a field has been impliedly preempted by a statute. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), § 47 (discussing the presumption against federal preemption of state law). At bottom, field preemption "is really 'a species of conflict preemption,' " in that it is triggered when a legal provision trenches upon (i.e., conflicts with) a statute's occupation of a field. *Id*., p 290, quoting *English v Gen Electric Co*, 496 US 72, 79 n 5; 110 S Ct 2270; 110 L Ed 2d 65 (1990). That a conflict lies at the heart of field preemption is important to keep in mind because it is very easy for the field-preemption analysis to "exalt extratextual purpose above statutory text." Note, *Preemption as Purposivism's Last Refuge*, 126 Harv L Rev 1056, 1057 (2013). The reason is that "field preemption essentially impl[ies] additional statutory clauses beyond the statute's text, clauses that mandate preemption." *Id*. at 1064. In addition, "choosing the correct field definition" is difficult and critical because "[d]efining the field at a certain level of generality becomes the entire game." *Id*. at 1067.

As a result, I believe it is important to stick to the text as much as possible when defining the field. One way to do this is by recognizing that a statute's occupation of one area of the law does not necessarily mean that it occupies adjacent areas as well. Cf. *AW Fin Servs*, 981 A2d at 1124 ("With one exception, the Escheat Statute does not impliedly supersede other areas of the common law, because there is no 'fair repugnance' between the statute and common law areas that are not related to escheat.").

In this case, by investigating the no-fault act's few scattered provisions concerning reimbursement, the majority thoroughly demonstrates that the act does not occupy this area of law. See *ante* at 172-175. And through the same analysis of these specific statutory provisions, the majority ably explains why the indemnity agreement at issue does not directly conflict with the operation of any other provision in the no-fault act.[1] This analysis, in my view, is generally sufficient to dispose of the case. It shows that the no-fault act does not occupy the field of indemnification and that none of the handful of relevant provisions conflicts with the indemnification contract at issue.

I therefore cannot agree that the majority's assessments of the sweeping scope and purpose of the no-fault scheme have much, if any, analytical significance. That is, I cannot agree that the enforceability of the indemnification contract at issue turns upon whether a

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[1] Implied conflict preemption is another type of preemption under which a provision directly conflicts with state law, i.e., when the provision permits what the statute prohibits or vice versa. *DeRuiter v Byron Twp*, 505 Mich 130, 140; 949 NW2d 91 (2020). As with the field-preemption inquiry, no one here expressly framed the case in these terms. But the mode of analysis used here, in searching for a conflict, is similar, and I would also consider, in an appropriate case, whether this framing is helpful.

court considers it to be consistent with the broadly characterized statutory goals of regulating the insurance of motor vehicles and requiring payment of benefits. See *ante* at 171-172. I do not believe that the proper question in cases like the present one is whether a contract provision "implicate[s]" or "relate[s] to" either of these broadly defined purposes of the no-fault schemes. *Ante* at 172.[2] Rather, the case calls

[2] The majority's use of statutory purpose here is problematic in at least two respects. One is that it further aggrandizes the purposes we have attributed (without much assessment of the text) to the no-fault act. In *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978), we articulated a somewhat narrower purpose of the statute as "provid[ing] victims of motor vehicle accidents [with] assured, adequate, and prompt reparation for certain economic losses" through the means of compulsory insurance. We subtly expanded this in *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 595; 648 NW 591 (2002), suggesting that both the "insurance of motor vehicles . . . and the payment of benefits" were purposes of the act. Today, the majority gives these purposes teeth, holding that contract provisions that "relate" to or "implicate" these broad purposes can thereby be rendered unenforceable. *Cruz* did not establish such an aggressive use of these statutory purposes. Rather, it stated that contracts that "contravene[] the requirements of the no-fault act by imposing some greater obligation upon one or another of the parties [are], to that extent, invalid." *Id*. at 598. That inquiry involves a more careful examination of the statutory provisions at issue.

A second troubling aspect of the majority opinion is the imprecise words it uses to describe when the purposes of the no-fault act preclude enforcement of a contract: if the provision "implicates" or "relates to" the purposes. It is uncertain how these criteria will be met, as it seems likely that many provisions in an insurance contract will "implicate" or "relate to" either insuring motor vehicles or paying benefits. The majority appears to give these terms a limited scope, implying that a provision implicates or relates to a purpose only if it results in denying insurance or benefits owed under the act. But if that is so, why does the majority define the purposes so broadly? There are specific statutory sections that relate to insuring vehicles and paying benefits. Under *Cruz*, a court should examine those particular sections to determine whether they are contravened by the contractual provision at issue. By generalizing the purposes of the no-fault act, the majority today suggests that contractual agreements are in jeopardy even if they do not

for a closer examination of the statutory text, such as the majority itself provides in addition to its assessments of the statute's broader objectives.

As I said at the outset, I agree with the conclusion the majority reaches and with much of its work in getting there. I agree that the no-fault act is not a comprehensive regulation of indemnification agreements and that none of the pertinent statutory provisions conflicts with the agreement here. Therefore, I agree that the indemnification contract does not violate the no-fault act and should be upheld. I do not believe, however, that to reach this conclusion we should rely on the statute's abstract goals as defined by this Court. While the proper interpretive framework remains somewhat unclear—in particular, whether preemption principles can illuminate the interpretation of the statute—I cannot subscribe to a methodology that relies so heavily on statutory purposes.[3] For these reasons, I respectfully concur.

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violate a particular provision but instead have some connection with a broadly conceived statutory purpose. See *Preemption as Purposivism's Last Refuge*, 126 Harv L Rev at 1067.

[3] The majority also extends its holding to insurers, even though the city here is a self-insurer. See *ante* at 175-176. While the majority's conclusion might very well be correct, the majority has not offered any supporting analysis and, in any event, it is unnecessary to reach this issue. Consequently, I do not join this portion of the majority opinion.

ESTATE OF BRENDON PEARCE v EATON COUNTY
ROAD COMMISSION
BRUGGER v MIDLAND COUNTY BOARD OF ROAD
COMMISSIONERS

Docket Nos. 158069 and 158304. Argued November 12, 2020 (Calendar No. 1). Decided June 4, 2021.

In Docket No. 158069, the estate of Brendon Pearce filed a negligence action in the Eaton Circuit Court against the Eaton County Road Commission and others, arguing, in part, that the commission breached its duty under MCL 691.1402 of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., to maintain the road on which the accident occurred. Lynn Pearce, acting as the personal representative of Brendon's estate, served notice on the commission fewer than 60 days after Brendon was killed in the accident. The commission moved for summary disposition, arguing that the notice was deficient under MCL 224.21(3) of the County Road Law, MCL 224.1 *et seq*., because the estate did not serve the notice on the county clerk. Edward J. Grant, J., on assignment from the State Court Administrative Office, denied the motion. Thereafter, the court, John D. Maurer, J., affirmed the denial for the reasons set forth in Judge Grant's opinion. The commission appealed, and the estate moved to affirm the trial court's written opinion, arguing that the notice was sufficient. The Court of Appeals granted the estate's motion to affirm in an unpublished order, entered October 25, 2016, and the commission sought leave to appeal in the Supreme Court. The Supreme Court denied leave to appeal. 500 Mich 1021 (2017). In the interim, the Court of Appeals issued *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), holding that MCL 224.21(3)—a provision of the County Road Law that requires notice to the clerk and the board of county road commissioners within 60 days after an injury occurs—controls the timing and content of presuit notices to a county road commission for injuries caused by an alleged highway defect, not MCL 691.1404(1) of the GTLA, which requires presuit notice to a governmental agency within 120 days after the injury occurs. The commission returned to the trial court and moved for summary disposition, arguing that the estate's notice was insufficient under MCL 224.21(3). The parties dis-

puted whether *Streng* applied retroactively and whether MCL 224.21(3), as applied in *Streng*, or MCL 691.1404(1) governed the estate's notice. Judge Maurer denied the commission's motion, concluding that *Streng* did not apply retroactively. The Court of Appeals, O'CONNELL, P.J., and K. F. KELLY and RIORDAN, JJ., affirmed in part and reversed in part the trial court's order, concluding that *Streng* applied retroactively; that the notice provisions of MCL 224.21(3) applied to the action; and that, even though the estate's notice was properly filed within the 60-day period in MCL 224.21(3), the notice was deficient because the estate did not serve it on the county clerk as required by that statute. 324 Mich App 549 (2018).

In Docket No. 158304, Tim E. Brugger II filed a negligence action in the Midland Circuit Court against the Midland County Board of Road Commissioners, alleging that he was injured in a motorcycle accident that was caused by a defect in a highway under the jurisdiction of the board and that the board was liable under MCL 691.1402, the highway exception of the GTLA. Brugger had notified the board of his injuries and the alleged highway defect 110 days after the crash in accordance with the GTLA's 120-day presuit-notice requirement. The board moved for summary disposition, arguing that under *Streng*, the County Road Law's 60-day presuit-notice provision applied and the notice was not sufficient. The court, Michael J. Beale, J., denied the board's motion, concluding that Brugger had correctly filed his notice within 120 days in accordance with MCL 691.1404(1). The court reasoned that the 60-day period set forth in MCL 224.21(3) did not apply because *Streng* applied prospectively only. The board appealed. In a split decision, the Court of Appeals, SHAPIRO, P.J., and M. J. KELLY, J. (O'BRIEN, J., dissenting), affirmed the trial court, agreeing that *Streng* applied prospectively only. 324 Mich App 307 (2018).

The Supreme Court granted the separate applications for leave to appeal filed by the Pearce estate and the Midland County Board of Road Commissioners. 505 Mich 1033 (2020).

In an opinion by Chief Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court *held*:

The Court of Appeals erred in *Streng* when it concluded that the presuit-notice requirements in the County Road Law apply when a plaintiff sues a county road commission under the highway exception to the GTLA. In *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), the Michigan Supreme Court held that the GTLA's notice provisions control. That holding in *Brown*

was never overruled and was binding on the Court of Appeals. Accordingly, *Streng*'s holding that the County Road Law's notice provisions govern in negligence actions against county road commissions was overruled. Because the issue was not raised by the parties, the question whether *Brown* was correctly decided was saved for another day.

1. MCL 691.1404(1) of the GTLA provides that as a condition to recovery, a person injured on a defective highway must notify the governmental agency of the injury and the defect within 120 days from the time the injury occurred. In contrast, MCL 224.21(3) provides that a person injured on a defective county road must notify the clerk and the board of county road commissioners of the occurrence within 60 days after the occurrence of the injury.

2. To determine whether *Streng* was correctly decided, it was necessary to consider the caselaw related to presuit-notice statutes. In *Brown*, the Court held that the GTLA's 120-day presuit-notice requirement controlled negligence actions brought against county road commissions, not the County Road Law's 60-day presuit-notice requirement because there was no rational basis for the County Road Law's shorter notice provision for actions against a county road commission as opposed to those against other governmental agencies. The *Brown* Court declined to overrule *Hobbs v Dep't of State Highways*, 398 Mich 90 (1976), which required the government to show actual prejudice before a statutorily required presuit-notice provision was enforced to preclude an action. Thirty years later, in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), the Court overruled *Hobbs* and *Brown*, holding that the GTLA did not contain an actual-prejudice requirement before enforcement of the notice provision, that the earlier cases had improperly engrafted that requirement onto the statute, and that a governmental agency did not have to show actual prejudice before the 120-day notice provision could be enforced. As a result, the Court stated that nothing could be saved from *Hobbs* and *Brown* because the analysis in those cases was deeply flawed. In *Streng*, the Court of Appeals held that the County Road Law's 60-day notice deadline applied to actions involving defects in county roads, not the GTLA's 120-day notice deadline, reasoning that because the *Rowland* Court repudiated *Hobbs* and *Brown*, the Court of Appeals was free to address whether the GTLA or the County Road Law notice provision applied when a plaintiff was injured on a county road. However, *Rowland* addressed whether courts should continue to apply the *Hobbs* actual-prejudice requirement in negligence cases against

the government. *Rowland* did not address MCL 224.21(3) or *Brown*'s holding that the GTLA's notice provision governed rather that of the County Road Law; therefore, any statements in the case not related to *Hobbs*'s prejudice requirement were nonbinding obiter dicta. Thus, *Rowland* did not overrule *Brown*'s holding that in actions against a county road commission, the GTLA's notice provision governed rather than the County Road Law's. In *Streng*, the Court of Appeals was required to follow *Brown*'s conclusion that the GTLA notice provision applied to actions brought against county road commissions; the *Streng* Court's conclusion otherwise was erroneous and was overruled. Because *Streng* was overruled, it was unnecessary in this case to determine whether *Streng* applied retroactively or prospectively.

Judgments of the Court of Appeals vacated and cases remanded to the respective trial courts.

Justice ZAHRA, dissenting, disagreed with the majority's conclusion that *Rowland* did not overrule all aspects of *Brown*. *Rowland* clearly stated that nothing could be saved from *Hobbs* and *Brown*, expressly conveying that all aspects of *Brown* were overruled, including application of the GTLA's notice provisions to actions brought against county road commissions; the portion of *Rowland* applying the GTLA notice provision was not obiter dictum. Instead, *Brown*'s holding as to the validity of the County Road Law's 60-day notice provision was tied up with the Court's conclusion in *Carver v McKernan*, 390 Mich 96 (1973), that actual prejudice must be shown before notice requirements could be enforced. *Rowland* repudiated both *Brown* and *Carver*, holding that notice requirements had to be enforced as written, and that holding applied to the entirety of *Brown*. As *Brown* is no longer good law, the Court of Appeals in *Streng* was permitted to apply MCL 224.21.

Justice WELCH did not participate in the disposition of these cases because the Court considered them before she assumed office.

Collison & Collison (by *Joseph T. Collison*) for the estate of Brendon Pearce.

Gray, Sowle, Iacco & Richards, PC (by *Patrick A. Richards*) for Tim E. Brugger II.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *D. Adam Tountas*, and *Jonathan B. Koch*) for the

Eaton County Road Commission and the Midland County Board of Road Commissioners.

Amicus Curiae:

Mark Granzotto, PC (by *Mark Granzotto*) and *Nolan & Shafer, PLC* (by *David P. Shafer*) for Scott Crouch.

MCCORMACK, C.J. In these consolidated cases, we consider whether the Court of Appeals correctly decided *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), and, if so, whether it should apply retroactively to all cases pending on appeal. In *Streng*, the Court of Appeals concluded that the presuit-notice requirements in the County Road Law, MCL 224.1 *et seq*., apply when a plaintiff sues a county road commission under the "highway exception" to the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. We hold that *Streng* was wrongly decided because in *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), this Court decided that the GTLA's notice provisions control, and we have not overruled that holding.

The *Streng* panel erred by failing to follow *Brown*. We therefore overrule *Streng*, vacate the decisions of the Court of Appeals, and remand these cases to the respective circuit courts for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

One hundred and ten days after plaintiff Tim Brugger was injured in an automobile accident, he served on the Midland County Board of Road Commissioners a notice of his intent to sue. Fewer than 60 days after Brendon Pearce was killed in an automobile accident,

his mother, Lynn Pearce, acting as the personal representative of Brendon's estate, served on the Eaton County Road Commission a "Notice to Eaton County of Fatal Injuries due to Defective Highway." Both Brugger's and Pearce's notices complied with the GTLA, which requires people making claims under the highway exception to give notice of the alleged injury and defective highway within 120 days of the injury. MCL 691.1404(1). But neither notice was adequate under the County Road Law, because Brugger's notice was filed more than 60 days after the accident and Pearce did not serve her notice on the Eaton County Clerk. See MCL 224.21(3) (providing that "a board of county road commissioners is not liable for damages . . . unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners").

While both cases proceeded in the trial courts, the Court of Appeals issued its decision in *Streng*. The Court of Appeals concluded that the County Road Law's 60-day provision governed the timing and content of a presuit notice directed to a county road commission rather than the GTLA's 120-day provision. *Streng*, 315 Mich App at 462-463.

Following that decision, the Midland County Road Commission relied on *Streng* to move for summary disposition in *Brugger*, arguing that Brugger's presuit notice was ineffective because it was not served within 60 days of Brugger's injury. The trial court denied the motion, concluding that *Streng* should apply prospectively only. In turn, the Eaton County Road Commission moved for summary disposition in *Pearce*, arguing that Pearce's presuit notice was insufficient because it was not served on the county clerk. The trial court

denied that motion and, like the trial court in *Brugger*, concluded that *Streng* applied prospectively only. Both defendants appealed in the Court of Appeals the trial courts' denial of their motions for summary disposition.

The *Brugger* panel held that *Streng* applied prospectively only. *Brugger v Midland Co Bd of Rd Comm'rs*, 324 Mich App 307, 316; 920 NW2d 388 (2018). But the *Pearce* panel held that *Streng* applied retroactively to all cases. *Pearce Estate v Eaton Co Rd Comm*, 324 Mich App 549, 553; 922 NW2d 391 (2018). Both opinions were published.

This Court granted leave to resolve the conflict. Besides asking whether *Streng* applied retroactively, we asked the parties to brief whether *Streng* was correctly decided. See *Brugger v Midland Co Bd of Rd Comm'rs*, 505 Mich 1033 (2020). We review these questions de novo. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008) (whether a court's ruling applies retroactively is a question reviewed de novo); *Page v Klein Tools, Inc*, 461 Mich 703, 709; 610 NW2d 900 (2000) (questions of law are reviewed de novo).

II. THE EVOLUTION OF MICHIGAN'S PRESUIT-NOTICE DOCTRINE

This Court's presuit-notice jurisprudence is the foundation for determining whether the Court of Appeals correctly decided *Streng*. It is against this backdrop that the *Streng* panel concluded that it was free to decide which notice provision applied.

A. *HOBBS*

We begin with *Hobbs v Dep't of State Highways*, 398 Mich 90; 247 NW2d 754 (1976). There, the plaintiff failed to file her presuit notice within 120 days as

required by the GTLA. *Id*. at 94. In deciding whether the plaintiff's claim was barred, the *Hobbs* Court relied on two cases: *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972), and *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973). In *Reich*, the Court held that an earlier version of the GTLA's notice provision violated equal-protection guarantees by treating plaintiffs injured by the government differently from plaintiffs injured by private tortfeasors. *Reich*, 386 Mich at 623. But *Carver*—a case involving the Motor Vehicle Accident Claims Act—held that a presuit-notice requirement for claims against the government could be constitutional as long as the requirement served a legitimate purpose. *Carver*, 390 Mich at 100. *Carver* observed that preventing prejudice to the government can be a legitimate purpose and held that a claim against the Motor Vehicle Accident Claims Fund could be dismissed on notice grounds only if the government showed that it was prejudiced by the plaintiff's inadequate notice. *Id*.

The *Hobbs* Court found *Carver*'s rationale to be "equally applicable" to cases brought under the GTLA and concluded that actual prejudice to the government because of an untimely notice was "the only legitimate purpose" the Court could identify to uphold the GTLA's notice requirement. *Hobbs*, 398 Mich at 96. Thus, *Hobbs* held, an untimely notice would not bar a claim under the GTLA absent a showing of actual prejudice. *Id*.

B. *BROWN*

Twenty years later, this Court revisited *Hobbs* in *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996). In *Brown*, the plaintiff alleged that he was injured on a county road when he tried to avoid

a pothole. Sixty-one days after the accident, the Manistee County Road Commission resurfaced the road, including the alleged pothole. Without filing a presuit notice, the plaintiff sued the road commission almost two years later. The road commission moved for summary disposition, arguing that the plaintiff violated the County Road Law's 60-day notice requirement set forth in MCL 224.21(3). *Id*. at 357. The trial court agreed, holding that MCL 224.21(3) governed and that the road commission was prejudiced by the plaintiff's failure to file a timely notice. *Id*. This seemed to be the type of prejudice the *Hobbs* Court envisioned; if the plaintiff had notified the road commission of his intent to sue during the 60-day period, the commission would have been able to preserve evidence about the pothole before it resurfaced the road.

The Court of Appeals affirmed. *Brown v Manistee Co Rd Comm*, 204 Mich App 574; 516 NW2d 121 (1994). First, the majority held that the County Road Law's notice provision controlled because it exclusively governed boards of county road commissioners. *Id*. at 577. Next, the majority, citing *Hobbs*, held that the road commission had been prejudiced by the lack of notice and thus the plaintiff's case had been properly dismissed. *Id*. at 577-578.

This Court granted leave to appeal to decide these questions:

1. Whether the plaintiff's action was governed by the County Road Law's 60-day notice provision, MCL 224.21(3), or the GTLA's 120-day notice provision, MCL 691.1404(1);

2. Whether *Hobbs*'s rule requiring a showing of prejudice should be overruled; and

3. If *Hobbs* remained good law, whether there was a showing of prejudice in this case.

Brown, 452 Mich at 356.

To the first question, *Brown* held that the GTLA's 120-day notice provision applies in a negligence action against a county road commission. *Id*. Because the Legislature intended "to provide uniform liability and immunity to both state and local governmental agencies," the *Brown* Court believed that having two distinct notice periods in two statutes was suspect. *Id*. at 361 (quotation marks and citation omitted). "By providing different notice periods," the Court explained, "the legislation divides injured persons into two classes: those injured on a defective road controlled by a county road commission and those injured on a defective road controlled by other governmental agencies." *Id*.

The Court analyzed the two statutes under rational-basis review and cited *Hobbs* to acknowledge that the only purpose it articulated for a notice requirement was to prevent prejudice to the government. *Id*. at 362. The Court concluded that it was "unable to perceive a rational basis for the county road commission statute to mandate notice of the claim within sixty days." *Id*. at 363. "Accordingly," the Court held, "the distinct sixty-day notice provision required for claims against a county road commission is unconstitutional." *Id*. at 363-364. But the Court also held that the GTLA's 120-day notice provision was reasonable and, therefore, constitutional because it "provide[d] a claimant sufficient time to serve the governmental agency with notice of an alleged injury and corresponding defect." *Id*. at 364. Finally, *Brown* declined to overrule *Hobbs* and reaffirmed its requirement that the government show actual prejudice before a statutory presuit-notice provision would be enforced. *Id*. at 365.

Justice RILEY dissented. But while she would have overruled *Hobbs*'s prejudice requirement because she believed the Court lacked the power to engraft it onto the GTLA, she agreed "with the majority's conclusion that plaintiff must comply with the 120-day notice requirement[.]" *Brown*, 452 Mich at 369 (RILEY, J., dissenting).

C. *ROWLAND*

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), this Court once again granted leave to appeal to consider overruling *Hobbs*. There, the plaintiff served the county road commission with notice of her claim 140 days after her accident. The trial court denied the road commission's motion for summary disposition, finding that there was a genuine issue of material fact about whether the road commission was prejudiced by the untimely notice, and the Court of Appeals affirmed. *Rowland v Washtenaw Co Rd Comm*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2005 (Docket No. 253210).

This Court's grant order made clear that it had *Hobbs* in its sights; it directed the parties to brief whether *Hobbs* and *Brown* should be overruled and, if so, whether a decision doing so would apply retroactively. *Rowland v Washtenaw Co Rd Comm*, 474 Mich 1099, 1099-1100 (2006).

We answered both questions yes. *Rowland*, 477 Mich at 200. Because we held that MCL 691.1404(1) should be enforced as written, we overruled *Hobbs*'s and *Brown*'s prejudice engraftment. *Id*. We concluded that *Hobbs* and *Brown* were "wrongly decided and poorly reasoned" because they presumed that governmental notice requirements were unconstitutional if

the government was not prejudiced by an untimely notice. *Id*. at 210 (capitalization omitted). This reasoning, we explained, was indefensible and could not be saved by the *Hobbs* Court's belief that the " 'only legitimate purpose' " of the GTLA's notice provision was to protect the government from being prejudiced. *Id*., quoting *Hobbs*, 398 Mich at 96.

Rowland held that the GTLA's notice requirement was constitutional and enforceable. *Rowland*, 477 Mich at 213. After describing *Hobbs* and *Brown* as remarkable examples of "judicial usurpation of legislative power," the Court announced that "[n]othing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed." *Id*. at 213-214. As a result, we held that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written." *Id*. at 219. That meant that a plaintiff suing a county road commission had to serve a notice within 120 days that identified the location and nature of the highway defect, the injury suffered, and the known witnesses to the accident. *Id*. The GTLA itself does not require that the government demonstrate prejudice to enforce its notice provision. *Id*. Thus, we explained, "the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice*." *Id*.

D. *STRENG*

Nine years after *Rowland*, the Court of Appeals was asked to decide whether the County Road Law or the GTLA controlled presuit notices in a negligence action filed against a county road commission. *Streng*, 315 Mich App 449. The *Streng* panel approached the question as if it were working off a blank slate. It explained

that *Rowland* "repudiated the entirety of" *Hobbs* and *Brown* and that *Brown* was the only precedential case that "substantively considered the potential conflicts between [the County Road Law] and the GTLA." *Id*. at 459-460. The panel acknowledged that *Rowland* did not address the County Road Law, noting correctly that *Rowland* "expressed neither approval nor disapproval" with the application in *Hobbs* and *Brown* of the GTLA's notice requirement and, instead, "simply focused on the lack of statutory language in MCL 691.1404 allowing exceptions to the time limit." *Id*. at 459-460.

The *Streng* panel conducted its own analysis about which notice provision would govern and held that the County Road Law's 60-day notice deadline applied. *Id*. at 463. "In sum," the panel concluded, "appellate courts appear to have overlooked the time limit, substantive requirements, and service procedures required by MCL 224.21(3) when the responsible body is a county road commission." *Id*.

III. ANALYSIS

Streng's fundamental flaw was its conclusion that *Rowland* had done away with *Brown* in its entirety. This error is understandable given *Rowland*'s declaration that "[n]othing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed." *Rowland*, 477 Mich at 214.

But "[t]he Court of Appeals is bound to follow decisions by this Court except where those decisions have *clearly* been overruled or superseded . . . ." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016). Even after a decision has been overruled in part, its holdings left untouched remain binding precedent. In fact, courts often cite

decisions for still valid legal principles even though the decision has been overruled in part on other grounds. See, e.g., *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 203; 747 NW2d 811(2008) (citing *Mich Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568; 519 NW2d 864 (1994), overruled in part on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63 (2003), for the proposition that "legal action" is synonymous with "lawsuit"). Despite *Rowland*'s broad swipe at *Brown*, it did not *clearly* overrule *Brown*'s holding on the competing notice provisions of the County Road Law and the GTLA. And whether the *Rowland* Court would have overruled this holding, had it been properly presented with the opportunity to do so, is neither here nor there.

The question *Rowland* answered was whether courts should continue to apply *Hobbs*'s prejudice requirement in negligence cases against the government. The grant order did not mention the County Road Law at all, even though the case concerned a county road accident; instead, the Court asked the parties to brief whether *Hobbs*'s prejudice requirement should be overruled. *Rowland*, 474 Mich at 1099-1100. And the opening sentence of the opinion confirms the scope of the Court's work: "The issue in this case is whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written." *Rowland*, 477 Mich at 200. *Rowland*'s one-sentence summary of *Brown* focused exclusively on *Brown*'s decision not to overrule *Hobbs*. *Id*. at 209. Not surprisingly therefore, *Rowland* never addressed MCL 224.21(3) or *Brown*'s holding that the GTLA's notice provision governed rather than the County Road Law's.

Rowland's reasoning for overruling *Brown* is more evidence that it did not displace *Brown*'s holding that the GTLA's notice provision applied: "The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced." *Id*. at 210. The Court considered and overruled only *Brown*'s holding affirming *Hobbs*, and therefore necessarily left *Brown*'s first holding—that the GTLA governed because the County Road Law's notice provision was unconstitutional—in place.

Because the issue before the *Rowland* Court was whether to overrule *Hobbs*'s prejudice requirement, any statements *Rowland* made that were unnecessary to decide that question were nonbinding obiter dicta. Unlike holdings, "[o]biter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication." *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) (quotation marks and citation omitted). Weighing in on the validity of *Brown*'s first holding was unnecessary for the *Rowland* Court to dispose of *Hobbs*'s prejudice engraftment. The only reason *Brown* was at issue at all in *Rowland* was because it reaffirmed *Hobbs*. Thus, *Rowland*'s declaration that "[n]othing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed" is nonbinding obiter dictum. *Rowland*, 477 Mich at 214.

And there is more evidence that *Rowland* did not wipe *Brown*'s slate clean. *Rowland* involved an action against a county road commission, and it held that the GTLA's 120-day notice provision applied. It concluded that "notice of the injuries sustained and of the high-

way defect must be served on the governmental agency *within 120 days of the injury*." *Id*. at 200 (emphasis added). Throughout the opinion, the *Rowland* Court emphasized that the GLTA's notice period controlled. For example, the *Rowland* majority observed that "in *Brown* the road commission was prejudiced because it, unaware that there had been an accident, repaved the road where the accident happened before the 120-day notice period expired." *Id*. at 219 n 16. And it called the GTLA the "controlling legal authority." *Id*. at 222. Finally, *Rowland*, 477 Mich at 210-211, quoted Justice RILEY's dissent in *Brown* approvingly without challenging her explicit agreement "with the majority's conclusion that plaintiff must comply with the 120-day notice requirement," *Brown*, 452 Mich at 369 (RILEY, J., dissenting). Any reader (with or without a law degree) would have to presume that the GTLA's 120-day notice requirement continued to control.

The *Streng* panel should have followed this Court's decision in *Brown* and applied the GTLA's presuit requirements, not the requirements provided in the County Road Law; it could not decide this question for itself. *Brown*'s holding on that point survived this Court's decision in *Rowland*, and it was therefore binding on the *Streng* panel. Whether *Brown* correctly decided this question is for this Court to decide. But because it was not raised by the parties here, we save it for another day.

IV. CONCLUSION

We overrule *Streng*'s holding that the County Road Law's notice provision governs in negligence actions against county road commissions rather than the GTLA's. Therefore, we need not address the matter of *Streng*'s retroactive application. We vacate the deci-

sions of the Court of Appeals and remand these cases to the respective circuit courts for further proceedings.

VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

ZAHRA, J. (*dissenting*). I respectfully dissent. It should not be that one needs a law degree to understand the opinions of this Court. In *Rowland v Washtenaw Co Rd Comm*,[1] this Court expressly overruled its prior decision in *Brown v Manistee Co Rd Comm*.[2] In doing so, the Court held that "[n]othing can be saved from . . . *Brown* because the analysis [it] employ[s] is deeply flawed."[3] This holding is clear, concise, and unambiguous. I surmise that virtually all people of ordinary intelligence who read these words would conclude that nothing from the *Brown* opinion remains good law. Yet today the majority concludes that when this Court proclaimed that "nothing can be saved from . . . *Brown*," it simply didn't mean it. Calling this clear, concise, and unambiguous holding obiter dictum, the Court today proclaims that aspects of *Brown* have somehow survived. Because the Court "save[s] . . . for another day" its view of whether *Brown* was rightly decided, I offer no opinion on its correctness. But on the question of whether any aspect of *Brown* is still good law, *Rowland* resoundingly answers that it is not.

Michigan has two presuit-notice statutes that, by their terms, apply to accidents involving allegedly defective highways maintained by a county govern-

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[1] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

[2] *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996).

[3] *Rowland*, 477 Mich at 214.

ment. The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., requires notice to *any* governmental defendant within 120 days of an injury, MCL 691.1404(1), while the County Road Law, MCL 224.1 *et seq*., requires notice to a county road commission within 60 days after the occurrence of the injury involving a highway within its jurisdiction, MCL 224.21(3). This Court's *Brown* opinion set forth two pertinent holdings. First, the Court held that there was no rational basis to require that county road commissions receive notice within 60 days if 120 days is adequate notice for other units of government. Second, the Court reaffirmed past precedent holding that the only legitimate purpose for presuit-notice requirements of the sort at issue in *Brown* is to prevent prejudice to the defendant, meaning that the requirements are unenforceable unless the government can show it was prejudiced by the failure to provide timely notice. The majority holds that *Rowland* only overruled this second holding, leaving the first holding intact. Thus, the majority reasons, the Court of Appeals was not free to deviate from that aspect of *Brown* in *Streng v Bd of Mackinac Co Rd Comm'rs*.[4] But the majority's holding obscures the fact that both of *Brown*'s holdings were premised on the same skepticism toward notice requirements that *Rowland* discarded.

Rowland provided a detailed "history of this Court's caselaw involving notice statutes"[5] that illustrated the common themes in both of *Brown*'s holdings. Over time, this Court moved from enforcing governmental-immunity notice provisions as plainly written, to en-

[4] *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016).

[5] *Rowland*, 477 Mich at 205-210 (capitalization omitted).

grafting upon such statutes legal analysis unsupported by a traditional understanding of Michigan's principles of constitutional interpretation and statutory construction. *Rowland* returned the Court to its original understanding that governmental-immunity notice provisions should be enforced as plainly written.

"From its earliest years this Court, evidently detecting no constitutional impediments, . . . enforced governmental immunity mandatory notice provisions according to their plain language."[6] This began to change in 1970, when in *Grubaugh v St Johns*,[7] this Court addressed whether the 60-day notice requirement of § 8 of Chapter 22 of the general highway statute[8] (the predecessor of the GTLA's highway exception) was constitutionally infirm as applied to incapacitated plaintiffs.[9] *Grubaugh* reasoned that "[t]o take away [an incapacitated plaintiff's] cause of action on the sixty-first day because he could not meet the notice provisions of the act would deprive him of a vested right of action without due process of law."[10] Therefore, this Court held "that the notice provisions of § 8 of chapter 22 of the general highway statute are constitutionally void as depriving claimant of due process of law."[11]

Two years later in *Reich v State Hwy Dep't*,[12] this Court determined that the 60-day provision newly enacted in the GTLA was unconstitutional as applied to minors. Relying on the reasoning in *Grubaugh*, the

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[6] *Id*. at 205.

[7] *Grubaugh v St Johns*, 384 Mich 165; 180 NW2d 778 (1970).

[8] 1948 CL 242.8.

[9] *Grubaugh*, 384 Mich at 167.

[10] *Id*. at 175.

[11] *Id*. at 176.

[12] *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972).

Court held that the notice requirement violated the due-process rights of minors. Further, the Court held that the notice provision violated the plaintiffs' right to equal protection of the laws because it treated a class of plaintiffs who filed a negligence claim against the government differently than it treated plaintiffs filing a cause of action against a private tortfeasor.[13] *Reich* further explained that the "diverse treatment of members of a class along the lines of governmental or private tortfeasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection."[14] This Court in *Rowland* quoted Justice BRENNAN's dissent in *Reich*, in which he identified his concerns with the majority's equal-protection analysis:

> The legislature has declared governmental immunity from tort liability. The legislature has provided specific exceptions to that standard. The legislature has imposed specific conditions upon the exceptional instances of governmental liability. The legislature has the power to make these laws. This Court far exceeds its proper function when it declares this enactment unfair and unenforceable.[15]

Although the statute at issue in *Reich* was the GTLA, in *Crook v Patterson*,[16] the Court of Appeals recognized that *Reich*'s reasoning applied with equal

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[13] *Id*. at 623-624.

[14] *Id*. at 623.

[15] *Id*. at 626 (BRENNAN, J., dissenting); see *Rowland*, 477 Mich at 207, quoting *Reich*, 386 Mich at 626 (BRENNAN, J., dissenting).

[16] *Crook v Patterson*, 42 Mich App 241, 241; 201 NW2d 676 (1972).

force to the County Road Law, holding that the 60-day notice provision in MCL 224.21(3) was also unconstitutional.

Thereafter, the GTLA was amended to require notice within 120 days, rather than within 60,[17] but the County Road Law was not so amended.[18] Further, with the increased notice period, the Court apparently thought better of a per se rule invalidating notice requirements. This re-evaluation occurred in two steps. In *Carver v McKernan*,[19] the Court examined the Motor Vehicle Accident Claims Act,[20] which required that a claimant provide notice within six months of the accrual of the cause of action. As the fund was exclusively a benefits program provided by the government, the case did not present the same circumstance as in *Reich* of dividing a "natural class" into "subclasses." Nevertheless, *Carver* acknowledged "that statutes which [sic] limit access to the courts by people seeking redress for wrongs are not looked upon with favor by us."[21] While the Court expressed a willingness to "acquiesce in the enforcement of statutes of limitation when we are not persuaded that they unduly restrict such access," the Court made clear that "we look askance at devices such as notice requirements which have the effect of shortening the period of time set forth in such statutes."[22] The Court concluded that a

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[17] MCL 691.1404, as amended by 1970 PA 155.

[18] MCL 691.1404 was amended by 1970 PA 155 before our decision in *Reich* was issued but after the underlying events of the case. Accordingly, the new 120-day notice provision was inapplicable to the case.

[19] *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973).

[20] MCL 257.1101 *et seq*.

[21] *Carver*, 390 Mich at 99.

[22] *Id*.

notice requirement could be enforced only if the government could show it was prejudiced by a lack of timely notice.[23]

Thereafter, in *Hobbs v Mich State Hwy Dep't*,[24] the Court applied the logic of *Carver* to the GTLA. Applying *Carver*'s willingness to " 'acquiesce in the enforcement of statutes [limiting access to the courts] when we are not persuaded that they unduly restrict such access,' " the Court held that MCL 691.1404(1)'s notice requirement was not necessarily unconstitutional.[25] Consistently with *Carver*, however, the Court said that "actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision[.]"[26]

While these cases did not implicate the County Road Law, *Brown* involved a suit against a county in which the county invoked the 60-day notice requirement of MCL 224.21(3). Thus, this Court in *Brown* addressed head on whether the 60-day notice provision under MCL 224.21(3) or the 120-day notice provision under MCL 691.1404(1) applied in cases involving county road commissions.[27] The Court also addressed whether the prejudice requirement in *Hobbs* should be overruled.[28] *Brown* first recognized the competing provisions under the GTLA and the County Road Law, and retreated to an equal-protection analysis similar to that used in *Reich* to find the 60-day notice provision of MCL 224.21(3) unconstitutional. The Court explained

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[23] *Id*. at 100.

[24] *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976).

[25] *Id*. at 96, quoting *Carver*, 390 Mich at 99.

[26] *Hobbs*, 398 Mich at 96.

[27] *Brown*, 452 Mich at 356.

[28] *Id*.

that "[b]y providing different notice periods, the legislation divides injured persons into two classes: those injured on a defective road controlled by a county road commission and those injured on a defective road controlled by other governmental agencies."[29] The Court believed that the two provisions treated persons of a similar class differently:

> [A] person injured in a county in which there is no county road commission would be required to file notice of the claim within 120 days, whereas an identical person injured in a county that has a county road commission would be required to provide notice within sixty days to the county road commissioner.[30]

The Court concluded, "[D]espite a presumption of constitutionality, we are unable to perceive a rational basis for the county road commission statute to mandate notice of a claim within sixty days."[31] Therefore, *Brown* held that "the distinct sixty-day notice provision required for claims against a county road commission is unconstitutional."[32] The *Brown* Court also reaffirmed *Hobbs* and the prejudice requirement as it related to the 120-day notice required under the GTLA, and it held that the road commission was not prejudiced by the defective notice.[33]

This Court's trend to view with disfavor statutory governmental-immunity notice provisions stopped with *Rowland*. *Rowland* reverted back to the more traditional analysis employed for more than 100 years before *Grubaugh*, *Reich*, *Carver*, *Hobbs*, and *Brown*;

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[29] *Id*. at 361.

[30] *Id*. at 363.

[31] *Id*.

[32] *Id*. at 363-364.

[33] *Id*. at 365-366, 368-369.

one that provides deference to the Legislature's law-making function. The facts in *Rowland* were straightforward. There was no dispute that the plaintiff failed to file her notice with the road commission until 140 days after the accident. The defendant invoked MCL 691.1404(1), and the Court concluded that the notice provision passed constitutional muster. The Court explained:

> We reject the hybrid constitutionality of the sort *Carver*, *Hobbs*, and *Brown* engrafted onto our law. In reading an "actual prejudice" requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible. *Hobbs* and *Brown* are remarkable in the annals of judicial usurpation of legislative power because they not only seized the Legislature's amendment powers, but also made any reversing amendment by the Legislature impossible.[34]

Rowland continued even further, overruling entirely, in no uncertain terms, these two decisions: "Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed," and "we are persuaded that [those cases] were wrongly decided."[35] Notably, when *Rowland* overruled *Brown*, it repudiated both the specific notion that avoiding prejudice to the government was the only rationale for notice requirements, as well as the general notion that the judiciary may "look askance" at notice statutes.[36] *Rowland* noted that "legislation invariably involves line drawing and social legislation involving line drawing does not violate equal protection guarantees when it

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[34] *Rowland*, 477 Mich at 213-214.

[35] *Id*. at 214-215.

[36] *Id*. at 210 (quotation marks and citations omitted).

has a 'rational basis,' i.e., as long as it is rationally related to a legitimate governmental purpose."[37] The Court upheld the constitutionality of notice requirements without regard to prejudice to the government: "*Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced."[38] *Brown* could not be "rescued by musings to the effect that the justices ' "look askance" ' at devices such as notice requirements[.]"[39] In rejecting the specific notion that avoiding prejudice to the government is the sole rationale for notice requirements, *Rowland* listed many others—"allowing time for creating [cash] reserves . . . , reducing the uncertainty of the extent of future demands, or even . . . forc[ing] the claimant to an early choice regarding how to proceed."[40] *Rowland* also noted that "common sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits."[41]

This reasoning completely undermined the entirety of *Brown*'s analysis. Both of *Brown*'s holdings were built upon the specific presumption that the only legitimate rationale for notice requirements was to avoid prejudice to the government, which was an instantiation of *Carver*'s general rule of skepticism toward notice requirements. By repudiating both the

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[37] *Id*. at 207 (citation omitted).

[38] *Id*. at 210.

[39] *Id*. (citations omitted).

[40] *Id*. at 212.

[41] *Id*.

specific presumption and the general rule, *Rowland* eliminated both of *Brown*'s holdings.

More specifically, *Brown* acknowledged that MCL 224.21(3)'s 60-day notice requirement only needed to survive rational-basis review, but based on the premise that avoiding prejudice to the government was the notice requirement's only legitimate purpose, held that there was no rational basis to believe counties needed such prompt notice. *Rowland* eliminated this premise—in its place, the Court offered numerous additional interests besides preventing prejudice to find a rational basis for a notice requirement. *Brown* also asserted that there was no legitimate reason to treat claims against county governments differently from claims against other levels of government. But as *Rowland* made clear, notice laws need not prove their own validity. " 'It being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred *any limitations it chose*.' "[42] In short, *Brown*'s equal-protection and prejudice holdings were inextricably intertwined, and the reasoning employed by the *Rowland* Court in rejecting *Brown*'s analysis of the potential rational legislative purposes of notice provisions applies with equal force to *Brown*'s analysis of the competing notice provisions of the County Road Law and the GTLA. It follows that *Rowland*'s repudiation of *Brown*'s reasoning dismantled *Brown*'s holding rejecting the shorter notice period for road commission claims as unconstitutional.[43] Both of *Brown*'s holdings are no longer good

[42] *Id*., quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919 (1908) (emphasis added).

[43] Notably, the bulk of *Brown*'s "rational basis" analysis supported its equal-protection holding, not its prejudice holding. In fact, *Brown*'s

law, and the Court of Appeals in *Streng* was therefore permitted to apply MCL 224.21.

The majority notes that *Rowland* discussed only the GTLA without mentioning the County Road Law. But this is not surprising because MCL 691.1404(1) was the only statute the defendant invoked, and while that defendant would apparently have also been *eligible* to

analysis of the prejudice issue did not contain an in-depth rational-basis analysis but, instead, relied largely on stare decisis and legislative acquiescence in upholding *Hobbs*. Consequently, in rejecting *Brown*'s rational-basis reasoning, the *Rowland* Court would not have considered its analysis as pertaining only to *Brown*'s prejudice holding. Indeed, there are additional indications in the *Rowland* opinion that the Court understood that it was opining on much more than prejudice. For example, the *Rowland* majority explicitly disagreed with the majority's analysis in *Reich*, which is notable because *Reich* was an equal-protection decision in which the majority concluded that the 60-day notice provision "clearly violates the equal protection guarantees of our state and Federal Constitutions." *Reich*, 386 Mich at 623. *Reich* did not refer to a prejudice requirement because that concept was developed years later in our caselaw. Yet the *Rowland* majority called *Reich*'s equal-protection analysis "simply incorrect," elaborating that "[p]rivate and public tortfeasors can be treated differently in the fashion they have been treated here by the Legislature. It does not offend the constitution to do so because with economic or social regulation legislation, such as this statute, there can be distinctions made between classes of persons if there is a rational basis to do so." *Rowland*, 477 Mich at 207. *Rowland* then proceeded to quote Justice BRENNAN's dissent in *Reich*, which the *Rowland* majority described as "pithily" pointing out the problems with the *Reich* majority's analysis. *Id*., citing *Reich*, 386 Mich at 626 (BRENNAN, J., dissenting). If *Rowland* intended to address only *Brown*'s prejudice requirement, it need not have explicitly rejected the Court's equal-protection reasoning in *Reich*. Moreover, footnote 9 of the *Rowland* opinion notes that the "vast majority of jurisdictions that have considered such a constitutional challenge [have] concluded that notice-of-claim and statute-of-limitations rules placed on persons bringing tort actions against governmental entities are rationally related to reasonable legislative purposes *and thus do not violate equal protection*." *Rowland*, 477 Mich at 213 n 9 (emphasis added). The *Rowland* Court then explicitly "agree[d] with the majority rule." *Id*. At the very least, these statements suggest that the *Rowland* majority did not view its analysis as speaking only to the prejudice requirement.

rely upon the County Road Law, defendant did not do so. Defendant's litigation strategies are not a legitimate basis to cabin our *Rowland* holding to say less than it did. The *reasoning* of *Rowland*—its repudiation of *Carver*'s skepticism toward notice laws—is equally applicable to *Brown*'s treatment of the County Road Law and the GTLA. It is not appropriate to write off *Rowland*'s repudiation of *Carver*'s skepticism toward notice requirements as mere obiter dictum—it is, rather, the essence of our *Rowland* opinion, which said the *Carver* principle "ha[d] no claim to being defensible constitutional theory," was "entirely indefensible," and "usurped the Legislature's power . . . ."[44] The majority also notes that *Rowland* cited with approval Justice RILEY's partial dissent in *Brown* and observes that Justice RILEY concurred as to the portion of *Brown* that held that MCL 224.21(3) is unconstitutional. But the fact that there was language from her partial dissent that the *Rowland* majority thought was well-put does not mean it adopted her position in toto.[45]

In sum, within the four corners of *Rowland*, this Court said in no uncertain terms that "[n]othing can be

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[44] *Id*. at 210, 211, 213.

[45] Although not dispositive, I also find it telling how novel the majority's conclusions are to the other jurists who are implicated in this proceeding. Including *Streng* and the instant cases, eight Court of Appeals judges on three different panels have reviewed these issues and none of them concluded that *Rowland* had not overruled *Brown*—including the judge who argued that *Streng* was wrongly decided. See *Brugger v Midland Co Bd of Rd Comm'rs*, 324 Mich App 307, 318-321; 920 NW2d 388 (2019) (SHAPIRO, P.J., concurring) (arguing that under *Apsey v Mem Hosp*, 477 Mich 120; 730 NW2d 695 (2007), the plaintiffs should have had the option of proceeding under either MCL 691.1404(1) *or* MCL 224.21(3)). Indeed, even one of the plaintiffs here, the estate of Brendon Pearce, in this Court forthrightly concedes that *Streng* was rightly decided—a concession that has contained within it an acknowledgment that *Rowland* overruled *Brown*.

saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed."[46] This expressly communicated that *Brown* had been totally eradicated above and beyond its consequences for the GTLA. The majority erroneously writes this off as mere obiter dictum. But *Brown*'s holding as to the validity of MCL 224.21(3) was bound up with *Carver*'s requirement that special justifications must be provided to enforce notice requirements. *Rowland* repudiated *Brown* and *Carver*, holding that notice requirements are to be enforced as written, a holding that applies to the entirety of *Brown*. The current state of our caselaw is clear and provides no basis to overrule *Streng*. For these reasons, I dissent.

WELCH, J., did not participate in the disposition of these cases because the Court considered them before she assumed office.

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[46] *Rowland*, 477 Mich at 214.

DEPARTMENT OF TALENT & ECONOMIC DEVELOPMENT/ UNEMPLOYMENT INSURANCE AGENCY v GREAT OAKS COUNTRY CLUB, INC

Docket No. 160638. Argued on application for leave to appeal March 4, 2021. Decided June 7, 2021.

This case stemmed from a dispute over the unemployment-insurance tax rate applicable to Great Oaks Country Club, Inc. (Great Oaks). All employers subject to the Michigan Employment Security Act (the MESA), MCL 421.1 *et seq*., are responsible for paying unemployment-insurance taxes to the Department of Talent and Economic Development/Unemployment Insurance Agency (the Agency). The Agency determined that Great Oaks was not entitled to the new-employer tax rate under the MESA, specifically MCL 421.13m(2)(a)(*i*)(A) and (B). Under MCL 421.19, an employer is taxed either at the new-employer rate or at a calculated, experienced-employer rate based on its unemployment experience. Before January 1, 2011, Great Oaks became a client employer of a Professional Employer Organization (PEO) that operated in Michigan. In 2011, statutory changes became effective that required client-level reporting by PEOs. Because Great Oaks was a client employer of a PEO before 2011, it was not required to change its reporting method until January 1, 2014. It was undisputed that Great Oaks had been a client employer of the PEO for at least 8 quarters as of January 1, 2014, and that Great Oaks had reported no employees or payroll for those same 8 quarters. It was also undisputed that Great Oaks's PEO did not change its reporting method until January 1, 2014. Great Oaks protested the Agency's determination that Great Oaks was not entitled to the new-employer tax rate. The Agency rejected Great Oaks's protests, and Great Oaks appealed to an administrative-law judge (ALJ). The ALJ determined that because Great Oaks had 8 quarters of no employment or payroll before January 1, 2014, it was entitled to the new-employer tax rate. The ALJ further ruled that the phrase "beginning January 1, 2014" in MCL 421.13m(2)(a)(*i*)(A) and (B) was the date by when a client employer must have accrued 8 quarters of not reporting employees or payroll. The Agency appealed the ALJ's decision in the Michigan Compensation Appellate Commission (the MCAC), and

the MCAC affirmed the ALJ's decision. The Agency appealed the MCAC's decision in the Oakland Circuit Court, and the court, Nanci J. Grant, J., affirmed the MCAC's decision. The Agency appealed in the Court of Appeals. The Court of Appeals, MURRAY, C.J., and METER and FORD HOOD, JJ., held that Great Oaks was not entitled to the new-employer tax rate, interpreting MCL 421.13m(2)(a)(*i*)(A) and (B) to require Great Oaks to have reported no employees or payroll for a period of 12 or more calendar quarters to qualify for the new-employer tax rate. 329 Mich App 581 (2019). In so holding, the Court of Appeals rejected Great Oaks's interpretation that a client employer must have accrued the relevant number of calendar quarters in which it reported no employees or payroll by January 1, 2014, to be assessed the new-employer tax rate and instead adopted the Agency's interpretation that a client employer must have switched to client-level reporting before January 1, 2014, to be assessed the new-employer tax rate. Great Oaks moved for reconsideration, which the Court of Appeals denied. Great Oaks sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 505 Mich 1056 (2020).

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal, *held*:

Employers liable for paying unemployment-insurance taxes are required to file quarterly tax reports with the Agency, and some employers utilize PEOs to file these reports. Before 2011, a PEO could report a client's payroll under the PEO's own unemployment account rather than the client employer's. But with the enactment of 2010 PA 370, PEOs were required to report the payroll information under the client employer's unemployment account beginning January 1, 2014. This practice is known as "client-level reporting," and reporting in this fashion was discretionary beginning January 1, 2011, but became mandatory as of January 1, 2014. When 2010 PA 370 was passed, the Legislature also changed how the unemployment tax rate is calculated for client employers with the enactment of 2010 PA 383. Although the PEO remains the employer liable for paying unemployment-insurance contributions, the unemployment tax rate is no longer based on the PEO's prior account and experience. Rather, beginning January 1, 2014, for purposes of calculating unemployment tax rates, the calculation is based on the number of years the client employer is deemed to have employed a staff, either directly or through the PEO, and each client employer is taxed at its own rate. MCL 421.13m, which was enacted into law on

January 1, 2011, governs the applicable unemployment tax rate for PEOs and their client employers. MCL 421.13m was amended in 2011 by 2011 PA 269 and again in 2012 by 2012 PA 219. MCL 421.13m(2)(a)(*i*)(A) currently provides, in pertinent part, that if the client employer reported no employees or no payroll to the Agency for 8 or more calendar quarters or, beginning January 1, 2014, for 12 or more calendar quarters, the client employer's unemployment tax rate will be the new-employer tax rate. MCL 421.13m(2)(a)(*i*)(B) currently provides that if the client employer was a client employer of the PEO for less than 8 calendar quarters or, beginning January 1, 2014, for less than 12 calendar quarters, the client employer's unemployment tax rate will be based on the client employer's prior account and experience. MCL 421.13m(2)(a)(*ii*) provides that a business entity that is a contributing employer and becomes a client employer of the PEO on or after January 1, 2014, shall retain its existing unemployment tax rate or establish a new rate as provided in MCL 421.19. Finally, MCL 421.13m(2)(b) provides that a PEO that is a liable employer and that was operating in this state before January 1, 2011, may elect and use the reporting method in MCL 421.13m(2)(a) before January 1, 2014, but shall report using the method in MCL 421.13m(2)(a) on and after January 1, 2014. In this case, Great Oaks's interpretation—not the Agency's interpretation—was correct: MCL 421.13m(2)(a)(*i*)(A) and (B) require a client employer to have accrued the relevant number of calendar quarters in which it reported no employees or payroll by January 1, 2014, to be assessed the new-employer tax rate. Because Great Oaks reported no employees or payroll for 8 consecutive calendar quarters before January 1, 2014, Great Oaks was entitled to be assessed the new-employer tax rate. Section 13m(2)(a)(*i*)(A) refers to some number of calendar quarters—8 or 12—in which the client employer reported no employees or no payroll to the agency; crucially, nowhere does it speak of a reporting *method* the way that MCL 421.13m(2)(b) does. Thus, when MCL 421.13m(2)(a)(*i*)(A) is read alongside MCL 421.13m(2)(b), giving effect to each, the phrase "beginning January 1, 2014" in MCL 421.13m(2)(a)(*i*)(A) refers to the date by when a certain number of nonreporting quarters must have been accrued, not to the date by when the switch to the method of client-level reporting occurred. If the Legislature had wanted MCL 421.13m(2)(a)(*i*)(A) to govern the assessment of a certain tax rate for client employers based on when they switched to the *method* of client-level reporting, it could have included language to that effect in MCL 421.13m(2)(a)(*i*)(A). But it did not. Instead, it provided only for the assessment of a certain tax rate to client employers based on

a certain *number* of nonreporting quarters accrued by a certain date, namely, January 1, 2014. Similarly, MCL 421.13m(2)(a)(*i*)(B) also refers only to some *number* of quarters, not a reporting *method*, vis-à-vis the appropriate tax rate to be assessed to client employers. As with MCL 421.13m(2)(a)(*i*)(A), in MCL 421.13m(2)(a)(*i*)(B), "January 1, 2014" functions as a cut-off date. Reading the subsections together, MCL 421.13m(2)(a)(*i*)(A) delineates under what circumstances a client employer like Great Oaks is entitled to the new-employer tax rate. MCL 421.13m(2)(a)(*i*)(B) then fills in the rest of the picture, clarifying that a client employer is to be assessed an experienced-employer tax rate if the client employer was a client employer of the PEO for less than 8 calendar quarters or, beginning January 1, 2014, for less than 12 calendar quarters. As with MCL 421.13m(2)(a)(*i*)(A), MCL 421.13m(2)(a)(*i*)(B) does not speak of a reporting *method* but, rather, of a certain *number* of quarters in which the client employer was in a relationship with its PEO, with January 1, 2014, serving as the cut-off date for the relevant number of quarters needed for assessment of the experienced-employer tax rate. For MCL 421.13m(2)(a)(*i*)(A) to mean what the Agency contends it means, it would have to say something about a reporting method, not just that not reporting employees or payroll must occur for a certain number of quarters "beginning January 1, 2014." And for MCL 421.13m(2)(a)(*i*)(B) to mean what the Agency contends it means, it likewise would need to say something about a reporting method, not just that a relationship between a client employer and its PEO for a certain number of quarters corresponds to a certain tax rate. Further, the amendments to MCL 421.13m that were made in 2011 and 2012—which changed "8" to "12" and then restored "8," all within 18 months of the enactment of MCL 421.13m—indicate that the purpose of the 2012 amendment was remedial, intended to undo the 2011 amendment's erasure of the 8-quarter safe-harbor condition so that client employers like Great Oaks under the facts of the instant case would receive the new-employer tax rate under MCL 421.13m. The Court of Appeals in this case failed to account for the exclusive, mandatory nature of MCL 421.13m; the Court of Appeals' interpretation of MCL 421.13m and MCL 421.19 rendered MCL 421.19 nugatory. The insertion of the clause "or, beginning January 1, 2014, for 12 or more calendar quarters" placed PEOs governed by MCL 421.13m on even footing with the 12-quarter scheme in place for all other employers governed by MCL 421.19 after the transition period—i.e., the time prior to January 1, 2014—concluded, and the statutory history supported this reading: MCL 421.19, which was amended at the same time

as MCL 421.13m by 2011 PA 269, was amended in that way to bring the standards governing non-PEO-using employers subject to MCL 421.19 into conformity with those standards governing PEO-using client employers subject to MCL 421.13m. In sum, because Great Oaks used a PEO and reported no employees or payroll to the Agency for 8 quarters prior to January 1, 2014, Great Oaks was entitled to the new-employer tax rate.

Court of Appeals opinion reversed and case remanded to the Agency for entry of a decision assessing Great Oaks the new-employer tax rate under MCL 421.13m.

STATUTORY INTERPRETATION — MICHIGAN EMPLOYMENT SECURITY ACT — UNEMPLOYMENT INSURANCE TAX RATE — NEW-EMPLOYER TAX RATE.

Under MCL 421.13m(2)(a)(*i*)(A) and (B) of the Michigan Employment Security Act, MCL 421.1 *et seq*., a client employer of a professional employer organization (PEO) that is a contributing employer and was a client employer of the PEO on the date that the PEO changed to the reporting method provided in MCL 421.13m(2)(a) must have accrued the relevant number of calendar quarters in which it reported no employees or no payroll by January 1, 2014, to be assessed the new-employer tax rate.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Zachary A. Risk*, Assistant Attorney General, for the Department of Talent and Economic Development/Unemployment Insurance Agency.

Stark Reagan, PC (by *Christopher E. LeVasseur*) and *Thav Gross PC* (by *Kenneth L. Gross* and *Jeffrey B. Linden*) for Great Oaks Country Club, Inc.

ZAHRA, J. This appeal arises from a relationship between an employer, defendant-appellant Great Oaks Country Club, Inc. (Great Oaks), and a Professional Employer Organization (PEO).[1] We are called upon to

[1] A PEO is often referred to as an employee-leasing company. PEOs contract with small to mid-sized employers to perform certain administrative functions for them. Employers that use the services of PEOs are known as "client employers" under the Michigan Employment Security

determine, in the context of this relationship, Great Oaks's unemployment-insurance tax rate under the Michigan Employment Security Act (the MESA), MCL 421.1 *et seq*., specifically MCL 421.13m(2)(a)(*i*)(A) and (B).[2] The Court of Appeals interpreted Section 13m to require Great Oaks to have reported "no employees or no payroll" for a period of 12 or more calendar quarters to qualify for the lower "new employer tax rate" under the MESA. The Court of Appeals adopted the interpretation of Section 13m offered by plaintiff-appellee, the Department of Talent and Economic Development/Unemployment Insurance Agency (the Agency), which maintained that a client employer must have switched to client-level reporting before January 1, 2014, to be assessed the new-employer tax rate (the conversion-date interpretation).[3] We disagree. We hold that, in this context, Section 13m is best understood according to the interpretation offered by Great Oaks: that a client employer must have accrued the relevant number of calendar quarters in which it reported "no employees or no payroll" by January 1, 2014, to be assessed the new-employer tax rate (the accrual-date interpretation). And because Great Oaks

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Act (the MESA), MCL 421.1 *et seq*. These contractual arrangements permit the PEO, as a coemployer, to combine the employee benefits of several client employers to offer the client employers increased efficiencies and reduced costs. See Mich Admin Code, R 421.190(1)(d).

[2] This opinion will refer to MCL 421.13m as "Section 13m."

[3] In 2011, the Legislature enacted the Michigan Professional Employer Organization Regulatory Act (the PEO Act), MCL 338.3721 *et seq*. The enactment of the PEO Act is significant not only because it interacts with the MESA in this case but also because the effective date of Section 13m was expressly conditioned on its passage. Generally stated, the PEO Act requires PEOs to report information under each of their client employer's unemployment-insurance accounts instead of the PEO's own account. This practice is referred to as client-level reporting. See MCL 421.13m(2)(b).

reported no employees or payroll for 8 consecutive calendar quarters before January 1, 2014, we hold that Great Oaks is entitled to be assessed the new-employer tax rate under Section 13m of the MESA. Accordingly, we reverse the Court of Appeals' decision and remand to the Agency for further proceedings consistent with this opinion.

Because the proper resolution of this case rests so heavily on the interaction between the MESA, Section 13m, and the PEO Act, as well as subsequent amendments, we first review the statutory scheme and its relevant statutory history before presenting the basic facts and procedural history of this case.

I. THE MESA

All employers subject to the MESA are responsible for paying unemployment-insurance taxes, or contributions, to the Agency.[4] The Agency places these contributions into the unemployment-compensation fund.[5] From this fund, the Agency pays unemployment benefits to eligible and qualified workers.[6] Benefits paid to claimants are charged against an employer's account.[7] Under MCL 421.19 (Section 19), an employer is taxed either at the new-employer rate or at a calculated, experienced-employer rate based on its unemployment experience.[8] Therefore, the more an employer's former

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[4] MCL 421.13(1).

[5] MCL 421.26(a).

[6] MCL 421.26(c)(1).

[7] MCL 421.20(a).

[8] See generally MCL 421.19.

workers are awarded unemployment benefits, the higher its tax rate will be.[9]

Liable employers are required to file quarterly tax reports with the Agency, and some employers utilize PEOs to file these reports.[10] Prior to 2011, a PEO could report a client's payroll under the PEO's own unemployment account rather than the client employer's. But with the enactment of the PEO Act in 2011,[11] PEOs were required to report the payroll information under the client employer's unemployment account beginning January 1, 2014.[12] This practice is known as "client-level reporting," and reporting in this fashion was discretionary beginning January 1, 2011, but became mandatory as of January 1, 2014.[13]

When the PEO Act was passed, the Legislature also changed how the unemployment tax rate is calculated

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[9] See *id*.

[10] See MCL 421.13m(2)(a). As explained by the Court of Appeals, see *Dep't of Talent & Economic Dev/Unemployment Ins Agency v Ambs Message Ctr, Inc*, 329 Mich App 581; 944 NW2d 125 (2019) (*Ambs Message Ctr*), a PEO can be thought of as somewhat of a shell entity that has no underlying business other than to provide payroll, payment of unemployment-insurance obligations, and other human resources services on behalf of its various client employers:

> Under a typical service agreement, a business transfers its employees to the professional employer organization, which then leases the employees back to the business. The leased employees are treated as the employees of the professional employer organization even though the original employer (now considered the client employer) maintains day-to-day control over the employees. The professional employer organization normally handles all of the human resource matters involving the employees, including paying the unemployment insurance obligations related to the payroll of the client employer. [*Id*. at 585.]

[11] See 2010 PA 370, effective July 1, 2011.

[12] MCL 421.13m(2)(a) and (b).

[13] MCL 421.13m(2)(b).

for client employers.[14] Although the PEO remains the employer liable for paying unemployment-insurance contributions, the unemployment tax rate is no longer based on the PEO's prior account and experience.[15] Rather, beginning January 1, 2014, for purposes of calculating unemployment tax rates, the PEO is taken out of the picture and the calculation is based on the number of years the client employer is deemed to have employed a staff, either directly or through the PEO, and each client employer is taxed at its own rate.[16]

II. STATUTORY HISTORY OF SECTION 13M AND TEXT OF OTHER KEY PROVISIONS

Section 13m is a subsection of the MESA and was enacted into law on January 1, 2011,[17] at the same time as the PEO Act.[18] Section 13m governs the applicable unemployment tax rates for PEOs and their client employers. In 2011, Section 13m provided, in relevant part:

> (2) . . . [A] PEO that is a liable employer shall use the following method for reporting wages and paying unemployment contributions under this act:
>
> (a) The PEO shall comply with all requirements of this act that apply to a contributing employer. . . .
>
> (*i*) For a client employer that is a contributing employer and was a client employer of the PEO on the date that the

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[14] See 2010 PA 383, effective January 1, 2011.

[15] MCL 421.13m(2)(a).

[16] MCL 421.13m(2)(b).

[17] See 2010 PA 383.

[18] See 2010 PA 370. Section 13m did not become effective until July 1, 2011. See 2010 PA 383, enacting § 2 (tie-barring the effective date of Section 13m to the July 1, 2011 effective date of 2010 SB 1037/2010 PA 370).

> PEO changed to the reporting method provided in this subdivision, the following rates apply:
>
> (A) Except as provided in sub-subparagraphs (B) and (C),[19] if the client employer reported no employees or no payroll to the agency for 8 or more quarters, the client employer's unemployment tax rate will be the new employer tax rate.
>
> (B) If the client employer was a client employer of the PEO for less than 8 full calendar quarters, the client employer's unemployment tax rate will be based on the client employer's prior account and experience.
>
> * * *
>
> (*ii*) A business entity that is a contributing employer and becomes a client employer of the PEO on or after January 1, 2011 shall retain its existing unemployment tax rate or establish a new rate as provided in section 19.[20]

Section 13m was amended for the first time on December 19, 2011, less than a year after it was first enacted, along with 28 other sections of the MESA (the 2011 Amendments).[21] Of relevance here is that the 2011 Amendments changed both occurrences of "8" in Section 13m to "12."[22]

Then, just six months later in 2012, Section 13m was amended for the second and final time (the 2012 Amendment).[23] The 2012 Amendment made four

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[19] The exception set forth in Sub-subparagraph (C) is not at issue in this case.

[20] See 2010 PA 383.

[21] 2011 PA 269, effective December 19, 2011.

[22] See *id*. And, as will be relevant later in our analysis, the 2011 Amendments also changed the "8" in Section 19—"or at the conclusion of 8 or more consecutive calendar quarters"—to "12." *Id*.

[23] 2012 PA 219, effective June 28, 2012.

changes to Section 13m(2)(a)(*i*) and one change to Section 13m(2)(a)(*ii*). As to Section 13m(2)(a)(*i*), both occurrences of "12" were changed back to "8"; the clause "or, beginning January 1, 2014, for 12 or more calendar quarters" was added to Section 13m(2)(a)(*i*)(A); the clause "or, beginning January 1, 2014, for less than 12 calendar quarters" was added to Section 13m(2)(a)(*i*)(B); and "quarters" was modified by "calendar" in Section 13m(2)(a)(*i*)(A). As to Section 13m(2)(a)(*ii*), "2011" was changed to "2014."

Section 13m now provides, in relevant part:

> (2) . . . [A] PEO that is a liable employer shall use the following method for reporting wages and paying unemployment contributions under this act:
>
> (a) The PEO shall comply with all requirements of this act that apply to a contributing employer. . . .
>
> (*i*) For a client employer that is a contributing employer and was a client employer of the PEO on the date that the PEO changed to the reporting method provided in this subdivision, the following rates apply:
>
> (A) Except as provided in sub-subparagraphs (B) and (C),[24] if the client employer reported no employees or no payroll to the agency for 8 or more calendar quarters or, beginning January 1, 2014, for 12 or more calendar quarters, the client employer's unemployment tax rate will be the new employer tax rate.
>
> (B) If the client employer was a client employer of the PEO for less than 8 calendar quarters or, beginning January 1, 2014, for less than 12 calendar quarters, the client employer's unemployment tax rate will be based on the client employer's prior account and experience.

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[24] As noted earlier, the exception set forth in Sub-subparagraph (C) is not at issue in this case.

* * *

> (*ii*) A business entity that is a contributing employer and becomes a client employer of the PEO on or after January 1, 2014 shall retain its existing unemployment tax rate or establish a new rate as provided in section 19.
>
> (b) A PEO that is a liable employer and that was operating in this state before January 1, 2011 may elect and use the reporting method in subdivision (a) before January 1, 2014, but shall report using the method in subdivision (a) on and after January 1, 2014.[25]

Finally, MCL 421.19(a)(1)(*i*) provides, in relevant part:

> (a) The commission shall determine the contribution rate of each contributing employer for each calendar year after 1977 as follows:
>
> (1)(*i*) . . . If . . . at the conclusion of 12 or more consecutive calendar quarters during which the employer has not had workers in covered employment, and if the employer again becomes liable for contributions, the employer shall be considered as newly liable for contributions for the purposes of the tables in this subsection.[26]

III. BASIC FACTS AND PROCEDURAL HISTORY

Several key facts are undisputed. First, Great Oaks became a client employer of a PEO that operated in this state before January 1, 2011.[27] For that reason, it was not required to change its reporting method until January 1, 2014.[28] Second, Great Oaks had been a client employer of the PEO for at least 8 quarters as of

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[25] MCL 421.13m(2).

[26] MCL 421.19(a)(1)(*i*).

[27] See *Unemployment Ins Agency v Great Oaks Country Club, Inc*, MAHS Decision & Order (Case No. 4872482), issued April 7, 2016, p 2 (ALJ Decision).

[28] MCL 421.13m(2)(b).

January 1, 2014, and Great Oaks had reported no employees or payroll for those same 8 quarters.[29] Third and finally, Great Oaks's PEO did not change its reporting method until January 1, 2014.[30]

The dispute began when the Agency concluded that Great Oaks, which had 8 quarters of not reporting employees or payroll by January 1, 2014, was *not* entitled to the new-employer tax rate beginning with tax year 2014 because it did not *report* its eighth nonreporting quarter until after January 1, 2014.[31] The Agency reasoned that client employers were only eligible for the new-employer tax rate if they reported no employees or payroll "beginning January 1, 2014, for 12 or more calendar quarters . . . ." Great Oaks protested the Agency's decision.[32] Great Oaks argued that the Agency's interpretation overlooked the 8-quarter safe-harbor lookback period of Section 13m, and it asserted that it was entitled to the new-employer tax rate because it "reported no employees or [no] payroll to the [A]gency for 8 [or more] calendar quarters prior to January 1, 2014."[33]

After the Agency rejected its protests, Great Oaks appealed to an administrative-law judge (ALJ). The ALJ determined that because Great Oaks had 8 quarters of no employment or payroll before January 1,

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[29] See ALJ Decision, p 2.

[30] See *id*.

[31] See ALJ Decision, p 2. Great Oaks points out that the Agency's position on the proper meaning of Section 13m was different in the proceedings prior to its appeal in the Court of Appeals. See Defendant's Supplemental Reply Brief on Appeal (August 19, 2020) at 5-6. In this appeal, however, we deal exclusively with the Agency's conversion-date argument, as that was the one that it made in this Court.

[32] See ALJ Decision, p 2.

[33] *Id*.

2014, it was entitled to the new-employer tax rate.[34] The ALJ ruled that the phrase "beginning January 1, 2014" in Section 13m is the date by when a client employer must have accrued 8 quarters of not reporting employees or payroll, rejecting the Agency's reading that "beginning January 1, 2014" is the date that triggered the increase of the number of nonreporting quarters from 8 to 12.[35]

A three-member panel of the Michigan Compensation Appellate Commission (the MCAC) affirmed the ALJ's ruling.[36] The Oakland Circuit Court did likewise.

The Agency subsequently appealed as on leave granted in the Court of Appeals, which held in the Agency's favor.[37] The Court of Appeals reversed the circuit court and vacated its order—along with the MCAC's decision and the ALJ's ruling—and remanded the case to the ALJ for entry of a decision upholding the Agency's tax determination for the relevant tax years.[38] The Court of Appeals reasoned that because the claimants' PEOs "waited until January 1, 2014, to

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[34] See *id*. at 5-6.

[35] See *id*.

[36] *In re Great Oaks Country Club, Inc*, 2017 Mich ACO 1852.

[37] See *Ambs Message Ctr*, 329 Mich App at 589-593. This case was consolidated along with two others in the Court of Appeals. See *Dep't of Talent & Economic Dev / Unemployment Ins Agency v Ambs Message Ctr, Inc* (Supreme Court Docket No. 160635; Court of Appeals Docket No. 343521); *Dep't of Talent & Economic Dev / Unemployment Ins Agency v NBC Truck Equip, Inc* (Supreme Court Docket No. 160636; Court of Appeals Docket No. 343989). We ordered oral argument only on Great Oaks's application for leave to appeal. See *Dep't of Talent & Economic Dev / Unemployment Ins Agency v Great Oaks Country Club, Inc*, 505 Mich 1056 (2020). The other two cases were held in abeyance pending a decision in this case. *Dep't of Talent & Economic Dev / Unemployment Ins Agency v Ambs Message Ctr, Inc*, 942 NW2d 37 (2020).

[38] *Ambs Message Ctr*, 329 Mich App at 593.

change their reporting method, the longer lookback period applied to each claimant, and the claimants were not entitled to the new-employer tax rate unless they had not reported payroll or employees for 12 quarters by January 1, 2014."[39]

This appeal followed. In lieu of granting leave, we ordered oral argument on the application, directing the parties to address whether Great Oaks could "satisfy MCL 421.13m(2)(a)(*i*)(A) by reporting no employees or no payroll for the eight quarters before January 1, 2014."[40]

IV. STANDARD OF REVIEW AND INTERPRETIVE PRINCIPLES

A question of statutory interpretation is a question of law that this Court reviews de novo.[41] "The primary goal of statutory interpretation is to 'ascertain the legislative intent that may reasonably be inferred from the statutory language.' "[42] Courts "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[43] " 'The first step in that determination is to review the language of the statute itself.' "[44] "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into

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[39] *Id*.

[40] *Great Oaks Country Club, Inc*, 505 Mich at 1056.

[41] *Wigfall v Detroit*, 504 Mich 330, 337; 934 NW2d 760 (2019).

[42] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011), quoting *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005).

[43] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[44] *Krohn*, 490 Mich at 156, quoting *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999).

account the context in which the words are used."[45] A statute's history—"the narrative of the 'statutes repealed or amended by the statute under consideration' —properly 'form[s] part of [its] context . . . .' "[46] When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed.[47]

V. ANALYSIS

To determine whether "beginning January 1, 2014" is better understood by the conversion-date interpretation preferred by the Agency and accepted by the Court of Appeals or by the accrual-date interpretation preferred by Great Oaks and accepted by the three lower tribunals, we apply the plain meaning of Section 13m in context—which means that we consider both the statutory scheme in which Section 13m is situated and whatever amendments were made to it since its enactment.

Section 13m(2)(a)(*i*) establishes two prerequisites for determining a client employer's tax rate. If a client

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[45] *Krohn*, 490 Mich at 156 (citations omitted).

[46] *People v Pinkney*, 501 Mich 259, 276 n 41; 912 NW2d 535 (2018), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256. See also *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.").

[47] *Pinkney*, 501 Mich at 268. See also *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1, 9; 967 NW2d 577 (2021) ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citation omitted).

employer "is a contributing employer" and "was a client employer of the PEO on the date that the PEO changed to the reporting method provided in this subdivision," then it is appropriate to move to Section 13m(2)(a)(*i*)(A) and (B). Both prerequisites of Section 13m(2)(a)(*i*) are satisfied here. Great Oaks is a contributing employer to the unemployment-compensation fund managed by the Agency, and the ALJ determined that Great Oaks was a client employer of its PEO on the date its PEO changed to client-level reporting, i.e., January 1, 2014.

Section 13m(2)(a)(*i*)(A) refers to some number of "calendar quarters"—8 or 12—in which "the client employer reported no employees or no payroll to the agency . . . ." Crucially, nowhere does it speak of a reporting *method* the way that Section 13m(2)(b) does. Since 2011 when it was enacted, Section 13m(2)(b) has always provided that a PEO that was operating in the state of Michigan before January 1, 2011, "may elect and use the reporting *method* in subdivision (a) before January 1, 2014," but that it "shall report using the *method* in subdivision (a) on and after January 1, 2014."[48] That "reporting method in subdivision (a)" is client-level reporting. Thus, when Section 13m(2)(a)(*i*)(A) is read alongside Section 13m(2)(b), giving effect to each, it becomes clear that "beginning January 1, 2014" in Section 13m refers to the date by when *a certain number of nonreporting quarters must have been accrued*, not to the date by when *the switch to the method of client-level reporting occurred*. If the Legislature had wanted Section 13m(2)(a)(*i*)(A) to govern the assessment of a certain tax rate for client employers based on when they switched to the *method* of client-level reporting, it could have included lan-

[48] MCL 421.13m(2)(b) (emphasis added).

guage to that effect in Section 13m(2)(a)(*i*)(A). But it did not. Instead, it provided only for the assessment of a certain tax rate to client employers based on a certain *number* of nonreporting quarters accrued by a certain date, namely, January 1, 2014.

Similarly, Section 13m(2)(a)(*i*)(B) also refers only to some *number* of quarters, not a reporting *method*, vis-à-vis the appropriate tax rate to be assessed to client employers. As with Section 13m(2)(a)(*i*)(A), in Section 13m(2)(a)(*i*)(B), "January 1, 2014" functions as a cut-off date. Reading the subsections together, Section 13m(2)(a)(*i*)(A) delineates under what circumstances a client employer like Great Oaks is entitled to the new-employer tax rate.[49] Section 13m(2)(a)(*i*)(B) then fills in the rest of the picture, clarifying that a client employer is to be assessed an experienced-employer tax rate "[i]f the client employer was a client employer of the PEO for *less than* 8 calendar quarters or, beginning January 1, 2014, for *less than* 12 calendar quarters . . . ."[50] Thus, prior to January 1, 2014, when a client employer had fewer than 8 calendar quarters as a client employer of a PEO, the client employer was assessed the experienced-employer tax rate, and after January 1, 2014, when a client employer has fewer than 12 calendar quarters as a client employer of a PEO, the client employer is assessed the experienced-employer tax rate. As with Section 13m(2)(a)(*i*)(A), Section 13m(2)(a)(*i*)(B) does not speak of a reporting *method*. Rather, Section 13m(2)(a)(*i*)(B) speaks of a certain *number* of quarters in which the client employer was in a relationship with its PEO,

[49] A client employer is entitled to the new-employer tax rate when it has accrued 8 nonreporting quarters before January 1, 2014 (or 12 nonreporting quarters after January 1, 2014).

[50] MCL 421.13m(2)(a)(*i*)(B) (emphasis added).

with January 1, 2014, serving as the cut-off date for the relevant number of quarters needed for the experienced-employer tax rate to be assessed.

In sum, for Section 13m(2)(a)(*i*)(A) to mean what the Agency contends it means, it would have to say something about a reporting method, not just that not reporting employees or payroll must occur for a certain number of quarters "beginning January 1, 2014." And for Section 13m(2)(a)(*i*)(B) to mean what the Agency contends it means, it likewise would need to say something about a reporting method, not just that a relationship between a client employer and its PEO for a certain number of quarters corresponds to a certain tax rate.

Further, the amendments to Section 13m that were made in 2011 and 2012—which changed "8" to "12" and then restored "8," all within 18 months of the enactment of Section 13m—indicate that the purpose of the 2012 Amendment was remedial, intended to undo the 2011 Amendments' erasure of the 8-quarter safe-harbor condition so that client employers like Great Oaks under the facts of the instant case would receive the new-employer tax rate under Section 13m. Prior to the 2012 Amendment, there was no cut-off date in Section 13m. The purpose of including the clause "or, beginning January 1, 2014, for 12 or more calendar quarters" in Section 13m(2)(a)(*i*)(A) and the clause "or, beginning January 1, 2014, for less than 12 calendar quarters" in Section 13m(2)(a)(*i*)(B) was to mandate that, beginning January 1, 2014, client employers who used a PEO were required to have 12 nonreporting quarters to be eligible for the new-employer tax rate; otherwise, they would be assessed the experienced-employer tax rate. That the 8-quarter nonreporting condition remains in Section 13m (after it was restored

by the 2012 Amendment) indicates that the original, 2011 version of Section 13m has been carried forward to the present.

In sum, the 2011 version of Section 13m provided that 8 or more nonreporting quarters were sufficient for the client employer to be assessed the new-employer tax rate and that fewer than 8 such quarters in a relationship with a PEO would mean that the client employer would be assessed the experienced-employer tax rate. Simply put, Section 13m preserves that requirement but also provides that after January 1, 2014, 12 nonreporting quarters are required.

We turn now to the Court of Appeals' conclusion that Great Oaks's interpretation of Section 13m—that "beginning January 1, 2014" means " 'as of January 1, 2014' "—is "untenable because it renders portions of the statutory scheme nugatory," specifically, Section 19.[51] We are not persuaded.

The Court of Appeals reasoned as follows:

> Under MCL 421.19(a)(1)(*i*), any employer—whether a client employer represented by a professional employer organization or a self-reporting employer—that has not had workers in covered employment for 12 or more consecutive calendar quarters is treated as a new employer if it should again become liable for contributions. Therefore, there was no reason for the Legislature to provide that, beginning January 1, 2014, any client employer who has had no employees or payroll for 12 quarters would qualify as a new employer.[52]

This is incorrect because the Court of Appeals failed to account for the exclusive, mandatory nature of Section 13m. In fact, it is the Court of Appeals' interpretation

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[51] *Ambs Message Ctr*, 329 Mich App at 591.

[52] *Id*.

of Section 13m and Section 19 that renders Section 19 nugatory, not Great Oaks's interpretation.

Section 13m(2)(a) states, in relevant part, that "a PEO that is a liable employer *shall* use the following method for reporting wages and paying unemployment contributions under this act: (a) The PEO *shall* comply with all requirements of this act that apply to a contributing employer."[53] The foregoing language is mandatory; therefore, Section 13m exclusively governs reporting payroll, calculating rates, and paying contributions for a client employer employing a PEO, which is what Great Oaks did with its PEO for the 8 quarters prior to January 1, 2014. And because Section 13m applies exclusively to client employers using PEOs, our interpretation cannot be said to render Section 19 nugatory, given that each provision applies to different factual circumstances. The insertion of the clause "or, beginning January 1, 2014, for 12 or more calendar quarters" placed PEOs governed by Section 13m on even footing with the 12-quarter scheme in place for all other employers governed by Section 19 after the transition period—i.e., the time prior to January 1, 2014—concluded. The statutory history of Section 19 supports this reading. The 2011 Amendments changed the "8" in Section 19—"or at the conclusion of 8 or more consecutive calendar quarters"—to "12."[54] This indicates that Section 19, which was amended at the same time as Section 13m,[55] was amended in that way to bring the standards governing non-PEO-using employers subject to Section 19 into conformity with those

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[53] MCL 421.13m(2)(a) (emphasis added).

[54] See 2011 PA 269, effective December 19, 2011.

[55] *Id*.

standards governing PEO-using client employers subject to Section 13m. Our interpretation therefore does not render Section 19 nugatory. Instead, our interpretation properly gives effect both to Section 19 and to Section 13m.

Moreover, if, as the Court of Appeals reasoned, Section 19(a)(1)(*i*) governs *all* employers and provides that those that do not report employees or payroll for 12 consecutive calendar quarters are to be assessed a new-employer rate, then the same would apply to PEOs governed by Section 13m. But if that is the case, then there is no reason for the Legislature to have included the 12-quarter clause in Section 13m because the 12-quarter nonreporting condition is already addressed in Section 19. Thus, it is the Court of Appeals that interprets the statutory provisions in a manner that renders Section 19 nugatory, not Great Oaks.

In sum, because Great Oaks used a PEO—meaning it is governed by Section 13m, not Section 19(a)(1)(*i*)—and "reported no employees or no payroll to the agency" for 8 quarters prior to January 1, 2014, it should be assessed the new-employer tax rate.

Finally, the Agency's conversion-date interpretation of Section 13m is contrary to the most reasonable, commonsense understanding of the operation of specific language in Section 13m, namely, the phrase "calendar quarters." To understand why this is so, it is helpful first to have some background about the mechanics of filing quarterly wage reports.

The MESA's unemployment-insurance taxation scheme requires employers to file reports on a "calendar quarterly" basis. In any given year, the first quarter runs from January 1 to March 31; the second quarter runs from April 1 to June 30; the third quarter runs from July 1 to September 30; and the fourth quarter

runs from October 1 to December 31. Payroll taxes are calculated and reported in arrears based on calendar quarterly reports for those quarterly periods. Pursuant to the Michigan Administrative Code, Rule 421.121(2), quarterly reports are due to be filed 25 days *after* the end of the quarter being reported.[56]

Under the Agency's conversion-date interpretation, to be eligible for the new-employer tax rate with only 8 nonreporting quarters, Great Oaks needed to have converted to client-level reporting by, at most, 25 days after the end of the *third* quarter of 2013 (which ended September 30), *not* the *fourth* quarter of 2013 (which ended December 31). That is because waiting until the final quarter of 2013 to convert to client-level reporting means that a quarterly wage report would not be filed until, at most, 25 days *after* January 1, 2014, thereby rendering Great Oaks's switch to client-level reporting effective January 1, 2014. In other words, the switch must occur a quarter "early" for it to be effective prior to January 1, 2014. And because, here, the switch to client-level reporting was effective on January 1, 2014, the moment Great Oaks completed its eighth quarter of not reporting employees or payroll on that date, it was also at that very same moment rendered ineligible to receive the new-employer tax rate because it was suddenly required to have completed 12 quarters of not reporting employees or payroll.

The conversion-date interpretation, in other words, renders nonsensical the logic of the quarterly reporting system established by the MESA. If reports are due to be filed, at most, 25 days after the end of a calendar

[56] "[A]n employer shall submit a quarterly report . . . on or before the twenty-fifth day of the month next following the last day of the calendar quarter . . . for which the report is submitted." Mich Admin Code, R 421.121(2).

quarter, then it cannot be the case that Great Oaks was required to have converted to client-level reporting after the third quarter of 2013 rather than after the fourth quarter of 2013. The concept and practice of quarterly reporting permit Great Oaks to make use of the final quarter of 2013 to meet its obligations under Section 13m and then file its reports, at most, 25 days after the end of the quarter. Punishing Great Oaks for doing just that renders null the logic and practice of calendar quarterly reporting, and we decline to read Section 13m to require something so opposed to common sense.[57]

In sum, the conversion-date interpretation imposes an impossible-to-meet and textually unstated rule; under it, Great Oaks simultaneously meets and fails to meet the standard to be assessed the new-employer tax rate under Section 13m.

VI. CONCLUSION

For the reasons set forth in this opinion, we reverse the Court of Appeals and remand to the Agency for entry of a decision assessing Great Oaks the new-employer tax rate under Section 13m because it reported no employees or payroll for the 8 quarters prior to January 1, 2014.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with ZAHRA, J.

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[57] The Agency overlooks the fact that Section 13m was enacted by the Legislature as a safe harbor, intended to help client employers adjust to the new financial burden posed by client-level reporting. If this Court were to accept the Agency's understanding of calendar quarterly reporting, businesses that follow a traditional quarterly calendar would be precluded from taking advantage of the 8-quarter safe-harbor provision, contrary to the Legislature's desire in enacting it.

BUHL v CITY OF OAK PARK

Docket No. 160355. Argued January 6, 2021 (Calendar No. 3). Decided June 9, 2021.

Jennifer Buhl brought an action in the Oakland Circuit Court against the city of Oak Park, alleging that defendant had a duty to maintain its sidewalks in reasonable repair under MCL 691.1402a of the governmental tort liability act (the GLTA), MCL 691.1401 *et seq*., and that defendant breached its duty by failing to inspect or repair a sidewalk that had a raised crack. Plaintiff tried to step over the crack in the sidewalk; however, she did not notice that the sidewalk was uneven on the other side of the crack, and she fell and fractured her left ankle. Plaintiff alleged that the injuries she sustained in the fall were a direct result of defendant's negligence. After plaintiff was injured but before she filed her complaint, the Legislature passed 2016 PA 419, which went into effect on January 4, 2017. 2016 PA 419 amended MCL 691.1402a to add a new subsection, MCL 691.1402a(5), which allows a municipality to assert any defense available under the common law with respect to a premises-liability claim, including, but not limited to, a defense that the condition was open and obvious. Defendant moved for summary disposition, arguing that MCL 691.1402a(5) applied retroactively and that the defect in the sidewalk where plaintiff fell was open and obvious. The trial court, Phyllis C. McMillen, J., held that MCL 691.1402a(5) applied retroactively and that defendant could raise the open and obvious danger doctrine as a defense. The trial court also held that the defect in the sidewalk was open and obvious as a matter of law and granted defendant's motion for summary disposition. Plaintiff appealed, and the Court of Appeals, O'BRIEN, P.J., and TUKEL, J. (LETICA, J., dissenting), affirmed, holding that MCL 691.1402a(5) applied retroactively and that plaintiff's claim was therefore barred by the open and obvious danger doctrine. 329 Mich App 486 (2019). Judge LETICA dissented, concluding that retroactive application was inappropriate because the Legislature never manifested an intent for MCL 691.1402a(5) to apply retroactively and because doing so would impair plaintiff's vested

rights. Plaintiff sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 505 Mich 1023 (2020).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justices ZAHRA (except as to Part III(C)), VIVIANO, CLEMENT (except as to Part III(C)), and WELCH, the Supreme Court *held*:

MCL 691.1402a(5) does not apply retroactively; it may only be applied to causes of action that accrued after the effective date of the amendment. MCL 691.1402a provides that municipalities have a duty to maintain sidewalks in reasonable repair. 2016 PA 419, which went into effect on January 4, 2017, amended MCL 691.1402a to add a provision, MCL 691.1402a(5), that grants municipalities the right to raise the open and obvious danger doctrine as a defense in premises-liability cases. Importantly, MCL 691.1402a(5) was not enacted until after the incident in this case took place. To determine whether MCL 691.1402a(5) should be applied retroactively, the primary and overriding rule is that legislative intent governs; all other rules of construction and operation are subservient to this principle. The framework set forth in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), is used to conduct this inquiry into the Legislature's intent: first, the court considers whether there is specific language providing for retroactive application; second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event; third, in determining retroactivity, the court must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past; and finally, a remedial or procedural act not affecting vested rights may be given retroactive effect when the injury or claim is antecedent to the enactment of the statute. Under the first factor, nothing in the plain language of the statute suggested that MCL 691.1402a(5) was intended to apply retroactively; rather, the amendment was given immediate effect without further elaboration. Standing alone, the phrase "[i]n a civil action" in MCL 691.1402a(5) was too vague to evince an intent to apply the amendment retroactively. Had the Legislature intended to make the open and obvious danger defense available in any civil action filed after the amendment became effective, it could have said so. Accordingly, the first factor did not support retroactive application. The second factor did not apply in this case because MCL 691.1402a(5) does not pertain to a specific antecedent event. Under the third factor, because

plaintiff's claim had already accrued on the day she was injured, the retroactive application of MCL 691.1402a(5) would effectively rewrite history as to the duty defendant owed plaintiff by absolving defendant of its duty to maintain public sidewalks in reasonable repair. This is precisely what the third factor disallows when it rejects laws that create new obligations, impose new duties, or attach new disabilities with respect to transactions or considerations already past. Accordingly, the third factor did not favor retroactive application. Under the fourth factor, retroactive application in this case would relieve defendant of the duty it owed to maintain its sidewalk in reasonable repair. Accordingly, the fourth factor did not favor retroactive application. The Court of Appeals relied on *Brewer v A D Transp Express, Inc*, 486 Mich 50 (2010), when it reached the question whether the amendment was remedial or procedural in nature. Through its analysis of *Brewer*, the Court of Appeals erroneously created a new principle called the "*Brewer* restoration rule" and then relied on this principle to find that the fourth *LaFontaine* factor favored retroactive application of MCL 691.1402a(5). The *Brewer* restoration rule disregards the general presumption that statutes are intended to apply prospectively absent the existence of clear legislative intent to the contrary; thus, applying the *Brewer* restoration rule would effectively require that courts ignore the first *LaFontaine* factor in its entirety. Such a conclusion would run contrary to the robust body of caselaw that applies the *LaFontaine* factors. The *LaFontaine* factors were not altered or abandoned in favor of the *Brewer* restoration rule. Accordingly, MCL 691.1402a(5) could not be applied retroactively in this case, and defendant could not avail itself of the open and obvious danger doctrine as a defense to plaintiff's negligence claim.

Reversed and remanded to the Oakland Circuit Court for further proceedings.

Justice VIVIANO, concurring, agreed with the result the majority reached and with much of its analysis but wrote separately because he believes that the current methodology for assessing whether a statute is retroactive is flawed and would like to clarify the area of law pertaining to retroactivity. He would define a statute as retroactive if it seeks to regulate conduct that occurred before its passage. To determine if a statute meets this standard, he would do the same thing courts do with every other statutory interpretation question: discern the ordinary meaning of the text to determine whether it purports to regulate such conduct, keeping in mind the strong presumption against retroactivity. Only if the meaning of the text remains uncertain should the

other principles potentially come into play. In this case, for instance, the text was clear, and therefore the analysis would stop there. The most significant problem with the current approach of applying the *LaFontaine* factors is that this approach does not begin and end with the text, as interpreted in light of the longstanding presumption against retroactivity. When the text answers the interpretive question, any approach that forces courts to carry the analysis beyond the text is an invitation to mischief. Finally, Justice VIVIANO also agreed with the majority that the Court of Appeals' creation of the *Brewer* restoration rule had no basis in Michigan's caselaw; the rule is premised on the improper notion that retroactivity can flow from the Legislature's unstated intentions.

Justice CLEMENT, joined by Justice ZAHRA, concurring in part and concurring in the judgment, agreed completely with the majority's result and joined most of its analysis of the *LaFontaine* retroactivity factors except for Part III(C), which addressed the *Brewer* restoration rule. The retroactivity analysis could and should have ended with the determination that the Court of Appeals erred when it held that MCL 691.1402a(5) satisfied the third *LaFontaine* factor. Justice CLEMENT expressed no view regarding the Court of Appeals' creation of the *Brewer* restoration rule but did not believe that it merited further review.

Justice CAVANAGH did not participate because of her prior involvement as counsel for a party.

NEGLIGENCE — GOVERNMENTAL TORT LIABILITY ACT — DUTY TO MAINTAIN A SIDEWALK — OPEN AND OBVIOUS DANGER DEFENSE.

MCL 691.1402a(5) of the governmental tort liability act, MCL 691.1401 *et seq*., provides that in a civil action, a municipal corporation that has a duty to maintain a sidewalk under MCL 691.1402a(1) may assert any defense available under the common law with respect to a premises-liability claim, including, but not limited to, a defense that the condition was open and obvious; MCL 691.1402a(5) does not apply retroactively; it may only be applied to causes of action that accrued after the effective date of the amendment, which is January 4, 2017.

Miller Johnson (by *Christopher J. Schneider* and *Stephen J. van Stempvoort*) and Michigan Advocacy Center (by *Matthew E. Bedikian*) for plaintiff.

Garan Lucow Miller, PC (by *Christian C. Huffman* and *John J. Gillooly*) for defendant.

BERNSTEIN, J. This case concerns a negligence claim governed by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The specific question before us is whether a GTLA amendment that went into effect after plaintiff's claim accrued but before plaintiff filed her complaint can be retroactively applied. We hold that the amended provision does not apply retroactively. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for reinstatement of plaintiff's claim of negligence against defendant.

I. FACTS AND PROCEDURAL HISTORY

On May 4, 2016, plaintiff and her husband went to a party store in Oak Park, Michigan. As she was walking, plaintiff saw a raised crack in the sidewalk outside the store and tried to step over it. Because plaintiff did not notice that the sidewalk was uneven on the other side of the crack, she fell and fractured her left ankle.

On January 31, 2017, plaintiff sued defendant, the city of Oak Park, under the "sidewalk exception" to governmental immunity, MCL 691.1402a. Plaintiff alleged that MCL 691.1402a imposes a duty on municipalities to maintain sidewalks in reasonable repair and that defendant breached its duty by failing to inspect or repair the sidewalk and maintain it in a reasonably safe condition. Plaintiff argued that the injuries she sustained in the fall were a direct result of defendant's negligence.

After plaintiff was injured but before she filed her complaint, the Legislature passed 2016 PA 419, which went into effect January 4, 2017. 2016 PA 419

amended MCL 691.1402a to add a new subsection, MCL 691.1402a(5). This new subsection allows a municipality to assert "any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious." MCL 691.1402a(5). Defendant subsequently moved for summary disposition under MCR 2.116(C)(10), arguing that MCL 691.1402a(5) applied retroactively and that the defect in the sidewalk where plaintiff fell was open and obvious. The trial court agreed that MCL 691.1402a(5) should be applied retroactively and held that defendant could raise the open and obvious danger doctrine as a defense. The trial court also held that the defect in the sidewalk was open and obvious as a matter of law and granted defendant's motion for summary disposition.

Plaintiff appealed the trial court's ruling, and the Court of Appeals affirmed in a split published decision. *Buhl v Oak Park*, 329 Mich App 486; 942 NW2d 667 (2019). The majority held that MCL 691.1402a(5) applied retroactively and that plaintiff's claim was therefore barred by the open and obvious danger doctrine. *Id*. at 519-522. Conversely, the dissent concluded that retroactive application was inappropriate because the Legislature never manifested an intent for MCL 691.1402a(5) to apply retroactively and because doing so would impair plaintiff's vested rights. *Id*. at 524-525, 537-538 (LETICA, J., dissenting).

Plaintiff timely sought leave to appeal in this Court. On April 17, 2020, this Court granted leave to appeal. *Buhl v Oak Park*, 505 Mich 1023 (2020).

II. STANDARD OF REVIEW

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Honigman Miller Schwartz & Cohn, LLP v Detroit*, 505 Mich 284, 294; 952 NW2d 358 (2020). When reviewing a motion brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 211-212; 934 NW2d 713 (2019) (quotation marks and citations omitted). Summary disposition is appropriate when no genuine issues of material fact exist. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

This case also concerns the statutory interpretation and retroactive application of amended statutes. We review both these matters de novo. *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 34; 852 NW2d 78 (2014).

III. ANALYSIS

The GTLA protects municipalities from tort liability when they are engaged in governmental functions, unless a statutory exception applies to limit this immunity. *Yono v Dep't of Transp*, 499 Mich 636, 645-646; 885 NW2d 445 (2016). A governmental function is an "activity that is expressly or impliedly mandated or

authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). One such governmental function is the maintenance of sidewalks. MCL 691.1402a(1).

As noted earlier, MCL 691.1402a has been amended to add a provision that grants municipalities the right to raise the open and obvious danger doctrine as a defense in premises-liability cases. Compare MCL 691.1402a, as amended by 2012 PA 50, to MCL 691.1402a, as amended by 2016 PA 419. The current version of MCL 691.1402a states, in pertinent part:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> * * *
>
> (5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious.

Because MCL 691.1402a(5) was not enacted until after the incident in this case took place, the outcome here turns on whether this provision applies retroactively. We hold that it does not and that MCL 691.1402a(5) may only be applied to causes of action that accrued after the effective date of the amendment. In this case, because plaintiff's cause of action accrued before the effective date of MCL 691.1402a(5), the amendment may not be applied retroactively to bar her claim against defendant.

When determining whether a statute should be applied retroactively or prospectively, " 'the primary and overriding rule is that legislative intent governs.

All other rules of construction and operation are subservient to this principle.' " *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation and brackets omitted). In conducting this inquiry into the Legislature's intent, we follow the framework set forth in *LaFontaine*, which states:

> First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [*LaFontaine*, 496 Mich at 38-39 (citations omitted).]

These factors are colloquially known as the *LaFontaine* factors. As an initial matter, we note that the second factor does not apply to this issue because MCL 691.1402a(5) does not pertain to a specific antecedent event. *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982). Therefore, our examination of MCL 691.1402a(5) is confined to a review of the first, third, and fourth *LaFontaine* factors.

A. EXPRESS DESIGNATION

The first *LaFontaine* factor addresses whether there is specific language in the statute that indicates whether it should be applied retroactively. *Id*. at 570-571. "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). As this Court has

noted, "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Lynch*, 463 Mich at 584. In this case, nothing in the plain language of the statute suggests that MCL 691.1402a(5) was intended to apply retroactively. To the contrary, the amendment was given immediate effect without further elaboration. Furthermore, the amendment makes no mention of whether it applies to a cause of action that had already accrued before its effective date. Although defendant argues that the Legislature clearly expressed its intent to apply the amendment retroactively by prefacing the availability of the open and obvious danger doctrine as a defense with the phrase "[i]n a civil action," we disagree. If the Legislature had intended to make the open and obvious danger defense available in *any* civil action filed after the amendment became effective, it could have said so. Standing alone, we find the phrase "[i]n a civil action" too vague to evince an intent to apply the amendment retroactively. If we were to accept defendant's argument, it would nevertheless remain unclear whether the amendment applied in all civil actions pending in the courts as of January 4, 2017, or only to actions filed on or after that date. But the Legislature knows how to make that distinction. For example, when the Legislature amended the GTLA in 1986, it clearly stated that one newly added provision "appl[ied] to cases filed on or after July 1, 1986." See 1986 PA 175, § 3. In this case, there is simply no indication in the text that the Legislature intended for the amendment to be applied retroactively; accordingly, the first factor does not support retroactive application.

B. RIGHTS AND DUTIES

According to the third *LaFontaine* factor, a statute or amendment may not be applied retroactively if doing so would "take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation and impose[] a new duty, or attach[] a new disability with respect to transactions or considerations already past." *In re Certified Questions*, 416 Mich at 571 (quotation marks and citation omitted).

As a general matter of premises-liability law, we have held that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). In *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002), we held that "municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair" and that this duty is "a greater duty than the duty a premises possessor owes to invitees under common-law premises liability principles." As a result, under *Jones* it was the affirmative duty of a municipality "to maintain their sidewalks on public highways in reasonable repair," without regard to the openness or obviousness of any defects. *Id*. (emphasis omitted).

Although the application of MCL 691.1402a(5) would not automatically extinguish plaintiff's claim, the subsequent application of the open and obvious danger doctrine would result in the dismissal of plaintiff's lawsuit because retroactive application would relieve defendant of the legal duty it owed to plaintiff at the time the injury occurred. In other words, because plaintiff's claim had already accrued on the day she was injured, the retroactive application of MCL

691.1402a(5) would effectively rewrite history as to the duty defendant owed plaintiff by absolving defendant of its duty to maintain public sidewalks in reasonable repair. This is precisely what the third factor disallows when it rejects laws that create new obligations, impose new duties, or attach new disabilities with respect to transactions or considerations already past. *In re Certified Questions*, 416 Mich at 571. Thus, we find that the third factor does not favor retroactive application of MCL 691.1402a(5).

Under the fourth *LaFontaine* factor, a statute that can be characterized as merely remedial or procedural should generally be given retroactive application. *LaFontaine*, 496 Mich at 39, 41. Where a statute "imposes a new substantive duty and provides a new substantive right that did not previously exist . . . it cannot be viewed as procedural, and the presumption against retroactivity applies." *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733, 740 (CA 6, 2013). Conversely, then, a newly enacted statute or amendment should not be retroactively applied if doing so would relieve a party of a substantive duty. Since retroactive application here would relieve defendant of the duty it owed to maintain its sidewalk in reasonable repair, as discussed in our analysis of the third *LaFontaine* factor, we hold that the fourth factor also does not favor retroactive application.

C. THE "*BREWER* RESTORATION RULE"

Because the Court of Appeals majority held that MCL 691.1402a(5) satisfied the third *LaFontaine* factor, the Court of Appeals majority then reached the question whether the amendment was remedial or procedural in nature under the fourth *LaFontaine*

factor. In so doing, the Court of Appeals majority relied on this Court's opinion in *Brewer v A D Transp Express, Inc*, 486 Mich 50; 782 NW2d 475 (2010). *Buhl*, 329 Mich App at 508. *Brewer* did not involve the application of the GTLA; rather, *Brewer* regarded the retroactive application of a statutory amendment that affected jurisdiction in workers' compensation cases. *Brewer*, 486 Mich at 57. Through its analysis of *Brewer*, the Court of Appeals majority created a new principle called the "*Brewer* restoration rule" and then relied on this principle to find that the fourth *LaFontaine* factor also favored retroactive application of MCL 691.1402a(5). *Buhl*, 329 Mich App at 508. Although we disagree with the conclusion that MCL 691.1402a(5) satisfies the third *LaFontaine* factor and could end our analysis here, the Court of Appeals' creation of the so-called *Brewer* restoration rule introduces a new element to the fourth *LaFontaine* factor that merits further review.

In *Brewer*, this Court observed that the statutory amendment at issue did not restore the state of workers' compensation law to the status quo that existed before this Court issued *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007),[1] a particularly important ruling concerning jurisdiction in workers' compensation cases. *Brewer*, 486 Mich at 54-55, 57. Regarding *Karaczewski*, the *Brewer* Court stated:

> Further undermining any notion of a legislative intent to apply the amendment . . . retroactively is the fact that, although the Legislature adopted the amendment after our decision in *Karaczewski*, it did not reinstate the pre-*Karaczewski* state of the law. On the contrary, the amendment . . . created an entirely new jurisdictional

[1] Overruled in part by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010).

> standard . . . . That is, this amendment did not restore the status quo before *Karaczewski* . . . but instead created a new rule . . . . [*Brewer*, 486 Mich at 57 (emphasis omitted).]

Put simply, *Karaczewski* had changed the state of workers' compensation law, but instead of rolling back the change introduced in *Karaczewski*, the amendment at issue in *Brewer* created a new rule. This Court therefore concluded that there was no evidence of legislative intent for the amendment to be applied retroactively.

In the instant case, the Court of Appeals majority found that the converse must also be true, such that if the amendment had rolled back the change introduced in *Karaczewski*, then the amendment would have applied retroactively. *Buhl*, 329 Mich App at 507. Specifically, the majority stated that "[t]he obvious teaching of this aspect of *Brewer* is that if the [amendment] . . . had *restored* the pre-*Karaczewski* status quo, then the new enactment would have applied retroactively." *Id*. (emphasis added). This is the crux of the Court of Appeals majority's *Brewer* restoration rule. *Id*. at 508.

The Court of Appeals majority then applied this new rule to MCL 691.1402a(5). The majority likened *Karaczewski* to *Jones*, 467 Mich at 266, concerning a municipality's use of the open and obvious danger doctrine. *Buhl*, 329 Mich App at 513-514. As previously discussed, the *Jones* Court held that "the open and obvious doctrine of common-law premises liability cannot bar a claim against a municipality under MCL 691.1402(1)." *Jones*, 467 Mich at 269. Applying its *Brewer* restoration rule, the majority reasoned that the Legislature enacted MCL 691.1402a(5) to supersede *Jones*. *Buhl*, 329 Mich App at 514. In other words,

because the newly enacted MCL 691.1402a(5) rolled back the change in *Jones*, the majority reasoned that *Brewer* compelled a finding that MCL 691.1402a(5) was intended to apply retroactively.[2]

However, the *Brewer* Court did not create such a restoration rule. When read in context, it is clear that the *Brewer* Court merely mentioned the pre-*Karaczewski* status quo as support for the conclusion that the Legislature had not intended for the amendment to be applied retroactively. *Brewer*, 486 Mich at 55-58. Furthermore, the *Brewer* Court only discussed *Karaczewski* in the context of the first *LaFontaine* factor and never cited *Karaczewski*—or any sort of "restoration rule"—in the context of the fourth *LaFontaine* factor. In this case, the Court of Appeals majority relied on the *Brewer* Court's analysis of the first *LaFontaine* factor in its own analysis of the fourth *LaFontaine* factor. By doing so, the majority incorrectly

[2] We find no support for the Court of Appeals majority's conclusion that the Legislature enacted MCL 691.1402a(5) to supersede *Jones* or restore the GTLA to a pre-*Jones* state. There is no reference to *Jones* in either the plain text of MCL 691.1402a(5) or the legislative history pertaining to 2016 PA 419. The lack of any discussion of *Jones* suggests that the Legislature did not take *Jones* into consideration when it enacted MCL 691.1402a(5). It also bears noting that *Jones* was decided in 2002, which was 14 years before 2016 PA 419 became law. This is a far greater passage of time than the two years between *Karaczewski* and the statutory amendments at issue in *Brewer*. Generally, "when a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act, it is logical to regard the amendment as a legislative interpretation of the original act." *Adrian Sch Dist v Mich Pub Sch Employees Retirement Sys*, 458 Mich 326, 337; 582 NW2d 767 (1998) (quotation marks and citation omitted). Such is not the case here, in which more than a decade has passed since this Court decided *Jones*. Simply put, there is no basis for the Court of Appeals' conclusion that the Legislature amended MCL 691.1402a(5) to supersede *Jones*. At most, MCL 691.1402a(5) appears to have been enacted to give municipalities another defense against slip-and-fall claims, with no apparent thought for *Jones*.

concluded that this Court intended to create the *Brewer* restoration rule, and the majority subsequently erred by finding that the fourth *LaFontaine* factor favors retroactive application of MCL 691.1402a(5).

To the extent that the passage in *Brewer* that discusses *Karaczewski* is mere dicta, the majority's creation of a new legal rule on the basis of extrapolations from that dicta is unfounded and erroneous. The *Brewer* restoration rule disregards the general presumption that statutes are intended to apply prospectively absent the existence of clear legislative intent to the contrary; thus, applying the *Brewer* restoration rule would effectively require that we ignore the first *LaFontaine* factor in its entirety. Such a conclusion would run contrary to the robust body of caselaw in which we have applied the *LaFontaine* factors. We decline to alter or abandon the *LaFontaine* factors in favor of the *Brewer* restoration rule. We therefore conclude that the Court of Appeals majority erred in its creation of the *Brewer* restoration rule.

In sum, we find that none of the applicable *LaFontaine* factors supports retroactive application of MCL 691.1402a(5). Consequently, we find that MCL 691.1402a(5) may not be applied retroactively in this case, and therefore defendant cannot avail itself of the open and obvious danger doctrine as a defense to plaintiff's negligence claim.

IV. CONCLUSION

We hold that MCL 691.1402a(5) does not apply retroactively to causes of action that accrued before the amendment became effective. For the reasons outlined in this opinion, we reverse the judgment of the Court of Appeals and remand this case to the Oakland Circuit

Court for further proceedings consistent with this opinion. We do not retain jurisdiction.

MCCORMACK, C.J., and ZAHRA (except as to Part III(C)), VIVIANO, CLEMENT (except as to Part III(C)), and WELCH, JJ., concurred with BERNSTEIN, J.

VIVIANO, J. (*concurring*). I agree with the result the majority reaches and with much of its analysis. I write separately because I think it is time to clarify this area of the law, beginning with the basic definition of "retroactivity" and including, most importantly, our current test used to interpret whether a statute applies retroactively. Very simply, I would define a statute as retroactive if it seeks to regulate conduct that occurred before its passage. To determine if a statute meets this standard, I would do the same thing we do with every other statutory interpretation question we face: discern the ordinary meaning of the text. But in our current test, the text is just one of four apparently equal principles.[1] I do not believe those other principles are relevant when the text is clear. Only if the meaning of the text remains uncertain should those principles potentially come into play. Here, the text is clear, and I agree with the majority that the statute does not apply retroactively in this case.

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[1] The other principles, discussed more below, include that the statute is not retroactive simply because it relates to pre-enactment events, that retroactive statutes impair vested rights or create new duties relating to past transactions, and that procedural or remedial statutes that do not affect vested rights may be given retroactive effect. *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-39; 852 NW2d 78 (2014).

I. DEFINING RETROACTIVITY

Interpreting a statute to determine whether it is retroactive requires knowing what retroactivity is, i.e., knowing when a statute's application in a given case is retroactive. Only then can a court know whether the language of the statute supports that application. Thus, in reassessing this topic, it is necessary to start with the meaning of retroactivity.

The canonical definition, which we have recognized, comes from Justice Joseph Story, who wrote that a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ." *Society for Propagation of the Gospel v Wheeler*, 22 F Cas 756, 767; 2 Gall 105 (CCDNH, 1814); see also *Hughes v Judges' Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1979). In applying this definition, the United States Supreme Court has stated that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf v USI Film Prod*, 511 US 244, 269; 114 S Ct 1483; 128 L Ed 2d 229 (1994). Instead, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id*. at 269-270.

In his concurrence in *Landgraf*, Justice Scalia proposed a clearer standard for defining and determining retroactivity: "The critical issue, I think, is not whether

the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates." *Id*. at 291 (Scalia, J., concurring in the judgment). The key, to Justice Scalia, was the "statute's actual operation on regulated parties . . . ." *Vartelas v Holder*, 566 US 257, 277; 132 S Ct 1479; 182 L Ed 2d 473 (2012) (Scalia, J., dissenting). To assess this, it is necessary to identify a "reference point—a moment in time to which the statute's effective date is either subsequent or antecedent." *Id*. This "reference point" occurs when "the party does what the statute forbids or fails to do what it requires." *Id*. So if the individual engages "in the primary regulated activity *before* the statute's effective date, then the statute's application *would* be retroactive. But if a person engages in the primary regulated activity *after* the statute's effective date, then the statute's application is prospective only." *Id*.

Justice Scalia and Bryan Garner give the helpful example of a statute that eliminates the common-law disability of a wife to testify against her husband at his criminal trial. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 263 (discussing this example). If this statute is passed after the husband committed the crime but before the trial occurs, applying it at trial is not retroactive: the statute governs trial conduct—the admission of testimony—and the trial occurred after the statute was enacted. *Id*.

But it is not simply because the statute mentions the court processes that the act's application would be prospective—rather, it is because the statute actually *regulates* an aspect of the trial, i.e., the admission of evidence. As a further example, consider the statute at issue in *Martin v Hadix*, which limited the amount of

attorney fees that could be awarded in prisoner litigation under another statute, 42 USC 1988. *Martin v Hadix*, 527 US 343, 362; 119 S Ct 1998; 144 L Ed 2d 347 (1999) (Scalia, J., concurring in part and concurring in the judgment). In applying his conception of retroactivity, Justice Scalia's concurrence opined that the statute would be retroactive if it applied to work that an attorney had already completed and for which fees were payable. *Id*. at 363. This would occur before the actual award of the legal fees at trial, which is what the statute discusses. According to Justice Scalia, if the new statute was "viewed in isolation," the "retroactivity event" would be the judicial award of fees. But because the new statute limited the former statute's fee award, it was the former statute that determined the relevant retroactivity event, "the doing of the [legal] work for which the incentive [of fees] was offered." *Id*. at 364. Thus, retroactivity is determined by the substance of what the statute regulates or refers to.

I believe that this articulation of retroactivity is clear, easy to apply, and captures how people actually conceive of retroactivity. *Collins English Dictionary* (online ed) (defining retroactivity as "having application to or effect on things done prior to its enactment").[2] Accordingly, I would adopt it in place of our current definition, which, as discussed below, muddies the waters by introducing the elusive concept of vested rights into what should be a straightforward interpretation of the text. A retroactive statute, therefore, is one that regulates conduct that occurred before the statute became effective.

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[2] *Collins English Dictionary* (online ed) <https://www.collinsdictionary.com/us/dictionary/english/retroactive> (accessed April 2, 2021) [https://perma.cc/K4DV-QKSC].

Under this conception of retroactivity, I would conclude that applying the statute here is retroactive. The statutory amendment at issue states as follows:

> In a civil action, a municipal corporation that has a duty to maintain a sidewalk under [MCL 691.1402a(1)] may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious. [MCL 691.1402a(5).]

At first glance, it might look like the statute governs conduct that occurred, in this case, after the statute's effective date. Specifically, it could be argued that the statute regulates the litigation process by prescribing the defenses a defendant can raise. And, under this line of thinking, since the statute was passed and became effective before plaintiff filed this lawsuit, applying the statute here does not constitute a retroactive application at all.

Such an argument exalts form over substance. Similarly to *Martin*, 527 US at 363-364 (Scalia, J., concurring in part and concurring in the judgment), the statute here refers to another law, the open-and-obvious doctrine. The invocation of the doctrine, without an express definition, serves to incorporate the meaning we have given it. MCL 8.3a (providing that words that "have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning") (punctuation omitted). As we have described it, the open-and-obvious doctrine "attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). In other words, with a few irrelevant exceptions, the "duty a possessor

of land owes his invitees . . . does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

Therefore, the permission MCL 691.1402a(5) provides to municipal corporations to use the open-and-obvious defense represents a simple means of regulating the scope of the duty possessors of land owe to certain classes of individuals who come onto their property. As the majority here notes, at the time of the accident, the open-and-obvious defense was unavailable, and therefore defendant owed a duty to guard against open-and-obvious hazards. The effect of MCL 691.1402a(5), if applied to this case, would be that at the time the accident occurred, defendant did not owe plaintiff a duty to guard against the open-and-obvious hazard that injured plaintiff. The core conduct that the statute regulates is the duty of a land possessor with regard to a hazard at the time of the accident, not the land possessor's post-accident litigation posture.

II. THE PROPER INTERPRETATION OF RETROACTIVE STATUTES

In light of the understanding of "retroactivity" described above, the question in this case is whether the statute, MCL 691.1402a(5), governs accidents that occurred before the statute's passage. The answer depends on the proper method for determining whether the statute is, in fact, retroactive. That method should be the same here as it is in any case of statutory interpretation: discovering the ordinary meaning of the statutory language. See *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020) ("In every case requiring

statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole."). The question is thus whether that meaning requires the statute to be applied retroactively, i.e., does the statutory text regulate accidents that occurred before its passage?

Despite our current use of multiple principles in addition to the text when determining retroactivity, we have long emphasized that the text is the primary criterion of whether a statute applies retroactively. See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) ("In determining whether a statute should be applied retroactively or prospectively only, '[t]he primary and overriding rule is that legislative intent governs,' " as evidenced by the statutory language.) (citation omitted). Accordingly, in finding that a statute does not apply retroactively, it has been critical to our analysis that no statutory language expressly commands such application. See *White v Gen Motors Corp*, 431 Mich 387, 398; 429 NW2d 576 (1988) ("We . . . find it significant that the Legislature omitted any reference to the retroactivity of [the statute at issue]."); *Van Fleet v Van Fleet*, 49 Mich 610, 613; 14 NW 566 (1883) (noting that the statute said nothing concerning events that had already transpired or rights that had already accrued). In one early case, for example, we simply said that "[t]here is nothing in the act itself from which we can gather any . . . intent" to apply the statute retroactively, and that was enough for us to conclude that the statute was "to have a prospective operation only . . . ." *Harrison v Metz*, 17 Mich 377, 382 (1868). One textual indication that a statute is not retroactive is the use of effective dates: "When it wishes to address the question of retroactivity, the Legislature has specifically done so *in addition to* providing for an effective date."

Selk v Detroit Plastic Prod, 419 Mich 32, 35 n 2; 348 NW2d 652 (1984); see also *White*, 431 Mich at 399 ("Therefore, we are persuaded that providing a specific, future effective date and omitting any reference to retroactivity supports our holding that [the statute at issue] is prospective in application.").

A longstanding presumption against retroactivity has guided our assessment of the text. The " 'general rule,' " we have noted, " 'is that a statute is to be construed as having a prospective operation only, unless its terms show clearly a legislative intention that its terms should operate retroactively.' " *Barber v Barber*, 327 Mich 5, 12; 41 NW2d 463 (1950), quoting *Angell v West Bay City*, 117 Mich 685, 688; 76 NW 128 (1898) (collecting cases). As a leading treatise explains, "a law is not construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application." 2 Singer, Sutherland Statutory Construction (7th ed, November 2020 update), § 41:4. Justice Cooley wrote that retroactive " 'legislation . . . is commonly objectionable in principle, and apt to result in injustice,' " except in limited circumstances; consequently, " 'it is a sound rule of construction which refuses lightly to imply an intent to enact it.' " *Reading Law*, p 261, quoting Cooley, Constitutional Limitations (1868), pp 62-63. The presumption thus requires the Legislature to craft clear language commanding retroactive application in order for a court to find that such application is warranted.

This presumption is not lightly dispensed with, and consequently, we are leery of reading a statute as retroactive based purely on the text's implications. We have said that retroactive application would not be found without express command or " 'necessary, un-

equivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt . . . .' " *Ramey v Michigan*, 296 Mich 449, 460; 296 NW 323 (1941), quoting Endlich, Interpretation of Statutes (1888), § 271. In a similar manner, Justice Scalia rejected the argument that because two sections of the relevant statute were expressly prospective, other sections that lacked such an express provision and instead simply had immediate effect were to be read as retroactive. *Landgraf*, 511 US at 288 (Scalia, J., concurring in the judgment). He wrote, "[The] presumption is too strong to be overcome by any negative inference derived from" the absence of an express provision. *Id*. We have also clarified that if "the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." *Todd v Bd of Election Comm'rs*, 104 Mich 474, 478-479; 62 NW 564 (1895) (quotation marks and citation omitted).

Applying these principles to the present case, I agree with the majority's analysis of the text. The issue is whether MCL 691.1402a(5) gives a textual indication that it seeks to regulate activity occurring prior to its effective date that is sufficient to rebut the presumption against retroactivity. Nothing in the statute expressly purports to apply to accidents that predated its enactment. Instead, the statute bears an effective date of January 4, 2017, which is after the accident occurred. The statute's silence on retroactivity along with the effective date offers textual support for the conclusion that the statute is not retroactive. See *White*, 431 Mich at 399; *Selk*, 419 Mich at 35 n 2.

Nor is there any clear implication that could overcome the presumption against retroactivity. At best, it might be argued that the terms “civil action” and “defense” in MCL 691.1402a(5) could be read broadly enough to encompass defenses raised in any civil action that occurs after the statute’s enactment, even if it involves an accident that happened prior to enactment. But to overcome the presumption against retroactive application, it is not enough that the language could be read in a wooden, literal fashion to encompass earlier events; instead, the implication must be “unequivocal,” *Todd*, 104 Mich at 478-479, or “unavoidable,” *Ramey*, 296 Mich at 460 (quotation marks and citation omitted). Here, any implication arising from “civil action” and “defense” is not sufficiently clear. The statute itself, as noted above, regulates the defendant’s duty at the time of the accident by permitting the open-and-obvious doctrine to be raised later as a defense. Yet, there is no language that directly reaches back to pre-enactment accidents themselves. Accordingly, the statute’s bare use of the terms “civil action” and “defense” does not create a sufficiently strong implication that the text applies to pre-enactment accidents.

Consequently, the statute’s text does not support its retroactive application.

III. PROBLEMS WITH OUR CURRENT APPROACH

This should be the end of the story. But under our current approach, the textual meaning of the statute is only one of four principles to be considered.

> First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event.

> Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [*LaFontaine*, 496 Mich at 38-39.]

The first and most significant problem with our approach, then, is that it does not begin and end with the text, as interpreted in light of the longstanding presumption against retroactivity. Our caselaw mentioned above makes clear the need for strong textual indications before a statute will be deemed retroactive. If the text fails to contain such indications, then I cannot fathom how the statute could be retroactive based on the other principles; conversely, if the text has such clear indications, sufficient to overcome the presumption, then I struggle to see how we could avoid interpreting the statute as having retroactive effect.

When the text answers the interpretive question, any approach that forces courts to carry the analysis beyond the text is an invitation to mischief. Take the present case, for example. The Court of Appeals accurately concluded that "[t]he lack of any language [in the statute] regarding retroactivity weighs in favor of prospective application only." *Buhl v Oak Park*, 329 Mich App 486, 496; 942 NW2d 667 (2019). By encouraging the Court of Appeals to go further than the text, our current approach resulted in an interpretive analysis resting heavily on observations that do not clearly relate to the text and on speculations about the Legislature's intent.

The Court of Appeals spent a great deal of space explaining why, under the third factor, retroactive application of the statute would not take away plain-

tiff's vested rights. *Id*. at 496-505. I fail to see why this observation—the merits of which I do not address because I do not believe we need to reach this principle—aids the cause of retroactivity. If there is nothing in the text that requires retroactivity, then the statute is not retroactive. The fact that retroactive application of the statute would not divest a plaintiff of rights cannot change the meaning of the text or overcome the presumption against retroactivity.[3]

The Court of Appeals' holding largely turned on the fourth principle, which involves speculative statements about legislative intent. I agree with the majority's analysis that the so-called *Brewer* restoration rule—a rule that the Court of Appeals developed here, under which a court perceives a legislative amendment to have been intended to undo a court decision and restore the status quo from before that decision—has no basis in our caselaw. See *Brewer v A D Transp Express, Inc*, 486 Mich 50; 782 NW2d 475 (2010). The restoration rule is premised on the notion that retroactivity can flow from the Legislature's unstated intentions, as revealed by a court-crafted narrative of the statute. See *Buhl*, 329 Mich App at 505-506 ("[I]f the Legislature adopts an amendment directed at a particular judicial decision, and through that amendment not only overrules the judicial decision but also reinstates the state of the law as it existed prior to the judicial decision, then the amendment is considered remedial and will be applied retroactively.").

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[3] And, on the other hand, the possibility that the statute divests a plaintiff of rights will not transform the meaning of clear text—rather, as noted below, such a possibility is relevant to the interpretive endeavor only if the divestment raises grave constitutional concerns that require a court to consider whether the text can reasonably bear other interpretations.

Such a rule calls for an unhealthy dose of speculation. Largely on this basis, the United States Supreme Court has rejected a nearly identical argument that a statutory amendment was retroactive because it simply restored the understanding of the statute that prevailed before the Court's original decision interpreting the pre-amendment statute:

> Congress' decision to alter the rule of law established in one of our cases—as petitioners put it, to "legislatively overrul[e]"—does not, by itself, reveal whether Congress intends the "overruling" statute to apply retroactively to events that would otherwise be governed by the judicial decision. A legislative response does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law—or it may be altogether indifferent to the decision's technical merits—but may nevertheless decide that the old law should be amended, but only for the future. Of course, Congress may also decide to announce a new rule that operates retroactively to govern the rights of parties whose rights would otherwise be subject to the rule announced in the judicial decision. Because retroactivity raises special policy concerns, the choice to enact a statute that responds to a judicial decision is quite distinct from the choice to make the responding statute retroactive. [*Rivers v Roadway Express, Inc*, 511 US 298, 304-305; 114 S Ct 1510; 128 L Ed 2d 274 (1994) (citation omitted).]

The Court also noted that its prior decision interpreting the statute did not change the statutory meaning but rather was an "authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id*. at 312-313. Accordingly, the Court's prior decision interpreting the statute did not "change[]" the law that had previously prevailed—rather, that earlier decision "decided what

[the statute] had *always* meant . . . ." *Id*. at 313 n 12. Finally, the Court noted that even if Congress's intent was to restore the law, the Court could not apply that intent without a "clear expression" of it in the text. *Id*. at 307.

These same principles are germane here. An intent to restore the law has no relevance unless the statutory text reflects that intent. Here, it does not. To discern such an intent absent textual support requires conjecture about why the Legislature chose to amend a statute. Such speculation disregards the principle that an authoritative interpretation of the statute establishes what the law has consistently meant since the time of enactment. Therefore, contrary to the Court of Appeals' suggestion in this case, an amendment seeking to overturn such an interpretation does not, without more, "reinstat[e] the *status quo ante* . . . ." *Buhl*, 329 Mich App at 506.

Our current approach poses a separate difficulty in the third principle, which reproduces our current definition of retroactivity. Because the third principle is simply our definition of retroactivity, I believe that this principle would be largely unnecessary were we to adopt the conception of retroactivity I laid down above: a retroactive statute is one that seeks to regulate activity occurring before its passage. The present focus on vested rights introduces a concept "of much difficulty. . . . 'Few questions have troubled the courts more than the problem of what are vested rights. . . . A few courts have frankly recognized that policy considerations, rather than definitions, are controlling . . . .' " *Rookledge v Garwood*, 340 Mich 444, 456; 65 NW2d 785 (1954), quoting *Wylie v City Comm of Grand Rapids*, 293 Mich 571, 587; 292 NW 668 (1940).

One aspect of the confusion is that the criterion of vested rights seems to invoke constitutional concepts. The result is that the interpretive issue of what the statute means becomes conflated with the separate issue (not always raised or relevant) of whether the statute is constitutional or otherwise enforceable. We have contributed to this confusion by sometimes indicating that the third principle is a bar to interpreting a statute as retroactive if such application would impair vested rights. See *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 572; 331 NW2d 456 (1982) ("The third rule states that retrospective application of a law is improper where the law 'takes away or impairs vested rights . . . .' ") (citation omitted). In the present case, for example, defendant analyzed the third principle largely under a constitutional framework, contending that the statute would be constitutional if applied retroactively. But as plaintiff acknowledges in reply, she has not challenged the constitutionality of the statute.

There are independent constitutional provisions and doctrines that might apply to render retroactive statutes unconstitutional. Most directly, "due process principles . . . prevent retrospective laws from divesting rights to property or vested rights," *Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994), although in certain areas, such as economic legislation, retroactive statutes need only meet the relatively lenient rational-basis standard to pass constitutional scrutiny, see *Pension Benefit Guaranty Corp v R A Gray & Co*, 467 US 717, 730; 104 S Ct 2709; 81 L Ed 2d 601 (1984). Other relevant provisions include the federal Ex Post Facto Clause forbidding retroactive penal legislation and the Contracts Clause prohibiting retroactive legislation that impairs contracts. See *Landgraf*, 511 US at 266.

But when no such constitutional arguments have been raised, the issue is whether the statutory text retroactively extends to past events, not whether it can constitutionally do so. For that reason, absent a specific constitutional objection, we have not indicated that the Legislature is otherwise barred from enacting retroactive legislation. See, e.g., *Smith v Humphrey*, 20 Mich 398, 405 (1870) ("We do not understand it to be questioned [whether] it was competent for the Legislature to make the general provisions of the act [retroactive]. . . . The question is whether they have expressed an intention to that effect."). The United States Supreme Court has likewise observed that the statutory interpretation question is distinct from the constitutional question: "Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Landgraf*, 511 US at 267-268. In other words, a statute's "retroactive operation may, but will not necessarily, violate" a constitutional provision. *Reading Law*, p 262.[4] For this reason, too, the "antiretroactivity presumption is just that—a presumption, rather than a constitutional command . . . ." *Republic of Austria v Altmann*, 541 US 677, 692-693; 124 S Ct 2240; 159 L Ed 2d 1 (2004).

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[4] See also 2 Singer, Sutherland Statutory Construction (7th ed, November 2020 update), § 41:5 ("It is misleading to use the terms 'retrospective' and 'retroactive,' as has sometimes been done, to mean an act is unconstitutional. The question of validity rests on further subtle judgments concerning the fairness of applying the new statute."); see Cooley, Constitutional Limitations (5th ed), p 456 ("There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden . . . by the State constitution, and provided further that no other objection exists to them than their retrospective character.").

Consequently, the only issue directly before a court in a case such as the present one is what the statute means, i.e., whether the ordinary meaning of the text clearly shows that the Legislature intended the statute to apply retroactively. If the language is clear, then the statute must be interpreted as retroactive irrespective of constitutional infirmities that might independently render the statute unenforceable. Legislatures can, after all, pass unconstitutional statutes. This is not to say, however, that constitutional concerns will never be relevant to statutory interpretation. When the text is unclear and various reasonable interpretations are possible, courts should opt for an interpretation that avoids raising grave doubts about the statute's constitutionality. See *In re Certified Questions from US Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332, 409; 958 NW2d 1 (2020) (VIVIANO, J., concurring in part and dissenting in part). Thus, if the text as interpreted in light of the presumption remains murky, with different interpretations possible, the fact that one interpretation raises serious constitutional concerns will be relevant in determining whether to select that interpretation.

Even in cases without such constitutional doubts, if the textual meaning is obscure, a court might consider whether the statute changes or modifies duties or rights pertaining to past transactions. Cf. *Frank W Lynch & Co*, 463 Mich at 583 (noting that the statutory text controls retroactivity but that the presumption against retroactivity is "especially" strong when the statute would have these effects on past events). This does not depart from a text-first focus but instead recognizes that the greater the impact of the retroactive application, the less likely it is that vague or unclear text will convey to a reasonable reader that the statute applies retroactively. Cf. Cross, Statutory In-

terpretation (2005), p 187 (noting the interpretive principle in English law that retroactivity "may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended") (quotation marks and citation omitted).

In the same way, the second and fourth principles might help focus the interpretation of unclear text, though their role is less clear. For example, under the fourth principle, which concerns remedial legislation, we have articulated a "narrower" definition of remedial as meaning " 'legislation which is procedural in nature, i.e., it does not affect substantive rights.' " *White*, 431 Mich at 397, quoting 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60.[5] Still, in a difficult

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[5] We have sometimes labeled the fourth factor an "exception" to the antiretroactivity presumption and indicated that truly remedial, i.e., procedural, legislation would apply retroactively. See, e.g., *Selk*, 419 Mich at 10, citing *Hansen-Snyder Co v Gen Motors Corp*, 371 Mich 480, 485; 124 NW2d 286 (1963). More recently, however, we said that the fourth factor was a "so-called 'exception' " and rejected its application when the parties' substantive rights would be affected. *Frank W Lynch & Co*, 463 Mich at 584; see also *Landgraf*, 511 US at 285 n 37 (noting that while some past caselaw suggested that remedial statutes should be applied to pending cases, it is not true for all remedial statutes because some can still cause harm). We have likewise stated that we are "reluctant to apply this exception without extensive exploration of [the] legislative intent." *Franks v White Pine Copper Div, Copper Range Co*, 422 Mich 636, 673; 375 NW2d 715 (1985). Further, we have cast doubt on the usefulness of classifying a statute as remedial, saying that "such a characterization of the act, as a whole, provides no further insight into whether this particular amendment should be applied retroactively or prospectively," and because almost every statute could be called remedial, the label " 'is of little value in statutory construction unless the term "remedial" has for this purpose a more discriminate meaning.' " *White*, 431 Mich at 396-397, quoting 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60. That is why our definition of remedial is so narrow. Whether this principle should operate as a true exception to the antiretroactivity presumption and be considered in

case it might be worth considering whether the statute's focus is procedural. I would, of course, leave it to such a case—one with text that is difficult to decipher—to sketch the precise function of these principles.

Again, however, when the meaning is apparent from the text alone, resorting to these considerations or those in the third principle is unnecessary.[6] In such cases—and this is one of them—the analysis should end with the text.

IV. CONCLUSION

I believe that our methodology for assessing whether a statute is retroactive is flawed. I would take this opportunity to clarify the basic meaning of retroactivity and reestablish the primacy of the text in the interpretive endeavor. In particular, I would clarify that application of a statute is retroactive when it regulates conduct that occurred prior to the statute's effective date. To apply this simple new definition of retroactivity, I would examine the text of the statute at issue to determine whether it purports to regulate such conduct, keeping in mind the strong presumption against retroactivity. If, after all this, the text re-

every case is unnecessary to resolve here because the statute at issue cannot be characterized as remedial, i.e., procedural; it affects the substantive rights and obligations of the parties, specifically the scope of the duty defendant owed to plaintiff. It is worth noting, however, that under the conception of retroactivity I established above, it would likely not be retroactive at all for a statute truly regulating court procedures to be applied to a case that arises before the enactment.

[6] My conclusion leaves the *LaFontaine* principles intact, albeit providing the last three with a more limited scope. Thus, under my framework, it would be unnecessary to overturn *LaFontaine*, which simply said that these were four principles to "keep . . . in mind." *LaFontaine*, 496 Mich at 38.

mained unclear, I would then consider the remaining principles discussed in *LaFontaine*, including whether the statute merely relates to antecedent events, whether it affects rights or duties surrounding past expectations, whether constitutional questions would arise if the statute is applied retroactively, and whether the statute is procedural rather than substantive.

In the present case, the text is clear, and the presumption against retroactivity remains unrebutted. I therefore agree with the majority that nothing in the text suggests the statutory amendment at issue applies to accidents that occurred before its effective date. Consequently, the analysis in this case should stop there. For these reasons, I concur.

CLEMENT, J. (*concurring in part and concurring in the judgment*). I agree completely with the result reached by the majority. I also join most of its analysis of the retroactivity factors from *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW2d 78 (2014), with the exception of Part III(C). As the majority notes, we hold today that the Court of Appeals erred when it held "that MCL 691.1402a(5) satisfies the third *LaFontaine* factor," meaning that we "could end our analysis here . . . ." I agree that we could, and therefore I would. I express no view regarding "the Court of Appeals' creation of the so-called *Brewer* restoration rule," but I do not believe that it "merits further review."

ZAHRA, J., concurred with CLEMENT, J.

CAVANAGH, J., did not participate because of her prior involvement as counsel for a party.

LAW OFFICES OF JEFFREY SHERBOW, PC v FIEGER & FIEGER, PC

Docket No. 159450. Argued January 6, 2021 (Calendar No. 1). Decided June 9, 2021.

The Law Offices of Jeffrey Sherbow, PC, brought an action in the Oakland Circuit Court against Fieger & Fieger, PC (the Fieger firm), asserting that the Fieger firm breached its referral-fee contract with plaintiff when the Fieger firm refused to pay plaintiff 20% of a contingent fee that the Fieger firm had received after it successfully represented several clients in a personal-injury and no-fault action related to an automobile accident in Ohio. Plaintiff alleged that Jeffrey Sherbow, an attorney and the sole proprietor of plaintiff, had referred the personal injury and no-fault cases to Jeffrey Danzig, an attorney who at the time was a named partner at the Fieger firm. Plaintiff alleged that Danzig originally agreed to pay Sherbow 1/3 of any contingent fee that the Fieger firm ultimately earned from the case. In 2011, Charles Rice (Rice) consulted with Sherbow regarding legal matters concerning Rice's nonprofit organization. On July 13, 2012, before their next scheduled meeting, Rice was killed in a car accident in Ohio. Mervie Rice (Mervie), Phillip Hill, and Dorothy Dixon (Rice's partner and the mother of his son, Dion Rice (Dion)) were also injured in the accident. On the day of the accident, Dion contacted Rice's organization, seeking Sherbow's contact information. A worker from the organization provided the information and then contacted Sherbow, informing him of the accident and that Dion wanted to speak with him. Sherbow then contacted Danzig at the Fieger firm to notify him of the potential case. Sherbow called Dion the following evening and then, over the following week, they spoke several times and met in person; Dion testified that he informed Sherbow that he intended to use the Fieger firm and had already contacted the firm. On July 26, 2012, Dion and Mervie met with Sherbow and Danzig at the Fieger firm's office; evidence presented at trial suggested that Mervie had also independently contacted the Fieger firm. During the meeting, Mervie signed a retainer agreement with the Fieger firm and Dion signed a similar agreement on behalf of his mother, who was in a coma at the time. The retainer agreements did not

contain a referral-fee agreement between the Fieger firm and plaintiff. There was conflicting testimony as to whether Mervie and Dion were told that Sherbow would receive a referral fee with regard to the four accident victims: Sherbow and Danzig testified that Mervie and Dion were told about the referral fee, and Mervie and Dion testified that they could not recall referral fees being discussed. Danzig later went to Hill's apartment to meet with Hill and obtained a signed retainer agreement. The referral agreement itself consisted of three letters between Danzig and Sherbow, ultimately stating that Sherbow was entitled to 20% of the attorney fees. Sherbow did not meet with or have contact with Hill before the discovery in this case, did not meet or have contact with Mervie until the July 2012 meeting at the Fieger firm, and did not speak with Dixon until Sherbow filed this action. In 2015, the Fieger firm won an award of $10,225,000 for the accident victims, with the contingent attorney fee totaling $3,408,333.34. Geoffrey Fieger refused Sherbow's request for his portion of the fee, explaining that while he had originally thought Sherbow referred the case, Fieger had subsequently learned that Mervie and Dion had contacted the firm on their own and that Hill and Dixon did not even know Sherbow. Sherbow filed this action, and the Fieger firm moved for partial summary disposition, arguing, in part, that the referral agreement violated MRPC 1.5(e). The court, James M. Alexander, J., denied the motion, concluding that Sherbow, as the referring attorney, was not required under MRPC 1.5(e) to have a written agreement with the client to split a fee and that the Fieger firm's claim that the agreement was against public policy was an affirmative defense for which the firm carried the burden. Despite that ruling, at the conclusion of the trial, the court instructed the jury that in order to recover fees for referring a client, Sherbow had to prove by a preponderance of the evidence that each of the four clients were Sherbow's clients. The jury found that only Dion, who was acting on behalf of Rice's estate, was Sherbow's client. Sherbow appealed in the Court of Appeals. In a published opinion, the Court, MURRAY, C.J., and SHAPIRO and RIORDAN, JJ., affirmed in part, reversed in part, vacated in part, and remanded for a new trial. 326 Mich App 684 (2019). The panel concluded that, contrary to the trial court's instruction, MRPC 1.5(e) did not require the referring attorney to have an attorney-client relationship with the client to recover a referral fee. The panel also concluded that the Fieger firm's public-policy argument was an affirmative defense, that the firm had the burden of providing supporting evidence, and that once evidence was introduced, Sherbow, as plaintiff, bore the burden of producing clear and decisive evidence to negate the defense. The

panel ruled that the trial court erred by instructing the jury that Sherbow, as plaintiff, bore the burden of proof and that the errors below affected the outcome of the trial, requiring a new trial. Sherbow and the Fieger firm both applied for leave to appeal in the Supreme Court. The Supreme Court granted the Fieger firm's application for leave to appeal, 505 Mich 982 (2020), and held in abeyance Sherbow's application, 937 NW2d 694 (2020).

In a unanimous opinion by Justice VIVIANO, the Supreme Court *held*:

For a referral-fee agreement to be valid under MRPC 1.5(e), the referring attorney must have an attorney-client relationship with the individual he or she refers; the relationship can be limited to the act of advising the individual to seek the services of the other attorney if the referring attorney and client expressly or impliedly demonstrate their intent to enter into a professional relationship for that purpose. The burden of proving that MRPC 1.5(e) has been violated and that the referral-fee agreement is unenforceable falls on the party challenging the agreement.

1. MRPC 1.5(e) provides that lawyers who are not in the same firm may divide a fee only if (1) the client is advised of and does not object to the participation of all the lawyers involved and (2) the total fee is reasonable. With regard to referral fees between attorneys, the Michigan Supreme Court—from its adoption of the American Bar Association's 1928 amendment of its Canon of Ethics to its adoption of the ABA's Disciplinary Rule 2-107 in 1971—has historically required the referring attorney to have a professional relationship with the referred client. Specifically, fee-splitting was originally prohibited unless the referring attorney provided legal services in the case *or* assumed responsibility for the representation; later, under Disciplinary Rule 2-107, the referring attorney had to provide both legal services *and* assume responsibility for the representation. In 1988, MRPC 1.5(e) eliminated the services-and-responsibility requirement, thereby opening the door for pure referral fees. The interplay of MRPC 7.2 (banning lawyers from giving anything of value to a person for recommending the lawyer's services) and MRPC 5.4 (prohibiting attorneys from sharing legal fees with nonlawyers except under certain circumstances) with MRPC 1.5(e) indicates that the latter is an exception to these general rules. It would be strange if this exception allowed lawyers to receive paid referrals and split fees simply based on an individual's status as a lawyer. This indicates that MRPC 1.5(e) requires the referring attorney to use his or her knowledge as an attorney, in some manner, on behalf of the client; in other words, as supported by the comments to MRPC 1.5(e) and

the surrounding court rules, the referring attorney must participate in the matter as a lawyer by establishing a professional relationship with the client in order to share in fees. This is an agency relationship that develops from the parties' agreement, which can be express or implied through their conduct; therefore, an attorney-client relationship cannot exist unless the client seeks to obtain legal advice or services from an attorney either directly or indirectly through an intermediary. If the attorney and client expressly or impliedly intend to enter into a professional relationship, the referral can form the basis for that relationship, which need not extend beyond that referral. In this case, the trial court correctly instructed the jury that a professional relationship was required for the fee-split to be allowed under MRPC 1.5(e). The trial court's definition of "client" in the jury instruction was correct because it accurately required that a client employ a lawyer for professional advice or help.

2. A plaintiff has the burden of proof in persuading the jury of the elements of his or her case. In turn, a defendant bears the burden of production related to any affirmative defense raised. An affirmative defense does not challenge the merits of a plaintiff's claim but, instead, seeks to foreclose the plaintiff from continuing his or her case for reasons unrelated to the plaintiff's prima facie case. After the defendant presents evidence for an affirmative defense, the burden shifts to the plaintiff to produce sufficient evidence to overcome the defendants' evidence. Referral agreements are a proper subject matter for contracts; they are not illegal or improper. Under MCR 2.111(F)(3)(a) and (b), a defendant's claim that an otherwise valid contract is void because it violates the public policy underlying MRPC 1.5(e) is an affirmative defense; the public-policy argument does not attack the prima facie case related to breach of contract but, instead, offers an independent reason why the referral agreement is void and the contract claim should be defeated. In this case, the Fieger firm's argument that the referral agreement was void as against public policy was an affirmative defense for which it had the burden of proof. Accordingly, the trial court erred by instructing the jury that Sherbow, as the plaintiff, had the burden of proving that the agreement was not against public policy. Under the circumstances of this case, the error did not prejudice Sherbow as to Mervie and Hill, because there was no evidence from which a jury could have inferred that Sherbow had any contact or communication with either from which an attorney-client relationship could have arisen or that Sherbow referred them to the Fieger firm. However, Sherbow was prejudiced by the incorrect jury instruction as it related to Dixon. Although Sherbow did not

speak with Dixon, there was evidence that her son Dion had acted on behalf of Dixon, just as he had acted on behalf of Rice's estate. Given this evidence and the fact that the jury found that Sherbow's interactions with Dion were enough to create an attorney-client relationship with Rice's estate, the Court could not say that a jury properly instructed on the burden of proof would have found that those same interactions with Dion were insufficient to establish an attorney-client relationship with Dixon. Remand for a new trial was warranted on Sherbow's claim regarding a referral fee for Dixon.

Court of Appeals judgment reversed in part and affirmed in part, jury verdict vacated with respect to Dixon, and case remanded to the trial court for a new trial regarding the portion of the fee Sherbow sought for referring Dixon.

1. ATTORNEYS — RULES OF PROFESSIONAL CONDUCT — REFERRAL-FEE AGREEMENTS — ATTORNEY-CLIENT RELATIONSHIP REQUIRED.

Under MRPC 1.5(e), lawyers who are not in the same firm may divide a fee only if (1) the client is advised of and does not object to the participation of all the lawyers involved and (2) the total fee is reasonable; for a referral-fee agreement to be valid under MRPC 1.5(e), the referring attorney must have an attorney-client relationship with the individual he or she refers; the relationship can be limited to the act of advising the individual to seek the services of the other attorney if the referring attorney and client expressly or impliedly demonstrate their intent to enter into a professional relationship for that purpose.

2. EVIDENCE — AFFIRMATIVE DEFENSES — REFERRAL-FEE AGREEMENTS.

The burden of proving that MRPC 1.5(e) has been violated and that a referral-fee agreement is unenforceable falls upon the party challenging the agreement.

James G. Gross, PLC (by *James G. Gross*) and *Gregory M. Janks* for plaintiff.

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger* and *Sima G. Patel*) for defendant.

Amici Curiae:

Kenneth M. Mogill, *Lawrence A. Dubin*, *Alan M. Gershel*, *Erica N. Lemanski*, *Joan P. Vestrand*, and *Victoria Vuletich* for Ethics Practitioners and Educators.

Law Offices of Robert June, PC (by *Robert B. June*) for Michigan Association for Justice.

VIVIANO, J. Michigan Rule of Professional Conduct 1.5(e) allows attorneys who are not in the same firm to split attorney fees in certain circumstances. This often occurs when one attorney refers an individual to another attorney for legal services but does not provide any other legal services. The primary question in this case is whether, in order to enforce a fee-splitting agreement, MRPC 1.5(e) requires the referring attorney to have an attorney-client relationship with the individual he or she refers. We hold that it does but that the relationship can be limited to the act of advising the individual to seek the services of the other attorney if the referring attorney and client expressly or impliedly demonstrate their intent to enter into a professional relationship for this purpose. Consequently, we reverse the Court of Appeals' judgment to the extent that it held to the contrary. We agree with the Court of Appeals, however, that the defendant bears the burden of proving noncompliance with MRPC 1.5(e) when the defendant raises the violation of the rule as a defense against enforcement of the referral agreement. The result in this case is that the trial court properly instructed the jury that an attorney-client relationship was required but erroneously instructed the jury about the burden of proof. This error requires a new trial as to only one of the potential clients at issue, Dorothy Dixon.

I. FACTS AND PROCEDURAL HISTORY

Jeffrey Sherbow was the sole proprietor of his law office, which is the plaintiff in this case. In 2011, he consulted with Charles Rice (Rice) on a few legal matters involving Rice's nonprofit organization. More meetings were scheduled for July 2012, but on July 13 of that year, Rice was killed in a car accident in Ohio. Also in the car were Mervie Rice (Mervie), Phillip Hill, and Dorothy Dixon, who was Rice's partner and the mother of his son, Dion Rice (Dion). These three injured parties plus Rice's estate are the four clients involved in the present case.

On the day of the accident, Dion called his father's organization and asked for Sherbow's contact information. Jennifer Hatchett, who worked for Rice's organization, provided the information and then called Sherbow to inform him about the accident and that Dion was looking to speak with him. Sherbow spoke with Hatchett for about one minute, and Sherbow then called Jeffrey Danzig, a partner at defendant, Fieger & Fieger, PC (the Fieger Firm), and head of the Fieger Firm's intake department, to notify him about the potential case concerning the car accident. Sherbow and Dion did not speak until the following evening when Sherbow called Dion. Over the following week, Sherbow spoke with Dion a few times and they met in person. Dion testified that at the meeting, he told Sherbow that he intended to use the Fieger Firm and, in fact, had already called the Firm. Evidence also existed indicating that Mervie had contacted the Fieger Firm on her own.

At a meeting at the Fieger Firm's office on July 26, Sherbow and Danzig met with, among others, Dion and Mervie. Hill did not attend the meeting and neither did Dixon, who remained in a coma. Danzig

and Sherbow both testified that Danzig explained that Sherbow would receive a referral fee with regard to the four clients and that no one objected. Mervie testified she did not recall any such explanation and that, although she did not object at the meeting, she would have if she had been told about the agreement. Dion testified that he could not remember if a referral fee was discussed at the meeting.

At the meeting, Mervie signed a retainer agreement with the Fieger Firm, as did Dion on behalf of Rice's estate. Dion also agreed to the Fieger Firm's representation of his mother, Dixon. Danzig later went to Hill's apartment and obtained a signed retainer agreement. Again, there was conflicting testimony about whether the referral fee was mentioned to Hill; Danzig said he explained it, and Hill denied hearing about it. For his part, Sherbow did not meet with or speak to Hill until the present case was in the discovery stage. Sherbow also acknowledged that he had not met or talked to Mervie until the July meeting. Dixon, after awakening from her coma, was informed by her son Dion that the Fieger Firm had been retained. Danzig visited her and explained that the Fieger Firm was representing her —Danzig and Dixon disputed at trial whether he told her of the referral arrangement. Dixon did not speak to Sherbow until the present case arose.

Three letters between Danzig and Sherbow form the referral agreement. The first two letters confirm that Sherbow was entitled to one-third of the attorney fees; the last letter readjusted this down to 20% because the local counsel in Ohio (where the underlying case proceeded) wanted more than the 10% he had agreed to take. When Danzig left the firm in 2014, Sherbow

confirmed the agreements with another Fieger Firm partner, Robert Giroux, who assured Sherbow that he would get paid.

Sherbow did no work on the case. In 2015, he learned that the Fieger Firm had prevailed in the underlying action, winning an award of $10,225,000, with the contingent fee totaling $3,408,333.34. Sherbow inquired about his portion of the fee, and Geoffrey Fieger (Fieger) responded that while he originally believed Sherbow had referred the case, Fieger had since learned that Mervie and Dion had contacted the office on their own and that Hill and Dixon did not even know Sherbow. Fieger indicated that the referral fee would not be paid. Later, Fieger obtained four identical affidavits from each of the clients attesting that Sherbow never represented them, that they did not want him to get a referral fee, that he did not work on the case, and that he did not refer them to the Fieger Firm.

Sherbow filed the present complaint in June 2015. In July 2016, the Fieger Firm sought partial summary disposition under MCR 2.116(C)(10), arguing among other things that the agreement violated MRPC 1.5(e). The trial court denied the motion, determining, in relevant part, that MRPC 1.5(e) did not require the referring attorney to have a written agreement with the client in order to split a fee and that the Fieger Firm's contention that the agreement was void as against public policy was an affirmative defense on which the Fieger Firm carried the burden.

A trial was held in February and March 2017. Despite its earlier ruling to the contrary, the trial court instructed the jury—over Sherbow's objection—that Sherbow had to prove by a preponderance of the evidence that each client was Sherbow's client in order to recover a fee for referring that client. The trial court

defined "client" as "a person or entity that employs a professional for advice or help in that professional's line of work, especially one in whose interest a lawyer acts as by giving advice, appearing in court or handling the matter." Question 1 on the jury verdict form asked whether a professional relationship existed. Question 2 stated, "If yes to any part of 1, did plaintiff refer one, some, or all or the following personal injury cases to Defendant?" The jury found that only Dion, on behalf of Rice's estate, was a client of Sherbow, who was awarded $93,333.33.

Sherbow appealed, contending among other things that the trial court erred by instructing the jury that the clients needed to have an attorney-client relationship with him in order for him to refer them and that the trial court erred by placing the burden of proving compliance with MRPC 1.5(e) on him. The Fieger Firm responded that the agreement violated MRPC 1.5(e) and, thus, was void as against public policy.

The Court of Appeals affirmed in part, reversed in part, vacated in part, and remanded.[1] The Court determined that the trial court erred in its jury instructions on MRPC 1.5(e), holding that contrary to the instructions given to the jury, that rule does not require the referring attorney to have an attorney-client relationship with the client.[2] With regard to the burden of proof, the Court of Appeals concluded that the public-policy argument constitutes an affirmative defense and, as such, the defendant bears the burden of providing supporting evidence.[3] Once such evidence has

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[1] *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684; 930 NW2d 416 (2019).

[2] *Id*. at 695-696, 708-709.

[3] *Id*. at 707-709.

been introduced, the burden shifts to the plaintiff to produce clear and decisive evidence negating the defense.[4] Given that determination, the Court held that the trial court erred by instructing the jury that Sherbow, as plaintiff, bore the burden. Finally, the Court concluded that these errors affected the outcome and therefore required retrial.[5]

Both parties sought leave to appeal in this Court. We granted the Fieger Firm's application and have held Sherbow's in abeyance for resolution of the questions posed here, namely, whether MRPC 1.5(e) requires an attorney-client relationship, who has the burden of proving violations of that rule, and whether any errors below require reversal of the jury verdict.[6]

II. STANDARD OF REVIEW AND INTERPRETIVE PRINCIPLES

We review de novo the interpretation of the rules of professional conduct.[7] When interpreting rules promulgated by this Court, such as the Michigan Rules of Professional Conduct, we are guided by the same principles that pertain to statutory interpretation.[8] Accordingly, "we seek to discern the ordinary meaning

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[4] *Id*. at 708-709.

[5] *Id*. at 713-715, 718.

[6] *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 505 Mich 982 (2020); *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 937 NW2d 694 (Mich, 2020).

[7] *Grievance Administrator v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006).

[8] See *Haliw v Sterling Heights*, 471 Mich 700, 704-705; 691 NW2d 753 (2005).

of the language in the context of the [court rule] as a whole."[9] Claims of instructional error are also reviewed de novo.[10]

III. ANALYSIS

Our analysis begins with MRPC 1.5(e), which we interpret to require an attorney-client relationship between a referring attorney and the individual the attorney refers. We next explain that the party seeking to void a referral agreement on the basis that it violates MRPC 1.5(e) carries the burden of demonstrating the violation. Finally, we determine that the trial court's error in instructing the jury that Sherbow bore the burden of proof requires a new trial only as to Sherbow's claim for referring Dixon.

A. MRPC 1.5(e)

MRPC 1.5(e) states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (2) the total fee is reasonable.

To understand what this rule means and whether it requires an attorney-client relationship, it is helpful first to trace the history of its language, which shows that we have long required the referring attorney to have a professional relationship with the referred

[9] *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020).

[10] *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002).

client.[11] The text and context of our current rule—examined after the history—demonstrate that we have not dispensed with the requirement of an attorney-client relationship in our current rule, even as we have dropped other requirements from the rule.

1. HISTORY

The genesis of the rule can be found in a 1928 amendment to the Canon of Ethics adopted by the American Bar Association (ABA). The amendment added Canon 34, which provided, in relevant part, that "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."[12] A few years after it was promulgated by the ABA, this Court incorporated that language into our Rule 34.[13] The ABA's ethics committee and commentators interpreted Canon 34 to "preclude a division of fees among attorneys when one attorney provided no other service to the case beyond the referral itself."[14] In

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[11] Our focus is on the history of the text itself, and thus, we do not rely on materials or considerations analogous to legislative history. Cf. *People v Pinkney*, 501 Mich 259, 276 n 41; 912 NW2d 535 (2018) (distinguishing legislative history from statutory history, the latter of which consists of "the narrative of the 'statutes repealed or amended by the statute under consideration' " and which "properly 'form[s] part of the context of the statute' ") (alteration in original), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256.

[12] *Canons of Professional & Judicial Ethics*, 51 Annu Rep ABA 767, 778-779 (1928).

[13] *Canons of Professional Ethics*, 15 Mich St B J 42, 54 (1936).

[14] Billings, *What Attorneys Should Know: A Comprehensive Analysis of Proposed Rule 8A*, 35 St Mary's L J 1015, 1018 (2004); see also Drinker, *Legal Ethics* (NY: Columbia Univ Press, 1953), p 186 ("Accordingly, it has been repeatedly held by the [ethics] [c]ommittees that no right to a division arises from the mere recommendation."); Richardson, *Division of Fees Between Attorneys*, 3 J Legal Prof 179, 185-186 (1978)

1937, our Committee on Professional and Judicial Ethics agreed, recognizing the position that " '[a]ll division of compensation between lawyers should be based upon the sharing of professional responsibility or service, and a division of fees merely because of the recommendation of another is not proper.' "[15]

The Canons, however, were aspirational and exhortatory standards, not rules that could be enforced through disciplinary proceedings.[16] Perhaps as a result, violations of Canon 34 were rampant.[17] In response, and as part of a general revision of the ethics code, the ABA constructed a tripartite system of ethical regulation, composed of general Canons, fleshed out by more specific Ethical Considerations, and given teeth by mandatory Disciplinary Rules.[18] Disciplinary Rule (DR) 2-107 provided:

(noting that a few earlier ethics committee decisions allowed fee division based on a mere referral if the client consented but that the committee decisions eventually settled on a "stricter interpretation," which became "the overwhelming view of bar associations," prohibiting fees in these circumstances).

[15] *Opinions of the Committee on Professional and Judicial Ethics*, *Opinion 24* (issued August 1937), 38 Mich St B J 31, 45 (1959) (citation omitted).

[16] See *In re Mardigian Estate*, 502 Mich 154, 189-191; 917 NW2d 325 (2018) (MCCORMACK, J., for reversal) (discussing the history of the ABA standards); see also *Report of the Special Committee on Evaluation of Ethical Standards*, 94 Annu Rep ABA 728, 730 (1969) ("The present Canons . . . are not cast in language designed for disciplinary enforcement and many abound with quaint expressions of the past.").

[17] See Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U Cin L Rev 239, 241-242 (1992); Zeligson, *The Referral Fee and the ABA Model Rules of Professional Conduct: Should States Adopt Model Rule 1.5(e)?*, 15 Fordham Urb L J 801, 805-806 (1987).

[18] ABA, *ABA Model Code Of Professional Responsibility*, Preliminary Statement (1969).

> (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is made in proportion to the services performed and responsibility assumed by each.
>
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.[19]

Our Court adopted this rule in 1971.[20] The key requirement continued to be the division of the fee based on services provided and responsibility assumed by each lawyer. Unlike Canon 34's use of the disjunctive "or"—service *or* responsibility—DR 2-107 required both services and responsibility to be shared, further cementing the need for the referring attorney to participate in the legal representation of the client. Courts, ethics committees, and commentators interpreted this services-and-responsibility requirement to "relate to an actual participation in or handling of the case," such that "the responsibility called for under the rule must be related to the legal services rendered *in the actual handling of the* case."[21] As our ethics com-

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[19] *Id*. at DR 2-107. The Code also contained an Ethical Consideration that essentially repeated the DR. See *id*. at EC 2-22 ("Without the consent of his client, a lawyer should not associate in a particular matter [with] another lawyer outside firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.").

[20] *Code of Professional Responsibility*, 53 Mich St B J 18r, 21r (1974).

[21] *Palmer v Breyfogle*, 217 Kan 128, 144; 535 P2d 955 (1975) (quotation marks and citation omitted), overruled after the state adopted a new rule on referral fees by *Ryder v Farmland Mut Ins Co*, 248 Kan 352;

mittee stated, "Where an attorney or law firm merely performs a referral function, rendering no other services to the client and assuming no responsibility in the matter, a division of fees is improper."[22]

Empirical and anecdotal evidence suggested that DR 2-107 was not popular and was often disregarded.[23] Perhaps acknowledging this reality, the ABA liberalized its standards in the current Model Rule 1.5(e), adopted in 1983:

> A division of a fee between lawyers who are not in the same firm may be made only if:

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807 P2d 109 (1991), citing *McFarland v George*, 316 SW2d 662, 670 (Mo App, 1958) ("To merely recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing service or discharging responsibility in the case."). See also 1 Rossi, Attorney's Fees (3d ed), § 4:2 (noting that "many courts" under the DR and the canon have held unenforceable referral-fee agreements under which "an attorney merely refers a case to another lawyer and contributes no further effort to the handling of the case and assumes no responsibility for it"); Note, *Money for Nothing? Have the New Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U Det L Rev 229, 232 (1991) ("Cases have 'consistently held that "services performed" requires, at a minimum, that the forwarding lawyer must do more than simply originate the matter and perhaps vaguely consult with the client for client relations purposes thereafter.' "), quoting Wolfram, Modern Legal Ethics (1986), p 512; *Division of Fees*, 3 J Legal Prof at 186 ("[T]he ABA [Ethics] Committee decided that in merely recommending a lawyer to one's client, the recommending attorney performs no service within the meaning of DR 2-107."); Senter, *On Grievances*, 51 Mich St B J 309, 310 (1972) (discussing Michigan's DR 2-107 and noting that "[w]ith respect to so called 'forwarding fees' there can be no proper sharing of a fee for merely bringing about the employment of another lawyer, and where the referring lawyer renders no service and assumes no responsibility"); cf. *Legal Ethics*, p 186 (discussing Canon 34's similar language and stating that "[t]he service and responsibility must, to be effective, relate to the handling of the case").

[22] State Bar of Michigan Ethics Op CI-893 (March 12, 1983).

[23] See *Division of Fees*, 3 J Legal Prof at 188-190; *Ohio Disciplinary Rule 2-107*, 61 U Cin L Rev at 244-245.

> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.[24]

Like Canon 34—but unlike DR 2-107—Model Rule 1.5(e) allows fee-splitting when each lawyer either performs services or assumes responsibility.[25] The ABA has provided a more concrete metric to measure responsibility, holding in ethics opinions that it requires the referring attorney to assume the same level of responsibility as would a " 'partner in a law firm under similar circumstances.' "[26] Either way—whether services were performed or responsibility assumed—the referring attorney must play some role in his or her professional capacity. Still, the possibility exists that

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[24] The most recent Restatement has retained the requirements from the ABA:

> A division of fees between lawyers who are not in the same firm may be made only if:
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> (1) (a) the division is in proportion to the services performed by each lawyer or (b) by agreement with the client, the lawyers assume joint responsibility for the representation;
>
> (2) the client is informed of and does not object to the fact of division, the terms of the division, and the participation of the lawyers involved; and
>
> (3) the total fee is reasonable. [1 Restatement Law Governing Lawyers, 3d, § 47, p 332.]

[25] Franck, *The New Michigan Rules of Professional Conduct*, 67 Mich B J 954, 955 (1988) (noting the similarity between Canon 34 and Model Rule 1.5(e) and that, coming after the DR, the model rule "enlarged the opportunity for the referring lawyer to earn a fee").

[26] *Ohio Disciplinary Rule 2-107*, 61 U Cin L Rev at 247, quoting ABA Informal Op 85-1514 (April 27, 1985).

the referring attorney might end up doing little more than referring the client, never needing to engage in actual representation, but nonetheless bearing professional responsibility for legal services provided to the client.[27]

Shortly after the ABA promulgated its new rule, we began the process of amending ours. Although we considered the ABA's model rule, we ultimately rejected it in favor of our present rule.[28] The key difference between this new rule and both its predecessor and the ABA model rule is that it completely discards the services-and-responsibility requirement.

This narrative of MRPC 1.5(e)'s textual development helps illuminate the answer to the question in this case: when attorneys seek to split a fee on the basis of a referral agreement, must the referring attorney have an attorney-client relationship with the client? The answer was abundantly clear under our previous rules. Fee sharing was prohibited unless the

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[27] *Money for Nothing?*, 68 U Det L Rev at 233 & n 27; see also Rossi, § 4:2 ("On its face, [Model Rule 1.5(e)] does not authorize pure referral fees, although it clearly allows more leeway in referral arrangements than did DR 2-107(A)."); *The Referral Fee and the ABA Model Rules of Professional Conduct: Should States Adopt Model Rule 1.5(e)?*, 15 Fordham Urb L J at 815 ("Under Model Rule 1.5(e), a referring lawyer doing absolutely no work could still be 'responsible' for the case as if he had done the work himself, *if* he had potential legal liability for everything, including the possibility of becoming a defendant in a malpractice action when the performing attorney has been negligent."). As the Restatement explains, the rationale for allowing these agreements is that each lawyer could be liable in a malpractice suit to the same extent as a partner in a law firm, and thus, the "assumption of responsibility discourages lawyers from referring clients to careless lawyers in return for a large share of the fee." Restatement, § 47, comment *d*, p 333.

[28] See *Proposed Michigan Rules of Professional Conduct*, 64 Mich B J 775 (1985) (publishing the ABA model rule for comment); *Money for Nothing?*, 68 U Det L Rev at 242 (discussing the adoption process).

referrer provided legal services in the case or assumed responsibility for the representation or, under DR 2-107, did both. By eliminating the services-or-responsibility requirement in 1988, we ended the mandate that the referring lawyer had to continue on in the underlying legal matter by either working on it or assuming liability for it. In doing so, we opened the door to pure referral fees.

But it would be a much greater break with the past to conclude that the 1988 amendment, by eliminating the services-and-responsibility requirement, also eliminated the requirement that the referring attorney contact or consult with or even know the client. In advocating for this interpretation, Sherbow overlooks the language that remains in the text and the relevant context in which that language appears. To be sure, MRPC 1.5(e) does not expressly articulate a requirement that the client have a professional relationship with the referring attorney. That requirement, however, is evident when the rule's terms are read in their proper context.

2. TEXT AND CONTEXT

Two other ethical rules provide necessary context that helps to situate our analysis of MRPC 1.5(e)'s text. The first is MRPC 7.2. With a few exceptions not relevant here, the rule bans lawyers from "giv[ing] anything of value to a person for recommending the lawyer's services[.]"[29] Against this background prohibition on paid referrals, MRPC 1.5(e) functions as an exception under which lawyers (but not nonlawyers)

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[29] MRPC 7.2(c) (excepting advertising payments, nonprofit referral services, and the purchase of a law practice).

can be paid for recommending another's services.[30] It would be strange, to say the least, if this exception allowed lawyers to be paid for referrals "simply because lawyers possess a license" to practice law, i.e., simply because they are a member of the legal profession.[31] Rather, the license can be relevant only because it gives the lawyer authority and expertise to exercise professional judgment. In a like manner, the second relevant ethical rule, MRPC 5.4, prohibits attorneys from sharing legal fees with nonlawyers except under certain circumstances not at issue here. An attorney can therefore share in another's fees only by virtue of being an attorney. Both rules thus indicate that MRPC 1.5(e) operates as an exception based solely on an individual's status as a lawyer. This suggests that MRPC 1.5(e) requires the referring lawyer to put his or her law license to use, in some manner, on behalf of the client.[32]

It is therefore no surprise to see that MRPC 1.5(e) adverts to the referring lawyer's "participation," of which the "client" must be informed and to which the client must not object. The word "participation" contemplates something more than the referring attorney's bare participation as a party to the fee agreement. Otherwise, MRPC 1.5(e)'s requirements will have been reduced nearly to nothing. For example, the referring attorney could hear about potential litigation

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[30] See Connecticut Bar Association Informal Ethics Op 2013-04 (May 15, 2013), p 2.

[31] *Id*.

[32] The Connecticut Professional Ethics Committee reached the same conclusion, reasoning that the "referral fees are permitted to be paid to lawyers because the referring lawyer has a lawyer-client relationship and because the referring lawyer owes the client the duties prescribed by the Rules of Professional Conduct." *Id*.

involving strangers and call a friend at another law firm to tip him or her off about the possible case. In those circumstances, as long as the client was told about the referring lawyer's participation and the client did not object, MRPC 1.5(e) would be satisfied. The rule would thus boil down to a requirement that someone tell the client that an unknown lawyer was to receive part of the fee despite having done no legal work on the case and having no actual connection to or contact with the client.

The text indicates that the minimum required "participation" is the establishment of an attorney-client relationship. The rule speaks of the "division of a fee between *lawyers* . . . ."[33] The effect of this language is to require the referring lawyer to participate as a lawyer. Our State Bar's ethics committee has recognized as much, noting that a contractual relationship that results in the sharing of attorney fees between lawyers "does not fall within MRPC 1.5(e)" when one lawyer "is not participating in the transaction *as a lawyer*."[34] In the transaction before the committee, for example, one lawyer rented office space to another, with part of the rent calculated on the basis of the renter's gross income.[35] As the committee pointed out, however, MRPC 5.4 prohibits the sharing of attorney fees with nonlawyers except under limited circumstances.[36] Thus, a lawyer who does not participate as a lawyer—or who, for some reason, is not eligible to

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[33] MRPC 1.5(e) (emphasis added).

[34] State Bar of Michigan Ethics Op RI-133 (May 28, 1992).

[35] *Id.*

[36] *Id.*; see MRPC 5.4. In the ethics opinion, the committee ultimately concluded on other grounds that the rent did not constitute fee-splitting. Ethics Op RI-133.

practice—would be barred from sharing fees.[37] The only reason, then, that a lawyer can share in fees is because, as the text of MRPC 1.5(e) suggests, he or she participates in the matter as a lawyer.

Also relevant is the rule's use of the word "client": the fee is permissible if, among other things, "the client is advised of and does not object to the participation of all the lawyers involved[.]" MRPC 1.5(e). At the time we adopted the rule in 1988, "client" was defined as "[a] person who employs or retains an attorney, or counsellor, to appear for him in courts, advise, assist, and defend him in legal proceedings, and to act for him in any legal business."[38] Thus, to be a "client" of an attorney, one must have a professional relationship with the attorney. The comments to MRPC 1.5 provide some additional support for the conclusion that the referring lawyer must participate as a lawyer and thereby establish a professional relationship with the "client."[39] As the comment explains, the divided fee still constitutes "a single billing to a client . . . ."[40] The fee division "facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring

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[37] *Id.*; cf. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38; 672 NW2d 884 (2003) (holding that an inactive member of the bar was ineligible to share fees as a lawyer under MRPC 1.5(e)).

[38] *Black's Law Dictionary* (6th ed). The lay dictionary provides a similar definition. See *Webster's Basic English Dictionary* (1995) ("[A] person who uses the professional advice or services of another.").

[39] "We acknowledge that staff comments to the court rules are not binding authority, but they can be persuasive in understanding the proper scope or interpretation of a rule or its terms." *People v Comer*, 500 Mich 278, 298 n 48; 901 NW2d 553 (2017).

[40] MRPC 1.5, comment.

lawyer and a trial specialist."[41] In other words, the comment characterizes a fee-splitting arrangement as an "association" of lawyers—including those who simply make referrals—for the benefit of the joint client, who is given one bill for the association's efforts.[42]

The surrounding rules also support our conclusion. One of the central ethical precepts in our profession is that lawyers with direct conflicts cannot represent a client unless the lawyer reasonably believes the conflict will not adversely affect the relationship and the client consents. We have codified this rule in MRPC 1.7.[43] If no professional relationship were required under MRPC 1.5(e), then MRPC 1.7 would not apply.

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[41] *Id*.

[42] Sherbow contends that the term "client" could refer to the relationship between the litigant and the attorney to whom he or she is referred and who handles the litigant's case. At least one court, in a brief analysis, has agreed when interpreting a similar rule. See *Ryder*, 248 Kan at 363 ("The word 'client' could refer either to the status of a litigant with regard to the referring attorney or with regard to the attorney to whom the matter is referred. If it refers to the relationship with regard to the referring attorney, the rule mandates an attorney-client relationship with the referring attorney. It is clear that the litigant would be a client of the attorney to whom the matter is referred. We adopt what we believe to be the logical interpretation, that 'client' refers to the status of the litigant with the attorney to whom the matter is referred."). Nonetheless, it does not follow that simply because the word client *could* refer to the relationship with the attorney to whom the case is referred, the word *must* refer to that attorney alone. It is perfectly consistent with the text for "client" to refer to the relationship the individual must have with both lawyers. And in light of the rule's comments, this interpretation of "client" is on sounder ground.

[43] The rule states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

As a result, a referring attorney who could not ethically represent a client could nonetheless guide that client to an attorney and, in the process, collect a fee. Interpreting MRPC 1.5(e) in this manner would thus conflict with the important client protections offered by MRPC 1.7.

Addressing this issue, our Court of Appeals and our ethics committee have recognized that

> "[i]f the referring lawyer has a conflict, then any advice might smack of a conflict, even if the advice is to go to a specific lawyer. If the conflict arises because the lawyer has a current client with interests directly adverse to those of the prospective client, MRPC 1.7(a), any advice regarding choice of counsel would be inappropriate, and akin to selecting one's adversary."[44]

Although neither the ethics opinion nor the Court of Appeals expressly analyzed whether MRPC 1.5(e) requires an attorney-client relationship, they concluded that the referring attorney had a fiduciary relationship with the client, which is the essence of the attorney-

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> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. [MRPC 1.7.]

[44] *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 201-202; 650 NW2d 364 (2002), quoting State Bar of Michigan Ethics Op RI-116 (February 19, 1992).

client relationship.[45] They stated, " 'When lawyers split fees, both remain in a fiduciary relationship with the client.' "[46] Other courts and ethics bodies, analyzing rules that similarly lack the services-or-responsibility requirement, have agreed.[47] To hold otherwise would undercut the protections offered by MRPC 1.7.

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[45] *Evans & Luptak*, 251 Mich App at 201-202, quoting Ethics Op RI-116. See *Rippey v Wilson*, 280 Mich 233, 243; 273 NW 552 (1937) ("The relationship between client and attorney is a fiduciary one, not measured by the rule of dealing at arm's length.").

[46] *Evans & Luptak*, 251 Mich App at 202, quoting Ethics Op RI-116.

[47] The Connecticut Professional Ethics Committee, for example, examined a rule identical to ours in all relevant respects and concluded "that Rule 1.5(e) by necessary implication requires that each lawyer receiving a fee from the representation of a client establish a lawyer-client relationship with the client . . . ." Informal Ethics Op 2013-04, pp 1-2 & 2 n 2, citing, among other things, *Evans & Luptak*, 251 Mich App 187, and Ethics Op RI-116. Maine's ethics body concluded likewise, determining that a similarly phrased rule "contemplates both lawyers being employed in some sense by the client, even if the referring lawyer does not expect to spend time proportional to her fee, or any time for that matter, or expect to be consulted about the litigation after her referral." Maine Board of Bar Overseers Op 145 (September 27, 1994) (examining a rule that stated, in relevant part, that the " 'client . . . consents to employment of the other lawyer' ") (citation omitted). A Massachusetts trial court reached the same result because, in part, a "client" could never consent to the employment of the nonreferring attorney given that "the 'client' can never actually be a client [of the referring attorney] because of a conflict of interest. . . . Theoretically the attorney-client relationship has never been established." *Bloomenthal v Halstrom*, unpublished opinion of the Massachusetts Superior Court, issued March 16, 1999 (Docket No. 951773B), p 5.

A few courts and ethics committees have reached the opposite conclusion. Respectfully, we do not find these cases persuasive. The only court to squarely address whether a rule like ours requires an attorney-client relationship was the Kansas Supreme Court. But its analysis rested on the mere fact that the term "client" does not necessarily relate to a relationship with the referring attorney. See *Ryder*, 248 Kan at 363. For the reasons stated, we do not believe this carries the day. Other courts opining on this topic have failed to directly resolve it. See *Naughton v Pfaff*, 2016 IL App (2d) 150360, ¶ 60; 57 NE3d 503 (2016)

The efficacy of our confidentiality rules would similarly be sapped if we interpreted MRPC 1.5(e) not to mandate any direct or indirect contact or consultation between the referring attorney and client. MRPC 1.6(a) requires lawyers not to reveal confidences and secrets learned in the "professional relationship" with the client. Similar protections apply to information learned from prospective clients—those who "consult[] with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter . . . ."[48] But if no attorney-client relationship forms and if the "referring" attorney never even consults with the individual, then it is hard to see how the "referring" attorney would have any obligations with regard to otherwise confidential information he has learned. And it is very possible that he or she could be exposed to such information. Consider in this case, for example, that Sherbow, the referring attorney, discussed the case with at least one client and the receiving attorney. He very well could have learned information that he could not disclose if he were considered to have an attorney-client relationship or even if the individuals had been mere prospective clients. Yet without such a connection to the individual, it would seem that the

(noting a similar version of the rule and stating, "[The term] 'client' can be understood to mean the individual who becomes the client of the receiving lawyer," and "[w]hile there might be unexplored public-policy reasons for requiring that an attorney first have an attorney-client relationship with an individual *before* a referral, such a result is not mandated by the rule's language itself") (emphasis added); *Law Offices of Robert L Crill, Inc v Bond*, 76 SW3d 411, 420-421 (Tex Civ App, 2001) (holding that no professional relationship with the client was required when the parties failed to adequately brief the issue and, in any event, the evidence was sufficient to allow the fact-finder to infer that an attorney-client relationship did, in fact, exist).

[48] MRPC 1.18(a). See also MRPC 1.18(b).

referring attorney would be free to broadcast otherwise confidential information at will.

In light of these considerations, we cannot agree with Sherbow that MRPC 1.5(e) is properly interpreted as permitting a referring attorney to enter into an agreement to divide a fee for a client with whom he or she has no professional relationship. And because MRPC 1.5(e) indicates that he or she must participate as a lawyer when the basis of the fee division is a referral, the lawyer must exercise some professional judgment in actually referring the case to an attorney. To hold otherwise would, as already noted, take this rule beyond not only what the text and context suggest but also what the history of the rule indicates was its meaning.

3. THE REQUIRED RELATIONSHIP

This does not mean, however, that the referring attorney must provide legal services for the client beyond the referral or assume responsibility for the client's case. Instead, the rule merely requires that the lawyer participate as a lawyer, which requires the establishment of a professional relationship with the client. This is an agency relationship that arises from the agreement of the parties, which can be express or implied through their conduct.[49] Although a consultation between the lawyer and client is not enough, by itself, to create the relationship, some direct or indirect consultation between the parties is necessary.[50] This is

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[49] See *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457 (1997).

[50] See *McCabe v Arcidy*, 138 NH 20, 25; 635 A2d 446 (1993) ("Consultation between an attorney and another person constitutes the fundamental basis of an attorney-client relationship. A critical element of that consultation, however, is that the person initiating it do so with the

not a radical concept or requirement but a pure fact of life for consumers of goods and services. Unless the consumer, say, places an order in the fast-food drive thru or sends someone else to do so on his or her behalf, he or she will not be getting the takeout meal. In the same manner, no attorney-client relationship can exist unless the client seeks to obtain legal advice or services from an attorney either directly or through an intermediary.

Consequently, MRPC 1.5(e) requires the attorney to participate as an attorney, which in turn requires him or her to establish a professional relationship with the client, which can be accomplished by a direct or indirect (i.e., through the client's agent) consultation. There is, however, no rule that the relationship thus formed must extend for any particular duration or seek any particular objectives (as opposed to being on a general retainer). As noted, the attorney-client relationship depends on the agreement of the parties and "is one of agency."[51] "An attorney at law," we have explained, "need not be in court or preparing to go into court, to be engaged in work as an attorney. In a legal

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intent of seeking legal advice from the attorney."); 1 Mallen, Legal Malpractice (2020), § 8:12 (noting the consultation requirement); 48 Am Jur, Existence of Attorney-Client Relationship, Proof of Facts 2d 525 (Nov 2020 update), § 8 ("Although a consultation directly or indirectly involving an attorney and another person constitutes the very basis of an attorney-client relationship, the fact of such a consultation is never enough, by itself, to give rise to the relationship."); cf. *Macomb Co Taxpayers*, 455 Mich at 11 ("The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession.") (quotation marks and citation omitted).

[51] *Fletcher v Bd of Ed of Sch Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948) (quotation marks and citation omitted); *id*. ("The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business.") (quotation marks and citation omitted).

sense, an attorney at law often acts as an agent or representative."[52] In that role, the attorney's scope of authority is defined by what the parties have expressly or impliedly agreed to.[53] The parties thus can determine the precise scope and nature of the relationship.[54] In addition, a recent amendment to our rules allows parties to control the extent of the attorney-client relationship even in areas where limitations were not traditionally allowed.[55] For example, when an attorney represents a client in court, the attorney and client can agree to limit the scope of their relationship in compliance with MRPC 1.2.

Thus, when the consultation or contact leads to or is for the purpose of a referral to another lawyer, the

[52] *Id*.

[53] See *Wigfall v Detroit*, 504 Mich 330, 340-342; 934 NW2d 760 (2019) (explaining that the agent can act in matters that the client has entrusted to the agent); see also *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004) ("[A]n attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority."). Of course, any limitations must be consistent with the lawyer's ethical duties. But we are aware of no such duty that would prevent the attorney from restricting his professional services to the referral.

[54] Cf. Day, *New Limited Scope Rules Benefit Underemployed Attorneys and Overburdened Courts*, 97 Mich B J 44, 44 (2018) (noting that attorneys have traditionally provided limited-scope services such as "the commercial or real estate attorney hired to review a single contract with no expectation of further engagement in the transaction, or the traditional litigator who provides an initial case assessment and consultation for a flat fee to a potential civil plaintiff or an appellant in a criminal matter"); Vauter, *Unbundling: Filling the Gap*, 79 Mich B J 1688, 1689 (2000) ("[A]ttorney-client relationships are ordinarily based on contract, and . . . parties may thus mutually agree to limit the scope of representation. . . . Providing limited advice and counsel is not new to the practice of law.") (paragraph structure omitted).

[55] See MRPC 1.2(b) (allowing an attorney and client to "limit the scope of a representation . . . if the limitation is reasonable under the circumstances and the client gives informed consent").

entire attorney-client relationship can begin and end with the consultation and referral itself, provided that the parties have expressly or impliedly demonstrated their intent to enter into such a relationship.[56] In these circumstances, the referring attorney is under no obligation to do anything other than refer the client to another attorney and comply with the other requirements in MRPC 1.5(e) if the fee is to be split. The referral itself constitutes valuable advice. It takes "both time and attention to evaluat[e] the abilities and qualifications of these specialists [i.e., the attorneys to whom the case is referred] so that he can refer clients to exactly the right lawyer."[57]

In requiring that this advice be given to meet the requirements of MRPC 1.5(e) when the basis for a fee division is a referral, we are not altering how referrals are traditionally handled in this state. As amicus Ethics Practitioners and Educators explained in this Court, the referral is simply a "communication that establishes a form of an attorney-client relationship," but "[n]o particular form of interaction is required" and "no *ongoing* attorney-client relationship results from this communication . . . ." Amicus observes that if this limited attorney-client relationship is found to be required by MRPC 1.5(e), then the only practical change

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[56] See *Macomb Co Taxpayers Ass'n*, 455 Mich at 11; see also Restatement, § 14, comments *c* and *e*, pp 126-128 (explaining that the client's intent to enter into a relationship can be inferred from the circumstances and that the attorney's assent to the relationship likewise can arise in various ways); 23 Williston, Contracts (4th ed), § 62:3, p 302 (noting that when determining whether a relationship has formed, "the majority of courts focus on whether it has been sufficiently established that the advice or assistance of the attorney in legal matters has been both sought and received").

[57] *Watson v Pietranton*, 178 W Va 799, 804; 364 SE2d 812 (1987) (Neely, J., concurring).

from current practices prevalent in the profession is the possibility that the referring attorney will document the referral.[58]

At bottom, our holding today rests on a simple proposition: attorneys cannot obtain referral fees under MRPC 1.5(e) without entering into an attorney-client relationship with the individual being referred. If the parties intend to enter a professional relationship, the referral can form the basis for that relationship, which does not need to extend any further than the referral.[59]

The trial court's instruction that a professional relationship is required was therefore correct. In addition, we find no error in the trial court's definition of "client" in the jury instructions because it accurately required that a client employ a lawyer for professional advice or help.

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[58] As noted, the existence of the professional relationship also brings into play attendant ethical duties. We need not decide how those duties apply in these circumstances because that question has not been raised. Nor do we here decide whether our holding today gives rise to an action against referring attorneys for negligent referrals. Cf. *Estate of Carpenter v Weiner & Assoc, PLLC*, unpublished per curiam opinion of the Court of Appeals, issued October 31, 2017 (Docket No. 332142), p 7 ("Michigan has not recognized a cause of action for negligent professional referral by an attorney.").

[59] To be clear, our holding pertains to situations in which the referring attorney seeks a share of the attorney fees under MRPC 1.5(e). We do not address the abstract question of whether a referral can, by itself, establish an attorney-client relationship. The attorney-client relationship generally is a "consensual one," Restatement, § 14, comment *b*, p 126, and thus, when no express contract exists, the circumstances concerning the referral must always be considered to determine whether the parties' intent to enter the relationship can be implied from their conduct; cf. *id*. at comment *c*, pp 126-127 (noting that the context in which the advice is given is a relevant factor).

B. THE BURDEN OF PROOF

The question that follows from our holding above is which side bears the burden of proving compliance with (or violation of) MRPC 1.5(e). In this case, defendant Fieger Firm raised the issue of a violation of MRPC 1.5(e) as a defense to plaintiff Sherbow's attempt to enforce the referral-fee contract. Specifically, the Fieger Firm argues that because contracts that violate public policy are unenforceable, and because MRPC 1.5(e) represents public policy, it follows that Sherbow's violation of MRPC 1.5(e) renders his referral-fee agreement unenforceable.[60] As noted, the trial court instructed the jury that Sherbow had the burden of proving by a preponderance of the evidence that he had an attorney-client relationship with each of the clients, i.e., Rice's estate, Mervie, Dixon, and Hill.

We agree with the Court of Appeals' well-reasoned analysis that the trial court's instruction regarding the burden was erroneous. We have explained that the "burden of proof," in a strict sense, "refers to the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case."[61] Under this sense of the phrase, plaintiffs will bear the ultimate burden of persuading the jury of the

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[60] See generally *Evans & Luptak*, 251 Mich App at 196 ("We hold that the alleged contract is unethical because it violates the Michigan Rules of Professional Conduct (MRPC). Furthermore, we hold that unethical contracts violate our public policy and therefore are unenforceable."). The parties do not dispute that a referral contract in violation of MRPC 1.5(e) could be void as against public policy. Accordingly, we do not address this question but assume, for purposes of this opinion, that violations of MRPC 1.5(e) can render the contract void on these grounds.

[61] *Palenkas v Beaumont Hosp*, 432 Mich 527, 550; 443 NW2d 354 (1989) (opinion by ARCHER, J.). Although Justice ARCHER's opinion was

elements of their case.[62] This means that plaintiffs have to establish what is known as their "prima facie case" by producing sufficient evidence for each of the elements of their legal claim that the fact-finder can "infer the fact at issue and rule in the party's favor."[63] Here, for instance, Sherbow seeks to enforce a contract, and he must therefore prove a valid contract exists.[64] To do so, he bears the burden of establishing, among other things, that the contract has "a proper subject matter."[65]

The "burden of proof" is also sometimes used to "denote[] the burden of going forward, i.e., the obligation to respond to a prima facie case established by the opposing party."[66] In this sense of the phrase, the defendant will bear the "initial burden of production on [their] affirmative defense," after which the burden of production shifts to the plaintiff to bring forth enough evidence to overcome the defendants' evidence.[67] An affirmative defense is one that does not challenge the "the merits of the plaintiff's claim"; that is, it "seeks to

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not joined by the other members of the Court, the other members of the Court concurred in this portion of his opinion. *Id*. at 530 (opinion of the Court).

[62] *Id*.

[63] *Black's Law Dictionary* (11th ed) (defining "prima facie case").

[64] See *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 101; 878 NW2d 816 (2016) (describing the elements of a contract claim).

[65] *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015).

[66] *Palenkas*, 432 Mich at 550 (opinion by ARCHER, J.); see also *Black's Law Dictionary* (11th ed) ("Burden of proof" means "[a] party's duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find. The burden of proof includes both the *burden of persuasion* and the *burden of production*.").

[67] *Palenkas*, 432 Mich at 550 (opinion by ARCHER, J.).

foreclose the plaintiff from continuing a civil action for reasons unrelated to the plaintiff's prima facie case."[68]

To summarize, a plaintiff carries the ultimate burden of persuasion and must prove the elements of his or her claim, but a defendant carries the burden of production on an affirmative defense. Once the defendant comes forward with evidence for such a defense, then the plaintiff must produce evidence in response. Thus, in this case, the question comes down to what type of defense has the Fieger Firm raised: does it negate Sherbow's prima facie case, for which Sherbow, as the plaintiff, bears the burden of proof, or is it an affirmative defense, for which the Fieger Firm bears the initial burden of producing evidence? The Fieger Firm contends that the violation of MRPC 1.5(e) negates the prima facie element of Sherbow's claim that the fee agreement relates to a proper subject matter. The Fieger Firm asserts that the violation of MRPC 1.5(e) resulting from the lack of attorney-client relationships renders improper the subject matter of the agreement.

We disagree. Referral agreements are a proper subject matter for contracts—that much is shown by the existence of MRPC 1.5(e), which authorizes contracts on this subject. Accordingly, the subject matter of the contract is not illegal or improper; it is not, for example, a contract for murder. Rather, what renders this particular contract challengeable as void is not its subject but the allegation that one of the parties to the contract, Sherbow, did not have an attorney-client

[68] *Campbell v St John Hosp*, 434 Mich 608, 615-616; 455 NW2d 695 (1990); see also *Chmielewski v Xermac, Inc*, 457 Mich 593, 617; 580 NW2d 817 (1998) ("An affirmative defense is a defense that does not controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff.") (quotation marks and citation omitted).

relationship with each client. The Fieger Firm's argument therefore is not that a referral agreement is generally inappropriate but that, under the facts here, this specific agreement is void. That does not amount to a defense negating the prima facie element of a "proper subject matter."[69]

Instead, the Fieger Firm's contention is that an otherwise valid contract is, in these circumstances, void because it violates the public policy inherent in MRPC 1.5(e). Our court rules indicate that this public-policy argument constitutes an affirmative defense. MCR 2.111(F)(3)(a) and (b) list examples of affirmative defenses, which include arguments "that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery" or "that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part[.]" The Fieger Firm's argument fits these descriptions. It does not attack Sherbow's prima facie case but, instead, offers an independent reason why the referral agreement is void and the contract claim should be defeated.[70]

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[69] *AFT Mich*, 497 Mich at 235.

[70] It is worth noting that we have likewise characterized a public-policy defense to a contract as an affirmative defense, as have other courts. See *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000) (finding that justice required allowing the defendant to amend its pleadings to add an affirmative defense that a contract was void as against public policy); *Gibson v Martin*, 308 Mich 178, 180; 13 NW2d 252 (1944) (addressing the argument that "the failure of defendant to plead the illegality of the contract as an affirmative defense precludes him from relying on [it] . . . in order to void the contract"); *Mahoney v Lincoln Brick Co*, 304 Mich 694, 695-696; 8 NW2d 883 (1943) ("As an affirmative defense, defendant claimed that its contract arrangement with plaintiff was void and unenforceable because [it was] against public policy."). See also *Honey Dew Assoc, Inc v M & K Food Corp*, 241 F3d 23, 27 (CA 1, 2001) ("[W]e find cases stating that

Consequently, we hold that the Fieger Firm's argument challenging the referral agreement as void as against public policy constitutes an affirmative defense for which the Fieger Firm, as defendant, bears the burden of proof. The trial court's instruction that Sherbow, as plaintiff, bore the burden of proof on this point was erroneous.

C. ERROR REQUIRING REVERSAL

The final issue we must address is whether, in light of our holdings, the trial court committed error that would require us to vacate the jury verdict and remand for retrial. Recall that the Court of Appeals found two errors in the jury instructions and concluded that those errors required retrial. First, as noted, the Court determined that MRPC 1.5(e) does not require an attorney-client relationship with the referring attorney. Therefore, the jury instructions and verdict form requiring proof of that relationship were in error, according to the Court of Appeals. And because the error affected the outcome of the case—the jury found no attorney-client relationship between Sherbow and three of the clients, Mervie, Hill, and Dixon, thereby precluding Sherbow from recovering with regard to those clients—the Court concluded that the error required a new trial. But given our holding that an attorney-client relationship is required, the trial court did not err by instructing the jury that such a relation-

defendants who challenged contract enforcement on the basis of illegality or a violation of public policy have the burden to raise and prove that defense. . . . We also find a . . . case which assigns the burden of demonstrating unenforceability to the party hoping to avoid enforcement of the contract.).

ship needed to be established for Sherbow to prevail. Therefore, there is no basis for a new trial on this ground.

The second error discerned by the Court of Appeals, with which we agree, is the trial court's instruction that Sherbow bore the burden of proving the professional relationship with the clients. It is not clear whether the Court of Appeals would have concluded that this error, by itself, required retrial. Nonetheless, as a result of our holdings in this opinion, this is the question we must answer here.

MCR 2.613(A) guides our analysis of whether an error below requires us to vacate or modify a judgment:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.[71]

It is no easy matter to determine whether a particular error implicates "justice," which requires courts to undertake the difficult task of discerning whether the error prejudiced the party challenging it.[72]

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[71] MCR 2.613(A).

[72] See *Solomon v Shuell*, 435 Mich 104, 138; 457 NW2d 669 (1990) (opinion by ARCHER, J.) (applying the harmless-error rule in MCR 2.613(A) and determining that error was inconsistent with substantial justice because it was prejudicial); *O'Donnell v Connecticut Fire Ins Co*, 73 Mich 1, 4; 41 NW 95 (1888) ("The rule that error which does not prejudice should be disregarded means such error as does not prevent a party from obtaining his just rights, and applies in all cases and in all proceedings had before courts; and, while the rule is one of the most wholesome in our system of jurisprudence, its application is not unfrequently fraught with much danger."); cf. *People v Lyles*, 501 Mich 107,

In the context of instructional errors, we have stated that such an error "warrants reversal if the error 'resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be "inconsistent with substantial justice." ' "[73] Applying this standard in *Cox v Flint Bd of Hosp Managers*, we addressed an erroneous jury instruction that affected the burden of proof.[74] There, the plaintiff's medical malpractice claim against a hospital rested on a vicarious-liability theory.[75] The trial judge instructed the jury that the professional-malpractice standard meant " 'the failure to do something which a hospital neonatal care unit would do or . . . would not do . . . .' "[76] As we pointed out, the neonatal care unit was not an independent actor capable of negligence but, rather, consisted of various individuals; thus, we concluded that "[i]nstructing the jury that it must only find the 'unit' negligent relieves plaintiffs of their burden of proof" because "[s]uch an instruction allows the jury to find defendant vicariously liable without specifying which employee or agent had caused the injury . . . ."[77] This warranted reversal because the instruction "effectively relieved plaintiffs of their bur-

126-127; 905 NW2d 199 (2017) (MCCORMACK, J., dissenting) (discussing harmless error in the analogous criminal context and stating that "[w]e must measure [the jury's] verdict based not on whether we agree with it ourselves, but on whether we can still trust it enough, as a matter of law, to reflect how they would have decided the case had it not been wrongly presented to them").

[73] *Cox*, 467 Mich at 8 (citations omitted).

[74] *Id*. at 9.

[75] *Id*. at 10-11.

[76] *Id*. at 10.

[77] *Id*. at 12.

den of proof and was not specific enough to allow the jury to 'decide the case intelligently, fairly, and impartially.' "[78]

It could be argued that the error in the present case is even clearer than it was in *Cox* because here the trial court did not simply state the law at a level of abstraction that had the indirect effect of shifting the burden —the trial court affirmatively placed the burden on the wrong party. But this observation largely goes toward establishing the existence of error itself rather than the effect of that error. When examining how the error might have influenced the outcome, it is clear that Sherbow was not prejudiced as to two of the clients but was prejudiced as to the third.

As a general matter, the parties were able to present, and the jury was able to consider, a substantial amount of evidence specifically detailing Sherbow's relationships with each of the clients. Some of the evidence was common to all three clients. For example, none had a signed agreement with Sherbow, nor did Sherbow present evidence in the proceedings below that he had any agreement with them. Moreover, as can be seen in the facts of this case, Sherbow's initial "referral" of the case came a full day before he talked to any of the clients.

With regard to Mervie, Sherbow admitted at trial that he did not meet her until the July 2012 meeting at the Fieger Firm, during which she signed a retainer agreement arranging for the Fieger Firm to represent her in the underlying case. Although there is some dispute about whether Mervie was informed that Sherbow would receive a referral fee, there was no evidence presented by either side that Sherbow and Mervie had

[78] *Id*. at 15 (citation omitted).

any contact or communication whatsoever, let alone that Sherbow provided professional advice to Mervie that she engage the Fieger Firm to represent her. Indeed, Mervie provided unrebutted testimony that she had never spoken with Sherbow and that Dion—who had talked with Sherbow—had never mentioned Sherbow to her. As to Hill, Sherbow testified at trial that he first met him in a deposition for the current case. No other testimony or evidence was presented by either side that could give rise to an inference that Sherbow had any contact or communication with Hill or that he referred Hill to the Fieger Firm. Nor does any evidence suggest that Sherbow could be deemed to have consulted with Hill through an intermediary, such as Dion. Thus, regardless of the trial court's error in assigning the burden of proof to Sherbow, there was no basis on which a jury could find Sherbow had an attorney-client relationship with Mervie or Hill that involved Sherbow's professional advice that they use the Fieger Firm for their case.

Our conclusion is different with regard to Dixon. As with Mervie and Hill, there is no dispute that Sherbow did not actually speak with Dixon about the case before the "referral" occurred. But that was because Dixon remained in a coma during the relevant period. Sherbow's argument, therefore, is that Dion acted on behalf of Dixon, just as he had acted on behalf of Rice's estate. Consequently, Sherbow concludes, the jury's finding that Dion was Sherbow's client on behalf of the estate also supports a finding that Dion was Sherbow's client on behalf of Dixon. In other words, Sherbow's referral of Dion to the Fieger Firm created a sufficient relationship between Sherbow and both the estate and Dixon.

Unlike with Mervie and Hill, there is evidence that could support such a conclusion. At the July 2012

meeting in the Fieger Firm's office, Dion did agree to the Fieger Firm's representation of Dixon even though she remained in a coma. Moreover, at trial, Dion agreed that when he spoke with Sherbow, he was looking for guidance as it related to his family.[79] Given this evidence and the fact that the jury found that Sherbow's interactions with Dion were enough to create an attorney-client relationship with Rice's estate, we cannot say with any certainty that a jury properly instructed on the burden of proof would find that those same interactions with Dion were insufficient to establish an attorney-client relationship with Dixon. Accordingly, we conclude that the erroneous jury instructions prejudiced Sherbow as it relates to Dixon. A new trial is therefore warranted as to Sherbow's claim regarding a referral fee for Dixon.[80]

IV. CONCLUSION

We hold that a fee division under MRPC 1.5(e) requires that the participating lawyers establish a professional relationship with the client. Where, as

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[79] As noted, however, he never discussed Sherbow with Mervie, and there is no evidence he related Sherbow's advice to Hill.

[80] The Fieger Firm's brief on appeal also requests that we reverse the jury verdict in favor of Sherbow with regard to Rice's estate. Our holdings, however, preclude such relief. Specifically, the jury determined that even with the burden of proof on Sherbow, he demonstrated that he had an attorney-client relationship with the estate through Rice's son, Dion, and that he actually referred the estate to the Fieger Firm. These findings adequately reflect the requirements of MRPC 1.5(e) as we have interpreted them here. The Fieger Firm also contends that reversal of the jury verdict is warranted because the estate's attorney, and not Dion, should be considered the client with respect to the estate. Even assuming that this issue properly falls within any of the specific questions on which we granted leave to appeal, we see no reason to reject the Court of Appeals' determination that the Fieger Firm failed to properly raise it on appeal in that Court.

here, one lawyer claims part of the fee on the sole basis of having referred the client to the other lawyer, the referring attorney must actually consult with the client, directly or through an intermediary, in giving the referral. The consultation itself is sufficient to create an attorney-client relationship, if the parties so intend. The burden of proving that MRPC 1.5(e) has been violated and that therefore a referral-fee agreement is unenforceable falls upon the party challenging the agreement, which here is the Fieger Firm. In light of these conclusions, the trial court properly instructed the jury that an attorney-client relationship was required but erred by placing the burden of proof on Sherbow. This error was prejudicial only as it relates to Sherbow's claim that he established a sufficient professional relationship with Dixon through Dion. Therefore, the Court of Appeals' judgment is reversed in part and affirmed in part, the jury's verdict is vacated with respect to Dixon, and the case is remanded to the trial court for a new trial with regard to the portion of the fee Sherbow seeks for referring Dixon.

MCCORMACK, C.J., and ZAHRA, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with VIVIANO, J.

YANG v EVEREST NATIONAL INSURANCE COMPANY

Docket No. 160578. Argued on application for leave to appeal March 3, 2021. Decided June 10, 2021.

Wesley Zoo Yang and his wife, Viengkham Moualor, brought an action in the Wayne Circuit Court against Everest National Insurance Company (Everest) and Motorist Mutual Insurance Company (Motorist), seeking to recover personal protection insurance (PIP) benefits under a no-fault insurance policy issued by Everest to plaintiffs. Everest issued Yang a six-month no-fault insurance policy, the term of which ran from September 26, 2017, through March 26, 2018. The policy required Yang to pay a monthly premium and provided that the policy could be canceled during the policy period by Everest sending at least 10 days' notice by first-class mail if the cancellation was for nonpayment of the premium. On October 9, 2017, Everest mailed Yang a bill for the second monthly payment, stating that if Yang failed to pay the amount due by October 26, 2017, the policy would be canceled, effective October 27, 2017; the policy provided that the cancellation notice did not apply if Yang paid the premium on time. Subsequently, Yang did not pay the premium on time, and Everest sent Yang an offer to reinstate, explaining that the policy was canceled as of October 27, 2017, for nonpayment and that Yang could reinstate the policy with a lapse in coverage. On November 15, 2017, plaintiffs were struck by a car when they were walking across a street; Motorist insured the driver of the vehicle that struck plaintiffs. Two days later, on November 17, 2017, Yang sent the monthly premium payment to Everest; the policy was reinstated effective that day, and the notice informed Yang that there had been a lapse in coverage from October 27, 2017, through November 17, 2017. Plaintiffs filed this action after Everest refused plaintiffs' request for PIP benefits under the policy. Everest moved for summary disposition, arguing that plaintiffs were not entitled to benefits under the policy because it had been canceled and was not in effect at the time of the accident and that the policy's cancellation provision was not inconsistent with MCL 500.3020(1)(b); Motorist disagreed with Everest's motion and argued that it was entitled to summary disposition under MCR 2.116(I)(2) because it was not the insurer responsible

for the payment of PIP benefits. The court, Susan L. Hubbard, J., denied Everest's motion and granted summary disposition in favor of Motorist, reasoning that Everest's notice of cancellation was not valid because it was sent before the nonpayment occurred and that Everest was therefore responsible for the payment of PIP benefits; the court dismissed Motorist from the action. Everest appealed. In a published opinion, the Court of Appeals, SHAPIRO, P.J., and GLEICHER, J. (SWARTZLE, J., concurring), affirmed the trial court's order, concluding that the cancellation notice was not valid under MCL 500.3020(1)(b) because Everest sent the notice before the premium was due and that the notice did not satisfy the terms of plaintiffs' no-fault policy itself. 329 Mich App 461 (2019). The Supreme Court ordered and heard oral argument on whether to grant Everest's application for leave to appeal or take other action. 505 Mich 1068 (2020).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under MCL 500.3020(1)(b), a policy of casualty insurance, including all classes of motor vehicle coverage, may not be delivered in Michigan by an insurer for which a premium or advance assessment is charged unless the policy provides, in part, that the policy may be canceled at any time by the insurer mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' written notice of cancellation with or without tender of the excess or paid premium or assessment above the pro rata premium for the expired time. The phrase "notice of cancellation" has a peculiar and appropriate meaning in the law as reflected in the Supreme Court's decisions in *American Fidelity Co v R L Ginsburg Sons' Co*, 187 Mich 264 (1915), and *Beaumont v Commercial Cas Ins Co*, 245 Mich 104 (1928). Those decisions held that a notice of cancellation must be peremptory, explicit, and unconditional to be effective. Because there is no evidence that the Legislature intended to abrogate the common-law meaning of this phrase when it enacted MCL 500.3020(1)(b), the common-law definition of the phrase applies, and a notice of cancellation must be peremptory, explicit, and unconditional to be effective. An insurance company's notice of cancellation for non-payment of insurance premiums before any nonpayment actually occurs is not peremptory, explicit, and unconditional, and therefore it is not an effective cancellation for purposes of the statutory provision. In this case, Everest's October 9, 2017 letter to plaintiffs was ineffective for purposes of MCL 500.3020(1)(b) because it provided that cancellation was conditioned on Yang's failure to

pay his insurance premiums. In other words, because the notice was not peremptory, explicit, and unconditional, it was not a valid cancellation notice. Accordingly, Yang's insurance policy with Everest was still in effect at the time of the accident.

Affirmed.

INSURANCE — NO FAULT — CANCELLATION OF INSURANCE — NOTICE.

Under MCL 500.3020(1)(b), a policy of casualty insurance, including all classes of motor vehicle coverage, may not be delivered in Michigan by an insurer for which a premium or advance assessment is charged unless the policy provides, in part, that the policy may be canceled at any time by the insurer mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' written notice of cancellation with or without tender of the excess or paid premium or assessment above the pro rata premium for the expired time; to be effective, a notice of cancellation must be peremptory, explicit, and unconditional; an insurance company's notice of cancellation for nonpayment of insurance premiums before any nonpayment actually occurs is not peremptory, explicit, and unconditional, and it is not an effective cancellation under MCL 500.3020(1)(b).

Temrowski & Temrowski Law Office (by *Lee Roy H. Temrowski, Jr.*) for Wesley Yang and Viengkham Moualor.

Zausmer, PC (by *James C. Wright*) for Everest National Insurance Company.

Garan Lucow Miller, PC (by *Christian C. Huffman* and *Christopher P. Jelinek*) for Motorist Mutual Insurance Company.

Amicus Curiae:

Nadia Ragheb-Gonzalez for the Michigan Association for Justice.

BERNSTEIN, J. This case concerns whether MCL 500.3020(1)(b) of the Insurance Code, MCL 500.100 *et*

seq., allows an insurance company to cancel an insurance policy when the company mails its customer a letter purporting to be a notice of cancellation for nonpayment of insurance premiums before any nonpayment actually occurred. We hold that MCL 500.3020(1)(b) does not allow cancellation on these grounds. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTUAL BACKGROUND

Plaintiffs, Wesley Zoo Yang and Viengkham Moualor, are a married couple who purchased a six-month no-fault insurance policy from defendant Everest National Insurance Company (Everest). Yang was the primary insured party on the policy and was responsible for making the monthly premium payments. The policy went into effect on September 26, 2017, when he made the first premium payment. On October 9, 2017, approximately two weeks after Yang made the first payment, Everest mailed him a letter titled, "PREMIUM BILLING AND CANCELLATION NOTICE FOR NON-PAYMENT." The letter informed Yang that his next insurance premium payment was due October 26, 2017, and that Everest would cancel the policy if he failed to pay by the due date. Everest maintains that this letter was sent in accordance with the termination provisions in the no-fault insurance policy, which stated:

> Cancellation — This Policy may be canceled during the policy period as follows:
>
> * * *
>
> 2. We may cancel by mailing you at the address last known by us or our agent:

a. at least 10 days notice by first class mail, if cancellation is for non-payment of premium[.] [Emphasis omitted.]

At the time the cancellation notice was mailed, Yang had made all required payments. However, Yang failed to make the subsequent payment due on October 26, 2017, and Everest terminated the policy for nonpayment of the premium on October 27, 2017.

On October 30, 2017, Everest sent Yang a letter informing him that Everest would reinstate the policy with a lapse in coverage if he made a premium payment by November 27, 2017. At that time, Yang did not take any steps to reinstate the policy. On November 15, 2017, plaintiffs were struck by a car while walking down the street. Two days later, Yang made a payment to Everest to reinstate the policy. Plaintiffs then filed a claim for personal protection insurance (PIP) benefits through Everest. Everest denied the claim, explaining that it was not responsible for PIP benefits because Yang did not have a valid no-fault insurance policy when the accident occurred.

Following the denial of the claim for PIP benefits, plaintiffs sued Everest.[1] During litigation, Everest moved for summary disposition under MCR 2.116(C)(10), arguing that the policy was lawfully canceled before plaintiffs were injured and that no genuine issue of material fact existed to show that Everest was responsible for servicing the claim for PIP

[1] Defendant Motorist Mutual Insurance Company (Motorist) was also named as a defendant in the trial court because the unnamed driver of the car that struck plaintiffs had a no-fault insurance policy through Motorist. All claims against Motorist were disposed of via summary disposition in the trial court. Although Motorist continues to participate in this appeal, the central issue in this case solely pertains to the cancellation notice Everest sent to Yang.

benefits. In response, plaintiffs argued that a genuine issue of material fact did exist as to whether Yang's payment to Everest on November 17, 2017, reinstated the policy. After hearing oral argument, the trial court denied Everest's motion, concluding that the cancellation notice had not complied with the terms of the no-fault insurance policy and therefore the policy had never actually been canceled, rendering Everest first in priority for payment of PIP benefits to plaintiffs.

Everest appealed in the Court of Appeals, which affirmed in a split published opinion. *Yang v Everest Nat'l Ins Co*, 329 Mich App 461; 942 NW2d 653 (2019). The Court of Appeals majority ruled in plaintiffs' favor, holding that the cancellation notice Everest mailed to Yang did not satisfy MCL 500.3020(1)(b) and, moreover, that it did not satisfy the terms of plaintiffs' no-fault policy. *Id*. at 470-472. The majority explained that for a cancellation to be valid under MCL 500.3020(1)(b), "the event triggering the right to cancel must have taken place first." *Id*. at 470. Because Yang had not yet failed to pay his insurance premium when Everest mailed the cancellation notice for nonpayment of the premium, the majority ruled that the notice was invalid and did not satisfy MCL 500.3020(1)(b). *Id*. The concurrence provided a different rationale, concluding that the Court of Appeals could rule in plaintiffs' favor without reaching the broader question of whether the cancellation notice failed to satisfy MCL 500.3020(1)(b). *Id*. at 472-473 (SWARTZLE, J., concurring). The concurrence explained that a cancellation notice must be unconditional to be effective. *Id*., citing *American Fidelity Co v R L Ginsburg Sons' Co*, 187 Mich 264, 276; 153 NW 709 (1915). Thus, the concurrence reasoned, the cancellation notice Everest sent Yang was not an effective cancellation of the policy

because it was conditioned on Yang's failure to pay his insurance premiums. *Yang*, 329 Mich App at 472 (SWARTZLE, J., concurring).

Everest timely sought leave to appeal in this Court. On May 20, 2020, we directed the Clerk to schedule oral argument on the application. *Yang v Everest Nat'l Ins Co*, 505 Mich 1068 (2020).

II. STANDARD OF REVIEW

The trial court denied Everest's motion for summary disposition, which was brought under MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 294; 952 NW2d 358 (2020). When reviewing a motion brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 211-212; 934 NW2d 713 (2019) (quotation marks and citations omitted). Summary disposition is appropriate when no genuine issue of material fact exists. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

Everest argues that MCL 500.3020(1)(b) did not preclude it from canceling Yang's policy after mailing a

letter—which it characterizes as a notice of cancellation for nonpayment of premium—before he failed to pay his insurance premiums. We disagree and hold that Everest's letter was not a valid cancellation notice because it did not satisfy MCL 500.3020(1)(b).

When interpreting an insurance policy, " '[t]he policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract,' " because the parties are presumed to have contracted with the intention of executing a policy that complies with the related statutes. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525 n 3; 502 NW2d 310 (1993), quoting 12A Couch, Insurance, 2d (rev ed), § 45:694, pp 331-332. See also *Bazzi v Sentinel Ins Co*, 502 Mich 390, 399; 919 NW2d 20 (2018) ("When a provision in an insurance policy is mandated by a statute, the policy and the statute must be construed together as though the statute were part of the policy, and the rights and limitations of the coverage are governed by that statute.") (quotation marks and citation omitted). Therefore, the pertinent question here is what constitutes a valid cancellation notice under MCL 500.3020(1), which states:

> A policy of casualty insurance . . . , including all classes of motor vehicle coverage, shall not be issued or delivered in this state by an insurer . . . for which a premium or advance assessment is charged, unless the policy contains the following provisions:
>
> * * *
>
> (b) . . . [T]hat the policy may be canceled at any time by the insurer by mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' *written notice of cancellation* with or without

> tender of the excess of paid premium or assessment above the pro rata premium for the expired time. [Emphasis added.]

Our analysis of this issue is governed by the general principles of statutory interpretation. When interpreting a statute, courts must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 167; 853 NW2d 310 (2014) (quotation marks and citation omitted). Undefined words are generally "presumed to have their ordinary meaning," but some words and phrases have a "peculiar and appropriate" meaning within the common law. *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 500 Mich 362, 373; 902 NW2d 293 (2017). If a word or phrase has acquired a peculiar or appropriate meaning in the law, it must be "construed and understood according to such peculiar and appropriate meaning." MCL 8.3a.

When a word " 'has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted.' " *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010) (citation omitted). As we have previously explained:

> When the Legislature, without indicating an intent to abrogate the common law, borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. [*Ray v Swager*, 501 Mich 52, 69 n 34; 903 NW2d 366 (2017) (quotation marks and citations omitted).]

The outcome of this case depends on the meaning of the phrase "notice of cancellation," which is not defined by the relevant statute.[2] The phrase "notice of cancellation" has acquired a peculiar and appropriate meaning in the law, as reflected in two early rulings of this Court: *American Fidelity Co*, 187 Mich at 264, and *Beaumont v Commercial Cas Ins Co*, 245 Mich 104, 107; 222 NW 100 (1928).

In *American Fidelity Co*, 187 Mich at 266-267, the plaintiff insurance company sent a cancellation notice to the defendant insured stating that the plaintiff would cancel the defendant's liability insurance policy if the defendant did not agree to an increased premium. When the defendant refused to agree to the rate increase, the plaintiff canceled the policy. *Id*. at 267. The trial court ruled that the cancellation notice was valid. *Id*. at 269. This Court disagreed, holding that a cancellation notice must "be according to the terms of the policy, and must also have been peremptory, explicit, and unconditional" in order to be valid. *Id*. at 276. Because cancellation of the liability policy was conditioned on the defendant's refusal to accept the increased premium, this Court concluded that the cancellation notice was invalid. *Id*. at 276-277.

In *Beaumont*, 245 Mich at 105, the plaintiff held a property insurance policy with the defendant insurance company. The plaintiff filed a large number of insurance claims with the defendant, and in an effort to avoid servicing the claims, the defendant sent the

[2] We have recognized that the term "cancellation" has itself acquired a peculiar and appropriate meaning in this context. See *Titan Ins Co v Hyten*, 491 Mich 547, 567; 817 NW2d 562 (2012) ("In contract law, 'cancellation' has acquired a peculiar and appropriate meaning in the law."). This case deals with a closely related issue, i.e., the legal sufficiency of a notice of cancellation.

plaintiff a letter asking the plaintiff to " 'kindly endeavor to procure this insurance with some other company by November 1st, at which time we would like to be relieved.' " *Id*. at 105-106. The defendant argued that the letter constituted a valid cancellation notice. *Id*. at 106. On appeal, this Court reiterated the principle that "[n]otice of cancellation of an insurance policy must be according to the provisions of the policy and be peremptory, explicit, and unconditional." *Id*. at 106-107, citing *American Fidelity Co*, 187 Mich 264. This Court also stated that a cancellation notice "is not sufficient if it is equivocal or merely states a desire or intention to cancel." *Beaumont*, 245 Mich at 107. Taking those principles into account, this Court concluded that the letter did not constitute a valid cancellation of the plaintiff's property insurance policy because the letter never unequivocally stated that the policy was canceled and instead merely informed the plaintiff that the defendant desired the plaintiff to find a different insurance company. *Id*.

MCL 500.3020(1)(b) was enacted well after our decisions in *American Fidelity Co* and *Beaumont*, and the peculiar and appropriate meaning of the phrase "notice of cancellation" has not been interpreted differently in the insurance context since *American Fidelity Co* was decided in 1915. See, e.g., *Blekkenk v Allstate Ins Co*, 152 Mich App 65, 72; 393 NW2d 883 (1986) (reiterating this Court's holding in *Beaumont*, 245 Mich at 106-107, that a notice of cancellation must be " 'peremptory, explicit, and unconditional' ").[3] Moreover, there is no

[3] We note that the phrase "notice of cancellation" has been similarly interpreted outside of Michigan. See *Keys Engineering Co v Boston Ins Co*, 192 F Supp 574, 577 (SD Fla, 1961) ("In order to be effective, a notice of cancellation of a policy of insurance must be unequivocal and absolute."); *Transamerica Ins Co v Bank of Mantee*, 241 So 2d 822, 825 (Miss, 1970) ("Cancellation of an insurance policy must be definite, clear

evidence that the Legislature intended to abrogate the common-law meaning of the phrase when it enacted MCL 500.3020(1)(b). "The common law remains in force unless it is modified." *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012). The Legislature's abrogation of the common law "is not lightly presumed," and we have required the Legislature to speak in "no uncertain terms" when it exercises its authority to modify the common law. *Id*. (quotation marks and citations omitted). Indeed, "[w]e must presume that the Legislature knows of the existence of the common law when it acts." *Id*. (quotation marks, citation, and brackets omitted). We therefore presume that when the Legislature enacted MCL 500.3020(1)(b), it did so knowing that the phrase "notice of cancellation" has a peculiar and appropriate meaning in the common law and that it intended for that meaning to be applied to the statute. See *Ray*, 501 Mich at 69 n 34; *McCormick*, 487 Mich at 192.[4] Accordingly, we interpret the phrase "notice of cancellation," as used in MCL 500.3020(1)(b), to require cancellation notices to be peremptory, ex-

and unequivocal."); *Stilen v Cavalier Ins Corp*, 194 Neb 824, 828; 236 NW2d 178 (1975) ("[A] notice of cancellation of insurance for nonpayment of premium or a premium installment must be peremptorily explicit . . . ."); *McQuarrie v Waseca Mut Ins Co*, 337 NW2d 685, 687 (Minn, 1983) ("In order to constitute notice of cancellation, the notice must be explicit, unconditional, and use unequivocal language.").

[4] We do not believe that the interpretation set forth in *American Fidelity* and *Beaumont* conflicts with the plain language of MCL 500.3020(1)(b). Although the statute provides that the policy may be canceled "at any time," MCL 500.3020(1)(b), this does not conflict with the common-law rule that notice of such cancellation must be "peremptory, explicit, and unconditional." See *Beaumont*, 245 Mich at 106-107; *American Fidelity Co*, 187 Mich at 276. In other words, the policy may be canceled "at any time," as long as the notice of cancellation is unconditional.

plicit, and unconditional. See *Beaumont*, 245 Mich at 106-107; *American Fidelity Co*, 187 Mich at 276.[5]

With this understanding in mind, we hold that the cancellation notice Everest sent to Yang violated MCL 500.3020(1)(b). The cancellation notice specifically included the condition that Yang's no-fault insurance policy would be canceled *if* he failed to pay his insurance premiums on time. Given that a cancellation notice must be unconditional to be effective, the letter that Everest sent Yang did not constitute a valid cancellation notice under MCL 500.3020(1)(b). Therefore, because Everest did not comply with MCL 500.3020(1)(b), Yang's insurance policy was still in effect at the time of the accident. See *Nowell v Titan Ins Co*, 466 Mich 478, 482-483; 648 NW2d 157 (2002) (describing that notice must be given in accordance with MCL 500.3020(1)(b) for a cancellation of an insurance policy to be effective).[6]

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[5] This interpretation is also consistent with the objective of MCL 500.3020(1)(b):

> The obvious objective of [MCL 500.3020] is to make certain that all of those who are insured under a policy are afforded a period of time, ten days, either to satisfy whatever concerns have prompted cancellation and thus revive the policy or to obtain other insurance, or simply to order their affairs so that the risks of operating without insurance will not have to be run. [*Lease Car of America, Inc v Rahn*, 419 Mich 48, 54; 347 NW2d 444 (1984).]

[6] On appeal, Everest presents the alternate argument that the October 30, 2017 letter offering to reinstate the insurance policy was an effective notice of cancellation. We disagree. While that letter described an unconditional cancellation, stating that the "insurance has been cancelled," that notice did not comply with MCL 500.3020(1)(b) or our holding in *Nowell*. MCL 500.3020(1)(b) requires that the insurer send a "not less than 10 days' written notice of cancellation . . . ." We concluded in *Nowell* that "the mailing must be reasonably calculated to be delivered so as to arrive at the insured's address at least ten days before the date specified for cancellation for the notice to be effective." *Nowell*,

IV. CONCLUSION

We hold that under MCL 500.3020(1)(b), a cancellation notice is effective only if it is peremptory, explicit, and unconditional. In this case, because Everest's letter provided that cancellation was conditioned on Yang's failure to pay his insurance premiums, the letter was ineffective as a notice of cancellation. We affirm the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

MCCORMACK, C.J., and ZAHRA, VIVIANO, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with BERNSTEIN, J.

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466 Mich at 484. In this case, the October 30 letter did not give that 10-day period; instead, it declared that the policy had already been cancelled and that the cancellation was already effective. It was insufficient to serve as a notice of cancellation under MCL 500.3020(1)(b).

ESTATE OF DONNA LIVINGS v SAGE'S INVESTMENT GROUP, LLC

Docket No. 159692. Argued on application for leave to appeal November 10, 2020. Decided June 30, 2021.

Donna Livings brought an action in the Macomb Circuit Court against her employer, Grand Dimitre's of Eastpointe Family Dining; Sage's Investment Group, LLC, which leased space to Grand Dimitre's; and T & J Landscaping & Snow Removal, Inc., alleging negligence based on premises liability after she slipped on ice while attempting to cross the employee parking lot to get to her job. Livings's claims against T & J Landscaping were resolved through the case-evaluation process. Sage's Investment Group moved for summary disposition under MCR 2.116(C)(10), arguing that the snow and ice were open and obvious and that Livings could have avoided these conditions by parking elsewhere and using the front door instead of the employee entrance. Grand Dimitre's also moved for summary disposition. The trial court, Edward A. Servitto, J., granted summary disposition with respect to Grand Dimitre's but denied it as to Sage's Investment Group, ruling that a question of fact existed as to whether Livings would have been permitted to use the front parking lot and entrance. Sage's Investment Group sought leave to appeal, which the Court of Appeals granted. The Court of Appeals, BECKERING and SHAPIRO, JJ. (TUKEL, P.J., concurring in part and dissenting in part), affirmed in an unpublished per curiam opinion issued February 26, 2019 (Docket No. 339152), concluding that although the ice was open and obvious, there was a genuine issue of material fact regarding whether the hazard was effectively unavoidable. Judge TUKEL, dissenting in part, would have held that because Livings could have skipped work rather than confront the snow and ice, the hazard was not effectively unavoidable. Sage's Investment Group again sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 505 Mich 985 (2020). After Livings's death in March 2020, her estate was substituted as the named plaintiff.

In an opinion by Justice VIVIANO, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CAVANAGH, the Supreme Court *held*:

Under the open and obvious danger doctrine, a hazard can be deemed effectively unavoidable if the plaintiff confronted it to enter their place of employment for purposes of work. In these circumstances, it is possible for a defendant to foresee that the employee will confront the hazard. The fact that the employee could have failed to report to work as required by their employer is not a reasonable alternative. Courts addressing this issue should consider whether a reasonable person in the plaintiff's circumstances would have used any available alternatives to avoid the hazard. In the present case, because Livings's fall on the snow and ice occurred as she attempted to enter her workplace, she has raised an issue of material fact as to whether the conditions of the parking lot were effectively unavoidable.

1. To prevail on a premises-liability claim, a plaintiff must establish that the defendant owed them a duty of care. In the present context, a possessor of land owes a duty to exercise reasonable care to protect invitees from dangerous conditions on the land. This duty generally does not extend to dangerous conditions that are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them. However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. Special aspects of an open and obvious hazard can give rise to liability when the danger is unreasonably dangerous or when the danger is effectively unavoidable. The standard for effective unavoidability is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard. The Second Restatement of Torts, after setting out the general standard for premises liability, explains that a premises possessor might expect a reasonable person to confront an obvious hazard when the advantages of doing so would outweigh the apparent risk, and it offers as an example an illustration in which a premises owner is liable to an employee of its lessor when the employee is injured by falling on an obviously slippery waxed stairway when the employee's only alternative to taking the risk was to forgo employment. Other jurisdictions follow this approach, and Michigan's open and obvious danger jurisprudence has long been informed by, and remains consistent with, the Restatement. In Michigan, it is reasonable to anticipate that many businesses will remain open even during bleak winter conditions. A landlord cannot expect that every one of its tenant's employees will be permitted to stay home on snowy days. Therefore, it is reasonable to anticipate that a person will proceed to encounter a known or obvious danger for purposes of their work.

Accordingly, an open and obvious hazard can become effectively unavoidable if the employee confronted it to enter their workplace for work purposes. This standard's application will depend on the facts of the case, but the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances. If an employee could have avoided the condition through the use of due care under the circumstances, then the condition was not effectively unavoidable. Another consideration is whether the employee would need to breach the employer's policies in order to avoid the condition and what the consequences of that breach might be. What a court cannot conclude, however, is that a hazard was avoidable simply because the employee could have elected to skip work or breach other requirements of their employment.

2. In this case, there was a genuine issue of material fact regarding whether the hazard was effectively unavoidable. Livings presented evidence that snow and ice covered the entire parking lot, encompassing both the employee and customer sections. It is undisputed that Livings confronted the snow and ice in order to enter the restaurant in order to begin her shift. From this, a fact-finder could reasonably conclude that Livings confronted the condition to enter her place of employment for work purposes. Livings presented evidence that she could not have avoided the condition by parking in the customer lot because it was also covered in snow and ice, and she could not have waited until the condition had resolved without effectively skipping work, which was not a reasonable alternative. Accordingly, Sage's Investment Group has not shown as a matter of law that any reasonable alternative would have allowed Livings to avoid the hazard. Consequently, a genuine question of material fact exists as to whether the condition here was effectively unavoidable.

Court of Appeals judgment affirmed; case remanded to the trial court for further proceedings.

Chief Justice MCCORMACK, joined by Justices BERNSTEIN and CAVANAGH, concurring, agreed in full with the majority opinion but wrote separately to express her reservations about the continued reliance on the special-aspects doctrine articulated in *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001). She noted that the special-aspects doctrine had been widely criticized by commentators, was an unnecessary departure from the sensible and straightforward approach of the Second Restatement of Torts, had not been embraced or adopted by any other jurisdiction, and used unlikely hypothetical examples to further narrow what was already a narrow exception to the general rule of nonliability for

open and obvious conditions. Given that Michigan had no state-specific need for a special rule regarding premises owners and invitees, Chief Justice MCCORMACK suggested that the Court reconsider the continued viability of the special-aspects doctrine in an appropriate case.

Justice ZAHRA, dissenting, stated that the majority opinion departed from nearly two decades of the Court's premises-liability jurisprudence by transforming the special-aspects doctrine from an objective inquiry to a plaintiff-focused inquiry encompassing the personal inclinations of each particular plaintiff encountering that condition, thereby creating the very subclass of invitees that the Court had rejected in *Hoffner v Lanctoe*, 492 Mich 450 (2012). He disagreed with the majority's endorsement of the Restatement's illustration regarding employees, which he stated was inconsistent with the Court's caselaw and would inject unpredictability into Michigan's premises-liability law by leading to inconsistent rulings based on the special circumstances of each plaintiff at issue. He would have applied the Court's well-established open and obvious danger caselaw to conclude that a person's employment is not a relevant consideration in determining whether a condition was "effectively unavoidable," reversed the Court of Appeals judgment, and remanded the case to the trial court for entry of summary disposition in favor of Sage's Investment Group.

Justice CLEMENT, dissenting, agreed with Justice ZAHRA that today's ruling deviated from *Hoffner* and its related caselaw even while purporting not to. While she was less sanguine than he was about the affirmative benefits of this area of Michigan caselaw and would be open to considering different approaches, she stated that any changes the Court adopted ought to offer greater clarity than the status quo. Because she did not believe the Second Restatement offered any improvement on Michigan law, in particular considering its inconsistencies and ambiguities regarding whether questions of duty are to be decided by the judge or the jury, she would have applied *Hoffner* to this case and reversed the Court of Appeals.

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — SPECIAL ASPECTS — EFFECTIVELY UNAVOIDABLE DANGERS — EMPLOYMENT.

A premises possessor generally owes no duty to protect invitees from dangerous conditions on the land that are open and obvious, but if special aspects of a condition make an open and obvious risk

unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk; special aspects of an open and obvious hazard can give rise to liability when the danger is unreasonably dangerous or when the danger is effectively unavoidable; a hazard may be deemed effectively unavoidable if a plaintiff confronted it to enter their workplace for work purposes and no reasonable alternatives were available; a court may not conclude that a hazard was avoidable on the ground that the employee could have elected to skip work or breach other requirements of their employment.

Baratta & Baratta, PC (by *Christopher R. Baratta*) for the estate of Donna Livings.

Segal McCambridge Singer & Mahoney (by *David J. Yates* and *Matin Fallahi*) for Sage's Investment Group, LLC.

Amicus Curiae:

Donald M. Fulkerson for the Michigan Association for Justice.

VIVIANO, J. Michigan, we have explained, "is prone to winter," and "with winter comes snow and ice accumulations . . . ." *Hoffner v Lanctoe*, 492 Mich 450, 454; 821 NW2d 88 (2012). But for most Michiganders, winter weather does not mean an automatic holiday from their jobs. Therefore, snow, ice, and other wintry elements sometimes must be confronted to get to work. That is what happened in this case, when Donna Livings[1] slipped on ice in her employer's parking lot as she headed in to begin her shift. Generally, when an injury occurs because of an open and obvious condition, landowners in Michigan are not liable because they have no duty to protect against those hazards. An

[1] After Donna Livings's death in March 2020, her estate was substituted as the named plaintiff.

exception exists, however, when the hazard is effectively unavoidable. The question here is whether a hazard one must confront to enter his or her place of employment should be considered effectively unavoidable. We hold that an open and obvious condition can be deemed effectively unavoidable when a plaintiff must confront it to enter his or her place of employment for work purposes. However, in assessing this question, it is still necessary to consider whether any alternatives were available that a reasonable individual in the plaintiff's circumstances would have used to avoid the condition. In the present case, we agree with the Court of Appeals that a genuine issue of material fact exists regarding whether the snow and ice were effectively unavoidable.

I. FACTS

On February 21, 2014, Livings pulled into the parking lot at her workplace, Grand Dimitre's of Eastpointe Family Dining, which leased the space from defendant Sage's Investment Group, LLC.[2] She testified that she arrived shortly before 6:00 a.m. and parked in the employee lot, choosing the closest space not covered with snow, about 70 feet from the back door. Another employee had already arrived by that time and had parked in the front lot for customers. Testimony from Livings, another employee, and Ayman Shkoukani, one of the restaurant's owners, indicated that employees

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[2] Although Grand Dimitre's is a named defendant, it is not involved in the appeal before the Court, and therefore only Sage's Investment Group, LLC, will be referred to as "defendant" in this opinion. In the courts below, the parties also disputed whether defendant had sufficient possession or control over the premises to be liable for Livings's injury. The Court of Appeals held that defendant exercised enough control with regard to snow removal and salting. That holding is not presently before the Court, and we make no decision as to its correctness.

were required to park in the rear lot and use the back door to enter the building. The whole lot, Livings said, was covered with packed snow and ice and looked like "a sheet of ice." Neither Livings nor Debra Buck, a fellow employee who had arrived earlier that morning, saw any salt on the lot. Buck testified that she also struggled to cross the parking lot because of the conditions.

After parking, Livings got out of her car, took a few steps, and fell. When she tried to stand up, she kept slipping. She attempted to crawl across the lot but could not reach the back door. Eventually, she made it to the front door, called the restaurant, and was let in by Buck. In pain the following day, Livings sought medical treatment and subsequently underwent three surgeries.

Livings sued defendant under a premises-liability theory, claiming that it failed to protect her from the dangerous accumulation of snow and ice in the lot. In the trial court, defendant moved for summary disposition under MCR 2.116(C)(10). It argued that the snow and ice were open and obvious and that Livings could have avoided these conditions by parking elsewhere and using the front door. The trial court denied the motion, finding that a question of fact existed as to whether Livings would have been permitted to use the front parking lot and entrance.

The Court of Appeals affirmed in a split decision. *Livings v Sage's Investment Group, LLC*, unpublished per curiam opinion of the Court of Appeals, issued February 26, 2019 (Docket No. 339152). The majority noted that the ice was open and obvious, as Livings admitted to seeing it. *Id*. at 9. But the majority concluded that a genuine issue of material fact existed regarding whether the hazard was effectively avoid-

able. *Id*. at 9-11. The majority explained that the front and rear lots were connected as one and, according to both Livings and Buck, the entire surface was covered in snow and ice. *Id*. at 10. The majority held that whether the hazard was effectively unavoidable constituted a question for the fact-finder. *Id*. at 10-11. The trial court's decision was affirmed. *Id*.

Judge SHAPIRO concurred, explaining that it would have been inconsistent with "substantive justice" to hold, as Judge TUKEL's partial dissent would have done, that the condition was avoidable because Livings "could have skipped work and suffered the consequences to her employment." *Id*. at 1 (SHAPIRO, J., concurring). The partial dissent cited caselaw suggesting that a plaintiff's employment is not a relevant consideration in determining whether a hazard was effectively unavoidable. The exception to this rule, according to the dissent, applies only when a court deems, "for public policy reasons," that the plaintiff's job is too important to miss, as when it involves "the safety and well-being of others . . . ." *Id*. at 3-4 (TUKEL, P.J., concurring in part and dissenting in part). Judge TUKEL concluded that Livings's job "lack[ed] such vital, critical importance or urgency." *Id*. at 5. The "ramifications" of missing a shift in a restaurant were simply not the same as they were in the healthcare field and, even so, Livings's "presence at the restaurant was not absolutely necessary to her employer or the restaurant's patrons." *Id*. at 4 & n 5. Thus, because Livings could have skipped work rather than confront the snow and ice, the hazard was not effectively unavoidable.

Defendant sought leave to appeal, and we ordered argument on the application to address "(1) whether the plaintiff's employment is a relevant consideration in determining whether a condition is effectively un-

avoidable" and "(2) whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition." *Livings v Sage's Investment Group, LLC*, 505 Mich 985, 985 (2020).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 84-85; 878 NW2d 816 (2016). "A motion brought under MCR 2.116(C)(10) 'tests the factual sufficiency of the complaint.' In resolving such a motion, 'a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion.' " *Id*. at 85 (citations omitted). A movant is not entitled to judgment as a matter of law if the evidence establishes a genuine issue of material fact. *Id*.

III. ANALYSIS

To resolve this case, we must decide whether an open and obvious hazard can be considered effectively unavoidable when a plaintiff must confront it to enter his or her place of employment for work purposes. We hold that it can. But, in analyzing the issue, it is relevant whether a reasonable individual in Livings's circumstances would have used any alternatives to avoid confronting the hazard. Given this conclusion, we hold that a genuine issue of material fact exists in this case as to whether the hazard Livings confronted was effectively unavoidable.

A. EFFECTIVELY UNAVOIDABLE

To prevail on a premises-liability claim, plaintiffs must establish that defendants owed them a duty of care. *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992).[3] The duty element represents the legal obligation that arises from the relationship between the parties. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). In the present context, a possessor of land owes a duty to exercise reasonable care to protect invitees from dangerous conditions on the land. *Riddle*, 440 Mich at 90. But this duty does not extend to dangerous conditions that are open and obvious. *Id*. at 95-96. Put differently, "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee . . . ." *Id*. at 96. When the evidence creates a question of fact regarding this issue, the issue is for the fact-finder to decide. *Bertrand*, 449 Mich at 617.[4]

The concept of open and obvious dangers has evolved into a doctrine of considerable complexity. This is especially true of the exceptions to the doctrine, which we first attempted to elaborate in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). There, we held that "a premises possessor is not

[3] Plaintiffs must also show that defendants breached the duty, damages were suffered, and the breach was the proximate cause of the damages. *Id*. at 96 n 10. None of those elements is at issue here.

[4] No one here disputes that Livings was an invitee, which is one of the three classes of plaintiffs in premises-liability cases. The duty of care a defendant owes depends on the class in which the plaintiff falls, and invitees are owed the highest duty of care. *Hoffner*, 492 Mich at 460 n 8. Similarly, it is undisputed that the snow and ice in the parking lot was an open and obvious condition.

required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. at 517. In a later case, we further elaborated on the "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner*, 492 Mich at 463.

The present case involves the "special aspect" of unavoidability. In *Lugo*, we hypothesized that an effectively unavoidable dangerous condition could exist in "a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water," and thus it is effectively unavoidable. *Lugo*, 464 Mich at 518. *Hoffner* later explained that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. at 469.

The only time we have applied this standard was in *Hoffner*. The plaintiff in that case slipped on the icy entrance to a fitness center, where she had a membership. *Id*. at 457. In rejecting her claim that the ice was effectively unavoidable, we stated that "[a] general interest in using, or even a contractual right to use, a business's services" was not enough. *Id*. at 472. As such, we determined that the plaintiff's desire to use

the gym did not force her to confront the hazard, which consequently was not effectively unavoidable. *Id*. at 473-474.

We have never considered the "effectively unavoidable" standard, as articulated in *Lugo* and *Hoffner*, in the context of plaintiffs who confronted an open and obvious danger due to their employment. In a case predating *Lugo*, however, we at least implied that employment was a consideration in determining whether an open and obvious danger could be avoided. The plaintiff in *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 137-138, 141; 565 NW2d 383 (1997), sued an ice hockey arena after being struck in the eye by a hockey puck, claiming that the rink lacked proper lighting that would have allowed him to see and avoid the puck. It was undisputed that the poor lighting constituted an open and obvious hazard. *Id*. at 141. The question we posed was whether the condition was made unreasonably dangerous by any "unusual aspects." *Id*. at 143. In concluding that there were no such aspects, the lead opinion observed that "plaintiff was not compelled to use the rink for work, or profit, or any other overriding or substantial motivation.[5] He chose to participate in a dangerous sport under conditions he knew to be dangerous." *Id*. at 144. As a result, no exception to the open-and-obvious doctrine applied.

[5] The partial dissent in *Singerman* did not dispute this point but believed that, under the circumstances, the defendants "should have anticipated that the defective lighting would cause injury" and in fact did foresee such an injury. *Id*. at 147 (MALLETT, J., concurring in part and dissenting in part). Thus, although the Court was evenly divided on the application of the standard—a point on which we have no reason to opine here—no one questioned the notion that a plaintiff's need to access the property for employment could be relevant to the special-aspects analysis.

Id. *Singerman* thus suggested that employment may be a relevant factor in the analysis.

This view finds substantial support from other sources. Most significantly, it reflects the view of the Second Restatement of Torts. The Restatement sets out the general standard for premises liability in § 343. 2 Restatement Torts, 2d, § 343, p 215 (establishing liability if the possessor fails to protect invitees against an unreasonable risk of harm that the possessor knew or should have known about and that the possessor "should expect that [the invitees] will not discover or realize . . . or will fail to protect themselves against"). In the next section—which is to "be read together with" § 343, see *id*. at 216, comment *a*—the Restatement states that a possessor of land is not liable for injuries caused to invitees "by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." 2 Restatement Torts, 2d, § 343A, p 218; see also Prosser, The Law of Torts (4th ed), p 394 (espousing the same standard).

In the comments, the Restatement explains that a possessor might expect a reasonable person to confront an obvious hazard when "the advantages of doing so would outweigh the apparent risk." 2 Restatement Torts, 2d, § 343A, comment *f*, p 220. The following example is given:

> A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C. [*Id*., comment *f*, Illustration 5, p 221.]

The illustration maps almost perfectly onto the current case and appears to provide a reasonable approach to this issue.[6]

Every case that we have found addressing this issue has followed the Restatement's approach.[7] The Illinois

[6] In dissent, Justice CLEMENT suggests that the illustration offers no rationale for why the premises owner is liable in these circumstances. This ignores the rule, which itself gives a reason for the result—namely, that the premises owner could reasonably foresee that employees would risk the hazardous stairs to reach their workplaces.

[7] See *Martinez v Angel Exploration, LLC*, 798 F3d 968, 975-976 (CA 10, 2015) (noting, in a case involving this issue, that "an emerging majority of states" have adopted the Restatement's general position that the open-and-obvious doctrine does not apply when it is foreseeable that a reasonable plaintiff would confront an open and obvious danger and also noting that under Oklahoma law, a premises-liability claim would not necessarily be barred by the open-and-obvious doctrine when the plaintiff had to confront the condition " 'in furtherance of her employment' "), quoting *Wood v Mercedes-Benz*, 336 P3d 457, 460 n 8; 2014 OK 68 (2014); *Staples v Krack Corp*, 186 F3d 977 (CA 7, 1999) (applying Illinois law containing this standard); *Hale v Beckstead*, 116 P3d 263, 270-271; 2005 UT 24 (2005) (analogizing to Illustration 5 in a case in which the plaintiff appeared to have been carrying out employment duties when injured); *Shannon v Howard S Wright Constr Co*, 181 Mont 269, 273; 593 P2d 438 (1979) (citing Illustration 5 and caselaw to support the proposition that a defendant should anticipate the risk where the victim is an employee who, "to continue his employment, has no alternative but to continue facing the risk or hazard"); *Docos v John Moriarty & Assoc, Inc*, 78 Mass App 638, 642; 940 NE2d 501 (2011) ("This record therefore presents a genuine issue of fact about whether a reasonable person in Docos's position would conclude that the advantages of continuing to work in a setting more dangerous than the typical active construction site due to excessive debris would outweigh the apparent risk."); *Mammoccio v 1818 Market Partnership*, 734 A2d 23, 34; 1999 PA Super 144 (1999) (citing Illustration 5 and upholding jury conclusion that the defendant should have anticipated the risk because the plaintiff encountered it while performing employment duties); *Maci v State Farm Fire & Cas Co*, 105 Wis 2d 710, 717; 314 NW2d 914 (Wis App, 1981) (citing Illustration 5 and concluding that the defendant should have anticipated the risk from the obvious danger when the only way for the plaintiff to complete his work was to confront it), overruled

Supreme Court, for example, engaged in an extended discussion of § 343A and the related comments in *LaFever v Kemlite Co*, 185 Ill 2d 380; 706 NE2d 441 (1998). Like Livings, the plaintiff in *LaFever* sued the defendant for injuries that occurred while working (for a third party) on the defendant's premises. *Id*. at 383. The nub of the analysis required by the Restatement, according to the court, was whether the defendant could foresee that the plaintiff would reasonably and deliberately encounter the obvious hazard. *Id*. at 391. The evidence established that the plaintiff would need to walk through the area with the hazard in order to complete his job and that others did as well. *Id*. at 392. The court held that the defendant "could have reasonably foreseen that plaintiff would risk walking through [the dangerous condition], because it was necessary for plaintiff to fulfill his employment obligations." *Id*.[8]

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on other grounds by *Rockweit v Senecal*, 197 Wis 2d 409 (1995), as recognized by *Pagel v Marcus Corp*, 313 Wis 2d 78, 84 n 2 (Wis App, 2008); cf. *LeClair v LeClair*, 204 Vt 422; 169 A3d 743; 2017 VT 34 (2017) (finding a triable issue when the defendant-grandfather instructed the plaintiff-grandson to replace a frosty roof because he should have foreseen that the plaintiff would deliberately encounter the danger and noting that this foreseeability did not depend on the jury finding on remand that an employment relationship existed—the key fact was that the defendant was in a position of authority); see generally 2 Dobbs, Hayden & Bublick, The Law of Torts (2d ed), § 276, p 90 (collecting cases and noting that "the plaintiff's decision to encounter a known risk is sometimes reasonable when the plaintiff must take the risk to fulfill an obligation or to carry out employment obligations") and *id*. (June 2020 update), p 18 (noting one case going the other way, but that decision was based on a state's specific rule for independent contractors). Tellingly, neither the parties nor the dissents have uncovered any decisions rejecting or even questioning employment as a relevant consideration in these circumstances.

[8] *LaFever* noted that other courts had held likewise. *Id*. at 394 (noting cases holding "that, in light of the 'economic compulsion' on an employee to perform his or her job, the landowner/employer had reason to expect that an employee would encounter the obvious danger rather than face

Our open-and-obvious jurisprudence has long been informed by the Restatement. As far back as 1938, we began relying on the relevant section and comments of the First Restatement.[9] And we have often utilized the Second Restatement since its appearance in 1965, going so far as to say that § 343 and § 343A had been "adopted" into our law.[10] In fact, our caselaw has

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the prospect of losing the job"), citing *Keller v Holiday Inns, Inc*, 107 Idaho 593, 595; 691 P2d 1208 (1984) ("The common theme . . . is the difficult position of an employee when directed by the employer to perform work which involves a dangerous condition or activity on the landowner's premises. . . . We hold that in these situations, a landowner is not relieved of the duty of reasonable care which the landowner owes to the employee/invitee for his or her protection even though the dangerous condition is known and obvious to the employee."), and *Konicek v Loomis Bros, Inc*, 457 NW2d 614, 619 (Iowa, 1990) ("Certainly [the defendant] could anticipate that the [roofing subcontractor that employed the plaintiff] would probably proceed in the face of obvious dangers, knowing that if they failed to do so, they could lose their jobs.").

[9] See *Goodman v Theatre Parking*, 286 Mich 80, 82; 281 NW 545 (1938), quoting Restatement Torts, § 343; see also *Ackerberg v Muskegon Osteopathic Hosp*, 366 Mich 596, 600; 115 NW2d 290 (1962) (stating that § 343 set forth the applicable standard of care for business invitees); *Zeglowski v Polish Army Veterans Ass'n of Mich, Inc*, 363 Mich 583, 586; 110 NW2d 578 (1961) (noting that the Court had "adopted" § 343 in *Nash v Lewis*, 352 Mich 488, 492; 90 NW2d 480 (1958)); *Spear v Wineman*, 335 Mich 287, 290; 55 NW2d 833 (1952) (noting that the "law is well stated" by a comment to § 343).

[10] See *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002) (applying *Bertrand* and observing that in *Bertrand* we had incorporated § 343 and § 343A); *Singerman*, 455 Mich at 139 (citing comment *e* to § 343A as part of the governing law); *Bertrand*, 449 Mich at 609-614, 623-624 (describing and applying § 343 and § 343A, along with various accompanying comments to those sections, as the law of the state); *Riddle*, 440 Mich at 92-93, 95 (noting that the Court had "adopted" the original § 343 in *Ackerberg* and the revised version in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 259-261; 235 NW2d 732 (1975), and that, together with § 343A, these sources "correctly define the law regarding a premises owner's duty of care to invitees"); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988) ("The duty a possessor of

already incorporated one of the illustrations listed in comment *f* to § 343A. See *Bertrand*, 449 Mich at 624 (applying Illustration 3).

Despite the fact that our current framework uses different terminology, we have stressed that our law remains consistent with the Restatement approach. In *Lugo*, we stated that the special-aspects test was

> consistent with § 343A of the Restatement, which indicates that a possessor of land is only liable to invitees for harm caused by an obvious condition if the possessor should "anticipate the harm." . . . Simply put, there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition. [*Lugo*, 464 Mich at 525.]

See also *Hoffner*, 492 Mich at 479 (noting that our standard reflects caselaw that relied on § 343 and § 343A of the Restatement and remains consistent with those provisions).[11]

We agree with the analysis set forth in the Restatement and in the cases from other jurisdictions cited

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land owes his invitees . . . does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself."), citing, *inter alia*, § 343A; *Quinlivan*, 395 Mich at 259-261 (adopting the view of an out-of-state case that found § 343 " 'controlling' " and calling the Restatement a "helpful exposition") (citation omitted).

[11] In light of this history, we cannot agree with Justice ZAHRA's suggestion that by looking to the Restatement, as we have for nearly 90 years (beginning with the First Restatement), our decision departs from "decades" of authority. Nor can we agree with Justice CLEMENT's apparent view that the Second Restatement, which she sharply criticizes, is distinct enough from our present standard to make it unusable here. It is clear that neither dissent truly credits our statements in *Lugo* and *Hoffner* that the special-aspects test is consistent with the Second Restatement.

above.[12] Given that our state is prone to winter, it is reasonable to anticipate that many businesses will remain open even during bleak winter conditions. A landlord cannot expect that every one of its tenant's employees will be permitted to stay home on snowy days. Therefore, it is reasonable to anticipate that a person will proceed to encounter a known or obvious danger for purposes of his or her work. Accordingly, an open and obvious hazard can become effectively unavoidable if the employee confronted it to enter his or her workplace for work purposes.[13]

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[12] By following this illustration from the Restatement, we do not intend to signify that all such illustrations have been or should be adopted or that the Restatement is somehow binding authority. The Restatement remains persuasive authority that we can look to, as we do here, in undertaking our duty to develop the common law. See *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 258; 828 NW2d 660 (2013) ("This Court is the principal steward of Michigan's common law . . . .") (citation and quotation marks omitted).

[13] *Hoffner* contains language suggesting we have taken the opposite approach on the issue presented in this case: "[I]t cannot be said that compulsion to confront a hazard by the *requirement of employment* is any less 'avoidable' than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as membership in a fitness club." *Hoffner*, 492 Mich at 471-472. But not only was this statement nonbinding dictum—*Hoffner* had nothing to do with the plaintiff's employment—it was also wrong. For support, *Hoffner* relied on *Perkoviq*, 466 Mich 11. *Perkoviq* is not apt.

In *Perkoviq*, the plaintiff was on a roof to paint a newly constructed house as part of his employment when he slipped on ice and fell. *Id*. at 12. Finding no duty in these circumstances, we held that "defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site." *Id*. at 18; see also *id*. at 19 (noting that the defendant "could not expect that employees of subcontractors working on the house would fail to take necessary precautions to guard against the obvious danger"). Although we did not expressly rely on the plaintiff's work experience, our analysis did explicitly invoke the foreseeability of harm in this situation and, in this regard, we emphasized the fact that the

Contrary to defendant's claims, this is not a subjective inquiry that focuses on the peculiar facts leading the employee to confront the condition. Instead, the overall analysis centers on whether a reasonable premises possessor in the defendant's circumstances could reasonably foresee that the employee would confront the hazard despite its obviousness. See *Hoffner*, 492 Mich at 461 n 15 ("The objective standard recognizes that a premises owner is not required to *anticipate* every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his land.") (emphasis added); *Lugo*, 464 Mich at 525 (discussing the possessor's reasonable expectations); *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11, 19-20; 643 NW2d 212 (2002) (same). The premises possessor can expect that the employee will act reasonably. Cf. *Perkoviq*, 466 Mich at 19-20; see also *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004) (noting that, in determining whether a condition is open and obvious, the perspective of a "reasonably prudent person" is used rather than the particular view of the plaintiff). It follows that the employee's circumstances are relevant only to the extent they conform to an objectively reasonable standard. Put differently, the employee's decision to confront the hazard to enter his or her workplace is considered under an objective standard.[14]

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plaintiff worked for a contractor with other employees on site and presumably with the means and knowledge "to take necessary precautions" to ward against the risk. *Id*. Thus, *Perkoviq* did not discuss whether compulsion to confront a hazard for purposes of employment can render that hazard effectively unavoidable. Instead, the Court determined that the hazard was avoidable because it was foreseeable, from the defendant's perspective, that the plaintiff had the ability to select alternatives that would have avoided the hazard.

[14] Justice ZAHRA's concerns about the supposed subjectivity of this approach are misplaced. Our standard does not invite considerations of

This standard's application will depend on the facts of the case, but the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances. Cf. *Perkoviq*, 466 Mich at 19-20. If an employee could have avoided the condition through the use of due care under the circumstances, then the condition was not effectively unavoidable. See *id*. For example, an employee might be able to avoid a hazard by taking a different path to work. Another consideration is whether the employee would need to breach the employer's policies in order to avoid the condition and what the consequences of that breach might be.[15] What a court cannot conclude, however, is that a hazard was avoidable simply because the employee could have elected to skip work or breach other requirements of his or her employment.[16]

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a particular individual's "work interests," "personal lifestyle priorities," or "sense of risk aversion." *Post* at 365. Instead, we simply recognize that a premises possessor might expect a reasonable person to confront a hazard to enter his or her workplace.

[15] In this regard, we do not believe that a plaintiff must show that he or she would have been terminated for failing to attend work. Cf. *LaFever*, 185 Ill 2d at 392 (rejecting the argument that the plaintiff had to show he would have been terminated). Even aside from simply keeping a job, an employee has other natural inducements to show up for work, such as remaining in good standing and earning a day's pay.

[16] The Court of Appeals has reached divergent conclusions on this topic. In doing so, it has developed a standard at odds with the one described above. In *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014), the Court held that "[t]he mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." But in *Lymon v Freedland*, 314 Mich App 746, 761-762; 887 NW2d 456 (2016), the Court, without citing *Bullard*, concluded that the plaintiff's employment as a home healthcare aide was relevant to the unavoidability analysis because the plaintiff needed to confront the hazard to reach her elderly and sick patient. The upshot of this caselaw can be seen in the partial dissent in the present case: courts must decide whether a particular job is "important" enough to justify, to the judges'

B. APPLICATION

Applying the above analysis to this case, we find a genuine issue of material fact regarding whether the hazard was effectively unavoidable. As the Court of Appeals recognized, Livings presented evidence that snow and ice covered the entire parking lot, encompassing both the employee and customer sections. It is undisputed that Livings confronted the snow and ice in order to enter the restaurant in order to begin her shift. From this, the fact-finder could reasonably conclude that Livings confronted the condition to enter her place of employment for work purposes.

The question then becomes whether Livings could or should have used a reasonable alternative. In this regard, the parties have discussed whether Livings would have violated her employer's policies by parking in the customer lot. But, as noted, Livings has presented evidence that the customer lot also was covered in snow and ice. Evidence therefore exists that she would not have avoided the condition by parking there. Defendant also contends that Livings could have left and returned when the condition had resolved or simply waited in her car until that time. These suggestions are tantamount to skipping work and, under the analysis above, are therefore not reasonable alternatives.[17]

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minds, risking a hazardous condition. Such a standard, requiring courts to sit in judgment of the social value of various jobs, is not a task suited to the judiciary. To the extent this caselaw is inconsistent with our opinion today, it is overruled. As noted above, however, courts can consider the consequences of failing to attend work or breaching other employment requirements, and those consequences may differ depending on the urgency of the work.

[17] Defendant also notes that Livings could have called for help in navigating the ice. Livings still would have needed to confront the ice, but presumably would have received assistance from someone else.

In short, then, Livings has presented sufficient evidence that she confronted the snow and ice to enter her workplace for purposes of her employment. Defendant has not shown as a matter of law that any reasonable alternative would have allowed Livings to avoid the hazard. Consequently, a genuine question of material fact exists as to whether the condition here was effectively unavoidable.

IV. CONCLUSION

Our decision today deals with a narrow but important part of our open-and-obvious doctrine: when is a hazard effectively unavoidable? We hold that a hazard can be deemed effectively unavoidable if the plaintiff confronted it to enter his or her place of employment for purposes of work. In these circumstances, it is possible for a defendant to foresee that the employee will confront the hazard. The bare fact that the employee could have failed to report to work as required by his or her employer is not a reasonable alternative. Instead, courts addressing this issue should consider whether a reasonable person in the plaintiff's circumstances would have used any available alternatives to avoid the hazard. In the present case, Livings's fall on the snow and ice occurred as she attempted to enter her workplace. She has raised an issue of material fact as to whether the conditions of the parking lot were effectively unavoidable. We accordingly affirm the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

MCCORMACK, C.J., and BERNSTEIN and CAVANAGH, JJ., concurred with VIVIANO, J.

Aside from noting evidence that Livings had her cell phone, defendant has not presented any evidence suggesting that requesting help was a viable alternative that could have sufficiently reduced the risk posed by the hazard.

MCCORMACK, C.J. (*concurring*). I concur with the majority because I agree that under our precedent, an open and obvious condition may be effectively unavoidable when the land possessor should have reasonably expected the plaintiff-employee to confront the condition to get to work. There remains a genuine issue of material fact about the effective unavoidability of the ice-covered parking lot that injured Donna Livings as she tried to enter her workplace, and the majority's analysis properly applies the special aspects doctrine. *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), does not bar that result; going to work is different from going to work out.

I write separately, however, to express my reservations about the continued reliance on the judicially created special aspects doctrine. It has been two decades since this Court first articulated this doctrine in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), and I am not convinced that its drift from the more sensible and straightforward approach outlined in the Second Restatement of Torts has worked to clarify the law.

This is not a novel view. From the moment *Lugo* was decided, commentators and justices have questioned the soundness of its logic and the wisdom of its special aspects inquiry. See, e.g., Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will It Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 Tex Tech L Rev 1, 42-47 (2005) (disagreeing with the *Lugo* Court's assertion that under § 343A of the Second Restatement, liability for injury caused by an open and obvious danger is appropriate only when the condition possesses a special aspect); Potocsky, Note, *The Blind Plaintiff Post-*Lugo v. Ameritech*: Fall-*

ing Away From the Restatement in "Open and Obvious" Jurisprudence in Michigan, 62 Wayne L Rev 557 (2017) (critiquing the *Lugo* Court for lessening the duty of care on landowners and abandoning the Restatement approach that had long been central to Michigan's open-and-obvious jurisprudence); Braden, *Adventures in OpenandObvious Land*, 86 Mich B J 28, 29-31 (Mar 2007) (criticizing *Lugo* and the special aspects inquiry as part of a broader critique of Michigan's open-and-obvious doctrine); *Lugo*, 464 Mich at 527-532 (CAVANAGH, J., concurring) (agreeing with the majority's conclusion that liability cannot be imposed against the defendant but questioning the majority's formulation of its special aspects inquiry, which conflicts with Michigan caselaw and the Restatement approach). In an appropriate case, with the benefit of two decades of hindsight, this Court should reconsider the continued viability of the special aspects doctrine.

I. THE EVOLUTION OF MICHIGAN'S OPEN-AND-OBVIOUS DOCTRINE

The First Restatement of Torts, published in 1934, created a bright-line rule: If the entrant on the land recognized the risk posed by a dangerous condition of the land, the land possessor was absolved from any liability for resulting harm. See 2 Restatement Torts, § 343. The rule was justified on grounds that have since fallen into disfavor—that the plaintiff's assumption of risk or contributory negligence should bar any recovery. See, e.g., *Shorkey v Great Atlantic & Pacific Tea Co*, 259 Mich 450; 243 NW 257 (1932) (the plaintiff was contributorily negligent and barred from recovery when she was injured after the heel of her shoe got stuck in a hole in a hot air register in the defendant's store; a reasonably prudent person would have known the size of her heels and avoided the danger); *Curtis v*

Traders Nat'l Bank, 314 Ky 765; 237 SW2d 76 (1951) (a 60-year-old customer who slipped and fell on defendant bank's wet marble floor assumed the risk "with full knowledge of its condition" and was barred from recovery). The results of this no-duty rule could be harsh, and several prominent critics called for it to be modified or abrogated altogether. See *Limit to Premises Liability*, 38 Tex Tech L Rev at 28-29.

The American Law Institute chose modification. The Second Restatement of Torts, published in 1965, tweaked the approach of the First Restatement and codified a general section on dangerous conditions and a subsection dedicated specifically to "known or obvious dangers."

> § 343. Dangerous Conditions Known to or Discoverable by Possessor.
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.
>
> * * *
>
> § 343A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated. [2 Restatement Torts, 2d, §§ 343 and 343A, pp 215-216, 218.]

Section 343 creates a general reasonable-care standard that land possessors owe to their invitees. Section 343A, like its predecessor in the First Restatement, creates a presumption of non-liability for known or obvious conditions. But § 343A also explains that this presumption can be overcome if the land possessor should have anticipated the harm *even though* the condition was known or obvious.[1]

Michigan courts have long embraced the Second Restatement approach. Indeed, even before the Second Restatement was published, Michigan courts were experimenting with its principles. In *Boylen v Berkey & Gay Furniture Co*, 260 Mich 211; 244 NW 451 (1932), the plaintiff worked for a railroad company as a switchman and suffered a severe injury after the defendant left a loaded furniture truck alongside the switch track on its premises. *Id*. at 212-213. The Court recognized that Michigan precedent excused liability when " 'the defect complained of was open, obvious, and apparent, and required only the most ordinary observation and notice in order to give him full knowledge of its condition.' " *Id*. at 216, quoting

[1] Comment *f* of § 343A provides examples of circumstances in which a land possessor should have anticipated that a dangerous condition would cause harm, despite its known or obvious nature. For instance, when the land possessor had reason to expect the invitee's attention would be distracted or where a reasonable person would conclude that the advantages of confronting the condition outweigh the apparent risk, liability may still attach. 2 Restatement Torts, 2d, § 343A, comment *f*, p 220.

Leary v Houghton Co Traction Co, 171 Mich 365, 369; 137 NW 225 (1912). But using language that would later be echoed in the Second Restatement, the Court considered whether, notwithstanding the open and obvious condition, the defendant "was reasonably bound to anticipate" the circumstances of the plaintiff's injury. *Boylen*, 260 Mich at 219.

This Court explicitly adopted the Second Restatement approach to open and obvious dangers in *Riddle v McLouth Steel Prod Corp*, 440 Mich 85; 485 NW2d 676 (1992). *Riddle* arrived in the wake of a revolution. More than a decade prior, the Court issued its landmark decision in *Placek v Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979), which did away with the doctrine of contributory negligence—a doctrine that "had caused substantial injustice since it was first invoked in England in 1809" by barring recovery when the plaintiff's own negligence helped cause the injury. *Id*. at 652. In its place, the Court adopted a doctrine of comparative negligence, by which damages would be reduced in proportion to the plaintiff's own negligence. *Id*. at 661-662. See also MCL 600.2958 (codifying a modified comparative fault regime to govern actions based on tort or other legal theories seeking damages for personal injury, property damage, or wrongful death). Some wondered, given *Placek*, whether the open-and-obvious doctrine's days were numbered. A doctrine that creates a general no-duty rule barring all liability is seemingly out of step with a comparative negligence scheme.

In *Riddle*, this Court held otherwise. The open-and-obvious doctrine, we said, focused on a threshold determination of the defendant's duty. *Riddle*, 440 Mich at 95-96. That duty element is "fundamentally exclusive" from the comparative negligence standard,

an affirmative defense invoked only *after* duty has been established. *Id*. at 95. We embraced § 343A of the Second Restatement, finding that Michigan precedent quoting that rule "correctly define[d] the law regarding a premises owner's duty of care to invitees." *Id*. at 95.

II. THE SPECIAL ASPECTS DOCTRINE

This takes us to *Lugo*. In *Lugo*, the plaintiff injured herself after stepping in a pothole in a parking lot. *Lugo*, 464 Mich at 514. The plaintiff provided no evidence that the pothole presented an unreasonable risk of harm or that the defendant should have expected that the pothole would cause injuries to its customers traversing the parking lot. *Id*. at 543-544 (CAVANAGH, J., concurring). But rather than simply applying the liability shield in § 343A, this Court introduced the special aspects doctrine. Two decades later, no other jurisdiction has embraced or adopted this doctrine.

The special aspects doctrine established that an open and obvious condition will only result in liability against the land possessor when "there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm . . . ." *Id*. at 517 (opinion of the Court). At first blush, this formulation may not appear to deviate in any important way from the Second Restatement approach. Indeed, an open and obvious danger with a "special aspect" that creates "an unreasonable risk of harm" may well be one of the types of dangers that § 343A envisioned when discussing circumstances in which the land possessor "should anticipate the harm despite such knowledge or obviousness." 2 Restatement Torts, 2d, § 343A, p 218.

But in an effort to provide guidance to lower courts applying this new test, *Lugo* offered two examples of the newly created special aspects doctrine at work. Rather than using facts from real cases, the Court presented what Justice WEAVER, in concurrence, presciently called "unlikely hypothetical examples." *Lugo*, 464 Mich at 545 (WEAVER, J., concurring). The first showcased an "effectively unavoidable" danger in the form of standing water next to a commercial building's only exit, effectively trapping consumers inside the building. *Id*. at 518 (opinion of the Court). The second highlighted an "unreasonably dangerous" condition in the form of an "unguarded thirty foot deep pit in the middle of a parking lot." *Id*.

The *Lugo* Court did not explain why it developed this new test rather than apply precedent. Before *Lugo*, Michigan courts were routinely applying § 343A of the Second Restatement to resolve premises liability disputes about open and obvious conditions. See *Riddle*, 440 Mich at 94-95; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 624; 537 NW2d 185 (1995) (relying on § 343A to conclude that notwithstanding the open and obvious nature of a step that caused an injury, a genuine issue remained as to whether the construction of the step and its placement created an unreasonable risk of harm so that "the defendant should have reasonably anticipated" the circumstances that led to the injury); *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 143; 565 NW2d 383 (contrasting the facts of the case with an illustration from § 343A that the *Bertrand* Court highlighted in its analysis). Court of Appeals opinions from the post-*Riddle*, pre-*Lugo* era also applied the Restatement test. See *Hottmann v Hottmann*, 226 Mich App 171, 175; 572 NW2d 259 (1997) (concluding that despite the open and obvious danger presented by falling off a steep roof, summary

disposition for the defendant was inappropriate because the land possessor "may still have a duty to protect invitees against foreseeably dangerous conditions"); *Butler v Wal-Mart Stores, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 27, 2001 (Docket No. 219203), pp 3-4 (acknowledging that open and obvious dangers can still result in liability if the land possessor should have anticipated the harm, but finding that no evidence suggested that the defendant should have anticipated that patrons would trip and fall on the trailer-mounted barbecue pit that caused the plaintiff's injury); *Hanna v Wal-Mart Stores, Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 13, 2001 (Docket No. 219477), p 2 (applying § 343A to conclude that an issue of fact remained as to whether the defendant department store's placement of a floor mat, which developed a two-inch fold that the plaintiff tripped over, constituted a "foreseeably dangerous condition" despite its open and obvious nature).

The special aspects doctrine strikes me as a solution in search of a problem. The Court suggested that it was simply applying the Restatement approach, but the scheme it created has little basis in the language of the Restatement or this Court's precedent. Even the phrase "special aspects" is plucked out of context from *Bertrand*. See *Lugo*, 464 Mich at 541-542 (CAVANAGH, J., concurring). The term does not appear in § 343 or § 343A. This departure from precedent was all the more perplexing because it came in a case in which a straightforward application of existing precedent would have arrived at the same result. The doctrine was an abrupt, unnecessary shift in Michigan's approach to open and obvious dangers.

Not surprisingly, since *Lugo*, 30-foot pits and standing water traps became the barometer for lower courts applying the special aspects doctrine. See, e.g., *Bredow v Land & Co*, 307 Mich App 579, 594; 862 NW2d 232 (2014) (WHITBECK, J., concurring) ("The Supreme Court's hypothetical 30-foot-deep pit is not even remotely similar to the situation we have here."); *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 410-411; 864 NW2d 591 (2014) (referring to *Lugo*'s "unguarded thirty foot deep pit" as a point of reference for what constitutes unreasonably dangerous conditions and concluding that ice on a plank of wood at a construction site was not unreasonably dangerous); *McKiddie v Super Bowl of Canton, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2007 (Docket No. 272597), p 2 ("[A] slippery floor does not present the same level of danger and risk as a commercial building surrounded by water or an unguarded 30-foot deep pit in the middle of a parking lot. The special aspects doctrine does not apply to the case at bar.").

Though some jurists have speculated that *Lugo*'s "effectively unavoidable" and "unreasonably dangerous" categories were merely "*illustrative examples* of situations featuring 'special aspects,' rather than an exclusive list," *Richardson v Rockwood Ctr, LLC*, 275 Mich App 244, 254; 737 NW2d 801 (2007) (DAVIS, J., dissenting) (a fair question, in my view), that has not been the predominant understanding. Due largely to the *Lugo* special aspects exemplars, what was already a narrow exception to the general rule of no liability for open and obvious conditions has been narrowed even further. Indeed, before today's opinion, our Court had never identified a real-world condition that was effectively unavoidable or unreasonably dangerous such that liability attached. One of the rare Court of Appeals

opinions finding such a condition shows just how high a bar *Lugo* set. In *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016), the Court of Appeals found that a home healthcare aide encountered an effectively unavoidable steep and icy driveway that she needed to cross to reach her patient, an elderly woman who suffered from dementia and Parkinson's disease and could not be left alone. Our Court denied leave in that case, though one justice dissented from that order, expressing skepticism that the driveway contained special aspects to render it effectively unavoidable. *Lymon v Freedland*, 501 Mich 933, 933-936 (MARKMAN, J., dissenting).

The practical result of the special aspects doctrine is that fewer cases find their way to Michigan juries. When the point of reference is a 30-foot-deep pothole or a group of people trapped in a building, it is unsurprising that courts so often conclude that land possessors owe no duty when a dangerous condition is obvious. Tort liability, like much of law, regulates risk; a rule that effectively prevents liability isn't managing risk efficiently. As a result, the dissonance already present between Michigan's open-and-obvious doctrine and comparative negligence principles has only magnified in the wake of *Lugo*.

The special aspects doctrine has set Michigan apart, and it isn't clear why Michigan needs a special rule. Jurisdictions vary in their approaches to premises liability, but the special aspects doctrine has left our state stranded on our own common law island for two decades. No other state had adopted a special aspects inquiry before *Lugo*, and no other state has done so since. Some state common law divergence is justified and one of the benefits of federalism. See, e.g., Cohen, *The Common Law in the American Legal System: The*

Challenge of Conceptual Research, 81 L Libr J 13, 23 (1989) ("The American deviations stemmed also from differences in the constitutional structures of the colonies, in their political experiences and social attitudes, in local traditions and social attitudes, and in local geography, resources, climate, and economic conditions."). But where, as here, that deviation is not rooted in a state-specific quirk, the rationale supporting the deviation shows its cracks. There is nothing inherently special about the relationship between Michigan premises owners and Michigan invitees. Given the goals of clarity and predictability, Michigan's unique approach to the open-and-obvious doctrine puts the public at a disadvantage. See *Woodard v ERP Operating Ltd Partnership*, 351 F Supp 2d 708, 713 (ED Mich, 2005) ("The 'open and obvious' doctrine is one of the most litigated areas of Michigan premises liability law. Despite the fact that Michigan courts have decided hundreds of cases involving the doctrine, inconsistent applications of the doctrine have resulted in a confusing jurisprudence.").

III. CONCLUSION

I hope this Court will one day consider the legacy of *Lugo* and the special aspects doctrine. For now, the majority correctly determines that an open and obvious condition can be considered effectively unavoidable when an employee must confront it to go to work. Rather than continually finessing and refining this outlier doctrine, we should ask whether the Second Restatement's approach (as adopted by many of our sister jurisdictions) would provide more stability and predictability for Michigan. Or perhaps it is time for this Court to consider the Third Restatement's approach, which aligns more neatly with comparative

negligence principles by imposing a blanket reasonable duty of care standard. See 2 Restatement Torts, 3d, Liability for Physical and Emotional Harm, § 51, p 242.

For this case, however, the majority correctly applies our existing premises liability law—there is a genuine issue of material fact about whether the ice-covered parking lot was effectively unavoidable. I therefore concur in full with the majority opinion.

BERNSTEIN and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

ZAHRA, J. (*dissenting*). I respectfully dissent. In endorsing the approach set forth in 2 Restatement Torts, 2d, § 343, comment *f*, Illustration 5, the majority imprudently shifts the focus of the open and obvious danger doctrine's special-aspects exception from an objective examination of the condition on the premises at issue to an examination of the individual characteristics or inclinations of the particular person approaching that condition, doing away with the uniformity and predictability that this Court has sought to bring to this area of the law over the last two decades. Moreover, in applying its standard, the majority creates the very subclass of invitees that this Court expressly rejected in *Hoffner v Lanctoe*.[1] Rather than adopting the Restatement illustration, I would apply this Court's well-established open and obvious danger jurisprudence to conclude that a person's employment is simply not a relevant consideration in determining whether a condition was itself effectively unavoidable for purposes of the special-aspects doctrine. Because the condition at issue in this case was undisputedly

[1] *Hoffner v Lanctoe*, 492 Mich 450, 470-473; 821 NW2d 88 (2012).

open and obvious and because Donna Livings's desire to reach her place of employment did not render the condition effectively unavoidable, I conclude that the open and obvious danger doctrine insulates defendant from liability. Accordingly, I would reverse the Court of Appeals' judgment and remand this case to the trial court for entry of summary disposition in defendant's favor.

I. ANALYSIS

A premises owner generally owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.[2] This duty does not extend to hazards that are "open and obvious."[3] If, however, despite its openness and obviousness, the risk involves some "special aspects" that exacerbate a danger, the premises owner is required to undertake reasonable precautions to protect invitees.[4] This Court has specifically recognized that a special aspect of an open and obvious condition that renders it effectively unavoidable may give rise to liability.[5] "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even

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[2] *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). As the majority notes, the parties do not dispute Livings's status as a business invitee.

[3] *Id*. at 610-612.

[4] *Id*. at 614.

[5] *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001).

effectively so."[6] This case pertains to this "effectively unavoidable" piece of the special-aspects doctrine.

The majority's holding that a plaintiff's employment situation is a relevant consideration in the special-aspects inquiry is inconsistent with decades of this Court's common-law premises-liability jurisprudence. This Court has repeatedly maintained that application of the open and obvious danger doctrine, and its special-aspects exception, turns on the objective nature of the condition on the premises itself. In the seminal case of *Lugo v Ameritech Corp*, this Court stated that "it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff."[7] A question almost identical to the question presented in this case was considered in *Hoffner*. We reaffirmed that the question of whether special aspects of the condition justify imposing liability on a defendant despite the open and obvious nature of the danger turns on the objective nature of the condition on the premises. This Court reiterated that "an invitee's subjective need or desire"

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[6] *Hoffner*, 492 Mich at 469.

[7] *Lugo*, 464 Mich at 523-524. See also *id*. at 514 ("The pothole was open and obvious, and plaintiff has not provided evidence of special aspects *of the condition* to justify imposing liability on defendant despite the open and obvious nature of the danger.") (emphasis added); *id*. at 517 ("[W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' *of the open and obvious condition* . . . .") (emphasis added); *id*. at 523 ("Accordingly, in light of plaintiff's failure to show *special aspects of the pothole at issue*, it did not pose an unreasonable risk to her.") (emphasis added); *id*. at 524 ("In the present case, there was no evidence of special aspects that made *the open and obvious pothole* unreasonably dangerous.") (emphasis added).

to enter a premises does not "affect[] an invitee's choice whether to confront an obvious hazard. To conclude otherwise would impermissibly shift the focus from an objective examination of the *premises* to an examination of the subjective beliefs of the *invitee*."[8] Thus, in applying the special-aspects doctrine, this Court has consistently and narrowly focused on the objective characteristics of the condition on the premises itself, not on the characteristics and considerations unique to the particular plaintiff encountering that condition.[9]

This is for good reason. The nature of a readily observable condition does not change on the basis of a plaintiff's personal obligations or responsibilities, including a need to reach his or her place of employment.

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[8] *Hoffner*, 492 Mich at 471. See also *id*. at 461 ("This is an *objective standard*, calling for an examination of 'the objective nature of the condition of the premises at issue.' "), quoting *Lugo*, 464 Mich at 523-524; *Hoffner*, 492 Mich at 461 n 15 ("The objective standard recognizes that a premises owner is not required to anticipate every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his land. This standard thus provides predictability in the law."); *id*. at 478 n 51 ("[W]e reiterate that issues arising in application of the open and obvious doctrine are to be decided using an *objective* standard—as our rejection of plaintiff's position and application of the standard in this case illustrates.").

[9] See also *Perkoviq v Delcor Homes–Lake Shore Pointe Ltd*, 466 Mich 11, 19-20; 643 NW2d 212 (2002) ("In short, plaintiff has presented no evidence that *the condition of the roof was unreasonably dangerou*s for purposes of premises liability. The mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition.") (emphasis added); *Mann v Shusteric Enterprises*, 470 Mich 320, 329; 683 NW2d 573 (2004) ("[I]n a premises liability action, the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff."), quoting *Lugo*, 464 Mich at 518 n 2; *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014) (focusing on the nature of the condition on the premises rather than the circumstances of the plaintiff and concluding that "[t]he mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable").

This Court's approach prior to this case, which concentrated on the condition on the premises itself rather than on any other factor unique to a particular invitee, allows for uniform application of and predictability in the law. This predictability is particularly important in the premises-liability context, as the applicable law shapes countless ordinary and pedestrian interactions that occur every day throughout the state of Michigan. Every property owner in this state is obligated to maintain its property in a way that is defined by common-law standards, as developed by our caselaw. And under our caselaw, at least until today, a property owner need only have assessed the potential harms of an open and obvious risk from a single objective standard, focused on the condition of the premises itself rather than from a potentially limitless number of standards defined by the individual circumstances and inclinations of every Michigan citizen. Application of a single standard defining the nature of interactions between property owners and the public fosters more predictability in the law than a standard requiring resolution by a jury of the various interests related to a particular person, including his or her work interests, the personal lifestyle priorities that he or she might have, the sense of risk aversion that he or she might bring to his or her daily interactions, and countless other personal instincts and inclinations.

By taking into consideration Livings's employment status in the "effectively unavoidable" inquiry, the majority adopts this latter type of standard, wrenching away the predictability from an area of the law in which predictability is necessary in order for landowners to arrange their affairs.

The majority disagrees that its inquiry subjectively "focuses on the peculiar facts leading the employee to

confront the condition,"[10] maintaining that the Restatement test and our caselaw alike center primarily on the perspective of the premises possessor. But the Restatement approach, even if focused on the perspective of the landowner rather than the invitee, still requires the possessor to consider an individual plaintiff's characteristics when anticipating whether a hazard poses an unreasonable danger rather than looking to the hazard itself to anticipate whether it poses an unreasonable danger. In other words, instead of looking only to the condition at issue to determine whether it possesses a special aspect, under the majority's test, the possessor looks to the plaintiff at issue to determine whether he or she possesses any special circumstances. This is markedly inconsistent with our longstanding jurisprudence.

Moreover, and relatedly, the majority's opinion creates the very subclass of business invitees that this Court considered and rejected in *Hoffner*. The *Hoffner* Court, in repudiating the notion that the plaintiff's need to enter a business rendered a condition effectively unavoidable, opined:

> We reject these conclusions permitting recovery for a typical hazard confronted under ordinary circumstances as inconsistent with the law of this state regarding the duty owed to invitees and premises owners' resultant liability for injuries sustained by invitees. The law of

[10] The majority claims that its approach does not require an examination of the specific facts leading an employee to confront a condition, yet seems to call for just that by explaining that the details of a person's employment are relevant in determining whether the condition was avoidable. The majority indicates that, in order to determine whether an employee could have avoided a condition, considerations for a court to consider might include asking whether the employee would need to breach the employer's policies in order to avoid the condition. This will necessarily require a court to engage in a very fact- and plaintiff-specific inquiry.

premises liability in Michigan provides that the duty owed to an invitee applies to *any business invitee*, regardless of whether a preexisting contractual or other relationship exists, and thus the open and obvious rules similarly apply with equal force to those invitees. . . .

* * *

Perhaps what is most troubling regarding the theory of liability advanced by plaintiff is that it would result, if upheld, in an expansion of liability by imposing a new, *greater* duty than that already owed to invitees. By providing that a simple business interest is sufficient to constitute an *unquestionable necessity* to enter a business, thereby making any intermediate hazard "unavoidable," plaintiff's proposed rule represents an unwarranted expansion of liability. It would, in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship. Such a rule would transform the very limited exception for dangerous, effectively unavoidable conditions into a broad exception covering nearly all conditions existing on premises where business is conducted. Such a rule would completely redefine the duty owed to invitees, allowing the exception to swallow the rule. This proposed rule appears to be an erroneous extrapolation of the basic principle that invitees are owed a greater duty of care than licensees or trespassers. Simply put, Michigan caselaw does not support providing special protection to those invitees who have paid memberships or another existing relationship to the businesses or institutions that they frequent above and beyond that owed to any other type of invitee. Neither possessing a right to use services, nor an invitee's subjective need or desire to use services, heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether to confront an obvious hazard. To conclude otherwise would impermissibly shift the focus from an objective examination of the *premises* to an examination of the subjective beliefs of the *invitee*.[11]

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[11] *Hoffner*, 492 Mich at 469-471.

By concluding that a certain group of invitees, here employees, are entitled to special treatment based on their employment status, the majority creates a hybrid status on the land that heightens the duty owed to one type of business invitee, contrary to *Hoffner*. While *Hoffner* did not itself pertain to employment, its logic applies with equal force to the employment context. Indeed, the *Hoffner* Court recognized this, opining that "it cannot be said that compulsion to confront a hazard by the *requirement of employment* is any less 'avoidable' than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as membership in a fitness club."[12] Even if this language is dictum, as the majority opinion suggests, *Hoffner*'s emphasis that all business invitees should be treated the same should be dispositive in this context. Crucially, nothing will prevent future courts from extending the majority's reasoning to other classes of business invitees. It is not difficult to envision a resulting system in which even the most trivial of subjective business interests combined with a hazardous condition would impose liability—the very scenario that the *Hoffner* Court cautioned against. For all practical purposes, this would make landowners the insurers for injuries that occur on their land, a result that is incompatible with this Court's prior premises-liability jurisprudence.[13]

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[12] *Id*. at 471-472. While the majority concludes that this statement from *Hoffner* was "wrong," I find it to be entirely consistent with the condition-focused approach that this Court has taken post-*Lugo*.

[13] See, e.g., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988) (" '[T]he occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection.' "), quoting Prosser & Keeton, Torts (5th ed), § 61, p 425; *Bertrand*, 448 Mich at 614 ("With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying

In endorsing and applying § 343A, Illustration 5 to comment *f* of the Restatement, the majority notes that other jurisdictions apply the Restatement in the employment context and emphasizes that this Court's jurisprudence has long been informed by the Restatement. But the majority downplays the tension that is undeniably present between our caselaw and the Restatement. While this Court has at times looked to the Restatement when developing our open and obvious danger doctrine, we have never embraced the treatise in its entirety. In fact, in *Hoffner*, this Court explicitly declined to do so, stating: "[T]his Court has never adopted wholesale the Restatement approach. While this Court has looked to the Restatement for guidance, it is our caselaw, as developed throughout the years, that provides the rule of law for this State."[14] And the principles of common law that have developed and evolved in our caselaw do not perfectly mirror the Restatement.[15] As discussed, the specific Restatement

principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees."), citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 224, 261; 235 NW2d 732 (1975); *Lugo*, 464 Mich at 517 (quoting this passage from *Bertrand*); *Hoffner*, 492 Mich at 459 ("[L]andowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land.").

[14] *Hoffner*, 492 Mich at 478-489.

[15] Indeed, former Justice CAVANAGH explicitly acknowledged that the Court's open and obvious danger doctrine departed from the Restatement. In his partial dissent in *Mann*, 470 Mich at 342 (CAVANAGH, J., concurring in part and dissenting in part), he opined: "In sum, I am troubled by the majority's overreliance on *Lugo*'s 'special aspects' analysis. By focusing solely on this analysis, the majority repudiates the Restatement approach and, at the very least, unwisely eliminates the 'unless' clause from Michigan jurisprudence." He went on to say that the decision in *Mann* was "simply the latest installment in the majority's systematic dismantling of the Restatement of Torts approach. The majority effectively states that the Restatement approach is dead

illustration cited by the majority is concerned with an individual plaintiff's ability or desire to avoid a dangerous condition; however, the focus of our jurisprudence is on the characteristics of the supposed dangerous condition itself. In short, Illustration 5 to comment *f* of § 343A of the Restatement is inconsistent with our body of caselaw, and I would decline to adopt it today.[16]

The majority understates the impact its opinion will have on our premises-liability law, failing to anticipate the far-reaching implications of its decision. Application of its plaintiff-oriented test will, over time, erode the predictability and consistency that this area of the law requires, as well as the opinions this Court has maintained in the 20 years since *Lugo* was decided. What is the next subclass of business invitees that will receive special protection under the special-aspects doctrine? What types of personal concerns or considerations can now be considered in determining whether a condition is effectively unavoidable? I acknowledge

because *Lugo*, and only *Lugo*, is the law in Michigan." *Id*. at 336. See also *Bragan v Symanzik*, 263 Mich App 324, 331; 687 NW2d 881 (2004) (stating that "in *Lugo v Ameritech Corp*, our Supreme Court replaced the Restatement approach with a special aspects analysis").

[16] The majority cites *Lugo* and notes that this Court has stated that our law remains consistent with the Restatement approach. But even the portion of *Lugo* that the majority quotes shows that this is not truly so. That passage indicates that the focus is purely on the special aspects (or lack thereof) of the condition itself, not the special circumstances of a plaintiff: "Simply put, there must be something out of the ordinary, in other words, special, *about a particular open and obvious danger* in order for a premises possessor to be expected to anticipate harm *from that condition*." *Lugo*, 464 Mich at 525 (emphasis added). And to the extent that the majority applies a foreseeability analysis, our Court has seemingly rejected such an approach. See *Mann*, 470 Mich at 331-332 (" '[S]pecial aspects' are not defined with regard to whether a premises possessor should expect that an invitee will not 'discover the danger' or will not 'protect against it,' but rather by whether an otherwise 'open and obvious' danger is 'effectively unavoidable' or 'impose[s] an unreasonably high risk of severe harm' to an invitee . . . .") (citation omitted).

that it is exceedingly difficult for a plaintiff to prove the existence of a special aspect. But I believe this was intended when the special-aspects doctrine was incorporated into our premises-liability jurisprudence. Again, this Court opted for a rule that provided clarity and uniformity in the law, while promoting principles of personal responsibility. Perhaps this Court should clarify the instances where special aspects may be found to exist. But I would not do so by adopting the rule that the majority does today, as it will not clarify, but further muddle, the law.

Because I believe the objective standard that this Court has formulated and applied brings necessary stability to our premises-liability law, and because I would follow the *Hoffner* Court's directive that this Court refrain from creating subclasses of invitees, I would apply *Lugo* and its progeny in this case to conclude that an individual plaintiff's employment status—a characteristic unique to that individual—cannot factor into the determination of whether a condition itself contained a "special aspect."[17] Consequently, a person's need to encounter an open and

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[17] I agree with defendant and the Court of Appeals dissent that *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 546 (2016), was wrongly decided. The lower court's determination in that case that the plaintiff's employment was important enough to compel her to traverse an icy driveway was the deciding factor in the Court of Appeals' holding that the ice on which she fell was "effectively unavoidable." This analysis improperly relied not on the nature of the condition itself, but on the type of services performed by the plaintiff.

Of course, this does not leave an employee entirely without recourse. When an employee is injured approaching his or her job, that person can ordinarily apply for and obtain benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., as Livings herself did. Under these facts, precluding additional recovery when the premises owner and employer happen to be different entities, as is the case here, does not create the unjust result envisioned by plaintiff.

obvious danger in order to reach his or her place of employment cannot create a special aspect under the law.[18]

Applying these principles to this case, even accepting as true that Livings would have necessarily needed to walk across ice and snow to report for work,[19] I conclude that her desire to reach her place of employment did not render the ice- and snow-covered driveway "effectively unavoidable."[20] Accordingly, I would hold that, because the undisputedly open and obvious

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[18] See *Hoffner*, 492 Mich at 471-472; *Perkoviq*, 466 Mich at 18-20. See also *Bullard*, 308 Mich App at 413 (concluding that the plaintiff's "job duties did not mandate that he encounter an obvious hazard"; instead, the plaintiff "could have made different choices that would have prevented him from encountering the ice," including declining to perform the scheduled monthly inspection on the premises at that time).

While the majority cites *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), for the proposition that a plaintiff's employment is a proper consideration in determining whether an open and obvious danger can be avoided, I do not place much weight on that decision given that it was decided before *Lugo*, in which the Court formulated the special-aspects doctrine at issue. As is discussed at length above, the approach the majority takes today, which allows for consideration of an invitee's employment in the special-aspects inquiry, is inconsistent with the approach developed by this Court post-*Lugo*.

[19] I question whether Livings was actually required to encounter the supposed hazard in order to reach her place of employment. Rather than parking near the back employee entrance, Livings could have parked closer to the front entrance and entered the building through the front door, just as she did without incident twice after her fall. While there was testimony indicating that the entirety of the parking lot was covered in ice and snow, Livings was nonetheless able to access the front door by walking around the building on a snow bank, and she seemingly could have taken the same route when first arriving to work. But, given my conclusion that Livings's employment did not "compel" her to enter the building, I need not resolve whether Livings could have entered the building without encountering the ice or snow.

[20] I additionally question whether the ice- and snow-covered parking lot at issue in this case posed the type of "unreasonably dangerous"

condition in this case possessed no "special aspects," the open and obvious danger doctrine insulates defendant from liability.

II. CONCLUSION

With today's decision, the majority departs from nearly two decades of this Court's premises-liability jurisprudence by transforming the special-aspects doctrine from an objective inquiry, focused on the nature of a readily observable condition itself, to a plaintiff-focused inquiry encompassing the personal inclinations of each particular plaintiff encountering that condition. In setting forth and applying this standard, the majority creates the very subclass of invitees that this Court rejected in *Hoffner*. I disagree with the majority's endorsement of Restatement § 343, comment *f*, Illustration 5, as that illustration is not only

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condition contemplated by the special-aspects doctrine. As explained by former Justice MARKMAN in *Lymon v Freedland*, 501 Mich 933, 936 (2016) (MARKMAN, J., dissenting):

> [W]hen read together, our decisions appear to indicate that the *central inquiry* is whether an open and obvious condition gives rise to an unreasonable risk of harm despite its open and obvious nature and that a hazard may pose an unreasonable risk of harm if: (1) the condition creates a substantial risk of death or severe injury, or (2) the condition is effectively unavoidable. While the first category would seem almost necessarily to give rise to an unreasonable risk of harm—as any potential injury caused by the condition would likely be severe—a condition fitting within the second category would not seem necessarily to have the same impact.

Under this analysis, the common winter conditions of snow and ice seemingly do not constitute the "unreasonably dangerous" condition needed to preclude application of the open and obvious danger doctrine. Again, I need not resolve this issue today, as my conclusion that Livings's desire to reach her place of employment did not render the condition effectively unavoidable is dispositive. This is simply another line of reasoning that calls into question the majority's holding.

inconsistent with our caselaw, but its application will inject unpredictability into our premises-liability law, undoubtedly leading to future inconsistent rulings based on the "special circumstances" of each plaintiff at issue. I would apply this Court's well-established open and obvious danger caselaw to conclude that a person's employment is not a relevant consideration in determining whether a condition was itself "effectively unavoidable." For these reasons, I would reverse the Court of Appeals' judgment and remand this case to the trial court for entry of summary disposition in defendant's favor.

CLEMENT, J. (*dissenting*). In *Hoffner v Lanctoe*, 492 Mich 450, 470; 821 NW2d 88 (2012), this Court rejected the prospect of "creat[ing] a new subclass of invitees consisting of those who have a business or contractual relationship" with a premises owner and to whom the premises owner owed a heightened duty of care. Yet today, the majority does just that: it holds "that an open and obvious condition can be deemed effectively unavoidable when a plaintiff must confront it to enter his or her place of employment for work purposes," leaving some invitees treated differently than others. In doing so, the majority largely looks to the Second Restatement of Torts for guidance. I agree with Justice ZAHRA that today's ruling deviates from *Hoffner* and its related caselaw even while purporting not to. However, I am less sanguine than he is about the affirmative benefits of this area of our caselaw and would be open to considering different approaches. That said, I believe any changes we adopt ought to offer greater clarity than our status quo. I do not believe the Second Restatement offers any improvement on our law, and I therefore would apply *Hoffner* to this case and reverse the Court of Appeals.

As the Chief Justice notes, the traditional rule for negligence actions in Michigan was the doctrine of "contributory negligence," in which any negligence on the part of the injured party was a bar to recovery. Michigan was no outlier in this regard; the contributory-negligence doctrine was, instead, the ordinary rule in the common-law world, a reality reflected in the treatment of the subject by the First Restatement of Torts. Thus, under the First Restatement, a premises owner was "subject to liability for bodily harm caused to business visitors by a natural or artificial condition [on the land] if, but only if, he . . . ha[d] no reason to believe that they [would] discover the condition or realize the risk involved therein . . . ." 2 Restatement Torts, § 343(b), pp 938-939.

> [This rule] thus provided an exemption from liability when a business visitor was injured by a known or obvious danger, regardless of case-specific circumstances. Under this bright-line exemption, the only question of fact that might be allocated to the jury is the question whether the condition was in fact known or obvious. [Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will It Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 Tex Tech L Rev 1, 27 (2005).]

This principle was well illustrated in *Garrett v WS Butterfield Theatres*, 261 Mich 262; 246 NW 57 (1933). There, the 70-year-old plaintiff stepped out of a dimly lit lounge into a bathroom with a 4.5-inch step from the doorway into the room. She fell at the step, was injured, and won a jury trial. We reversed, setting aside the jury's verdict:

> Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The

> construction is not negligent unless, by its character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it. . . .
>
> Argument is made that the dim lighting of the lounge contrasted with the bright lighting in the toilet room and the color scheme of the toilet floor had such effect upon the visibility of the step as to render the question of negligence in maintaining it for the jury.
>
> Toilets are frequently put in left-over spaces and have vagaries of construction. The door was a warning that there might be a difference in floor levels. The act of opening the door towards him would require a person to pause long enough to have ample opportunity to see the step. The situation contained no element of a trap. A reasonably prudent person, watching where he was going, would have seen the step. Defendant is not under legal duty to prevent careless persons from hurting themselves. [*Id*. at 263-264.]

This principle—that the defendant was under no legal duty to prevent careless persons from hurting themselves—was the essence of the contributory-negligence rule that was traditionally used in Michigan. We reaffirmed it later that same year in another case involving steps, *Boyle v Preketes*, 262 Mich 629; 247 NW 763 (1933). It was only decades later, with the relatively recent decision in *Placek v Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979), that we largely did away with the doctrine of contributory negligence and instead adopted the rule of comparative negligence, which allows an injured party's damage award to be *reduced* by the degree to which they contributed to their own injury, but not *eliminated*.

The problem we face, however, is that the Second Restatement was written before the comparative-negligence revolution in American tort law. Instead, the Second Restatement was still structured around the *Garrett/Boyle* rule of contributory negligence:

"[T]he plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him." 2 Restatement Torts, 2d, § 467, p 515. As a result, what the Chief Justice describes as the Second Restatement's "tweak[]" of the First Restatement's premises-liability rules concerning open and obvious dangers was the American Law Institute's effort at providing broader avenues for relief *in a contributory-negligence world*. The Second Restatement's premises-liability rules must be understood in this context.

On the one hand, the Second Restatement broadened the premises owner's apparent duty to protect invitees. While § 343 of the First Restatement imposed liability only when a landowner "ha[d] no reason to believe that [invitees would] discover [a dangerous] condition or realize the risk involved therein," the Second Restatement expanded § 343 to impose liability when the owner "should expect that [invitees] will not discover or realize the danger, *or will fail to protect themselves against it*[.]" (Emphasis added.) The Second Restatement thus contemplated that a premises owner would need to protect invitees even from hazards they could reasonably be expected to "discover," so long as the premises owner could expect that invitees would "fail to protect themselves against it . . . ." "The disjunctive clause, 'or will fail to protect themselves against it,' implies extension of possible liability to known or obvious conditions," and thus "sets out a full-blown and ever-present duty of reasonable care owed to invitees." *Limit to Premises Liability*, 38 Tex Tech L Rev at 25, 29. "If the [American Law Institute] intended complete abrogation of the First Restatement's obvious-danger immunity, it would have ad-

opted section 343 as revised in the Second Restatement and said no more." *Id*. at 29.

But the Second Restatement had more to say. It added a new section, § 343A, which acknowledged its basic contributory-negligence regime by asserting that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." 2 Restatement, 2d, § 343A(1), p 218. "The first clause of section 343A, up to the word 'unless,' seems to carry forward from the First Restatement a decision to limit, in some manner, the negligence liability of invitors when invitees are injured by known or obvious dangers." *Limit to Premises Liability*, 38 Tex Tech L Rev at 29. That the premises owner is "not liable," rather than merely partially relieved of liability in proportion to the owner's degree of fault, creates the fundamental tension with comparative negligence rules. This is reflected in the remainder of § 343A(1), which reimposes liability if "the possessor should anticipate the harm despite such knowledge or obviousness." In short: § 343 broadens liability under the Second Restatement to impose "a full-blown and ever-present duty of reasonable care owed to invitees," *Limit to Premises Liability*, 38 Tex Tech L Rev at 29, a duty which is then limited by the first clause of § 343A(1), with that limitation in turn qualified by the second clause of § 343A(1). Left unexplained in this series of hairpin turns is who makes the decision about whether the parties proceed through each of these gates—and, implicitly, whether they are decisions to be made as a matter of fact or law.

Some courts have refused to try to fit the Second Restatement's square peg into the round hole of comparative negligence. For example, the federal Longshore and Harbor Workers' Compensation Act, 33 USC 901 *et seq*., has been construed as requiring a rule of comparative rather than contributory negligence, and several federal courts have specifically rejected the use of the Second Restatement as the legal standard for analyzing accidents under the statute. In *De Los Santos v Scindia Steam Navigation Co*, 598 F2d 480, 486 (CA 9, 1979), the United States Court of Appeals for the Ninth Circuit said that §§ 343 and 343A of the Second Restatement "place limitations on a landowner's liability to an invitee inconsistent with Congress' explicit direction to reject common law rules of contributory negligence and assumption of risk in favor of applying the admiralty concept of comparative negligence."[1] On its review, the United States Supreme Court did not expressly resolve the issue of the applicability of the Second Restatement, but it did affirm the Ninth Circuit. See *Scindia Steam Navigation Co v De Los*

[1] Other federal circuits (but not all) had reached similar conclusions about the ability to reconcile the Second Restatement's premises-liability rules with a rule of comparative negligence. See *Griffith v Wheeling-Pittsburgh Steel Corp*, 610 F2d 116, 125 (CA 3, 1979) ("Sections 343 and 343A . . . would apparently relieve a vessel owner of all liability for an unreasonably dangerous condition on board ship if the invitee longshoreman has failed to exercise ordinary care in dealing with that danger, on the theory that a negligent invitee has assumed the risk of injury. . . . [T]hat principle is inconsistent with the clearly stated intention of Congress to abolish the doctrines of contributory negligence and assumption of risk in [such] cases . . . ."), vacated and remanded in light of *Scindia* sub nom *American Commercial Lines, Inc v Griffith*, 451 US 965 (1981); *Johnson v A/S Ivarans Rederi*, 613 F2d 334, 347 (CA 1, 1980) ("Our review . . . has convinced us that sections 343 and 343A are too heavily laden with the prohibited defenses of assumption of the risk and contributory negligence to be followed rigidly as the standard of care . . . .").

Santos, 451 US 156, 179; 101 S Ct 1614; 68 L Ed 2d 1 (1981). In doing so, it also noted that §§ 343 and 343A "do not furnish sure guidance in cases such as this." *Id*. at 168 n 14. See also *Koutoufaris v Dick*, 604 A2d 390, 396 (Del, 1992) (noting, more than a decade after *Scindia*, the debate in the federal courts over the meaning of §§ 343 and 343A).

Michigan did not go this route. Instead, as noted by the Chief Justice, this Court tried to reconcile the Second Restatement with a rule of comparative negligence in *Riddle v McLouth Steel Prod Corp*, 440 Mich 85; 485 NW2d 676 (1992). We insisted that "[t]he adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees" and held "that the duty element and the comparative negligence standard are fundamentally exclusive—two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action." *Id*. at 95. This continued to evolve in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), a case—actually, a consolidated pair of cases—involving injuries suffered by people who failed to navigate steps. We said that a premises owner's "duty is to protect invitees from *unreasonable* risks of harm, [but] the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees." *Id*. at 614.

> Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be special aspects of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to rem-

> edy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe. [*Id.*]

The basic confusion, however, is this: if a premises owner faces no liability *whatsoever* for injuries caused by at least some obvious hazards, what aspect of a premises-liability action does the obviousness of such a hazard relate to—duty or breach? The "ambiguity of the Second Restatement's rule that the land possessor is 'not liable' for harms caused by obvious dangers, 'unless the possessor should anticipate the harm' nonetheless," *Limit to Premises Liability*, 38 Tex Tech L Rev at 39, is the source of the problem. In *Riddle*, 440 Mich at 95, we emphasized "the necessity of an initial finding that the premises owner owed a duty to invitees," supporting an interpretation that premises owners are "not liable" because they owe no duty to the plaintiff—a plaintiff cannot satisfy that "initial finding" as to obvious hazards. But who makes that initial finding—the judge or a jury? Traditionally, we have said that "the court and jury perform different functions in a negligence case," one of which is that "the court decides the question[] of duty . . . , and the jury determines what constitutes reasonable care under the circumstances." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). This comports with the Second Restatement, which says that "[i]n an action for negligence the court determines . . . whether [the alleged] facts give rise to any legal duty on the part of the defendant[.]" 2 Restatement, 2d, § 328B(b), p 151.[2] The Restatement's cat-

[2] To be clear, we did not cite Restatement § 328B(b) in *Williams*, but our ruling comported with the Restatement, which merely recited the traditional rule that the issue of duty is a question of law for the court to decide.

egorical "not liable" rule from § 343A(1) would be consistent with a decision made by the court as a matter of law under § 328B(b). Yet the "unless" clause of § 343A(1), imposing liability if "the possessor should anticipate the harm," appears intrinsically fact-based (and thus a question for the jury). In *Bertrand*, 449 Mich at 617, we tried to resolve this by claiming that "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." But this statement that "the existence of duty" is a "question[] for the jury to decide" appears to be a significant departure from our caselaw, is inconsistent with at least § 328B(b) of the Second Restatement, and is not supported by the very case cited by *Bertrand* in support—*Williams*, which held that "the *court* decides the question[] of duty," *Williams*, 429 Mich at 500 (emphasis added).

Bertrand struggled not only with the inconsistency between § 343A(1) and § 328B(b) of the Second Restatement; it also struggled with the comments to § 343A itself. In *Bertrand*'s companion case, the plaintiff "stumbled and fell on an unmarked cement step" while leaving a public restroom. *Bertrand*, 449 Mich at 618. The plaintiff "alleged that the defendant was negligent in failing to mark the step with a contrasting color, [or] by failing to warn of the additional step . . . ." *Id*. We reversed the Court of Appeals' resuscitation of the plaintiff's case and took the matter out of the hands of a jury because "[t]he plaintiff's only asserted basis for finding that the step was dangerous was that she did not see it," but she "ha[d] not presented any facts that the step posed an *unreasonable* risk of harm . . . ." *Id*. at 621, rev'g *Maurer v Oakland Co Parks & Recreation Dep't*, 201 Mich App 223 (1993). This meant that "the plaintiff ha[d] failed to establish anything

unusual about the step that would take it out of the rule of *Garrett* and *Boyle*." *Id*. By reaffirming *Garrett* and *Boyle*, we reaffirmed a "no duty" theory for open and obvious hazards in premises-liability cases, making the plaintiff's failure to see the open, obvious, and ordinary step a complete liability shield for the defendant as a matter of law. On the other hand, the dissent noted that the Restatement and its comments "provide that the landowner owes a duty to take reasonable precautions to protect invitees where their attention may be distracted, or they are forgetful." *Id*. at 627 (LEVIN, J., dissenting). This is true; the Restatement says that "reason to expect harm to the visitor from known or obvious dangers may arise . . . where the possessor has reason to expect that the invitee's attention may be distracted, . . . or [that he] will forget what he has discovered, or fail to protect himself against it." 2 Restatement, 2d, § 343A, comment *f*, p 220. In my view, both the debate between the majority and dissent in *Bertrand*, as well as *Bertrand*'s tension with *Williams*, expose the ambiguity in the Second Restatement's treatment of this subject.

In light of this confusion, we "attempted to more fully reconcile [our] no-duty rule with section 343A," *Limit to Premises Liability*, 38 Tex Tech L Rev at 42, in *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). There, we held that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." Thus, our rationale for the open and obvious danger doctrine being a potentially complete shield for a premises owner's liability was because we said that it ultimately related to the duty the premises owner owed to invitees. The only harms that we held the premises owner should "anticipate" were harms caused by a hazard

that had "special aspects"—"something out of the ordinary . . . about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition." *Id*. at 525. This "special aspects" doctrine continues to be what we use. In *Hoffner*, 492 Mich at 471, we emphasized that it was "impermissibl[e] [to] shift the focus from an objective examination of the *premises* to an examination of the subjective beliefs of the *invitee*."

Whatever the faults of this duty-based open and obvious danger analysis in premises-liability actions, it appears to me to at least have the benefit of greater clarity and ease of application than the Second Restatement. By emphasizing that the open and obvious danger doctrine relates to the duty owed to the invitee, *Lugo* makes clear that the question is one that a judge should resolve, rather than a jury, because "the duty question is solely for the court to decide . . . ." *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). Indeed, the separate opinion criticizing *Lugo*'s reasoning acknowledged that "the Restatement approach can be somewhat difficult to apply because it bears some similarity to the contributory negligence doctrine." *Lugo*, 464 Mich at 533 (CAVANAGH, J., concurring).[3] It also acknowledged that "the Restatement does not explicitly lay out the standard of care, [but] simply says that a possessor of land 'is subject to liability' in

[3] Although styled as a "concurring" opinion, Justice CAVANAGH's opinion is more accurately an opinion concurring in the judgment only. "A judge who doesn't agree with the majority opinion may file a dissenting opinion to explain his or her vote in the case. Likewise, a judge may concur in the judgment to express disagreement with the majority's reasoning or write a 'simple concurrence,' in which the judge agrees with both the reasoning and result of the majority opinion but wishes to write separately to make some other point." Garner et al, The Law of Judicial Precedent (2016), pp 182-183. Michigan appellate courts have not been disciplined about expressing this distinction in our opinions, however.

§ 343 cases, or 'is not liable' in § 343A cases." *Id*. at 531. Or consider the Restatement illustration highlighted by the majority. It says:

> 5. A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C. [2 Restatement, 2d, § 343A, comment *f*, p 221.]

As the majority notes, this illustration "maps almost perfectly onto the current case." But given the contradictory nature of § 343A and its comments, see *Koutoufaris*, 604 A2d at 395, we have little explanation of *why* "A is subject to liability to C"—in particular, the Restatement offers inconsistent guidance about what the relative roles are for the judge and jury in reaching this result. "Both the rule and its comments fail to clearly indicate whether 'not liable' means no duty or no breach and, in turn, who usually decides whether 'the possessor should anticipate the harm' nonetheless, the judge or the jury." *Limit to Premises Liability*, 38 Tex Tech L Rev at 39.

Under *Lugo* and *Hoffner*, Michigan has an answer to this conundrum. Because the open and obvious danger doctrine relates to whether the premises owner owes a duty to invitees, it is a question of law for the court to resolve. I am not all that wedded to this as the best answer we could reach, but I prefer it to continuing to wrestle with the ambiguities of the Second Restatement. As a result, without an alternative as clear as our status quo, I would keep employing our status quo; and, because I do not believe the majority's conclusions square with *Hoffner*, I dissent.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

RICKS v STATE OF MICHIGAN

Docket No. 160657. Argued on application for leave to appeal March 4, 2021. Decided July 8, 2021.

Desmond Ricks filed a complaint in the Court of Claims under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., seeking compensation for the nearly 25 years that he spent in prison following a wrongful conviction. Ricks was sentenced in 1987 for armed robbery and assault with intent to rob while armed, and in 1991, he was paroled with 4 years and 118 days remaining on his sentences. While on parole in 1992, Ricks witnessed the shooting death of Gerry Bennett. While Ricks was fleeing from the gunman, he dropped his coat, which the police later used to connect him to Bennett's killing along with fabricated ballistics evidence. On October 12, 1992, Ricks was sentenced to 30 to 60 years in prison for second-degree murder and two years for felony-firearm. As a result of these convictions, Ricks's parole for armed robbery and assault was violated and revoked. Under Michigan law, Ricks was required to serve the remainder of his sentences for armed robbery and assault before his new sentences would begin to run; he served these sentences from October 13, 1992 to February 8, 1997. After serving these sentences, Ricks began to serve his sentences for the murder of Bennett, for which he was imprisoned until May 26, 2017. Following the discovery that the police had fabricated the ballistics evidence used to convict Ricks, the Wayne Circuit Court, Richard M. Skutt, J., vacated Ricks's convictions for murder and felony-firearm, and Ricks was released from prison. Ricks filed a WICA complaint seeking $1,231,918 for the time he spent in prison from October 13, 1992 to May 26, 2017. The state agreed that Ricks had been wrongfully imprisoned for Bennett's murder and was eligible for compensation under the WICA. However, the state asserted that Ricks was not entitled to compensation for the 4 years and 118 days he had served for his armed-robbery and assault sentences after his parole was revoked. Ricks argued that he was entitled to compensation for this time because the wrongful conviction was the only reason that his parole was revoked. The Court of Claims, MICHAEL J. TALBOT, J., concluded that Ricks was not entitled to compensation under the WICA for

the time he served for the remainder of his armed-robbery and assault sentences and entered a stipulated judgment in Ricks's favor for $1,014,657.53. Ricks reserved the right to appeal the remainder of his claim. The Court of Appeals, CAMERON and TUKEL, JJ. (JANSEN, P.J., dissenting), affirmed the Court of Claims. 330 Mich App 277 (2019). The Supreme Court ordered and heard oral argument on whether the Court of Appeals erred by concluding that MCL 691.1755(4) barred Ricks from recovering compensation for the time he served for the parole revocation. 505 Mich 1068 (2020).

In an opinion by Chief Justice MCCORMACK, joined by Justices BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The exception in MCL 691.1755(4), which bars compensation under the WICA for any time served under a consecutive sentence for another conviction, is not applicable when a wrongful conviction triggered a parole revocation which required the WICA claimant's parole-revoked sentence to be served before the sentence for the wrongful conviction would begin to run, because the time served under the parole-revoked sentence is not served under a consecutive sentence for another conviction.

1. The WICA allows a person who was wrongfully convicted and imprisoned to seek compensation by bringing an action against the state. The WICA has two steps: (1) determining who is eligible for compensation and (2) calculating the amount of compensation to be awarded. Once a WICA claimant has satisfied the threshold-eligibility requirements of MCL 691.1755(1), the court must determine whether any time served is subject to the exception in MCL 691.1755(4) and calculate the amount owed for each year from the date the claimant was imprisoned until the date the claimant was released from prison. Under MCL 691.1755(4), compensation may not be awarded for any time during which the claimant was imprisoned under a concurrent or consecutive sentence for another conviction.

2. Just because a WICA claimant served sentences consecutively does not mean that the WICA's consecutive-sentence exception applies. Under MCL 768.7a(2), Ricks was required to serve the remaining portion of his sentences for armed robbery and assault before serving the sentences he received for second-degree murder and felony-firearm. The text of MCL 691.1755(4) makes the order in which the sentences were served critical. It provides that a WICA claimant cannot be compensated for time served in prison "under a . . . consecutive sentence for another conviction." A sentence that is served *before* another sentence

begins to run is not a consecutive sentence, because it is not consecutive to anything. Under MCL 691.1755(4), compensation is barred only for time served under a sentence that begins to run *after* the completion of the sentence that gave rise to the claimant's WICA eligibility. Ricks served the remainder of his sentences for his 1987 convictions before serving his sentences for murder and felony-firearm. Therefore, the exception in MCL 691.1755(4) did not apply to bar compensation for time Ricks served after his wrongful conviction because he did not serve a consecutive sentence for another conviction.

3. The context and purpose of the WICA further support the conclusion that the Legislature intended to compensate eligible claimants who served a parole-revoked sentence only as a result of the wrongful conviction and, as required by law, served the parole-revoked sentence before the wrongful-conviction sentence. For example, the WICA's formula for compensation is straightforward: $50,000 per year of wrongful imprisonment from the date that the claimant was wrongfully imprisoned until the date of release. Only the exception in MCL 691.1755(4) ties compensation to the sentence imposed for the wrongful conviction. This exception also bars compensation for any time served under a concurrent sentence for another conviction. The Legislature presumably saw little utility in using the limited monies that fund the WICA to compensate a wrongfully convicted individual if they would have been imprisoned anyway under a concurrent sentence that was independent of the wrongful conviction. Similarly, the exception in MCL 691.1755(1)(b) bars compensation when there is an adequate and independent basis for the claimant's incarceration. By contrast, when a wrongfully convicted person whose prior parole is violated because of a wrongful conviction is imprisoned, all of their imprisonment is wrongful. This result reflects the WICA's remedial purpose. All of Ricks's imprisonment was wrongful because all of it was caused by his wrongful convictions; WICA compensation helps to remedy that harm. Because the text, context, and purpose of the WICA agree that the Legislature intended to provide compensation for time served under a parole-revoked sentence when the revocation was caused solely by a wrongful conviction, Ricks was entitled to WICA compensation for the entire period that he was incarcerated between October 13, 1992 and February 8, 1997.

4. The Court of Appeals majority alternately held that even if Ricks's claim for compensation was not barred by MCL 691.1755(4), he still would not be entitled to additional compensation because his 1987 convictions were never reversed or

vacated, and therefore, he did not meet the threshold-eligibility requirements of MCL 691.1755(1). The Court of Appeals majority erred by conflating the WICA's eligibility requirements with its compensation calculation. Nothing in the compensation formula required Ricks to meet the threshold-eligibility requirements for his 1987 convictions to be compensated for the time he served on those sentences as a result of his wrongful convictions. Rather, MCL 691.1755(2)(a) simply directs the court to calculate an eligible claimant's compensation based on the time served between the date of imprisonment and the date of release, so long as the exception in MCL 691.1755(4) does not apply to any of that time served. Because neither MCL 691.1755(2) nor (4) contains any language suggesting that a claimant who meets the wrongful-conviction threshold-eligibility requirements of MCL 691.1755(1) must satisfy those requirements again for each sentence that contributes to their wrongful imprisonment, the Court of Appeals erred when it read that requirement into the WICA.

Reversed and remanded.

Justice ZAHRA, joined by Justices VIVIANO and CLEMENT, dissenting, disagreed that Ricks was entitled to compensation for the time that he was imprisoned pursuant to his 1987 convictions under the clear, unambiguous language of the WICA. Justice ZAHRA noted that, in enacting the WICA, the Legislature had waived sovereign immunity as a matter of public policy in order to provide a path to limited compensation for a defined class of wrongfully imprisoned people. Under the WICA, these persons are entitled to compensation for the crimes they did not commit that form the basis of their WICA claims. Thus, the WICA ties a claimant's eligibility for compensation to the specific crimes, charges, and convictions that led to their wrongful imprisonment and that form the basis of the WICA claim. Justice ZAHRA disagreed with the majority that the question of eligibility was separate from the calculation of the amount due. He asserted that this analysis severed the necessary tie between the crimes, charges, and convictions that led to the wrongful imprisonment and the compensation owed. Additionally, contrary to the majority's assertion, MCL 691.1755(2) and (4) contained language limiting compensation by requiring the court to find that the claimant was wrongfully convicted and imprisoned before calculating the amount of compensation due, i.e., both the conviction and imprisonment referred to in MCL 691.1755(2) must be wrongful in order for a claimant to be eligible for compensation. Because Ricks did not satisfy the threshold requirements of MCL

691.1755(1) with respect to his 1987 convictions, he was not entitled to compensation for the time he served under those convictions. Further, contrary to the majority's assertions, the specific order in which sentences are served is not what defines a sentence as consecutive; rather, it is the cumulative nature of the time served. The majority's reliance on the Legislature's use of the indefinite article "a" before "consecutive sentence" in MCL 691.1755(4) did not change the result that the statute precludes compensation for time served under a concurrent or consecutive sentence that is not the subject of the WICA claim. Finally, Justice ZAHRA disputed that there was anything wrongful about the time Ricks served under his valid 1987 convictions. The Legislature did not condition the applicability of MCL 691.1755(4) on the cause of the concurrent or consecutive sentence for another conviction. Under the WICA, Ricks was entitled to compensation for the time served only for his wrongful 1992 convictions.

WRONGFUL IMPRISONMENT COMPENSATION ACT — EXCEPTIONS — CONSECUTIVE SENTENCES — TIME SERVED ON A PAROLE-REVOKED SENTENCE BASED ON A WRONGFUL CONVICTION.

Under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., persons who were wrongfully convicted and imprisoned may seek compensation from the state through an action in the Court of Claims; under MCL 691.1755(4), compensation may not be awarded for any time served when the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction; this exception does not bar compensation for time served in prison on a parole-revoked sentence when the wrongful conviction triggered the parole revocation and the WICA plaintiff was required to serve the parole-revoked sentence before serving the sentence for the wrongful conviction.

Fieger, Fieger, Kenney & Harrington PC (by *Sima G. Patel* and *Geoffrey N. Fieger*) for Desmond Ricks.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, for the people.

Amicus Curiae:

Michigan Innocence Clinic (by *Imran J. Syed* and *David A. Moran*) for Justly Johnson.

MCCORMACK, C.J. A wrongful conviction is a harm that can never be fully redressed. When an innocent person is imprisoned for a crime they didn't commit, we can't rewind the clock to make them whole again. They can't get back the time lost raising their children, forging a career, or contributing to their communities. But our Legislature has tried to compensate for these injuries, as best as the government can, by enacting the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*. The WICA awards $50,000 for each year someone spends wrongfully imprisoned, subject to a few exceptions set forth in the act. This case is about one of those exceptions: MCL 691.1755(4), which bars compensation for any time served under a consecutive sentence for another conviction.

The question is whether this exception applies when a wrongful conviction alone triggered a parole revocation, which required the WICA claimant's parole-revoked sentence to be served before the sentence for the wrongful conviction would begin to run. We hold that it does not, because the time served under the parole-revoked sentence is not served under a consecutive sentence for another conviction. We reverse the decision of the Court of Appeals and remand this case to the Court of Claims for further proceedings.

I. FACTS AND PROCEEDINGS

In 1992, plaintiff Desmond Ricks saw a man shoot and kill Gerry Bennett in Detroit. Ricks was on parole then; he began serving concurrent sentences for armed robbery and assault with intent to rob while armed in

1987 and was paroled on May 30, 1991. When he witnessed Bennett's murder, Ricks still had 4 years and 118 days remaining on his armed-robbery and assault sentences.

As he fled from the gunman, Ricks dropped his winter coat. It would later be discovered by the police, who used it to connect him to Bennett's killing. Inside the coat was a phone book, a hospital visitor pass, and a picture of Ricks's baby daughter. Ricks was convicted of Bennett's murder, based in large part on ballistics evidence fabricated by a Detroit police officer. On October 12, 1992, he was sentenced to 30 to 60 years in prison for second-degree murder and two years for carrying a firearm during the commission of a felony (felony-firearm). Because Ricks was convicted of these new felonies, his parole for armed robbery and assault was violated and revoked. Michigan law required Ricks to serve the rest of those sentences before his new sentences could begin to run. Ricks's judgment of sentence for the wrongful murder conviction reflected this:

> ORDER: Pursuant to [MCL] 768.7a(2), the term of imprisonment imposed in th[is] case shall begin to run at the expiration of the remaining portion of the[] term of imprisonme[nt] imposed in case no. 86-4314 (Recorder's Court).

As a result, Ricks served the rest of his armed-robbery and assault sentences from October 13, 1992 to February 8, 1997: 4 years and 118 days. After those sentences were completed, Ricks began to serve his sentences for the murder of Gerry Bennett. He would remain incarcerated for the next 7,412 days for a crime he didn't commit.

After the Michigan Innocence Clinic discovered that a Detroit Police Department officer had fabricated the

ballistics evidence used to convict Ricks, the Wayne Circuit Court issued an order vacating his murder and felony-firearm convictions and sentences. Ricks was released from prison the same day, and the charges were dismissed.

Ricks filed a WICA complaint in the Court of Claims seeking compensation for the almost 25 years he was wrongfully imprisoned from October 13, 1992 to May 26, 2017. The state agreed that he had been wrongfully imprisoned and met the WICA's eligibility requirements for the time he wrongfully served for Bennett's murder. But it maintained that Ricks wasn't entitled to compensation for the 4 years and 118 days he served for his armed-robbery and assault sentences because his parole was revoked. The state's view was that MCL 691.1755(4), which provides that WICA "[c]ompensation may not be awarded . . . for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction," prohibited compensation for this time.

Ricks believed that he was entitled to compensation for the years that were allocated to his prior sentences because his wrongful convictions were the only reason his parole was violated and revoked. He included in his complaint an affidavit from Cynthia Partridge, the time computation manager for the Michigan Department of Corrections, who confirmed that Ricks's parole was violated only because he was convicted of murder.

The Court of Claims agreed with the state, holding that the time Ricks served under the armed-robbery and assault sentences should not be included in the WICA compensation calculation. A stipulated judgment was entered in Ricks's favor for $1,014,657.53, while he reserved the right to appeal the remainder of his claim. The Court of Appeals affirmed the Court of

Claims in a split decision. *Ricks v Michigan*, 330 Mich App 277; 948 NW2d 83 (2019). This appeal followed.

II. THE WICA'S COMPENSATION SCHEME

A. THE TWO-STEP INQUIRY

The WICA was enacted "to provide compensation and other relief for individuals wrongfully imprisoned for crimes; to prescribe the powers and duties of certain state and local governmental officers and agencies; and to provide remedies." 2016 PA 343, title. It waives sovereign immunity and allows a person who was wrongfully convicted and imprisoned to seek compensation by bringing an action against the state in the Court of Claims. MCL 691.1753.

The WICA has two steps. The first determines whether a claimant is eligible for compensation. See MCL 691.1755(1). The second calculates the precise amount of compensation that must be awarded to eligible claimants. See MCL 691.1755(2).

Step one: The WICA defines who is eligible for compensation at MCL 691.1755(1). A successful WICA claimant must have been convicted of at least one crime under Michigan law, must have been sentenced to a term of imprisonment in a state correctional facility, and must have served at least part of the sentence for that crime. MCL 691.1755(1)(a). The claimant's conviction must have been reversed or vacated, and the claimant must prove that their charges were subsequently dismissed or that they were acquitted upon retrial. MCL 691.1755(1)(b). Finally, the claimant must prove by clear and convincing evidence that the reason they can satisfy the requirements set forth in Subdivision (b) is because new evidence shows that they "did not perpetrate the crime and [were] not

an accomplice or accessory to the acts that were the basis of the conviction . . . .” MCL 691.1755(1)(c). If the claimant satisfies all of these requirements, they are “entitled to judgment” in their favor. MCL 691.1755(1).

Step two: Subject to two exceptions, once a court finds that a plaintiff was wrongfully convicted and imprisoned, it “shall award compensation” according to the provisions set forth in MCL 691.1755(2). The court must award $50,000 “for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison . . . .” MCL 691.1755(2)(a).

B. THE EXCEPTIONS

The WICA carves out two relevant exceptions: one in the eligibility step and one in the compensation step. First, MCL 691.1755(1)(b) provides that a WICA claimant is not entitled to compensation—even if their conviction was set aside and they were not convicted of that offense again—if they were “convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.”

Second, the compensation formula set forth at MCL 691.1755(2) explicitly conditions a WICA recipient’s award on MCL 691.1755(4), which states that “[c]ompensation may not be awarded under subsection (2) for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction.” This is the exception relevant here.

III. ANALYSIS

We review de novo the WICA’s compensation provisions. *Sanford v Michigan*, 506 Mich 10, 14; 954 NW2d 82 (2020). The precise question before us is whether

the time Ricks served on the remainder of his parole-revoked sentences falls within MCL 691.1755(4)'s bar on compensation "for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction." The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State (On Remand)*, 489 Mich 194, 217; 801 NW2d 35 (2011). To do that, we read a statute's provisions "reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

The text of MCL 691.1755(4), the context in which it is set, and the WICA's purpose all lead to the same conclusion: the Legislature intended to compensate claimants like Ricks for time served on a parole-revoked sentence when it is directly attributable to their wrongful conviction.

A. MCL 691.1755(4): THE TEXT

Starting with the text. A statute's language "offers the most reliable evidence of the Legislature's intent." *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). Here, that text is "Compensation may not be awarded under subsection (2) for any time during which the plaintiff was imprisoned under *a* concurrent or *consecutive sentence for another conviction*." MCL 691.1755(4) (emphasis added).

After the murder conviction, Ricks served two separate sets of sentences: as required by Michigan law, he first served the parole-revoked sentences for his armed-robbery and assault convictions and he then served his sentences for murder and felony-firearm. MCL 768.7a(2) leaves no room for discretion: when a person on parole is convicted of a new felony, they must first finish serving the rest of their parole-revoked

sentence before they start serving their sentence for the new offense. Ricks's murder and felony-firearm sentences did not begin to run until he finished serving the 4 years and 118 days that remained for his armed-robbery and assault sentences. One set of these sentences was, indeed, served consecutively to the other.

"Consecutive sentences" are "those following in a train, succeeding one another in a regular order, with an uninterrupted course or succession, and having no interval or break." *People v Chambers*, 430 Mich 217, 220 n 2; 421 NW2d 903 (1988). But the WICA doesn't use the phrase "consecutive sentences." It refers to "*a* . . . consecutive sentence"—a singular noun. MCL 691.1755(4). When we interpret a statute, we strive to give effect to every phrase, clause, and word in it. *Rock v Crocker*, 499 Mich 247, 262; 884 NW2d 227 (2016). The Legislature's choice to cabin the exception to "a" consecutive sentence, rather than "consecutive sentence*s*," is important. A single sentence that is properly characterized as "a consecutive sentence" is one that only begins to run after the completion of another sentence. 21A Am Jur 2d, Criminal Law, § 808, § 812, pp 23-28. Ricks's murder and felony-firearm sentences were served after—that is, consecutively to—the completion of his parole-revoked sentences.

That a WICA claimant served a consecutive sentence doesn't mean that the WICA's consecutive-sentence exception must apply. The text of MCL 691.1755(4) makes the order the sentences are served critical. A WICA claimant can't be compensated for time they spent imprisoned "under a . . . consecutive sentence for another conviction." If the Legislature had not intended to provide compensation in cases like Ricks's, it could simply have written MCL 691.1775(4)

to bar compensation "for any time during which the plaintiff was imprisoned under a sentence for another conviction." But it did not.

A sentence that is served *before* another begins to run is not a consecutive sentence. It is not consecutive to anything. And the exception in MCL 691.1755(4) applies only when the excluded-from-compensation consecutive sentence is served for "another conviction"—a conviction other than the one that established the claimant's eligibility for compensation. Therefore, MCL 691.1755(4)'s consecutive-sentence exception bars compensation only for time served under a sentence that begins to run *after* the completion of the sentence for the conviction giving rise to the claimant's WICA eligibility.

Hypotheticals help. Imagine a person wrongfully convicted of an offense for which they received a 10-year prison term. If they tried to escape prison while serving that sentence, they would be guilty of a felony under MCL 750.193(1) and would receive a new sentence of up to five years for that offense. Under that statute, the attempted-escape sentence would have to be served consecutively to the original (wrongful) sentence. See *id*. ("The term of the further imprisonment shall be served after the termination, pursuant to law, of the sentence or sentences then being served."). If that person sought WICA compensation after completing both sentences, they would only be eligible for 10 years of compensation because MCL 691.1755(4) would bar compensation for the time served for the consecutive sentence for the attempted-escape conviction. That result follows the WICA's purpose, of course.

Or, if a person who is paroled for a wrongful conviction commits a new felony, MCL 768.7a(2) would require them to first serve the rest of their wrongful

sentence before the sentence for their new (and valid) conviction began to run. The WICA would award compensation for the time served completing the wrongful-conviction sentence. But it would exclude compensation for any time served under the new sentence because that would be imprisonment under a consecutive sentence for another conviction. This too is harmonious with the WICA's purpose. There is nothing wrongful about the imprisonment for the new offense; it was not caused by a wrongful conviction.

Ricks served the remainder of his sentences for his 1987 convictions before he began to serve his sentences for murder and felony-firearm. The exception in MCL 691.1755(4) does not apply to bar compensation for any time Ricks served after his wrongful conviction because he did not serve "a . . . consecutive sentence for another conviction."

B. MCL 691.1755(4): CONTEXT AND PURPOSE

The rest of the WICA's language is more evidence that the Legislature intended to compensate eligible claimants who serve a parole-revoked sentence only as a result of the wrongful conviction and, as required, serve the parole-revoked sentence before the wrongful-conviction sentence. For example, after establishing the eligibility requirements, the statute provides a straightforward formula for compensation: it directs a court to award $50,000 "for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison," subject to MCL 691.1755(4). MCL 691.1755(2)(a). MCL 691.1755(4)'s exception is the only compensation carve out—no other statutory text cabins compensation only to the sentence imposed for the wrongful conviction.

MCL 691.1755(4)'s exception also bars compensation for any time served under a concurrent sentence for another conviction. This text too tells us something about the Legislature's intent. The amount of compensation to award is a matter of legislative judgment; there are only so many dollars to fill the WICA bucket, after all, and the Legislature had to decide how best to allocate limited funding. It presumably saw little utility in compensating someone for a wrongful conviction if they would have been incarcerated anyway under a concurrent sentence that was independent of the wrongful conviction.

Similarly, the WICA's eligibility requirements bar compensation "if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial." MCL 691.1755(1)(b). In that situation, as with MCL 691.1755(4)'s exception, there is an adequate and independent basis for the claimant's incarceration. If a WICA claimant was convicted of multiple offenses arising from the same transaction and some—but not all—of the convictions were vacated or reversed, then their imprisonment was justified because any undisturbed conviction was an adequate and independent basis for their incarceration. Or if a claimant was wrongfully convicted of a greater offense but was convicted of a lesser offense on retrial, their incarceration would not be wrongful because they were still guilty of an offense arising from the same transaction. These potential claimants would not be eligible for WICA compensation. But a wrongfully convicted person whose prior parole is violated because of that wrongful conviction stands in sharp contrast with these examples. All of their imprisonment is wrongful.

This result reflects the WICA's remedial purpose, too. The Legislature named the act the "Wrongful Imprisonment Compensation Act," not the "Wrongful *Conviction* Compensation Act." MCL 691.1751. And it was enacted "to provide compensation and other relief for individuals wrongfully imprisoned for crimes . . . ." 2016 PA 343, title. Compensating an exoneree for time spent incarcerated for a parole violation that resulted only from the wrongful conviction is harmonious with that purpose. (And the opposite is disharmonious.) All of Ricks's imprisonment was "wrongful" because it was all caused only by his wrongful convictions; WICA compensation helps to remedy that harm.

And WICA compensation is about more than money; it also represents the state's acknowledgment of the wrong done. As the Attorney General has explained, "the government's public recognition and overturning of the convictions of these men helps to foster a healing process, and assures Michiganders that the government—regardless of fault—will take ownership of its errors." Department of the Attorney General, *Michigan AG Nessel Approves $2,320,000 in Compensation Awards to Wrongfully Convicted Men* (May 17, 2019), available at <https://www.michigan.gov/ag/0,4534,7-359--497851--,00.html> [https://perma.cc/G3R4-A2BV]. See also Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 Am U Crim L Brief 10, 13-16 (2010) (detailing the psychological impact of wrongful imprisonment). The state does not dispute that Ricks's parole-revoked sentence was caused only by his wrongful convictions; the government's errors caused all of Ricks's imprisonment.

The WICA's text, context, and purpose agree: the Legislature intended to provide compensation for time

served under a parole-revoked sentence when the revocation was caused solely by a wrongful conviction. For these reasons, we conclude that Ricks is entitled to WICA compensation for the entire period that he was incarcerated between October 13, 1992 and February 8, 1997.

IV. THE COURT OF APPEALS' ALTERNATE HOLDING

The Court of Appeals majority alternately held that even if MCL 691.1755(4) didn't bar Ricks's claim for compensation for the time he served on the rest of his parole-revoked sentences, he would still not be entitled to compensation for that time. *Ricks*, 330 Mich App at 288. After all, the majority explained, Ricks's 1987 convictions were never reversed or vacated. *Id*. at 288-289. Therefore, in the majority's view, Ricks should not be compensated for time served under the parole-revoked sentences because the Legislature did not intend to award compensation "unless the charges in a specific judgment of conviction were reversed or vacated and those charges were later dismissed or the plaintiff was found not guilty on retrial." *Id*. at 289. "Because Ricks cannot meet the threshold requirements of WICA with respect to the 1987 convictions," the majority concluded, "he was not entitled to compensation for the time he was incarcerated in relation to those convictions." *Id*.

We reverse this alternate holding. The Court of Appeals majority erred by conflating the WICA's eligibility requirements with its compensation calculation. The state doesn't dispute that Ricks is eligible for compensation—the only disagreement is how to calculate his compensation. Nothing in the compensation formula requires Ricks to clear the threshold-eligibility requirements for his 1987 convictions to be compen-

sated for the time he served on those sentences as a result of his wrongful convictions. And MCL 691.1755(2)(a) simply directs the court to calculate an eligible claimant's compensation based on the time served between "the date the plaintiff was imprisoned until the date the plaintiff was released from prison," so long as MCL 691.1755(4)'s exception does not apply to any of that time served.

Because neither MCL 691.1755(2) nor MCL 691.1755(4) contains any language suggesting that a claimant who meets the wrongful-conviction threshold-eligibility requirements of MCL 691.1755(1) must satisfy those requirements *again* for each sentence that contributed to their wrongful imprisonment, the Court of Appeals erred by reading that requirement into the WICA.

V. CONCLUSION

Because Ricks did not serve a consecutive sentence for another conviction during his wrongful imprisonment from October 13, 1992 to May 26, 2017, MCL 691.1755(4)'s exception does not bar compensation for any of that time. We also hold that once a WICA claimant has satisfied the threshold-eligibility requirements of MCL 691.1755(1), the only remaining tasks are to determine whether any time served is subject to MCL 691.1755(4)'s exception and to calculate the amount owed "for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison . . . ." MCL 691.1755(2)(a). We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Claims for further proceedings.

BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, C.J.

ZAHRA, J. (*dissenting*). I dissent from the majority's decision reversing the judgment of the Court of Appeals. In 1987, plaintiff was convicted of armed robbery and assault with intent to rob while armed and was sentenced to 4 to 10 years' imprisonment for each conviction. In 1992, while on parole for the 1987 convictions, plaintiff was convicted of second-degree murder and possession of a firearm during the commission of a felony (felony-firearm). He was sentenced to 30 to 60 years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. As a result of his new convictions, plaintiff's parole was revoked. Michigan law mandates consecutive sentencing for parolees who are convicted of new felonies while on parole and requires them to serve the remainder of their previous sentence before serving the sentences received for the new convictions.[1] Accordingly, plaintiff served the remainder of his sentences for the 1987 convictions from October 13, 1992 to February 8, 1997, and began serving his sentences for the 1992 convictions on February 9, 1997.

In 2017, new evidence revealed that plaintiff did not commit the second-degree murder and felony-firearm offenses underlying his 1992 convictions. His 1992 convictions and sentences were vacated, the prosecution dismissed the charges related to that crime, and he was released from prison on May 26, 2017. Plaintiff

[1] See MCL 768.7a ("If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.").

then filed the instant action under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*. The parties stipulated that plaintiff was entitled to compensation totaling $1,014,657.53 for the time he was wrongfully imprisoned for the 1992 convictions, but they disputed whether he was entitled to compensation for the time he served on the remainder of his sentences for the 1987 convictions, which would result in an additional $216,438.36. In a split, published decision, the Court of Appeals held that plaintiff was not entitled to the additional compensation because (1) he was seeking compensation for time served under a consecutive sentence for other convictions, which is precluded under MCL 691.1755(4),[2] and (2) he failed to satisfy the WICA's threshold requirements for compensation with respect to his 1987 convictions, which were never reversed or vacated and remained valid.[3] In dissent, Judge JANSEN opined that the WICA "does not mandate a setoff" for the time plaintiff was incarcerated on a parole violation caused by a wrongful conviction.[4]

A review of the clear, unambiguous language of the WICA demonstrates that the Court of Appeals reached the correct result: plaintiff is not entitled to additional compensation for the time he was imprisoned under his valid 1987 convictions. The WICA provides compensation only for the wrongful conviction(s) and imprisonment that form the basis of the plaintiff's WICA claim. That is, the WICA only compensates individuals for the time they were *wrongfully imprisoned for the*

[2] See MCL 691.1755(4) ("Compensation may not be awarded under subsection (2) for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction.").

[3] *Ricks v Michigan*, 330 Mich App 277, 288-289; 948 NW2d 83 (2019).

[4] *Id*. at 289-290 (JANSEN, J., dissenting).

crimes they did not commit—not time served under a consecutive sentence for another, valid conviction. The majority opinion maneuvers around this straightforward reading of the WICA by reviewing its provisions in isolation. It then compounds its erroneous construction of the WICA with a misapprehension of the basic principles of consecutive and concurrent sentencing. Finally, the majority opinion misapplies this Court's jurisprudence and relies on public-policy considerations to award plaintiff compensation that is beyond what the Legislature expressly provided when waiving this state's sovereign immunity in the WICA. I dissent from that decision and would affirm the result reached by the Court of Appeals.

I. STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF STATUTORY INTERPRETATION

Whether plaintiff is entitled to the additional compensation under the WICA for the time he was imprisoned under his valid 1987 convictions presents an issue of statutory interpretation that we review de novo.[5] "Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute."[6] "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used."[7] Further, "[a] statutory

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[5] *Sanford v Michigan*, 506 Mich 10, 14; 954 NW2d 82 (2020).

[6] *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999) (quotation marks and citation omitted).

[7] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (citations omitted).

term or phrase cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme."[8] Ultimately, "where the statutory language is clear and unambiguous, the statute must be applied as written."[9]

II. ANALYSIS

As we recently recognized in *Sanford*, the WICA is a relatively new law that waives this state's sovereign immunity and creates a cause of action for certain people wrongfully imprisoned by the state of Michigan.[10] "Before March 29, 2017, people who were wrongfully imprisoned by the state of Michigan had no recourse against it for compensation."[11] Yet the Legislature, as a matter of public policy, decided to waive this state's immunity and provide a "defined class of wrongfully imprisoned people a path to *limited* compensation."[12] Of course, like all statutory causes of actions stemming from an express waiver of sovereign immunity, the Legislature may place on such actions any limits or conditions it sees fit.[13] Reviewing the WICA as a whole, the Legislature has plainly limited

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[8] *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018) (quotation marks and citation omitted).

[9] *Id*. (quotation marks and citation omitted).

[10] *Sanford*, 506 Mich at 13; 2016 PA 343, title (stating that the WICA is an act "to provide compensation and other relief for individuals wrongfully imprisoned for crimes; to prescribe the powers and duties of certain state and local governmental officers and agencies; and to provide remedies").

[11] *Sanford*, 506 Mich at 15.

[12] *Id*. at 17 (emphasis added).

[13] See *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012) ("[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed.").

plaintiff's entitlement to compensation to the period of February 9, 1997 to May 26, 2017—the time that plaintiff was wrongfully imprisoned for his wrongful 1992 convictions.

A. THE WICA TIES COMPENSATION TO THE WRONGFUL CONVICTION AND IMPRISONMENT THAT FORM THE BASIS OF THE WICA CLAIM

The WICA provides compensation to individuals wrongfully imprisoned for crimes they did not commit, thus forming the basis of their WICA claims. For example, MCL 691.1753 states that "[a]n individual convicted under the law of this state and subsequently imprisoned in a state correctional facility *for 1 or more crimes that he or she did not commit* may bring an action for compensation against this state in the court of claims as allowed by this act."[14] The WICA also repeatedly uses the term "charges," which the act defines as "the criminal complaint filed against the plaintiff . . . that resulted in *the conviction and imprisonment of the plaintiff that are the subject of the claim for compensation under this act*."[15] Indeed, the time period in which an individual must bring a claim under the WICA does not begin to run until the judgment of conviction is reversed or vacated and the "charges" forming the basis of the WICA claim are dismissed or the claimant is found not guilty on retrial.[16] A review of these provisions leads one to the straightforward conclusion that the WICA is designed to compensate individuals who were wrongfully imprisoned for crimes they did not commit and whose wrongful convictions

[14] Emphasis added.

[15] MCL 691.1752(a) (emphasis added).

[16] MCL 691.1757(1), citing MCL 691.1754(1)(b).

and imprisonment form the basis of their WICA claims. Members of the majority have recognized as much.[17]

MCL 691.1755, the section of the WICA governing compensation and a plaintiff's burden of proof, further supports this conclusion. MCL 691.1755 states, in relevant part:

> (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:
>
> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

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[17] See *Sanford*, 506 Mich at 24 (MCCORMACK, C.J., dissenting, joined by BERNSTEIN and CAVANAGH, JJ.) (stating that the plaintiff was "imprisoned" for purposes of the WICA "every day that he was confined in a juvenile detention facility *for a crime that he did not commit*") (emphasis added); *Tomasik v Michigan*, 505 Mich 956, 956 (2020) (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.) ("In enacting the WICA, the Legislature intended wrongly incarcerated individuals to seek compensation *when their convictions are voided* and they are exonerated of all *charges* on the basis of new evidence.") (emphasis added).

> (2) Subject to subsections (4) and (5),[18] if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as follows:
>
> (a) Fifty thousand dollars for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison, regardless of whether the plaintiff was released from imprisonment on parole or because the maximum sentence was served. For incarceration of less than a year in prison, this amount is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated in prison.
>
> * * *
>
> (4) Compensation may not be awarded under subsection (2) for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction.

While the majority devotes much of its analysis to MCL 691.1755(4), plaintiff's claim for additional compensation fails without the need to even reach that provision. As an alternative basis for its conclusion that plaintiff is not entitled to that additional compensation, the Court of Appeals held that while plaintiff has satisfied the threshold requirements for compensation under MCL 691.1755(1) with respect to his wrongful 1992 convictions, he could not do the same with respect to his 1987 convictions, which were never reversed or vacated and ultimately remained valid.[19] This holding correctly recognizes that the WICA, as a whole, ties a plaintiff's eligibility for compensation to

[18] MCL 691.1755(5) provides that "[c]ompensation may not be awarded under subsection (2) for any injuries sustained by the plaintiff while imprisoned," and is not at issue here.

[19] *Ricks*, 330 Mich App at 288-289.

the specific crimes, charges, and convictions that led to the wrongful imprisonment and form the basis of the WICA claim.

In its review of the threshold-eligibility requirements in MCL 691.1755(1), the Court of Appeals aptly recognized that the Legislature repeatedly used the word "the" in front of "crimes," "charges," and "judgment of conviction" in MCL 691.1755(1)(a) to (c) in setting forth when a plaintiff is eligible for compensation under the WICA. On the other hand, the Legislature uses the word "another" before "criminal offense" in MCL 691.1755(1)(b) and "conviction" in MCL 691.1755(4)—other subsections of MCL 691.1755 that explain when a plaintiff is *not* eligible for compensation. We have previously defined "the" as a "definite article . . . (used, especially before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)."[20] As an adjective, "another" is defined as "different or distinct from the one first considered"; "some other"; or "being one more in addition to one or more of the same kind."[21] Accordingly, the Legislature's use of "the" before "crimes," "charges," and "judgment of conviction" throughout MCL 691.1755(1)(a) to (c) means those provisions refer to the specific crimes and charges leading to a plaintiff's wrongful conviction and imprisonment that gave rise to a WICA claim. The Legislature's use of "another" before "criminal offense" in MCL 691.1755(1)(b) and "conviction" in MCL

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[20] *Robinson v Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (quotation marks, citations, and brackets omitted).

[21] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *The American Heritage Dictionary of the English Language* (2011) (defining "another" as "1. One more; an additional. . . . 2. Distinctly different from the first. . . . 3. Some other").

691.1755(4) means those provisions refer to some other offense or conviction that is different or distinct from the wrongful conviction and imprisonment, and which therefore does not warrant compensation under the WICA. Thus, MCL 691.1755 reflects the overall structure of the WICA in only providing compensation for the specific crimes, charges, or convictions that the plaintiff was wrongfully convicted of and imprisoned for, and which ultimately form the basis of the WICA claim—not "another" crime, charge, or conviction.

The majority opinion disagrees with this commonsense reading of the WICA and instead frames MCL 691.1755 as a two-step inquiry in which a claimant's eligibility for compensation is wholly separate from the calculation of the amount of compensation due. Specifically, the majority states that "neither MCL 691.1755(2) nor MCL 691.1755(4) contains any language suggesting that a claimant who meets the wrongful-conviction threshold-eligibility requirements of MCL 691.1755(1) must satisfy those requirements *again* for each sentence that contributed to their wrongful imprisonment[.]"[22] By separating the eligibility requirement from the compensation formula and treating the latter as a stand-alone inquiry, the majority severs the necessary tie between the crimes, charges, and convictions that led to the wrongful imprisonment and the compensation owed. Further, the majority's distorted framework ignores the maxim that courts must construe the statutory text as a whole, not in isolation or piecemeal.[23] In rejecting the

[22] *Ante* at 398.

[23] *McQueer*, 502 Mich at 286. See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to

Court of Appeals' alternative holding that plaintiff failed to meet the WICA's threshold requirements for his 1987 convictions, the majority points to the state's concession that plaintiff is entitled to compensation for his wrongful 1992 convictions and concludes that this concession automatically entitles him to compensation for the time served under his valid 1987 convictions. Such bootstrapping of WICA eligibility is not only precluded by MCL 691.1755, but by a complete reading of the WICA as a whole, which, as explained above, provides compensation only for the wrongful conviction and imprisonment that form the basis of the plaintiff's WICA claim. The majority opinion recognizes as much.[24]

Further, contrary to the majority's assertion, both MCL 691.1755(2) and (4) *do* contain language demonstrating this limitation on compensation. MCL 691.1755(2) requires the court to find that the "plaintiff was wrongfully convicted and imprisoned" before calculating the amount of compensation due. As we explained in *Sanford*, "[t]he most natural reading of MCL 691.1755(2) is that the adverb 'wrongfully' modifies both verbs immediately following it, which are separated by the conjunctive 'and.' "[25] Thus, both the conviction and the imprisonment referred to in MCL 691.1755(2) must be "wrongful." It would make little sense if a WICA claimant was only required to set forth a single wrongful conviction as a baseline for compensation, but could then lay claim to compensation that is

consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

[24] See *ante* at 399 ("[T]he exception in MCL 691.1755(4) applies only when the excluded-from-compensation consecutive sentence is served for 'another conviction'—a conviction *other than the one that established the claimant's eligibility for compensation*.") (emphasis added).

[25] *Sanford*, 506 Mich at 20 (opinion of the Court).

related to *other* convictions, including convictions that were never reversed or vacated and, therefore, are not wrongful. This is precisely the reason why MCL 691.1755(4) precludes compensation for any time served under a concurrent or consecutive sentence for "another conviction."

While no one disputes that plaintiff has satisfied the threshold requirements in MCL 691.1755(1) for compensation with respect to the *wrongful* 1992 convictions, he has very clearly not done so with respect to his *valid* 1987 convictions. Therefore, plaintiff is not entitled to compensation for the time he served under his 1987 convictions.

B. THE MAJORITY'S INTERPRETATION OF MCL 691.1755(4)'S PHRASE "A . . . CONSECUTIVE SENTENCE" IS ERRONEOUS

Even assuming plaintiff could somehow satisfy the threshold requirements for compensation under MCL 691.1755(1) for his 1987 convictions, he must still overcome the setoff provision of MCL 691.1755(4), which precludes compensation "for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction." The majority opinion conjures up textual support for its position by introducing a novel concept to consecutive sentencing that was not raised by the parties or either Court of Appeals opinion below. In concluding that MCL 691.1755(4) is inapplicable, the majority concludes that this provision bars compensation only for time served under a sentence that begins to run *after* the sentence for the wrongful conviction has been served and that because plaintiff served the remainder of his sentences for his 1987 convictions *before* his sentences for the wrongful 1992 convictions, plaintiff is

not actually seeking compensation for time served under a consecutive sentence for another conviction.[26] I disagree.

The WICA does not define "consecutive sentence," and unsurprisingly, the term has acquired a peculiar and appropriate meaning within the law; therefore we must construe the phrase according to that meaning.[27] *Black's Law Dictionary* (11th ed) defines "consecutive sentences" as "[t]wo or more sentences of [incarceration] to be served in sequence."[28] At first glance, it may appear that the majority's focus on the specific order in which a sentence is served bears some relevance in defining a consecutive sentence. But again, the majority fails to read the relevant language in context with the rest of the statute. MCL 691.1755(4) precludes compensation for any time served under *a concurrent or consecutive sentence* for another conviction. Of course, sentences for multiple convictions are either served consecutively or concurrently. Unlike consecutive sentences, "concurrent sentences" are "[t]wo or more sentences of [incarceration] to be served simultaneously."[29] That is, while concurrent sentences are served at the same time, consecutive sentences are served in a continuous and uninterrupted manner. Contrary to the majority's assertions, the specific order in which the sentences are served is not what defines a sentence as consecutive; instead, it is the cumulative

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[26] *Ante* at 399.

[27] *Sanford*, 506 Mich at 21 n 19 (opinion of the Court) ("[A] legal term of art must be construed in accordance with its peculiar and appropriate legal meaning.") (quotation marks and citations omitted). See also MCL 8.3a.

[28] *Black's Law Dictionary* (11th ed), p 1367.

[29] *Id*.

nature of the time served that makes a sentence consecutive rather than concurrent.[30]

In this case, after finding that plaintiff had violated his parole, the trial court was required by law to order plaintiff's sentences for his wrongful 1992 convictions to run consecutively with his sentences for his 1987 convictions.[31] The fact that plaintiff's sentences for his 1987 convictions were served first does not mean they lost their status as consecutive sentences. Rather, because plaintiff's sentences for his 1987 convictions were served in a continuous and uninterrupted manner with his sentences for his 1992 convictions, plaintiff's imprisonment under his 1987 convictions was time served under a consecutive sentence.

The majority's reliance on "a" before "consecutive sentence" in MCL 691.1755(4) as referring to a singular noun does not change this result. Just as the Legislature used the definite article "the" before "crimes," "charges," and "judgment of conviction" in MCL 691.1755(1) to explain when a plaintiff is eligible for compensation, it also used "the" before "sentence."[32] The indefinite article "a," on the other hand, is used without specificity.[33] Accordingly, the Legislature's use of the word "a" before "concurrent or consecutive sentence" in MCL 691.1755(4) is further evidence that the statute precludes compensation for time served under a concurrent or consecutive sentence that is not the

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[30] See *id.*, explaining "consecutive sentences" ("For example, if a convicted criminal receives consecutive sentences of 20 years and 5 years, the total amount of jail time is 25 years. — Also termed *cumulative sentences*; *back-to-back sentences*; *accumulative sentences*.").

[31] See MCL 768.7a(2).

[32] See MCL 691.1755(1)(a) (stating that the plaintiff must prove that he or she "served at least part of *the* sentence") (emphasis added).

[33] *Robinson*, 486 Mich at 14.

subject of the WICA claim. Further, "[e]very word importing the singular number only may extend to and embrace the plural number . . . ."[34] It is therefore reasonable to construe MCL 691.1755(4)'s phrase "a . . . consecutive sentence for another conviction" as referring to *a* consecutive sentence, *or any number* of consecutive sentences, that did not form the basis of the plaintiff's WICA claim, but were instead served consecutively with the sentence that did form the basis of the claim. Here, plaintiff's sentences for his 1987 armed-robbery and assault convictions were concurrent to one another but consecutive with his sentences for his 1992 convictions.[35] Because the additional compensation plaintiff seeks is for time served under a "consecutive sentence for another conviction," MCL 691.1755(4) precludes relief.

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[34] MCL 8.3b.

[35] The majority posits that "[a] single sentence that is properly characterized as 'a consecutive sentence' is one that only begins to run after the completion of another sentence." *Ante* at 398. This is simply not true, and plaintiff's wrongful convictions and sentences illustrate why. Plaintiff was convicted, wrongfully of course, of felony-firearm and second-degree murder in 1992 and sentenced to 30 to 60 years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Michigan law provides that a felony-firearm sentence is "in addition to the sentence imposed" for the underlying felony and "*shall be served consecutively with and preceding* any term of imprisonment imposed" for the underlying felony. MCL 750.227b(3) (emphasis added). Thus, in the first two years of plaintiff's wrongful imprisonment (February 9, 1997 to May 26, 2017), he was serving his felony-firearm sentence and doing so *consecutively* with his second-degree murder sentence. Our Legislature correctly recognizes that a sentence is still consecutive even if it is served first, and no one seems to dispute that plaintiff's 1992 sentences were served consecutively because they were served in a continuous and uninterrupted manner. Yet the majority's transmogrified view of consecutive sentencing brushes past this elementary point without explanation.

C. THE MAJORITY'S REMAINING ARGUMENTS ARE UNAVAILING

In an attempt to reconcile its result with this Court's jurisprudence, the majority appears to draw on this Court's recent decision in *Sanford* to support its conclusion. In *Sanford*, we concluded that the WICA did not provide compensation for time that the plaintiff had spent in preconviction detention because such detention is not "wrongful" for purposes of the WICA, which only compensates an innocent person for imprisonment after a conviction.[36] Without citing *Sanford*, the majority nonetheless relies on its governing principle that imprisonment must be "wrongful" to be compensable under the WICA by concluding that *all* of plaintiff's imprisonment was "wrongful" because it was all caused by his wrongful convictions.[37] That is, but for his wrongful convictions, plaintiff would not have violated his parole and therefore would not have been imprisoned for his 1987 convictions.

The majority's arguments fail for a number of reasons. First, there was no dispute that the plaintiff in *Sanford* sought compensation under the WICA for the same crimes and charges leading to his wrongful conviction and thus forming the basis of his WICA claim. The same cannot be said here. The majority fails to recognize that plaintiff is seeking compensation for time he served under his valid 1987 convictions. Put simply, there is nothing "wrongful" about plaintiff serving a period of incarceration under a valid conviction for purposes of the WICA.[38] The relevant date for

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[36] *Sanford*, 506 Mich at 21-22 (opinion of the Court).

[37] *Ante* at 402.

[38] This Court has recognized that parole is merely "a permit to the prisoner to leave the prison, and not a release . . . ." *People v Idziak*, 484 Mich 549, 571; 773 NW2d 616 (2009) (quotation marks and ellipsis

application of the compensation formula under MCL 691.1755(2)(a) is February 9, 1997—the date plaintiff began to serve his wrongful term of imprisonment for his wrongful 1992 convictions. In fact, the majority opinion recognizes this when it states that plaintiff's sentences for the wrongful 1992 convictions "did not begin to run until he finished serving the 4 years and 118 days that remained for his armed-robbery and assault sentences."[39]

I agree with the majority that plaintiff's wrongful 1992 convictions were the sole cause of his parole violation that led to his reimprisonment for the 1987 convictions.[40] Nonetheless, the factual circumstances

omitted), citing MCL 791.238(6). "While on parole, the prisoner shall be considered to be serving out the sentence imposed by the court, . . . but he remains in the legal custody and under the control of the department [of corrections]." *Idziak*, 484 Mich at 564 (quotation marks and brackets omitted), citing MCL 791.238(1) and (6). Thus, when plaintiff was on parole in 1992, he was, in essence, still serving his sentence for the 1987 convictions. After entry of his wrongful convictions in 1992, he was still serving his 1987 convictions, but doing so in prison.

[39] *Ante* at 398.

[40] As the Court of Claims noted, however, it appears that plaintiff was engaged in substantial drug-trafficking activity with the murder victim. Specifically, during plaintiff's 1992 murder trial, plaintiff admitted to accompanying the victim to the place where he was killed, leaving the scene of the murder, and not returning after police arrived because plaintiff knew he was not supposed to be involved in drug activity as a condition of his parole.

Notably, the parole board is not even required to hold a hearing when a parole violation is based on a new felony conviction and sentence. Michigan Department of Corrections, *Parole Violation Process*, PD 06.06.100 (July 1, 2018) <https://www.michigan.gov/documents/corrections/06_06_100_626674_7.pdf> (accessed June 15, 2021) [https://perma.cc/VXZ9-SWYU] ("A parolee convicted of a felony while on parole who receives a new sentence to be served with the Department shall be found to have violated parole based on that new conviction and sentence. A parole violation hearing is not required."). Perhaps the trial court used the surest piece of evidence available at the time to conclude

of this case do not give us license to deviate from the plain and unambiguous language of the WICA. MCL 691.1755(4) precludes compensation for "any" time served under a concurrent or consecutive sentence for another conviction. The Legislature's use of the term "any" in MCL 691.1755(4) demonstrates its intent to preclude compensation for *all* time served under a concurrent or consecutive sentence for another conviction.[41] Contrary to the majority's reading of MCL 691.1755(4), the Legislature very clearly does not condition that subsection's applicability on the *cause* of the concurrent or consecutive sentence for another conviction. This legislative choice must be honored.

Indeed, the Legislature, in enacting the WICA, did not intend to provide compensation for *every* wrong that resulted from the wrongful imprisonment. MCL 691.1755(5), the other setoff provision, precludes compensation for "any injuries sustained by the plaintiff while imprisoned." Of course, the individual would not have sustained those injuries but for the wrongful

that plaintiff was in violation of his parole, i.e., the 1992 convictions. Defendant has argued on appeal that plaintiff's conduct would have resulted in a parole violation irrespective of the wrongful 1992 convictions. In any event, because the plain language of the WICA clearly provides no compensation for time served under a consecutive sentence for another conviction, I need not determine whether the record in this case also demonstrates that independent reasons existed to support plaintiff's parole violation.

[41] See *People v Harris*, 495 Mich 120, 131; 845 NW2d 477 (2014) (" 'Any' is defined as: **1.** one, a, an, or some; one or more without specification or identification. **2.** whatever or whichever it may be. **3.** in whatever quantity or number, great or small; some. **4.** every; all[.]") (citation omitted). See also *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1, 11; 967 NW2d 577 (2021) ("By using the term 'any,' however, it is clear that the Legislature intended to encompass *all* types of notice required under the [General Property Tax Act, MCL 211.1 *et seq*.], not just actual notice.") (emphasis added).

imprisonment. But just as application of MCL 691.1755(4) would preclude plaintiff from recovering compensation for time he may not have otherwise served but for the wrongful conviction and imprisonment, the WICA does not provide a remedy for injuries sustained while wrongfully imprisoned. As we recognized in *Sanford*, the WICA is not designed to make those who were wrongfully imprisoned whole; no amount of compensation can accomplish this. Instead, the WICA provides limited compensation to those wrongfully imprisoned for crimes they did not commit and that ultimately form the basis of their claim. Whether a given limitation is reasonable is a question for the Legislature, not this Court.

Finally, the majority's focus on the WICA's remedial purpose is unpersuasive. While the majority astutely points out that the act is not titled the "Wrongful *Conviction* Compensation Act," it fails to recognize that the act makes a wrongful conviction a necessary prerequisite to compensation for the wrongful imprisonment.[42] Here, plaintiff *is* being compensated for the time he was wrongfully imprisoned for the wrongful 1992 convictions, which is all the compensation that the WICA authorizes and requires. Further, in finding its result harmonious with the WICA as a remedial law, the majority completely disregards the fact that the WICA is an express waiver of sovereign immunity. "It is the exclusive province of the Legislature to define when and to what extent the state of Michigan relinquishes its sovereign immunity."[43] The statutory

[42] See, e.g., MCL 691.1753 (allowing individuals to file an action for compensation on the basis of wrongful conviction and imprisonment); MCL 691.1755(2) (requiring the court to find that "a plaintiff was wrongfully convicted and imprisoned" before awarding compensation).

[43] *Sanford*, 506 Mich at 17 (opinion of the Court).

waiver of sovereign immunity will necessarily result in arguably arbitrary line-drawing negotiated through the political process. How and why the Legislature draws the lines between those entitled to recover and those who are not are questions typically outside the purview of judicial review.[44] Ultimately, the Legislature's decision to waive this state's sovereign immunity and enact a law that compensates those wrongfully imprisoned individuals only for the time they served under their wrongful convictions was a policy choice, and "[c]ourts cannot substitute their opinions for that of the legislative body on questions of policy."[45] Yet, in granting plaintiff more relief than he is entitled to under the guise of the WICA's remedial purpose, the majority is not only derelict in its own duty to apply the WICA as written but also encroaches on the Legislature's exclusive authority to make the policy decisions of this state.

III. CONCLUSION

In granting plaintiff relief today, the majority no doubt achieves a desirable result for WICA claimants. But in doing so, it unapologetically usurps the Legislature's role in establishing the parameters for waivers of sovereign immunity and grants WICA claimants more compensation than the Legislature saw fit to award them under the plain language of the WICA. I would affirm the opinion and judgment of the Court of Appeals. Because the majority reverses that judgment, I dissent.

VIVIANO and CLEMENT, JJ., concurred with ZAHRA, J.

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[44] See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 207; 731 NW2d 41 (2007).

[45] *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939).

LICHON v MORSE
SMITS v MORSE

Docket Nos. 159492 and 159493. Argued October 8, 2020 (Calendar No. 2). Decided July 20, 2021.

In Docket No. 159492, Samantha Lichon brought an action in the Oakland Circuit Court against Michael Morse and Michael J. Morse, PC (the firm), alleging workplace sexual harassment in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; negligent and intentional infliction of emotional distress; negligence, gross negligence, and wanton and willful misconduct; and civil conspiracy. Lichon also alleged sexual assault against Morse. Lichon worked as a receptionist at the firm from September 2015 until her termination in April 2017. Lichon alleged that throughout her employment with the firm, she was sexually harassed by Morse and that she was sexually assaulted by Morse on multiple occasions. According to Lichon, Morse repeatedly groped her breasts without permission and touched her while making sexual comments. Although Lichon reported the incidents to the firm's human resources department, no action was taken and Morse's conduct continued. After she was terminated, Lichon was contacted by an attorney from the firm who pressured her not to file any action against Morse or the firm. Lichon filed her action in May 2017, and defendants moved to dismiss and compel arbitration on the basis that Lichon was required to arbitrate her claims pursuant to the firm's Mandatory Dispute Resolution Procedure agreement (MDRPA), which she had signed upon being hired at the firm. The trial court, Shalina Kumar, J., granted defendants' motion, finding that the arbitration agreement was valid and enforceable and that all of Lichon's claims fell under the agreement. Lichon appealed in the Court of Appeals.

In Docket No. 159493, Jordan Smits filed an action in the Wayne Circuit Court against the same defendants in May 2017, alleging workplace harassment in violation of the ELCRA; negligent and intentional infliction of emotional distress; and negligence, gross negligence, and wanton and willful misconduct. Smits later filed a second complaint against Morse individually,

alleging sexual assault and battery; negligent and intentional infliction of emotional distress; and negligence, gross negligence, and willful and wanton misconduct. Smits was employed as a paralegal at the firm. In December 2015, she attended the firm's Christmas party. At the party, according to Smits, Morse approached her from behind and grabbed her breasts. Smits reported the assault to human resources, but no action was taken. Smits later resigned and declined to accept two weeks' severance pay in exchange for signing a nondisclosure agreement. Defendants moved to dismiss and compel arbitration, citing the MDRPA, which Smits had signed when she began working for the firm. The trial court, Daniel A. Hathaway, J., granted defendants' motion, concluding that the arbitration agreement was valid and enforceable and that Smits's claims were related to her employment and therefore subject to arbitration. Smits appealed in the Court of Appeals. The Court of Appeals, JANSEN, P.J., and BECKERING, J. (O'BRIEN, J., dissenting), consolidated all three cases and affirmed the trial court's dismissal of Smits's complaint against Morse individually but reversed the circuit court rulings in the other two cases. 327 Mich App 375 (2019). The Court of Appeals majority concluded that plaintiffs' claims of sexual assault were not subject to arbitration because sexual assault was not "related to" plaintiffs' employment. Further, the Court of Appeals stated that the fact that the alleged assaults would not have occurred but for plaintiffs' employment with the firm did not provide a sufficient nexus between the terms of the arbitration agreement and the alleged sexual assaults. The Supreme Court granted defendants' application for leave to appeal. 504 Mich 962 (2019).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CLEMENT, the Supreme Court *held*:

The threshold question of whether a dispute is subject to arbitration is for a court to determine. Michigan public policy generally favors arbitration, but arbitration is a matter of contract, and a party cannot be required to arbitrate an issue that the party did not agree to submit to arbitration. The MDRPA expressly limited its application to matters relative to employment. Therefore, whether the MDRPA prevented plaintiffs from litigating their claims against defendants depended on whether their claims were relative to their employment. Defendants noted certain facts that supported connections between plaintiffs' claims and their employment, including that the alleged assaults occurred at work or work-related functions. But those facts did not necessarily make plaintiffs' claims relative to employment;

rather, the facts had to be evaluated under a standard that distinguished claims relative to employment from claims not relative to employment. Other jurisdictions evaluate motions to compel arbitration by asking whether the plaintiff's claim can be maintained without reference to the contract or relationship at issue. This analysis prevents the absurdity of an arbitration clause that bars the parties from litigating any matter, regardless of how unrelated to the substance of the agreement, and it ensures that the mere existence of a contract does not mean that every dispute between the parties is arbitrable. Neither the circuit courts nor the Court of Appeals considered this standard when evaluating defendants' motions to compel arbitration. Rather than apply this newly adopted approach in the first instance, the Michigan Supreme Court vacated the judgment of the Court of Appeals and remanded the cases to the circuit courts so that those courts could analyze defendants' motions to compel arbitration by determining which of plaintiffs' claims could be maintained without reference to the contract or employment relationship.

Court of Appeals judgment vacated and cases remanded to the circuit courts.

Justice VIVIANO, joined by Justice ZAHRA, dissenting, asserted that a proper interpretation of the language of the contract showed that plaintiffs' claims against the firm were arbitrable and that their claims against Morse were arbitrable if he was able to invoke the arbitration clause, despite not being a signatory to the contract. The general scope of arbitrability was established in the contract: the agreement was to apply to "all concerns [employees] have over the Firm's Policies and Procedures relative to . . . employment." The agreement specifically included disputes over violations of state employment law, and both plaintiffs had alleged violations of the ELCRA, which prohibits sexual assaults that create a hostile work environment. Accordingly, plaintiffs' claims arising under the ELCRA were arbitrable under the agreement. Regarding plaintiffs' other claims, under the agreement, any "concern" an employee had about how the firm's policies were applied to him or her was arbitrable, and the agreement did not limit arbitration on the basis of the legal cause of action. Under the contract, a "concern" that was subject to arbitration was one that arose from how the firm's policies and procedures were applied or interpreted relative to the plaintiff's employment. This interpretation of the contract excluded only an employee's concerns over the application of policies or procedures not related to that employee, such as concerns regarding their

application to another employee. Given that the firm's policies specifically proscribed sexual harassment and unwanted sexual contact, plaintiffs' allegations involved concerns with how the firm's policies were applied to them relative to their employment and were therefore arbitrable under the agreement. However, given that Morse did not sign the agreement in his individual capacity, Justice VIVIANO would have remanded the cases for a determination of whether Morse could compel arbitration as a nonsignatory to the contract.

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

1. EMPLOYMENT CONTRACTS — ARBITRATION CLAUSES — DETERMINING WHETHER A CLAIM IS RELATIVE TO EMPLOYMENT.

In determining whether a claim must be submitted to arbitration when an employment contract includes an arbitration clause that mandates arbitration of all concerns "relative to" or "related to" employment, the court must determine whether the claim can be maintained without reference to the contract or relationship at issue.

2. EMPLOYMENT CONTRACTS — ARBITRATION CLAUSES — INTERPRETATION — MATTERS ARGUABLY WITHIN THE ARBITRATION CLAUSE.

When interpreting an arbitration agreement, the same legal principles that govern contract interpretation apply, and the goal is to ascertain the intent of the parties at the time they entered into the agreement; a party cannot be required to arbitrate an issue that it has not agreed to submit to arbitration; when interpreting collective-bargaining agreements, the parties may be bound to arbitration if the disputed issue is arguably within the arbitration clause, but that rule does not apply outside the context of collective-bargaining agreements.

Fieger, Fieger, Kenney & Harrington PC (by *Geoffrey N. Fieger* and *Sima G. Patel*) for Samantha Lichon and Jordan Smits.

Honigman LLP (by *Robert M. Riley* and *I. W. Winsten*) and *Starr, Butler, Alexopoulos & Stoner, PLLC* (by *Joseph A. Starr*) for Michael Morse and Michael J. Morse, PC.

Amicus Curiae:

McClelland & Anderson, LLP (by *Melissa A. Hagen*) for Home Builders Association of Michigan.

Linderman Law PLLC (by *Marla A. Linderman*) for Michigan Association for Justice.

CAVANAGH, J. In these cases, the Court must determine whether plaintiffs' claims fall within the scope of arbitration agreements limited to matters that are "relative to" plaintiffs' employment. Whether plaintiffs' allegations of sexual assault, and the multiple claims stemming from those allegations, are relative to plaintiffs' employment is resolved by asking whether the claims can be maintained without reference to the contract or relationship at issue. Because the lower courts did not have the benefit of this framing, we vacate the decision of the Court of Appeals and remand these cases to the circuit courts for reconsideration of whether plaintiffs' claims are subject to arbitration. Because plaintiffs also did not have the benefit of this framing when filing their claims, plaintiffs may seek to amend their complaints before the circuit courts make this determination.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Samantha Lichon and Jordan Smits both worked for defendant Michael J. Morse, PC, doing business as the Mike Morse Law Firm (the Morse firm). Upon their hire, each plaintiff signed the Morse firm's "Mandatory Dispute Resolution Procedure" agreement (MDRPA). Defendant Michael Morse was the sole shareholder of the firm and exercised significant control over its operations, serving as its presi-

dent, secretary, treasurer, and director. Both plaintiffs sued Morse and the Morse firm, alleging that Morse sexually assaulted them.

Lichon started working at the Morse firm as a receptionist in September 2015. Lichon alleges that "[t]hroughout the course of her employment," she was "continuously and periodically sexually harassed" by Morse. Morse "sexually assaulted" her "when he groped her breasts without invitation, permission, or inducement on multiple occasions." Morse "touched his groin to her rear while audibly stating sexual comments, including but not limited to, 'you make me so hard' and 'I want to take you into my office,' " on multiple occasions, without invitation, permission, or inducement. Lichon complained to her superiors at the Morse firm and to the human resources department, but no action was taken, and the sexual harassment and sexual assaults continued. On March 29, 2017, Lichon was placed on "Final Warning Status" for poor performance, and she was fired on April 7, 2017. On May 15, 2017, Lichon was contacted by Derek Brackon, an attorney at the Morse firm, who asked Lichon if she was going to sue Morse and "pressured and/or coerced and/or intimidated and/or attempted to persuade" her not to take any action against Morse or the Morse firm.

Lichon filed suit against both defendants alleging workplace sexual harassment in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; negligent and intentional infliction of emotional distress; and negligence, gross negligence, and wanton and willful misconduct. She also alleged sexual assault against Morse. Lichon filed an amended complaint adding an allegation of civil conspiracy based on defendants' efforts to intimidate her to not file a lawsuit.

In lieu of filing an answer, defendants moved to dismiss and compel arbitration under MCR 2.116(C)(7), arguing that the MDRPA required Lichon to arbitrate her claims. Lichon responded that the MDRPA's scope was limited to matters which "arise out of her employment," and because her claims were related to the sexual assault they did not "arise out of her employment" at the Morse firm. She also argued that the MDRPA was unenforceable as a matter of law because it is unconscionable, illusory, and contrary to public policy. The trial court granted defendants' motion, finding that the MDRPA was "a valid and enforceable arbitration agreement" and that Lichon's claims were "inextricably intertwined and therefore all f[e]ll within the arbitration agreement and the workplace policies." Lichon appealed in the Court of Appeals.

Smits worked at the Morse firm as a paralegal, and in December 2015, she attended an office Christmas party. She alleged that Morse sexually assaulted her at the party. Morse approached her from behind and grabbed her breasts. She immediately grabbed his arms and yanked them away from her. Multiple guests witnessed the assault. When Smits reported the assault to the firm's human resources department, the firm's representative told Smits that the "number one priority [was] to protect Morse's reputation." When Smits expressed her concerns to an attorney employed at the Morse firm who witnessed the assault, he said, "[W]hat was I supposed to do, you know how Michael is." Smits resigned by e-mail in February 2016. She was offered two weeks of severance pay if she would sign a nondisclosure agreement, but she declined. An employee of the Morse firm warned her to be careful because Morse "knows a lot of people in the legal community," and he "could make it difficult for [Smits] to get a job."

Smits first filed suit on May 30, 2017. She alleged workplace sexual harassment in violation of the ELCRA; negligent and intentional infliction of emotional distress; and negligence, gross negligence, and wanton and willful misconduct against both defendants. Smits also alleged sexual assault against Morse. In lieu of an answer, defendants moved to dismiss and compel arbitration under MCR 2.116(C)(7).[1] Like Lichon, Smits argued that her claims of sexual assault were not related to her employment, so they were not governed by the MDRPA. She also argued that the arbitration provision was unenforceable because it is procedurally and substantively unconscionable and illusory, that defendants forfeited enforcement of the MDRPA by failing to adhere to its process, and finally, that Morse could not invoke the MDRPA because he is not a party to the agreement. The trial court granted defendants' motion, finding that the MDRPA is "a valid and enforceable agreement, supported by consideration and mutuality of obligation," and that Smits's claims were related to her employment and therefore subject to arbitration. Smits appealed in the Court of Appeals.

On July 25, 2017, Smits filed a second complaint against only Morse, alleging sexual assault and battery; negligent and intentional infliction of emotional distress; and negligence, gross negligence, and willful and wanton misconduct. The trial court granted a motion to dismiss under MCR 2.116(C)(7), concluding

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[1] Defendants alternatively argued that Smits's claims were barred by the statute of limitations. Smits signed an "Acknowledgement Form" in the Morse firm's Employee Policy Manual, which states in relevant part:

> I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

that the action was precluded by res judicata and compulsory joinder. Smits appealed in the Court of Appeals.

Before discussing the Court of Appeals' analysis, it's important to set out the relevant texts. The MDRPA signed by both plaintiffs states in pertinent part:

> This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.
>
> * * *
>
> The only exceptions to the scope of this Mandatory Dispute Resolution Procedure shall be for questions that may arise under the Firm's insurance or benefit programs (such as retirement, medical insurance, group life insurance, short-term or long-term disability or other similar programs). These programs are administered separately and may contain their own separate appeal procedures. In addition, this Procedure does not apply to claims for unemployment compensation, workers' compensation or claims protected by the National Labor Relations Act. While this Procedure does not prohibit the right of an employee to file a charge with the Equal Employment Opportunity Commission ("EEOC") or a state civil rights agency, it would apply to any claims for damages you might claim under federal or state civil rights laws. In

> addition, either Party shall have the right to seek equitable relief in a court of law pending the outcome of the arbitration proceeding.

The Court of Appeals summarized the process required by the MDRPA:

> [F]irst, within one year an employee must file with a direct supervisor a "request for review of your concern stating your disagreement or concern and the action you request the Firm to take." The supervisor will date the request, provide the employee with a copy, and then "generally schedule a meeting with [the employee] to hear [the employee's] concerns and will provide [the employee] with a written decision within" 15 business days. Second, if the dispute is not resolved to the employee's satisfaction, a written request for review must be filed directly with Morse within 15 days. Morse, or his "designated representative," will issue a written decision within 15 days. If the employee is still not satisfied, the final recourse is to submit a written request for arbitration to the firm within 15 days, and the employee "must deposit with the Firm $500.00 or Five (5) Days' pay, whichever is less." [*Lichon v Morse*, 327 Mich App 375, 382-383; 933 NW2d 506 (2019) (emphasis omitted).]

Smits also signed an "Agreement for At-Will Employment and Agreement for Resolution of Disputes," which provided in relevant part:

> IV. ARBITRATION OF DISPUTES:
>
> As a condition of my employment, I agree that any dispute or concern relating to my employment or termination of employment, including but not limited to claims arising under state or federal civil rights statutes, must be resolved pursuant to the Firm's [MDRPA] which culminates in final and binding arbitration. I have been provided with a copy of the Firm's [MDRPA] and agree to be bound by this Dispute Procedure.

The Morse firm's employee manual has an "Anti-Discrimination, Harassment, and Retaliation Policy," which defines sexual harassment broadly and purports to include physical harassment that creates a hostile or offensive work environment within that definition. The manual provides that "[t]his policy covers all employees." The policy specifically states as follows:

> **Anti-Discrimination, Harassment, and Retaliation Policy**
>
> Sexual harassment, whether verbal, written, physical or environmental, is unacceptable and will not be tolerated. Sexual harassment is defined as unwelcome or unwanted conduct of a sexual nature (verbal, written, physical or environment[al]) when:
>
> 1. Submission to or rejection of this conduct is used as a factor in decisions affecting hiring, evaluation, promotion or other aspects of employment; and/or
>
> 2. Conduct substantially interferes with an individual's employment or creates an intimidating, hostile or offensive work environment.

The Court of Appeals consolidated all three cases and affirmed the trial court with regard to Smits's complaint against Morse individually, but reversed the trial court decisions in the other two cases in a published, split decision. *Lichon*, 327 Mich App at 379-380. The majority noted that the parties had agreed as to the existence of the MDRPA and its terms but disagreed as to whether sexual assault by a supervisor or employer was covered. So, the majority reasoned, this was the "sole issue" to be decided on appeal. The majority then held that sexual assault was not "related to" employment:

> Despite the fact that the sexual assaults may not have happened but for plaintiffs' employment with the Morse firm, we conclude that claims of sexual assault cannot be related to employment. The fact that the sexual assaults would not have occurred but for Lichon's and Smits's employment with the Morse firm does not provide a sufficient nexus between the terms of the MDRPA and the sexual assaults allegedly perpetrated by Morse. To be clear, Lichon's and Smits's claims of sexual assault are unrelated to their positions as, respectively, a receptionist and paralegal. Furthermore, under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm. Accordingly, the circuit courts erroneously granted defendants' motions to dismiss these actions and compel arbitration of plaintiffs' claims. Both Lichon and Smits shall be permitted to litigate their claims in the courts of this state because the claims fall outside the purview of the MDRPA. [*Id*. at 393-394.]

The majority agreed with plaintiffs that because sexual assault at the hands of an employer or supervisor cannot be related to employment and because the MDRPA limits the scope of arbitration to claims that are "related to" employment, the MDRPA is inapplicable. The majority did not reach plaintiffs' argument that the MDRPA is unconscionable or illusory or their argument that Morse could not enforce the MDRPA as a nonsignatory.

The Court of Appeals dissent reasoned that plaintiffs' claims "arguably" fell within the language of the MDRPA. *Id*. at 400 (O'BRIEN J., dissenting). The dissent agreed that sexual assault is not related to employment, but thought the dispositive question was broader. Rather than focusing on the language of the MDRPA limiting its scope to matters "relative to your employment," the dissent looked to other language in the agreement stating that the parties agreed to arbitrate " 'any claim against another employee of the Firm

for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws.' " *Id*. at 403. Thus, the dissent concluded, plaintiffs had "agreed to arbitrate 'any claim against another employee of the Firm for . . . discriminatory conduct.' " *Id*.

Defendants sought leave to appeal here, and we granted leave to appeal, ordering the parties to address generally whether the claims set forth in the plaintiffs' complaints are subject to arbitration. *Lichon v Morse*, 504 Mich 962 (2019).

II. STANDARD OF REVIEW

This Court reviews de novo circuit court decisions on motions for summary disposition brought under MCR 2.116(C)(7). *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016). Under MCR 2.116(C)(7), summary disposition is appropriate when claims are subject to "an agreement to arbitrate or to litigate in a different forum." "Whether a particular issue is subject to arbitration is also reviewed de novo, as is the interpretation of contractual language." *Id*. at 295 (citations omitted).

III. ANALYSIS

The Court of Appeals majority's analysis started from the proposition that "[t]he sole issue for us to decide is whether the MDRPA encompasses the subject matter of the dispute at issue in this case." *Lichon*, 327 Mich App at 392 (quotation marks and citation omitted). The MDRPA expressly limits its application to matters "relative to . . . employment." So, whether the MDRPA encompasses the subject matter of the dispute turns on whether the claims are relative to employ-

ment. The MDRPA is not alone in limiting its scope to matters which are "relative to employment" or "related to employment," and other courts have put considerable thought into whether various claims are relative to employment. Generally, we think this question can be resolved by asking whether the claim can be maintained without implicating the employment relationship.

A. PRINCIPLES OF CONTRACTUAL INTERPRETATION

Because "[a]rbitration is a matter of contract," *Kaleva-Norman-Dickson Sch Dist No. 6 v Kaleva-Norman-Dickson Sch Teachers' Assoc*, 393 Mich 583, 587; 227 NW2d 500 (1975), "when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation," *Altobelli*, 499 Mich at 295. Our goal in interpreting a contract is to "ascertain the intent of the parties at the time they entered into the agreement." *Id*.

Here, the question is whether plaintiffs' claims are governed by the MDRPA. This threshold question of whether a dispute is subject to arbitration is for a court to determine. *Kaleva*, 393 Mich at 591. As we have said, "[a] party cannot be required to arbitrate an issue which [it] has not agreed to submit to arbitration." *Id*. at 587.

As a general matter, Michigan's public policy favors arbitration. *Altobelli*, 499 Mich at 295. But this general position favoring arbitration does not go so far as to override foundational principles of contractual interpretation. In *Kaleva*, in the context of collective-bargaining agreements, we held that it was appropriate to apply United States Supreme Court precedent regarding the National Labor Relations Act (NLRA), 29 USC 151 *et seq*., to contracts entered into under the state's

public employment relations act (PERA), MCL 423.201 *et seq*. *Kaleva*, 393 Mich at 590-591. That holding seems to have expanded in application in the lower courts beyond collective-bargaining agreements to a more general rule that parties are bound to arbitration if the disputed issue is "arguably" within the arbitration clause. See, e.g., *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007); *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004). This is not a rule we have adopted outside of the context of collective-bargaining agreements, and we decline to do so now. Our general practice of looking to federal precedent discussing the NLRA to interpret the PERA is simply inapplicable here because the PERA is not at issue. In no way does this signal a judicial hostility to arbitration; rather, we simply recognize that agreements to arbitrate should be read like any other contract. *Altobelli*, 499 Mich at 295.

B. WHETHER THESE CLAIMS ARE COVERED BY THE MDRPA

To answer whether the MDRPA governs plaintiffs' claims in these cases, we look first to the words of the agreement. The MDRPA applies to "all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment." Thus, the MDRPA limits its scope from the outset to matters "relative to . . . employment."[2]

[2] The dissent asserts that our analysis fails to give consideration to the complete sentence—i.e., that we have "lop[ped] off" the first part of the phrase, "all concerns you have over the application or interpretation of the Firm's Policies and Procedures," in order to "isolate the second half, 'relative to your employment.' " We disagree. Our analysis gives effect to every part of the sentence. Under the MDRPA, plaintiffs must have "concerns"; they indisputably do. Those concerns must be over the application or interpretation of the Morse firm's policies and procedures;

Defendants accurately recite facts supporting connections between plaintiffs' claims and their employment. For example, the alleged assaults took place at work or at work-related functions, and Morse held a position of power over the plaintiffs. But not every factual connection between a plaintiff's claim and her job makes the claim relative to or related to employment—those facts need to be evaluated under a standard that distinguishes claims "relative to" employment from claims not "relative to" employment. As the United States Court of Appeals for the Eleventh Circuit observed, in evaluating what it means for a claim to be "related to" employment:

> "[R]elated to" marks a boundary by indicating some direct relationship; otherwise, the term would stretch to the horizon and beyond. As the Supreme Court has explained in the [Employment Retirement Income Security Act, 29 USC 1001 *et seq*.,] pre-emption context, "related to" is limiting language and "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy," it would have no limiting purpose because "really, universally, relations stop nowhere." *NY State Conference of Blue Cross & Blue*

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plaintiffs' concerns meet this requirement because, as the dissent points out, the firm's policies and procedures proscribe unwanted sexual contact, harassment, and abuse. Next, those concerns must be "relative to . . . employment." This is the disputed issue. To be arbitrable, the concerns must *both* involve the application or interpretation of the Morse firm's policies and procedures *and* be relative to employment. Either fact, standing alone, is insufficient. It is the dissent that "lops off" the phrase "relative to . . . employment," choosing instead to read the limitation as only excluding "an employee's concerns about how the policies or procedures were interpreted or applied to another employee or how they were interpreted or applied in general, unrelated to any particular employee." Perhaps if the modifying phrase was "relative to you," rather than "relative to your employment," this would be a reasonable interpretation. Still, it would be an odd construction given that it is unclear how one employee might seek to arbitrate the concerns of another employee, or to arbitrate the meaning of the firm's policies in the abstract. But this is not the phrase we are asked to interpret.

> *Shield Plans v Travelers Ins Co*, 514 US 645, 655; 115 S Ct 1671, 1677; 131 L Ed 2d 695 (1995) (quotation marks omitted). [*Doe v Princess Cruise Lines, Ltd*, 657 F3d 1204, 1218-1219 (CA 11, 2011).]

The same principle applies here. If litigating parties have an employment or other contractual relationship, one party will likely be able to find some factual connection, however remote, between their dispute and the relationship. But we require more than the barest factual connection for a claim to be relative to employment or another pertinent contractual relationship.

In determining whether a claim is relative to employment, we adopt the approach of a number of other jurisdictions that "ask if [the] action could be maintained without reference to the contract or relationship at issue." *Academy of Med of Cincinnati v Aetna Health, Inc*, 108 Ohio St 3d 185, 186; 842 NE2d 488 (Ohio 2006), citing *Fazio v Lehman Bros, Inc*, 340 F3d 386 (CA 6, 2003). Accord *Jones v Halliburton*, 583 F3d 228 (CA 5, 2009); *Doe*, 657 F3d at 1219-1220; *United States v My Left Foot Children's Therapy, LLC*, 871 F3d 791, 799 (CA 9, 2017). This analysis "functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue." *Academy of Med of Cincinnati*, 108 Ohio St 3d at 191. Such an analysis "prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement," and ensures that the mere "existence of a contract between the parties does not mean that every dispute between the parties is arbitrable." *Id*.[3]

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[3] We agree with the dissent that " '[r]elative' means 'a thing having a relation to or connection with or necessary dependence on another

The Eleventh Circuit applied this test in *Doe*. In that case, the plaintiff worked on a cruise ship as a bar server. *Doe*, 657 F3d at 1208. Her employment agreement contained an arbitration provision. *Id*. at 1214-1215. It stated, in part, that she agreed to arbitrate " 'any and all disputes . . . [or] claims . . . relating to or in any way arising out of or connected with the Crew Agreement.' " *Id*. (emphasis omitted). A "dispute" arose when the plaintiff was drugged and raped by coworkers. *Id*. at 1209. When she reported the rape to her supervisors, they didn't let her seek medical treatment and forced her to continue working and to submit to repeated questioning. *Id*. at 1209-1210. She was eventually provided some treatment on the ship, but she was not permitted to leave the ship to seek further necessary treatment until three weeks after the assault. *Id*. Ultimately, the plaintiff's blood and rape kit samples as well as her medical records were incinerated. *Id*. at 1210.

The plaintiff sued Princess Cruise Lines, asserting ten claims. The first five claims arose from her status as a "seaman,"[4] while the other claims were common-

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thing.' " (Citation omitted.) However, that circular observation is not very helpful given that "really, universally, relations stop nowhere." *NY State Conference of Blue Cross & Blue Shield Plans*, 514 US at 655 (quotation marks and citation omitted). We disagree with the dissent that its reading of the phrase is "more concrete."

[4] These claims were:

> (1) a "Jones Act negligence" claim, alleging that Princess Cruise Lines breached its "duty to provide a safe place to work such that [Doe] could perform the job obligations in a reasonably safe manner and live aboard the vessel free from sexual violence and/or sexual harassment"; (2) an unseaworthiness claim, alleging that the cruise line breached its "non-delegable duty to provide [Doe] with a seaworthy vessel upon which to work and live free from sexual battery and/or sexual harassment"; (3) a Jones Act claim, alleging that the cruise line breached its duty

law tort claims.[5] The defendant sought to compel arbitration on the entire complaint, and the district court denied the motion in its entirety. *Id*. at 1212. The defendant appealed, arguing that all the claims arose out of or were connected to the plaintiff's employment and, as a result, were subject to arbitration. *Id*. at 1213. The appellate court held that some of the claims were subject to arbitration, and some were not. *Id*. at 1219.

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under that act to provide Doe with prompt, adequate, and complete medical treatment for "injuries sustained while in the service of the vessel"; (4) a maintenance and cure claim, alleging that the cruise line "purposefully refused to arrange for and pay [for] timely and complete medical cure" despite its obligation to do so under "the General Maritime Law"; and (5) a Seaman's Wage Act claim that the cruise line breached its "duty to timely pay all of [Doe's] wages as a seaman." [*Doe*, 657 F3d at 1211-1212 (alterations in original).]

[5] These claims were:

(6) a false imprisonment claim, alleging that the cruise line had "purposefully and intentionally restrained [Doe] against her will on the cruise ship and did not permit her to leave the cruise ship to go ashore for medical treatment" in Seattle; (7) an intentional infliction of emotional distress claim, alleging "separate and independent torts committed by" the cruise line, its agents, and its employees related to Doe's rape and the way that they handled the situation and treated her after learning of the rape; (8) a spoliation of evidence claim, alleging that the cruise line breached its duty to preserve evidence after one of its crew members sexually assaulted and battered Doe; (9) an invasion of privacy claim, alleging that the cruise line, th[r]ough its agents, breached its duty to protect Doe's confidentiality and privacy as a rape victim by repeatedly disclosing her real name in an effort to intimidate and embarrass her; and (10) a fraudulent misrepresentation claim, alleging that officers of the cruise line who were on the ship repeatedly and falsely told Doe after she had been drugged and raped that she could not disembark the ship to get medical treatment and counseling by doctors of her own choosing. [*Id*. at 1212 (first alteration in original).]

The court concluded that the five common-law tort claims were not subject to arbitration because they did not depend on the employment relationship. *Id*. Those claims were based on allegations that, *inter alia*, the officers of the cruise ship had not allowed the plaintiff to go ashore for medical treatment, the evidence of the rape had been destroyed, and, of course, that the plaintiff was drugged and raped. *Id*. The court noted that none of those allegations had anything to do with the plaintiff's employment agreement or her work duties. *Id*. Further, "[t]he cruise line could have engaged in that tortious conduct even in the absence of any contractual or employment relationship with [the plaintiff]," so those claims were not "an immediate, foreseeable result of the performance of the parties' contractual duties." *Id*. (quotation marks and citation omitted). The fact that the plaintiff would likely not have been on the ship but for her employment did not mean that all her claims arose from her employment. *Id*. The court illustrated the point by noting that if a passenger on the ship had been subjected to the same treatment as the plaintiff, he or she could have brought the same claims. *Id*. at 1220.

By contrast, the court concluded that the plaintiff's other claims were subject to arbitration because they depended on the employment relationship. Two of those claims were based specifically on the Jones Act, 46 USC 30104, and alleged that the defendant had breached statutory duties owed to the plaintiff. *Id*. But the defendant owed those duties to the plaintiff only because of her status as a seaman. *Id*. Another claim subject to arbitration was based on an assertion of "unseaworthiness," which also depended on the plaintiff's status as a seaman. *Id*. A fourth claim subject to arbitration asked for "maintenance and cure," which is a maritime law remedy available to seamen. *Id*. at

1221. The final claim subject to arbitration was brought under the Seaman's Wage Act, 46 USC 10313, and also depended on the plaintiff's status as a seaman. *Id*. None of these claims could have been brought if not for the employment relationship. *Id*. at 1220-1221.

Like the plaintiff in *Doe*, plaintiffs here have brought several claims. Whether the claims are subject to arbitration depends on whether they are covered by the MDRPA, which, in turn, depends on whether the claims are relative to plaintiffs' employment. We hold that a court answers that question by considering whether the claims could be maintained without reference to the contract or relationship at issue. To borrow the illustration from *Doe*, if Morse had groped or propositioned opposing counsel or a client while at the Morse firm's office, or if Morse had grabbed the breasts of a server or other patron of the restaurant during the firm's Christmas party, could those individuals bring the same claims as plaintiffs?

Neither the Court of Appeals nor the circuit courts considered this standard when evaluating defendants' motions to compel arbitration. Rather than apply this standard in the first instance, we vacate the decision of the Court of Appeals and remand these matters to the circuit courts. Further, just as the lower courts did not have the benefit of this framing when evaluating defendants' motions, neither did plaintiffs have the benefit of this framing when formulating their complaints. In this regard, we remind the circuit courts that, under MCR 2.118(A)(2), "[l]eave [to amend pleadings] shall be freely given when justice so requires."

Defendants argue that the claims do not need to be relative to employment to be covered by the MDRPA, because they are otherwise expressly covered by the

MDRPA given that it applies to "any claim against another employee of the Firm for violation of the Firm's Policies" and because the firm's policies prohibit sexual harassment, including physical contact. The dissent also focuses on this language. As a textual matter, we do not read the language relied on by the dissent and defendants as additional words of inclusion covering matters beyond those relative to employment. Rather, this language merely specifies some matters relative to employment which are included. The paragraph reads, in full:

> This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.

The first sentence clearly limits the scope of the MDRPA to matters "relative to . . . employment." The next two sentences begin, "[t]his includes" and "[t]his Procedure includes." But the procedure is limited to matters "relative to . . . employment." These sentences specify some matters "relative to employment" that are covered. Finally, the Morse firm's reciprocal obligation in the last sentence contains the same limitation, defining the firm's obligation to arbitrate as limited to claims "arising out of the employment relation-

ship . . . .” Read in context, the MDRPA clearly limits its scope to matters relative to employment.[6]

In light of this resolution, we do not reach plaintiffs’ argument that the MDRPA is unconscionable or illusory, nor do we address plaintiffs’ argument that Morse could not enforce the MDRPA because he did not sign it. The circuit court in Smits’s case had considered whether her claims were barred by the contractual-limitations period in the employee manual. Like the MDRPA, that period applies only to matters “relating to . . . employment,” so its scope is similarly limited. Therefore, on remand, the circuit court should consider whether the contractual-limitations period applies only to claims arbitrable under the MDRPA.

IV. CONCLUSION

We vacate the judgment of the Court of Appeals and remand these cases to their respective circuit courts where the courts may analyze defendants’ motions to compel arbitration by analyzing which of plaintiffs’

[6] The argument advanced by defendants and the dissent in this regard also wades into the territory of “the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement.” *Academy of Med of Cincinnati*, 108 Ohio St 3d at 191. Taking this argument to its logical conclusion, plaintiffs would be bound to arbitrate *any* sexual assault Morse might inflict on them because sexual assault is prohibited by the firm’s policies. One wonders, under this interpretation, could defendants compel arbitration of *any* claim merely by proscribing such conduct in its policy manual? Could a plaintiff be compelled to arbitrate a wrongful death claim merely because defendants’ policy manual stated, “We do not tolerate intentional or negligent killing at the Firm”? Though we do not reach plaintiffs’ argument that the MDRPA is unconscionable, plaintiffs would seem to be in a much stronger position with regard to that argument if their employment agreement bound them to arbitrate concerns unrelated to their employment.

claims can be maintained without reference to the contract or relationship at issue. Plaintiffs may seek to amend their complaints in light of this new direction.

MCCORMACK, C.J., and BERNSTEIN and CLEMENT, JJ., concurred with CAVANAGH, J.

VIVIANO, J. (*dissenting*). The task before the Court in these cases is a common one. We must interpret contractual language to determine the parties' intent; specifically, we must determine whether the parties meant to assign plaintiffs' present claims to arbitration. Instead of examining the relevant text and context, the majority plucks a standard from out-of-state caselaw and imposes it upon the parties here. A proper interpretation of the contract's language shows that plaintiffs' claims against defendant Michael J. Morse, PC, doing business as the Mike Morse Law Firm (the Firm) are arbitrable under the contract. I would therefore reverse the Court of Appeals' decision to the contrary. The claims against defendant Michael Morse individually are also arbitrable under the contract if he can invoke the arbitration clause. Because the Court of Appeals below did not determine whether Morse has the authority to enforce the agreement, which he did not sign, I would remand on that issue.

Arbitration agreements are contracts, and so "when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation." *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016). Accordingly, the Court's "task is to ascertain the intent of the parties at the time they entered into the agreement, which [is] determine[d] by examining the language of the agreement according to its plain and ordinary meaning." *Id*. This requires reading individual clauses in light of the contract as a

whole, "since a contract should be construed so as to give full meaning and effect to all its provisions." 21 Williston, Contracts (4th ed), § 57:20, p 220. Although we have indicated that public policy supports arbitration, the contract here is clear and therefore any policy favoring arbitration does not inform my interpretation. See *Altobelli*, 499 Mich at 295.[1]

While the majority frames the question of arbitration as depending on whether the plaintiffs' claims are "related to employment," that is not how the contract puts it:

> This Mandatory Dispute Resolution Procedure shall apply to *all concerns you have over the application or interpretation of the Firm's* Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit

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[1] I agree with the majority to the extent it limits the application of the principle that a party is bound to arbitration if the dispute is "arguably" within the arbitration clause. See *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). The policy in support of arbitration flows from statutes permitting parties to arbitrate. See *Detroit v AW Kutsche & Co*, 309 Mich 700, 703; 16 NW2d 128 (1944). But such legislation simply compels courts to "place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *AT&T Mobility LLC v Concepcion*, 563 US 333, 339; 131 S Ct 1740; 179 L Ed 2d 742 (2011). Consequently, this pro-arbitration policy should not mislead courts into distorting a contract's ordinary meaning in an effort to render it applicable to the dispute at issue.

> them to final and binding arbitration pursuant to this Procedure. [Emphasis added.][2]

The general scope of arbitrability is established at the outset: the arbitration agreement "shall apply to *all concerns you have over . . . the Firm's* Policies and Procedures relative to your employment . . . ." Following this are specific examples of arbitrable disputes falling within the agreement as well as the Firm's commitment to arbitrate "any claims" against its employees "arising out of the employment relationship . . . ."

The issue is whether this language covers plaintiffs' present claims, making them arbitrable. As an initial matter, the agreement specifically includes "disagreements" regarding the violation of state employment laws. Both plaintiffs here have alleged violations of the Elliott-Larsen Civil Rights Act, MCL 37.2101 to MCL 37.2804. We have interpreted that statute to prohibit sexual assaults that create a hostile work environment. See *Radtke v Everett*, 442 Mich 368, 394-395; 501 NW2d 155 (1993). Plaintiffs here have alleged that they were sexually assaulted in a manner that affected their work. Those claims, therefore, fit within the arbitration agreement.

To be arbitrable, the rest of the claims—all based on the common law—would need to involve "concerns . . . over the application or interpretation of the Firm's Policies and Procedures relative to your employment."[3] In other words, if an employee has a "concern" about how the Firm's policies were applied to him or

[2] A second paragraph in the agreement details specific exclusions to arbitration that are not at issue here.

[3] Against both defendants, plaintiffs assert claims of negligent and intentional infliction of emotional distress and negligence, gross negligence, and wanton and willful misconduct. Against Morse, in his individual capacity, plaintiffs also assert a claim of sexual assault.

her, that concern goes to arbitration. A "concern" is relevantly defined as a "matter for consideration." Merriam-Webster.com Dictionary, *Concern* <https://www.merriam-webster.com/dictionary/concern> (accessed April 22, 2021) [https://perma.cc/2J7R-77US]. As used in the agreement, "concerns" encompasses various "claims," such as those arising from "the denial of hire" or those lodged against another employee. But nothing limits the key sentence here—regarding concerns about the policies and procedures—to any particular type of legal cause of action, such that a tort claim for sexual assault or intentional infliction of emotional distress would be excluded from the agreement. If the claim involves the "concern," it must be arbitrated. This conclusion flows from the language of the contract and also is consistent with the view of other courts that determining whether a claim is arbitrable depends on the underlying facts rather than the particular legal cause presented. See, e.g., *Gregory v Electro-Mechanical Corp*, 83 F3d 382, 384 (CA 11, 1996) ("Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted.").[4]

Next, the "concerns" must involve the "application or interpretation of the Firm's Policies and Procedures

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[4] See also *Doe v Hallmark Partners, LP*, 227 So 3d 1052, 1056 (Miss, 2017) ("To answer whether [the plaintiff] agreed to arbitrate her assault- and rape-based tort claims, this Court must 'focus on factual allegations in the complaint rather than the legal causes of action asserted.' ") (citation omitted); 21 Williston, Contracts (4th ed), § 57:21, p 231 ("In ascertaining whether a particular claim falls within the scope of an arbitration agreement, the court should focus on the factual allegations in the complaint rather than the legal causes of action asserted; if the allegations underlying the claim touch matters covered by the arbitration agreement, then the claim must be arbitrated, whatever legal labels are attached to it.").

relative to your employment." The majority lops off the critical first part of this phrase so that it can isolate the second half, "relative to your employment." And in analyzing the latter phrase, the majority makes no pretense of applying normal interpretive methods but instead reaches for out-of-state caselaw that similarly fails to offer much in the way of textual interpretation.[5] Even so, the majority may have come close to capturing the ordinary meaning of "relative to your employment," to the extent that the majority holds that this phrase requires asking whether the claim "can be maintained without reference" to the plaintiff's employment. In the present context, "relative" means "a thing having a relation to or connection with or necessary dependence on another thing." Merriam-Webster.com Dictionary, *Relative* <https://www.merriam-webster.com/dictionary/relative> (accessed April 22, 2021) [https://perma.cc/7C5S-B3BP]. Thus, if a "concern" must

[5] For instance, in *Doe v Princess Cruise Lines, Ltd*, the court appears to have adopted the gist of its interpretation not from an examination of the ordinary meaning of the arbitration clause at issue but rather from caselaw discussing the need to place limits on the term "related to" as it appeared in a federal retirement statute. *Doe v Princess Cruise Lines, Ltd*, 657 F3d 1204, 1218-1219 (CA 11, 2011), citing *NY State Conference of Blue Cross & Blue Shield Plans v Travelers Ins Co*, 514 US 645, 655; 115 S Ct 1671; 131 L Ed 2d 695 (1995). The Ohio case the majority relies on simply cited a case from the United States Court of Appeals for the Sixth Circuit for the same standard, calling it a "test" without suggesting that it reflected the meaning of the contractual language. *Academy of Med of Cincinnati v Aetna Health, Inc*, 108 Ohio St 3d 185, 186, 190-191; 842 NE2d 488 (Ohio, 2006), citing *Fazio v Lehman Bros, Inc*, 340 F3d 386 (CA 6, 2003). *Fazio*, in turn, took the test from a decision of the United States Court of Appeals for the Fifth Circuit, again failing to ask whether the test accurately captured the meaning of the contract's text. See *Fazio*, 340 F3d at 395, citing *Ford v NYLCare Health Plans of the Gulf Coast, Inc*, 141 F3d 243, 250-251 (CA 5, 1998). Finally, in *Ford*, the Fifth Circuit applied Texas law, and its decision, like the other decisions, did not describe how the formulation of the test is the proper product of contract interpretation.

be "relative" to "employment," the concern must have some connection to employment. And so if the concern can be made "without reference" to employment, perhaps we could conclude that the concern is not "relative to . . . employment."[6]

But the arbitration agreement's scope is not defined by the "concerns" that are "relative to . . . employment." Instead, the arbitrable "concerns" involve "the application or interpretation of the Firm's Policies and Procedures relative to your employment . . . ." Accordingly, a "concern" that must go to arbitration is one

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[6] It is noteworthy, however, that courts frequently characterize arbitration clauses using this basic phrase, i.e., "relating to," as "broad." See, e.g., *Hallmark Partners*, 227 So 3d at 1056 ("Narrow arbitration language governs disputes that 'arise out of' the contract, while broad clauses cover disputes that 'relate to' or 'are connected with' the contract."). But the majority's failure to apply its new standard in this case—something we often do in cases that develop a new standard—leaves doubt about how broad or narrow the standard is. From the majority's examples, the standard would seem to severely limit the scope of arbitrable disputes. The majority asks whether a client of the Firm or a server at a restaurant could bring the same sexual-assault claims as the plaintiffs in these circumstances. If so, then the claims do not relate to employment. The answer clearly appears to be that those individuals could bring the same claims. Thus, the result of the majority's hypotheticals is that only those disputes arising from a core aspect of the employment relationship, such as a dispute over the terms of the employment agreement, must be arbitrated. But if the parties wanted to accomplish this, they could have used the language they included later in the agreement under which the Firm agreed to arbitrate "any claims" against its employees "arising out of the employment relationship . . . ." That language has been construed as narrower than the type of language at issue here involving disputes that "relate to" employment. See, e.g., *United States ex rel Welch v My Left Foot Children's Therapy, LLC*, 871 F3d 791, 798 (CA 9, 2017) ("As we have held, the words arising out of are 'relatively narrow as arbitration clauses go' . . . . [T]he phrase 'relate to' is broader than the phrases "arising out of' or 'arising under' . . . .") (citations omitted); *Hallmark Partners*, 227 So 3d at 1056 ("Narrow arbitration language governs disputes that 'arise out of' the contract, while broad clauses cover disputes that 'relate to' or 'are connected with' the contract.").

that regards how the policies and procedures were applied or interpreted "relative to [a plaintiff's] employment." From this perspective, the phrase "relative to [a plaintiff's] employment" simply excludes from the scope of arbitration a plaintiff's concerns with the interpretation or application of the policies and procedures that are not related to that plaintiff. This would exclude an employee's concerns about how the policies or procedures were interpreted or applied to another employee or how they were interpreted or applied in general, unrelated to any particular employee.[7]

Under the proper interpretation of the contract, then, the arbitrability of plaintiffs' common-law claims turns upon whether the Firm's policies and procedures cover the alleged conduct (sexual assault and harassment) and whether plaintiffs' allegations concern the application or interpretation of those policies or procedures. Therefore, the application of the contract to this case requires an examination of the policies and procedures, which contain much that encompasses the factual allegations here. The Employee Policy Manual specifically proscribes sexual harassment, which it defines as "unwelcome or unwanted conduct of a sexual

[7] The majority elides the agreement's reference to "the Firm's Policies and Procedures" by dividing the relevant contractual language into three parts: "[1] all concerns you have [2] over the application or interpretation of the Firm's Policies and Procedures [3] relative to your employment . . . ." The first two requirements are satisfied, according to the majority, and only the third remains to be decided on remand, i.e., whether the concerns were relative to plaintiffs' employment. But the third part cannot be construed to simply relate back to "concerns" irrespective of the Firm's policies and procedures, as the majority suggests. The "concerns" themselves are about how the Firm's policies and procedures were applied "relative to [plaintiffs'] employment . . . ." Only by artificially separating the policies-and-procedures language can the majority create its freestanding "relative to your employment" requirement.

nature (verbal, written, physical or environment[al]) when" either (1) the "[s]ubmission to or rejection of this conduct is used as a factor in decisions affecting hiring, evaluation, promotion or other aspects of employment," or (2) the "[c]onduct substantially interferes with an individual's employment or creates an intimidating, hostile or offensive work environment." "This policy covers all employees," the manual continues, and "[t]he Firm will not tolerate, condone or allow any incident of discrimination, harassment or retaliation. The Firm encourages reporting of all such incidents, regardless of who the offender may be." If the employee cannot confront the harasser, he or she "must report any perceived discrimination, harassment, or retaliation to their [sic] supervisor or Human Resources." An investigation will follow and "[p]rompt corrective action will be taken," including by disciplining or firing the offender.

Another portion of the manual establishes standards of conduct, the breach of which can lead to discipline. Included among these are "[s]exual or other unlawful or unwelcome harassment." The Firm also "strongly discourage[s]" dating between employees and prohibits an employee from dating a supervisor—if a relationship with a supervisor occurs, one of the employees is subject to transfer or termination. In yet another section, the manual states that coworkers must be treated "with courtesy and respect at all times." Further, "[t]he Firm does not allow behavior in the workplace at any time that threatens, intimidates, bullies, or coerces another employee" or that harasses another employee on the basis of sex. This prohibition extends to any proscribed acts "that might occur on our premises at any time, at work-related functions, or outside work if it affects the workplace." Again, violations are to be reported, with investigations and disci-

pline to follow. The manual puts the Firm's Compliance Officer in charge of investigating and resolving all complaints alleging that a policy has been violated.

In sum, the manual specifically proscribes unwanted sexual contact and a great deal of behavior that might surround that contact, such as verbal harassment or an abusive work environment. The manual also establishes a general requirement of respect for coworkers, and it puts in place a procedure for complaints concerning violations of the Firm's policies.

The question is whether plaintiffs' allegations involve concerns with how the Firm's policies were interpreted or applied to them. I believe that the facts laid out in the complaint meet this requirement. Both plaintiffs allege that Morse engaged in behavior that would directly violate the manual. Plaintiff Samantha Lichon contends that Morse sexually harassed her at work, both verbally and physically. "At all relevant times," her complaint states, she was an employee of Morse and the Firm. Also "[a]t all relevant times," Morse was an agent of the Firm and was "acting within the course and scope of his employment." She further states that she made multiple reports of this behavior to her superiors and to the human resources department, but that no action was taken and the harassment continued. This conduct created an intimidating and hostile work environment that "substantially interfered with [her] employment."

With regard to her claims against the Firm for negligent and intentional infliction of emotional distress, Lichon alleges that the Firm failed to remedy the situation after her formal complaints, failed to supervise Morse, failed to maintain safe premises, failed to have safeguards against sexual assaults, failed to provide a safe work environment, and assisted Morse

in seeking to cover up the assault. The last contention refers to Lichon's allegation that, a few months after she was fired, an employee of the Firm intimidated her in an attempt to dissuade her from filing suit against defendants. This gives rise to her claim of civil conspiracy against defendants for trying to prevent her lawsuit.

At the core of all the legal claims are Lichon's allegations of sexual harassment and the Firm's related failure to abide by its policies and procedures. She contends, in essence, that Morse engaged in conduct violating the Firm's policies and that the Firm failed to redress these violations in accordance with the manual. The claims thus represent Lichon's concerns with how the Firm's policies and procedures were interpreted or applied relative to her employment. The claims therefore fall within the substantive scope of the arbitration clause.

The analysis is the same for plaintiff Jordan Smits's allegations. Both of her complaints concern events that occurred at the Firm's 2015 Christmas party. Smits contends that Morse sexually assaulted her in front of other employees by grabbing her breasts at that employee-only party. Smits claims to have reported the assault to the Firm's human resources department, which did nothing in response. After resigning and refusing to sign a nondisclosure agreement, Smits says she received a call from an employee of the Firm warning her that Morse "could make it difficult" for Smits "to get a job." She further states that the Firm was aware of Morse's similar behavior with other female employees and therefore knew of his propensity for such acts. The Firm also failed to remedy the

situation, properly supervise Morse, provide a safe workplace, and conduct company events in a safe manner.

As with Lichon, all of Smits's legal claims surround the assault, the lack of response to Smits's internal complaints concerning the assault, and the attempted cover-up. Like Lichon's allegations, Smits's factual contentions similarly represent her concerns regarding how the Firm's policies and procedures were interpreted or applied relative to her employment. Therefore, like Lichon's claims, Smits's claims are within the substantive scope of the arbitration clause.

This analysis suffices to determine that the claims are arbitrable under the contract. The Firm, as a signatory of the agreement, can therefore seek to compel arbitration pursuant to the contract. But Morse, in his individual capacity, did not sign the agreement. Thus, the next question is whether he can invoke the agreement. Because this was not decided below, I would remand the case to determine whether Morse can compel arbitration despite being a nonsignatory.[8] If Morse has such authority, then under the

[8] It is possible that the plain language of the arbitration clause covers these claims against Morse. It states, "This Procedure [i.e., the arbitration clause] includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws." But interpreting the arbitration clause to cover the claims against Morse would require a finding that Morse is an employee of the Firm. As the Court of Appeals majority noted below, the Firm's regulatory filings show that "Morse is the president, secretary, treasurer, director, and sole shareholder of the Morse firm." *Lichon v Morse*, 327 Mich App 375, 396; 933 NW2d 506 (2019). It is not clear, however, whether he would also be considered an employee for purposes of the arbitration clause. Alternatively, various courts have recognized that nonsignatories can enforce arbitration agreements in certain circumstances, such as "when the issues in dispute are intertwined with the agreement that the signatory signed,

analysis above, the substance of the claims made against him falls within the contract, and those claims, like the claims against the Firm, are subject to arbitration.[9]

In reaching a different conclusion, the majority upends the parties' allocation of certain disputes to arbitration and others to litigation. The parties specified the range of arbitrable subjects by linking arbitration to the matters contained in the Firm's policies and procedures. This made the scope of arbitration more concrete than it would be under the open-ended standard fashioned by the majority today. The application of the majority's standard will rely heavily on a court's belief about what "relates" to employment. The majority's failure to apply the standard here also yields no

or if there is a close relationship between the entities involved and between the alleged wrongs and the contract . . . ." *Application of Equitable Estoppel to Compel Arbitration By or Against Nonsignatory —State Cases*, 22 ALR6th 387, 403, § 2; see also *GE Energy Power Conversion France SAS, Corp v Outokumpu Stainless USA, LLC*, 590 US ___, ___; 140 S Ct 1637, 1643-1644; 207 L Ed 2d 1 (2020) (recognizing "that arbitration agreements may be enforced by nonsignatories through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel") (cleaned up). Our Court of Appeals has similarly observed that whether nonsignatories can arbitrate depends on general common-law principles, such as agency law. See *American Federation of State, Co & Muni Employees, Council 25 v Wayne Co*, 292 Mich App 68, 81; 811 NW2d 4 (2011).

[9] Plaintiffs develop other arguments against enforcement of the arbitration agreement by the Firm or Morse, including that the agreement is unconscionable and illusory and that defendants forfeited their right to enforce arbitration. These arguments do not directly involve the interpretation of the agreement and were not addressed by the Court of Appeals below. My resolution of the interpretive issues before the Court here would leave plaintiffs free to raise these other arguments on remand.

insights. Results will vary, and the stability the parties sought by invoking the policies and procedures will be lost.

In some cases, under this new standard, employees will be forced to litigate certain "concerns" they clearly intended to arbitrate—those involving a dispute about how a provision in the policies and procedures has been applied to him or her. If a court does not believe that the concern truly relates to employment—despite the fact that the subject matter has been placed in the policies and procedures—then the dispute will be headed to court. Conversely, in other cases, a court might conclude that a dispute relates to employment even though the subject matter is not covered by the policies and procedures (and therefore does not fall within the ordinary meaning of the arbitration clause, as discussed above). The court will accordingly order arbitration of a dispute the parties wanted to litigate.

By disregarding the text, the majority has attempted to craft a standard rather than interpret a contract. The resulting analysis resembles common-law rulemaking that seeks to find or formulate what the court thinks is the best rule for the circumstances.[10] But our imperative is to enforce the agreement into which the parties freely entered. See *Rory v*

[10] The majority also invites plaintiffs to amend their complaints and "remind[s]" the lower courts of the lenient standard for amendments. The question of arbitrability here depends on the factual allegations of the complaint and whether they fall within the arbitration clause. By encouraging plaintiffs to amend, the majority appears to implicitly agree with my conclusion that, as they stand now, the allegations in the complaints require arbitration. In any event, one is left to wonder why the majority is so confident that plaintiffs have at the ready an alternate set of facts to plead in avoidance of the arbitration clause. See *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (noting that although leave to amend should be freely given, it should be denied if the amendment would be futile).

Continental Ins Co, 473 Mich 457, 469; 703 NW2d 23 (2005). Because the majority opinion today departs from these foundational principles, I dissent.

ZAHRA, J., concurred with VIVIANO, J.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

MAPLES v STATE OF MICHIGAN

Docket No. 160740. Argued on application for leave to appeal April 7, 2021. Decided July 20, 2021.

David A. Maples filed a complaint in the Court of Claims seeking compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., after his conviction of delivery of cocaine was vacated and the related criminal charges were dismissed. Maples was at a bar with Lawrence Roberts and James Murphy when Murphy sold cocaine to an undercover officer. Although Maples and Roberts claimed they did not know about the drug sale, they were arrested after leaving the bar. The charges against Roberts were eventually dismissed, but the charges against Maples were not. Murphy moved to dismiss the charges against him under an entrapment defense; Maples joined the motion. During a pretrial hearing on the motion, Murphy testified that Maples had not been involved in or aware of the drug deal. Maples also moved to dismiss his case on a speedy-trial violation. The trial court denied both motions. Maples then planned to present Murphy as a defense witness at his trial, but he learned the day before the trial was set to begin that Murphy had reached a plea deal with the prosecution under which he was not permitted to testify on Maples's behalf at Maples's trial. Maples's only other witness, Roberts, could not be located to testify. Maples decided to plead guilty to delivery of cocaine after learning that neither of his witnesses were available to testify and after being incorrectly advised by defense counsel that pleading guilty would not impair his ability to appeal on the basis of the speedy-trial violation. The Court of Appeals, HOLBROOK, JR., P.J., and KELLY and GRIBBS, JJ., denied Maples's appeal in an unpublished per curiam opinion, and the Supreme Court denied his application for leave to appeal. 459 Mich 867 (1998). Maples filed a habeas corpus petition in the United States Court of Appeals for the Sixth Circuit, alleging ineffective assistance of counsel. The Sixth Circuit granted relief, concluding that Maples had been prejudiced by an uncommonly long delay before trial and by his attorney's constitutionally ineffective advice that Maples could raise his speedy-trial-violation claim on appeal after pleading guilty. Maples's charges were then dismissed and

his conviction vacated by the Macomb Circuit Court, Richard L. Caretti, J. In his WICA complaint, Maples argued that the exculpatory testimony of Roberts and Murphy that he was unable to present at trial was new evidence that had resulted in the vacation of his convictions and the dismissal of the charges against him. The Court of Claims, MICHAEL J. TALBOT, J., granted summary disposition for the state, concluding that the testimony was not new evidence and, alternatively, that it was Maples's trial counsel's deficient performance and the speedy-trial violation that had resulted in the vacation of Maples's conviction, not the proffered testimony. The Court of Appeals, SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ., affirmed, reasoning that Murphy's testimony was not new evidence because it had been offered at the entrapment hearing and that Roberts's testimony was not new evidence because Maples had not offered any proof regarding how Roberts would testify. 328 Mich App 209 (2019). Maples sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 505 Mich 1088 (2020).

In an opinion by Chief Justice MCCORMACK, joined by Justices BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

To receive compensation under the WICA, a plaintiff must prove by clear and convincing evidence that (1) new evidence demonstrated that they did not perpetrate the crime, (2) new evidence resulted in their conviction being reversed or vacated, and (3) new evidence resulted in either the dismissal of the charges or in an acquittal of all the charges on retrial. In MCL 691.1752(b), the WICA defines "new evidence," in part, as any evidence that was not presented in the proceedings leading to the plaintiff's conviction. Thus, the Legislature selected a definition that turns on whether the evidence was presented in certain proceedings—not on when it was discovered. Pursuant to the WICA's definition, whether evidence is "new evidence" depends on what constitutes the proceedings leading to a plaintiff's conviction. If the Legislature had intended that evidence presented in any preconviction proceeding could not be new evidence, it could have stated that evidence presented in "*any* proceedings" leading to the plaintiff's conviction was not new evidence. Because the Legislature instead chose narrower language, i.e., "*the* proceedings," "the proceedings leading to plaintiff's conviction" must be a subset of all proceedings. The statute does not further define "the proceedings leading to plaintiff's conviction," but "criminal proceedings" include judicial hearings, sessions, or a

prosecution in which a court adjudicates whether a person has committed a crime or pronounces punishment when guilt has already been determined. "Leading" can be used as a transitive or intransitive verb. The Court of Appeals defined "leading" as a transitive verb, meaning "to bring to some conclusion." However, "leading" is used in MCL 691.1752(b) as an intransitive verb. The relevant intransitive definitions are "to tend toward or have a result" or "cause." A conviction results from or is caused by a guilty verdict following a bench or jury trial or from the defendant's admission of guilt in a plea hearing. These proceedings are the subset of proceedings that result in a conviction; pretrial hearings do not result in convictions. Although Maples's conviction would not have occurred but for the trial court's denial of the entrapment motion, the same can be said for an arraignment, preliminary examination, or any other pretrial court proceeding that does not end in the case being dismissed. Additionally, the WICA provides that in order to receive compensation, the plaintiff must prove that new evidence resulted in reversal or vacation of the charges in the judgment of conviction, or dismissal of the charges or a finding of not guilty on retrial. It is not clear how a plaintiff could prove that the new evidence caused a different result after their original conviction was set aside unless "new evidence" refers only to evidence that was not presented to the trier of fact when it initially convicted the plaintiff. This interpretation of "new evidence" gives the best effect to the WICA's remedial purpose to provide compensation for individuals who were wrongfully imprisoned. Maples's claim that Roberts would provide new evidence failed for the reason identified by the courts below: because Maples did not present an affidavit or other offer of proof showing what Roberts would say, Maples failed to prove that Roberts would have offered exculpatory testimony that could be considered "new evidence" under the WICA. On the other hand, there was an adequate offer of proof regarding Murphy's proposed testimony, and that testimony was new evidence under the WICA because it was not presented at a proceeding that adjudicated guilt.

Reversed and remanded to the Court of Appeals.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, disagreed that Maples had presented new evidence as defined by the WICA. Because Murphy's proffered testimony was presented at the entrapment hearing, it was not new evidence. Under the WICA, "the proceedings leading to plaintiff's conviction" are not limited to a plea hearing or trial, but more broadly include all events or actions that, taken together, tend toward, result in, or cause the

plaintiff's conviction, which necessarily includes pretrial hearings. Although the majority cited the definition of "criminal proceeding" in its interpretation of the statutory language, the statute does not use this term, but rather refers to "proceedings." "Proceedings" is a legal term of art that may be defined as the regular and orderly progression of a lawsuit, including all acts and events between commencement and entry of judgment. Therefore, "proceedings" is not limited to the final plea hearing or trial at which guilt is ultimately determined. The statute's use of the plural "proceedings" further supports the interpretation that multiple events or actions are encompassed by this term as opposed to a singular plea hearing or trial. The plain meaning of "leading to" is to tend toward or have a result, which, as used in the statute, includes the series of events that tend toward or result in a conviction. Because both "proceedings" and "leading to" are defined broadly as used in the statute, when read together, they did not support the majority's conclusion that "proceedings leading to plaintiff's conviction" refers only to the one event that most directly resulted in plaintiff's conviction. Justice ZAHRA would hold that Maples did not present new evidence under the WICA because Murphy's testimony was offered at the entrapment hearing, which was a proceeding that led to plaintiff's conviction.

WRONGFUL IMPRISONMENT COMPENSATION ACT – WORDS AND PHRASES – "NEW EVIDENCE" – "PROCEEDINGS LEADING TO PLAINTIFF'S CONVICTION."

To receive an award under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., a plaintiff must prove by clear and convincing evidence that new evidence: demonstrates that they did not perpetrate the crime, resulted in their conviction being reversed or vacated, and resulted in either the dismissal of the charges or an acquittal of all charges on retrial; MCL 691.1752(b) defines "new evidence," in part, as "any evidence that was not presented in the proceedings leading to plaintiff's conviction"; evidence that was presented at a preconviction hearing that did not result in an adjudication of guilt is new evidence under the WICA; conversely, evidence that was presented at a proceeding that resulted in the plaintiff's conviction or guilty plea, such as a trial or plea hearing, is not new evidence under the WICA.

Bendure & Thomas, PLC (by *Mark R. Bendure*) for David A. Maples.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher M. Allen*, Assistant Solicitor General, and *Robyn Frankel* and *Gallant Fish*, Assistant Attorneys General, for the state of Michigan in support of plaintiff's position.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Linus Banghart-Linn*, Assistant Attorney General, for the state of Michigan in support of defendant's position.

MCCORMACK, C.J. The Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq.*, allows people who were wrongfully imprisoned to seek compensation for the harm they suffered. The WICA limits eligibility for compensation to claimants who can prove (among other things) that new evidence shows that they were wrongfully convicted. This appeal is about what "new evidence" means under the act.

The WICA defines "new evidence," in relevant part, as "any evidence that was not presented in the proceedings leading to plaintiff's conviction . . . ." MCL 691.1752(b). David Maples, the WICA plaintiff here, relies on exculpatory evidence that was unavailable to present at his originally scheduled trial but *was* considered by the court at a pretrial hearing. We hold that this is new evidence under the WICA because it was not presented to a trier of fact during a proceeding that determined guilt—a trial or a plea hearing. We therefore reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings.

I. FACTS AND PROCEEDINGS

Maples, Lawrence Roberts, and James Murphy were at a bar when Murphy sold cocaine to an undercover

officer. Maples and Roberts claimed they did not know about the drug sale but were arrested after they left the bar together. The charges against Roberts were eventually dismissed; the charges against Maples were not.

Shortly after his arrest, Murphy wrote a letter to the trial court, explaining that Maples and Roberts had nothing to do with the crime. During a pretrial hearing on Murphy's motion to dismiss his own charges based on an entrapment defense, which Maples joined, Murphy testified that Maples was neither involved in nor aware of the drug deal. (Murphy later signed affidavits swearing to the same.) The trial court denied that motion. Maples also moved to dismiss his case for a speedy-trial violation but did not prevail.

After the trial court denied his entrapment and speedy-trial motions, Maples planned to present Murphy as a defense witness at his trial. But the day before it was set to begin, he learned that Murphy had promised the prosecution he would not testify on Maples's behalf as part of his own plea deal. And Roberts—Maples's only other witness—couldn't be found. With no available witnesses, and relying on his counsel's advice that he could still appeal the speedy-trial violation, Maples pled guilty to delivery of cocaine.

Maples's appeal did not succeed in the Court of Appeals, and this Court denied leave; his attorney's advice that he could challenge the speedy-trial violation on appeal after pleading guilty was wrong. See *People v Maples*, unpublished per curiam opinion of the Court of Appeals, issued November 4, 1997 (Docket No. 196975), p 1; *People v Maples*, 459 Mich 867 (1998). He filed a habeas corpus petition in federal court alleging ineffective assistance of counsel based on that incorrect

advice, and the United States Court of Appeals for the Sixth Circuit granted him relief. *Maples v Stegall*, 427 F3d 1020, 1034 (CA 6, 2005). The panel concluded that Maples had been prejudiced by his trial's uncommonly long delay because both Roberts and Murphy likely would have testified favorably for him but were unavailable by the time of trial. *Id*. at 1033-1034. Since Maples's speedy-trial-violation claim had merit, his attorney was constitutionally ineffective for advising him to plead guilty when doing so waived his right to appeal the claim, and he was entitled to habeas relief on that basis. *Id*. at 1034. The Macomb Circuit Court then dismissed Maples's criminal charges and vacated his conviction.

Maples filed his WICA complaint in the Court of Claims shortly after the WICA became law in 2017, seeking compensation from the state for his wrongful imprisonment. Maples argued that he met the WICA's requirements for compensation because new evidence demonstrated that he did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction. The new evidence that resulted in the vacation of his convictions and the dismissal of the charges against him, according to Maples, was the exculpatory testimony of Murphy and Roberts that he was unable to present at a trial. Maples relied on Murphy's testimony at the entrapment hearing, Murphy's affidavits, and Murphy's letter to the trial court to support his claim. Maples did not include a similar offer of proof to establish Roberts's purported testimony, though he argued that Roberts would have testified favorably for him.

The state moved for summary disposition, which the Court of Claims granted under MCR 2.116(C)(10). The court determined that neither Murphy's nor Roberts's

testimony was new evidence. Alternatively, the court found that it was Maples's trial counsel's deficient performance and the speedy-trial violation that had "resulted in" the vacation of his conviction, not Murphy's proffered testimony.

The Court of Appeals affirmed. *Maples v Michigan*, 328 Mich App 209, 213; 936 NW2d 857 (2019). The panel agreed that Murphy's testimony was not new evidence because it had been presented at the entrapment hearing. *Id*. at 221. It also agreed that Roberts's alleged testimony was not new evidence because Maples had offered no proof of what that testimony would have been. *Id*. at 221-222. Therefore, the panel held that the Court of Claims did not err by granting summary disposition in the state's favor. *Id*. at 222. Because it found that Maples had not carried his burden of proof by supporting his claim with new evidence, the panel did not address the alternative ground proffered by the Court of Claims for dismissing his case. *Id*. This appeal followed.

II. THE WICA'S "NEW EVIDENCE" REQUIREMENT

New evidence is the key to prevailing on a claim for compensation. To receive an award under the WICA, the plaintiff must prove by clear and convincing evidence that (1) new evidence demonstrates that they did not perpetrate the crime; (2) new evidence resulted in their conviction being reversed or vacated; and (3) new evidence resulted in either the dismissal of the charges or in an acquittal of all the charges on retrial. MCL 691.1755(1)(c). The WICA defines new evidence as follows:

> "New evidence" means any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the

> results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction. New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation. [MCL 691.1752(b).]

The WICA does not further define any of these terms. It does not explain what "proceedings" might "lead[] to [the] plaintiff's conviction."

We have long required criminal defendants seeking relief from judgment based on new evidence to show that the evidence is not just new, but that it is newly discovered. See *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). As this Court has explained, "evidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial." *People v Rao*, 491 Mich 271, 281; 815 NW2d 105 (2012). Had the Legislature intended to exclude evidence like Murphy's exculpatory testimony from the definition of "new evidence" because it was known at the time of trial, it could have simply adopted our well-established standard for newly discovered evidence. The WICA's text, however, includes no discovery timing requirement.

The Legislature chose not to incorporate this Court's definition of new evidence into the WICA even though it was aware of our judge-made standard for newly discovered evidence. See *Reed v Breton*, 475 Mich 531, 540; 718 NW2d 770 (2006) ("[T]he Legislature is held to be aware of this state's law . . . ."). The WICA's

definition of new evidence turns not on when it was discovered, but on whether the evidence was presented in certain proceedings.

III. ANALYSIS

We review the interpretation of the WICA de novo. *Sanford v Michigan*, 506 Mich 10, 14; 954 NW2d 82 (2020). As always, our primary task is to determine and give effect to the Legislature's intent. *Id*. at 14-15. The most reliable indicator of intent is usually the statute's text. *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). When a term in that text is undefined, we apply its plain and ordinary meaning. *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 305-306; 952 NW2d 358 (2020). And we analyze the ordinary meaning of statutory language in the context of the entire statute, *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020), to give it "the reasonable construction that best accomplishes the purpose of the statute," *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (quotation marks and citation omitted).

The meaning of "new evidence" under the WICA depends on what "proceedings lead[] to [a] plaintiff's conviction." If the entrapment hearing was a proceeding that led to Maples's conviction, his complaint would fail as a matter of law because Murphy's exculpatory testimony would not be new evidence under the WICA.

The text of MCL 691.1752(b) in isolation makes this a hard question. But the text isn't isolated, and we "must construe its meaning in light of the context of its use." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich

349, 367-368; 917 NW2d 603 (2018). The term's context in the statute and the statute's remedial purpose make the answer clear.

We start with the text. The WICA defines new evidence as "any evidence that was not presented in the proceedings leading to plaintiff's conviction . . . ." MCL 691.1752(b). This definition has three elements: (1) "any evidence";[1] (2) "that was not presented"; (3) "in the proceedings leading to plaintiff's conviction." The third element is the only one that has been disputed. The Court of Appeals held that "the proceedings leading to plaintiff's conviction" means *any* proceeding in the case (including pretrial hearings) that "brought about the [plaintiff's] conviction." *Maples*, 328 Mich App at 220. The panel reasoned that since the information about Murphy's exculpatory evidence was presented at the entrapment hearing and the court denied that motion, the hearing was a proceeding that brought about the conviction. *Id*. Maples has consistently argued (and the Attorney General ultimately endorsed) that "the proceedings leading to plaintiff's conviction" include only the proceedings that determined guilt—that is, the trial or a guilty or no-contest plea. We agree with Maples and the Attorney General.

First, the definition is limited to "*the* proceedings leading to plaintiff's conviction." If the Legislature intended to include all preconviction proceedings, it

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[1] Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact . . . ." *Black's Law Dictionary* (11th ed). Maples's claim that Roberts would also provide new evidence fails for the reason identified by the courts below: because Maples has not presented an affidavit or other offer of proof showing what Roberts would say, Maples has failed to prove that Roberts would have offered exculpatory testimony that could be considered "new evidence" under the WICA.

could have written MCL 691.1752(b) to bar evidence that was presented in "*any* proceeding leading to plaintiff's conviction." The indefinite article "any" means "one, some, or all indiscriminately of whatever quantity." *Merriam-Webster's Collegiate Dictionary* (11th ed). This contrasts with "the," a definite article, which has "a specifying or particularizing effect." *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000) (quotation marks and citation omitted). When "the" and an indefinite article are used within the same statutory provision, they should not be read to mean the same thing. *Id*. See also *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings."). Such is the case here: MCL 691.1752(b) states that new evidence is "*any* evidence that was not presented in *the* proceedings . . . ." MCL 691.1752(b) (emphasis added). "Any" and "the" are not synonymous. Similarly, if the Legislature meant to include all proceedings in a case, it could have defined new evidence as "any evidence that was not presented in the original proceedings." But it cabined "the proceedings" to those "*leading to plaintiff's conviction.*" "The" proceedings leading to a conviction, therefore, must be a subset of all proceedings in a case.

That the proceedings leading to the plaintiff's conviction can't mean all the proceedings in the case gets us only so far; it doesn't tell us what subset of proceedings are included in the definition. The Court of Appeals aptly recognized this when it sought to limit "the proceedings" from all proceedings to only those that "brought about the conviction." *Maples*, 328 Mich App at 220-221.

We agree with the panel that a "criminal proceeding" is "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial." *Black's Law Dictionary* (10th ed). But we disagree with the panel's understanding of "leading."

The panel selected a definition of "lead"—"to bring to some conclusion," see *Merriam-Webster's Collegiate Dictionary* (11th ed), p 706—that defines the word in one of its transitive senses. "Leading" in MCL 691.1752(b), however, is used as an intransitive verb. See Strunk & White, *The Elements of Style* (Needham Heights: Allyn & Bacon, 2000), p 95 (a transitive verb is "[a] verb that requires a direct object to complete its meaning"). When used as a transitive verb, "leading" may mean: (1) "to guide on a way" (e.g., *he led the officers to his hiding place*); (2) "to direct the operations, activity, or performance of" (e.g., *the director is leading the orchestra*); or (3) "to bring to some conclusion or condition" (e.g., *they led me to believe otherwise*). Merriam-Webster.com Dictionary, *Lead* <https://www.merriam-webster.com/dictionary/lead> (accessed July 9, 2021) [https://perma.cc/9UD3-5N6P]. The direct objects in these examples—"the officers," "the orchestra," and "me"—receive the action from the verb "leading" and are necessary to give it meaning. In contrast, "leading" as used in MCL 691.1752(b) doesn't require a direct object to complete its meaning. "[T]he proceedings leading to plaintiff's conviction" doesn't have a direct object that receives the action from the verb—here, "leading" is an intransitive verb. The verb's form informs our interpretation; we can't rely on the definition for a transitive verb when the statute uses the intransitive form.

The relevant definition of "lead" when used as an intransitive verb is "to tend toward or have a result." *Merriam-Webster's Collegiate Dictionary* (11th ed). It also is synonymous with "cause." See Cambridge Dictionary, *Lead* <https://dictionary.cambridge.org/us/dictionary/english/lead> (accessed June 4, 2021) [https://perma.cc/SKJ8-636L] (defining "lead," in relevant part, as "to prepare the way for something to happen; cause," noting that this sense of the word can be used transitively or intransitively, and providing the following example of the word being used intransitively: "Ten years of scientific research led to the development of the new drug").

A conviction *results from* or is *caused by* a guilty verdict by a judge or jury following a trial or from the defendant's admission of guilt in a plea hearing. Those are the subset of proceedings that result in or cause a conviction; no other proceeding in a criminal case does that. Pretrial hearings do not result in a conviction; they can result in the dismissal of charges or in setting the parameters for a trial.

The Court of Appeals correctly observed that if the trial court had granted the entrapment motion, Maples never would have been convicted. See *Maples*, 328 Mich App at 221. Thus, the panel held, the entrapment hearing was a proceeding leading to Maples's conviction. *Id*. It is true that but for the trial court's denial of the entrapment motion, Maples's conviction would not have occurred. Not prevailing at the entrapment hearing meant that Maples's case proceeded—but the same can be said for an arraignment, a preliminary examination, and every other pretrial court proceeding that doesn't end in the case being dismissed. For this reason, the Court of Appeals' conclusion that the entrapment hearing led to a conviction because it did not

end the case does not provide any limiting principle to define the subset of proceedings that lead to a conviction. The panel did not explain why a motion hearing on an entrapment claim is different from any other pretrial proceeding that does not end in the case being dismissed.[2] Despite the panel's effort to cabin "the proceedings" to a specific subset of the criminal proceedings, its definition and application did not do so.[3]

Moreover, the WICA's broader context and statutory scheme show that "leading to" does not mean "to cause" as in but-for cause. And as always, we must analyze the definition "in harmony with the whole of the statute, construed in light of history and common sense." *Honigman*, 505 Mich at 295 (quotation marks and citation omitted). The WICA uses the term "new evidence" elsewhere and in a pivotal way. To receive WICA compensation, the plaintiff must prove that (1) new evidence demonstrates that they didn't perpetrate the crime; (2) new evidence "*results in* the reversal or vacation of the charges in the judgment of conviction"; and (3) new evidence "*results in* either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial." MCL 691.1755(1)(c) (emphasis added). A plaintiff's entitlement to compensation thus turns on whether they can prove that the new evidence caused a different result after their original conviction was set aside. It is hard to imagine how a plaintiff

[2] A defendant who does not prevail at an entrapment hearing is no differently situated than one who never raised an entrapment defense—no conclusion is brought about in either case. In both cases, the prosecutor would still need to secure a conviction to bring the case to some conclusion.

[3] For the same reason, we fail to see how Justice ZAHRA's broader interpretation of "the proceedings leading to plaintiff's conviction" sufficiently distinguishes between all the proceedings in a criminal case and those that result in a conviction.

could make this showing unless "new evidence" refers only to evidence that was not presented to the trier of fact when it convicted the plaintiff in the first place. Given this context, when it defined "new evidence," the Legislature was concerned with whether the evidence was considered by the trier of fact when it convicted the WICA plaintiff—not whether it was presented at a pretrial hearing.

Finally, this construction of "new evidence" is the one that best gives effect to the WICA's purpose. *People v Sharpe*, 502 Mich 313, 326; 918 NW2d 504 (2018) ("When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent."). The WICA's remedial purpose is "to provide compensation and other relief for individuals wrongfully imprisoned for crimes . . . ." 2016 PA 343, title.

A hypothetical is useful. Imagine a pretrial defense motion alleging that the prosecution is withholding exculpatory evidence in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and requesting that the court order that the evidence be disclosed. The trial court conducts an *in camera* review of the evidence and erroneously concludes that production is not required, so the evidence is never considered by the jury. If, after their conviction, the defendant eventually prevailed on the *Brady* claim and filed a complaint under the WICA, they would not be entitled to compensation under the Court of Appeals' interpretation of "new evidence"; the *in camera* review would be a proceeding that led to their conviction. But a defendant who never made a pretrial motion because they learned of the suppressed evidence *after* their conviction would be eligible for compensation. Both cases are examples of wrongful convictions, because the evidence was improperly kept from the jury when

it decided the defendant's guilt. Denying compensation in the first case because the evidence is not "new" would frustrate the Legislature's stated intent to compensate people who were convicted and imprisoned for "crimes that [they] did not commit." MCL 691.1753.

Whether to provide compensation for wrongful imprisonment and who is entitled to that compensation are policy questions for the Legislature to decide—not this Court. And we have recognized that WICA compensation isn't available for every wrongful conviction: "there are only so many dollars to fill the WICA bucket, after all, and the Legislature had to decide how best to allocate limited funding." *Ricks v Michigan*, 507 Mich 387, 401; 968 NW2d 428 (2021). See also *Sanford*, 506 Mich at 17 (the WICA gives "a defined class of wrongfully imprisoned people a path to limited compensation"). But while the WICA offers limited compensation, there is no principled reason why plaintiffs who are otherwise similarly situated should be treated differently when exculpatory evidence was offered at a pretrial proceeding but not considered by the trier of fact.

The WICA doesn't make this distinction, so we can't. So long as the evidence was not presented at a proceeding where guilt was decided—that is, a trial or a hearing where a plea was entered—the WICA considers it "new."

IV. CONCLUSION

Murphy's proposed testimony is new evidence under the WICA because it was not presented at a proceeding that adjudicated guilt. See *People v D'Angelo*, 401 Mich 167, 176; 257 NW2d 655 (1977) (a defendant's guilt or innocence "is irrelevant" to the entrapment determina-

tion). We therefore reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings.

BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, C.J.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's decision reversing the judgment of the Court of Appeals. At issue is whether plaintiff has presented "new evidence," as is required to establish a case for compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*. I agree with the Court of Appeals that he has not. MCL 691.1752(b) provides, in pertinent part, that "new evidence" is "any evidence that was not presented in the proceedings leading to plaintiff's conviction . . . ." The evidence that plaintiff relies on in this WICA action was presented at a pretrial entrapment hearing in the criminal case against plaintiff that led to his guilty plea. Contrary to the majority's conclusion, "the proceedings leading to plaintiff's conviction" are not limited to a plea hearing or trial, but more broadly include all events or actions that, taken together, tend toward, result in, or cause the plaintiff's conviction. This necessarily includes pretrial hearings. The evidence proffered by plaintiff was therefore presented at "the proceedings leading to plaintiff's conviction" and cannot qualify as "new evidence" under MCL 691.1752(b), meaning his WICA claim fails. I dissent from the majority's contrary conclusion and would affirm the result of the Court of Appeals.[1]

[1] While the Attorney General has conceded in this Court that plaintiff has proffered "new evidence" under MCL 691.1752(b), this Court is not bound by that concession. See *People v Reed*, 449 Mich 375, 395; 535

I. STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF STATUTORY INTERPRETATION

Whether plaintiff has proffered "new evidence" under the WICA presents an issue of statutory interpretation that we review de novo.[2] When reviewing questions of statutory interpretation, the role of the Court is to "ascertain the legislative intent that may reasonably be inferred from the words in a statute."[3] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent."[4] "When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written."[5]

II. ANALYSIS

MCL 691.1755 sets forth the threshold requirements that a plaintiff must establish in order to receive compensation under the WICA:

> (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:

NW2d 496 (1995). As Justice VIVIANO noted in his dissenting statement in *People v Altantawi*, 507 Mich 873, 874; 954 NW2d 518 (2021) (VIVIANO, J., dissenting), citing *Young v United States*, 315 US 257, 258-259; 62 S Ct 510; 86 L Ed 832 (1942), "a prosecutor's confession of error 'does not relieve this Court of the performance of the judicial function,' and while the opinion of the prosecutor is entitled to some weight, 'our judicial obligations compel us to examine independently the errors confessed.' . . . The public interest in the 'proper administration of the criminal law cannot be left merely to the stipulation of parties.' " Because I disagree with and am not bound by the Attorney General's interpretation of the WICA in this case, I decline to adopt it.

[2] *Sanford v Michigan*, 506 Mich 10, 14; 954 NW2d 82 (2020).

[3] *Id*. at 14-15 (quotation marks and citation omitted).

[4] *Id*. at 15 (quotation marks and citation omitted).

[5] *Id*. (quotation marks and citation omitted).

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

At issue is whether plaintiff has proffered "new evidence," as is required to satisfy MCL 691.1755(1)(c). The WICA defines "new evidence" as follows:

> "New evidence" means any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction. New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation.[6]

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[6] MCL 691.1752(b).

The "new evidence" that plaintiff relies on is the testimony of James Murphy, who has averred that plaintiff had no involvement in the drug transaction that resulted in plaintiff's plea-based conviction of delivery of cocaine, a conviction that was reversed on appeal[7] and subsequently vacated. Murphy testified similarly at the February 1994 hearing on his entrapment motion, which plaintiff joined, in which Murphy sought dismissal of the criminal charges against him. Because Murphy already testified at the entrapment hearing, because Murphy's affidavit is substantively the same as his testimony at the entrapment hearing, and because plaintiff offers no additional new evidence,[8] the key question is whether Murphy's testimony at the February 1994 pretrial entrapment hearing was presented in "the proceedings leading to plaintiff's conviction" for purposes of MCL 691.1752(b). If so, then Murphy's testimony cannot constitute "new evidence" to satisfy MCL 691.1752(b) and MCL 691.1755(1)(c). The majority concludes that Murphy has presented "new evidence" because only a plea hearing or trial, not a pretrial hearing, can constitute "the proceedings leading to plaintiff's conviction." I disagree.

To resolve this case, we must reasonably construe the phrase "the proceedings leading to plaintiff's conviction" as used in MCL 691.1752(b). The WICA does not define the terms "proceedings" or "leading to," so I

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[7] *Maples v Stegall*, 427 F3d 1020 (CA 6, 2005).

[8] I agree with the majority that Roberts's purported testimony is not "evidence" at all given that plaintiff has not presented an affidavit or other offer of proof supporting the existence of that testimony. It therefore cannot qualify as "new evidence" for purposes of MCL 691.1752(b).

turn to dictionary definitions of these terms.[9] In concluding that pretrial hearings do not constitute "proceedings leading to plaintiff's conviction," the majority first cites the definition used by the Court of Appeals for a "criminal proceeding," which is "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial."[10] But reliance on this definition is misplaced because MCL 691.1752(b) uses the term "proceedings," not "criminal proceeding." Because "proceedings" is a legal term of art, consulting legal dictionaries is appropriate.[11]

[9] " 'An undefined statutory term must be accorded its plain and ordinary meaning.' " *Sanford*, 506 Mich at 21 n 19, quoting *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008), citing MCL 8.3a. " 'A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning.' " *Sanford*, 506 Mich at 21 n 19, quoting *Brackett*, 482 Mich at 276. In contrast, "[a] legal term of art is a technical word or phrase that has acquired a particular and appropriate meaning in the law." *People v Law*, 459 Mich 419, 425 n 8; 591 NW2d 20 (1999). See also MCL 8.3a. "[A] legal term of art 'must be construed in accordance with its peculiar and appropriate legal meaning.' " *Sanford*, 506 Mich at 21 n 19, quoting *Brackett*, 482 Mich at 276, citing MCL 8.3a. "Courts should ordinarily use a dictionary that is contemporaneous with the statute's enactment." *Sanford*, 506 Mich at 21 n 19, citing *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58; 886 NW2d 113 (2016). Given that the WICA was enacted only four years ago, online dictionaries prove useful in interpreting the terms used in the act, as they easily describe how terms have been used in the last several years.

[10] *Black's Law Dictionary* (10th ed).

[11] I conclude that "proceedings" is a term of art because lay dictionaries consistently refer to "proceedings" generally as a "legal action," suggesting that the term, as used in this context, is specific to the legal context. See *New Oxford American Dictionary* (3d ed) (defining "proceedings" in a legal context as "action taken in a court to settle a dispute: *criminal proceedings were brought against him*"); *Webster's New World College Dictionary* (4th ed) ("legal action" or "the taking of legal action");

Black's Law Dictionary (11th ed) defines "proceeding," in pertinent part, as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment" and as "[a]n act or step that is part of a larger action."[12] Merriam-Webster's online legal dictionary defines "proceeding," in pertinent part, as "a particular step or

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Merriam-Webster's Collegiate Dictionary (11th ed) (defining the singular "proceeding" as a "legal action," i.e., "a divorce proceeding"); Cambridge Dictionary, *Proceedings* <https://dictionary.cambridge.org/us/dictionary/english/proceedings> (accessed June 28, 2021) [https://perma.cc/M42Y-QFHB] ("legal action"; for example, "*Allegations of sexual harassment have led to disciplinary proceedings being taken against three naval officers*"; and "*I started legal proceedings to try to have him taken away from his parents permanently*") (emphasis omitted); Macmillan Dictionary, *Proceedings* <https://www.macmillandictionary.com/us/dictionary/american/proceedings> (accessed June 28, 2021) [https://perma.cc/NGX8-M7SC] (defining "proceedings" as a legal term meaning "the actions taken, usually in court, to settle a legal matter") (emphasis omitted).

[12] *Black's Law Dictionary* (11th ed) also contains the following commentary on the term:

> "Proceeding" is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include — (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort. [Quoting Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3–4 (2d ed, 1899) (quotation marks omitted).]

series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations," including "an action, hearing, trial, or application before the court," and as "a criminal prosecution or investigation[.]"[13] These definitions do not restrict "proceedings" to the final guilty plea hearing or trial in a criminal case at which guilt is ultimately determined. To the contrary, they contemplate a broader, more expansive understanding of the term that also encompasses the other events and actions prior to the conviction; this broader understanding certainly includes a pretrial hearing.[14] After all, a pretrial hearing is part of the "regular and orderly progression of a lawsuit" and constitutes an event between the commencement of an action and the entry of judgment. It is surely one of the "series of steps" in a criminal prosecution.[15] The statute's use of the plural "proceedings" rather than the singular "proceeding" further supports this interpretation, as the term "proceedings"

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[13] Merriam-Webster.com Dictionary, *Proceeding* <https://www.merriam-webster.com/dictionary/proceeding#legalDictionary> (accessed June 28, 2021) [https://perma.cc/C5BU-ES99].

[14] The commentary provided by *Black's Law Dictionary* (11th ed) supports this interpretation in that it refers to the word "proceeding" as a "comprehensive" term that "may include in its general sense *all* the steps taken or measures adopted in the prosecution or defense of an action, *including the pleadings and judgment*." (Emphasis added.) Pretrial hearings clearly fall within this description.

[15] While labeling "proceedings" a legal term of art as used in this context is seemingly noncontroversial given that neither the majority nor the parties have relied on a lay definition of the term, I submit that a pretrial hearing would fall under the lay definitions of the term as well because such hearings are certainly part of a "legal action."

contemplates multiple events or actions and is not limited to the singular proceeding of a plea hearing or trial.[16]

While the meaning of "proceedings" is expansive, that word precedes the modifying phrase "leading to plaintiff's conviction." It is only evidence presented at the proceedings "leading to plaintiff's conviction" that is excluded from constituting "new evidence." Unlike the term "proceedings," "leading to" does not have a definition specific to the legal field, so consulting lay dictionaries to ascertain the meaning of the term is appropriate. The *New Oxford American Dictionary* defines "lead to" in this context as "culminate in (a particular event): *closing the plant will lead to the loss of 300 jobs*."[17] *Merriam-Webster's Collegiate Dictionary* defines the term as "to tend toward or have a result," as in, "study *leading* to a degree[.]"[18] Merriam-Webster's online dictionary defines "lead to" as "to result in (something)."[19] The examples provided include, "[A] course of study *leading* to a degree in agriculture";

[16] The majority focuses heavily on the Legislature's use of the word "the" instead of "any" before "proceedings," interpreting this as a signal of the Legislature's intent to use the term "proceedings" narrowly. But even if the word "the" was used to limit "proceeding," a conclusion that I do not find obvious, the Legislature immediately negated any narrowing effect by using the plural form of the word "proceedings." In my view, it is not the word "the" before "proceedings" that does the limiting work in MCL 691.1752(b), but the subsequent phrase "leading to plaintiff's conviction."

[17] *New Oxford American Dictionary* (3rd ed).

[18] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Webster's New World College Dictionary* (4th ed) (defining "lead" as "to be or form a way (*to*, *from*, *under*, etc.); tend in a certain direction; go").

[19] Merriam-Webster.com Dictionary, *Lead to* <https://www.merriam-webster.com/dictionary/lead%20to> (accessed June 29, 2021) [https://perma.cc/9ZAE-V7TB].

"Her investigations ultimately *led* to the discovery of the missing documents"; and "His volunteer work in the hospital *led* to a career in nursing."[20] The Cambridge online dictionary defines "lead" as "to prepare the way for something to happen; cause" and gives the example, "*Ten years of scientific research led to the development of the new drug.*"[21] Lastly, the Macmillan online dictionary defines "lead to" as "to begin a process that causes something to happen," as in: "*There is no doubt that stress can lead to physical illness*"; and "[*A*] *process of negotiation leading to a peaceful settlement*[.]"[22]

These definitions belie the majority's conclusion that the modifying phrase "leading to plaintiff's conviction" limits the aforementioned "proceedings" to the final, singular proceeding that results in a determination of guilt, i.e., the plea hearing or trial. Under its plain meaning, "lead to" means to "culminate in," "tend toward or have a result," "to result in something," or "to begin a process that causes something to happen." The majority itself similarly defines this term as to "tend toward," "have a result," or "cause." None of those definitions is so restrictive to suggest that "lead to" references only the single, immediate event that most directly results in the end product—here, the conviction. Instead, these definitions more sweepingly include the series of events that "tends toward" or

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[20] *Id*.

[21] Cambridge Dictionary, *Lead* <https://dictionary.cambridge.org/us/dictionary/english/lead> (accessed June 29, 2021) [https://perma.cc/SKJ8-636L] (emphasis omitted).

[22] Macmillan Dictionary, *Lead to* <https://www.macmillandictionary.com/us/dictionary/american/lead-to> (accessed June 29, 2021) [https://perma.cc//XR6R-4M3L] (emphasis omitted).

"results in" the conviction. Many of the usage examples confirm this expansive interpretation.[23]

Thus, the definitions of both "proceedings" and "leading to" are broad, and when read together, they simply do not support the majority's conclusion that "proceedings leading to plaintiff's conviction" refers only to the one event that most directly results in plaintiff's conviction. Rather, "proceedings leading to plaintiff's conviction" as used in MCL 691.1752(b) refers to all events or actions that tend toward, result in, or cause the plaintiff's conviction, not the singular final event of the plea hearing or trial. This necessarily includes pretrial hearings, including those pertaining to the admissibility of evidence or the viability of defenses; such hearings "tend toward" or "result in" a conviction by causing the case to be directed toward the conviction, as opposed to another direction.[24] These proceedings contribute to the conviction, regardless of whether each individual proceeding can independently

[23] For instance, the example of "study leading to a degree" would include not just the studying required to pass the last set of final exams, but also the studying required to pass all previous courses that contributed to the earning of the degree. A "process of negotiation leading to a peaceful settlement" would not be limited to only the final successful agreement, but would include preliminary discussions and prior rejected offers. The usage examples therefore indicate that "leading to" encompasses all events that ultimately result in the conclusion.

[24] Of course, we are approaching the case in the context of a plaintiff who has been wrongfully convicted, meaning that he or she was convicted in the first place. If a pretrial hearing results in the dismissal of charges, we would have no reason to discuss the WICA.

In taking a hardline stance that no pretrial hearing can constitute a proceeding leading to a conviction, the majority accuses the Court of Appeals of applying a type of "but for" causation analysis. In making this accusation, the majority suggests there can only be one "cause" of a conviction. Such a narrow interpretation is simply not supported by the words used by the Legislature, which, as discussed above, contemplate a series of actions or events leading to a conviction. It is only by taking

establish guilt. The evidence and defenses (or lack thereof) presented at these pretrial proceedings shape the criminal prosecution against the accused and collectively culminate or result in a conviction. Further, as described above, because "proceedings" is used in the plural rather than the singular, it contemplates that there are multiple events or actions that, when taken together, result in the conviction. For these reasons, I conclude that a pretrial hearing is indeed a proceeding that leads toward a plaintiff's conviction, and I disagree with the majority's holding that evidence presented in such pretrial hearings can constitute "new evidence" for purposes of the WICA.[25]

In awarding plaintiff compensation, it is the majority who expands the statute to make distinctions that the statute does not itself make. No language in the WICA defines "new evidence" as "evidence that was not admitted at the plea hearing or trial" or "evidence that was not presented to the jury." The Legislature easily could have chosen these definitions if that is what it

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an overly narrow stance that the majority can conclude that a pretrial hearing, even one that led to plaintiff's decision to plead guilty, cannot tend toward a conviction.

[25] Contrary to plaintiff's assertion, this interpretation does not render nugatory the words "leading to plaintiff's conviction" in MCL 691.1752(b). The "leading to plaintiff's conviction" modifier restricts the proceedings to those in plaintiff's criminal prosecution. It excludes related civil proceedings or other criminal proceedings unrelated to the prosecution that ultimately results in plaintiff's conviction at issue. It likely even excludes postconviction proceedings, such as sentencing or appellate proceedings, as the limitation of "leading to plaintiff's conviction" would suggest that only the evidence presented *before* the conviction should be considered. Thus, the "leading to plaintiff's conviction" language is significant under this interpretation. And it is for these same reasons that I disagree with the majority that the Court of Appeals' interpretation does not contain "any limiting principle."

intended.[26] Having specified which proceedings are relevant—"proceedings leading to a conviction"—the Legislature did not restrict them further by limiting them only to proceedings in which guilt was determined.

Finally, the majority says that its interpretation comports with the "remedial purpose" of the WICA. But this Court has declined to rely on the remedial nature of the WICA to "place a thumb on the scale in favor of one party over the other," instead making clear that "this Court will take a reasonable-construction approach in giving meaning to the unambiguous language of the WICA."[27] It is therefore unnecessary to refer to the purpose of the WICA in this case because, as is demonstrated above, the plain language of the statute clearly supports the conclusion that "new evidence" does not include evidence presented in pretrial hearings. I decline to expand the state's waiver of sovereign immunity beyond the conditions set forth by the Legislature in the WICA.[28]

Applying the above understanding, plaintiff has not proffered "new evidence" for purposes of MCL

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[26] For similar reasons, I am not persuaded by the majority's observation that the Legislature would have used the well-established term "newly discovered evidence" rather than "new evidence" had it wanted to exclude evidence that was known at the time of trial from the definition of "new evidence" in MCL 691.1752(b). That the Legislature could have used that phrase does not impact our reading of the words it actually chose, which are much broader than the majority suggests. Rather than importing the term "newly discovered evidence" from other contexts, the Legislature explicitly defined the term "new evidence" to broadly include "the proceedings leading to plaintiff's conviction."

[27] *Sanford*, 506 Mich at 18.

[28] See *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000) (Courts may not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature.").

691.1752(b). Plaintiff joined the entrapment hearing at which Murphy offered the pertinent testimony. The evidence was therefore introduced not just in Murphy's pretrial hearing, but in plaintiff's pretrial hearing as well. For the reasons discussed above, such a pretrial proceeding is a "proceeding leading to plaintiff's conviction." By joining the entrapment hearing, plaintiff asserted a defense that, if granted, would have resulted in the dismissal of all charges. The trial court instead denied the motion and allowed the case to proceed to trial, bringing plaintiff's case closer to a conviction. The pretrial entrapment hearing was one proceeding in the series of proceedings that resulted in plaintiff's decision to plead guilty. Accordingly, because plaintiff seeks to admit the same testimony that was presented during a "proceeding leading to [his] conviction," I agree with the Court of Appeals that Murphy's testimony is not "new evidence" for purposes of the WICA.

III. CONCLUSION

I disagree with the majority's holding that "the proceedings leading to plaintiff's conviction" as used in MCL 691.1752(b) are limited to a plea hearing or trial. "Proceedings" is a broad term that encompasses all actions and events that occur in a plaintiff's criminal prosecution, which necessarily includes pretrial hearings. "Leading to" does not limit the "proceedings" to the plea hearing or trial where guilt is definitively determined. Rather, it refers to those actions or events that collectively result in the conclusion of the proceedings, i.e., plaintiff's conviction. With this understanding, plaintiff has not presented "new evidence" for purposes of MCL 691.1752(b), because the evidence he claims as "new" was presented at his pretrial entrap-

ment hearing, which was one of the proceedings leading to his conviction. Because plaintiff has not presented “new evidence,” his WICA claim fails under MCL 691.1755(1)(c). I would affirm the result reached by the Court of Appeals. Because the majority reverses that judgment, I dissent.

VIVIANO, J., concurred with ZAHRA, J.

OMER v STEEL TECHNOLOGIES, INC

Docket No. 161658. Decided July 21, 2021.

Ahmed Omer filed an action with the Worker's Compensation Board of Magistrates, seeking compensation from Steel Technologies, Inc., and New Hampshire Insurance Company for a work-related lower-back injury. After trial, the magistrate issued an opinion finding that Omer sustained an injury on January 3, 2011, arising out of and in the course of his employment and that he was totally disabled and entitled to weekly wage benefits for a closed period from April 12, 2011 through December 29, 2011. The magistrate found that Omer was a credible witness, that a physical-therapy report noting Omer's back-pain complaint was credible, and that the testimony of Dr. Nabil Suliman, an internal-medicine specialist who testified that Omer was "totally disabled," was credible. The magistrate also found credible the deposition testimony of Barbara Feldman, a vocational-rehabilitation counselor who testified that Omer would not be capable of returning to a job at which he earned his highest wages. Defendants appealed the magistrate's decision to the Michigan Compensation Appellate Commission (the MCAC), contending that the magistrate erred by concluding that Omer had proved he was disabled as a result of a work-related incident and that Omer was totally disabled during the identified period. The MCAC reversed the magistrate's decision, denying Omer's claim for wage-loss benefits on two grounds. First, the MCAC reasoned that the magistrate's finding of total disability was unsupported by competent evidence because it was based solely on a physician's—here, Dr. Suliman's—conclusory declarations of total disability, rather than on a quantification of limitations described through physical restrictions that may lead to wage loss. Second, the MCAC concluded that Omer had failed to meet his burden of establishing that he was entitled to total-disability benefits. Omer appealed by leave granted. The Court of Appeals, JANSEN and GLEICHER, JJ. (O'BRIEN, P.J., concurring), reversed the MCAC's opinion and order and remanded for entry of an order in Omer's favor. The Court reasoned that (1) there was no legal basis for the MCAC's legal conclusion that, standing alone, a treating

physician cannot provide competent evidence (or a competent opinion) regarding a claimant's disability and (2) the MCAC erred by determining that the evidence underlying the magistrate's decision was incompetent and, in turn, by holding that Omer had failed to establish that he had a "disability" as defined by MCL 418.301(4)(a) of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. 332 Mich 120 (2020). Defendants sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Under MCL 418.301(4)(a), the term "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease. In light of this definition, establishing a disability requires more than a medical diagnosis or a physician's testimony that the claimant can no longer perform their existing job duties. Even though there are no absolute requirements in proving entitlement to workers' compensation benefits and a claimant may prove entitlement to those benefits using any method the claimant chooses, given the WDCA's definition of "disability"—i.e., the necessity of establishing that there is a limitation of an employee's wage earning capacity in work suitable to his or her qualifications—claimants typically offer additional evidence about employment opportunities and suitability. In this case, Omer offered more than a minimal medical diagnosis to support a finding of disability under MCL 418.301(4)(a); specifically, the magistrate's determination was based on the credible testimony of Omer, Suliman, and Feldman and on supporting medical records establishing how Omer's injuries prevented him from performing the jobs for which he was qualified and trained. Feldman's testimony was significant and credible, and there was competent, material, and substantial evidence to support the magistrate's findings. Accordingly, the Court of Appeals correctly concluded that the MCAC should have affirmed the magistrate's finding of disability for the closed period. In its opinion, the Court of Appeals speculated about whether a magistrate's disability finding could be supported solely on medical testimony; because that speculation was not necessary to its holding, Part IV of the Court of Appeals' opinion was vacated.

Affirmed in part and vacated in part.

Alpert & Alpert (by *Joel L. Alpert*) for plaintiff.

Foster, Swift, Collins, & Smith, PC (by *Michael D. Sanders*) for defendants.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Paul D. Hudson* and *Michael C. Simoni*) for the Michigan Manufacturers Association.

Lacey & Jones LLP (by *Gerald M. Marcinkoski*) for the Michigan Self-Insurers' Association.

PER CURIAM. The defendant-employer, Steel Technologies, Inc., asks this Court to consider whether a medical professional's conclusory declaration of a claimant's total disability, without more, can provide competent, material, and substantial evidence of "disability," as defined by the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. We decline to do so because under the facts of this case, it is unnecessary to reach that issue. We instead vacate Part IV of the Court of Appeals' opinion discussing the issue,[1] but we affirm its result: the magistrate relied on competent, material, and substantial evidence to find that the plaintiff-claimant, Ahmed Omer, had established a disability and was entitled to wage-loss benefits.

The WDCA defines the term "disability" as a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." MCL 418.301(4)(a). Establishing a disability, then, requires more than a medical diagnosis or a physician's testimony that the claimant can no longer perform their existing job duties. See *Stokes v Chrysler LLC*, 481 Mich 266, 281; 750 NW2d 129 (2008). Though "there are no absolute requirements, and a claimant

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[1] *Omer v Steel Technologies, Inc*, 332 Mich App 120, 135-142; 955 NW2d 575 (2021).

may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits," *id*. at 282, the statutory definition of "disability"—i.e., the requirement of establishing that there is a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training"[2]—explains why claimants typically offer additional evidence about employment opportunities and suitability. And, contrary to the findings of the Michigan Compensation Appellate Commission (MCAC),[3] that is precisely what the claimant did in this case. The claimant offered more than a mere medical diagnosis to support a finding of a compensable disability.

The claimant suffered a workplace lower-back injury in January 2011. He aggravated the injury at work two months later and did not work from April 4, 2011 until January 2012. After a trial that featured testimony from the claimant, vocational experts, and various doctors, the magistrate ruled in the claimant's favor. He concluded that the injury arose out of and was in the course of employment, that the claimant was totally disabled, and that he was entitled to weekly wage benefits from April 12 through December 29, 2011. The magistrate cited, among other evidence: (1) a statement from the deposition testimony of the claimant's doctor, Dr. Nabil Suliman, asserting that the claimant was unable to perform his work and was "totally disabled," and (2) disability slips from the claimant's chiropractor, Dr. Mohamed Saleh, indicating that the claimant was unable to work.

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[2] MCL 418.301(4)(a).

[3] The MCAC has been replaced, in part, by the Workers' Disability Compensation Appeals Commission. Executive Reorganization Order No. 2019-13.

On appeal, the MCAC seized on the magistrate's reliance on Dr. Suliman's testimony and Dr. Saleh's disability slips to reverse the wage-loss benefit award. "[W]here a magistrate's finding of total disability is based upon [a] physician['s] conclusory declarations of total disability, rather than quantification of limitations, described through physical restrictions, which may lead to wage loss, that finding is unsupported by competent evidence." *Omer v Steel Technologies, Inc*, 2018 Mich ACO 15, p 6. But the magistrate's determination was based on more than the conclusory declarations of medical professionals. Indeed, the magistrate's opinion expressly relied on the credible testimonies of the claimant, Dr. Suliman, vocational expert Barbara Feldman, and medical records that spoke to how the claimant's injury prevented him from performing all the jobs within his qualifications and training.

We find the deposition testimony of the claimant's vocational expert particularly significant. The MCAC downplayed the significance of this testimony, noting that Feldman admitted that she did not perform a labor-market survey. But Feldman also testified that the restrictions medical professionals placed on the claimant meant he was capable of performing only sedentary work. Given that restriction, she opined that the claimant would not be capable of returning to a job at which he earned his highest wages, and she "was not able to find a job that pays his maximum pre-injury rate of pay." Indeed, Feldman's testimony traced, step-by-step, the multifactor test required to establish disability that this Court laid out in *Stokes*. *Stokes*, 481 Mich at 281-284. The magistrate deemed this expert's testimony credible, and we won't second-guess that credibility determination. The claimant's own testimony, in which he stated that he did not think he could

perform *any* job, because of the severity of pain, further supported the magistrate's total-disability finding. There is competent, material, and substantial evidence to support the magistrate's findings.[4]

The Court of Appeals' speculation about whether a magistrate's disability finding could be based exclusively on medical testimony was not necessary to its holding. Because this case does not present that question, we vacate Part IV of the Court of Appeals' opinion, though we agree with its ultimate result: the claimant's evidence—which included medical testimony, medical records, and testimony from a vocational expert and the claimant himself—satisfied the substantial-and-competent-evidence requirement and should have been affirmed by the MCAC.

Affirmed in part and vacated in part.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred.

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[4] See *Omer*, 332 Mich App at 133 (explaining that the MCAC must consider as conclusive the findings of fact made by a workers' compensation magistrate as long as those facts are supported by competent, material, and substantial evidence on the whole record).

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY v MICHIGAN ASSIGNED CLAIMS PLAN

Docket No. 160592. Argued on application for leave to appeal April 8, 2021. Decided July 26, 2021.

Esurance Property & Casualty Insurance Company filed an action in the Wayne Circuit Court against the Michigan Assigned Claims Plan (MACP) and the Michigan Automobile Insurance Placement Facility (MAIPF), seeking reimbursement from defendants for the personal protection insurance (PIP) benefits Esurance had paid to Roshaun Edwards for the injuries he sustained in a motor vehicle crash; there were no other vehicles involved in the crash. Edwards did not have no-fault insurance at the time of the accident, and he did not live with a resident relative who had no-fault insurance. At the time of the accident, the vehicle Edwards was driving was registered in Michigan and titled to Anthony Robert White II (Anthony), who also did not have no-fault insurance of his own. The vehicle was insured by Esurance under a Colorado automobile insurance policy issued to Anthony's mother, Luana Edwards-White (Luana). When Luana obtained the policy, she falsely represented that she owned the vehicle, that she lived in Colorado, and that the vehicle would be garaged in that state. Edwards sought PIP benefits from Esurance, and Esurance began paying those benefits. Edwards also applied for benefits from the MACP (as administered by the MAIPF), but the MAIPF did not assign a servicing insurer to Edwards's claim under MCL 500.3175 because Esurance had already taken responsibility for paying PIP benefits to Edwards. When Esurance eventually discovered that Luana had obtained the Colorado policy through her fraudulent misrepresentations, it obtained in the Macomb Circuit Court a default judgment against Edwards, Anthony, and Luana that rescinded the policy, declaring it void *ab initio*. Esurance then filed this equitable-subrogation claim, requesting an order requiring defendants to reimburse it for the PIP benefits it had paid to Edwards. Defendants moved for summary disposition under MCR 2.116(C)(8), arguing that there was no legal basis for the claim because the no-fault act, MCL 500.3101 *et seq*., did not contemplate reimbursement and indemnification rights in these circumstances. Esurance argued that it

could stand in Edwards's place and pursue a claim against defendants through the doctrine of equitable subrogation because Edwards could seek recovery from defendants given that Edwards had timely filed for benefits from the MACP and was not covered by a no-fault policy. The court, David J. Allen, J., granted summary disposition for defendants. Relying on the doctrine *expressio unius est exclusio alterius*, the trial court concluded that equitable subrogation was unavailable to Esurance because while the no-fault act contained some provisions that contemplated reimbursement and indemnification, none of those provisions allowed Esurance to seek reimbursement from defendants in these circumstances. Esurance appealed. In a published opinion, the Court of Appeals (METER, P.J., and O'BRIEN and SWARTZLE, JJ.) affirmed the trial court's dismissal of Esurance's complaint but on different grounds. The Court concluded that Esurance's equitable-subrogation claim failed as a matter of law for either of two reasons: (1) if the policy existed when Esurance paid the PIP benefits, Esurance's equitable-subrogation claim failed because Edwards could not have pursued benefits from defendants under MCL 500.3172(1); and (2) if the policy was void *ab initio*, then Esurance was a volunteer when it paid the benefits and could not recover its payment of them to Edwards from defendants. In so holding, the Court also rejected the trial court's application of the doctrine *expressio unius est exclusio alterius*, reasoning that the trial court had misapplied the canon when analyzing reimbursement provisions in the no-fault act and from there concluding that Esurance could not make out a claim for equitable subrogation. 330 Mich App 584 (2019). Esurance sought leave to appeal.

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

When a paying insurer has at least an arguable duty to pay benefits under the no-fault act, the insurer is simply protecting its own interests and not acting as a volunteer, and it may invoke the doctrine of equitable subrogation to recover any benefits paid erroneously. The mere existence of an insurance policy that ostensibly covers a claimant does not *ipso facto* render it a policy "applicable to the injury" for purposes of MCL 500.3172(1)(a). Instead, to determine whether there is an "applicable" policy, courts must perform an order-of-priority analysis under MCL 500.3114(1) and (4)(a) through (b).

1. Equitable subrogation is a flexible, elastic doctrine of equity that is analyzed on the case-by-case basis characteristic of equity jurisprudence. Equitable subrogation is the method by

which equity compels the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it. It is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. Under the doctrine, the subrogee acquires no greater rights than those possessed by the subrogor, and to recover, the subrogee may not be a mere volunteer. For purposes of equitable subrogation, a "volunteer" is one who intrudes into a matter that does not concern the person, or one who pays the debt of another without request when the person is not legally or morally bound to do so and has no interest to protect in making the payment. A person paying the debt is not a volunteer when the person has an interest to protect. In addition, a payment is not voluntary when made under compulsion, in ignorance of the real state of facts, or under an erroneous impression of one's legal duty. To that end, an insurance company is not a volunteer when it pays expenses on behalf of its insured pursuant to an insurance contract. Similarly, when an insurer pays a claim that another insurer may be liable for, the paying insurer is protecting its own interests and is not acting as a volunteer; under those circumstances, the paying insurer is entitled to invoke the doctrine of equitable subrogation because an insurer who has at least an arguable duty to pay is not a volunteer.

2. MCL 500.3114(1), as amended by 2002 PA 38, provided that a person who sustains an accidental bodily injury in a motor vehicle accident must look first to no-fault insurance policies in their own household for PIP benefits—i.e., to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household—before looking to other insurers for benefits. If a person injured in a motor vehicle accident is not covered by a no-fault policy in their own household, MCL 500.3114(4)(a) and (b) provided that the injured person may next claim PIP benefits from, first, the insurer of the owner or registrant of the vehicle occupied and then, second, from the insurer of the operator of the vehicle occupied. If the person is unable to collect benefits applicable to the injury through that order of priority, MCL 500.3172(1)(a) provides that the person may claim PIP benefits through the MACP. The mere existence of an insurance policy that ostensibly covers a claimant does not *ipso facto* render it a policy "applicable to the injury" for purposes of MCL 500.3172(1)(a). Instead, to determine whether there is an "applicable" policy, courts must perform an order-of-priority analysis under MCL 500.3114(1) and (4)(a) through (b).

3. MCL 500.3142, MCL 500.3148, and MCL 600.6013 incentivize insurers to pay benefits promptly and to sort out priority and reimbursement later by the potential imposition of steep penalties if an insurer does not pay promptly. To achieve that aim, the no-fault act is designed to provide sure and speedy recovery of certain economic losses that occur from motor vehicle accidents. Therefore, when there is a dispute between two insurers regarding responsibility to pay, it is preferred that one of the insurers pay the claim and sue the other in an action for equitable subrogation. Accordingly, an insurer that pays the claim for which another may be liable has an arguable duty to pay. For that reason, when an insurer does pay under those circumstances, it is simply protecting its own interests and not acting as a volunteer, and it may invoke the doctrine of equitable subrogation to recover the benefits paid erroneously; to hold otherwise would be contrary to the purpose, logic, and incentive structure of Michigan's no-fault act.

4. In this case, the Esurance policy was declared void *ab initio* after the accident. However, at the time of the accident, Edwards did not have no-fault insurance, and he was not a resident relative of someone who had a no-fault policy. As a result, Edwards was not covered by the policy issued by Esurance under MCL 500.3114(1). Esurance was also not in the order of priority under MCL 500.3114(4)(a) through (b) because the vehicle was owned by another person not insured by Esurance and the operator of the vehicle, Edwards, did not have a no-fault policy and did not live with a resident relative who had no-fault insurance. Because there was no policy "applicable to the injury" under the order-of-priority analysis, the facts as alleged in Esurance's complaint supported that Edwards had a viable claim for PIP benefits against defendants under MCL 500.3172(1)(a). Furthermore, although Esurance was not in the order of priority before the policy was rescinded, it believed it was because of Luana's misrepresentations in her insurance application. As a result, Edwards was not a volunteer when it paid the benefits because it did so under an erroneous impression of both the facts and its legal duty; to hold otherwise would frustrate the purpose, logic, and incentive structure of the no-fault act. In light of that conclusion, Esurance's equitable-subrogation claim was not precluded as a matter of law. The Court of Appeals erred by concluding that Esurance's equitable-subrogation claim failed as a matter of law because there either was a policy applicable to the injury under MCL 500.3172(1) or because Esurance's payments to Edwards were voluntary. But the Court of Appeals correctly rejected the trial court's application of the *expressio unius est*

exclusio alterius canon of statutory interpretation to the no-fault act's reimbursement provisions. Finally, given that the Court of Appeals did not address whether defendants could be sued under MCL 500.3174, remand for it to address that issue was necessary.

Reversed and remanded.

Justice CLEMENT, joined by Justice VIVIANO, dissenting, agreed with the majority that the lower courts erroneously resolved the issues presented but disagreed that it was necessary to resolve more than whether those courts correctly resolved the issues. The trial court incorrectly applied the *expressio unius* canon to conclude that Esurance could not pursue an equitable-subrogation claim because it was not one of the listed mechanisms in the no-fault act by which a no-fault insurer could recover benefits paid; the reimbursement options in the no-fault act do not exclude other theories of reimbursement. The Court of Appeals should have recognized that whether Esurance had a valid claim for equitable subrogation turned on whether Edwards would have had a claim against defendants *if* the policy issued by Esurance to Luana had been rescinded before Edwards's accident. Further contrary to the Court of Appeals' conclusion, the fact that the insurance policy was rescinded did not turn Esurance into an after-the-fact volunteer such as to defeat its subrogation claim. Justice CLEMENT would have corrected the lower courts' errors and remanded to the trial court to resume its consideration of the case in view of the corrections.

1. INSURANCE — NO-FAULT ACT — MOTOR VEHICLES — PERSONAL PROTECTION INSURANCE BENEFITS — EQUITABLE SUBROGATION — "VOLUNTEERS."

A payment made under the no-fault act is not voluntary when made under compulsion, in ignorance of the real state of facts, or under an erroneous impression of one's legal duty; when a paying insurer has at least an arguable duty to pay benefits under the no-fault act, the insurer is simply protecting its own interests and not acting as a volunteer, and it may invoke the doctrine of equitable subrogation to recover any benefits paid erroneously (MCL 500.3101 *et seq*.).

2. INSURANCE — NO-FAULT ACT — MOTOR VEHICLES — NO-FAULT POLICIES — "APPLICABLE TO THE INJURY" — ORDER-OF-PRIORITY ANALYSIS.

MCL 500.3172(1)(a) provides that a person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in Michigan may claim personal protection insurance benefits through the assigned claims plan if no personal protec-

tion insurance is applicable to the injury; the mere existence of a no-fault policy that ostensibly covers a claimant does not *ipso facto* render it a policy "applicable to the injury" for purposes of MCL 500.3172(1)(a); to determine whether there is an applicable policy, courts must perform an order-of-priority analysis under MCL 500.3114(1) and (4)(a) through (b).

Secrest Wardle (by *Nathan J. Edmonds* and *Drew W. Broaddus*) for plaintiff.

Dykema Gossett PLLC (by *Lori McAllister* and *Erin A. Sedmak*) and *Anselmi Mierzejewski Ruth & Sowle, PC* (by *Michael Phillips*) for defendants.

ZAHRA, J. Plaintiff Esurance Property & Casualty Insurance Company (Esurance) paid personal injury protection (PIP) benefits[1] to the claimant, Roshaun Edwards (Edwards), pursuant to a no-fault automobile insurance policy, issued to another person, that was later declared void *ab initio*.[2] Thereafter, Esurance filed this suit against defendants, the Michigan Assigned Claims Plan (MACP) and the Michigan Automobile Insurance Placement Facility (MAIPF), seeking reimbursement from them under a theory of equitable subrogation for the PIP benefits that Esurance had paid to Edwards under Michigan's no-fault act, MCL 500.3101 *et seq*., before the policy was rescinded. We hold that an insurer who erroneously pays PIP benefits may be reimbursed under a theory of equitable subro-

[1] "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute. MCL 500.3142. However, lawyers and others call these benefits PIP benefits to distinguish them from property protection insurance benefits." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66 n 4; 737 NW2d 332 (2007).

[2] "Null from the beginning, as from the first moment when a contract is entered into." *Black's Law Dictionary* (11th ed), p 1885. The circuit court found that the policy was obtained through fraud and by default judgment adjudged it void *ab initio*.

gation when the insurer is not in the order of priority and the payments are made pursuant to its arguable duty to pay to protect its own interests. On the facts alleged in this case, Esurance can stand in Edwards's shoes and pursue a claim for equitable subrogation because it was not in the order of priority and also was not a "mere volunteer"[3] under Michigan law when it paid Edwards's PIP benefits. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

On January 10, 2016, Edwards was seriously injured when he crashed a red 2015 Dodge Challenger into a telephone pole in the city of Detroit. At the time, Edwards did not have no-fault insurance of his own, and he did not live with a resident relative who had no-fault insurance. When the accident occurred, the vehicle was registered in Michigan and titled to Anthony Robert White II (Anthony). Anthony likewise did not have no-fault insurance of his own; however, his mother, Luana Edwards-White (Luana), had procured a Colorado automobile insurance policy from Esurance on the basis of her representations that she owned the vehicle, that she lived in Colorado, and that the vehicle would be garaged there.

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[3] The term "mere volunteer" comes from the law of equitable subrogation. As will be explained more fully later in this opinion, a party cannot seek equitable subrogation for a voluntary action, where *voluntary* means *without an interest to protect*. See *DAIIE v Detroit Mut Auto Ins Co*, 337 Mich 50, 53-54; 59 NW2d 80 (1953) (quotation marks and citation omitted; emphasis added).

Esurance began paying PIP benefits in response to Edwards's claims.[4] Edwards also applied for benefits from defendants,[5] but a servicing insurer was not assigned to his claim under MCL 500.3175 because Esurance had already taken responsibility for paying Edwards's PIP benefits.

Esurance eventually discovered that Luana had obtained the Colorado policy through her fraudulent misrepresentations. In reality, Luana was neither the registrant nor owner of the vehicle, which had been garaged in Michigan and not Colorado. Esurance subsequently filed an action in the Macomb Circuit Court to rescind the policy, naming Edwards, Luana, and Anthony as defendants. In a March 20, 2017 order, the circuit court entered a default judgment that rescinded the policy, voiding it *ab initio*.

Esurance subsequently filed the instant suit in the Wayne Circuit Court, asserting a claim of equitable subrogation and requesting an order that would require defendants to reimburse it for the PIP benefits that it had paid to Edwards. Defendants moved for summary disposition under MCR 2.116(C)(8) (failure to state claim on which relief can be granted), arguing that there was no legal basis for an equitable-subrogation claim against them.[6] Defendants argued that the no-fault act contemplates rights of reimburse-

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[4] At the time Esurance paid these PIP benefits, it believed that it was the highest-priority insurer.

[5] Specifically from the MACP, as administered by the MAIPF. See MCL 500.3171(2).

[6] Given that this case comes to us on appeal from a (C)(8) motion, whether the MACP is a proper party is not obvious, see *Mich Head & Spine Institute, PC v Mich Assigned Claims Plan*, 331 Mich App 262, 265 n 1; 951 NW2d 731 (2019), but we need not decide this question to resolve this case.

ment and indemnification in a variety of circumstances, but not in this one. In response, Esurance argued that the lack of statutory authority for its claim was not dispositive given that Edwards could have sought recovery from defendants because he had timely applied for benefits from defendants and had no applicable no-fault policy; moreover, because Esurance had paid Edwards's medical bills, it could pursue, standing in Edwards's shoes, a claim against defendants for reimbursement under the doctrine of equitable subrogation.[7] The circuit court, relying on the statutory canon of interpretation *expressio unius est exclusio alterius*,[8] ruled that equitable subrogation was unavailable to Esurance because the no-fault act contains some provisions that explicitly contemplate reimbursement and indemnification[9] but none that contemplates Esurance's requested reimbursement from defendants in these circumstances.

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[7] See *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521-522; 475 NW2d 294 (1991) ("Equitable subrogation has been described as a 'legal fiction' that permits one party to stand in the shoes of another.") (opinion by BRICKLEY, J.) (citation omitted).

[8] *Dave's Place, Inc v Liquor Control Comm*, 277 Mich 551, 555; 269 NW 594 (1936) (describing the canon as the "general principle of interpretation that the mention of one thing implies the exclusion of another thing") (opinion by BUSHNELL, J.) (quotation marks and citation omitted).

[9] See, e.g., MCL 500.3114(8) (allowing a no-fault insurer to receive partial recoupment from other no-fault insurers standing in equal priority); MCL 500.3116 (providing rights of reimbursement and indemnity to no-fault insurers for cases in which a claimant recovers on a tort claim); MCL 500.3146 (setting a limitations period for claims for reimbursement or indemnity brought under MCL 500.3116); MCL 500.3175(2) (allowing insurers to whom a claim is assigned by the MAIPF to seek reimbursement and indemnity from third parties); MCL 500.3177(1) (creating a right for a no-fault insurer to seek reimbursement from an owner of an uninsured vehicle involved in an accident).

Esurance appealed as of right in the Court of Appeals, which affirmed the circuit court's grant of summary disposition to defendants, albeit on the alternate ground that Esurance could not make out a claim of equitable subrogation.[10] The Court of Appeals succinctly summarized its holding:

> In the end, there are two ways to look at the problem. Either the equitable-subrogation claim must be analyzed under the circumstances that existed when benefits were paid, which was before the policy was rescinded, or it must be looked at through the lens that the policy never existed in the first place. If the policy exists, [Esurance's] claim of equitable subrogation fails as a matter of law because Edwards could not have pursued benefits from defendants under MCL 500.3172(1). If the policy never existed, then

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[10] *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 330 Mich App 584, 589; 950 NW2d 528 (2019) (*Esurance*). The Court of Appeals very briefly addressed, and disagreed with, the circuit court's application of the *expressio unius est exclusio alterius* canon of statutory interpretation, holding that it had misapplied the canon to conclude that Esurance could not make out a claim for equitable subrogation. *Id*. at 590-591. "The maxim 'has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.' " *Id*. at 591, quoting *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003). And because various reimbursement provisions are scattered throughout the no-fault act and involve distinct factual scenarios, the Court of Appeals reasoned that it could not "presume that those statutes are necessarily exclusive of any and all other similar remedies in all factual scenarios. Doing so would presume that the Legislature deliberately chose not to include a right to equitable subrogation by a no-fault insurer against defendants, which is unwarranted from the text of the [no-fault act]." *Esurance*, 330 Mich App at 591. The Court of Appeals' analysis on that issue was correct. See *Bronner v Detroit*, 507 Mich 158, 173-176; 968 NW2d 310 (2021) (holding that the Court of Appeals misapplied the *expressio unius* canon in construing provisions of the Insurance Code that permit no-fault insurers to seek reimbursement for payment of some benefits as implicitly excluding any other reimbursement mechanism).

> [Esurance] was a mere volunteer when it paid $571,000 in PIP benefits. In either case, [Esurance's] equitable-subrogation claim fails as a matter of law.[11]

In other words, according to the Court of Appeals, Esurance's equitable-subrogation claim fails regardless of the status of the insurance policy's existence.

Esurance sought leave to appeal in this Court, and in lieu of granting leave, we ordered oral argument on the application.[12]

II. STANDARD OF REVIEW

The trial court granted defendants summary disposition under MCR 2.116(C)(8). As this Court recently explained:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery.[13]

We review de novo a trial court's decision on a motion for summary disposition.[14] A question of statutory interpretation is a question of law that this Court also reviews de novo.[15] "[C]ourts must interpret stat-

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[11] *Esurance*, 330 Mich App at 595.

[12] *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 506 Mich 913 (2020).

[13] *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 685 (2019) (citations and emphasis omitted).

[14] *Kendzierski v Macomb Co*, 503 Mich 296, 302; 931 NW2d 604 (2019).

[15] *Wigfall v Detroit*, 504 Mich 330, 337; 934 NW2d 760 (2019).

utes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."[16] "A statute is rendered nugatory when an interpretation fails to give it meaning or effect."[17] Finally, this Court reviews de novo the application of a remedial, equitable doctrine such as equitable subrogation.[18]

III. ANALYSIS

Our analysis proceeds in four parts. First, we state the principles that underpin a claim for equitable subrogation. Second, we lay out the relevant provisions of the no-fault act. Third, we establish that Esurance is not asserting greater rights than Edwards possesses; that is, there is a legal basis upon which Esurance can press its claim for equitable relief, grounded in an order-of-priority analysis. Fourth and finally, we analyze the interplay among rescission, Esurance's alleged volunteer status, and its claim for equitable subrogation—namely, whether rescission of the policy renders Esurance a volunteer and prevents Esurance from pursuing its equitable-subrogation claim.

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[16] *O'Connell v Dir of Elections*, 316 Mich App 91, 98; 891 NW2d 240 (2016) (quotation marks and citation omitted).

[17] *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007).

[18] See *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013) (applying this principle to the equitable doctrine of laches).

A. PRINCIPLES THAT UNDERPIN AN EQUITABLE-SUBROGATION CLAIM

"Equitable subrogation is a flexible, elastic doctrine of equity."[19] Thus, "[i]ts application 'should and must proceed on the case-by-case analysis characteristic of equity jurisprudence.' "[20] Equitable subrogation is the "mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it."[21] Equitable subrogation has been invoked successfully in a variety of circumstances,[22] but "the mere fact that [it] has not been previously invoked in a particular situation is not a prima facie bar to its applicability."[23] This Court has explained that equitable subrogation "is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other."[24] The doctrine has two prongs: "the subrogee acquires no

[19] *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999), citing *Atlanta Int'l Ins Co v Bell*, 438 Mich at 521 (opinion by BRICKLEY, J.).

[20] *Hartford Accident & Indemnity Co*, 461 Mich at 215, quoting *Atlanta Int'l Ins Co*, 438 Mich at 516 n 1 (opinion by BRICKLEY, J.).

[21] *Smith v Sprague*, 244 Mich 577, 580; 222 NW 207 (1928) (quotation marks and citations omitted).

[22] *Esurance*, 330 Mich App at 590 (collecting cases).

[23] *Hartford*, 461 Mich at 216 (quotation marks and citation omitted).

[24] *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 59; 658 NW2d 460 (2003), quoting *Commercial Union Ins Co v Med Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion by WILLIAMS, C.J.). See also *Machined Parts Corp v Schneider*, 289 Mich 567, 574; 286 NW 831 (1939) ("The doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect.") (quotation marks and citations omitted).

greater rights than those possessed by the subrogor, and . . . the subrogee may not be a 'mere volunteer.' "[25]

This Court has defined a "volunteer" as "one who intrudes himself into a matter which does not concern him, or one who pays the debt of another without request, when he is not legally or morally bound to do so, and when he has no interest to protect in making such payment."[26] But "[w]here the person paying the debt has an interest to protect, he is not a stranger. . . . A payment is not voluntary when made *under compulsion, . . . in ignorance of the real state of facts, or under an erroneous impression of one's legal duty*."[27] When an insurer pays expenses on behalf of its insured pursuant to an insurance contract, it is not doing so as a volunteer.[28] And when an insurer pays a claim that another insurer may be liable for, it is "protecting its own interests and not acting as a volunteer," and in that instance, the insurer is "entitled to invoke the doctrine of equitable subrogation."[29] Logically, then, an insurer who has "at least an arguable duty to pay" is "clearly not a volunteer."[30]

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[25] *Auto-Owners Ins Co*, 468 Mich at 59, quoting *Commercial Union Ins Co*, 426 Mich at 117 (opinion by WILLIAMS, C.J.).

[26] *DAIIE*, 337 Mich at 53-54 (quotation marks and citations omitted).

[27] *Id*. at 54 (quotation marks, citation, and paragraph structure omitted; emphasis added).

[28] *Auto-Owners Ins Co*, 468 Mich at 59, citing *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 132; 485 NW2d 695 (1992). See also *DAIIE*, 337 Mich at 54-55.

[29] *Auto-Owners Ins Co*, 468 Mich at 60; see also *Auto Club Ins Ass'n*, 440 Mich at 132-133.

[30] See *Maryland Cas Co v Transamerica Ins Corp of America*, 199 Mich App 561, 565; 502 NW2d 749 (1993). See also *Fed Ins Co, an Indiana Corp v Hartford Steam Boiler Inspection & Ins Co*, 415 F3d 487, 494-495 (CA 6, 2005) (applying Michigan law and holding that the plaintiff was "not a volunteer, and its claim for equitable subrogation

B. RELEVANT PROVISIONS OF THE NO-FAULT ACT

At the time of the accident, MCL 500.3114 provided, in relevant part:

> (1) . . . [A] personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .
>
> * * *
>
> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied.[31]

MCL 500.3172(1) provides, in relevant part:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may claim personal protection insurance benefits through the assigned claims plan if any of the following apply:

may proceed" because, at the time each payment was made, the plaintiff was "ignorant of the 'real state of facts' " and " 'under an erroneous impression' that it had a legal duty to compensate" another party under an insurance policy provision).

[31] MCL 500.3114(1) and (4)(a) through (b), as amended by 2002 PA 38, effective March 7, 2002.

(a) No personal protection insurance is applicable to the injury.[32]

C. BECAUSE ESURANCE WAS NOT IN THE ORDER OF PRIORITY, IT HAD NO ACTUAL DUTY TO PAY PIP BENEFITS

The Court of Appeals erred when it determined that MCL 500.3172(1)(a) prevents Esurance from pursuing an equitable-subrogation claim against defendants. In an action sounding in equitable subrogation, Esurance, as the subrogee, possesses no greater rights than those possessed by Edwards, the subrogor.[33] Accordingly, we determine whether, on the facts alleged, Edwards could have claimed benefits from defendants; if he could have, then Esurance has a viable equitable-subrogation claim. In light of our order-of-priority analysis under MCL 500.3114, we conclude that Edwards did have a claim for those benefits from defendants, so Esurance's equitable-subrogation claim does not fail as a matter of law.

MCL 500.3172(1)(a) provides that a claimant "may claim [PIP] benefits through the [MACP] if . . . [n]o personal protection insurance is applicable to the injury."[34] The Court of Appeals reasoned that Esurance

[32] MCL 500.3172(1)(a). The version of this statute in effect at the time of the accident was MCL 500.3172(1)(a), as amended by 2012 PA 204, effective September, 1, 2012. The former version of the statute was substantively the same as the current version, and any minor differences between the 2012 version and the current version are neither material nor relevant to this case. All references to MCL 500.3172 in this opinion are to the current version of the statute. See 2019 PA 21.

[33] "Equity follows the law." See 1 Callaghan's Michigan Pleading & Practice (2d ed), § 8:35, p 496.

[34] MCL 500.3172(1)(a) (paragraph structure omitted). Esurance alleged in its complaint that "Edwards, at the time of the accident, did not have insurance of his own and did not live with a resident relative who had insurance"; that "at the time of the accident, the 2015 Dodge

was claiming greater rights in its action for equitable subrogation than Edwards could himself have claimed because "when Edwards applied for benefits from the MAIPF, there *was* an applicable no-fault insurer: [Esurance]."[35] Thus, "because Edwards had no claim against defendants, there is no claim for [Esurance] to enforce against defendants through equitable subrogation."[36] But this reasoning is flawed. The mere existence of an insurance policy that ostensibly covers a claimant does not *ipso facto* render it a policy "applicable to the injury" under MCL 500.3172(1)(a). To know if there is such an "applicable" policy, courts must perform an order-of-priority analysis under MCL 500.3114(1) and (4)(a) through (b).

Based on the allegations in its complaint, Esurance's policy was not "applicable to the injury" for purposes of MCL 500.3172(1)(a) because Esurance, whose policy was declared void *ab initio* after the accident,[37] was not

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Challenger was solely owned and registered to [Anthony]"; that "there is no applicable automobile insurance for [Edwards's] bodily injuries as a result of" the car accident; and that "[u]pon information and belief, there are no other priority insurers other than MACP/MAIPF." These assertions—which must be accepted as true for the purposes of a motion for summary disposition under MCR 2.116(C)(8)—are sufficient to allege that Edwards, and thus Esurance, had a claim against defendants under MCL 500.3172(1)(a).

[35] *Esurance*, 330 Mich App at 592.

[36] *Id*. at 593.

[37] *Bazzi v Sentinel Ins Co*, 502 Mich 390, 409; 919 NW2d 20 (2018). See also *id*. ("[R]escission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made."), citing *Wall v Zynda*, 283 Mich 260, 264-265; 278 NW 66 (1938); and *id*. at 409 n 10 ("[R]escission abrogates a contract completely. All former contract rights are annulled, and it is as if no contract had been made. Thus, to rescind a contract is not merely to terminate it, but to undo it from the beginning, and the effect of rescission is not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the

in the order of priority stated in MCL 500.3114(1) and (4)(a) through (b). MCL 500.3114(1) establishes a general rule that a person who sustains an accidental bodily injury in a motor vehicle accident must look first to no-fault insurance policies in his or her own household for no-fault benefits before looking to other insurers for benefits.[38] Moreover, it is persons who are insured against loss, not vehicles; that is, no-fault coverage is tied to persons, not vehicles.[39] At the time of the accident, Edwards did not have no-fault insurance, and he also was not a resident relative of someone who did, which means that he was not covered by the policy issued by Esurance under MCL 500.3114(1). We next turn to MCL 500.3114(4)(a), which provides that Edwards could recover from "[t]he insurer of *the owner or registrant* of the vehicle occupied" in the accident.[40] In this case, the vehicle was in fact owned by Anthony, regardless of the policy's rescission, and Esurance was not his insurer, which means Esurance again was not in the order of priority. Finally, we turn to MCL 500.3114(4)(b), which provides that Edwards could recover from "[t]he insurer of *the operator* of the vehicle

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contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission involves a restoration of the status quo."), quoting 5A Michigan Civil Jurisprudence, Contracts, § 215, pp 439-440.

[38] *Mich Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 630; 455 NW2d 352 (1990). Accord *Underhill v Safeco Ins Co*, 407 Mich 175, 191; 284 NW2d 463 (1979) ("It is our understanding of the legislative purpose that it was intended that injured persons who are insured or whose family member is insured for no-fault benefits would have primary resort to their own insurer.").

[39] *Lee v DAIIE*, 412 Mich 505, 509; 315 NW2d 413 (1982) ("[I]t is the policy of the no-fault act that persons, not motor vehicles, are insured against loss.").

[40] MCL 500.3114(4)(a) (emphasis added).

occupied" in the accident.[41] Again, the operator of the vehicle was Edwards, who, at the time, did not have no-fault insurance of his own and did not live with a resident relative who had no-fault insurance. Thus, Esurance's complaint supports the conclusion that Edwards had a viable claim against defendants under MCL 500.3172(1)(a) because there was no policy "applicable to the injury" under the foregoing order-of-priority analysis. As a result, Esurance's equitable-subrogation claim, as pled by Esurance, can proceed.

D. BECAUSE ESURANCE WAS NOT A VOLUNTEER, IT CAN PURSUE A CLAIM FOR EQUITABLE SUBROGATION

The Court of Appeals correctly recognized that when an insurance policy has been rescinded, it is void *ab initio*, which means it is as though the policy never existed; consequently, the parties are "restore[d] . . . to the relative positions that they would have occupied if the contract had never been made."[42] Based on the allegations in the pleadings, Esurance was not in the order of priority before the policy was rescinded, but it believed that it was because of Luana's misrepresentations in her insurance application. Therefore, Esurance paid PIP benefits to Edwards "under an erroneous impression of [its] legal duty."[43] Accordingly, the issue

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[41] MCL 500.3114(4)(b) (emphasis added).

[42] *Bazzi*, 502 Mich at 409. See also note 37 of this opinion.

[43] *DAIIE*, 337 Mich at 54; *Maryland Cas Co*, 199 Mich App at 564-565; *Fed Ins Co, an Indiana Corp*, 415 F3d at 494. In addition, a similar rule has been stated with approval in 16 Couch, Insurance, 3d, § 223:27, pp 58-59 ("For purposes of determining insurer's subrogation rights, insurance payment is not voluntary if it is made with reasonable or good-faith belief in obligation or personal interest in making that payment. This standard is met when an insurer has acted in good faith to discharge a disputed obligation, even if it is ultimately determined that its insurance policy did not apply.").

here is simply whether Esurance's claim for equitable subrogation is precluded as a matter of law given that it promptly, albeit erroneously, paid PIP benefits to Edwards as the no-fault act requires. Esurance is not so precluded; that holding would defeat the purpose of equitable subrogation,[44] and it would frustrate the no-fault act's purpose vis-à-vis the timing of payments for benefits and the expedited handling of disputes.

It is helpful to contextualize this dispute in light of both the purpose of the no-fault act and the incentive structure that it puts in place for insurers like Esurance to pay a claimant's PIP benefits in a timely fashion. The no-fault act is "a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents."[45] For that reason, "whenever a priority question arises between two insurers, the preferred method of resolution is for one of the insurers to pay the claim and sue the other in an action of [equitable] subrogation."[46] Accordingly, an insurer that pays a claim for which another *may* be liable has "an arguable duty" to pay.[47] Therefore, when an insurer

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[44] Equitable subrogation is the "mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it." *Smith*, 244 Mich at 580 (quotation marks and citations omitted).

[45] *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 240; 293 NW2d 594 (1980). Accord *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 647; 344 NW2d 773 (1984) (LEVIN, J., for reversal) (explaining that the no-fault act "provid[es] assured, adequate and prompt recovery for certain economic losses arising from motor vehicle accidents") (quotation marks and citation omitted).

[46] *Allstate Ins Co v Citizens Ins Co of America*, 118 Mich App 594, 603-604; 325 NW2d 505 (1982), citing *Farmers Ins Group v Progressive Cas Ins Co*, 84 Mich App 474, 484; 269 NW2d 647 (1978).

[47] *Maryland Cas Co*, 199 Mich App at 564-565.

does pay under those circumstances, it is merely "protecting its own interests and not acting as a volunteer," which "entitle[s] [it] to invoke the doctrine of equitable subrogation . . . ."[48] The notion that an insurer with an arguable duty to pay PIP benefits must do so promptly to protect its own interests, and that its doing so does *not* make it a volunteer, stems largely from the operation of three specific statutes, two of which are part of the no-fault act.[49] These statutes strongly incentivize insurers like Esurance to adhere to the no-fault act's "pay promptly, litigate later" logic.

MCL 500.3142[50] specifies that PIP benefits "are payable as loss accrues" and "are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained."[51] The 30-day window also applies to parts of claims supported by reasonable proof, and in addition, an insurer has 30 days to pay PIP benefits on "any part of the remainder of the claim that is later supported by reasonable proof . . . ."[52] "An overdue payment bears simple interest at the rate of 12% per annum."[53] Further, MCL 600.6013 authorizes levying statutory interest on judgments "rendered on a written instru-

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[48] *Auto-Owners Ins Co*, 468 Mich at 60; see also *Auto Club Ins Ass'n*, 440 Mich at 132-133.

[49] MCL 500.3142 and MCL 500.3148 are part of the no-fault act, and the third, MCL 600.6013, is part of the Revised Judicature Act, MCL 600.101 *et seq*.

[50] MCL 500.3142 was amended by 2019 PA 21, effective June 11, 2019. The amendment did not substantively change the relevant subsections, and all references in this opinion to MCL 500.3142 are to the current version of the statute.

[51] MCL 500.3142(1) and (2). See also *Auto Club Ins Ass'n*, 440 Mich at 133.

[52] MCL 500.3142(2).

[53] MCL 500.3142(4).

ment evidencing indebtedness with a specified interest rate[.]"[54] That rate "shall not exceed 13% per year compounded annually."[55] Finally, MCL 500.3148 provides for the assessment of attorney fees "if the court finds that a no-fault insurer has unreasonably delayed in making benefit payments."[56] "[W]hen the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits."[57] "A dispute of priority among insurers will not excuse the delay in making timely payment."[58]

What emerges from these statutes is an axiom of both no-fault insurance law and practice: insurers like Esurance must pay PIP benefits to claimants promptly and sort out priority and reimbursement issues later. That axiom is actualized by the very real possibility that steep penalties will be assessed against an insurer that drags its feet in paying PIP benefits to claimants.[59] Thus, the purpose, logic, and incentive structure of Michigan's no-fault regime all run contrary to the conclusion that Esurance was acting as a volunteer when it promptly complied with the no-fault act's various payment-incentivizing provisions while at the same time doing so "in ignorance of the real state of facts" and while laboring "under an erroneous impres-

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[54] MCL 600.6013(7). See also *Auto Club Ins Ass'n*, 440 Mich at 133.

[55] MCL 600.6013(7).

[56] *Auto Club Ins Ass'n*, 440 Mich at 133; MCL 500.3148(1).

[57] *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 737; 650 NW2d 129 (2002), overruled on other grounds by *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017).

[58] *Bloemsma v Auto Club Ins Co*, 174 Mich App 692, 697; 436 NW2d 442 (1989).

[59] See *Univ of Mich Regents*, 250 Mich App at 737; *Bloemsma*, 174 Mich App at 697.

sion of [its] legal duty."[60] Under these circumstances, Esurance had "an arguable duty" to pay Edwards's claim because Luana had represented that she owned the crashed vehicle, which, if true, would have rendered Esurance the highest-priority insurer under MCL 500.3114.[61] But because Esurance was not in the order of priority, and it was operating under a mistaken understanding of both the facts and its legal duties, Esurance's payments to Edwards were properly understood to be nonvoluntary, and equitable subrogation is thus available to it as a remedy.

IV. CONCLUSION

The Court of Appeals observed that the question of whether defendants can be sued under MCL 500.3174 "is not relevant if there is no possible claim to bring against them in the first place."[62] And since the Court of Appeals held that Esurance could not pursue its equitable-subrogation claim against defendants, it concluded that MCL 500.3174 was ultimately not relevant and that it did not need "to address the question of who, exactly, may be sued under that statute."[63] But because we have determined that Esurance does have a viable claim against defendants, the question of who may be sued under MCL 500.3174 is relevant.

Accordingly, we reverse the Court of Appeals, and on remand, the Court of Appeals shall consider—in addition to any other issues it deems relevant in light of this opinion—whether defendants can be sued under MCL 500.3174. If necessary to the proper resolution of

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[60] *DAIIE*, 337 Mich at 54 (quotation marks and citation omitted).

[61] *Maryland Cas Co*, 199 Mich App at 564-565.

[62] *Esurance*, 330 Mich App at 593 n 4.

[63] *Id*.

this case, the Court of Appeals may remand to the trial court. We do not retain jurisdiction.

MCCORMACK, C.J., and BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with ZAHRA, J.

CLEMENT, J. (*dissenting*). Esurance Property & Casualty Insurance Company issued a no-fault insurance policy to Luana Edwards-White. Later, Roshaun Edwards was injured while operating the insured vehicle, and Esurance paid personal protection insurance (PIP) benefits to Roshaun. Eventually, Esurance filed a successful rescission action against Luana, rescinding the no-fault policy it had issued to her. Seeking to recover the PIP benefits it had paid, Esurance then sued the Michigan Assigned Claims Plan (MACP), theorizing that it was equitably subrogated to the claim Roshaun *would* have had against the MACP if the policy issued to Luana had been rescinded before Roshaun's accident. The trial court disagreed, and the Court of Appeals affirmed.[1] In my view, this Court need not do more than resolve whether those courts correctly resolved the issues presented. I agree with the rest of the Court that the lower courts did not correctly resolve the issues presented, but I believe the majority reaches issues we need not address. I would simply hold that the rationales the lower courts adopted for dismissing Esurance's subrogation claim were incorrect and remand to the trial court to resume its consideration of the case from the point it left off when it (erroneously) granted summary disposition to the MACP.

The trial court's rationale for granting summary disposition to the MACP was the negative-implication

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[1] *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 330 Mich App 584; 950 NW2d 528 (2019).

canon *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. The court held that Michigan's no-fault laws provide mechanisms by which a no-fault insurer can recover PIP benefits paid and, by negative implication, that these are the exclusive mechanisms for no-fault insurers to recover PIP benefits paid. Because an equitable-subrogation action is not one of the listed mechanisms in the no-fault act,[2] the trial court concluded that Esurance could not maintain this action. The Court of Appeals correctly rejected this argument, stating, "[I]t is a misapplication of the *expressio unius* maxim to conclude that the Legislature must have intended to exclude the type of suit brought by plaintiff because such action is not specified in the no-fault act." *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 330 Mich App 584, 591; 950 NW2d 528 (2019). This Court recently agreed, holding that "we do not believe these [reimbursement] options can be construed as 'an expression of all that shares in the grant' of avenues for reimbursement" allowed by the no-fault law. *Bronner v Detroit*, 507 Mich 158, 173; 968 NW2d 310 (2021).

However, the Court of Appeals affirmed the trial court, holding that it had reached the right result for the wrong reasons. The Court of Appeals reasoned that, at the time Esurance was paying PIP benefits to Edwards, Edwards had no claim against the MACP, precisely because the insurance policy Esurance had issued to Luana existed. "[W]hen Edwards applied for [an assigned claim], there was an applicable no-fault insurer: plaintiff. Thus, Edwards had no right to [an assigned claim] because none of the four avenues for making a[n assigned claim] under MCL 500.3172 was open to him." *Esurance*, 330 Mich App at 592 (empha-

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[2] MCL 500.3101 *et seq*.

sis omitted). On this theory, Edwards had no claim against the MACP to which Esurance could be subrogated.

This reasoning denies the equitable nature of both rescission and subrogation. As the majority notes, subrogation is a "flexible and elastic equitable doctrine" "that permits one party to stand in the shoes of another." *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521-522; 475 NW2d 294 (1991) (opinion by BRICKLEY, J.). But rescission itself is also an equitable remedy. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982). It imposes some degree of revisionist history—a legal fiction—in the name of fairness:

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning ; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and *restore the parties to the relative positions which they would have occupied if no such contract had ever been made*. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while *the idea of rescission involves the additional and distinguishing element of a restoration of the status quo*. [*Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938) (quotation marks and citation omitted; emphasis added).]

The inquiry does not ask what Roshaun's options were on the day he filed a claim for PIP benefits. To "restore the parties to the relative positions which they would have occupied if no . . . contract had ever been made," *id.*, we ask what Roshaun's options *should have been* on the day he filed a claim for PIP benefits—what he could have done *if* the policy Esurance issued to Luana

had been rescinded before Roshaun's accident. If Roshaun *should* have had a claim against the MACP for PIP benefits had Esurance never issued any policy to Luana, then Esurance could potentially be subrogated to that claim.[3]

The Court of Appeals held in the alternative that Esurance's successful rescission of the policy it had issued to Luana turned it into a volunteer—precluding subrogation relief. Because Esurance successfully rescinded the policy it had issued to Luana, the PIP payments it made to Roshaun as a result of the policy were to be construed, ex post facto, as voluntary payments made to someone with whom Esurance had no contractual relationship and to whom it owed no legal responsibilities.

> [I]f the claim for equitable subrogation proceeds under the premise that the policy never existed, then plaintiff had no obligation to pay PIP benefits on [Roshaun's] behalf. Without a policy, plaintiff would have paid benefits not to its insured, but to an individual with whom it had no relationship. Without any legal or equitable duty to pay PIP benefits, plaintiff is a mere volunteer—one who accidentally paid nearly $600,000 in PIP benefits. [*Esurance*, 330 Mich App at 595.]

This reasoning once again frustrates the equitable character of both rescission and subrogation. As noted, rescission is revisionist history in the name of fairness—a legal fiction. The fact that Esurance successfully rescinded the policy it issued to Luana does not turn it into a volunteer such that subrogation relief

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[3] As noted by the majority, Roshaun "also applied for benefits from defendants," satisfying MCL 500.3174. If he had not, this analysis might well be different—I do not mean to suggest that the equitable nature of rescission can construct, via a legal fiction, notice owed to a third party which was not as a matter of historical fact actually provided.

is precluded. To retroactively construe Esurance's PIP payments as "voluntary" because the parties are being treated as though the policy never existed would be unjust—at the time the PIP payments were made, Esurance did not yet know the policy did not exist and therefore may have made the payment under a reasonable but erroneous impression of its legal duty. "A payment is not voluntary when made . . . in ignorance of the real state of facts, or under an erroneous impression of one's legal duty." *Detroit Auto Inter-Ins Exch v Detroit Mut Auto Ins Co*, 337 Mich 50, 54; 59 NW2d 80 (1953) (quotation marks and citation omitted).[4] When "the real state of facts" is a legally constructed one—i.e., that the policy is rescinded and thus the parties are to be treated as though the policy had never existed—a payment made in ignorance of that subsequent rescission cannot be held against the subrogor to turn it into a volunteer.

In short, then, I would hold that: (1) the trial court's *expressio unius* holding was erroneous, (2) whether Roshaun had a claim against defendants to which Esurance can be subrogated turns on whether Roshaun *would have had* a claim against defendants *if* the policy Esurance issued to Luana had been rescinded before Roshaun's accident, and (3) rescission of the policy Esurance issued to Luana does not turn Esurance into an after-the-fact "volunteer" such as to defeat this subrogation action. Having made these corrections, I would remand the case to the trial court

[4] Of course, neither ignorance of the true facts nor an erroneous impression of one's legal duty is automatic insulation against being a volunteer. A party who *happens* to have been ignorant of the true facts could, presumably, render itself a volunteer for some other reason, and in similar fashion, a party whose erroneous impression of its legal duties is *unreasonable* could still be a volunteer.

for it to resume its consideration of the matter from the point the proceedings ended there in light of these corrections.

VIVIANO, J., concurred with CLEMENT, J.

PEOPLE v BETTS

Docket No. 148981. Argued October 7, 2020 (Calendar No. 1). Decided July 27, 2021.

Paul J. Betts, Jr., entered a no-contest plea in the Muskegon Circuit Court, William C. Marietti, J., to violating the registration requirements in MCL 28.729(1)(a) of Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., as amended by 2011 PA 17 and 18 (the 2011 SORA), conditional on his ability to challenge on appeal the constitutionality of the retroactive application of the 2011 SORA. Defendant pleaded guilty in 1993 to second-degree criminal sexual conduct (CSC-II), MCL 750.520c. The trial court sentenced defendant to 5 to 15 years' imprisonment. Two years later, SORA took effect. After defendant's successful completion of parole, defendant failed to comply with SORA requirements. Specifically, in 2012, defendant failed to report his change of residence, his e-mail address, and his purchase of a vehicle within 3 days, contrary to MCL 28.725(1)(a), (f), and (g), as amended by 2011 PA 17. The prosecution charged defendant with violating SORA's registration requirements, MCL 28.729(1)(a). Defendant moved to dismiss the charge, arguing that the retroactive application of the 2011 SORA requirements violated the constitutional prohibitions on ex post facto laws. The trial court denied this motion. Defendant ultimately entered a no-contest plea, conditional on his ability to challenge on appeal the constitutionality of the retroactive application of the 2011 SORA. The trial court sentenced defendant to 36 months' probation, with 12 months' jail time, but suspended imposition of that sentence during the pendency of defendant's appeal. Defendant sought leave to appeal in the Court of Appeals, and in an unpublished order entered on February 27, 2014 (Docket No. 319642), the Court of Appeals, K. F. KELLY, P.J., and RIORDAN, J. (STEPHENS, J., dissenting), denied defendant's application for lack of merit in the grounds presented. Defendant sought leave to appeal in the Supreme Court, and after a period of abeyance for the resolution of related cases, the Supreme Court ordered oral argument on the application. 502 Mich 880 (2018). Following oral argument, the Supreme Court granted defendant's application for leave to appeal and directed further oral argument. 504 Mich

893 (2019). The Legislature subsequently enacted a series of amendments of SORA, effective March 24, 2021, and therefore the Supreme Court issued an order directing the parties to provide supplemental briefing to address the effect, if any, of the new legislation on the case. 507 Mich 864 (2021).

In an opinion by Justice CLEMENT, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CAVANAGH, the Supreme Court *held*:

Michigan's Sex Offenders Registration Act, MCL 28.721 *et seq*., as amended by 2011 PA 17 and 18, when applied to registrants whose criminal acts predated the enactment of the 2011 amendments, violates the constitutional prohibition on ex post facto laws, US Const, art I, § 10; Const 1963, art 1, § 10.

1. The Michigan Legislature enacted SORA in 1994; this first version of SORA created a confidential database accessible only to law enforcement. It required persons convicted of certain sex offenses to register and notify law enforcement of address changes. SORA initially conceived a confidential law enforcement tool to manage registrants' names and addresses, but by 2012, that tool transformed into a publicly accessible database that imposed significant restrictions on the lives of registrants. Defendant alleged that this transformation caused the retroactive application of the 2011 SORA to violate constitutional ex post facto protections. US Const, art I, § 10 and Const 1963, art 1, § 10 prohibit ex post facto laws. A law is considered ex post facto if it increases the punishment for a committed crime. A two-step inquiry is used to determine whether retroactive application of the 2011 SORA unconstitutionally increases the punishment for defendant's CSC-II conviction. First, it must be determined whether the Legislature intended the statute as a criminal punishment or a civil remedy. If a criminal punishment was intended, the retroactive application of such a statute violates the ex post facto prohibitions, and the inquiry ends. However, if the Legislature intended to impose a civil or regulatory remedy, it must then be determined whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil. The following factors are relevant to the inquiry: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment (i.e., retribution and deterrence), whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for

it, and whether it appears excessive in relation to the alternative purpose assigned. In this case, while some aspects of SORA suggested a punitive intent, the Legislature likely intended SORA as a civil regulation rather than a criminal punishment. The Legislature stated that SORA was enacted to promote public safety, a nonpunitive goal. However, considering the relevant factors, the 2011 SORA's aggregate punitive effects negated the state's intention to deem it a civil regulation: although the 2011 SORA was connected to a nonpunitive purpose given the low bar of rationality, the 2011 SORA bore significant resemblance to the traditional punishments of banishment, shaming, and parole because of its limitations on residency and employment, publication of information and encouragement of social ostracism, and imposition of significant state supervision; the 2011 SORA imposed onerous restrictions on registrants by restricting their residency and employment, and it also imposed significant affirmative obligations by requiring extensive in-person reporting; the 2011 SORA promoted the traditional aims of punishment because it aimed to protect the public through deterrence and because its restrictions appeared retributive; and given the uncertainty of the 2011 SORA's efficacy, the restraints it imposed were excessive. Considering these factors cumulatively, the 2011 SORA's aggregate punitive effects negated the state's intention to deem it a civil regulation. Accordingly, the retroactive imposition of the 2011 SORA increased registrants' punishment for their committed offenses in violation of federal and state constitutional prohibitions on ex post facto laws.

2. MCL 8.5 expresses a legislative preference for severability. MCL 8.5 provides two important guiding factors: (1) the remaining application of the act must be consistent with the manifest intent of the Legislature, and (2) the remaining application of the act must be operable, i.e., otherwise complete in itself and capable of being carried out without reference to the unconstitutional sentence or provision. In this case, the 2011 amendments completely restructured SORA through the imposition of a tiered classification system, and the duties and requirements of each registrant were based on that registrant's tier classification. Removing the 2011 amendments from SORA would render unclear who was required to comply with the act, how long each registrant must comply, how many times annually each registrant must report to law enforcement, and what a registrant must show to petition for removal from registration. Outside the tiered classification system, certain discrete provisions of the 2006 and 2011 amendments—including the student-safety zones of MCL 28.733 to MCL 28.736, as amended by 2005 PA 121, and the

in-person reporting requirements of MCL 28.725(1), as amended by 2011 PA 17—could be excised from retroactive application without affecting the statute's workability. However, even if the retroactive application of SORA without these discrete provisions were constitutional, that application would require improper judicial engagement in essentially legislative choices. Furthermore, the passage of 2020 PA 295 did not support the prosecution's proposed remedy for severing the 2011 SORA. Similarly, the proposal of amicus the Gratiot County Prosecutor's Office to remedy the constitutional violation by excising the particular provisions of the 2011 SORA that extended beyond its federal counterpart, the Sex Offender Registration and Notification Act (SORNA), 34 USC 20901 *et seq.*, was rejected. The fact that the 2011 Legislature did not amend SORA to create an identical statutory scheme to SORNA and instead included several additional provisions indicated that the Legislature was, at the very least, not motivated *solely* by a desire to conform to SORNA. Moreover, this proposed remedy again required improper judicial engagement in the legislative domain. Finally, a former version of SORA could not be applied to defendant through revival. Revival presents special challenges in the context of an ex post facto challenge to a statute with as complicated a legislative history as SORA. This holding did not affect the prospective application of the 2011 SORA to registrants who committed listed offenses after 2011, from the time of their conviction to the effective date of the 2020 SORA amendments. Accordingly, it would not be accurate to say that the SORA amendments failed to alter the statutory scheme, leaving the previous version in place unchanged, as with the usual revival context. In this case, given the extensive legislative history of SORA, it was unclear whether revival of earlier SORA formulations was consistent with the Legislature's intent. Because severability and revival were deemed inappropriate tools to remedy the constitutional violation in this case, the 2011 SORA could not be retroactively applied to registrants whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments. As applied to defendant, because the crime subjecting him to registration occurred in 1993, his instant conviction of failure to register as a sex offender had to be vacated.

Defendant's conviction vacated and case remanded for further proceedings.

Justice ZAHRA, concurring in part and dissenting in part, joined Parts I and II of Justice VIVIANO's partial concurrence and dissent regarding the application of Michigan's severability prec-

edents to the 2011 SORA. However, Justice ZAHRA declined to join Part III of Justice VIVIANO's opinion because it was unnecessary to the resolution of this case.

Justice VIVIANO, joined by Justice ZAHRA (except as to Part III), concurring in part and dissenting in part, generally agreed with the majority's holding that the 2011 SORA violates the Ex Post Facto Clauses of the state and federal Constitutions; however, he disagreed that the statute is not severable and would have concluded that the unconstitutional portions of the statute could be removed to the extent necessary in this case. When considering whether smaller portions of the statute could be severed, the majority admitted that two pieces of the statute—the student-safety zones in MCL 28.733 to MCL 28.736, as amended by 2005 PA 121, and the in-person reporting requirements in MCL 28.725(1), as amended by 2011 PA 17—could be excised from retroactive application without affecting the statute's workability. Under these circumstances, MCL 8.5 *requires* severance. Severing the unconstitutional portions of the statute does not require legislative decision-making; rather, it requires precision in defining the unconstitutional sections. Accordingly, Justice VIVIANO would have severed a few words—"report in person and"—from the reporting requirement, MCL 28.725(1), as amended by 2011 PA 17; he would not decide how much or how little to sever of the student-safety zones, MCL 28.733 through MCL 28.736, as amended by 2005 PA 121, because defendant was not convicted under these provisions; and he would not sever any of the tiered classification system, which he believed was not unconstitutional. Justice VIVIANO's analysis would have required upholding defendant's conviction, given that defendant violated the severed version of MCL 28.725(1), as amended by 2011 PA 17. As severed, the provision still required defendant to register and report certain information to the authorities, and his failure to do so violated the valid portions of the statute. Finally, Justice VIVIANO would, in an appropriate future case, consider whether Michigan's precedent has focused too heavily on legislative intent and whether a more historically grounded approach to severability would better reflect the nature of judicial decision-making and the text of MCL 8.5.

Justice WELCH did not participate in the disposition of this case because the Court considered it before she assumed office.

CONSTITUTIONAL LAW — PROHIBITION ON EX POST FACTO LAWS — MICHIGAN'S SEX OFFENDERS REGISTRATION ACT.

Michigan's Sex Offenders Registration Act, MCL 28.721 *et seq*., as amended by 2011 PA 17 and 18, when applied to registrants whose criminal acts predated the enactment of the 2011 amendments, violates the constitutional prohibition on ex post facto laws (US Const, art I, § 10; Const 1963, art 1, § 10).

D. J. Hilson, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat*, *Jessica Zimbelman*, and *Sofia Nelson*) for defendant.

Amici Curiae:

Miriam J. Aukerman, *Michael J. Steinberg*, *Monica Andrade*, and *Daniel S. Korobkin* for the American Civil Liberties Union Fund of Michigan.

Michigan Appellate Assigned Counsel System (by *Bradley R. Hall*) and *Warner Norcross + Judd LLP* (by *Ga'tan Gerville-Réache*, *Nicole A. Samuel*, *Ashley G. Chrysler*, and *Adam D. Bruski*) for the Criminal Defense Attorneys of Michigan.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Ann M. Sherman*, Deputy Solicitor General, for the Attorney General.

Keith Kushion, Gratiot County Prosecutor, *B. Eric Restuccia*, Deputy Solicitor General, and *Joseph T. Froehlich* and *Jessica Mullen*, Assistant Attorneys General, for the Gratiot County Prosecutor.

Kimberly A. Thomas for law professors in support of defendant.

Paul D. Reingold for Safe & Just Michigan, the Michigan Chapter of the National Association of Social Workers, the Michigan Youth Justice Center, the

Northwest Initiative, the Professional Advisory Board to the Coalition for a Useful Registry, and the Michigan Collaborative to End Mass Incarceration.

CLEMENT, J. We are asked to decide whether the retroactive application of Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2011 PA 17 and 18 (the 2011 SORA), violates state and federal constitutional prohibitions on ex post facto laws. See US Const, art I, § 10; Const 1963, art 1, § 10. We hold that it does.

I. THE EVOLUTION OF SORA

The Michigan Legislature enacted SORA in 1994[1] in response to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 USC 14071, "to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders," MCL 28.721a. This first version of SORA created a confidential database accessible only to law enforcement; it required persons convicted of certain sex offenses to register and notify law enforcement of address changes. MCL 28.725(1), as enacted by 1994 PA 295. Since then, the Legislature has amended the act several times, altering both the nature of the registry and the requirements imposed by it. Defendant alleges that these changes transformed SORA from a regulatory scheme, as it existed in 1996, into a punishment scheme by the time of his failure-to-register conviction in 2012,[2] such

[1] See 1994 PA 295, effective October 1, 1995.

[2] The Legislature again amended SORA in 2020. See 2020 PA 295, effective March 24, 2021. Because defendant's legal challenges concern

that the retroactive application of those provisions to him violated the Ex Post Facto Clauses of the Michigan and United States Constitutions.

The registry became accessible to the public in 1997, when the Legislature required law enforcement to make the registry available for in-person public inspection during business hours. MCL 28.730(2), as amended by 1996 PA 494. Shortly thereafter, in 1999, the Legislature required computerization of the registry and granted law enforcement the authority to make the computerized database available to the public online. MCL 28.728(2), as amended by 1999 PA 85. And in 2006, the Legislature allowed for the registry to send e-mail alerts to any subscribing member of the public when an offender registers within or when a registrant moves into a specified zip code.

As the registry became more accessible to the public, the information registrants were required to provide to law enforcement also expanded.[3] In 2002, the Legislature required registrants to report whenever they enrolled, disenrolled, worked, or volunteered at an institution of higher education. MCL 28.724a, as amended by 2002 PA 542. Two years later, in 2004, the Legislature directed registrants to provide an updated photograph for addition to the online database. MCL 28.728(3)(c), as amended by 2004 PA 238, effective May 1, 2005. And in 2011, the Legislature required registrants to report more personal information, including employment status, "electronic mail addresses

SORA as it existed in 2012, our discussion of the current SORA provisions will be limited. See Part V of this opinion.

[3] Most—but not all—of this information is accessible to the public. Compare MCL 28.727(1) (detailing the registration information required to be reported to law enforcement), with MCL 28.727(2) (detailing the information contained in a registration).

and instant message addresses," vehicle information, and travel schedules. MCL 28.727, as amended by 2011 PA 18. Registrants were required to update law enforcement of these changes within three business days, a substantial shortening of the time frame from the initial 10-day reporting window. MCL 28.725(1), as amended by 2011 PA 17. The updates were also required to be made in person rather than by mail, telephone, or e-mail. *Id*. The 2011 amendments further added a periodic reporting requirement that instructed registrants to present themselves to law enforcement, in person, one or more times a year, even if registrants had no changes to report. MCL 28.725a(3), as amended by 2011 PA 17.

In addition to the expansion of personal information contained in the database, the Legislature also increased other restrictions and obligations imposed by SORA. Specifically, amendments effective in 2006 created "exclusion zones" that prohibited most registrants from living, working, or "loitering" within 1,000 feet of a school. MCL 28.733 to MCL 28.736, as amended by 2005 PA 121. The Legislature also added an annual registration fee of $50. See MCL 28.725a(6), as amended by 2013 PA 149.

The Legislature also enacted significant structural amendments of SORA in 2011. These amendments categorized registrants into three tiers on the basis of their offenses and based the length of registration on that tier designation. MCL 28.722(k) and MCL 28.722(s) through (u), as amended by 2011 PA 17. With this reclassification came lengthened registration periods, including a lifetime registration requirement for Tier III offenders. MCL 28.725(12), as amended by 2011 PA 17. Registrants' tier classifications were also

made available on the public database. MCL 28.728(2)(*l*), as amended by 2011 PA 18.

Not all amendments burdened registrants; some were ameliorative. Registration requirements were removed for individuals who were under 14 years old at the time of their offense, MCL 28.722(b), as amended by 2011 PA 17, and for individuals who engaged in consensual but unlawful sexual conduct with a minor under certain conditions, MCL 28.722(t)(*v*), as amended by 2011 PA 17. Students enrolled in remote-learning programs for higher education were relieved from reporting their education status, MCL 28.724a(6), as amended by 2011 PA 17. And Tier I offenders' registration information was removed from public access. MCL 28.728(4)(c), as amended by 2011 PA 18.

SORA initially conceived a confidential law enforcement tool to manage registrants' names and addresses, but by 2012, that tool transformed into a publicly accessible database that imposed significant restrictions on the lives of registrants. It is this transformation that defendant alleges has caused the retroactive application of the 2011 SORA to violate constitutional ex post facto protections.

II. FACTS AND PROCEDURAL HISTORY

In December 1993, defendant pleaded guilty to second-degree criminal sexual conduct (CSC-II), MCL 750.520c. The trial court sentenced defendant to 5 to 15 years' imprisonment. Two years later, SORA took effect. After defendant's successful completion of parole, defendant failed to comply with SORA requirements. Specifically, in 2012, defendant failed to report his change of residence, his e-mail address, and his

purchase of a vehicle within 3 days, contrary to MCL 28.725(1)(a), (f), and (g), as amended by 2011 PA 17.

The prosecutor charged defendant with violating SORA's registration requirements, MCL 28.729(1)(a). Defendant moved to dismiss the charge, arguing that the retroactive application of the 2011 SORA requirements violated the constitutional prohibitions on ex post facto laws. The trial court denied this motion. Defendant ultimately entered a no-contest plea, conditional on his ability to challenge on appeal the constitutionality of the retroactive application of the 2011 SORA. The trial court sentenced defendant to 36 months' probation, with 12 months' jail time, but suspended imposition of that sentence during the pendency of defendant's appeal.

Defendant sought leave to appeal in the Court of Appeals, and the Court of Appeals denied defendant's application for lack of merit in the grounds presented.[4] Defendant subsequently sought leave to appeal in this Court. After a period of abeyance for the resolution of related cases, this Court heard oral argument on the application in March 2019.[5] Following oral argument on the application, this Court granted defendant's application for leave to appeal and directed further oral argument as to the following issues:[6]

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[4] *People v Betts*, unpublished order of the Court of Appeals, entered February 27, 2014 (Docket No. 319642). Judge STEPHENS would have granted leave to appeal.

[5] See *People v Betts*, 502 Mich 880 (2018).

[6] Although the application for leave to appeal in *People v Snyder* (Docket No. 153696) was originally considered alongside *Betts* in March 2019, this Court has since ordered *Snyder* to be held in abeyance pending the resolution of this case. *People v Snyder*, 928 NW2d 703 (2019).

> (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., taken as a whole, amount to "punishment" for the purposes of the Ex Post Facto Clauses of the Michigan and United States Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10; see *People v Earl*, 495 Mich 33[; 845 NW2d 721] (2014), see also *Does #1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does #1-5*, 138 S Ct 55 (2017); (2) if SORA, as a whole, constitutes punishment, whether it became punitive only upon the enactment of a certain provision or group of provisions added after the initial version of SORA was enacted; (3) if SORA only became punitive after a particular enactment, whether a resulting ex post facto violation would be remedied by applying the version of SORA in effect before it transformed into a punishment or whether a different remedy applies, see *Weaver v Graham*, 450 US 24, 36 n 22[; 101 S Ct 960; 67 L Ed 2d 17] (1981) ("the proper relief . . . is to remand to permit the state court to apply, if possible, the law in place when his crime occurred."); (4) if one or more discrete provisions of SORA, or groups of provisions, are found to be ex post facto punishments, whether the remaining provisions can be given effect retroactively without applying the ex post facto provisions, see MCL 8.5; (5) what consequences would arise if the remaining provisions could not be given retroactive effect; and (6) whether the answers to these questions require the reversal of the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA.[7]

Following oral argument, the Legislature enacted a series of amendments of SORA, effective March 24, 2021. 2020 PA 295. This Court subsequently issued an order directing the parties to provide supplemental briefing addressing the effect, if any, of the new legislation on the present case.[8]

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[7] *People v Betts*, 504 Mich 893, 893 (2019).

[8] *People v Betts*, 507 Mich 864 (2021).

III. PARALLEL FEDERAL LITIGATION

During defendant's appeal in state court, related litigation has progressed through the federal courts. In 2012, five plaintiffs required to register as Tier III offenders sued Michigan's governor and the director of the Michigan State Police, arguing that the 2011 SORA was unconstitutional on several grounds. In a series of opinions,[9] the district court partially ruled in the plaintiffs' favor, holding that the 2011 SORA's student-safety zone provisions were unconstitutionally vague, that certain in-person reporting provisions were unconstitutionally vague, that certain in-person reporting provisions violated the First Amendment, and that registrants could not be held strictly liable for violating the 2011 SORA's requirements. However, the district court rejected the remainder of the plaintiffs' claims, including their argument that the retroactive application of the 2011 SORA violated ex post facto protections.

On appeal, the United States Court of Appeals for the Sixth Circuit disagreed, concluding that the retroactive application of the 2011 SORA did violate constitutional ex post facto provisions. *Does #1-5 v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016) (*Does I*). It reasoned that the cumulative punitive effects of the 2011 SORA outweighed the nonpunitive intent of the Legislature such that the retroactive application of the 2011 SORA constituted the retroactive application of punishment in violation of the federal Constitution. *Id*. Because this holding rendered the 2011 SORA inapplicable to the federal plaintiffs, the Sixth Circuit declined to

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[9] See *Does 1-4 v Snyder*, 932 F Supp 2d 803 (ED Mich, 2013); *Does #1-5 v Snyder*, 101 F Supp 3d 672 (ED Mich, 2015); *Doe #1-5 v Snyder*, 101 F Supp 3d 722 (ED Mich, 2015).

address the remainder of the issues decided by the district court. *Id*. at 706. The United States Supreme Court denied certiorari. *Snyder v Does #1-5*, 138 S Ct 55 (2017).

Shortly after the Sixth Circuit's decision in *Does I*, six other plaintiffs filed a class-action complaint in the federal district court challenging the constitutionality of the 2011 SORA on the same grounds raised by the *Does I* plaintiffs. These plaintiffs also noted that although the *Does I* plaintiffs had received a favorable ruling from the Sixth Circuit on their ex post facto challenge, the state of Michigan had continued to enforce the 2011 SORA against all SORA registrants. Ultimately, the district court ruled for the plaintiffs and entered an order permanently enjoining the state of Michigan from enforcing the unconstitutional provisions of the 2011 SORA identified in *Does I* against any registrant and from enforcing the 2011 SORA retroactively. *Doe v Snyder*, 449 F Supp 3d 719, 737-738 (ED Mich, 2020) (*Does II*).[10] In so doing, the district court rejected the possibility that portions of the 2011 SORA or an earlier version of SORA could be constitutionally applied retroactively. *Id*. at 731-735. The district court also rejected the defendants' request to certify these issues to this Court. *Id*. at 729-731.

The district court directed the parties to draft a proposed judgment and ordered that the judgment would be effective 60 days after its entry. *Id*. at 739. However, that process was hindered by the global outbreak of the severe acute respiratory disease known

[10] The district court originally entered a stipulated order granting declaratory relief on the ex post facto arguments in May 2019 but deferred consideration of a remedy in order to give the Michigan Legislature an opportunity to remedy SORA's constitutional infirmity. The Legislature did not do so, and litigation recommenced.

as COVID-19. In April 2020, the district court entered an order suspending final judgment "for the duration of the current COVID-19 crisis" but preliminarily enjoining the state from "enforcing registration, verification, school zone, and fee violations of SORA that occurred or may occur from February 14, 2020, until the current crisis has ended . . . ." *Doe v Snyder*, 612 F Supp 3d 710, 712-713 (ED Mich, 2020). Proceedings resumed the following year, and in June 2021, the district court issued an order resolving several disagreements regarding the content of a final judgment. *Doe v Snyder*, 606 F Supp 3d 608, 621-622 (ED Mich, 2021). This order also extended the interim injunction to July 12, 2021, and directed the parties to produce a joint proposed judgment by that time. *Id*. The court subsequently extended the deadline to July 19, 2021. To date, a final judgment has not been entered.

IV. EX POST FACTO

This Court is asked to determine whether the retroactive application of the 2011 SORA violates federal and state constitutional ex post facto protections.[11] Although the Sixth Circuit in *Does I* determined that the retroactive application of the 2011 SORA violates federal constitutional ex post facto protections, this Court is not bound by that determination, see *Johnson v VanderKooi*, 502 Mich 751, 764 n 6; 918 NW2d 785 (2018), and the Sixth Circuit's opinion did not assess an ex post facto challenge under our state constitutional law.

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[11] This Court reviews constitutional issues de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016).

Both the Michigan and United States Constitutions prohibit ex post facto laws. US Const, art I, § 10; Const 1963, art 1, § 10.[12] A law is considered ex post facto if it: "(1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a [committed] crime; or (4) allows the prosecution to convict on less evidence." *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014). The prohibitions on ex post facto laws "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning" as well as prevent the government from imposing arbitrary and vindictive legislation. *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981). See also The Federalist No. 44 (Madison) (Rossiter ed, 1961), p 282 (stating that "*ex post facto* laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation"); The Federalist No. 84 (Hamilton) (Rossiter ed, 1961), pp 511-512 (observing that ex post facto laws have historically been "the favorite and most formidable instruments of tyranny").

At issue here is the third type of ex post facto law, namely, whether the retroactive application of the 2011 SORA unconstitutionally increases the punishment for defendant's CSC-II conviction. To answer this question, this Court must engage in a two-step inquiry. *Earl*, 495 Mich at 38. First, this Court must determine "whether the Legislature intended the statute as a criminal punishment or a civil remedy." *Id*. If the statute imposes a disability for the purpose of repri-

[12] Defendant has not argued any basis in this case for finding greater protection under the state Constitution than under the federal Constitution for this constitutional claim. See *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 777 n 13; 527 NW2d 468 (1994).

manding the wrongdoer, the Legislature likely intended the statute to be a criminal punishment. *Id*. However, if the statute imposes a disability to further a legitimate public purpose, the Legislature likely intended the statute to be a civil or regulatory remedy. *Id*.

If the Legislature intended to impose criminal punishment, the retroactive application of such a statute violates the ex post facto prohibitions, and the inquiry ends. *Id*. However, if the Legislature intended to impose a civil or regulatory remedy, this Court must then consider "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id*. (quotation marks, citation, and brackets omitted). To aid in that analysis, the United States Supreme Court has provided that the following nonexhaustive factors are relevant to the inquiry:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . . [*Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963) (citations omitted). See also *Earl*, 495 Mich at 43-44 (noting the *Mendoza-Martinez* factors as the proper avenue of analysis for this issue).]

Further, the Legislature's manifest intent will be rejected only when "a party challenging the statute provides *the clearest proof* that the statutory scheme is so punitive either in purpose or effect to negate the

State's intention to deem it civil." *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997) (quotation marks, citation, and brackets omitted; emphasis added).

In 2003, the United States Supreme Court applied this two-step inquiry when it considered whether Alaska's sex-offender registry statute violated state and federal ex post facto protections. *Smith v Doe*, 538 US 84; 123 S Ct 1140; 155 L Ed 2d 164 (2003). The Alaska registry statute required every convicted sex offender in the state to provide law enforcement with their name, aliases, identifying features, address (including anticipated changes of address), place of employment, date of birth, conviction information, driver's license number, information about vehicles to which they had access, and postconviction history of medical treatment. *Id*. at 90. The information regarding driver's license numbers, anticipated changes of addresses, and whether the registrant sought and obtained medical treatment was kept confidential; other information was available to the public online. *Id*. at 90-91. The amount of time that a person was required to remain registered with this system was based on the registrant's number and type of convictions. *Id*. at 90. Two respondents who pleaded *nolo contendere* to sexual abuse of a minor before the registry scheme was enacted brought suit under 42 USC 1983, seeking a declaration that the registry statute was unlawful as applied to them because it violated ex post facto protections. *Id*. at 91.

The United States Supreme Court first determined that the Alaska Legislature had intended its registry law to be nonpunitive, reasoning that the statutory text provided a purpose of public safety; that the statute was codified within Alaska's Health, Safety,

and Housing Code; and that the authority to promulgate implementing procedures was vested in the Alaska Department of Public Safety. *Id*. at 93-96. It next considered whether the effects of the statutory scheme were so punitive in effect as to negate the Alaska Legislature's nonpunitive intent. *Id*. at 97. The Court acknowledged that the *Mendoza-Martinez* factors were neither exhaustive nor individually dispositive, and the Court identified the following factors as particularly relevant to the case at hand: "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Id*.

With regard to the first factor, whether the regulatory scheme has been regarded in our history and traditions as punishment, the Court reasoned that sex-offender registries are not traditional means of punishment because they were of relatively recent design. *Id*. The Court rejected the respondents' argument that the registry resembled colonial-era shaming punishments because those punishments "involved more than the dissemination of information," and the Court further noted that, although some registrants might experience negative effects because of public access to their information, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id*. at 98-99. Finally, the Court observed that the registry was "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id*. at 99.

With regard to the second factor, whether the regulatory scheme imposes an affirmative disability or restraint, the Court concluded that the registry did not do so because it did not impose any physical restraint. *Id*. at 100. It specifically observed that the registry allowed registrants to change jobs or residences as they desired and imposed no requirement to appear in person. *Id*. at 100-101.

With regard to the third factor, whether the regulatory scheme promotes traditional aims of punishment, the Court considered Alaska's concession that the registry might deter future crimes but ruled that this concession did not render the registry punitive. *Id*. at 102 ("To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation.") (quotation marks and citation omitted). The Court also held that the registry's lack of individualized risk assessment did not render it retributive, reasoning that the registry logically related the length of reporting requirements to the amount and severity of the registrant's convictions, which was consistent with the registry's regulatory objective of public safety. *Id*. at 102-103.

With regard to the fourth factor, whether the regulatory scheme has a rational connection to a nonpunitive purpose, the Court held that the registry was rationally connected to the nonpunitive purpose of public safety because it alerted the public to the risk of sex offenders in their community. *Id*. at 103-104. And, regarding the final factor, excessiveness, the Court held that the registry's requirements were not excessive in relation to its nonpunitive goal. *Id*. at 103-106. Specifically, the Court reasoned:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id*., at 33, 122 S.Ct. 2017 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))). [*Smith*, 538 US at 103.]

Taking into account all the *Mendoza-Martinez* factors, the Court concluded that any punitive effects of Alaska's sex-offender registry did not overcome the Alaska Legislature's intent to establish a civil regulatory scheme. *Id*. at 105-106. Accordingly, the retroactive application of the registry's requirements did not violate federal constitutional ex post facto protections. *Id*. at 106.

Although Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in *Smith*, subsequent amendments have imposed additional requirements and prohibitions on registrants, warranting a fresh look at how the 2011 SORA fares under the constitutional ex post facto protections. See, e.g., *Doe v State*, 189 P3d 999, 1017 (Alas, 2008) (wherein the Alaska Supreme Court held that because of intervening amendments of its sex-offender registry that increased requirements and restrictions on registrants, the retroactive application of its sex-offender registry laws violated ex post facto protections).

A. LEGISLATIVE PURPOSE

This Court must first consider "whether the Legislature intended the statute as a criminal punishment or a civil remedy." *Earl*, 495 Mich at 38. When the Legislature amended SORA in 2002, it included the following statement:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. [MCL 28.721a.]

This description indicates that the Legislature's intent in enacting SORA was the promotion of public safety, a nonpunitive goal. Further, SORA is codified in Chapter 28 of the Michigan Compiled Laws rather than Chapter 750, the Michigan Penal Code. However, other aspects of SORA suggest a punitive intent. Although MCL 28.721a describes the Legislature's intent as the promotion of public safety, it does so by seeking to deter future crimes, a traditional penological aim. Further, SORA requirements are imposed as a consequence of a criminal conviction, its requirements are enforced by law enforcement, and violations of its requirements are punishable by criminal conviction. Weighing these characteristics against the Legislature's expression of

its intent in MCL 28.721a, we conclude that the Legislature likely intended SORA as a civil regulation rather than a criminal punishment.

B. PUNITIVE EFFECTS

Because we conclude that the Legislature likely intended SORA as a civil regulation, we must now determine "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Earl*, 495 Mich at 38 (quotation marks, citation, and brackets omitted). Again, a challenging party must provide "the clearest proof" of the statutory scheme's punitive character in order "to [successfully] negate the State's intention to deem it civil." *Hendricks*, 521 US at 361 (quotation marks, citation, and brackets omitted). In determining whether defendant has satisfied this burden, we do not examine individual provisions of SORA in isolation but instead assess SORA's punitive effect in light of all the act's provisions when viewed as a whole. See *Smith*, 538 US at 92, 94, 96-97, 99, 104-105; see also *Doe v State*, 167 NH 382, 402; 111 A3d 1077 (2015) (holding that the punitive-effect "inquiry cannot be answered by looking at the effect of any single provision in the abstract"; rather, a court "must consider the effect of all the provisions and their cumulative impact upon the defendant's rights") (quotation marks and citations omitted).[13] We assess in turn each of the *Mendoza-*

[13] Although the challenge to the New Hampshire SORA addressed in *Doe* was brought under its state constitutional prohibition on ex post facto laws and not the federal Constitution, the New Hampshire Supreme Court relied on federal precedent to aid in its analysis of the issue. *Doe*, 167 NH at 396. Moreover, we find the analysis in *Doe* consistent with *Smith*, in which the United States Supreme Court analyzed whether Alaska's SORA had a punitive effect by considering the statute's aggregate effects rather than each provision in isolation.

Martinez factors that the United States Supreme Court identified as relevant in *Smith*.

1. HISTORY AND TRADITION

This *Mendoza-Martinez* factor asks this Court to consider whether SORA has "been regarded in our history and traditions as a form of criminal punishment." *Earl*, 495 Mich at 45. Sex-offender registries are of relatively recent origin and so have no direct analogies in this nation's history and traditions. See *Smith*, 538 US at 97. However, the 2011 SORA does resemble, in some respects, the traditional punishments of banishment, shaming, and parole.

In regard to banishment, the 2011 SORA's student-safety zones excluded registrants from working, living, or loitering within 1,000 feet of school property. See MCL 28.733 to MCL 28.736, as amended by 2005 PA 121. Unlike traditional banishment, these exclusion zones did not explicitly exile a registrant from the community. See *United States v Ju Toy*, 198 US 253, 269-270; 25 S Ct 644; 49 L Ed 1040 (1905). But they might have effectively banished a registrant from living within the community. For example, in urban areas that host several schools within their geographic borders, the 1,000-foot restriction emanating from each school might have eliminated access to affordable housing. See, e.g., *Does I*, 834 F3d at 702 (providing a visual representation of exclusion zones in Grand Rapids). Or, in rural areas with fewer schools but concentrated community areas, the 1,000-foot restriction might have eliminated a registrant's access to employment and resources within the town or city center. And available homeless shelters might have also been encompassed by the 1,000-foot residency restriction. Compare with *Smith*, 538 US at 101 (not-

ing that the 2003 Alaska sex-offender registry, which the United States Supreme Court held did not violate ex post facto protections, left registrants "free to move where they wish[ed] and to live and work as other citizens").

The 2011 SORA also resembles the punishment of shaming. The breadth of information available to the public—far beyond a registrant's criminal history—as well as the option for subscription-based notification of the movement of registrants into a particular zip code, increased the likelihood of social ostracism based on registration. While the initial version of SORA might have been "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality," *Smith*, 538 US at 99, its 2011 iteration contained more personal information and required less effort to access that information. The public-facing registry contained not only information regarding a registrant's criminal conviction but also the registrant's home address, place of employment, sex, race, age, height, weight, hair and eye color, discernible features, and tier classification. When SORA's notification provision was used, members of the public were alerted to this information without active effort on their behalf, in sharp contrast with the endeavor of visiting an official archive for information. Further, a registrant's information could precede his entrance into a community, increasing the likelihood of ostracism. MCL 28.721a itself—the Legislature's statement of its intent in enacting SORA—refers to providing the public, not just law enforcement, with the means to monitor persons with sex-offense convictions, encouraging public participation and engagement with the registry and furthering the stigma of registration. See *Doe*, 167 NH at 406 ("Placing offend-

ers' pictures and information online serves to notify the community, but also holds them out for others to shame or shun."). As with banishment, however, the 2011 SORA does not perfectly resemble the traditional punishment of shaming. See *Smith*, 538 US at 97-98 (describing traditional shaming punishments such as requiring offenders to stand in public with signs describing their crimes or branding offenders in order to inflict permanent stigma). The 2011 SORA did not provide a conduit for the public to directly criticize and shame registrants—as it would have, for example, if it provided an online forum or area for comments in addition to the online registry.[14]

Finally, the 2011 SORA also resembles parole.[15] Although registrants need not have sought permission

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[14] In fact, SORA's main page warns that "[i]nformation on this site must not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address" and that "[a]ny such action could result in civil or criminal penalties." Michigan State Police, *Michigan Public Sex Offender Registry* <https://www.communitynotification.com/cap_main.php?office=55242/> (accessed June 4, 2021) [https://perma.cc/K2FJ-69XF].

[15] The prosecutor argues that any resemblance of the 2011 SORA's requirements to parole is not relevant to this specific *Mendoza-Martinez* factor because it is not a colonial-era punishment like banishment and shaming. But the prosecutor identifies no such "colonial-era" limitation imposed by the United States Supreme Court's reference to "traditions" and "history" in *Smith*. Admittedly, in *Smith*, 538 US at 101, the Court discussed supervised release only in terms of the restraint imposed and not in relation to traditional punishment. But in the absence of a specific, explicit limitation, we decline to foreclose comparison to a mode of punishment that has been available in this country for more than 100 years. United States Department of Justice, United States Parole Commission, *History of the Federal Parole System* (May 2003), p 1, available at <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf> (accessed June 4, 2021) [https://perma.cc/8M9B-AHZQ]. Further, as the Supreme Court explained in *Smith*, 538 US at 97, "[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our

to make life changes, they were not free to live and work where they desired because of the student-safety zones. Registrants, like parolees, were required to periodically report in person to law enforcement. See MCL 28.725a(3), as amended by 2011 PA 17; MCL 28.725(1), as amended by 2011 PA 17. They were also required to pay registration fees. See MCL 28.725a(6), as amended by 2011 PA 17. Failure to comply with SORA's requirements, like the failure to comply with parole conditions, potentially subjects the offender to imprisonment. See MCL 28.729(1), as amended by 2011 PA 18. Further, as with parole, a law enforcement officer at any time could have investigated a registrant's status based on an anonymous tip. The 2011 SORA thus imposed a significant amount of supervision by the state on registrants. This amount of supervision differentiates the 2011 SORA from the 2003 Alaska sex-offender registry, which the United States Supreme Court held did not resemble parole because registrants were "free to move where they wish and to live and work as other citizens" and because registrants were not required to make periodic updates to law enforcement in person. *Smith*, 538 US at 101-102. Neither of these characteristics is true of the 2011 SORA.

In conclusion, the 2011 SORA bears significant resemblance to the traditional punishments of banishment, shaming, and parole because of its limitations on residency and employment, publication of information and encouragement of social ostracism, and imposition of significant state supervision.

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tradition, so that the public will recognize it as such." The same reasoning applies here when comparing the 2011 SORA to this country's longstanding use of parole.

2. AFFIRMATIVE DISABILITY OR RESTRAINT

This *Mendoza-Martinez* factor asks this Court to "inquire how the effects of" the 2011 SORA "are felt by those subject to it." *Smith*, 538 US at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. at 100.

Imprisonment is the "paradigmatic" affirmative restraint, *id*., and the 2011 SORA ensured adherence to its many requirements on the potential for imposition of imprisonment. Although SORA has always contained such a penalty provision, the conditions that a registrant must satisfy to avoid incarceration have increased. See *Doe*, 167 NH at 403 (explaining that courts have found sex-offender registry requirements "to be amplified" when "the failure to comply with the requirements could result in harsh prosecution and penalties, such as a fine or imprisonment").

Even those who adhered faithfully to the 2011 SORA's requirements were subject to onerous burdens. As discussed earlier, the 2011 SORA affirmatively barred registrants from living, working, and loitering in large regions of the state through the student-safety zones. The application of these exclusionary zones also had substantial collateral consequences, including limiting access to public transportation, employment opportunities, educational opportunities, resources like counseling and mental-health treatment, and medical care such as residential nursing homes. The 2011 SORA's definition of "loiter"—"to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors," MCL 28.733(b), as amended by 2005 PA 121—was also arguably broad enough to encompass parenting activities such as attending parent–teacher conferences, attending stu-

dent sporting events, or transporting children to school. Further, the student-safety zones also risked preventing registrants from establishing a permanent home, given that registrants were not excepted from the residency ban if a school opened within 1,000 feet of their established home. See MCL 28.735, as amended by 2005 PA 322.

The in-person reporting requirements imposed by former MCL 28.725(1) also imposed affirmative disabilities on registrants. Upon numerous life events, including moving residences, changing employment, changing educational status, changing names, making plans to reside outside of the home for more than 7 days, and changing vehicles, registrants were required to provide an in-person update to law enforcement within three days. MCL 28.725(1), as amended by 2011 PA 17. Particularly onerous was the requirement in former MCL 28.725(1)(f) of immediate in-person reporting when a registrant established "any electronic mail or instant message address, or any other designations used in internet communications or postings." Given the ubiquity of the Internet in daily life, this requirement might have been triggered dozens of times within a year.[16] In addition to the in-person reporting requirements triggered by life events, each registrant was required to make periodic in-person reports to law enforcement: for Tier I offenders, yearly; for Tier II offenders, semiannually; and for Tier III offenders, quarterly. MCL 28.725a(3), as amended by

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[16] The prosecutor's position that these in-person reporting requirements were "no worse than having to appear in person to secure a driver's license"—an event generally required once every eight years—is without merit given that these requirements are wholly dissimilar.

2011 PA 17.[17] Cumulatively, these frequent in-person reports imposed a burden on registrants, especially for those who might have had difficulty traveling to make the reports—such as those who did not have access to public transportation, did not have the financial resources necessary for private or public transportation, or had health or accessibility issues that would have impeded transportation. See *State v Letalien*, 985 A2d 4, 24-25; 2009 ME 130 (2009) ("[I]t belies common sense to suggest that a newly imposed lifetime obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the free exercise of individual liberty.").

In sum, the 2011 SORA imposed onerous restrictions on registrants by restricting their residency and employment, and it also imposed significant affirmative obligations by requiring extensive in-person reporting.

3. TRADITIONAL AIMS OF PUNISHMENT

This *Mendoza-Martinez* factor asks the Court to consider whether the 2011 SORA promotes the traditional aims of punishment: retribution and specific and general deterrence. See *Earl*, 495 Mich at 46.

As the prosecutor concedes, SORA promotes the aim of deterrence. Deterrence is necessarily encompassed by SORA's stated purpose of "preventing and protect-

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[17] When considered in conjunction with the length of time registrants were required to remain registered under MCL 28.725(11) to (13), this means that—not including any in-person reports initiated by the registrant's life changes—Tier I registrants would make, at minimum, 15 trips to a registration site; Tier II registrants would make, at minimum, 50 trips to a registration site; and Tier III registrants would likely make more than 100 trips to a registration site.

ing against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. The extensive requirements of the 2011 SORA also generally deterred potential offenders by increasing the resultant consequences of sexual predation. Yet the aim of deterrence alone does not render a statute punitive. See *Smith*, 538 US at 102. As the United States Supreme Court has reasoned, "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Id*. (quotation marks and citation omitted). However, the deterrent effect of the 2011 SORA is not merely an indirect consequence, incidental to its regulatory function, but instead a main feature of the statutory scheme. See MCL 28.721a.

The 2011 SORA also supports the aim of retribution. The 2011 SORA was imposed on offenders for the sole fact of their prior offenses and made no individualized determination of the dangerousness of each registrant, indicating that SORA's restrictions were retribution for past offenses rather than regulations to prevent future offenses.[18] See *Smith*, 538 US at 109 (Souter, J., concurring in the judgment) ("The fact that the Act uses past crimes as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there

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[18] Although the 2011 SORA organized offenders into tiers on the basis of the offenses committed and then based the length of registration on that tier, all tiers were generally subject to the same requirements and restrictions regardless of the risk of recidivism the registrants posed individually.

is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.").

In sum, because the 2011 SORA aimed to protect the public through deterrence and because its restrictions appear retributive, the 2011 SORA promotes the traditional aims of punishment.

4. CONNECTION TO NONPUNITIVE PURPOSE

Next, this Court must consider whether the 2011 SORA has a rational connection to a nonpunitive purpose. See *Earl*, 495 Mich at 46. A rational connection is all that is required; "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 103 (opinion of the Court).

Again, the asserted goal of the Legislature is to "provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons" who have committed a specified sex offense and who are therefore considered to "pose[] a potential serious menace and danger to the health, safety, morals, and welfare of the people . . . of this state." MCL 28.721a. The protection of citizens from potentially dangerous sex offenders is "a compelling state interest in furtherance of the state's police powers." *Letalien*, 985 A2d at 22. The 2011 SORA, by identifying potentially recidivist sex offenders and alerting the public, seeks to further the nonpunitive purpose of public safety. Accordingly, given the low bar of rationality, the 2011 SORA is connected to a nonpunitive purpose.

5. EXCESSIVENESS

The final *Mendoza-Martinez* factor to be assessed is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 US at 105 (opinion of the Court). Similar to the rational-connection determination, the lynchpin of this analysis is "reasonableness," not "whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Id*.

The Legislature's asserted nonpunitive goal was based on the Legislature's determination that "a person who has been convicted of committing an offense covered by [SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." MCL 28.721a. Central to our inquiry, then, is whether the 2011 SORA is a reasonable means of protecting the public from sex offenders who allegedly pose such a "potential serious menace." *Id*.[19]

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[19] In *Smith*, 538 US at 103 (opinion of the Court), when evaluating whether Alaska's sex-offender registry was rationally related to the Alaska Legislature's asserted public-safety purpose, the United States Supreme Court reasoned that the Alaska Legislature's "findings [that a conviction for a sex offense provides evidence of a substantial risk of recidivism] are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." The Court went on to pronounce that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' " *Id*., quoting *McKune v Lile*, 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002). But in recent years, the Court's "frightening and high" statement has received significant attention, and it has been widely disparaged as an unsubstantiated assertion. See Ellman & Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const Comment 495, 498-499 (2015) ("[T]he evidence for *McKune*'s claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons."); Goldberg & Zhang, *Our Fellow American, the*

Defendant—as well as his similarly situated counterparts throughout the nation—endeavors to demonstrate that the dangerousness of sex offenders has been historically overblown and that, in fact, sex offenders are actually less likely to recidivate than other offenders. Further, he argues that sex-offender registries have dubious efficacy in achieving their professed goals of decreasing recidivism. A growing body of research supports these propositions. See, e.g., United States Department of Justice, Alper & Durose, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-2014)* (May 2019), available at <https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf> (accessed June 4, 2021) [https://perma.cc/U9HY-MJ7F] (concluding that sex offenders are less likely than other offenders to be rearrested for any crime); Huebner et al, *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (July 1, 2013), p 72, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf> (accessed June 4, 2021) [https://perma.cc/D9K4-CV5P] (concluding that residency restrictions "are unlikely to mitigate or reduce the risk of recidivism among sex offenders"); Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behav-*

Registered Sex Offender, 2016-2017 Cato Sup Ct Rev 59, 76-77 (2017) (stating that *McKune*'s claim "was essentially rubbish; it had appeared in a 'practitioner's guide' and was little more than the sales pitch of someone marketing his treatment services to corrections officials"); *State v Chapman*, 944 NW2d 864, 878-879 (Iowa, 2020) (Appel, J., concurring). However, as the prosecution asserts, the Michigan Legislature did not depend on this pronouncement of the United States Supreme Court in enacting SORA, and its statement regarding sex offenders' risk of recidivism is appreciably different. See MCL 28.721a (stating that sex offenders "pose[] a *potential serious* menace and danger to the health, safety, morals, and welfare of the people") (emphasis added).

ior?, 54 J L & Econ 161, 192 (2011) (concluding that notification requirements in a typical sex-offender registry "effectively increases the number of sex offenses by more than 1.57 percent," likely "because of the social and financial costs associated with the public release of their criminal history and personal information"). For our limited purpose in examining the potential excessiveness of the 2011 SORA in regard to its public-safety purpose, these studies demonstrate that, at minimum, the 2011 SORA's efficacy is unclear.[20]

Given the uncertainty of the 2011 SORA's efficacy, the restraints it imposed were excessive. Over 40,000 registrants were subject to the 2011 SORA's requirements without any individualized assessment of their risk of recidivism. The duration of an offender's reporting requirement was based solely on the offender's conviction and not the danger he individually posed to the community. Registrants remained subject to SORA —including the stigma of having been branded a potentially violent menace by the state—long after they had completed their sentence, probation, and any required treatment. All registrants were excluded from residing, working, and loitering within 1,000 feet of a school, even those whose offenses did not involve children and even though most sex offenses involving children are perpetrated by a person already known to

[20] The dissent challenges the accuracy of these studies, noting that the significant underreporting of sex crimes may undermine the conclusions reached therein and advising deference to the Legislature with regard to the evaluation of scientific studies. Given that we must determine whether the 2011 SORA is excessive in regard to the Legislature's public-safety purpose, we do not believe that our recognition of the above research calling the efficacy of sex-offender registries into question is inappropriate or goes beyond our judicial role. That being said, the concerns raised by the dissent are sound and contribute to our choice to acknowledge only that the efficacy of sex-offender registries such as the 2011 SORA is unclear.

the child. As described, this restriction placed significant burdens on registrants' ability to find affordable housing, obtain employment, and participate as a member of the community. Registrants were also required to make frequent in-person reports to law enforcement upon minor life changes and regular in-person reports—sometimes multiple times a year—even when no information had changed. These demanding and intrusive requirements, imposed uniformly on all registrants regardless of an individual's risk of recidivism, were excessive in comparison to SORA's asserted public-safety purpose.

Considering the *Mendoza-Martinez* factors cumulatively, the 2011 SORA's aggregate punitive effects negate the state's intention to deem it a civil regulation. See *Earl*, 495 Mich at 38. Accordingly, the retroactive imposition of the 2011 SORA increases registrants' punishment for their committed offenses in violation of federal and state constitutional prohibitions on ex post facto laws.[21]

V. REMEDY

Having concluded that the retroactive application of the 2011 SORA violates constitutional ex post facto provisions, we turn to the issue of remedy. Although the 2011 SORA did not contain a general severability provision,[22] Michigan has a legislative preference for severability, as expressed in MCL 8.5:

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[21] Given this conclusion, we need not address amicus the American Civil Liberties Union of Michigan's argument that collateral estoppel bars the prosecutor's arguments.

[22] MCL 28.728(8), as amended by 2011 PA 18, provided a severability provision regarding registry information provided to the public, but it did not apply to the 2011 SORA as a whole.

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable. [See also *Blank v Dep't of Corrections*, 462 Mich 103, 122-123; 611 NW2d 530 (2000) (stating that the "general rule" regarding laws determined to be unconstitutional "favors severability").]

Because this Court has found that the retroactive application of the 2011 SORA is unconstitutional, this Court must now consider whether "the remaining portions or applications of the act . . . can be given effect without the invalid . . . application . . . ." MCL 8.5. This Court's conclusion does not affect the prospective application of the 2011 SORA, and so we must consider only whether certain provisions of the 2011 SORA can be given retroactive effect without violating a registrant's constitutional ex post facto protections.[23] In so doing, MCL 8.5 provides two important guiding factors: (1) the remaining application must be consistent with the manifest intent of the Legislature; and

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[23] Given the enactment of 2020 PA 295, the 2011 SORA will no longer be applied prospectively to new registrants. However, this Court's ex post facto ruling does not apply to registrants whose criminal acts occurred after the 2011 amendments were enacted and who were subject to the 2011 SORA requirements until 2020 PA 295 took effect on March 24, 2021. Similarly, although the 2011 SORA is no longer actively being applied retroactively to registrants, the question whether the 2011 SORA may have retroactive effect is still pertinent to many registrants similarly situated to defendant who have been charged with failure to register based on the retroactive application of the 2011 SORA.

(2) the remaining application must be operable, i.e., "otherwise complete in itself and capable of being carried out without reference to the unconstitutional sentence or provision," *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 357; 22 NW2d 433 (1946).

Under the *Mendoza-Martinez* punitive-effects analysis, this Court analyzed the aggregate effects of the 2011 SORA rather than the effects of each individual amendment. It is apparent, however, that a majority of the former SORA provisions underlying our conclusion that the 2011 SORA constitutes punishment were added by its 2006 and 2011 amendments. See, e.g., MCL 28.733 to MCL 28.736, as amended by 2005 PA 121 (creating the student-safety zones excluding registrants from living, working, or loitering within 1,000 feet of a school); MCL 28.727, as amended by 2011 PA 18, and MCL 28.725(1), as amended by 2011 PA 17 (adding events triggering an in-person reporting requirement and decreasing the reporting period to three days); MCL 28.722, as amended by 2011 PA 17 (creating the tiered classification system and basing SORA's requirements on those tiers). But even assuming that the retroactive application of the 2011 SORA without the specific provisions added by the 2006 and 2011 amendments would not violate constitutional ex post facto protections, the 2006 and 2011 amendments, in whole, cannot be excised from retroactive application because doing so renders the statute unworkable. The 2011 amendments completely restructured SORA through the imposition of a tiered classification system, and the duties and requirements of each registrant were based on that registrant's tier classification. Removing the 2011 amendments from SORA would render unclear who was required to comply with the act, see MCL 28.722(k), as amended by 2011 PA 17 (defining "listed offense" as a "tier I, tier II, or tier III

offense"); how long each registrant must comply, see MCL 28.725(10) to (12), as amended by 2011 PA 17; how many times annually each registrant must report to law enforcement, see MCL 28.725a(3), as amended by 2011 PA 17; and what a registrant must show to petition for removal from registration, see MCL 28.728c, as amended by 2011 PA 18.

Outside the tiered classification system, certain discrete provisions of the 2006 and 2011 amendments—including the student-safety zones of MCL 28.733 to MCL 28.736, as amended by 2005 PA 121, and the in-person reporting requirements of MCL 28.725(1), as amended by 2011 PA 17—could be excised from retroactive application without affecting the statute's workability. However, even if the retroactive application of SORA without these discrete provisions were constitutional, that application would require this Court to engage in essentially legislative choices. Should this Court remove all in-person reporting requirements or only those beyond residence and employment changes? Should this Court retain the in-person reporting requirements but remove the "immediate" timeliness requirement? Or retain the reporting requirements and their timeliness requirement but remove the "in-person" requirement? Should this Court remove the student-safety zones completely or narrow their applicability to certain registrants who present a particular risk to children? Or narrow the student-safety zones to only "residing" within 1,000 feet of a school, removing the restrictions on employment and "loitering"? We decline to encroach on the Legislature's plenary authority to create law or on its role in shaping and articulating policy by choosing among the plethora of possibilities. See *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 329-330; 126 S Ct 961; 163 L Ed 2d 812 (2006) (characterizing the rewrit-

ing of state law as "quintessentially legislative work" and opining that crafting a remedy "where line-drawing is inherently complex may call for a far more serious invasion of the legislative domain than we ought to undertake") (quotation marks, citation, and punctuation omitted); *People v Steanhouse*, 500 Mich 453, 483-484; 902 NW2d 327 (2017) (LARSEN, J., concurring) (stating that the Legislature "is certainly better equipped than this Court to weigh the policy options").

The prosecutor suggests that severance would not constitute problematic guesswork of legislative intent here because the Legislature *has* demonstrated its intent regarding the continued viability of SORA through its recent passage of 2020 PA 295. In light of the federal courts' rulings in *Does I* and *Does II* that the 2011 SORA violates federal constitutional ex post facto protections, the Legislature chose to amend SORA to cure its constitutional infirmity. These amendments included the removal of the student-safety zones; the removal of the retrospective application of in-person reporting requirements for vehicle information, electronic mail addresses, Internet identifiers, and telephone numbers, MCL 28.725(2)(a); and the removal of registrants' tier-classification information from the public website, MCL 28.728(3)(e). Considering that the Legislature removed these provisions from SORA through 2020 PA 295, it is argued that this Court's severance of similar provisions in the 2011 SORA from retroactive application would be consistent with the Legislature's intent and not constitute an unwise invasion into the legislative domain.[24]

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[24] The prosecution also argues that 2020 PA 295 applies retroactively to defendant's conviction and that his conviction can be sustained under those amendments. However, retroactive application of 2020 PA 295 to

We decline to adopt this proposed remedy. To begin, the intent of a prior legislature cannot be determined by looking at the actions of a subsequent one. See *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 177 n 33; 615 NW2d 702 (2000). The 2019–2020 Legislature acted nearly 10 years after the 2011–2012 Legislature and did not consist of the same membership. Moreover, the 2019–2020 Legislature was considering not only a successful federal ex post facto challenge against SORA but also successful due-process and First Amendment challenges against SORA. See *Does II*, 449 F Supp 3d at 737-738.

Further, while the 2019–2020 Legislature did remove the provisions detailed earlier in this opinion, it did so at the same time it also introduced a bevy of other changes. These changes include both additional

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defendant's pending conviction would necessarily violate the constitutional prohibition on ex post facto laws regardless of whether SORA as revised by 2020 PA 295 is punitive, given that "[l]egislatures may not retroactively alter the definition of crimes . . . ." *Collins v Youngblood*, 497 US 37, 43; 110 S Ct 2715; 111 L Ed 2d 30 (1990); see also *People v Scott*, 251 Mich 640; 232 NW 349 (1930) (holding that a defendant could not be convicted pursuant to an amended statute that did not exist when the offense at issue was alleged to have been committed). Even assuming SORA as amended by 2020 PA 295 is a nonpunitive civil regime, it clearly creates criminal consequences for failing to comply with that scheme. Moreover, contrary to the prosecution's assertion, 2020 PA 295 does not criminalize the same conduct to which defendant pleaded guilty. Rather, 2020 PA 295 redefines the precise conduct that would subject defendant to criminal punishment for violating SORA. Accordingly, 2020 PA 295 cannot be applied retroactively to assess the validity of defendant's conviction for alleged criminal behavior that occurred before the enactment of those amendments. See *California Dep't of Corrections v Morales*, 514 US 499, 506 n 3; 115 S Ct 1597; 131 L Ed 2d 588 (1995) (explaining that a law violates the Ex Post Facto Clause if it retroactively "alters the definition of criminal conduct").

ameliorative changes and more restrictive changes.[25] It is not altogether clear whether the Legislature would still advocate for the removal of the three provisions identified earlier without the addition of the several

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[25] These changes include: allowing for removal from the registry persons who have had their listed offense convictions expunged, see MCL 28.725(16); removing the requirement for a registrant to provide a valid driver's license when that registrant lacks a fixed or temporary residence, see MCL 28.725a(7); adding a requirement that the failure to register be a "willful" failure to comply, MCL 28.729(2); removing a provision preventing the inclusion on the public-registry website of "[a]ny electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and any login names or other identifiers used by the individual when using any electronic mail address or instant messaging system," MCL 28.728(3)(e), as amended by 2013 PA 2; altering when vehicle information must be reported from when "[t]he individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued," MCL 28.725(1)(g), as amended by 2011 PA 17, to the occurrence of "any change in vehicle information," MCL 28.725(2)(a); altering the vehicle information that must be provided from "[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual and the location at which the motor vehicle, aircraft, or vessel is habitually stored or kept," MCL 28.727(1)(j), as amended by 2011 PA 18, to "[t]he license plate number and description of any vehicle owned or operated by the individual," MCL 28.727(1)(j)—notably removing both the "regular" operation requirement and the "motor" vehicle limitation; altering when Internet-related information must be reported from where "[t]he individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings," MCL 28.725(1)(f), as amended by 2011 PA 17, to "any change in . . . electronic mail addresses[and] internet identifiers," MCL 28.725(2)(a); and altering the Internet-related information that must be provided from "[a]ll electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system," MCL 28.727(1)(i), as amended by 2011 PA 18, to "all electronic mail addresses and internet identifiers registered to or used by the individual," MCL 28.727(1)(i), with "internet identifier" being further defined as "all designations used for self-identification or routing in internet communications or posting," MCL 28.722(g).

other amendments that were introduced in 2020 PA 295. Were we to sever the three specific provisions identified earlier, the resultant statute would be neither what the 2011–2012 Legislature intended with the creation of the 2011 SORA nor what the 2019–2020 Legislature intended with the enactment of 2020 PA 295. Accordingly, we do not believe that the passage of 2020 PA 295 supports the prosecution's proposed remedy for severing the 2011 SORA.

We also reject the proposal of amicus the Gratiot County Prosecutor's Office to remedy the constitutional violation by excising the particular provisions of the 2011 SORA that extend beyond its federal counterpart, the Sex Offender Registration and Notification Act (SORNA), 34 USC 20901 *et seq*. Specifically, amicus suggests that this Court excise from retroactive application the student-safety zones, MCL 28.733 to MCL 28.736, as amended by 2005 PA 121; the inclusion of the registrant's tier status on the public database, MCL 28.728(2)(*l*), as amended by 2011 PA 18; and the in-person reporting requirements regarding temporary residences, the establishment of "any electronic mail or instant message address, or any other designations used in internet communications or postings," and the operation of vehicles, MCL 28.725(1)(e) through (g), as amended by 2011 PA 17. Amicus argues that because the Legislature's 2011 SORA amendments were intended to bring SORA into compliance with SORNA to avoid a reduction in federal funding,[26] reforming SORA to match SORNA would be consistent with the Legislature's intent. And, because ex post facto challenges to

[26] Under 34 USC 20927(a), any state that fails "to substantially implement" SORNA "shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction" under the Edward Byrne Memorial Justice Assistance Grant Program.

SORNA have been rejected by the federal circuit courts, amicus argues that the constitutional error presented here would be cured. See, e.g., *United States v Parks*, 698 F3d 1, 5-6 (CA 1, 2012); *United States v Young*, 585 F3d 199, 204-206 (CA 5, 2009); *United States v Felts*, 674 F3d 599, 605-606 (CA 6, 2012); *United States v WBH*, 664 F3d 848, 855-860 (CA 11, 2011).

Amicus is correct that legislative bill analyses regarding the 2011 SORA amendments indicate that the amendments would conform SORA to SORNA. See House Legislative Analysis, SB 188-189, 206 (March 22, 2011) (stating that the senate bills at issue would revise SORA "to conform to mandates under" SORNA and remarking that "[f]ailure to comply with SORNA will result in a state losing 10 percent of Byrne Justice Grant funding used to support law enforcement efforts"). But we have in the past been skeptical of the value of bill analyses in determining the Legislature's intent. See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 n 7; 624 NW2d 180 (2001) ("The problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator. Rather, they are prepared by House and Senate staff."). Further, the fact that the 2011 Legislature did not amend SORA to create an identical statutory scheme to SORNA and instead included several additional provisions[27] indicates that the Leg-

[27] In addition to the provisions mentioned earlier in this opinion, the 2011 SORA also contained a $50 registration fee not included in SORNA, MCL 28.725a(6), as amended by 2011 PA 17; SORA requires that the registrants maintain a driver's license or identification card with an accurate, updated address, but SORNA does not, see MCL 28.725a(7), as amended by 2011 PA 17; SORA requires notification of a new residence in another state *before* moving, whereas SORNA requires notification within three days of the move, compare MCL 28.725(6), as

islature was, at the very least, not motivated *solely* by a desire to conform to SORNA. This proposed remedy raises again the prospect of this Court engaging in lawmaking on tenuous assumptions of the Legislature's intent, and we decline to do so.

Finally, in the absence of a remedy through severability, the prosecutor proposes that a former version of SORA can be applied to defendant through revival. In its usual application, revival occurs when an amendment of a statute is repealed and the former version of the statute is revived by the repeal of the amendatory provision. See *Dykstra v Holden*, 151 Mich 289, 293; 115 NW 74 (1908). Revival also applies when, instead of a legislative repeal of a statutory amendment, the courts find the amendment unconstitutional. When the amendment is constitutionally invalid, the statute behaves as if the amendment never existed. See, e.g., *People v Smith*, 246 Mich 393, 398; 224 NW 402 (1929) ("We must hold the amendment . . . unconstitutional, and therefore no amendment. This holding leaves the law as it was before the abortive attempt to amend."); *McClellan v Stein*, 229 Mich 203, 213; 201 NW 209 (1924) ("We are therefore constrained to hold the law

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amended by 2011 PA 17, with 34 USC 20913(c); and SORA requires the registry to include the registrant's original charge, whereas SORNA requires only the offense of which the registrant was convicted, compare MCL 28.728(1)(n), as amended by 2011 PA 18, with 34 USC 20914(b)(3). Further, SORNA requires that the failure to comply with the registry constitute "a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year . . . ." 34 USC 20913(e). SORA provides that the failure to comply with the registry—with certain, narrow exceptions—constitutes a felony punishable by maximum imprisonment of 4, 7, or 10 years depending on the number of prior convictions. MCL 28.729(1), as amended by 2011 PA 18. Although this provision is consistent with SORNA, it is stricter than SORNA requires. Further, when the Legislature amended SORA in 2020, it again created a statutory scheme containing several deviations from its federal counterpart. See 2020 PA 295.

invalid, which leaves all preceding laws upon that subject in force."). Michigan has a legislative preference against revival, MCL 8.4,[28] but it refers only to the legislative context of revival wherein the Legislature has acted to repeal an amendatory provision, not necessarily to the context wherein the courts have struck a provision down as unconstitutional.

Revival presents special challenges in the context of an ex post facto challenge to a statute with as complicated a legislative history as SORA. Our holding does not affect the prospective application of the 2011 SORA to registrants who committed listed offenses after 2011, from the time of their conviction to the effective date of the 2020 SORA amendments. Accordingly, it is not accurate to say that the SORA amendments failed to alter the statutory scheme, leaving the previous version in place unchanged, as with the usual revival context. Compare with *Smith*, 246 Mich at 398; *McClellan*, 229 Mich at 213. It is possible that revival could nonetheless be applied only to pre-2011 registrants under a theory that the amendments were invalid as to retroactive application only, leaving previous SORA formulations active.[29] However, doing so raises the same concerns of legislative infringement and practical complications discussed in conjunction

[28] MCL 8.4 provides that "[w]henever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute."

[29] Although this Court has not, to date, used revival in the context of an ex post facto law, United States Supreme Court precedent suggests that it is possible. See *Weaver v Graham*, 450 US 24, 36 n 22; 101 S Ct 690; 67 L Ed 2d 17 (1981) ("The proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred.").

with severability, and the prosecutor has offered no response to these concerns raised by defendant and amici.

The Legislature has modified SORA over the past nearly 30 years in a series of amendments introducing new provisions; contracting, expanding, and removing established provisions; creating new ameliorative provisions; and in the case of the 2011 amendments, completely restructuring the statutory scheme. Accordingly, SORA presents a different situation altogether than the prototypical single statutory amendment that represents the Legislature's intent to change a singular provision of the law and that can be neatly foreclosed from certain applications. In this case, given the extensive legislative history of SORA, it is unclear whether revival of earlier SORA formulations is consistent with the Legislature's intent. See *Ayotte*, 546 US at 330 ("[T]he touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.") (quotation marks and citation omitted). And, although not a dispositive obstacle, the sheer volume of past versions of SORA poses significant administrative difficulties for the Michigan State Police in attempting to define and enforce multiple different registry schemes and for registrants in attempting to adhere to the requirements of an out-of-date registry scheme.

Having determined that severability and revival are inappropriate tools to remedy the constitutional violation in this case, we are constrained to hold that the 2011 SORA may not be retroactively applied to regis-

trants whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments.[30]

VI. CONCLUSION

We hold that the 2011 SORA, when applied to registrants whose criminal acts predated the enactment of the 2011 SORA amendments, violates the constitutional prohibition on ex post facto laws. As applied to defendant Betts, because the crime subjecting him to registration occurred in 1993, we order that his instant conviction of failure to register as a sex offender be vacated.

The case is remanded for further proceedings consistent with this opinion.

MCCORMACK, C.J., and BERNSTEIN and CAVANAGH, JJ., concurred with CLEMENT, J.

ZAHRA, J. (*concurring in part and dissenting in part*). I join Parts I and II of Justice VIVIANO's opinion concurring in part and dissenting in part. I agree with his application of this Court's severability precedents to Michigan's Sex Offenders Registration Act, MCL 28.721 *et seq*., as amended by 2011 PA 17 and 18. But I decline to join Part III because it is unnecessary to the resolution of this case.

VIVIANO, J. (*concurring in part and dissenting in part*). I generally agree with the majority's holding that Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., as amended by 2011 PA 17

[30] No party has asked—and we have therefore declined to consider—whether the retroactive application of any post-2011 SORA amendments violates constitutional ex post facto provisions.

and 18 (the 2011 SORA), violates the Ex Post Facto Clauses of the state and federal Constitutions. But I disagree that the statute is not severable and would conclude that the unconstitutional portions of the statute can be removed to the extent necessary in this case. But doing so requires greater care than the majority offers in specifying the constitutional infirmities in the statute. The difficulties presented by the majority's analysis, as well as other problems posed by current precedent, should also lead us to consider whether a different approach to the severability analysis is needed and whether that approach better reflects the requirements of MCL 8.5, the general statute on severability.

I. PRINCIPLES OF SEVERABILITY

Our "Court has long recognized" that unconstitutional portions of a statute are not to be given effect if the constitutional portions of the statute remain operable. See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 345; 806 NW2d 683 (2011). Our general rule therefore favors severability. *Id.*; see also 2 Singer, Sutherland Statutes and Statutory Construction (7th ed, November 2020 update), § 44:1 ("There is a presumption in favor of severability.").[1] As Justice Thomas Cooley wrote, "It

[1] See also *Barr v American Ass'n of Political Consultants, Inc*, 591 US ___, ___; 140 S Ct 2335, 2350-2351; 207 L Ed 2d 784 (2020) (plurality opinion) ("From *Marbury v. Madison* to the present, apart from some isolated detours mostly in the late 1800s and early 1900s, the Court's remedial preference after finding a provision of a federal law unconstitutional has been to salvage rather than destroy the rest of the law passed by Congress and signed by the President. The Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause."); *Seila Law LLC v Consumer Fin Protection Bureau*, 591 US ___, ___; 140 S Ct

would be inconsistent with all just principles of constitutional law to adjudge these enactments void, because they are associated in the same act, but not connected with or dependent on others which are unconstitutional." Cooley, Constitutional Limitations (1868), p 177.[2] The partial unconstitutionality of a statute "does not authorize the courts to declare the remainder void also," unless the provisions are so entwined that the remaining portion is not "complete in itself, and capable of being executed wholly independent of that which was rejected . . . ." Cooley, p 178.

The Legislature has codified this favorable view of severability in MCL 8.5:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such

2183, 2209; 207 L Ed 2d 494 (2020) (plurality opinion) ("Even in the absence of a severability clause, the 'traditional' rule is that 'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.' ") (citation omitted).

[2] These general principles include, among others, the presumption that statutes are constitutional, that the Legislature intended its enactment to be constitutional, and that legislation should not be declared unconstitutional "except for clear and satisfactory reasons." 2 Singer, Sutherland Statutes and Statutory Construction (7th ed, November 2020 update), § 44:1.

> remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.[3]

Under this statute, a court must "consider, first, whether the Legislature expressed that the provisions at issue were not to be severed from the remainder of the act." *Blank v Dep't of Corrections*, 462 Mich 103, 123; 611 NW2d 530 (2000). "If it did not, then [a court] must determine whether the unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation of the act." *Id*. Put differently, a court must determine that (1) the Legislature manifested an intent to remove the statute at issue from the general presumption of severability in MCL 8.5, and if not (2) whether the act is "capable of separation in fact" in that the constitutional portions represent an operable whole. 2 Singer, Sutherland Statutes and Statutory Construction (7th ed, November 2020 update), § 44:3. In resolving the first question, we have considered whether "the Legislature 'would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act.' " *In re Request for Advisory Opinion*, 490 Mich at 346 (citation omitted).

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[3] Shortly after passing this general severability statute in 1945 PA 119, the Legislature repealed severability clauses in specific statutes dating back to 1897. See 1945 PA 267, § 4 ("The legislature having incorporated into the statute on construction a uniform severability clause applicable to all public acts and declaring such acts to be severable, the provisions of Act No. 119 of the Public Acts of 1945 [i.e., the uniform severability act] are declared applicable to the following acts and the sections of such acts hereafter indicated are declared to be obsolete and are hereby repealed[.]"). These repeals demonstrate the universal application of MCL 8.5 across all statutes.

II. ANALYSIS

A. THE LEGISLATURE'S MANIFEST INTENT

The first question when applying MCL 8.5 is whether the Legislature manifested its intent to make SORA inseverable. The majority fails to point to, nor have I discovered, any statutory text or other material that would suggest—let alone "manifest"—the Legislature's intent to shield SORA from the normal presumption favoring severability. Nor does the majority address whether the Legislature would have enacted SORA without its unconstitutional portions. As discussed below, the nature of this question focuses on the Legislature's unexpressed intentions and thus is difficult to answer. Nevertheless, under my analysis below, only discrete portions of the statute would be severed. I have a difficult time believing that the Legislature, had it reflected on this possibility, would prefer that a complex and far-reaching statute like SORA should be eliminated simply because a few insular sections have been removed. Accordingly, there is no basis for concluding that the Legislature has manifested an intent that SORA be inseverable.

B. OPERABILITY OF THE VALID PORTIONS

The central question therefore is whether severing the unconstitutional portions of SORA leaves a complete and operable statute in place. The majority proclaims that even if removing the 2006 and 2011 amendments from SORA resulted in a constitutional statute, those amendments "cannot be excised from retroactive application because doing so renders the statute unworkable." But severance does not require taking a machete to the statute—few statutes would remain operable after that approach. Instead, "[w]hen

confronting a constitutional flaw in a statute, the court should try to invalidate no more of the statute than necessary." 2 Singer, Sutherland Statutes and Statutory Construction (7th ed, November 2020 update), § 44:4; see also *Alaska Airlines, Inc v Brock*, 480 US 678, 684; 107 S Ct 1476; 94 L Ed 2d 661 (1987) (" '[A] court should refrain from invalidating more of the statute than is necessary . . . .' ") (citation omitted).

When considering whether smaller portions could be severed, the majority acknowledges that two pieces of the statute—the student-safety zones in MCL 28.733 to 28.736, as amended by 2005 PA 121, and the in-person reporting requirements in MCL 28.725(1), as amended by 2011 PA 17—"could be excised from retroactive application without affecting the statute's workability." In other words, the majority essentially admits that we could sever two portions of the statute and leave the rest operable. Of course, finding that the rest of the statute could remain operable without these requirements is not difficult—SORA did, in fact, operate without them before the 2006 and 2011 amendments that added them.

Under these circumstances, MCL 8.5 *requires* severance. And yet the majority shies away from this conclusion because deciding which parts to sever, in these circumstances, involves "essentially legislative choices." But the relevant legislative choice here was made by the Legislature when it enacted MCL 8.5. And it is hard to see how MCL 8.5 could survive the majority's logic; if the decision on how to sever certain "discrete" portions of SORA is impermissibly legislative, then severability would never be permissible. See Fallon, *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 Tex L Rev 215, 224 (2020) ("[C]haracterizations of the judicial role in severing

statutes as involving an impermissible 'rewriting' prove too much insofar as they imply that courts should never sever statutes with invalid applications that Congress sought to prescribe."). By rejecting the Legislature's choice, codified in MCL 8.5, the majority reaches the baffling conclusion that wiping out an entire statute is more respectful of legislative intent than removing a few words or sections.

C. APPLICATION

Severing the unconstitutional portions of the statute does not require legislative decision-making. It does, however, require precision in defining the unconstitutional sections. The majority assesses the "aggregate effects of the 2011 SORA rather than the effects of each individual amendment." While the United States Supreme Court suggested such an analysis in *Smith v Doe*, 538 US 84, 99-100; 123 S Ct 1140; 155 L Ed 2d 164 (2003), neither that Court nor ours has extended this mode of analysis to the question of severability. The United States Supreme Court itself has stated that portions of a statute that violate the Ex Post Facto Clause might be severed. See *Weaver v Graham*, 450 US 24, 36 n 22; 101 S Ct 960; 67 L Ed 2d 17 (1981).

The arguments in this case have generally focused on the in-person reporting requirements, the student-safety zones, and the public notification of the tiered-classification system. My analysis likewise centers on these provisions. For the reasons that follow, I would sever a few words from the reporting requirement, I would not decide how much or little to sever of the student-safety zones, and I would not sever any of the tiered-classification system, which I do not believe is unconstitutional.

1. IMMEDIATE IN-PERSON REPORTING REQUIREMENT

At the time of defendant's present conviction for violating SORA, this requirement provided that an individual who resides in Michigan and is required to register under SORA "shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately after" various events occur, including changes of residence or domicile, establishment of e-mail addresses or designations used on the Internet, and when he or she "purchases or begins to regularly operate any vehicle" or discontinues ownership or use of the vehicle. MCL 28.725(1)(a), (f), and (g), as amended by 2011 PA 17. "Immediately" is defined in the statute to mean "within 3 business days." MCL 28.722(g), as amended by 2011 PA 17. These were the provisions defendant pleaded guilty to violating. In determining whether and how to sever this provision, we must go further than the majority in isolating the requirement's unconstitutional aspects under the relevant factors of the ex post facto analysis.

The majority's analysis demonstrates that this provision is unconstitutional punishment because it required immediate *in-person* reporting on a host of quotidian events, such as signing up for a new e-mail account. As defendant has persuasively argued, the need to immediately report in person is what restrains and disables him, which is one of the factors in the ex post facto analysis applicable here. See *Smith*, 538 US at 99-100.[4] Standing alone, a reporting requirement is

[4] Because I agree with much of the majority's constitutional analysis, I will not examine each of the relevant factors but only those that have led me to reach a different conclusion as to severability.

not disruptive or restraining.[5] Forcing a registrant to call or otherwise contact the authorities, even "immediately," i.e., within three days, is not overly burdensome. But the requirement that the registrant arrange their affairs so that they can show up in person within three days after relatively routine events is, as the majority observes, a significant burden.

With regard to the excessiveness of the requirements in relation to a nonpunitive purpose, it is again the need to report *in person* within three days that proves problematic. The desire to keep close tabs on registrants by requiring frequent reporting bears a reasonable relationship to the nonpunitive purpose of protecting the public. The majority and various parties and amici cite statistical research indicating that sex offenders do not have unusually high recidivism rates. However, I am not yet ready to say that the Legislature was unreasonable in requiring frequent reporting to combat recidivism. For one thing, the research rests on data concerning sex offenders who were caught committing a subsequent offense. See, e.g., Hanson et al, *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J Interpersonal Violence 2792, 2796 (2014) (defining "offense-free" as "no new sexual offenses were detected during [the] time period"). And it is well established that sex crimes are seriously underre-

[5] For example, the annual in-person reporting requirements—which, in any event, defendant was not convicted of violating—are not similarly burdensome because they are infrequent and can be planned in advance. See *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013) (noting that periodic in-person reporting requirements were " 'inconvenient, but . . . not punitive' "), quoting *United States v WBH*, 664 F3d 848, 857 (CA 11, 2011); *Doe v Pataki*, 120 F3d 1263, 1285 (CA 2, 1997) ("Although we recognize that the duty to register in person every 90 days for a minimum of ten years is onerous, we do not believe that this burden is sufficiently severe to transform an otherwise nonpunitive measure into a punitive one.").

ported. See Morgan & Kena, US Department of Justice, *Criminal Victimization, 2016: Revised* (October 2018, NCJ 252121), p 7 (showing that in 2016 only 23.2% of rapes and sexual assaults were reported, making it the most underreported class of crimes).[6] As a result, it remains possible, if not likely, that the recidivism rates reported in the studies " 'underestimate the risk an offender will commit an offense over [his or her] lifetime.' " *Belleau v Wall*, 811 F3d 929, 933 (CA 7, 2016), quoting DeClue & Zavodny, *Forensic Use of the Static-99R: Part 4. Risk Communication*, 1 J Threat Assessment & Mgmt 145, 149 (2014); Scurich & John, Abstract, *The Dark Figure of Sexual Recidivism*, 37 Behav Sci & L 158 (2019) ("Virtually all of the studies [of sexual offender recidivism] define recidivism as a new legal charge or conviction for a sexual crime . . . . It is uncontroversial that such a definition of recidivism underestimates the true rate of sexual recidivism because most sexual crime is not reported to legal authorities, a principle known as the 'dark figure of crime.' . . . Under any configuration of assumptions, the dark figure is substantial, and as a consequence the disparity between recidivism defined as a new legal charge or conviction for a sex crime and recidivism defined as actually committing a new sexual crime is large. These findings call into question the utility of recidivism studies that rely exclusively on official crime statistics . . . .").

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[6] See also *Belleau v Wall*, 811 F3d 929, 933 (CA 7, 2016) ("There is serious underreporting of sex crimes, especially sex crimes against children. A nationwide study based on interviews with children and their caretakers found that 70 percent of child sexual assaults reported in the interviews had not been reported to police. . . . The true level of underreporting must be even higher, because the study did not account for sexual assaults that go unreported in the interviews. Another study finds that 86 percent of sex crimes against adolescents go unreported to police or any other authority, such as a child protective service.").

Even were I more inclined to credit the studies on which the majority relied, I would defer to the Legislature on such matters when there is room for debate. Given the nature of our role of adjudicating individual disputes and the consequent institutional limitations this role entails, we must exercise "humility about the capacity of judges to evaluate the soundness of scientific and economic claims[.]" Barrett, *Countering the Majoritarian Difficulty*, 32 Const Comment 61, 74 (2017) (reviewing Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (New York: HarperCollins, 2016)).

Thus, the immediate reporting requirements are not excessive standing alone. What makes them excessive is the need to report *in person*. There has been no evidence put forward to believe that registrants are particularly apt to shirk their reporting obligation or to make false reports if they are not in person. Indeed, it is hard to see any connection between the in-person requirement and the contents of the required reports. For example, how does showing up in person make it more or less believable that the registrant really changed his or her e-mail address? I would therefore find that the in-person requirement is what transforms the immediate reporting requirement into a prohibited punishment under the Ex Post Facto Clauses.

Having pinpointed the source of the constitutional infirmity, the severance analysis is straightforward: I would sever the phrase "report in person and" from MCL 28.725(1), as amended by 2011 PA 17. The statute will still require that the registrant "notify the registering authority" when the various triggering events occur. In this respect, the statute would resemble its pre-2011 version, which similarly required the registrant to "notify" the appropriate authorities. MCL

28.725(1), as amended by 2006 PA 402. The reporting requirement would therefore remain valid and operable, as would the remainder of SORA; only the need to make the reports in person would be removed from the statute.

2. STUDENT-SAFETY ZONES

With regard to the student-safety zones, the various questions posed by the majority about what to sever are largely misplaced. Even if the sections creating these zones were struck down in their entirety, the majority admits that the remaining provisions of SORA would be operable. These sections are tucked in a separate corner of SORA called "article II." MCL 28.733 through MCL 28.736, as amended by 2005 PA 121. The zones are a discrete requirement that does not involve registration itself but rather a distinct limitation imposed on registrants. They are not entwined with the rest of SORA—they refer to SORA only to note that the geographic restrictions apply to individuals required to register under SORA "article II," MCL 28.723 through MCL 28.730.

There is no need in this case to decide which parts of these sections should be severed. Defendant was not convicted under these provisions. Indeed, even he admits that if they were severed, his conviction must be upheld. All that MCL 8.5 requires is that the remaining constitutional portions of the statute be operable. Here, as noted, under any conceivable severance of the student-safety zones, the remaining portions would be operable, and the present dispute—whether defendant's conviction can be upheld—would be resolved. In other words, a decision on how to sever the student-safety zones has no relevance in resolving

the case before the Court.[7] It is, therefore, rather astounding that the majority would strike down the entire statute because, among other things, deciding how to do something that does not need to be done—sever the student-safety zones—would be an impermissible legislative action. See *People v McMurchy*, 249 Mich 147, 160; 228 NW 723 (1930) ("In *Brazee v Michigan*, [241 US 340; 36 S Ct 561; 60 L Ed 1034 (1916),] the court held that it was not necessary to go into the constitutionality of certain clauses of an act, where the act was severable and defendant had been convicted under a part of the act, the constitutionality of which could not be questioned."). In sum, then, I agree that the student-safety zones are unconstitutional but would not decide in this case whether they could be severed in a manner that renders the remaining portions of these sections constitutional.

3. TIERED-CLASSIFICATION SYSTEM

The tiered-classification system is a different story. Under this framework, the registrant is publicly placed into one of three tiers depending on the offense of which he or she was convicted. The majority does not spend much time explaining the constitutional infirmities with the classification system. It notes that SORA's public broadcasting of information resembles the historic punishment of shaming. And it observes that SORA resembles the aim of retribution because it classifies individuals without regard to individualized risk assessments. But once again, it is unclear which specific provisions the majority finds constitutionally

[7] The same was not true with regard to the reporting requirements, which contained the provisions that defendant pleaded guilty to violating. Deciding which portions of those requirements to sever is dispositive under my analysis.

troublesome for purposes of the severability analysis. As amicus the Gratiot County Prosecutor rightly notes, however, the crux of defendant's argument was not with the lack of individualized risk assessments (although he does cover that) but more specifically with the public nature of the tiered classifications.

Specificity matters with respect to the tiered system. The majority correctly explains that the 2011 amendments "restructured SORA through the imposition of a tiered classification system, and the duties and requirements of each registrant were based on that registrant's tier classification." Severing the tiers would, as the majority concludes, undoubtedly result in an unworkable statute. The issues therefore are whether and to what extent the tiered system is unconstitutional and can be severed. There are two aspects of this issue that must be addressed: (1) Is it punitive to use criminal offenses as the basis for the tiered classification rather than an individualized risk assessment? and (2) Does the public availability of the registrant's tier classification constitute punishment?

With regard to individualized risk assessments, I struggle to see how the Legislature is imposing a punishment by tying registration classifications to the offense of which the individual was convicted. See MCL 28.722(k) and MCL 28.722(s) through (u), as amended by 2011 PA 17. The Legislature can reasonably conclude that violation of certain crimes portends a greater risk of recidivism or danger to the public than does violation of other crimes, and it can adjust the regulatory requirements accordingly. As the United States Supreme Court noted:

> The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory

> consequences. We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. . . . As stated in *Hawker* [*v New York*, 170 US 189, 197; 18 S Ct 573; 42 L Ed 1002 (1898)]: "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application . . . ." *Ibid*. The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause. [*Smith*, 538 US at 103-104.]

Given the Supreme Court's holding, it is not surprising that the federal sex offender registration statute similarly links the registrant's tier classification to the type of offense of which he or she was convicted. See 34 USC 20911.

Moreover, it is not clear that an individualized risk assessment offers a superior means for accurately appraising the probability that the registrant will commit another sex offense. An assessment tool like the Static-99R that the Attorney General endorses here produces "estimates . . . [that] pertain only to the odds that the released offender will subsequently be arrested for or convicted of—in short, detected—committing further sex crimes." *Belleau*, 811 F3d at 933. As noted above, the data used in such an assessment relates to the risk of detection rather than the risk that the registrant will actually commit a new offense, whether detected or not; as a result, it might underestimate the relevant probability. *Id*. For these reasons, I cannot see how the lack of such a metric and the reliance on the convicted offense constitutes a punishment.

Furthermore, the publication of the registrant's tier classification is not a punishment. Indeed, where, as here, the tier simply reflects the underlying offense, the tier classification itself provides the public with no new information. Cf. *Smith*, 538 US at 101 ("Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record.").[8]

Therefore, I would not find the tiered-classification system to be unconstitutional.

D. SUMMARY

In short, while I generally concur in the majority's conclusion that SORA violates the Ex Post Facto Clauses of the state and federal Constitutions, I disagree that the offending statutory provisions applicable here are inseverable. The severability analysis requires a more exacting appraisal of the constitutional problems with particular provisions. In undertaking that examination, I would sever the immediate in-person reporting requirement from MCL 28.725(1), as amended by 2011 PA 17. I would also hold that although the student-safety zones are unconstitutional, it is unnecessary to decide whether those provisions could be severed in a manner that allows any portion of them to remain. Finally, I would hold that

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[8] Even if I concluded that making this information publicly available is unconstitutionally punitive, these portions of the statute could be easily severed, as amicus the Gratiot County Prosecutor observes. The Court would need only strike the portion of MCL 28.728(1)(u), as amended by 2011 PA 18, providing that the registration shall include "[t]he individual's tier classification . . . ."

the publicly available tiered-classification system based on the registrant's conviction is not unconstitutional.

My analysis would require upholding defendant's conviction, given that he violated the severed version of MCL 28.725(1), as amended by 2011 PA 17. As severed, the provision still required him to register and report certain information to the authorities. His failure to do so violated the valid portions of the statute.

III. HISTORICAL APPROACH TO SEVERABILITY

To the extent that the majority's opinion reflects existing precedent—specifically, the focus on the Legislature's hypothetical intentions—the majority's opinion raises questions that should be considered in an appropriate future case. In particular, I would consider whether our precedent has focused too heavily on legislative intent and whether a more historically grounded approach to severability would better reflect the nature of judicial decision-making and the text of MCL 8.5.

The historical approach to severability rests on a few fundamental principles. Our courts do not sit as councils of revision, wielding a pen to strike out the offending portions of the statute or to remove the law from the statute books. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 92 n 149; 921 NW2d 247 (2018) ("Despite our ruling [that an enacted provision is unconstitutional], we have no power to make the law disappear."). Our authority is limited to the exercise of judicial power, by which we can "hear and determine controversies between adverse parties, and questions in litigation." *Daniels v People*, 6 Mich 381, 388 (1859). The judicial " 'power exercised is that of ascertaining and declaring the law

applicable to the controversy.' " *Seila Law LLC v Consumer Fin Protection Bureau*, 591 US ___, ___ ; 140 S Ct 2183, 2219; 207 L Ed 2d 494 (2020) (Thomas, J., concurring in part and dissenting in part), quoting *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923). "In the context of a constitutional challenge, '[i]t amounts to little more than the negative power to disregard an unconstitutional enactment.' " *Seila Law LLC*, 591 US at ___; 140 S Ct at 2219 (Thomas, J., concurring in part and dissenting in part), quoting *Mellon*, 262 US at 488. Given the nature of our power, we cannot "excise, erase, alter, or otherwise strike down a statute." *Seila Law LLC*, 591 US at ___; 140 S Ct at 2220 (Thomas, J., concurring in part and dissenting in part).

In light of these central principles, courts historically did not claim to sever or strike down statutory language when facing statutes that were partially unconstitutional. Instead, they would simply apply the challenged statute together with the Constitution to the case at hand; if the statute conflicted with the Constitution, courts held the "law void to the extent of repugnancy," but "there was no 'next step' in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder" of the statute. Walsh, *Partial Unconstitutionality*, 85 NYU L Rev 738, 777 (2010); see also *Murphy v Nat'l Collegiate Athletic Ass'n*, 584 US ___, ___; 138 S Ct 1461, 1486; 200 L Ed 2d 854 (2018); cf. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 Harv J on Legis 1, 25-26 (1984) (advocating for a similar approach, under which courts are not regarded "as choosing how much or how little of a law to 'strike down' but as resolving controversies in a manner that rejects only such claims based upon a given law as are themselves deemed incompatible with

the Constitution"). The general question, in other words, was whether the portion of the statute at issue could be applied in the case at hand and not whether the unconstitutional parts of the statute, unrelated to the case, precluded enforcing any part of the statute. In essence, the Constitution was found to have displaced the statute to the extent the statute contravened the Constitution. *Partial Unconstitutionality*, 85 NYU L Rev at 742 ("[U]nder a displacement-based approach, a court does not excise anything from a statute but instead determines the extent to which superior law displaces inferior law in resolving the particular case before it."). Of course, some constitutional defects might infect the rest of the statute to such an extent that no operable portions remain. See *The Legislative Veto Decision*, 21 Harv J on Legis at 25.[9]

The historical approach would appear to solve some of the problems with the current framework. One of the most significant difficulties is with the proposition that severability requires a court to determine whether the Legislature would have passed the statute without the unconstitutional portions had it known of their defects. See *In re Request for Advisory Opinion*, 490 Mich at 345.[10] This question essentially forces a court to specu-

[9] Courts in the 1850s began formulating the more modern approach focusing on the hypothetical intentions of legislatures. Nagle, *Severability*, 72 NC L Rev 203, 212-215 (1993) (noting this history and describing the first cases that "consider[ed] legislative intent—along with the ability of the remaining provisions of the statute to function—in deciding severability" and noting that "[t]his approach to severability gained immediate acceptance among state courts and has remained virtually unchallenged to this day").

[10] While the majority does not directly articulate this proposition, the majority's construction of MCL 8.5 implies it. The majority states that MCL 8.5 requires that "the remaining application must be consistent with the manifest intent of the Legislature[.]" This statement suggests that the Legislature must have intended for the unsevered portions to

late about what the Legislature intended should occur if a statute is found partially unconstitutional—yet, the Legislature likely never thought about that scenario and did not provide for it through enacted text. The answer to the question—to the extent there is one—will be difficult to ascertain, and the search for it will take courts away from their prescribed role in determining what the statutory text means. See *Murphy*, 584 US at ___; 138 S Ct at 1486-1487 (Thomas, J., concurring). As Justice Thomas wrote, the modern approach "requires judges to determine what Congress would have intended had it known that part of its statute was unconstitutional. But it seems unlikely that the enacting Congress had any intent on this question[.]" *Id*. at ___; 138 S Ct at 1486-1487. And, critically, "intentions do not count unless they are enshrined in a text that makes it through the constitutional process of bicameralism and presentment." *Id*. at ___; 138 S Ct at 1487. See also Note, *Constitutional Avoidance, Severability, and a New* Erie *Moment*, 42 Harv J L & Pub Pol'y 649, 650 (2019) (criticizing the assumption, sometimes relied on in severability analyses, of "the existence of an unexpressed legislative intent that judges can discover").

Another potential problem with the modern approach is that it enables a court to pass on the constitutionality of provisions that have scarce rela-

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be applicable on their own—in other words, that the Legislature would have adopted those portions even without the unconstitutional pieces. I believe that any such suggestion likely is incorrect. The reference in MCL 8.5 to "manifest intent" represents a threshold question: did the Legislature manifest its intent to exclude the statute at issue from the general rule of severability enacted in MCL 8.5? By requiring the intent to be "manifest," MCL 8.5 seems to preclude resort to speculation about the Legislature's hypothetical intentions. In any event, the majority here does not directly apply this factor, and I would leave for a future case the issue of how the factor relates to MCL 8.5.

tionship to the case before the court. In other words, it potentially enables parties to challenge statutory provisions that they might lack standing to challenge. See *Murphy*, 584 US at ___; 138 S Ct at 1487 ("If one provision of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of being declared nonseverable and thus inoperative" irrespective of whether the plaintiff had standing to attack those provisions.). Severability might enable parties to evade a constitutionally valid statutory provision that applies to the dispute simply because other parts of the statute, which do not apply in the case, are unconstitutional. See Zimmerman, *Supplemental Standing For Severability*, 109 Nw U L Rev 285, 304 (2015) (noting the possibility that a party could "argue that, even if the part of the statute that applies to them is constitutional, that part is invalid because some *other* part of the statute is unconstitutional and cannot be severed"); see generally 2 Singer, Sutherland Statutes and Statutory Construction (7th ed, November 2020 update), § 44:2 (noting that severability raises this possibility "whenever a person not subject to the invalid provision, but nevertheless within the scope of the statute, seeks to attack the act by showing the entire act to be invalid by reason of the invalidity of a part").[11] A few federal courts have found that a party lacks standing to make such arguments, although the United States Supreme Court has ad-

[11] Along these lines, one could question whether defendant here has standing to challenge portions of the statute that do not apply, such as the student-safety zones. But as no one has raised the argument, the issue must await a future case. See *California v Texas*, 593 US ___, ___; 141 S Ct 2104, 2121-2122; 210 L Ed 2d 230 (2021) (Thomas, J., concurring) (noting that a similar argument concerning standing had not been properly raised and therefore was not addressed by the Court).

dressed such arguments without questioning standing. See *Supplemental Standing*, 109 Nw U L Rev at 306-307 (discussing the caselaw).[12]

In an appropriate future case, I would consider whether our precedent has gone off track with its focus on legislative intent and the need to address parts of statutes inapplicable to the case at hand. I would also consider whether MCL 8.5 is consonant with the historical approach and thereby avoids the possible problems discussed above. In particular, the Court should examine whether MCL 8.5 allows courts to enforce any valid provisions that can stand alone regardless of the constitutionality of the statute's other provisions. Or does MCL 8.5 require courts to examine the entire statute at issue and pencil off the portions that are unconstitutional?

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[12] See also 13A Wright & Miller, Federal Practice & Procedure (3d ed, April 2021 update), § 3531.9.4 ("So long as the valid applications can stand alone, moreover, the possibly invalid applications have not caused any injury to the party in court and a pronouncement of invalidity would not confer any remedial benefit. So it is often said that a person to whom a statute is validly applied may not challenge the statute on the ground that it might conceivably be applied unconstitutionally to others."); Vermeule, *Saving Constructions*, 15 Geo L J 1945, 1951 (1997) ("*Jus tertii* severance occurs when the court has found that the application of the statute to the party before the court is constitutionally valid. The party then attempts to assert *jus tertii*—the rights of third parties—by claiming that other applications embraced by the statute are unconstitutional and that the court should therefore invalidate the statute as a whole. Under the traditional rule, however, courts generally do not permit such claims. Rather, the court enforces the valid application against the party before it, but refrains from adjudicating the constitutionality of applications other than those at bar. * * * The court's response, however, rests necessarily (if implicitly) on a judgment that the statute is severable."); cf. *California*, 593 US at ___; 141 S Ct at 2130-2131 (Alito, J., dissenting) (arguing that the majority's logic foreclosed a finding that an individual has standing to challenge a constitutionally valid statutory provision on the basis that a related provision is unconstitutional and inseverable from the first).

IV. CONCLUSION

My questions concerning the historical approach to severability are for another day. Applying the plain language of MCL 8.5 in light of current precedent, I would conclude that the unconstitutional portions of SORA are severable and that defendant's conviction must be upheld. I therefore dissent from the majority's contrary conclusions.

ZAHRA, J. (except as to Part III), concurred with VIVIANO, J.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE v ALLEN

Docket No. 160594. Argued on application for leave to appeal April 7, 2021. Decided July 27, 2021.

Erick R. Allen was convicted following a jury trial in the Monroe Circuit Court, Michael A. Weipert, J., of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and was sentenced as a fourth-offense habitual offender, MCL 769.12, to a prison term of 30 months to 15 years. Defendant committed this offense while on parole, but the Michigan Department of Corrections (the MDOC) did not file a parole detainer against him when he was arrested. Defendant was released from the Monroe County Jail on July 13, 2017, on a personal recognizance bond. Defendant subsequently missed two court dates, and the district court issued a bench warrant for his arrest. He was arrested on that bench warrant on August 17, 2017. The district court turned his personal recognizance bond into a cash/surety bond of $5,000. Defendant was unable to post bond, and he remained in jail. On August 31, 2017, the district court changed his bond back to a personal recognizance bond so that defendant could participate in a drug treatment program. However, defendant brought drugs with him to the program, and he tested positive for cocaine on September 5, 2017. That same day, defendant was arrested, and the MDOC filed a parole detainer against defendant under MCL 791.239 asking the Monroe County Jail to hold defendant "until further notice." After being bound over, defendant was convicted by a jury on January 8, 2018, of possession of less than 25 grams of cocaine. Defendant remained in jail until his sentencing on March 1, 2018. At sentencing, defendant made no request to be given credit for time served. Although the court believed that defendant was not legally entitled to any jail credit because of his status as a parolee, it stated that it would use its discretion to give defendant some credit for the time served prior to sentencing. Defendant spent approximately 195 days in jail prior to sentencing, 17 of which came before the MDOC filed a parole detainer against him. Defendant appealed in the Court of Appeals, arguing that the circuit court erred by not granting any jail credit for the total time he spent in jail. According to defendant, the circuit court's decision violated MCL 769.11b, which generally requires a trial

court to grant jail credit for a convicted person's time served in jail prior to sentencing when the person is unable to furnish bond. The Court of Appeals affirmed, concluding that *People v Idziak*, 484 Mich 549 (2009), foreclosed any relief. 330 Mich App 116 (2019). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on the application to address whether (1) *Idziak* encompasses parolees who are arrested for a new offense but are not subject to a parole detainer; if so, (2) whether that part of *Idziak*'s holding was correctly decided; and (3) whether defendant had established plain error affecting his substantial rights. 505 Mich 1045 (2020).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under MCL 769.11b, individuals are entitled to jail credit if they are held in jail pending trial because they were denied or were unable to furnish bond. In this case, on September 5, 2017, parole officials issued a parole detainer under MCL 791.239, which provides for warrantless arrests and detention of parolees whom parole officials reasonably suspect have violated parole. Under MCL 791.239, once the parole officials have issued an arrest warrant under MCL 791.238 for the parole violation or have reasonable grounds for suspecting a violation, the named officials can arrest the parolee or detain the paroled prisoner in jail or both. MCL 791.239 provides that parole officials may seek detention of a parolee who has already been arrested on new charges, as occurred here. Until the MDOC issued that detainer in the instant case, defendant spent a total of 17 days in jail. Because this portion of defendant's jail time resulted solely from his inability to furnish bond, all the requirements of the jail-credit statute, MCL 769.11b, were met and he was entitled to credit for those 17 days. But when the MDOC issued the detainer, the Monroe County Jail was authorized under MCL 791.239 to detain defendant on different grounds altogether. At that point, defendant was held in jail not because of any bond determination on the new criminal charges but because MDOC officials ordered him to be held on the basis of the suspected parole violation. From that time, the terms of the jail-credit statute were not met, and his entitlement to credit under that statute ended. Nothing in *Idziak* precluded this straightforward application of the statutes. In fact, *Idziak*'s logic supported the conclusion here. *Idziak* analyzed a different parolee-detention statute, MCL 791.238, under different facts. *Idziak* broadly stands for the proposition that once the parole officials properly invoke their statutory authority to detain a parolee, that parolee is not entitled to jail

credit under MCL 769.11b. In *Idziak*, the invocation of MCL 791.238 occurred at the time of detention, i.e., the time of arrest, and thus there was no period in which the parolee was being detained on the new charges because of denial of or inability to furnish bond. In this case, the parole officials invoked their detention powers under MCL 791.239 only after defendant had been detained for a total of 17 days. In each case, the MDOC's invocation of its detention authority served as the key point after which no jail credit could be awarded. Accordingly, parolees who are not arrested or detained under MCL 791.238 or arrested under MCL 791.239 who spend time in jail because of the denial of or inability to furnish bond are entitled to jail credit until the MDOC files a parole detainer under MCL 791.239. Defendant in this case spent 17 days in jail prior to the filing of the detainer and is entitled to credit against his sentence on the new criminal charges because he satisfied the plain-error standard. The plain-error test has four elements: error must have occurred; the error was plain, i.e., clear or obvious; the plain error affected substantial rights; and an appellate court must exercise its discretion in deciding whether to reverse once a defendant satisfies the first three requirements. In this case, defendant showed that the trial court and Court of Appeals erred as a matter of law by holding that he was not legally entitled to jail credit; *Idziak*, despite its broad holding, did not address the situation present in this case. This clear legal error was apparent on the record and satisfied the first two prongs of the plain-error test. Defendant also established prejudice because as a result of the trial court's decision not to award jail credit to defendant for the 17 days for which he was entitled to that credit, defendant spent an extra 17 days in jail that the law did not require of him. Consequently, he was deprived of his liberty for an extra 17 days. The trial court's error affected the outcome of the trial court proceedings and the fairness, integrity, or public reputation of judicial proceedings because it led to increased incarceration time for defendant and greater deprivation of his liberty when the law did not require that of him. Even though the trial court gave defendant a lesser minimum sentence to account for the days he spent in jail awaiting trial, the record did not demonstrate that the trial court explicitly considered the 17 days that defendant spent in jail prior to the parole detainer being filed. More importantly, the trial court's sentencing decision was an act of discretion. But under MCL 769.11b, it was mandatory that defendant be awarded credit for the 17 days at issue because no parole detainer had yet been

filed. Accordingly, defendant's sentence had to be vacated and the case remanded for resentencing to give defendant credit for the 17 days.

Court of Appeals judgment reversed; defendant's sentence vacated; and case remanded to the Monroe Circuit Court for resentencing to grant defendant credit for the time he spent in jail prior to the MDOC's filing of a parole detainer against him.

SENTENCING — JAIL CREDIT — PAROLEES — PAROLE DETAINERS.

Under MCL 769.11b, parolees who are not arrested or detained under MCL 791.238 or arrested under MCL 791.239 and who spend time in jail because of the denial of or inability to furnish bond are entitled to jail credit when the Michigan Department of Corrections does not file a parole detainer against that parolee.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael G. Roehrig*, Prosecuting Attorney, and *Alexis Gipson-Goodnough*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Lindsay Ponce*) for defendant.

VIVIANO, J. This case presents the issue whether a parolee defendant is entitled to jail credit under MCL 769.11b when the Michigan Department of Corrections (the MDOC) has not yet filed a parole detainer against the defendant. We conclude that jail credit must be given in this situation and that our holding in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009), broadly speaking, supports that determination. Further, because the trial court did not grant defendant the jail credit to which he is entitled, defendant has demonstrated plain error affecting his substantial rights. Defendant is entitled to jail credit for the 17 days he spent in the Monroe County Jail prior to the MDOC filing a parole detainer against him. Therefore, we

reverse the Court of Appeals' judgment to the contrary, and we remand the case to the Monroe Circuit Court for resentencing.

I. FACTS AND PROCEDURAL HISTORY

In 2013, defendant pleaded guilty to assaulting, resisting, and obstructing a police officer, MCL 750.81d, and he was sentenced as a fourth-offense habitual offender to 2½ to 15 years in prison. He was subsequently released on parole for that offense. On July 12, 2017, while on parole, defendant was arrested for possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). The MDOC did not file a parole detainer against him at that time.[1] He was released from the Monroe County Jail the next day, July 13, 2017, on a personal recognizance bond. Defendant subsequently missed two court dates, and the district court issued a bench warrant for his arrest. He was arrested on that bench warrant on August 17, 2017. The district court turned his personal recognizance bond into a cash/surety bond of $5,000. Defendant was unable to post bond, and he remained in jail. On August 31, 2017, the district court changed his bond back to a personal recognizance bond so that defendant could participate in a drug treatment program. However, defendant brought drugs with him to the program, and he tested positive for cocaine on September 5, 2017. That same day, defendant was arrested, and the MDOC filed a parole detainer against defendant under MCL 791.239 asking the Monroe County Jail to hold defendant "until further notice." After being bound over from the district court, defendant

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[1] As will be discussed in detail below, parole detainers are issued by the MDOC to ensure that county jails hold parolees who are already in jail until the hold is removed.

was convicted by a jury on January 8, 2018, of possession of less than 25 grams of cocaine.

Defendant remained in jail until his sentencing on March 1, 2018. At sentencing, he made no request to be given credit for time served. The circuit court sentenced defendant near the top end of his 0 to 34 months' minimum sentencing guidelines range, rejecting a probation department recommendation of six months' imprisonment. Although the court believed that defendant was not legally entitled to any jail credit because of his status as a parolee, it stated that it would use its discretion to give defendant some credit for the time served prior to sentencing:

> I'll do this, Mr. Allen, because I know it's contrary to statute to give any credit while you're on parole, but I'm making a count for some of the time that you sat in there. I'm gonna do this, I'm gonna sentence you to serve 30 months to a maximum of 180 months in state prison, Michigan Department of Correction. Unfortunately, I cannot give you any credit for time served, and this time must run consecutive to any parole.

All told, defendant spent approximately 195 days in jail prior to sentencing, 17 of which came before the MDOC filed a parole detainer against him.

Defendant appealed in the Court of Appeals, arguing that the circuit court erred by not granting any jail credit for the total time he spent in jail. According to defendant, the circuit court's decision violated MCL 769.11b, which generally requires a trial court to grant jail credit for a convicted person's time served in jail prior to sentencing when the person is unable to furnish bond. The Court of Appeals affirmed, concluding that our decision in *Idziak* foreclosed any relief. "[W]hile *Idziak* may not have squarely addressed the detainer issue, its analysis covers both circumstances

in which a detainer is issued and in which one was not issued. And, in either case, the parolee is not entitled to any credit for time served on the new offense."[2]

Judge CAMERON concurred with the majority but wrote separately to examine the merits of the prosecution's concession on appeal that defendant was entitled to 17 days of jail credit for the time defendant spent imprisoned before a parole detainer was filed.[3] He concluded that the plain language of MCL 769.11b precluded an award of jail credit to a parolee defendant after a parole detainer is filed.[4] However, he opined that if no parole detainer had yet been filed but the defendant still remained in jail, the prosecution's concession "is entirely consistent with the plain and unambiguous language of the jail credit statute" because the parolee was being held "for no other reason than his inability to furnish bond."[5] Nevertheless, he agreed that *Idziak* "allow[ed] no room to apply MCL 769.11b to parolees" and, thus, that defendant was not entitled to any credit.[6]

Thereafter, defendant sought leave to appeal in this Court, and we ordered oral argument on the application to address: "(1) whether this Court's holding in [*Idziak*] encompasses parolees who are arrested for a new offense but are not subject to a parole detainer; if so, (2) whether that part of *Idziak*'s holding was

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[2] *People v Allen*, 330 Mich App 116, 122; 944 NW2d 433 (2019).

[3] On appeal in the Court of Appeals, the prosecution changed course and conceded that defendant was entitled to jail credit for the 17 days spent in jail before the detainer was filed given that he "was being held solely because he could not furnish bond."

[4] *Allen*, 330 Mich App at 125-126 (CAMERON, J., concurring).

[5] *Id*. at 126-127 (quotation marks omitted).

[6] *Id*. at 127.

correctly decided; and (3) whether the appellant has established plain error affecting his substantial rights."[7]

II. STANDARD OF REVIEW

Defendant did not request jail credit at sentencing or object to the trial court's sentence prior to raising the issue before the Court of Appeals; therefore, the issue is unpreserved on appeal.[8] Unpreserved, nonconstitutional errors are reviewed for plain error.[9] Underlying questions of statutory interpretation are reviewed de novo.[10] "In every case requiring statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole."[11]

III. ANALYSIS

Under MCL 769.11b, individuals are entitled to jail credit if they are held in jail pending trial because they were denied or were unable to furnish bond. The question here is whether the arrestee is entitled to this credit when he or she had been on parole at the time of the arrest but the parole officials have not yet sought to detain on the basis that the new arrest constituted a parole violation, i.e., they have not yet issued a war-

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[7] *People v Allen*, 505 Mich 1045, 1045 (2020).

[8] See *People v Clark*, 315 Mich App 219, 224; 888 NW2d 309 (2016) ("[D]efendant's sentence-credit argument is unpreserved because he did not request credit for time served at sentencing or object to the trial court order that denied him sentence credit.").

[9] *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

[10] See *People v Kowalski*, 489 Mich 488, 497; 803 NW2d 200 (2011).

[11] *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020).

rant, arrested, or sought to detain the parolee due to the possible parole violation. Here, defendant spent 17 days in jail before the MDOC filed a parole detainer against him.[12] Defendant contends that MCL 769.11b requires jail credit for parolees when no parole detainer has been issued. The denial of the credit, according to defendant, establishes plain error, and the 17 extra days he spent in jail establishes prejudice. The prosecution, changing its position from the one it had advanced in the Court of Appeals, argues that defendant is not entitled to jail credit under *Idziak*. To resolve this issue, we must determine whether defendant is legally entitled to jail credit and, if so, whether he has established plain error affecting his substantial rights.

A. JAIL CREDIT[13]

Our analysis begins with MCL 769.11b, which provides, in pertinent part:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

This statute provides that if a defendant has spent time in jail because he or she is denied or unable to

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[12] On appeal, both parties agree that the period at issue is 17 days.

[13] Courts have used the terms "sentence credit" and "jail credit" synonymously when describing the credit awarded for time spent in jail under MCL 769.11b. Compare *Idziak*, 484 Mich at 552 (using "jail credit"), with *People v Prieskorn*, 424 Mich 327, 330; 381 NW2d 646 (1985) (using "sentence credit"). For ease of reference, this opinion uses the term "jail credit" because *Idziak* used that term.

furnish bond, the trial court "shall specifically grant credit against the sentence" for the time served.[14] Thus, the trial court must grant jail credit when a defendant is held in jail for the offense of which he or she is ultimately convicted if he or she is denied or unable to furnish bond for that offense.[15]

It follows from this statute that individuals who are detained in jail for some reason other than the denial of or inability to furnish bond are not entitled to jail credit. As is discussed in greater detail below, one such reason is that the individual was a parolee who was arrested on a new charge that might also constitute a violation of his or her parole. In these circumstances, parole officials may issue a warrant for the return of a parolee to a state penal institution under MCL 791.238 or require that the parolee be arrested without a warrant or detained in any jail of the state or both under MCL 791.239. If the parole officials properly invoke one of these statutes, the individual is not being held because of a bond determination on the new charge but because the parole officials want him or her held to face the possible parole violation charges. Put differently, once the individual is held for the parole violation, his or her continued detention has nothing to do with a denial of or inability to furnish bond in the new criminal proceeding. And once the individual is not being held because he or she was denied or unable to furnish bond in that proceeding, he or she is no longer entitled to jail credit under MCL 769.11b toward any sentence imposed in the new proceeding.

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[14] MCL 769.11b.

[15] See also *Prieskorn*, 424 Mich at 341 (clarifying that the Legislature has limited a defendant's entitlement to credit to time served "for the offense of which he is convicted" and not for any other conviction).

Entitlement to jail credit thus ends when detention for the parole violation begins. Here, on September 5, 2017, parole officials issued a parole detainer under MCL 791.239, which provides for warrantless arrests and detention of parolees whom parole officials reasonably suspect have violated parole:

> A probation officer, a parole officer, a peace officer of this state, or an employee of the department other than a probation or parole officer who is authorized by the director to arrest parole violators *may arrest without a warrant and detain in any jail of this state a paroled prisoner*, if the probation officer, parole officer, peace officer, or authorized departmental employee has reasonable grounds to believe that the prisoner has violated parole or a warrant has been issued for his or her return under [MCL 791.238]. [Emphasis added.]

Under this section, once the parole officials have issued an arrest warrant under MCL 791.238 for the parole violation or have reasonable grounds for suspecting a violation, the named officials can arrest the parolee or detain the paroled prisoner in jail or both. Under MCL 791.239, parole officials may seek detention of a parolee who has already been arrested on new charges, as occurred here.[16] As Judge CAMERON described in his

[16] The statute contains the conjunctive "and," which might lead one to believe that it requires *both* a warrantless arrest *and* a detention, such that one cannot be done without the other. That is, the word "and" might suggest that detention is inappropriate unless the individual was arrested for the suspected parole violation without a warrant. While it is true that "and" generally denotes a joinder of terms—whereas the word "or" is a "disjunctive, used to indicate a disunion, a separation, an alternative," *Mich Pub Serv Co v Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949)—"and" can also be used as a disjunctive if the context so requires. See *Elliott Grocer Co v Field's Pure Food Market, Inc*, 286 Mich 112, 115; 281 NW 557 (1938). Here, the context mandates a disjunctive reading of "and" because the statute specifically states that the warrantless arrest and detention is permitted if the appropriate

concurring opinion, in these circumstances the MDOC issues a parole detainer ordering the jail to detain parolees who are already in the jail.[17] The parole detainer in the present case, for example, was addressed to the "Monroe County Jail" and stated that "[p]ursuant to Section 39 of Act. No. 314, Public Acts of 1982 [i.e., MCL 791.239], please detain in your custody until further notice the parolee named below [i.e., defendant]."

Until the MDOC issued that detainer in the instant case, defendant spent a total of 17 days in jail. Because this portion of defendant's jail time resulted solely from his inability to furnish bond, all the requirements of the jail-credit statute, MCL 769.11b, were met and he is entitled to credit for those 17 days. But when the MDOC issued the detainer, the Monroe County Jail was authorized under MCL 791.239 to detain defen-

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parole official either reasonably suspects a parole violation or obtained a warrant under MCL 791.238(1). That statute, in turn, states that "upon a showing of probable violation of parole," a named parole official "may issue a warrant for the return of any paroled prisoner." MCL 791.238(1). If the parolee is arrested pursuant to such a warrant, then a warrantless arrest has not occurred for purposes of MCL 791.239. Yet, MCL 791.239 nonetheless contemplates that the parolee can be detained in these circumstances. It follows that MCL 791.239 authorizes detention irrespective of the issuance of a warrant, as long as the parole official has a reasonable basis for believing that the parolee has violated parole.

[17] *Allen*, 330 Mich App at 124 n 1 (CAMERON, J., concurring). The MDOC's official policy further describes the role that these detainers play:

> If a parolee is held in custody on either a parole violation charge or a criminal charge which may result in the issuance of parole violation charges, the field agent shall ensure that a Parole Detainer (CFJ-108) is filed with the law enforcement agency holding the parolee. Prior to filing the detainer, the field agent shall ensure that the parolee has been properly identified. [MDOC, *Parole Violation Process*, PD 06.06.100 (July 1, 2018), p 2.]

dant on different grounds altogether. At that point, defendant was held in jail not because of any bond determination on the new criminal charges but because MDOC officials ordered him to be held on the basis of the suspected parole violation (which, in this case, was the same conduct that led to the new charges).[18] From that time, the terms of the jail-credit statute were not met, and his entitlement to credit under that statute ended.[19]

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[18] See 2 Gillespie, Michigan Criminal Law & Procedure (2d ed, 2019 rev), § 22:144, p 320 ("[Jail credit] is not awarded where the person is being held on a parole detainer, even one from another state, as the person is being held for that purpose and not on the charged offense.").

[19] MCL 791.238(6) and MCL 768.7a(2), when read together, do not mandate a different conclusion. MCL 791.238(6) provides that a prisoner on parole has merely left the prison; "[w]hile at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court . . . ." MCL 768.7a(2) provides that

> [i]f a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense *shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense*. [Emphasis added.]

In other words, these statutes provide that a parolee is still serving out his or her original sentence while on parole, and if he or she is convicted of an offense while on parole, the sentence for the later offense must be consecutive to the sentence for the first offense. A colorable argument could be made that a trial court may not award jail credit for any period of time that a defendant is on parole because the two sentences would no longer be consecutive.

We do not believe that these sections warrant a different outcome in our analysis. This argument brings the plain language of MCL 769.11b and MCL 791.238(2), as outlined above, in conflict with MCL 791.238(6) and MCL 768.7a(2). When there is a potential conflict between statutes, "it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *TOMRA*, 505 Mich at 349 (quotation marks and citation omitted). Here, these statutes can be reconciled. Jail *credit* is not synonymous with a defendant's *sentence*. If a defendant is sentenced for a new crime, the court, under MCL 769.11b,

Nothing in *Idziak* precludes this straightforward application of the statutes. In fact, *Idziak*'s logic supports our conclusion here. Our opinion in that case analyzed a different parolee-detention statute under different facts. The statute at issue in *Idziak* was MCL 791.238, which provides another way for MDOC parole officials to have a parolee detained in jail:

> (1) Each prisoner on parole shall remain in the legal custody and under the control of the department. The deputy director of the bureau of field services, upon a showing of probable violation of parole, *may issue a warrant for the return of any paroled prisoner*. Pending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.
>
> (2) *A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued* by the deputy director of the bureau of field services is treated as an escaped prisoner and *is liable, when arrested, to serve out the unexpired portion of his or her*

"shall" give the defendant credit for time spent in jail for being unable to furnish bond. When a parolee spends time in jail for a new offense *prior to conviction* without a parole detainer being filed, he or she is not serving a sentence for the later conviction because he or she has not yet been convicted or sentenced. See *Black's Law Dictionary* (5th ed) (defining "sentence" as the "judgment formally pronounced by the court or judge upon the defendant *after his conviction* in a criminal prosecution, imposing the punishment to be inflicted") (emphasis added). Instead, the defendant is accruing credit in case he or she is ultimately convicted and sentenced. Therefore, if a parolee is arrested, convicted, and sentenced for a new offense but spent time in jail on the new offense before a parole detainer was filed, the sentence for the new offense still begins after the original sentence ends, giving effect to MCL 791.238(6) and MCL 768.7a(2). However, the defendant may still receive *credit* for preconviction jail time because the sentence commenced only after the first sentence expired, giving effect to MCL 769.11b and MCL 791.238(2). The time spent in jail prior to conviction for which one is given credit is not the legal equivalent of serving a sentence for the later conviction. Therefore, because a construction exists that harmonizes the statutes, MCL 791.238(6) and MCL 768.7a(2) should not be interpreted to negate the clear directive of MCL 769.11b and MCL 791.238(2).

> *maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.* The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution. [MCL 791.238(1) and (2) (emphasis added).]

MCL 791.238 creates a warrant-based process for arresting and detaining a parolee. It allows for arrests pursuant to a warrant, and it allows the warrant to serve as a detainer.[20] Judge CAMERON aptly described the difference between this process and the parole detainer issued under MCL 791.239 in this case:

> [T]here is a considerable difference between MDOC arrest warrants issued under MCL 791.238(2) and MDOC parole detainers like the one issued in this case. An MDOC arrest warrant authorizes the arrest of suspected parole violators who are not already in custody. Our Legislature has made the clear policy decision that these not-in-custody parolees shall not receive credit against their prison sentence because they are considered to be "escaped prisoners." Parole detainers, on the other hand, are issued by the MDOC in order to ensure that county jails detain parolees who are already in jail until the parole hold is removed.[21]

Idziak's analysis centered on MCL 791.238(2).[22] Examining the text of that provision, we observed that "the

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[20] MCL 791.238(2).

[21] *Allen*, 330 Mich App at 125 n 1 (CAMERON, J., concurring).

[22] The majority opinion in *Idziak* did not describe the circumstances under which the defendant was detained in jail, and Justice MARKMAN's dissent merely mentioned in passing that a detainer had been filed. See *Idziak*, 484 Mich at 603 (MARKMAN, J., dissenting). Regardless, we applied MCL 791.238(2), and our analysis and holding was thus limited

time *after* 'the date of the prisoner's availability for return to an institution' *is* to be counted as time served against the parolee's original sentence."[23] When the parolee became available for return to the state institution—which we said usually occurred at the time of arrest—he or she resumed serving his or her prior sentence and therefore was no longer being held in jail because of being denied or unable to furnish bond in the new case.[24] Consequently, *Idziak* held that under MCL 791.238(2), a parolee is generally not entitled to jail credit after arrest.[25]

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to that section. We have no reason to believe—nor need we decide whether—*Idziak* erred by applying MCL 791.238 rather than MCL 791.239 to the facts of that case.

[23] *Id*. at 565 (opinion of the Court), quoting MCL 791.238(2).

[24] *Id*. at 565-567.

[25] *Idziak* contained a few broader statements suggesting that the date of arrest was *always* the relevant date. See *id*. at 552 ("We hold that, under MCL 791.238(2), the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense."). But we made clear that the date of availability for return to the MDOC was the relevant date, "which in [*Idziak*] is synonymous with the date of his arrest." *Id*. at 566.

Under MCL 791.238(6), all parolees are treated as serving out their original sentence while on parole. But MCL 791.238(2) suspends the running of that sentence when the prisoner has violated parole and a warrant has been issued by the deputy director of field services. The suspension of the sentence occurs from the "date of the declared violation to the date of the prisoner's availability for return to an institution . . . ." MCL 791.238(2). As *Idziak* explained, the latter date typically is the date of arrest. *Idziak*, 484 Mich at 566. Thus, the suspension covers the period from the violation to the parolee's capture. That period is considered "dead time" that is not counted toward the parole violator's *original* sentence. See *Browning v Mich Dep't of Corrections*, 385 Mich 179, 183; 188 NW2d 552 (1971). Whether such "dead time" also occurs in cases like this one—in which the MDOC takes no action to detain the parolee until after his or her arrest on new charges—is not before the Court.

We believe that *Idziak* broadly stands for the proposition that once the parole officials properly invoke their statutory authority to detain a parolee, that parolee is not entitled to jail credit under MCL 769.11b. In *Idziak*, the invocation of MCL 791.238 occurred at the time of detention, i.e., the time of arrest, and thus there was no period in which the parolee was being detained on the new charges because of denial of or inability to furnish bond. In this case, the parole officials invoked their detention powers under MCL 791.239 only after defendant had been detained for a total of 17 days. In each case, the MDOC's invocation of its detention authority served as the key point after which no jail credit could be awarded.

In sum, parolees who are not arrested or detained under MCL 791.238 or arrested under MCL 791.239 who spend time in jail because of the denial of or inability to furnish bond are entitled to jail credit until the MDOC files a parole detainer under MCL 791.239. Defendant here spent 17 days in jail prior to the filing of the detainer and is entitled to credit against his sentence on the new criminal charges if he can satisfy the plain-error standard.

B. PLAIN ERROR

Our conclusion that the relevant statutes mandate jail credit under the circumstances of this case does not end our analysis. As previously noted, this issue is ultimately reviewed for plain error because it is unpreserved. The plain-error test has four elements:

> "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) . . . the plain error affected substantial rights . . . [, and 4)] once a defendant satisfies these three requirements, an appellate court must exercise its discre-

> tion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[26]

"A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.' "[27] The third prong " 'generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.' "[28]

Defendant has shown that the trial court and Court of Appeals erred as a matter of law by holding that he is not legally entitled to jail credit. MCL 791.238(2) requires an arrest for a parole violation, and *Idziak*, despite its broad holding, did not address the situation present in this case. This clear legal error is apparent on the record, and it satisfies the first two prongs of the plain-error analysis.

We further believe that defendant has demonstrated prejudice. In *Glover v United States*, the United States Supreme Court, addressing prejudice in the context of ineffective assistance of counsel, concluded: "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment signifi-

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[26] *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018), quoting *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (alteration in original).

[27] *Randolph*, 502 Mich at 10, quoting *Puckett v United States*, 556 US 129, 135; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

[28] *Randolph*, 502 Mich at 10, quoting *Carines*, 460 Mich at 763.

cance."[29] Citing *Glover*, the United States Court of Appeals for the Sixth Circuit has further described that "[a]ctual prejudice also exists when there is a reasonable probability that petitioner would have avoided even 'a minimal amount of additional time in prison' were it not for counsel's performance at sentencing."[30]

We believe that this reasoning applies in this particular plain-error context. As a result of the trial court's decision not to award jail credit to defendant for the 17 days for which he was entitled to that credit, defendant spent an extra 17 days in jail that the law did not require of him.[31] Consequently, he was deprived of his liberty for an extra 17 days. Even though this is a "minimal" amount of jail time, it is sufficient to show prejudice. The trial court's error affected the outcome of the trial court proceedings and the "fairness, integrity or public reputation of judicial proceedings" because it led to increased incarceration time for defendant and greater deprivation of his liberty when the law did not require that of him.[32]

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[29] *Glover v United States*, 531 US 198, 203; 121 S Ct 696; 148 L Ed 2d 604 (2001).

[30] *Phillips v White*, 851 F3d 567, 582 (CA 6, 2017), quoting *Glover*, 531 US at 203.

[31] We note that defendant has apparently been released on parole as of September 1, 2020. See Michigan Department of Corrections, Offender Tracking Information System, *Biographical Information for Erick Rosean Allen* <https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=470886> (accessed July 2, 2021) [https://perma.cc/7DCG-ZFAW]. This, however, does not change our analysis. If defendant had been awarded the jail credit to which he was legally entitled, he would have been eligible for parole sooner and his supervision discharge date from parole would have ended sooner. He still spent an extra 17 days in prison, prior to being released on parole, that the law did not require of him.

[32] *Randolph*, 502 Mich at 10, quoting *Carines*, 460 Mich at 763-764.

We acknowledge that the trial court apparently gave defendant a lesser minimum sentence to account for the days he spent in jail awaiting trial. However, the record does not demonstrate that the trial court explicitly considered the 17 days that defendant spent in jail prior to the parole detainer being filed. More importantly, the trial court's sentencing decision was an act of discretion.[33] But our conclusion today is that defendant *must* be awarded credit for the 17 days at issue because no parole detainer had yet been filed. Under MCL 769.11b, "the trial court in imposing sentence *shall specifically grant credit* against the sentence for such time served in jail prior to sentencing."[34] By using "shall," the Legislature made this grant of credit mandatory.[35] The trial court made a discretionary decision to give an indeterminate amount of credit for the time defendant spent in jail; it did not *specifically* grant him credit for the days he spent in jail prior to the filing of the parole detainer. Therefore, we conclude that defendant has established prejudice. Finally, because defendant was not specifically awarded credit and was instead deprived of his liberty for an additional 17

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[33] See *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990) ("We believe that judicial sentencing discretion should be exercised, within the legislatively prescribed range, according to the same principle of proportionality that guides the Legislature in its allocation of punishment over the full spectrum of criminal behavior. Thus, a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing."), abrogated, in part, on other grounds by *People v Steanhouse*, 500 Mich 453 (2017).

[34] MCL 769.11b (emphasis added).

[35] See *People v Lockridge*, 498 Mich 358, 387; 870 NW2d 502 (2015) ("As we have stated many times, 'shall' indicates a *mandatory* directive.").

days, we vacate defendant's sentence and remand for resentencing to give defendant credit for the 17 days to which he is entitled.

IV. CONCLUSION

We hold that a parolee is entitled to jail credit under MCL 769.11b for time spent in jail after arrest for a new offense when the MDOC does not file a parole detainer against that parolee. We further hold that defendant has shown plain error. The trial court committed an error of law, and that error prejudiced defendant because he was erroneously deprived of his liberty and was not specifically awarded credit for the time he served in jail. Therefore, we reverse the Court of Appeals' holding to the contrary, vacate defendant's sentence, and remand the case to the Monroe Circuit Court for resentencing to grant defendant credit for the time he spent in jail prior to the MDOC's filing of a parole detainer against him.

MCCORMACK, C.J., and ZAHRA, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with VIVIANO, J.

Orders in Cases

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Motion to Waive Fees Denied January 4, 2021:

CARTER v DEPARTMENT OF CORRECTIONS, No. 162423; Court of Appeals No. 354650.

On order of the Chief Justice, the motion of appellant to waive fees is considered and it is denied because MCL 600.2963 requires that a prisoner pursuing a civil action be liable for filing fees.

Within 21 days of the date of this order, appellant shall (1) pay an initial partial fee of $58.00 and (2) submit one copy of this order and the copy of the pleading returned to him as acknowledgement of his responsibility to pay the $317.00 balance of the fee. Failure to pay the partial fee and submit the documents will result in the appeal being administratively dismissed.

If appellant timely complies with this order, monthly payments shall be made to the Department of Corrections in the amount of 50 percent of the deposits made to appellant's account until the payments equal the balance due of $207.00. That amount shall then be remitted to this Court.

Generally, appellant may not file a new civil action or appeal in this Court until the filing fee in this case is paid in full. MCL 600.2963(8).

The Clerk of the Court shall furnish two copies of this order to appellant and return a copy of appellant's pleadings with this order.

Leave to Appeal Denied January 13, 2021:

PEOPLE v TINSLEY, No. 162231; Court of Appeals No. 354422.

Application for Leave to Appeal Dismissed on Stipulation January 13, 2021:

In re TJ DIEHL, MINOR, No. 160457; reported below: 329 Mich App 671.

Leave to Appeal Denied January 15, 2021:

PEOPLE v SINDONE, No. 159709; Court of Appeals No. 340328. On January 7, 2021, the Court heard oral argument on the application for leave to appeal the April 11, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v SEDGEMAN, No. 162396; Court of Appeals No. 355121.

Summary Disposition January 20, 2021:

PEOPLE v GOOD, No. 160827; Court of Appeals No. 349268. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of (1) whether the defendant, by filing a Standard 4 supplemental brief on direct appeal, waived his right to claim ineffective assistance of appellate counsel in proceedings under MCR Subchapter 6.500; (2) whether the Court of Appeals decided the defendant's restitution and sentencing grounds for relief against him in the prior appeal, MCR 6.508(D)(2); and (3) if not, whether the defendant is entitled to relief from judgment on these grounds for relief. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Mecosta Circuit Court and direct that court to appoint counsel to represent the defendant in the Court of Appeals. Because the State Appellate Defender Office and Laurel Kelly Young represented the defendant in prior appellate proceedings, neither may be appointed as appellate counsel. We do not retain jurisdiction.

PEOPLE v NYE, No. 161267; Court of Appeals No. 351480. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to address: (1) whether the Oakland Circuit court had statutory authority under MCL 769.1k to issue the September 23, 2015 amended order to remit prisoner funds; and (2) if so, whether setting the amount of attorney fees several years after sentencing violates due process. *People v Jackson*, 483 Mich 271, 292 (2009).

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court and direct that court to appoint counsel to represent the defendant in the Court of Appeals. We direct the Court of Appeals' attention to the fact that we have also remanded *People v Terry* (Docket No. 161983) to the Court of Appeals for consideration of similar issues. We do not retain jurisdiction.

PEOPLE v AARON ROBINSON, No. 161607; Court of Appeals No. 335193. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentences for first-degree home invasion and safe-breaking, and remand this case to the Genesee Circuit Court for resentencing. When the trial court departed upward from the recommended guidelines range, it improperly sentenced the defendant based in part on acquitted conduct. *People v Beck*, 504 Mich 605 (2019). On remand, the trial court must also reconsider whether to impose discretionary consecutive sentencing. The motion to add issue is denied. We do not retain jurisdiction.

PEOPLE v TERRY, No. 161983; Court of Appeals No. 353663. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to address: (1) whether the Oakland Circuit Court had statutory authority under MCL 769.1k to issue the August 28, 2018 amended order to remit prisoner funds; and (2) if so, whether setting the amount of attorney fees several years after sentencing violates due process. *People v Jackson*, 483 Mich 271, 292 (2009).

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court and direct that court to appoint counsel to represent the defendant in the Court of Appeals. We direct the Court of Appeals' attention to the fact that we have also remanded *People v Nye* (Docket No. 161267) to the Court of Appeals for consideration of similar issues. We do not retain jurisdiction.

PEOPLE v KIOGIMA, No. 161997; Court of Appeals No. 353815. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Oral Argument Ordered on the Application for Leave to Appeal January 20, 2021:

PEOPLE v DONALD DAVIS, No. 161396; reported below: 331 Mich App 699. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether he was denied his right to a public trial pursuant to US Const, Am VI, and Const 1963, art 1, § 20 where the Genesee Circuit Court stated that it was barring everyone, but the decedent's mother, from the courtroom for the remainder of the trial and told others in the courtroom to leave and not return; (2) whether, despite the court's statement, the courtroom remained open to the public because the courtroom door was unlocked, no sign was posted advising members of the public that the courtroom was closed, and court personnel did not prevent persons from entering the courtroom; (3) whether the appellant waived his right to a public trial; (4) whether trial counsel rendered ineffective assistance in failing to object; see *Weaver v Massachusetts*, 582 US ____; 137 S Ct 1899, 1913 (2017); and (5) whether the trial court committed plain error entitling the appellant to a new trial. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE V PIPPEN, No. 161723; Court of Appeals No. 347729. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether there is a reasonable probability that, but for trial defense counsel's failure to investigate and present Michael Hudson's testimony, the outcome of this trial would have been different. *Strickland v Washington*, 466 US 668, 694 (1984). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

MEEMIC INSURANCE COMPANY V ANGELA JONES, No. 161865; Court of Appeals No. 346361. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether its declaration that a homeowners insurance policy was void *ab initio* should be considered a denial of a claim under the policy such that it may invoke its right to subrogation when it was required by a standard mortgage clause to pay the balance of the appellee's mortgage. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 20, 2021:

PEOPLE V GARY JACKSON, No. 161097; Court of Appeals No. 351450.

PEOPLE V BODMAN, No. 161249; Court of Appeals No. 351854.

PEOPLE V CARLTON WILLIAMS, No. 161803; Court of Appeals No. 345585.

PEOPLE V MICHAEL LAWSON, No. 162062; Court of Appeals No. 349523. This order is without prejudice to the defendant's ability to file a motion for relief from judgment pursuant to MCR 6.501 *et seq*. that may include any claim of actual innocence or newly discovered evidence.

BURNETT v AHOLA, Nos. 162338 and 162339; Court of Appeals Nos. 354991 and 354996.

Summary Disposition January 22, 2021:

PEOPLE v MARTINEZ, No. 160060; Court of Appeals No. 341147. On January 6, 2021, the Court heard oral argument on the application for leave to appeal the June 18, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the defendant's convictions and sentences, and remand this case to the Berrien Circuit Court for a new trial. We agree with dissenting Judge RIORDAN that the complainant's statements concerning a threat to make prior false allegations were not inadmissible hearsay because they were not offered for the truth of the matter asserted. MRE 801(c). Rather, the complainant's out-of-court statements were offered to directly attack the complainant's credibility. Although these statements were not hearsay, it does not automatically follow that they were admissible. See *People v Musser*, 494 Mich 337, 354 (2013). Character evidence is not admissible to prove an action in conformity therewith unless an exception applies. MRE 404(a). MRE 608 provides such an exception. The statements were admissible pursuant to MRE 608(b), which permits the admission of evidence "concerning the witness' character for truthfulness or untruthfulness" on cross-examination, limited to the purpose of attacking or supporting a witness' credibility. See *People v Jackson*, 475 Mich 909, 910 (2006).

The exclusion of this otherwise admissible evidence was not harmless. In this case, the excluded evidence was specific, highly relevant, and acknowledged by the complainant while under oath during the preliminary examination. The similarities between the threatened accusations against the complainant's biological father and the accusations against the defendant were striking and rendered the complainant's prior threat highly probative of her credibility as to the allegations she made against the defendant. See *People v Grissom*, 492 Mich 296, 317 (2012) (stating that when a witness is "prepared to admit on the stand that a prior accusation of a similar nature was false, it is hard to imagine good reason for excluding the evidence") (quotation marks and citation omitted). In light of the absence of other direct or circumstantial evidence supporting the defendant's convictions, the exclusion of this impeachment evidence was not harmless error. The risk of prejudice is especially high in a case such as this in which the evidence essentially presents a one-on-one credibility contest between the complainant and the defendant because of the reasonable probability "that this additional attack on the complainant's credibility would have tipped the scales in favor of finding a reasonable doubt about [the] defendant's guilt." *People v Armstrong*, 490 Mich 281, 291-292 (2011); see also *People v Gursky*, 486 Mich 596, 620-621 (2010). We do not retain jurisdiction.

Leave to Appeal Denied January 22, 2021:

SULLIVAN v MICHIGAN REFORMATORY WARDEN, No. 161597; Court of Appeals No. 352985.

In re SMIELEWSKI, MINORS, No. 162349; Court of Appeals No. 353405.

GALE v GALE, No. 162440; Court of Appeals No. 355455.

PEOPLE v WITZKE, No. 162442; Court of Appeals No. 355786.

PEOPLE v SAMUEL CALHOUN, No. 162463; Court of Appeals No. 354648.

Order Denying Motion to Disqualify Entered January 25, 2021:

IW v MM, No. 162441; Court of Appeals No. 350711. On order of the Chief Justice, the motion of respondent-appellant to disqualify her from participating in the decision of this case is denied.

Summary Disposition January 27, 2021:

PEOPLE v MCMICHAEL, No. 161015; Court of Appeals No. 351869. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals shall address whether the defendant is entitled to withdraw his plea in light of *People v Warren*, 505 Mich 196 (2020).

PEOPLE v GERALD ALLEN, No. 161605; Court of Appeals No. 342999. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part III.B.2 of the judgment of the Court of Appeals and we remand this case to that court for reconsideration of the defendant's ineffective assistance of counsel claim, based on trial counsel's failure to call witnesses, under the correct standard. The Court of Appeals erred in holding that "[b]ecause Allen was not deprived of a substantial defense, trial counsel's decision not to call Dr. Hicks and Dr. Defriez as witnesses at trial did not fall below an objective standard of reasonableness and counsel was not ineffective in this respect." *People v Allen*, ____ Mich App ____ (2020), slip op p 10. The defendant was not required to show, in order to obtain relief for ineffective assistance of counsel, that trial counsel's failure to call witnesses deprived him of a substantial defense. Rather, a claim of ineffective assistance of counsel premised on the failure to call witnesses is analyzed under the same standard as all other claims of ineffective assistance of counsel, i.e., a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012); see also *Strickland v Washington*, 466 US 668 (1984). On remand, the Court of Appeals shall resolve the defendant's claim of ineffective assistance of counsel under this standard. In all other respects, leave to appeal is denied, because we

are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal January 27, 2021:

PEOPLE V SHANE HAWKINS, No. 161243; Court of Appeals No. 339020. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether there is a reasonable probability that, but for trial defense counsel's failure to object to Detective Boczar's testimony, the outcome of this trial would have been different. *Strickland v Washington*, 466 US 668, 694 (1984). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PRICE V AUSTIN, No. 161655; Court of Appeals No. 346145. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether (1) the trial court improperly assessed the appellee-driver's credibility regarding the existence of a sudden emergency in granting summary disposition pursuant to MCR 2.116(C)(10), and (2) the sudden emergency doctrine is an application of the reasonably prudent person standard, not an affirmative defense, such that it may only be determined by a jury. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 27, 2021:

PEOPLE V ROSIAK, No. 160957; Court of Appeals No. 351537.

NEW PRODUCTS CORPORATION V HARBOR SHORES BHBT LAND DEVELOPMENT, LLC, No. 161107; Court of Appeals No. 344211.

GRANADOS-MORENO V FACCA, No. 161257; Court of Appeals No. 346598.

PEOPLE V WARNER, No. 161431; Court of Appeals No. 343419.

PEOPLE V MICHAEL GRAHAM, No. 161879; Court of Appeals No. 353816.

CAVANAGH, J. (*concurring*). I concur in this Court's order denying leave to appeal. I write separately to note that, although defendant is precluded from obtaining a plea withdrawal on direct appeal because he failed to file a motion to withdraw his plea in the trial court, MCR 6.310(C)(1); MCR 6.310(D), he may still seek a plea withdrawal based on the trial court's failure to advise him of the possibility that his sentences would be imposed consecutively in a motion for relief from judgment, MCR 6.310(C)(2); MCR 6.508(D)(3); see also *People v Warren*, 505 Mich 196 (2020). I further note that this Court's denial is not a decision on the merits and therefore defendant is not precluded under MCR 6.508(D)(2) from seeking a plea withdrawal in a motion for relief from judgment. See *People v Poole*, 497 Mich 1022 (2015) ("[O]rders denying leave to appeal [are] not rulings on the merits of the issues presented."), citing *Grievance Administrator v Lopatin*, 462 Mich 235, 260 (2000).

MOORE V FINDLING, No. 161946; Court of Appeals No. 353619.

Summary Disposition January 29, 2021:

TURNER V FARMERS INSURANCE EXCHANGE and EVERSON V FARMERS INSURANCE EXCHANGE, Nos. 159660 and 159661; Court of Appeals Nos. 339624 and 339815. On order of the Court, leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we reverse the April 16, 2019 judgment of the Court of Appeals and, in Docket No. 159660, we reinstate the May 5, 2017 order of the Wayne Circuit Court granting summary disposition in favor of Enterprise Leasing Corporation of Detroit, LLC, and EAN Holdings, LLC. In Docket No. 159661, we reinstate the August 2, 2017 order of the Washtenaw Circuit Court granting summary disposition in favor of Enterprise Leasing Company.

MCL 500.3101(1) of the no-fault act, MCL 500.3101 *et seq*., provides that "the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of [no-fault] benefits . . . ." And MCL 500.3102(1) provides that "[a] nonresident owner or registrant of a motor vehicle . . . not registered in this state shall not operate or permit the motor vehicle . . . to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of [no-fault] benefits . . . ." Furthermore, at the time relevant to this case, MCL 500.3114 provided for the following insurer priority:

> (3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered

> by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.
>
> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) *The insurer of the owner or registrant of the vehicle occupied*.
>
> (b) The insurer of the operator of the vehicle occupied. [MCL 500.3114, as amended by 2016 PA 347 (emphasis added).]

In *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191 (1986), we held that under MCL 500.3114(3), "when an employee is injured in an employer's out-of-state vehicle, which is not required to be registered in this state . . . , and when the vehicle is not subject to the security provisions of the no-fault act because it has not been operated in this state for more than thirty days within the calendar year," then any insurer of that vehicle does not have priority for no-fault benefits. *Id*. at 207. In dictum, we added that "we read the phrase 'owner or registrant of the vehicle occupied' within [MCL 500.3114(4)(a)] to be part of the more complete requirement as stated in [MCL 500.3101(1)]: 'The owner or registrant of a motor vehicle *required to be registered in this state*' (emphasis added)." *Id*. at 203 n 3. See *Robinson v City of Lansing*, 486 Mich 1, 16-17 (2010) ("[T]he Legislature is not required to be overly repetitive in its choice of language. . . . We do not believe that this is required of the Legislature in order that it communicate its intentions. . . . [U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute.").

Here, as in *Parks*, it is undisputed that the vehicles at issue owned by the Enterprise appellants which the injured individuals were occupying at the time of the respective accidents were (1) out-of-state vehicles, (2) not required to be registered in this state, and (3) not subject to the security provisions of the no-fault act because they had not been operated in this state for more than 30 days within the calendar year. See MCL 500.3101(1); MCL 500.3102(1). Furthermore, we believe that the holding of *Parks* as to MCL 500.3114(3) applies with equal force to former MCL 500.3114(4)(a) in this context. MCL 500.3114(3), as with former MCL 500.3114(4)(a), does not expressly condition an insurer's priority for no-fault benefits upon the vehicle's being required to be registered in Michigan or otherwise being subject to the security provisions of the no-fault act because it has been operated within the state for more than 30 days within the calendar year. Yet, such a condition is implicit within MCL 500.3114(3) and former MCL 500.3114(4)(a) when the no-fault act is read as a whole. Under MCL 500.3101(1) and MCL 500.3102(1), an owner or registrant of a vehicle must maintain security for the payment of no-fault benefits (i.e., obtain a no-fault insurer) when the vehicle is either required to be registered in this state or operated in this state for more than 30 days within the calendar year. In our judgment, consistent with *Parks*, the word

"insurer" as used in MCL 500.3114(3) and former MCL 500.3114(4)(a) refers to the no-fault insurer contemplated by MCL 500.3101(1) and MCL 500.3102(1). That is, the word "insurer" as used in MCL 500.3114(3) and former MCL 500.3114(4)(a) refers *only* to a particular insurer that has agreed to provide no-fault insurance to an owner or registrant as required by MCL 500.3101(1) or MCL 500.3102(1). Therefore, where no such insurer exists, there can be no "insurer of the furnished vehicle," see MCL 500.3114(3), or "insurer of the owner or registrant of the vehicle occupied," see former MCL 500.3114(4)(a).

As applied to this case, because these self-insured Enterprise appellants, see MCL 500.3101d, were not required under either MCL 500.3101(1) or MCL 500.3102(1) to obtain no-fault insurance for the vehicles at issue, the Enterprise appellants could not have constituted the "insurer of the owner or registrant of the vehicle occupied" under former MCL 500.3114(4)(a). Accordingly, the trial court in each case correctly granted summary disposition in favor of the Enterprise appellants.

CLEMENT, J. (*concurring*). I concur in full with the Court's order. I write separately to note that my vote in this case is dictated by this Court's decision in *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167 (2019). In my view, the fundamental inquiry in this case is determining the nature of the commitment a no-fault insurer makes when it issues a policy of no-fault insurance (or, as here, when an entity commits to self-insuring). The obligation to obtain no-fault insurance is triggered upon becoming "the owner or registrant of a motor vehicle required to be registered in this state" that is going to be "driven or moved on a highway." MCL 500.3101(1). Is the no-fault insurer's commitment to the *insured owner*, or is it to the *owner's vehicle*? My view is that "nothing in the no-fault act requires a vehicle to be insured," but rather that "a certain person (the vehicle's owner or registrant) [must] maintain security against liability . . . ." *Dye*, 504 Mich at 197 (CLEMENT, J., dissenting). But my view did not prevail; the Court held that MCL 500.3101(1) "refers to the vehicle, not the person." *Id*. at 192 (opinion of the Court). As a result, a no-fault insurer makes a commitment to cover a particular *vehicle*, rather than making a commitment to cover a particular *vehicle owner* and that owner's collection of automobiles.

In its argument to this Court, Enterprise emphasizes that there must be a "predicate" for insurance liability to trigger its placement in the priority hierarchy to pay benefits, and because the vehicle at issue did not need to be insured under MCL 500.3101(1), there is no such predicate here. In my view, this assumes the conclusion. There is no dispute that Enterprise owns other vehicles in Michigan that are subject to MCL 500.3101(1); the question is whether *those* automobiles are a sufficient "predicate" to impose liability on Enterprise. Had the Court adopted my position in *Dye*, I believe it would follow that Enterprise's other vehicles subject to Michigan's insurance requirement would be a sufficient "predicate." Enterprise (as insurer) would have committed to covering Enterprise (as owner of one or more vehicles subject to Michigan's insurance requirement), and it is in that latter capacity that Enterprise appears in the order of priority under former

MCL 500.3114(4)(a). Instead, the Court held in *Dye* that no-fault insurance is attached to a specific vehicle rather than a specific vehicle owner. I therefore conclude that those other vehicles are not a sufficient "predicate," that the vehicle at issue should be considered uninsured, and thus that the "insurer of the owner" does not exist, meaning that "no personal protection insurance [was] applicable to the injury" and the claim was eligible to be assigned through the assigned claims plan, MCL 500.3172(1). As the insurer to whom the claim was assigned, Farmers Insurance Exchange thus is liable for benefits, and I concur in the Court's order.

CAVANAGH, J. (*dissenting*). I would affirm the April 16, 2019 decision of the Court of Appeals holding that defendant EAN Holdings, Inc. (EAN) is obligated to pay plaintiffs personal protection insurance (PIP) benefits under former MCL 500.3114(4)(a) because it is the insurer of the owner of the vehicles occupied by plaintiffs when the accidents at issue occurred.

In both of these consolidated actions, plaintiffs were injured when they were passengers in vehicles owned by defendant Enterprise Leasing Corporation of Detroit, LLC (Enterprise). The vehicles at issue were rented in Michigan but were registered in other states and were self-insured by defendant EAN. Because the vehicles had not been operated in Michigan for more than 30 days, Enterprise and EAN argued that they were not required to be registered or insured in Michigan under MCL 500.3101(1) and MCL 500.3102(1). When EAN refused to provide PIP coverage to plaintiffs, defendant Farmers Insurance Exchange (Farmers) was assigned through the assigned claims plan to handle plaintiffs' claims for benefits. Farmers argued that EAN was responsible for paying PIP benefits to plaintiffs because EAN was higher in priority under former MCL 500.3114(4)(a). The trial courts in both cases held that EAN was not in the order of priority under former MCL 500.3114(4)(a) because the vehicles were not required to be registered or insured in Michigan under MCL 500.3101(1) and MCL 500.3102(1). On appeal, the Court of Appeals reversed, holding that priority under former MCL 500.3114(4)(a) was not linked to the registration and insurance requirements of MCL 500.3101(1) and MCL 500.3102(1) and, under the plain language of former MCL 500.3114(4)(a), EAN was higher in the order of priority because it was the "insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a), as amended by 2016 PA 347; *Turner v Farmers Ins Exch*, 327 Mich App 481, 499-500 (2019), citing *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 113-115 (2006). The Court of Appeals also concluded that a self-insured entity is an insurer under former MCL 500.3114(4)(a) because an entity that elects to self-insure certifies that it will provide security equivalent to the security afforded by an insurance policy. *Turner*, 327 Mich App at 499-500. The majority now reinstates judgment in favor of EAN because, as a self-insured entity, EAN was not required under MCL 500.3101(1) or MCL 500.3102(1) to obtain no-fault insurance for the vehicles at issue, and it could not have constituted the "insurer of the owner or registrant of the vehicle

occupied" under former MCL 500.3114(4)(a). Because I do not construe the plain language of these statutes as the majority does, I respectfully dissent.

Construction of the plain language of former MCL 500.3114(4)(a) is straightforward: an uninsured person suffering injury "while an occupant of a motor vehicle" claims PIP benefits from "the insurer of the owner or registrant of the vehicle occupied . . . ." An insurer, like EAN, who has agreed to provide Michigan PIP coverage to the owner or the registrant of the vehicle occupied, like Enterprise, is first in priority to provide PIP coverage to uninsured occupants of that vehicle. There is no express exception in former MCL 500.3114(4)(a) for vehicles not required to be insured in Michigan. Based on the language of the statutes, registration and security are not conditions precedent to priority. As we have consistently recognized, absent specific language to the contrary, coverage under the no-fault act should not be conflated with the security and registration requirements of the act. *Lee v Detroit Auto Inter-Ins Exch*, 412 Mich 505, 513 (1982). In *Lee*, this Court found that there was nothing in the language of MCL 500.3105(1) tying coverage to the registration and security requirements of MCL 500.3101(1) and MCL 500.3102(1), and it held that we could not insert that connection through artful statutory construction:

> It is noteworthy that [MCL 500.3105(1)] declares that entitlement to benefits depends, in part, upon "use of a motor vehicle as a motor vehicle". There is no language qualifying the right to benefits or the insurer's duty to pay them with a requirement that such motor vehicle be a "registered", "insured", or "covered" motor vehicle as indeed might easily have been done had the Legislature so intended. The requirement is merely that the vehicle involved be a "motor vehicle" used, maintained, operated or owned "as a motor vehicle".
>
> We are not left to speculate about whether the Legislature intended the expression "motor vehicle" to mean a covered or registered or insured motor vehicle when it used those words as an expression of art throughout the statute. The meaning of that expression is explicitly set down in the definitional section of the act . . . .
>
> Conspicuously absent is any language limiting "motor vehicle" to one required to be registered in the state or for which no-fault security must be maintained. [*Lee*, 412 Mich at 512-513.]

I would follow *Lee* and construe priority under former MCL 500.3114(4)(a) as separate and distinct from the registration and security requirements of MCL 500.3101(1) and MCL 500.3102(1).[1]

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[1] While the majority is correct that we do not require the Legislature to be overly repetitive in its choice of language, we do follow the plain meaning of the statute when the Legislature uses certain and unambiguous language. *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 294-295 (2020), quoting *Danse Corp v Madison Hts*, 466 Mich

The majority acknowledges that the link between former MCL 500.3114(4)(a) and MCL 500.3101(1) is not found in the actual language of the statutes. Rather, the majority contends that the link is "implicit" in former MCL 500.3114(4)(a) when the act is construed as a whole. The majority construes MCL 500.3101(1) and MCL 500.3102(1) as requiring an owner or registrant to "obtain a no-fault insurer" and then links that implicitly required insurer to the insurer referred to as first in priority in former MCL 500.3114(4)(a). I disagree with this approach. Had the Legislature meant to link priority under former MCL 500.3114(4)(a) to the registration and security requirements of the act, it presumably would have employed language to that effect—i.e., "[t]he insurer of the owner or registrant of the vehicle occupied [*with respect to which the security required by MCL 500.3101 was in effect*]" or "[t]he insurer of the owner or registrant of the vehicle occupied [*if that vehicle was required to be insured under MCL 500.3101*]." See *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448 (2002) ("When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional."); see also *In re MKK*, 286 Mich App 546, 556-557 (2009) (stating that our Legislature is presumed to be aware of the consequences of its use of statutory language as well as its effect on existing laws).

Citing our decision in *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191 (1986), the majority reasons that Enterprise did not need to "obtain an insurer" under MCL 500.3101(1) and MCL 500.3102(1) because the vehicles were not required to be registered in this state and were not operated in the state for more than 30 days within the calendar year and, therefore, EAN cannot be considered the insurer of priority under former MCL 500.3114(4)(a). I agree with the Court of Appeals majority that *Parks* does not control the analysis here because a different subsection of the statute was at issue in *Parks* and, hence, any statement regarding the proper construction of former MCL 500.3114(4)(a) in *Parks* was dicta. In addition, while I believe that *Parks* incorrectly tied priority under MCL 500.3114(3) to the registration and security requirements of MCL 500.3101(1) and MCL 500.3102(1), it is not necessary to overrule *Parks* in this case because MCL 500.3114(3) and former MCL 500.3114(4)(a) are not worded identically. As the appellee points out, MCL 500.3114(3) does not refer to the insurer of the *owner* of the vehicle but rather refers to the insurer of *the vehicle itself*.[2]

175, 181-182 (2002) (" 'Where the statutory language is unambiguous, the plain meaning reflects the Legislature's intent and the statute must be applied as written.' "). In this case, I disagree with the majority that construction of the statutes at issue is merely an exercise in construing a term consistently within a single statute. Rather, I believe the majority is improperly inserting language from one statute into another despite the fact that the Legislature did not see fit to do the same.

[2] I recognize that, as a general principle, the no-fault statutory scheme centers on insuring people, not vehicles, against loss.

In any event, I would not extend *Parks* beyond the statute at issue there. Further, even if there is an implicit link between priority under former MCL 500.3114(4)(a) and the registration and security requirements of the act, I believe that link is satisfied in these cases. MCL 500.3101(1) states that an owner or registrant must "maintain security for payment of benefits," and MCL 500.3102(1) states that an owner or registrant is excused from maintaining that security if the vehicle does not have to be registered in this state or is driven within this state less than an aggregate of 30 days in any calendar year. Enterprise did "maintain security" by self-insuring through EAN, regardless of whether it was required to under MCL 500.3102(1).[3] Because Enterprise did maintain security for the vehicles through EAN, EAN was the insurer of the owner of the vehicle occupied by the plaintiffs and was first in priority under former MCL 500.3114(4)(a). Accordingly, I would affirm the decision of the Court of Appeals.

VIVIANO, J., joins the statement of CAVANAGH, J.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

Supplemental Briefing Ordered January 29, 2021:

PEOPLE V BETTS, No. 148981; Court of Appeals No. 319642. On order of the Court, leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we direct the parties to file supplemental briefs within 28 days of the date of this order addressing the following issues: if this Court finds that the retroactive application of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is unconstitutional, (1) whether the constitutional infirmity may be remedied through the application of the recently enacted 2020 PA 295; (2) if not, whether 2020 PA 295 has any effect on

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Lee, 412 Mich at 516. Accordingly, it is not surprising that many of the statutory coverage provisions speak in terms of coverage for an insured person, rather than coverage for an insured vehicle. But some statutory provisions do speak in terms of the vehicle rather than the person and, when they do, we must construe those statutes as actually written, regardless of whether those provisions follow the general scheme of "people, not vehicles." In other words, whether a statutory provision ties priority to an individual (such as former MCL 500.3114(4)(a)) or to the vehicle (such as the exclusion in MCL 500.3113(b) and *Dye*), it should be construed accordingly.

[3] While the required security is most often acquired by "obtain[ing] a no-fault insurer," the statute specifically states that the security "may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance" and that "[t]he person filing the security has all the obligations and rights of an insurer under this chapter." MCL 500.3101(5).

the potential remedy; and (3) what effect the answers to these questions have upon defendant's conviction pursuant to MCL 28.729 for failure to register under SORA.

WELCH, J., did not participate because the Court considered this order before she assumed office.

Oral Argument Ordered on the Application for Leave to Appeal January 29, 2021:

MECOSTA COUNTY MEDICAL CENTER V METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY, Nos. 161628 and 161650; Court of Appeals No. 345868. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether the appellees' claims for no-fault personal protection insurance benefits are barred by (1) res judicata or (2) collateral estoppel. See *Adair v Michigan*, 470 Mich 105, 121 (2004); *Monat v State Farm Ins Co*, 469 Mich 679, 682-684 & n 2 (2004). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' briefs. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. Replies, if any, must be filed by the appellants within 14 days of being served with the appellees' briefs. The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the defendants to be divided at their discretion and 20 minutes for the plaintiffs to be divided at their discretion. MCR 7.314(B)(2).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, Docket No. 161628, only and served on the parties in both cases.

PEOPLE V KEVIN WHITE, No. 162136; Court of Appeals No. 346661. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the criminal act of the principal can, for purposes of venue, be attributed to an alleged aider and abettor who is being "prosecuted, indicted, [and] tried . . . as if he had directly committed the offense," MCL 767.39; and (2) whether it is relevant for the purpose of establishing venue in this prosecution for delivery of a controlled substance causing death, MCL 760.317a, that the appellant delivered the controlled substance in Macomb County and there is no evidence that the appellant knew that the person to whom he delivered the controlled substance had moved from Macomb County to Livingston County, see MCL 762.8; *People v McBurrows*, 504 Mich 308 (2019). In addition to the brief, the appellant shall electronically file an appendix

conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Denying Motion to Disqualify Entered January 29, 2021:

IW v MM, No. 162441; Court of Appeals No. 350711. On order of the Court, the motion to disqualify Chief Justice BRIDGET M. MCCORMACK from participating in the decision of the case, upon de novo review by the other justices, is denied.

Application for Leave to Appeal Dismissed January 29, 2021:

IW v MM, No. 162441; Court of Appeals No. 350711. On order of the Court, because respondent-appellant has failed to pay the filing fee as required by the orders of January 7, 2021, and January 20, 2021, the clerk of the Court is directed to administratively dismiss the application for leave to appeal and close the file. The motions to stay and to change venue are denied.

Summary Disposition February 2, 2021:

JACKSON v SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, No. 160888; Court of Appeals No. 344058. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Oakland Circuit Court for reconsideration of the defendants' motions for summary disposition in light of *Rafaeli v Oakland Co*, 505 Mich 429 (2020). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. We do not retain jurisdiction.

JODE INVESTMENTS, LLC v BURNING TREE PROPERTIES, LLC, No. 161434; Court of Appeals No. 346403. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II-B of the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration. The trial court did not rely upon MCL 600.6013(1) when it partially granted the defendants' request for post-judgment

interest, but instead cited its equitable authority. See *Cyranoski v Keenan*, 363 Mich 288, 294-295 (1961). On remand, the Court of Appeals shall determine: (1) whether the trial court abused its discretion by awarding post-judgment interest; and (2) if not, whether the trial court abused its discretion with respect to the interest accrual date it selected. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE V CAMERON, No. 161571; Court of Appeals No. 345736. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of *Lewis*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V RECTOR, No. 161986; Court of Appeals No. 353564. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall consider this case in light of *Lewis*. We do not retain jurisdiction.

Leave to Appeal Denied February 2, 2021:

PEOPLE V MERRELL, No. 159662; Court of Appeals No. 339934.

PEOPLE V BENTLEY, No. 159914; Court of Appeals No. 340582.

PEOPLE V LAYTON, No. 160078; Court of Appeals No. 341970.

PEOPLE V MICHAEL CANNON, No. 160091; Court of Appeals No. 343995.

PEOPLE V RODNEY MARTIN, No. 160363; Court of Appeals No. 348508.

SIMPSON V GENERAL MOTORS, LLC, Nos. 160943 and 160944; Court of Appeals Nos. 341961 and 342291.

SIMPSON V GENERAL MOTORS, LLC, Nos. 160946 and 160947; Court of Appeals Nos. 341961 and 342291.

PEOPLE V POLK, No. 161176; Court of Appeals No. 352242.

PEOPLE V THOMAS HAWKINS, No. 161189; Court of Appeals No. 351602.

PEOPLE V MILLIS, No. 161192; Court of Appeals No. 351989.

PEOPLE V LEON JACKSON, No. 161226; Court of Appeals No. 346046.

PEOPLE V JOHN MURPHY, No. 161248; Court of Appeals No. 352341.

PEOPLE v YEAGER, No. 161321; Court of Appeals No. 351948.

BLEAU v ALPENA COMMUNITY COLLEGE, No. 161360; Court of Appeals No. 349466.

PEOPLE v BALL, No. 161383; Court of Appeals No. 352700.

JEHOVAH SHALOM CHURCH OF GOD v CITY OF DETROIT, No. 161420; Court of Appeals No. 348320.

PEOPLE v PORTER, No. 161439; Court of Appeals No. 352048.

PEOPLE v DMITRI ANDERSON, No. 161484; Court of Appeals No. 352531.

HAYGOOD v GENERAL MOTORS, LLC, No. 161546; Court of Appeals No. 346470.

PEOPLE v HARDEN, No. 161570; Court of Appeals No. 342992.

PEOPLE v AVENDT, No. 161572; Court of Appeals No. 353137.

2 CROOKED CREEK, LLC v FRYE, No. 161578; Court of Appeals No. 341274.

PEOPLE v OAKES, No. 161623; Court of Appeals No. 346523.

PEOPLE v RAYNADA JONES, No. 161637; Court of Appeals No. 352877.

KEYBANK NATIONAL ASSOCIATION v LAKE VILLA OXFORD ASSOCIATES, LLC, No. 161647; Court of Appeals No. 348443.

SALEH v SAFECO INSURANCE COMPANY OF ILLINOIS, No. 161654; Court of Appeals No. 345866.

PEOPLE v RUSSON, No. 161663; Court of Appeals No. 351581.

PEOPLE v INGE, No. 161702; Court of Appeals No. 353333.

PEOPLE v ABSOLEM THOMAS, No. 161703; Court of Appeals No. 346923.

PEOPLE v ARCHIE THOMAS, No. 161704; Court of Appeals No. 352148.

PEOPLE v HITTLE, No. 161705; Court of Appeals No. 352784.

PEOPLE v HEARD, No. 161707; Court of Appeals No. 348105.

PEOPLE v WEBB, No. 161709; Court of Appeals No. 352003.

PEOPLE v SIERADZKI, No. 161712; Court of Appeals No. 353379.

WHITE v OCHALEK, No. 161718; Court of Appeals No. 347377.

PEOPLE v ANTHONY YOUNG, No. 161729; Court of Appeals No. 352923.

PEOPLE v BENJAMIN BEACH, No. 161742; Court of Appeals No. 353149.

PEOPLE v CARLSON, No. 161757; reported below: 332 Mich App 663.

PEOPLE v BRUCE BUTLER, No. 161783; Court of Appeals No. 353475.

PEOPLE V KITCHEN, No. 161784; Court of Appeals No. 353151.

PEOPLE V EDDIE WILLIAMS, No. 161788; Court of Appeals No. 346689.

PEOPLE V WARREN, No. 161798; Court of Appeals No. 344384.

PEOPLE V MOENCH, No. 161809; Court of Appeals No. 347086.

PEOPLE V SOLER-NORONA, No. 161812; Court of Appeals No. 348547.

PEOPLE V TERRENCE THOMAS, No. 161819; Court of Appeals No. 353523.

PEOPLE V RICHARD DAVIS, No. 161820; Court of Appeals No. 353377.

PEOPLE V CLARKE, No. 161822; Court of Appeals No. 352932.

PEOPLE V WAYNE BROWN, No. 161850; Court of Appeals No. 346659.

GRANT V NOLAN, No. 161855; Court of Appeals No. 348521.

PEOPLE V GENTRY, No. 161858; Court of Appeals No. 352322.

PEOPLE V BERNARD PETERSON, No. 161861; Court of Appeals No. 353271.

CALLAHAN V MAROTA, No. 161890; Court of Appeals No. 349454.

PEOPLE V OLGER, No. 161897; Court of Appeals No. 353108.

PEOPLE V ULRICH, No. 161923; Court of Appeals No. 353522.

WALDRON V WALDRON, Nos. 161926 and 161927; Court of Appeals Nos. 346897 and 348305.

PEOPLE V ROTH, No. 161935; Court of Appeals No. 353774.

PEOPLE V WHITSON, No. 161941; Court of Appeals No. 353337.

PEOPLE V HEFLIN, No. 161954; Court of Appeals No. 353578.

PEOPLE V JAIME JOHNSON, No. 161961; Court of Appeals No. 353105.

PEOPLE V DARBY, No. 161962; Court of Appeals No. 353344.

PEOPLE V ANDRE CANNON, No. 161965; Court of Appeals No. 352955.

SULLIVAN V PEKKALA, No. 161979; Court of Appeals No. 347435.

STOLAJ V FCA TRANSPORT, LLC, No. 161981; Court of Appeals No. 353220.

PEOPLE V MELTON, No. 161994; Court of Appeals No. 353659.

PEOPLE V WOLTER, No. 161998; Court of Appeals No. 354129.

PEOPLE V FYVIE, No. 162002; Court of Appeals No. 353554.

PEOPLE V JOHN MURPHY, No. 162003; Court of Appeals No. 353637.

PEOPLE V ANTOINE PATTERSON, No. 162014; Court of Appeals No. 345389.

PEOPLE v RONALD SMITH, No. 162015; Court of Appeals No. 347586.

PEOPLE v STEVEN SMITH, No. 162020; Court of Appeals No. 353467.

PEOPLE v WHITFIELD, No. 162021; Court of Appeals No. 354261.

PEOPLE v HEATH, No. 162024; Court of Appeals No. 353923.

PEOPLE v WALTER WILLIAMS, No. 162025; Court of Appeals No. 353135.

In re MENEFEE, No. 162029; Court of Appeals No. 352920.

PEOPLE v JENNINGS, Nos. 162034 and 162035; Court of Appeals Nos. 352528 and 352529.

PEOPLE v MCCLINTOCK, No. 162037; Court of Appeals No. 353750.

PEOPLE v STINE, No. 162049; Court of Appeals No. 353731.

PEOPLE v SHUMATE, No. 162051; Court of Appeals No. 354257.

PEOPLE v ANGELA JAMISON, No. 162052; Court of Appeals No. 345260.

PEOPLE v DELPHON CALHOUN, No. 162053; Court of Appeals No. 346972.

PEOPLE v GOLIDAY, No. 162061; Court of Appeals No. 348343.

PEOPLE v STOTLER, No. 162073; Court of Appeals No. 354033.

PEOPLE v ERIC DIXON, No. 162074; Court of Appeals No. 353777.

PEOPLE v COATES, No. 162075; Court of Appeals No. 354082.

PEOPLE v WINANS, No. 162082; Court of Appeals No. 348241.

PEOPLE v LARRY SMITH, No. 162101; Court of Appeals No. 353597.

PEOPLE v BAKER, No. 162108; Court of Appeals No. 353667.

PEOPLE v IRVIN, No. 162134; Court of Appeals No. 347599.

PEOPLE v MOONAN, No. 162135; Court of Appeals No. 350102.

PEOPLE v JOHN THOMAS, No. 162138; Court of Appeals No. 353700.

PEOPLE v ROBERT PRICE, No. 162140; Court of Appeals No. 354520.

PEOPLE v JAWON TURNER, No. 162147; Court of Appeals No. 348349.

GRIEVANCE ADMINISTRATOR v KOSELKA, No. 162162.
CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

PEOPLE v DALE DUNN, No. 162187; Court of Appeals No. 354400.

SWANSON v BRADLEY, No. 162255; Court of Appeals No. 350004.

Superintending Control Denied February 2, 2021:

VISNER v ATTORNEY GRIEVANCE COMMISSION, No. 161452.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

BLAKEMAN v ATTORNEY GRIEVANCE COMMISSION, No. 162000.

Reconsideration Denied February 2, 2021:

BROZ v PLANTE & MORAN, PLLC, No. 160988; reported below: 331 Mich App 39. Leave to appeal denied at 506 Mich 950.

MIGDALEWICZ v HOLLIE, No. 161090; Court of Appeals No. 343981. Leave to appeal denied at 506 Mich 950.

PEGASUS WIND, LLC v JUNIATA TOWNSHIP and ACKERMAN v JUNIATA TOWNSHIP, Nos. 161241 and 161242; Court of Appeals Nos. 351532 and 351644. Leave to appeal denied at 506 Mich 941.

PEGASUS WIND, LLC v TUSCOLA AREA AIRPORT ZONING BOARD OF APPEALS, No. 161290; Court of Appeals No. 351915. Leave to appeal denied at 506 Mich 941.

PEOPLE v WITHERSPOON, No. 161369; Court of Appeals No. 350319. Leave to appeal denied at 506 Mich 941.

PEOPLE v PEATS, No. 161372; Court of Appeals No. 352224. Leave to appeal denied at 506 Mich 941.

PEOPLE v DORIAN COLLIER, No. 161406; Court of Appeals No. 344717. Leave to appeal denied at 506 Mich 919.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII v ERWIN COMPANIES, LLC, Nos. 161547 and 161548; Court of Appeals Nos. 349763 and 349931. Leave to appeal denied at 506 Mich 942.

PEOPLE v KELTY, No. 161604; Court of Appeals No. 352571. Leave to appeal denied at 506 Mich 943.

REIKOWSKY v COVENANT MEDICAL CENTER, INC, No. 161653; Court of Appeals No. 347427. Leave to appeal denied at 506 Mich 943.

Reconsideration Granted February 12, 2021:

DETROIT ALLIANCE AGAINST THE RAIN TAX v CITY OF DETROIT, No. 158852; Court of Appeals No. 339176. Summary disposition order entered at 506 Mich 996. On order of the Court, the motion for reconsideration of this Court's December 11, 2020 order is considered, and it is granted, in part. We modify our order dated December 11, 2020, to provide that the appellants may participate in the proceedings below undertaken

pursuant to MCR 7.206(E)(3)(d). In all other respects, the motion for reconsideration is denied. We do not retain jurisdiction.

CLEMENT, J. (*concurring*). I am concerned about the confusion expressed by the movants in this motion about what is to be achieved on remand, and I write separately to identify what I believe needs doing. The Court of Appeals held that the sewer system at issue is distinguishable from the sewer system we considered in *Bolt v City of Lansing*, 459 Mich 152 (1998), because the *Bolt* system was "separated" while this sewer system is "combined." In remanding this matter for further factual development, I believe the Court has communicated that the mere fact that this sewer system is combined is not, on its own, sufficient to uphold the constitutionality of this financing scheme. By the same token, however, the Court has remanded because it clearly does not believe it has enough factual understanding of this case to strike down the sewer charge either. The critical problem, it seems to me, is that we have no way of assessing how *proportional* the money being assessed is to the benefit that is being conferred.

How would a court go about determining that? It seems to me that a court would, at minimum, need reasonable estimates on issues such as: (1) what is the overall cost of the sewer system, (2) what portion of that overall cost is reasonably ascribed to the storm-sewer service vis-à-vis the sanitary-sewer service, (3) how is the cost of the storm-sewer service being apportioned among property owners in the city, and (4) are the city's assumptions about the amount of water that runs off of permeable vs. impermeable ground reasonable? It goes without saying that these inquiries cannot be calculated with absolute mathematical precision, but at least some effort at an estimate should be made. As a trivial example I can think of, we might calculate approximately how many gallons of storm-sewer water the system processes vis-à-vis the number of gallons of sanitary-sewer water, and use this as a way of apportioning the overall cost of the system between its storm and sanitary components. Of course, it may be reasonable to refine this further—perhaps sanitary-sewer water is, on average, more expensive to treat, thus affecting the ratio. In any event, it seems to me the only way we can assess whether property owners are being charged no more than the fair value of the service provided to each owner's parcel is to have a reasonable estimate of the total cost of the storm-sewer system.

Plaintiffs have raised facially legitimate questions about this system. It is, for example, fair to wonder how, if many property owners are not being assessed anything, the overall system can remain financially viable unless those owners who *are* paying are being charged more than the value of the service being provided to them to make up for foregone revenue from parcels not being charged. It is also fair to question whether the cost of clearing water from city streets is a benefit that can be involuntarily paid for via a "fee" rather than a "tax." But by the same token, I am not aware of a rule in our Headlee jurisprudence saying that municipalities may not provide services at *less* than their cost to property owners (including, perhaps, to the municipality itself as a landowner); rather, I understand our law as allowing municipalities to

charge *no more than* the reasonable cost of the service conferred. It appears to me that on this record, we simply cannot determine whether property owners are being overcharged. I would note, in this regard, that we sit in *review* of the Court of Appeals, and it made no findings on these matters. Even if, theoretically, the answers to these questions appear somewhere in the record, it is not for this Court to identify them. Therefore, I concur with the order remanding for fact-finding, both in the technical sense of "[t]he process of considering the evidence presented to determine the truth about a disputed point of fact," *Black's Law Dictionary* (11th ed), as well as in the nonlegal, very literal sense of locating these facts within the record.

I further note that plaintiffs have maintained throughout these proceedings, and continue to maintain in this motion, that fact-finding of the sort this Court has ordered is unnecessary. By contrast, the plaintiffs in *Binns v Detroit* (Docket No. 158856) argued in this Court that the Court of Appeals erred by ruling on this case without referring the matter to a circuit court for fact-finding under MCR 7.206(E)(3)(d). I believe our initial orders directing that these matters be remanded to the Court of Appeals and that this matter be held in abeyance for *Binns* were a fair reflection of this distinction between the cases, and I therefore do not believe it is necessary that we grant this relief. That said, I also believe granting this relief is harmless, and so I do not object to the entry of this order.

WELCH, J., did not participate because the Court considered this case before she assumed office.

Reconsideration Granted February 19, 2021:

IW V MM, No. 162441; Court of Appeals No. 350711. Order denying motion to disqualify entered at 507 Mich 856. On order of the Court, the motion to reconsider this Court's order of January 29, 2021, denying respondent-appellant's motion to disqualify Chief Justice BRIDGET M. MCCORMACK from participating in the decision of the case is granted in part. The prior order is modified to specify that the motion was denied because the respondent-appellant failed to establish any of the bases for disqualification under MCR 2.003(C). In all other respects, the motion for reconsideration is denied.

MCCORMACK, C.J., not participating in the decision on this motion.

Summary Disposition February 26, 2021:

PEOPLE V ALTANTAWI, No. 160436; Court of Appeals No. 346775. On April 21, 2020, the Court ordered oral argument on the application for leave to appeal the September 5, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. Pursuant to MCR 7.305(H)(1) and in light of the prosecutor's concession that the juvenile defendant was subjected to a "custodial interrogation" without being advised of his rights pursuant to *Miranda v Arizona*, 384 US 436, 444 (1966), we vacate our order dated April 21, 2020. In lieu of granting leave to appeal, we vacate Part III.B. of the judgment of the Court of Appeals addressing the *Miranda* issue, and we vacate that part of the

November 20, 2018 order of the Oakland Circuit Court that denied the defendant's motion to suppress his statements to the police. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). The Court's order today vacates the lower court judgments simply "in light of the prosecutor's concession" that defendant was in custody for the purposes of *Miranda v Arizona*, 384 US 436, 444 (1966). As a result of the concession, the prosecutor submits that the statements defendant made during his interrogation without being advised of his *Miranda* warnings should not be used against him at trial. However, the order does not purport to determine whether that concession is legally correct and, instead, simply wipes the proverbial slate clean for future proceedings. I write to explain why I believe that, in resolving the case in this manner, the Court has relinquished its responsibility to independently evaluate and adjudicate this case in light of the alleged error now raised on appeal. And it has chosen a poor vehicle for doing so, as I do not believe that there was any plausible error below. Instead, I would request supplemental briefing on whether the case has become moot and whether the lower court judgments should be vacated.

As the United States Supreme Court has noted, a prosecutor's confession of error "does not relieve this Court of the performance of the judicial function," and while the opinion of the prosecutor is entitled to some weight, "our judicial obligations compel us to examine independently the errors confessed." *Young v United States*, 315 US 257, 258-259 (1942). The public interest in the "proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id*. at 259. See also *Sibron v New York*, 392 US 40, 58 (1968) ("Confessions of error are, of course, entitled to and given great weight, but they do not relieve this Court of the performance of the judicial function. It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained.") (quotation marks and citation omitted).

Nonetheless, the Supreme Court has engaged in a "now well entrenched" practice of summarily disposing of such cases by what is known as a "GVR": the Court grants certiorari, vacates the lower court judgment, and remands. *Lawrence v Chater*, 516 US 163, 183 (1996) (Scalia, J., dissenting). The Court has asserted the authority to order such relief under 28 USC 2106, which "appears" to give the Supreme Court the "broad power" to vacate and remand any judgment for further proceedings. *Lawrence*, 516 US at 166 (opinion of the Court).[1] A GVR

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[1] 28 USC 2106 states in full:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appro-

does not require a finding that error occurred and therefore does not create any precedent. See *id*. at 171 (recognizing the established practice of GVRing a case "without determining the merits"); *Casey v United States*, 343 US 808, 808 (1952) ("To accept in this case [the Solicitor General's] confession of error would not involve the establishment of any precedent."). But, to reconcile these orders with the obligation to independently consider the legal issue, the Supreme Court accepts only legally "plausible confessions of error . . . ." *Lawrence*, 516 US at 171.

Justice Scalia and other members of the Supreme Court have criticized the GVR process. See *Nunez v United States*, 554 US 911, 912 (2008) (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting) ("In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error."). They contend that the "facially unlimited statutory text" of 28 USC 2106 remains "subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States." *Lawrence*, 516 US at 178 (Scalia, J., joined by Thomas, J., dissenting). The lower courts, "staffed by judges whose manner of appointment and tenure of office are the same as our own," are "not the creatures and agents of this body," unlike "masters, whose work we may reject and send back for redoing at our own pleasure." *Id*. at 178-179. Moreover, according to this line of thought, the routine acceptance of confessions fits poorly within our adversary system, can smack of gamesmanship, and provides dubious value in determining the existence of legal errors in complicated areas of law.[2]

I agree with this critique and find it applicable to confessions made in our Court.[3] MCR 7.305(H)(1) provides that the Court may "grant or deny the application for leave to appeal, enter a final decision, direct

priate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[2] See *Mariscal v United States*, 449 US 405, 407 (1981) (Rehnquist, J., dissenting) ("I harbor serious doubt that our adversary system of justice is well served by this Court's practice of routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own."); *Hicks v United States*, 582 US ___, ___; 137 S Ct 2000, 2001 (2017) (Gorsuch, J., concurring) (noting agreement with "much in Justice Scalia's dissent" in *Nunez*, including the admonishment against GVRing a case when "we cannot with ease determine the existence of an error of federal law" or when the "confession bears the marks of gamesmanship").

[3] Although our experience with confessions of error is not extensive, we have similarly reversed, vacated, and remanded while professing to avoid the merits and thereby prevent the establishment of precedent. See *People v Foster*, 377 Mich 233, 235 (1966) (reversing and remanding without comment on the merits in response to confession); *People v Miles*, 376 Mich 165, 166 (1965) ("I would purposely refrain from

argument on the application, or issue a peremptory order." As with 28 USC 2106, this court rule is subject to the implicit limitations of the appellate system created by our Constitution. As in the federal court system, judges across Michigan's judiciary are appointed and elected in the same manner as justices of this Court. Compare Const 1963, art 6, §§ 2, 8, 12, 16, and 23. More generally, we have forcefully rejected the notion that the parties' stipulations of law bind the Court, as this result would be contrary to the judicial obligation "to determine the applicable law in each case." *In re Finlay Estate*, 430 Mich 590, 595 (1988). I believe that this obligation flows to cases involving confessions of error—automatic acceptance of confessions would be tantamount to allowing the parties to stipulate the law, even if the resolution does not create binding precedent going forward. For these reasons, I believe that our Court also has the duty to "examine independently the errors confessed" and make a determination on the merits of an error in order to avoid leaving the "proper administration of the criminal law . . . to the stipulation of parties." *Young*, 315 US at 258-259.

In the present case, I respectfully submit that the majority has abdicated this responsibility by simply vacating the lower court judgments and remanding without any analysis of the legal issue at stake. The Court's action falls short of even the GVR standard, as there is no pretense that the confession is plausible. I would not undo the judgment of the Court of Appeals without either resolving the merits or explaining why some other applicable legal principle (such as mootness) requires vacatur.

Even if I were inclined to acquiesce in this general GVR practice, I would refrain from it here because I am not convinced there was any plausible error in the Court of Appeals' judgment that defendant was not in custody.[4] See *Lawrence*, 516 US at 171 (requiring the error to be plausible in order to GVR). To determine whether a defendant was in custody at the time of an interview, the Court must determine whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave" and then whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v Fields*,

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determining the merit of defendant's presented claim of error, there being no need for such determination considering the prosecutor's confession.").

[4] Notwithstanding his criticism, Justice Scalia did eventually acquiesce to this practice given its well-entrenched nature. See *Lawrence*, 516 US at 191-192 (Scalia, J., dissenting); see also *Nunez*, 554 US at 911 (Scalia, J., dissenting) (recognizing that, even though he did not believe the Court had the authority to vacate a judgment absent a finding of error, "I have reluctantly acquiesced in our dubious yet well-entrenched habit of entering a GVR order *without an independent examination of the merits* when the Government, as respondent, confesses error in the judgment below").

565 US 499, 509 (2012) (quotation marks and citation omitted; alteration in original). In making this assessment, the court must examine "all of the circumstances surrounding the interrogation." *Id*. (quotation marks and citation omitted). Relevant factors include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Id*. (citations omitted). If the defendant is a juvenile, the child's age is also a relevant factor in the custody analysis. *JDB v North Carolina*, 564 US 261, 271-272 (2011).

For the reasons stated by the Court of Appeals' majority, nearly all the non-age-related factors favor a finding that a reasonable person in defendant's position would have felt free to leave the interview. The interview took place in an open, familiar location in defendant's home —the dining room table.[5] The interview did not last long, only 38 minutes.[6] While the officers did not tell defendant that he was free to leave, they did ask permission from defendant's father to interview defendant.[7] They also did not threaten defendant but generally talked in a conversational tone and implored him to tell the truth.[8] Defendant was not physically restrained in any way, and he was released after

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[5] See *Beckwith v United States*, 425 US 341, 342, 347 (1976) (recognizing that an interview in a private home weighs against a finding of custody); *United States v Faux*, 828 F3d 130, 138 (CA 2, 2016) (concluding that the defendant was not in custody because she was "questioned in the familiar surroundings of her home" and was "seated at her own dining room table").

[6] Compare *Oregon v Mathiason*, 429 US 492, 495 (1977) (holding that a 30-minute interview was noncustodial), with *Yarborough v Alvarado*, 541 US 652, 665 (2004) (noting that a two-hour interview would weigh in favor of a finding of custody).

[7] See *California v Beheler*, 463 US 1121, 1122, 1125 (1983) (noting that when a defendant "agree[s] to talk to police," even at the station house, that weighs against custody); *United States v Lowen*, 647 F3d 863, 868 (CA 8, 2011) (holding that an interview in a defendant's home, where the suspect consented to the interview and the police told him that his "vehicle and physical description matched that" of the prime suspect, was noncustodial).

[8] See *Yarborough*, 541 US at 664 (noting that an officer's appeal to a defendant's "interest in telling the truth" without making threats weighs against a finding of custody); *Beckwith*, 425 US at 343, 348 (concluding that an interview described as a "conversation" that was "friendly" and "relaxed" was "free of coercion") (quotation marks and citation omitted).

questioning.[9] Finally, in considering defendant's age, it is true that defendant was a 16-year-old minor at the time of questioning. However, defendant was close to the age of majority at the time of the interview and, like other courts that are less willing to give substantial weight to this factor the closer a defendant is to 18, I would also decline to conclude that his age weighs so strongly in favor of a finding of custody as to outweigh all the other factors.[10] The Court of Appeals majority could have more thoroughly analyzed the role that defendant's age played in the custody analysis; however, its failure to do so did not result in an erroneous judgment given the relatively minor impact that defendant's age had on the custody analysis in this case.[11] Therefore, I do not believe the Court of Appeals committed a plausible error by determining that defendant was not in custody. Because I do not believe there was a plausible error below, this would not be an appropriate case to GVR even if GVRs were ever warranted.

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[9] See *Yarborough*, 541 US at 665, and *Mathiason*, 429 US at 495 (each noting that a suspect's ability to get up and leave weighs against a finding of custody). Though the officers knew that they would not have let defendant leave the house, they did not communicate this to defendant. This means that it has no bearing on the custody analysis. See *Berkemer v McCarty*, 468 US 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.").

[10] See *JDB*, 564 US at 277 (noting the potential for a deferential standard when a defendant "was almost 18 years old at the time of his interview" or that "teenagers nearing the age of majority are likely to react to an interrogation as would a typical 18-year-old in similar circumstances") (quotation marks and citations omitted). See also *State v Jones*, 55 A3d 432 (2012) (holding that a 17-year-old was not in custody); Marcus, *The Miranda Custody Requirement and Juveniles*, 85 Tenn L Rev 251, 283 (2017) ("Precedent dictates that the cut off seems to be about thirteen-years-old. Below that age, the courts are highly skeptical; much above that age and the courts are more inclined to defer to law enforcement.").

[11] See *People v Altantawi*, unpublished per curiam opinion of the Court of Appeals, issued September 5, 2019 (Docket No. 346775), p 10 n 3 (noting *JDB* but summarily concluding that "[i]n the instant case, taking into account all the evidence of record, including the age of defendant, we believe defendant was not in a custodial environment when he met with law enforcement officers in the dining room of his home"). Defendant's surname also appears in court documents as "Al-Tantawi."

The only other rationale for vacating the decision below is if we found that the confession of error mooted the case and justified vacatur. The prosecutor has presented a cursory argument to this effect, noting in her confession that she will not present the challenged evidence from defendant's interview at trial. A " 'moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.' " *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580 (2020), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 610 (1920). If a case is moot, the normal practice is to vacate the lower court decisions, but the inquiry turns on the "conditions and circumstances of the particular case." *League of Women Voters of Mich*, 506 Mich at 589 (quotation marks and citations omitted).

While we have not expressly addressed whether a confession of error can render a case moot, a few federal courts have rejected the argument that it can. See, e.g., *United States v Brainer*, 691 F2d 691, 693 (CA 4, 1982) ("[W]e think it clear that the government's subsequent change of position neither mooted the case nor otherwise transformed it into something less than a case or controversy.").[12] Moreover, in the seemingly analogous context in which the parties to a case on appeal settle, vacatur is not necessarily justified. See *US Bancorp Mtg Co v Bonner Mall Partnership*, 513 US 18, 29 (1994) (holding that "mootness by reason of settlement does not justify vacatur of a judgment under review" while noting that "the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course"). And although the prosecutor now states that she will not present the challenged evidence on remand, the parties have not made that commitment concrete by, for example, stipulating in the trial court to the evidence's inadmissibility. By vacating the Court of Appeals judgment without such an agreement, or something comparable, in place, the Court opens the door to allowing the prosecutor to change her mind on remand and seek introduction of the evidence. This possibility is why the United States Supreme Court has stated that a party's voluntary conduct moots a case only if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 189 (2000) (quotation marks and citation omitted).

Because the issues of mootness and vacatur in the context of this case involve questions of first impression, I would do as we have in the

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[12] See also *United States v Wilson*, 169 F3d 418, 427 n 9 (CA 7, 1999) (agreeing with *Brainer* that a confession of error does not moot the issue). In *Foster*, 377 Mich at 235, we did express the view that a confession rendered the case moot, but we did not cite any authority or provide any analysis of the issue. See note 3 of this statement.

past and order supplemental briefing on these matters. See, e.g., *League of Women Voters of Mich*, 506 Mich at 574 (noting the Court sought supplemental briefing on whether the case was moot and whether vacatur of the lower court judgment was appropriate).[13] Only with these questions resolved can we decide the case. If the prosecutor's current position somehow rendered the case moot and warranted vacatur, we could decide the case on those grounds. If the case is not moot, then I see no alternative but to reach the merits. Either way, we would have clear and transparent grounds for our decision. Unfortunately, the majority today chooses a different path, neither reaching the merits nor articulating a sound legal basis for reversing the Court of Appeals judgment. For these reasons, I dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

MORSE v COLITTI, No. 162474; Court of Appeals No. 354720. By order of January 19, 2021, this Court granted immediate consideration and a temporary stay of trial court proceedings. On order of the Court, the application for leave to appeal the January 7, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the January 7, 2021 order of the Court of Appeals and remand this case to that court for entry of a stay of trial court proceedings to remain in effect until completion of the appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. The Court of Appeals shall expedite its consideration of this case. We do not retain jurisdiction.

Leave to Appeal Granted February 26, 2021:

JOHNSON v VANDERKOOI and HARRISON v VANDERKOOI, Nos. 160958 and 160959; reported below: 330 Mich App 506. The parties shall include among the issues to be briefed: (1) whether fingerprinting constitutes a search for Fourth Amendment purposes; (2) if it does, whether fingerprinting based on no more than a reasonable suspicion of criminal activity, as authorized by the Grand Rapids Police Department's "photograph and print" procedures, is unreasonable under the Fourth Amendment; and (3) whether fingerprinting exceeds the scope of a permissible seizure pursuant to *Terry v Ohio*, 392 US 1 (1968). The total

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[13] See also *Smith v Dep't of Human Servs*, 828 NW2d 18 (2013) (vacating a Court of Appeals judgment after the parties were directed to file supplemental briefs but instead filed a joint motion to vacate); *Progress Mich v Attorney General*, 504 Mich 966 (2019) (directing the parties to file supplemental briefing on the issue of vacatur); *Bonner Mall*, 513 US at 20 (noting that the Court directed additional briefing on vacatur when the parties settled).

time allowed for oral argument shall be 40 minutes: 20 minutes for the appellants, and 20 minutes for appellee City of Grand Rapids. MCR 7.314(B)(1).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied February 26, 2021:

PEOPLE V CORTEZ, No. 162424; Court of Appeals No. 353336.

In re VANNATTER/COOPER, MINORS, No. 162443; Court of Appeals No. 352588.

In re VANNATTER, MINORS, No. 162444; Court of Appeals No. 352587.

In re TAYLOR, MINORS, No. 162446; Court of Appeals No. 352486.

Leave to Appeal Denied March 2, 2021:

PEOPLE V SHARON PATTERSON, No. 161106; Court of Appeals No. 346512.

AES MANAGEMENT, INC V KECKES SILVER & GADD, PC, No. 161137; Court of Appeals No. 346160.

PEOPLE V HENRY, No. 161229; Court of Appeals No. 346269.

PEOPLE V ECHOLS, No. 161298; Court of Appeals No. 345502.

PEOPLE V KIM ANDERSON, No. 161309; reported below: 331 Mich App 552.

PEOPLE V LAWRENCE, No. 161423; Court of Appeals No. 345842.

PEOPLE V BENSON, No. 161450; Court of Appeals No. 352963.

DENEAU V HAAG, No. 161464; Court of Appeals No. 351562.

FRIED V SANDERS, No. 161470; Court of Appeals No. 348269.
CAVANAGH, J., did not participate because of her prior involvement in this case.

PEOPLE V LIPPS, No. 161485; Court of Appeals No. 352347.

PEOPLE V WILBERT EDMOND, No. 161500; Court of Appeals No. 346834.

CITY OF BAD AXE V PAMAR ENTERPRISES, INC, No. 161506; Court of Appeals No. 345810.

PEOPLE V AHMAD, No. 161634; Court of Appeals No. 353572.

PEOPLE V ANDRE JAMISON, No. 161636; Court of Appeals No. 345262.

MARUSZA v AUTO-OWNERS INSURANCE COMPANY, No. 161640; Court of Appeals No. 348355.

CITY OF DETROIT v RITCHIE, No. 161664; Court of Appeals No. 352240.

PEOPLE v STEVENS, No. 161711; Court of Appeals No. 352374.

PEOPLE v DANIEL BUTLER, No. 161725; Court of Appeals No. 353517.

PEOPLE v FAZZINI, No. 161755; Court of Appeals No. 347206.

PEOPLE v JON FOX, No. 161779; Court of Appeals No. 344159.

PEOPLE v PNIEWSKI, No. 161814; Court of Appeals No. 352296.

PEOPLE v WASHINGTON, No. 161817; Court of Appeals No. 347013.

PEOPLE v SCHRAUBEN, Nos. 161830 and 161831; Court of Appeals Nos. 346134 and 346462.

PEOPLE v MELVEN, No. 161843; Court of Appeals No. 353141.

PEOPLE v DAMOTH, No. 161852; Court of Appeals No. 348013.

PEOPLE v WILBERT EDMOND, No. 161868; Court of Appeals No. 353101.

PEOPLE v BURTON, No. 161881; Court of Appeals No. 349081.

PEOPLE v LILIES, No. 161894; Court of Appeals No. 348205.

PEOPLE v BYERS, No. 161909; Court of Appeals No. 347212.

PEOPLE v ZEIGLER, No. 161913; Court of Appeals No. 346811.

PEOPLE v ROLANDIS RUSSELL, No. 161924; Court of Appeals No. 353086.

CAIN v NIEMELA, No. 161939; Court of Appeals No. 350553.

PEOPLE v TERRANCE JORDAN, No. 161999; Court of Appeals No. 347093.

JACKSON v MICHIGAN SUPREME COURT DEPUTY CLERK, No. 162028; Court of Appeals No. 353726.

PEOPLE v DEMARIO BUCHANAN, No. 162054; Court of Appeals No. 353558.

PEOPLE v VEGH, No. 162055; Court of Appeals No. 353742.

PEOPLE v HAIRE, No. 162056; Court of Appeals No. 346575.

PEOPLE v TIMOTHY YOUNG, No. 162078; Court of Appeals No. 349999.

PEOPLE v ALPHONSO RUSSELL, No. 162080; Court of Appeals No. 344890.

PEOPLE v TRAVONTE BROWN, No. 162088; Court of Appeals No. 349170.

FREEMAN v DILORENZO, No. 162117; Court of Appeals No. 348115.

SOWLE v ESURANCE INSURANCE COMPANY, Nos. 162118, 162119, and 162120; Court of Appeals Nos. 346289, 347819, and 348538.

PEOPLE V DARRELL GUTZMAN, No. 162133; Court of Appeals No. 353521.

TAJ GRAPHIC ENTERPRISES, LLC V HERTZBERG, No. 162146; Court of Appeals No. 346988.

PRICE V MARRAS, No. 162153; Court of Appeals No. 349162.

PEOPLE V WINGARD, No. 162159; Court of Appeals No. 344472.

GRIEVANCE ADMINISTRATOR V REIZEN, No. 162176.

PEOPLE V KENNETH WALKER, No. 162179; Court of Appeals No. 346737.

CORNWELL V CASTANEDA, No. 162181; Court of Appeals No. 347563.

BENTIVOLIO V RACZKOWSKI, No. 162186; Court of Appeals No. 348878.

PEOPLE V SANDERS, No. 162189; Court of Appeals No. 354323.

PEOPLE V TESMER, No. 162190; Court of Appeals No. 354376.

PEOPLE V MOORE, No. 162191; Court of Appeals No. 350317.

PEOPLE V SCOTT WILSON, No. 162197; Court of Appeals No. 353959.

KAUFMAN V CRANBERRY LAKE, No. 162200; Court of Appeals No. 353318.

PEOPLE V QUINN JAMES, No. 162212; Court of Appeals No. 346983.

PEOPLE V QUINN JAMES, No. 162214; Court of Appeals No. 348886.

PEOPLE V THOMPSON-MOORE, No. 162216; Court of Appeals No. 348242.

NYKORIAK V NAPOLEON, No. 162233; Court of Appeals No. 354410.

In re JACKSON, No. 162235; Court of Appeals No. 353559.

PEOPLE V CARTER, No. 162243; Court of Appeals No. 350429.

PEOPLE V MCDONALD, No. 162244; Court of Appeals No. 348243.

NAGLE V NAGLE, No. 162251; Court of Appeals No. 345396.

ROETKEN V ROETKEN, No. 162252; Court of Appeals No. 354515.

In re JACKSON, No. 162254; Court of Appeals No. 353675.

PEOPLE V WELLMAN, No. 162271; Court of Appeals No. 354762.

PEOPLE V MAURICE WILLIAMS, No. 162272; Court of Appeals No. 348036.

PEOPLE V EWING, No. 162363; Court of Appeals No. 351446.

PEOPLE V DERRICO SEARCY, No. 162364; Court of Appeals No. 351442.

Superintending Control Denied March 2, 2021:

BROWN v ATTORNEY GRIEVANCE COMMISSION, No. 162057.

TRUSS v ATTORNEY GRIEVANCE COMMISSION, No. 162137.

Reconsideration Denied March 2, 2021:

DANIEL v ANN ARBOR TRANSIT AUTHORITY, Nos. 160917 and 160918; Court of Appeals Nos. 343860 and 343866. Leave to appeal denied at 506 Mich 973.

PEOPLE v GILLIS, No. 161049; Court of Appeals No. 350249. Leave to appeal denied at 506 Mich 961.

PEOPLE v MILLSAP, No. 161266; Court of Appeals No. 352269. Leave to appeal denied at 506 Mich 961.

PEOPLE v CARROLL, No. 161295; Court of Appeals No. 351741. Leave to appeal denied at 506 Mich 961.

PEOPLE v LARRY WALKER, No. 161347; Court of Appeals No. 345294. Leave to appeal denied at 506 Mich 1040.

In re PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 161387; Court of Appeals No. 351723. Leave to appeal denied at 506 Mich 962.

PEOPLE v MAINE, No. 161391; Court of Appeals No. 353111. Leave to appeal denied at 506 Mich 941.

PEOPLE v STEVEN FISHER, No. 161429; Court of Appeals No. 352798. Leave to appeal denied at 506 Mich 962.

PEOPLE v DEERING, No. 161505; Court of Appeals No. 344734. Leave to appeal denied at 506 Mich 1025.
MCCORMACK, C.J., did not participate because of her prior association with a party in this case.

ALTOBELLI v HARTMANN and ALTOBELLI v MILLER, CANFIELD, PADDOCK AND STONE, PLC, Nos. 161533 and 161534; Court of Appeals Nos. 348953 and 348954. Leave to appeal denied at 506 Mich 962.

Summary Disposition March 5, 2021:

PEOPLE v CEASOR, No. 159948; Court of Appeals No. 338431. On January 7, 2021, the Court heard oral argument on the application for leave to appeal the May 23, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the defendant's conviction and sentence, and remand this case to the St. Clair Circuit Court for further proceed-

ings not inconsistent with this order. By failing to request public funds for an expert based on a mistaken belief that the defendant did not qualify for those funds because he had retained counsel, counsel performed deficiently. See *Hinton v Alabama*, 571 US 263, 273 (2014) ("[I]t was unreasonable for [the defendant's lawyer] to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000."). Moreover, for the reasons set forth by the United States Court of Appeals for the Sixth Circuit in *Ceasor v Ocwieja*, 655 F Appx 263, 286 (CA 6, 2016), we conclude that the defendant can show prejudice. See *id*. ("[N]o amount of cross-examination or lay witness testimony could have rebutted Dr. Gilmer-Hill's medical opinions that these injuries were medically consistent with abuse and inconsistent with an accidental fall. Thus, we acknowledge, as the *Ackley* court did, that in many [shaken baby syndrome] cases 'where there is no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to [harm], the expert *is* the case.' "), quoting *People v Ackley*, 497 Mich 381, 397 (2015) (quotation marks and citation omitted).

CLEMENT, J. (*concurring*). I concur in the order reversing the Court of Appeals because I agree that counsel was ineffective. Namely, I do not believe it would have been a novel argument for counsel to contend that defendant qualified for public funds for an expert under MCL 775.15, the statute in use at the time, when the statutory language clearly applies to him.

It is true, as Justice WELCH recounts, that "defense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument." *People v Reed*, 453 Mich 685, 695 (1996). Here, counsel failed to request public funds for an expert because he believed that defendant did not qualify for those funds since he had retained his own counsel. MCL 775.15, the statute that governed requests for public funds for an expert at the time, reads:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in

> the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

Clearly, the statutory language says nothing about an individual with retained counsel being ineligible for public funds to retain an expert.

There is no reason to doubt that counsel testified truthfully when he said he had never seen a court award public funds for an expert when a defendant had retained his or her own attorney. It is unsurprising that, generally, a defendant who can pay to retain counsel would not be able to show that he or she is "poor and has not and cannot obtain the means to procure the attendance of [a material] witness," as the statute requires. However, that is not the case when the defendant can afford to retain counsel only because a third party has offered to pay for him or her to do so. I recognize that counsel in the instant case took considerable steps to help defendant, even forgoing his own fee to help defendant raise the needed funds for an expert. However, I cannot conclude that holding a mistaken belief regarding the application of a statute—a belief wholly unsupported by the statutory text—is anything but deficient performance. Therefore, I concur in the Court's order reversing the judgment of the Court of Appeals and remanding to the trial court for further proceedings.

WELCH, J. (*dissenting*). I agree with the majority that the prejudice in this matter is undisputed given the nature of the case and the evidence presented. The issue in this case is whether trial counsel in 2005 rendered ineffective assistance to defendant in violation of the Sixth Amendment to the United States Constitution when he did not request funds from the circuit court under MCL 775.15 for the purpose of hiring an expert witness.[1] I respectfully dissent because in 2005, the time that the trial occurred in this matter, the law was not clear that defense counsel could, let alone was obligated to, request expert-witness funds for clients who were not appointed counsel by the state. The only information available from the record is that during that time, St. Clair County defense attorneys generally understood that public funding for expert-witness fees was not available to clients who had not been declared indigent and who were represented by a retained attorney.

In *People v Arquette*, 202 Mich App 227, 230 (1993), the primary case cited by the defendant as the reason defense counsel should have known to request expert-witness fees for his client, the Court of Appeals noted that "[this] would be a different case if defendant had retained an

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[1] Trial counsel's assistance is constitutionally ineffective only if counsel engaged in deficient performance that resulted in prejudice. *Strickland v Washington*, 466 US 668, 687-688 (1984). Deficient performance is assessed "on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Id*. at 690 (emphasis added). I dissent because counsel's performance was not deficient.

attorney and then declared indigence."[2] Therefore, that case could not have put trial counsel on notice that retained clients, such as the defendant in this case, were eligible to receive funding from the state to cover expert-witness fees.[3] As the Court of Appeals noted in this case, such a request would have been a novel idea at that time. *People v Ceasor*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2019 (Docket No. 338431), p 10; see also *People v Reed*, 453 Mich 685, 695 (1996) (holding that counsel cannot be deemed ineffective for failing to advance a novel legal argument).

Thus, I do not believe counsel's performance in failing to request public funds from a St. Clair County trial court for an expert witness in 2005 fell below the then-applicable "objective standard of reasonableness." See *People v Trakhtenberg*, 493 Mich 38, 51 (2012).

ZAHRA, J., joins the statement of WELCH, J.

MCCORMACK, C.J., did not participate because of her prior involvement in this case as counsel for a party.

Request for the Appointment of a Master Granted March 5, 2021:

IN THE MATTER OF TRACY E GREEN, JUDGE 3RD CIRCUIT COURT, No. 162260. On order of the Court, the request by the Judicial Tenure Commission for the appointment of a Master is considered, and the Honorable Betty R. Widgeon is hereby appointed Master to hear Formal Complaint No. 103.

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[2] In *Arquette*, the defendant was declared indigent but then retained an appellate attorney (paid for by a relative) who replaced his court-appointed appellate attorney. The court administrator refused to provide the defendant trial transcripts at public expense because he had, at that time, a retained attorney. The Court of Appeals concluded that, given his previously declared indigent status, the defendant could receive the transcript at public expense—but it also observed that the analysis would be different if the defendant had first retained an attorney and later been declared indigent (i.e., the public funds would not have been available in that situation). In the instant case, defendant was represented by his own retained trial attorney and was never declared indigent—exactly the scenario in which the Court of Appeals in *Arquette* indicated that public funds would not have been available to a defendant.

[3] The three main precedents that governed this area of law in 2005—this Court's decisions in *People v Jacobsen*, 448 Mich 639 (1995), and *People v Tanner*, 469 Mich 437 (2003), and the Court of Appeals' decision in *People v Miller*, 165 Mich App 32 (1987)—all were cases applying MCL 775.15 to indigent defendants with court-appointed counsel.

Leave to Appeal Denied March 12, 2021:

PEOPLE V HAMPTON, No. 159676; Court of Appeals No. 338418.

PEOPLE V STEVENS, No. 162085; Court of Appeals No. 353833.

Summary Disposition March 17, 2021:

In re THOMAS MONROE KITTS, No. 161942; Court of Appeals No. 353469. On order of the Court, the motion to seal is granted in part, to the extent that the Court of Appeals granted the motion to seal the record, because the Court finds good cause that those items contain personal and identifying information and there are no less restrictive means to adequately and effectively protect the interest asserted. MCR 8.119(I). In all other respects, the motion is denied. The application for leave to appeal the July 24, 2020 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Cf. *People v Rosen*, 201 Mich App 621, 623 (1993) ("The nature of the offense itself does not preclude the setting aside of an offender's conviction. That reason, standing alone, is insufficient to warrant denial of an application to set aside a conviction.").

Leave to Appeal Granted March 17, 2021:

COMERICA, INC V DEPARTMENT OF TREASURY, No. 161661; reported below: 332 Mich App 155. The appellant's brief and appendix shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. The time for filing the remaining briefs shall be as set forth in MCR 7.312(E). The parties shall include among the issues to be briefed whether, under the now-repealed Single Business Tax Act, MCL 208.1 *et seq*., the appellee is entitled to the transfer of single business tax credits, by virtue of the merger of two of its subsidiaries, under the theory that the tax credits are either vested property rights or privileges that automatically transferred by operation of law during the merger. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Taxation Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal March 17, 2021:

LEGION-LONDON V THE SURGICAL INSTITUTE OF MICHIGAN AMBULATORY SURGERY CENTER, LLC, No. 161672; reported below: 331 Mich App 364. The appellants shall file a supplemental brief by August 30, 2021, with no extensions except upon a showing of good cause, addressing whether

the Court of Appeals erred when it determined that the second affidavit of merit constituted an amendment of the first affidavit of merit. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The plaintiff-appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Negligence Law Section of the State Bar of Michigan, the Michigan Association for Justice, and the Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 17, 2021:

PEOPLE V DEWEY, No. 161200; Court of Appeals No. 351119.

PEOPLE V FRANKLIN, No. 161218; Court of Appeals No. 351735.

PEOPLE V VERHULST, No. 161745; Court of Appeals No. 351731.

PEOPLE V TIPTON, No. 161782; Court of Appeals No. 345039.

KANTOS V MAJOR, No. 162050; Court of Appeals No. 346680.

PEOPLE V ELIJAH ROBINSON, No. 162089; Court of Appeals No. 346390.

PEOPLE V MARSHALL, No. 162152; Court of Appeals No. 353811.

In re BOOKER/ANTHONY, MINORS, No. 162353; Court of Appeals No. 351237.

Superintending Control Denied March 17, 2021:

BRADLEY V STRIEGLE, No. 161995; Court of Appeals No. 353627.

Rehearing Denied March 17, 2021:

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID V STATE OF MICHIGAN, No. 158751; reported below: 326 Mich App 124. Opinion at 506 Mich 455.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

WELCH, J., did not participate in the disposition of this case due to her prior membership on the board of one of the plaintiff organizations.

Summary Disposition March 19, 2021:

PEOPLE V MICHAEL JACKSON, No. 161801; Court of Appeals No. 345912.

Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part III of the opinion of the Court of Appeals and we remand this case to the Muskegon Circuit Court for an evidentiary hearing to determine whether the defendant was denied his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. *Duren v Missouri*, 439 US 357 (1979). The circuit court shall apply the framework outlined in *People v Bryant*, 491 Mich 575 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE V BERRIDGE, No. 162071; Court of Appeals No. 348768. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment affirming the trial court's scoring of Offense Variable (OV) 6, vacate the sentence of the Lenawee Circuit Court, and remand this case to the trial court for resentencing. As noted by dissenting Judge STEPHENS, OV 6 should be assigned 25 points only where there is a very high risk of death, meaning more than the risk attendant to other deliveries, or that the defendant had particularized knowledge that this delivery was more probably than not going to lead to great bodily harm or death. MCL 777.36(1)(b). The prosecutor has thus far failed to point to evidence demonstrating this type of risk. We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal March 19, 2021:

ROWLAND V INDEPENDENCE VILLAGE OF OXFORD, LLC, No. 161007; Court of Appeals No. 345650. On order of the Court, the motion to strike is granted. The application for leave to appeal the January 14, 2020 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief addressing: (1) whether the Court of Appeals properly applied the test for assessing the foreseeability of the alleged harm, see *Bertin v Mann*, 502 Mich 603, 620-621 (2018) (saying, albeit in the assumption of the risk context, that the test for foreseeability "is objective and focuses on what risks a reasonable participant, under the circumstances, would have foreseen. The risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the 'mechanism' it resulted from"); (2) whether the Court of Appeals erred by holding that no special relationship exists between the senior living facility at issue and its residents, including the decedent. See *Bailey v Schaaf*, 494 Mich 595 (2013); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495 (1988); and (3) whether the Court of Appeals erred in concluding that appellees did not owe the decedent a common-law duty to monitor and secure the side entrances and exits to the facility, see *Hill v Sears, Roebuck & Co*, 492 Mich 651 (2012); *Valcaniant v Detroit Edison, Co*, 470 Mich 82 (2004). The appellant's brief should be

filed by September 7, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Litigation, Negligence Law, and Elder Law Sections of the State Bar of Michigan, the Michigan Association for Justice, and the Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

BERNSTEIN J., not participating because he has a family member with an interest that could be affected by the proceeding.

Leave to Appeal Denied March 19, 2021:

TANKANOW v CITIZENS INSURANCE COMPANY OF AMERICA, No. 162180; Court of Appeals No. 348669.

ZAHRA, J. (*dissenting*). I dissent from the Court's denial of leave. I would grant leave to appeal to consider whether this Court should overrule the cases employing the "substantial nexus" test as defined in *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 342 (1996), and *Hill v Citizens Ins Co of America*, 157 Mich App 383, 394 (1987). The Court of Appeals reversed the trial court's grant of defendant's motion for partial summary disposition and dismissal of plaintiff's claim for uninsured motorist benefits, holding that "a finder of fact could conclude that there was a 'substantial physical nexus' between the hit-and-run vehicle and the sulky, which plaintiff then hit with his insured vehicle."[1] But application of this "substantial nexus" test is seemingly contrary to this Court's repeated directive that courts must apply the common and ordinarily understood meaning of the language in an insurance contract.[2] Defendant reasonably argues that, without application of the

[1] *Tankanow v Citizens Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2020 (Docket No. 348669), p 4.

[2] E.g., *Bianchi v Auto Club of Mich*, 437 Mich 65, 71 n 1 (1991) ("The terms of an insurance policy should be construed in the plain, ordinary and popular sense of the language used, as understood by an ordinary person . . . .") (quotation marks and citation omitted); *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534 (2004) ("An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning."); *Rory v Continental Ins Co*, 473 Mich 457, 461, 468 (2005) ("[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract. . . . A fundamental tenet of our jurisprudence is that

"substantial nexus" test, the uninsured motorist policy at issue in this case would not apply, as the policy language contemplates coverage only when an uninsured vehicle itself hits plaintiff's vehicle. Given the tension between application of the "substantial nexus" test and the plain language of the contract at issue, I would order oral argument to consider whether continued application of this test is appropriate.

SMITH V WOLL, No. 162696; Court of Appeals No. 356065.

BERNSTEIN, J., not participating because he has a family member with an interest that could be affected by the proceeding.

Summary Disposition March 24, 2021:

In re CARLSEN ESTATE, No. 161646; Court of Appeals No. 352026. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

ELIZABETH A SILVERMAN, PC V KORN, No. 162047; Court of Appeals No. 350830. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals regarding the above docket number, and we remand this case to the Court of Appeals for reconsideration.

Assuming without deciding that the Court of Appeals correctly determined that the term "attorney fee" for purposes of a contract should not be treated differently than it must for purposes of a statute or a court rule as addressed in *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423 (2007), and *Fraser Trebilcock Davis & Dunlap PC v Boyce Tr 2350*, 497 Mich 265 (2015), it still must be determined whether the parties' contract in this case otherwise entitled the plaintiff law firm to recover the "attorney fees" incurred by its member attorney for representing the law firm in this litigation. Of note, the contract contains the following provision: "If Attorney has to commence litigation against [the defendant] to collect outstanding fees, [the defendant] shall be responsible for all fees, costs, and attorney fees for Attorney's actual time expended." (Emphasis added.) The term "Attorney" refers to the plaintiff law firm. On remand, the Court of Appeals should consider the import, if any, of the emphasized language and whether the plain language of this provision allows the plaintiff to recover the "attorney

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unambiguous contracts are not open to judicial construction and must be *enforced as written*.") (emphasis altered). The "substantial nexus" test is uncomfortably similar to the approach to interpreting insurance policies that this Court repudiated in *Royal Globe Ins Cos v Frankenmuth Mut Ins Co*, 419 Mich 565, 574 (1984) (rejecting an approach that gives a "purposely broad construction" to a term in an insurance contract "for the public policy purpose of finding coverage").

fees" requested in this case in a way that is not inconsistent with this Court's holdings in *Omdahl* and *Fraser Trebilcock*. We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal March 24, 2021:

FOUNDATION FOR BEHAVIORAL RESOURCES V WE UPJOHN UNEMPLOYMENT TRUSTEE CORP, No. 161592; reported below: 332 Mich App 406. The appellant shall file a supplemental brief addressing whether private-figure plaintiffs must prove malice to establish the tort of false light invasion of privacy. The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 24, 2021:

PEOPLE V TAITT, No. 161271; Court of Appeals No. 352365.

PEOPLE V JAMES JONES, No. 161275; Court of Appeals No. 345742.

MICKELS V SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 161359; Court of Appeals No. 344977.

ZAHRA, J., would grant leave to appeal.

PEOPLE V FORD, No. 161565; Court of Appeals No. 345097.

COLE V BLAND, No. 161603; Court of Appeals No. 347034.

CARTER V EDUSTAFF, LLC, INC, No. 161660; Court of Appeals No. 353172.

SULLIVAN V SULLIVAN, No. 161679; Court of Appeals No. 348606.

GOODFELLOW V LAM, No. 161715; Court of Appeals No. 347818.

PEOPLE V LONNIE BARNES, No. 161825; reported below: 332 Mich App 494.

PEOPLE V SCHURZ, No. 161973; Court of Appeals No. 340420.

TINSLEY V YATOOMA, No. 162041; reported below: 333 Mich App 257.

PEOPLE V FLYNN, No. 162127; Court of Appeals No. 346668.

Reconsideration Denied March 24, 2021:

PEOPLE v KEVIN WHITE, No. 162136; Court of Appeals No. 346661. Oral argument ordered on the application for leave to appeal at 507 Mich 865.

Summary Disposition March 26, 2021:

CUMMINGS MCCLOREY DAVIS & ACHO, PLC v WHITE, No. 162142; Court of Appeals No. 352765. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals order denying the defendant's motion to reinstate the appeal. Under the unique circumstances of this case, including the obstacles posed by the COVID-19 pandemic, the defendant made the requisite showing of "mistake, inadvertence, or excusable neglect" for his failure to file a stenographer's certificate. MCR 7.217(D). We remand this case to the Court of Appeals for further proceedings not inconsistent with this order.

Oral Argument Ordered on the Application for Leave to Appeal March 26, 2021:

WELLS v STATE FARM FIRE & CASUALTY COMPANY, No. 161911; Court of Appeals No. 348135. On order of the Court, the application for leave to appeal the July 16, 2020 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief addressing: (1) whether the appellant's underlying complaint in its action against the insureds is a "written instrument" under MCR 2.113(C)(1) (formerly MCR 2.113(F)(1)), a "pertinent part" of a written instrument under MCR 2.113(C)(1), or is otherwise part of "the pleadings" in this case such that the lower courts could properly consider it in the MCR 2.116(C)(8) analysis; (2) whether the Court of Appeals correctly concluded that the appellant's pleadings showed the insureds knowingly provided alcohol to minors and that this knowing act was a proximate cause of the appellant's damages; (3) whether pleading proximate causation is the equivalent of pleading that an act "created a direct risk of harm from which the consequences should reasonably have been expected by the insured," *Allstate Ins Co v McCarn*, 466 Mich 277, 283 (2002); and (4) whether the Court of Appeals erred in affirming the Macomb Circuit Court's grant of summary disposition to appellee State Farm under MCR 2.116(C)(8). See *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105 (1999); *Nabozny v Burkhardt*, 461 Mich 471 (2000); *Allstate*, *supra*. The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by

the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 26, 2021:

PEOPLE V CLEOPHAS BROWN, No. 160661; reported below: 330 Mich App 223. On March 4, 2021, the Court heard oral argument on the application for leave to appeal the October 15, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring*). The question presented in this case is whether certain immunities from liability and arrest in the concealed pistol licensing act (CPLA), MCL 28.421 *et seq*., apply to arrests for carrying a concealed weapon (CCW) under the Michigan Penal Code, MCL 750.1 *et seq*. Defendant claims that although he was carrying a concealed pistol without a valid license, he cannot be liable for CCW because the immunities provided in the CPLA apply to convictions under the CCW statute, MCL 750.227. He relies on MCL 28.428(8) and (9), which provide:

> (8) A suspension or revocation order or amended order issued under this section is immediately effective. However, an individual is not criminally liable for violating the order or amended order unless he or she has received notice of the order or amended order.
>
> (9) If an individual is carrying a pistol in violation of a suspension or revocation order or amended order issued under this section but has not previously received notice of the order or amended order, the individual must be informed of the order or amended order and be given an opportunity to properly store the pistol or otherwise comply with the order or amended order before an arrest is made for carrying the pistol in violation of this act.

The Court of Appeals held that the CCW and CPLA statutes should not be read *in pari materia*, despite involving the same subject matter, because specific language in the immunity provisions indicates that they apply only to crimes arising under the CPLA. Accordingly, the immunity provisions do not apply to violations of the CCW statute. The Court of Appeals also held, in the alternative, that even if the CPLA immunities apply to the CCW statute, defendant here received all the notice required before revocation of his license and thus, as a factual matter, he is not entitled to immunity.

I agree with the panel that defendant received adequate notice and therefore, even if the immunities are applicable, he is not entitled to them. But I write separately because the interpretive issue of whether the immunity provisions apply is a difficult one and should be closely considered in an appropriate future case. As a general matter, I disagree with the panel's conclusion that the *in pari materia* canon of statutory

construction is inapplicable. It is applicable because the statutes relate to the same subject and share a common subject matter. See *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n 26 (2017). Indeed, the CCW statute is so closely related to the CPLA that it was originally part of it until the Legislature created the Penal Code in 1931 PA 328. See 1927 PA 372. All this means, however, is that the statutes must be read harmoniously—it does not mean that provisions from one statute must be dragged into the other statute in a manner that does violence to the language of the receiving statute. See *SBC Health Midwest, Inc*, 500 Mich at 73-75.

Here, there is some limiting language in the CPLA's immunity provisions that suggest they do not apply to the CCW statute. The provisions refer to violations of orders "issued under this section" and violations of "this act." MCL 28.428(8) and (9). At the same time, it is difficult to discern what effect these immunity provisions have if they only apply to crimes in the CPLA, for there are few such crimes and it is not immediately apparent that the immunity provisions would cover any of them.[1] Thus, whether these provisions apply to the CCW statute is a close question that I believe will merit this Court's review if more squarely presented in a future case.

But here the Court of Appeals' determination that defendant received sufficient notice is dispositive and would render any decision of this Court on the interpretive issue unnecessary to the outcome. I therefore concur in the denial of leave in this case.

MCCORMACK, C.J., and CLEMENT, J., join the statement of VIVIANO, J.

PEOPLE V ROBERT MORLEY, No. 161903; Court of Appeals No. 353400.

BARNES V SPIERLING, No. 162487; Court of Appeals No. 354307.

PEOPLE V FIELDS, No. 162598; Court of Appeals No. 354875.

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[1] While it appears an argument can be made that the immunity set forth in MCL 28.428(8) may apply to a criminal charge for failing to surrender a firearm upon notice of suspension or revocation under Subsection (4) of the statute, it is more difficult to find a role for Subsection (9) to play under the CPLA. At oral argument, the prosecutor posited that this latter section may apply to violations of MCL 28.425o, but that seems a bit of a stretch. Section 8o primarily regulates where a person with a valid license may carry a concealed pistol. It is no defense to a criminal charge for violating § 8o's location restriction that a person did not have notice that his or her license was suspended or revoked. Certain individuals are exempted from these location restrictions; however, those individuals would have to violate the statute three times before the protection from arrest provided in MCL 28.428(9) could come into play. See MCL 28.425o(6)(a) (first offense is a state civil infraction), (6)(b) (second offense is a misdemeanor, but it is only punishable by a fine), and (6)(c) (third offense is a felony punishable by up to four years in prison).

PEOPLE V HILLIARD, No. 162705; Court of Appeals No. 355332.

Application for Leave to Appeal Dismissed March 26, 2021:

PEOPLE V PLANTE, No. 158934; Court of Appeals No. 344555. By order of July 29, 2019, the application for leave to appeal the November 26, 2018 order of the Court of Appeals was held in abeyance pending the decision in *People v Betts* (Docket No. 148981). On order of the Court, the parties having filed a joint motion to remand this case to the Macomb Circuit Court, the motion is considered, and it is granted. The application for leave to appeal is dismissed with prejudice and without costs. We remand this case to the circuit court for any further necessary proceedings. The motion to hold this case in abeyance is denied as moot.

PEOPLE V MCCLELLAN, No. 161348; Court of Appeals No. 346885. On order of the Court, the motion to withdraw the application for leave to appeal is granted, and the application for leave to appeal is dismissed with prejudice and without costs.

Summary Disposition March 30, 2021:

PEOPLE V CHAPPEL, No. 161813; Court of Appeals No. 352329. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for reconsideration of whether the defendant's 2019 motion for relief from judgment is a successive motion, as the circuit court states in the November 22, 2019 order denying relief from judgment, and for further proceedings as set forth in this order.

We first note that the circuit court record is in disarray and possibly incomplete. In support of its characterization of the motion for relief from judgment as a successive motion, the circuit court's November 22, 2019 order states that a motion for relief from judgment was denied on July 25, 2016, and a successive motion for relief from judgment was denied on November 10, 2016. It is unclear from the record what was denied on July 25, 2016. On November 10, 2016, the circuit court denied the defendant's motion for a new sentence, following this Court's May 24, 2016 order remanding this case to the circuit court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). See *People v Chappel*, 499 Mich 924 (2016). The motion for a new sentence denied on November 10, 2016, was not a motion for relief from judgment.

On remand, the circuit court shall issue an opinion setting forth its analysis. If the circuit court determines that the defendant's motion for relief from judgment is not a successive motion, as appears to be the case based on the circuit court record provided to this Court, the circuit court shall consider the motion under MCR 6.504(B). We do not retain jurisdiction.

SCHUTT V SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 162066; Court of Appeals No. 347868. Pursuant to MCR 7.305(H)(1),

in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration.

In considering whether the defendant-bus driver owed the plaintiff a duty of care, the Court of Appeals referenced the trial court's ruling on the defendants' motion for summary disposition but not the trial court's ruling on the defendants' motion for reconsideration after first allowing the plaintiff to submit additional evidence. On remand, the Court of Appeals shall address the February 13, 2019 opinion and order of the trial court and reconsider whether the plaintiff has presented evidence of a "special and apparent reason" that the defendant-bus driver should have waited for the plaintiff to reach a seat before moving the bus. The Court of Appeals shall also reconsider its previous holdings that are impacted by this determination and, if necessary, the other arguments made by the defendants that the Court of Appeals did not address in its initial opinion. We do not retain jurisdiction.

Leave to Appeal Denied March 30, 2021:

PEOPLE V TERRY EDWARDS, No. 160986; Court of Appeals No. 340546.

PEOPLE V TOOMER, No. 160997; Court of Appeals No. 340390.

PEOPLE V DENNIS WARD, No. 161113; Court of Appeals No. 351268.

PEOPLE V CHARLES BROOKS, No. 161131; Court of Appeals No. 351163.

PEOPLE V LAVINGTON, No. 161245; Court of Appeals No. 344225.

PEOPLE V DEMIESTRO WATSON, No. 161322; Court of Appeals No. 352378.

VOUTSARUS V BOSSENBROOK, No. 161330; Court of Appeals No. 345493.
CAVANAGH, J., did not participate due to her preexisting relationship with a party.

PEOPLE V ZEHFUSS, No. 161364; Court of Appeals No. 346777.

PEOPLE V FINCH, No. 161375; Court of Appeals No. 344933.

PEOPLE V PETTO, No. 161392; Court of Appeals No. 339997.

PEOPLE V MONTANEZ, No. 161437; Court of Appeals No. 343414.

PEOPLE V CECIL DUNN, No. 161442; Court of Appeals No. 352484.

PEOPLE V LOVE, No. 161444; Court of Appeals No. 352709.

PEOPLE V ATKINS, No. 161458; Court of Appeals No. 342467.
ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE V MARK THOMPSON, No. 161461; Court of Appeals No. 352941.

PEOPLE V NEWELL, No. 161501; Court of Appeals No. 352984.

PEOPLE v EVANISH, No. 161523; Court of Appeals No. 345355.

In re SOLOMON ADU-BENIAKO, M.D., Nos. 161537 and 161538; Court of Appeals Nos. 348668 and 349754.

MORRIS v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 161600; Court of Appeals No. 350214.

PEOPLE v BISH, No. 161614; Court of Appeals No. 353112.

BREEDLOVE v MOTION INDUSTRIES, INC, No. 161617; Court of Appeals No. 351672.

SCHNEIDER v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 161684; Court of Appeals No. 345618.

PEOPLE v CARDWELL, No. 161735; Court of Appeals No. 343436.

MILES-EL v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 161748; Court of Appeals No. 352357.

PEOPLE v SARDY, No. 161750; Court of Appeals No. 346962.

PEOPLE v GOOSBY, No. 161781; Court of Appeals No. 343749.

PEOPLE v POLEN, No. 161811; Court of Appeals No. 348324.

PEOPLE v AMBER MERCER, No. 161816; Court of Appeals No. 352659.

PEOPLE v ANTHONY MORROW, No. 161833; Court of Appeals No. 344029.

PEOPLE v MOBLEY, No. 161853; Court of Appeals No. 352390.

TOTAL QUALITY, INC v FEWLESS, No. 161872; reported below: ____ Mich App ____.

TIA CORPORATION v PEACEWAYS, No. 161873; Court of Appeals No. 346591.

PEOPLE v TAYLOR, No. 161874; Court of Appeals No. 352774.

CITY OF ALPENA v TOWNSHIP OF ALPENA, No. 161877; Court of Appeals No. 345817.

PEOPLE v COCHELL, No. 161880; Court of Appeals No. 353261.

PEOPLE v FLINT, No. 161884; Court of Appeals No. 353295.

PEOPLE v HEAD, No. 161904; Court of Appeals No. 353181.

HUNTINGTON NATIONAL BANK v STEUER, No. 161912; Court of Appeals No. 346998.

In re GERALDINE M BENJAMIN TRUST, No. 161920; Court of Appeals No. 345632.

PEOPLE v HAYS, No. 161925; Court of Appeals No. 352938.

In re APPLICATION OF DTE ELECTRIC COMPANY TO INCREASE RATES and *In re* APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, Nos. 161932 and 161933; Court of Appeals No. 344811 and 344821.

PEOPLE V SOUTHWELL, No. 161934; Court of Appeals No. 353645.

SINCLAIR V BOARD OF PHARMACY, No. 161937; Court of Appeals No. 349288.

DUNN COUNSEL, PLC V ZAPPONE, No. 161949; Court of Appeals No. 350288.

SIMON V PRIORITY HEALTH INSURANCE COMPANY, No. 161951; Court of Appeals No. 347075.

WHITE V RINESS, No. 161984; Court of Appeals No. 347924.

NORTHLAND RADIOLOGY, INC V USAA CASUALTY INSURANCE COMPANY, No. 161987; Court of Appeals No. 346345.

PEOPLE V COMBS, No. 161992; Court of Appeals No. 353566.

PEOPLE V ERICK BROWN, No. 161993; Court of Appeals No. 353596.

HUTH V WEAVER, Nos. 162004, 162005, and 162006; Court of Appeals Nos. 352033, 352105, and 352118.

HOLLAND V SPRINGER, No. 162011; Court of Appeals No. 347562.
BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

GONZALEZ V BEAUMONT HOSPITAL-FARMINGTON HILLS, No. 162019; Court of Appeals No. 347521.

PEOPLE V WILLIAM GUTZMAN, No. 162022; Court of Appeals No. 353712.

In re CONSERVATORSHIP OF DORIS LELA BJORK, No. 162030; Court of Appeals No. 350034.

THOMAS V KESSEL, No. 162032; Court of Appeals No. 348556.

PEOPLE V PERRY, No. 162038; Court of Appeals No. 344863.

INTERNATIONAL OUTDOOR, INC V SS MITX, LLC, No. 162040; Court of Appeals No. 353858.

ALTAYE V SA & R TRUCKING COMPANY, INC, No. 162059; Court of Appeals No. 346797.

FORTUNE V WALSWORTH, No. 162067; Court of Appeals No. 347277.

MARTIN V WATT, No. 162069; Court of Appeals No. 353889.

PEOPLE V JULIAN, No. 162099; Court of Appeals No. 348650.

PEOPLE V HARRIS, No. 162102; Court of Appeals No. 352243.

VANDUINEN v COUNTY OF ALPENA, No. 162113; Court of Appeals No. 349618.

PEOPLE v CORNELIUS ADAMS, No. 162115; Court of Appeals No. 349562.

PEOPLE v CORNELIUS TATE, No. 162123; Court of Appeals No. 349684.

PEOPLE v SHAUL, No. 162141; Court of Appeals No. 349717.

PEOPLE v SAARI, No. 162151; Court of Appeals No. 353756.

PEOPLE v CARLOS JOHNSON, No. 162157; Court of Appeals No. 354739.

PEOPLE v ARNETT JACKSON, No. 162161; Court of Appeals No. 353931.

PEOPLE v TANISHA WILLIAMS, No. 162165; Court of Appeals No. 353499.

PEOPLE v TOWNES, Nos. 162171, 162172, and 162173; Court of Appeals Nos. 353894, 353895, and 353896.

PEOPLE v REEDER, No. 162188; Court of Appeals No. 352857.

PEOPLE v PERKINS, No. 162192; Court of Appeals No. 354811.

PEOPLE v VILLALOBOS, No. 162193; Court of Appeals No. 354870.

PEOPLE v MARUIS ROBINSON, No. 162195; Court of Appeals No. 354522.

PELICHET v WAYNE CIRCUIT JUDGE, No. 162199; Court of Appeals No. 354363.

PEOPLE v MESSENGER, No. 162202; Court of Appeals No. 348175.

AAA MEMBER SELECT INSURANCE COMPANY v JOHNSON, No. 162205; Court of Appeals No. 349608.

WILSON v WILSON, No. 162206; Court of Appeals No. 350225.

PEOPLE v HEMWALL, No. 162213; Court of Appeals No. 347828.

PEOPLE v CARR, No. 162224; Court of Appeals No. 348119.

PEOPLE v MAXIE, No. 162228; Court of Appeals No. 354056.

PEOPLE v HERMAN, No. 162229; Court of Appeals No. 354163.

PEOPLE v FULLER, No. 162253; Court of Appeals No. 354985.

PEOPLE v JAMAR OLIVER, No. 162257; Court of Appeals No. 353652.

LETICA CORPORATION v DEMERITT, No. 162262; Court of Appeals No. 349329.

PEOPLE v EAREGOOD, No. 162263; Court of Appeals No. 354292.

PEOPLE v ARMONDO JACKSON, No. 162264; Court of Appeals No. 350539.

PEOPLE v SAMUEL LEE, No. 162265; Court of Appeals No. 353600.

PEOPLE v REID, No. 162268; Court of Appeals No. 354340.

PEOPLE v TIMBERLINE LOGGING, INC, No. 162275; Court of Appeals No. 353952.

YU v MIGLIAZZO, No. 162282; Court of Appeals No. 350940.

BROOKS v PHCN INVESTMENTS, LLC, No. 162295; Court of Appeals No. 350238.

WHITE v MICHIGAN STATE UNIVERSITY, No. 162298; Court of Appeals No. 349812.

RIAHI v HOPE NETWORK, No. 162299; Court of Appeals No. 346525.

WHITE v MATTHEWS, No. 162310; Court of Appeals No. 354308.

WHITE v SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 162312; Court of Appeals No. 354313.

PEOPLE v FOUNTAIN, No. 162313; Court of Appeals No. 349361.
ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v HARTSON, No. 162318; Court of Appeals No. 349972.

PEOPLE v NATHANIEL WARD, No. 162321; Court of Appeals No. 348475.

PEOPLE v RIDGEWAY, No. 162324; Court of Appeals No. 354187.

CARVER v HILLS LAW FIRM, No. 162329; Court of Appeals No. 353621.

PEOPLE v WELD, No. 162335; Court of Appeals No. 348373.

PEOPLE v ALICIA WRIGHT, No. 162341; Court of Appeals No. 348900.

PEOPLE v OVALLE, No. 162367; Court of Appeals No. 347259.

PEOPLE v SYLA, No. 162369; Court of Appeals No. 349348.

RUDD v CITY OF NORTON SHORES, No. 162370; Court of Appeals No. 354840.

WEBER v COMMON GROUND, No. 162379; Court of Appeals No. 352733.

PEOPLE v ELLISON, No. 162380; Court of Appeals No. 354787.

SUNDBERG v OBERSTAR, INC, No. 162392; Court of Appeals No. 350876.

PEOPLE v GRAY, No. 162405; Court of Appeals No. 348292.

PEOPLE v ANTHONY ADAMS, No. 162481; Court of Appeals No. 349489.
ZAHRA, J., did not participate due to a familial relationship with counsel of record.

SHAW v SHAW, No. 162505; Court of Appeals No. 352851.

Superintending Control Denied March 30, 2021:

OAKES v 30TH JUDICIAL CIRCUIT COURT, No. 162218.

ST AMANT v BOARD OF LAW EXAMINERS, No. 162483.

BOINES v BOARD OF LAW EXAMINERS, No. 162544.

O'BRIEN v BOARD OF LAW EXAMINERS, No. 162545.

Reconsideration Denied March 30, 2021:

PEOPLE v RAPOZA, No. 161104; Court of Appeals No. 351897. Leave to appeal denied at 506 Mich 1024.

BYKAYLO v CHARTER TOWNSHIP OF WEST BLOOMFIELD, No. 161532; Court of Appeals No. 346711. Leave to appeal denied at 506 Mich 1025.

PEOPLE v ROBERT BOLES, No. 161542; Court of Appeals No. 351899. Leave to appeal denied at 506 Mich 1025.

PEOPLE v PAYNE, No. 161724; Court of Appeals No. 345734. Leave to appeal denied at 506 Mich 1026.

PEOPLE v FEEK, No. 161732; Court of Appeals No. 352410. Leave to appeal denied at 506 Mich 1026.

PEOPLE v EDDIE WILLIAMS, No. 161788; Court of Appeals No. 346689. Leave to appeal denied at 507 Mich 869.

BELL v DEPARTMENT OF CORRECTIONS, No. 161832; Court of Appeals No. 349194. Leave to appeal denied at 506 Mich 1026.

PEOPLE v WAYNE BROWN, No. 161850; Court of Appeals No. 346659. Leave to appeal denied at 507 Mich 869.

CLARIZIO v FORBES, No. 161918; Court of Appeals No. 347846. Leave to appeal denied at 506 Mich 1027.

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE, No. 162111; Court of Appeals No. 353846. Leave to appeal denied at 506 Mich 1021.

Summary Disposition March 31, 2021:

PEOPLE v CLIFFORD, No. 161744; Court of Appeals No. 349359. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment ordering reinstatement of the identity theft charge. As explained by dissenting Judge JANSEN, in the absence of evidence that the decedent did not actually use or authorize the use of his bank card, there was not probable cause to bind over the defendant on the identity theft charge. In all other respects,

leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE V GRANT BALOGH and PEOPLE V GABRIEL BALOGH, Nos. 161785 and 161786; Court of Appeals Nos. 343097 and 343098. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the October 24, 2017 orders of the 33rd District Court granting the defendants' motions for dismissal. The 33rd District Court did not abuse its discretion in concluding that the prosecution failed to present sufficient evidence of the causation elements of the crimes charged to establish probable cause to believe that the defendants committed a felony. *People v Shami*, 501 Mich 243, 250-251 (2018). Even crediting the prosecution's expert medical testimony, in light of the evidence regarding the progressive nature of the decedent's medical condition, as well as her capacity to make her own decisions, it was within the range of principled outcomes for the district court to conclude that "a person of ordinary prudence and caution" would not entertain "a reasonable belief" that the defendants caused the decedent's death. *People v Anderson*, 501 Mich 175, 178 (2018).

SPORS V STATE OF MICHIGAN, No. 161883; Court of Appeals No. 353216. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Oral Argument Ordered on the Application for Leave to Appeal March 31, 2021:

In re ESTATE OF HERMANN A VON GREIFF, No. 161535; reported below: 332 Mich App 251. The appellant shall file a supplemental brief addressing whether the period of time after the filing of a complaint for divorce is counted when considering whether a spouse was "willfully absent" from the decedent for more than a year before his or her death. MCL 700.2801(2)(e)(*i*); *In re Estate of Erwin*, 503 Mich 1 (2018). The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Probate and Estate Planning Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

DAVIS V JACKSON PUBLIC SCHOOLS, No. 161836; Court of Appeals No.

344203. The appellant shall file a supplemental brief addressing whether causation, in cases brought under Section 2 of the Whistleblowers' Protection Act, MCL 15.362, is determined using a motivating-factor standard or instead a but-for standard. The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 31, 2021:

PEOPLE V JOEI JORDAN, No. 161386; Court of Appeals No. 351040.

FRATARCANGELI V MYERS, No. 161627; Court of Appeals No. 347390.

ADAMS V BROWN, No. 161667; Court of Appeals No. 346503.

STATE TREASURER V ROBERT HENNING, No. 161887; Court of Appeals No. 352129.

STATE TREASURER V ROBERT HENNING, No. 161889; Court of Appeals No. 352130.

PEOPLE V DONALD DAVIS, No. 161956; Court of Appeals No. 353395.

PEOPLE V UTURO, No. 162149; Court of Appeals No. 347311.

In re CONTEMPT OF NICHOLAS SOMBERG, No. 162284; Court of Appeals No. 344041.

Summary Disposition April 2, 2021:

In re SMITH, MINORS, No. 161525; Court of Appeals No. 351095. On Thursday, March 4, 2021, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Kalamazoo Circuit Court Family Division for further proceedings not inconsistent with this order. MCL 712a.2(b)(1) provides that a court may assume jurisdiction over a juvenile if his or her parent "when able to do so, neglects or refuses to provide proper or necessary . . . education . . . ." Subsection (B) specifies that "neglect" is defined as it is in MCL 722.602. That provision defines "neglect" as "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs

through negligent treatment . . . ." MCL 722.602(1)(d). Therefore, there must be a showing of harm in order for a court to assume jurisdiction over a juvenile under the "neglects" clause of MCL 712A.2(b)(1).[1] Here the children attended school 75% of the time and had several tardies. While that is a greater number of absences than the 85% average attendance rate of their school, the only testimony presented regarding the children's academic performance was from BS, Jr.'s teacher. She testified that he was performing at grade level. Though she also said that she struggled to get a complete picture of his progress and that she feared he would not be able to maintain his academic level in the future, such testimony is speculative and does not show by a preponderance of the evidence that BS, Jr., was actually harmed so as to have been neglected under the statutory definition. See *In re Ferranti, Minor*, 504 Mich 1, 15 (2019). Because there was no showing of harm caused by the children's absences, we agree with Judge RIORDAN's dissent that the circuit court erred by assuming jurisdiction on that ground alone.

Oral Argument Ordered on the Application for Leave to Appeal April 2, 2021:

MURPHY v INMAN, No. 161454; Court of Appeals No. 345758. The appellant shall file a supplemental brief addressing: (1) whether, with respect to Covisint Corporation's cash-out merger with OpenText Corporation, corporate officers and directors owed cognizable common-law fiduciary duties to the corporation's shareholders independent of any statutory duty; and (2) whether the appellant has standing to bring a direct cause of action under either the common law or MCL 450.1541a. The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Business Law and Litigation Sections of the State Bar of Michigan and the Michigan Chamber of Commerce are invited to file

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[1] The Court of Appeals relied on *In re Nash*, 165 Mich App 450, 455-456 (1987), for the proposition that a "child's chronic absence from school is a sufficient basis for the trial court to assume jurisdiction on the ground of educational neglect as contemplated by the statute." *In re Smith, Minors*, unpublished opinion of the Court of Appeals, issued April 30, 2020 (Docket Nos. 351095 and 351178), p 2. But *Nash* did not involve chronic absences without a showing of harm. There, in addition to the children's absences from school, the respondent had no stable residence and one of the children was born with symptoms of a drug overdose. *Nash*, 164 Mich App at 455.

briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 2, 2021:

DEPARTMENT OF TRANSPORTATION v RIVERVIEW-TRENTON RAILROAD COMPANY, DEPARTMENT OF TRANSPORTATION v CROWN ENTERPRISES, INC, DEPARTMENT OF TRANSPORTATION v DIBDETROIT, LLC, and DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, Nos. 161760-161778; reported below: 332 Mich App 574.

VIVIANO, J. (*dissenting*). This case raises serious questions about the activities of the Michigan Department of Transportation (MDOT) in relation to the Gordie Howe International Bridge. The Legislature has never authorized the bridge and, in fact, has since 2011 placed limitations on MDOT's authority to approve the bridge or use state funds for it. The meaning and effect of those limitations, and the constitutionality of MDOT's actions, are at the heart of this case. The Court of Appeals concluded that MDOT's actions complied with all the statutory restrictions and were otherwise constitutional.

Defendants raise strong arguments that the Court of Appeals erred. For example, when the state of Michigan, "by and through" MDOT, among other entities, entered into an agreement with Canada to construct a new bridge crossing between Detroit and Windsor, Ontario (the Crossing Agreement), there was an appropriations statute in effect that prohibited MDOT from "expend[ing] any state transportation revenue for the construction of the" bridge and from "commit[ting] the state to any new contract related to the construction planning or construction of the" bridge. 2011 PA 63, Art XVII, Part 2, § 384(1). Since the Crossing Agreement was entered, the Legislature has continued to prohibit MDOT from expending state funds except for "staff resources used in connection with project activities . . . ." 2013 PA 59, § 384(1). Under the Crossing Agreement, although Canada is required to reimburse MDOT for various expenditures including the land condemnations at issue here, MDOT must expend funds on the front end. It is at least a close question whether a prohibition on spending funds still allows hundreds of millions of dollars to be spent as long as the expenditures are later reimbursed. In addition to this interpretive issue, it is also questionable whether MDOT's actions pass muster under constitutional and statutory requirements that limit state agencies like MDOT to spending funds that are specifically appropriated by the Legislature. Const 1963, art 9, § 17; MCL 18.1366. It appears that no appropriations have been made for the funds spent by MDOT that are subject to reimbursement by Canada. These are difficult legal issues that merit this Court's attention.

This is yet another missed opportunity to address a contention that executive agencies and officials have acted outside the bounds of their prescribed authority. See *Davis v Secretary of State*, 506 Mich 1040 (2020) (VIVIANO, J., dissenting) (dissenting from denial of leave to appeal in a challenge to the Secretary of State's mass mailing of

absentee ballot applications); *Davis v Secretary of State*, 506 Mich 1022 (2020) (dismissing appeal by stipulation of the parties in a case challenging the Secretary of State's last-minute directive banning the open carrying of firearms at polling places on Election Day). This is no small matter. See Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), p 29 ("It was precisely to bar prerogative or administrative evasions of law that seventeenth-century Englishmen developed ideas of constitutional law."). As I explained when this issue arose recently, "In general, '[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.' " *Davis*, 506 Mich at 1040, quoting *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 225-226 (2011) (quotation marks and citation omitted). The present case puts this issue in even starker relief, as the question is not simply whether MDOT was authorized to undertake its actions in regard to the bridge, but whether MDOT was affirmatively prohibited by the Legislature from taking these actions.

I would grant leave to appeal so that we could examine these important and far-reaching issues.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for former Governor Rick Snyder.

Summary Disposition April 9, 2021:

HUNT v DRIELICK, HUBER v DRIELICK, and LUCZAK v DRIELICK, Nos. 157476, 157477, and 157478; reported below: 322 Mich App 318. On October 7, 2020, the Court heard oral argument on the application for leave to appeal, as cross-appellants, the December 14, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals correctly held that prejudgment interest on the underlying actions should be calculated from the dates the underlying complaints were filed through March 14, 2000, the date of the consent judgments. However, the Court of Appeals erred in holding that no other interest should be awarded.

Here, writs of garnishment were issued on December 4, 2000. Judgment on those writs entered on June 2, 2016. Although the writs were predicated upon the consent judgments awarded in the underlying actions, the writs themselves constitute a separate action. See MCR 3.101. Accordingly, the judgments on the writs of garnishment mark a separate date from which to calculate prejudgment and postjudgment interest. Similar to the Court of Appeals' analysis of prejudgment interest on the underlying actions, prejudgment interest should be awarded from the dates the writs of garnishment were issued until the date the judgment on those writs entered. Postjudgment interest should also be awarded from the dates the judgment on those writs entered, as Empire has participated in and defended against the garnishment

action. We remand this case to the Bay Circuit Court for calculation of prejudgment and postjudgment interest.

ZAHRA, J. (*concurring*). I concur in the order that reverses in part the judgment of the Court of Appeals. I write separately to respond to Justice VIVIANO's dissent, wherein he cites caselaw from 1889 up to 1960 and rhetorically asks, "On what authority, one might wonder, does the majority rely to overturn over a century of settled law *sub silentio*? Only a bare citation of MCR 3.101, the garnishment court rule. But that rule has 20 subsections and runs to over 4,800 words."

Sometime after the cases cited by Justice VIVIANO were decided, the court rule governing garnishment was amended. Specifically, when MCR 3.101(M)(1) was adopted in 1985, it provided, as it does currently, that "[i]f there is a dispute regarding the garnishee's liability or if another person claims an interest in the garnishee's property or obligation, the issue shall be tried in the same manner as other civil actions." In addition, the rule currently indicates that "[t]he verified statement acts as the plaintiff's complaint against the garnishee, and the disclosure serves as the answer." MCR 3.101(M)(2). Finally, the court rule provides that garnishment proceedings may result in entry of a money judgment against the garnishee-defendant that may include interest. See MCR 3.101(O)(1).

Because MCR 3.101(M)(1) and (O)(1) provide ample authority allowing for a court to award interest on the judgment resulting from writs of garnishment in a disputed action, I concur in the order that reverses in part the judgment of the Court of Appeals.

VIVIANO, J. (*dissenting*). I dissent from the majority's decision because I do not believe that a garnishment proceeding constitutes a separate action for purposes of calculating statutory interest under MCL 600.6013. As a result, I do not believe that a separate award of prejudgment interest is permitted against a garnishee-defendant from the date of issuance of a writ of garnishment.

This case arises out of a fatal multivehicle accident that occurred on January 12, 1996. All parties except Empire Fire and Marine Insurance Company (Empire), which insured the semi-tractor involved in the accident under a "bobtail" policy, stipulated to entry of consent judgments resolving the parties' various claims. The consent judgments were entered on March 14, 2000. As part of the settlement, defendant Roger Drielick assigned his rights under the insurance policy with Empire to plaintiffs, Sargent Trucking, Inc. (Sargent) and Great Lakes Carriers Corporation (GLC). Thereafter, Sargent and GLC served writs of garnishment against Empire. After extensive litigation over the policy exclusions, including an appeal in this Court, the trial court determined that the exclusions were inapplicable. The Court of Appeals summarized well what happened next:

> Thereafter, garnishor-plaintiffs moved for entry of judgment against Empire, seeking a judgment that Empire was liable for payment of the amounts owing under the consent judgments, including statutory interest. Empire argued that its responsibility for payment of the liabilities under the consent judgments was

> limited to the $750,000 policy limit because the policy contained no provision for the payment of prejudgment interest in excess of the policy limit, and because the policy's "Supplementary Payments" provision contained an interest clause that provides that postjudgment interest will be paid only in suits in which Empire assumes the defense.[1] In other words, Empire argued that it was not obligated to pay postjudgment interest because it did not defend the underlying suits. The trial court found that Empire had breached its duty to defend under the policy and that the breach had negated the provision in the policy that limited the payment of postjudgment interest to those suits in which Empire had assumed the defense. The trial court entered final orders of judgment inclusive of statutory judgment interest from the date the underlying complaints were filed through June 2, 2016 . . . . [*Hunt v Drielick*, 322 Mich App 318, 328-329 (2017).]

On appeal, the Court of Appeals agreed that Empire is "responsible for prejudgment interest calculated based on the policy limit, even if the judgment amounts plus prejudgment interest exceed the policy limits." *Id*. at 336. On the issue of whether prejudgment interest could be assessed on the money judgments issued on the writs of garnishments, however, the Court of Appeals disagreed with the trial court's ruling, explaining as follows:

> The trial court awarded prejudgment interest from the dates the underlying complaints were filed until the final judgments on the writs of garnishment were entered on June 2, 2016. Empire argues that prejudgment interest can only be measured from the date of the original complaints through March 14, 2000, the date of the consent judgments. We agree. The settling parties memorialized their agreements in consent judgments. When those judgments were entered, the prejudgment-interest period ended and the postjudgment-interest period began. [*Matich v Modern Research Co*, 430 Mich 1, 20 (1988)]. See also *Madison v Detroit*, 182 Mich App 696, 700-701; 452 NW2d 883 (1990). Therefore, prejudgment interest accrued until the consent judgments were entered; interest that accrued after entry of the consent judgments is postjudgment interest. Empire is obligated to pay prejudgment interest on the policy limits from the dates the complaints in the underlying actions were filed until the date of the consent judgments were entered. [*Id*.]

We heard oral argument on the application filed by GLC and Sargent challenging the Court of Appeals' ruling limiting prejudgment interest to the period prior to entry of the consent judgments in the underlying action. In a terse order, the majority now reverses the Court of Appeals on this point, but provides little in the way of explanation or legal

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[1] Specifically, Empire's insurance policy provides that Empire will only pay "[a]ll interest on the full amount of any judgment that accrues after entry of the judgment in any 'suit' we defend[.]"

support for its holding. Indeed, the majority's analysis is boiled down to a single sentence and a single citation: "Although the writs were predicated upon the consent judgments awarded in the underlying actions, the writs themselves constitute a separate action. See MCR 3.101." I cannot agree with this assertion for the following reasons.

First and foremost, we have clearly and repeatedly held to the contrary for over a century. See *Milwaukee Bridge & Iron Works v Wayne Circuit Judge*, 73 Mich 155, 157 (1889) ("The writ of garnishment and proceedings thereon are always ancillary, and the service of such writ is not the commencement of an action."); *Wyngarden v LaHuis*, 251 Mich 276, 278 (1930) ("Garnishment is ancillary and not the commencement of an action."); *Stevens v Northway*, 293 Mich 31, 34 (1940) ("The garnishment proceeding was ancillary to the action against the principal defendants and wholly dependent thereon and not the commencement of an independent action."); *Rodgers v Mikolajczak*, 361 Mich 61, 67 (1960) ("This [garnishment proceeding] is not a new or different action, but a proceeding ancillary to the principal suit.").[2]

On what authority, one might wonder, does the majority rely to overturn over a century of settled law *sub silentio*? Only a bare citation of MCR 3.101, the garnishment court rule. But that rule has 20 subsections and runs to over 4,800 words. The majority's vague citation of it—without specifying any particular part of the rule—does not assist the reader in understanding why the majority believes the rule overruled *Milwaukee Bridge* and its progeny. As discussed below, I do not believe it can be interpreted in such a manner.

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[2] See also *Westland Park Apartments v Ricco, Inc*, 77 Mich App 101, 104 n 1 (1977) ("Michigan courts have further held that a garnishment proceeding is ancillary to an action against the principal defendant and wholly dependent thereon and is not the commencement of an independent action."); see generally 6 Am Jur 2d, Attachment and Garnishment, § 15, p 493 ("As a general rule, an attachment or garnishment is not an original action but is ancillary to the original action seeking judgment. . . . '[A]ncillary,' as used in the law, is defined as designating or pertaining to a proceeding that is subordinate to, or in aid of, another primary or principal one."); 38 CJS, Garnishment, § 3, p 332 ("Generally, the principal action or proceeding and the garnishment proceeding are regarded as constituting a single suit.").

Garnishor-plaintiffs rely on *Hayes v Ross*, 236 Mich 208 (1926), but it is hard to see how that case is relevant here. The parties there did not dispute when the interest began to accrue, and the Court never decided that matter. Moreover, our judgment-interest statute specifies that interest is calculated from the date the complaint was filed. See MCL 600.6013(10). The Court's analysis instead focused on the appropriate interest rate. *Hayes*, 236 Mich at 213. Consequently, nothing in *Hayes* supports the proposition that a garnishment proceeding is a separate action or that separate award of interest for garnishment proceedings is permitted.

I begin with MCL 600.6013 because it establishes the entitlement to interest on money judgments by authorizing such judgments in the first instance, whereas MCR 3.101 governs the procedures related to the award of such interest. See *Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Servs*, 201 Mich App 301, 305 (1993) ("Although garnishment actions are authorized by statute, the procedural aspects of the garnishment process are set out in the court rules . . . ."). MCL 600.6013(1) provides, in pertinent part, that "[i]nterest is allowed on a money judgment recovered in a civil action, as provided in this section." Subsection (8) states that "interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint . . . ." MCL 600.6013(8). Subsection (10) provides that, if a settlement offer is not made, "the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment." MCL 600.6013(10).[3] Thus, the statute "governs the award of interest from the date a complaint is filed until judgment is satisfied." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 504 (1991). As it relates to prejudgment interest—which is the focus of this case, in light of the policy's limitation on postjudgment interest—the statute "entitles a prevailing party to prejudgment interest from the filing of the complaint to the entry of a judgment in any civil action." *Old Orchard by the Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 256 (1990).[4] See generally *Matich*, 430 Mich at 20 (clarifying the distinction between prejudgment and postjudgment interest, stating that "[*p*]*re*judgment interest vests or becomes fixed at the time the judgment is entered, while *post*judgment interest continues to accumulate or 'accrue' after the time the judgment is entered.").

The narrow issue in this case, then, is whether an award of prejudgment interest under MCL 600.6013(8) is permitted only from "the date of filing the complaint" in the underlying action, as the statute provides, or whether a separate award of prejudgment interest is permitted against a garnishee-defendant from the date of filing of a writ of garnishment in a garnishment proceeding. The filing of a complaint commences a civil action. See MCL 600.1901 ("A civil action is commenced by filing a complaint with the court."); MCR 2.101(B) ("A civil action is commenced by filing a complaint with a court."). See also *Black's Law Dictionary* (6th ed) (defining "complaint" as the "*original or initial pleading* by which an action is commenced under codes or Rules of Civil Procedure.") (emphasis added). Garnishment proceedings, by contrast, are commenced by filing of a verified statement, which triggers issuance of a "writ" of garnishment. See MCL 600.4011; MCR 3.101(E). A "writ" is "[a] written judicial order to perform a specified act," *Black's Law Dictionary* (6th ed), which, in the context of a garnishment

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[3] See also MCL 600.6013(13) (providing that, when a settlement offer is made, the interest shall be calculated "from the date of the rejection of the offer to the date of satisfaction of the judgment").

[4] *Old Orchard* was overruled in part on other grounds by *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608 (1996).

proceeding, is to obtain a satisfaction of a judgment. See MCR 3.101(D) (providing that a clerk of court, after entry of a prior judgment, shall enter the writ to commence the periodic garnishment). The distinction between a complaint and a writ leads me to conclude that an award of prejudgment interest under MCL 600.6013(8) is permitted only from the date of filing of the complaint in the underlying action; a separate award of prejudgment interest against the garnishee-defendant may not be made based on the writ of garnishment.[5]

Turning back to MCR 3.101, even assuming that the rule could go beyond the statute in awarding prejudgment interest, I find nothing in the Court's adoption of this rule (or its predecessor, GCR 1963, 738), that would lead to such a conclusion.[6] I do not believe the language of the

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[5] In an analogous context, the Court of Appeals has reached a similar conclusion. In *Grand Trunk W R Co v Pre-Fab Transit Co, Inc*, 46 Mich App 117 (1973), the court interpreted similar language (i.e., "interest to be calculated from the date of filing the complaint") in an earlier version of MCL 600.6013. In addressing whether a third-party defendant's liability for interest runs only from the filing of the third-party complaint for contribution, the Court of Appeals held that that phrase "implies that only that complaint central to the overall action is relevant for purposes of determining interest." *Id*. at 127. The court explained its rationale as follows: "Since a third-party complaint for contribution is not by any means central to the action, but is ancillary or auxiliary thereto, the interest statute is held to contemplate that a third-party defendant's liability for interest runs from the date of filing of the original complaint." *Id*. Though *Grand Trunk* is not binding on this Court and I take no position on the ultimate conclusion in that case, I find its mode of analysis—i.e., its close examination of the meaning of the term "complaint" and exclusion of other court filings that do not appear to fall within that meaning—to be persuasive and supportive of the conclusion I reach here.

[6] It is worth questioning, as an initial matter, whether MCR 3.101 could abrogate or modify MCL 600.6013. Our authority to promulgate court rules that trump statutes extends only to matters of practice and procedure, not to substantive law. *McDougall v Schanz*, 461 Mich 15, 27 (1999). An argument could be made that MCL 600.6013 is a substantive provision, as it grants the right to interest, and thus MCR 3.101 could not modify the statutory entitlement to prejudgment interest. We have, however, indicated that the statute is procedural for purposes of determining whether an amendment to it could apply retroactively. See *Ballog v Knight Newspapers, Inc*, 381 Mich 527 (1969). I have doubts about whether that case was correctly decided, and it is not clear that its logic would apply outside the context of retroactivity. See Comment, *Should Prejudgment Interest be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U Chi L Rev 705, 709-710 (2002)

garnishment court rule provides any basis for concluding that the filing of a writ of garnishment should be treated as the commencement of a new civil action. In a few places, the rule provides that procedures under the rule shall occur as they do in other civil actions. Thus, for example, when there is a dispute regarding the garnishee-defendant's liability, the issue "shall be tried in the same manner as other civil actions." MCR 3.101(M)(1).[7] In addition, the rule indicates that "[t]he verified statement acts as the plaintiff's complaint against the garnishee, and the disclosure serves as the answer." MCR 3.101(M)(2). Finally, it provides that garnishment proceedings may result in entry of a money judgment against the garnishee-defendant. See MCR 3.101(O)(1). But these provisions do not create a new civil action. The rule does not define what garnishment proceedings are; instead, MCR 3.101 simply reflects the general understanding that a garnishment proceeding "closely approximates" a normal civil action and is "largely governed by the rules that apply to actions . . . ." 38 CJS, Garnishment, § 2, p 329.

Nothing in the court rule conflicts with our holding that a garnishment proceeding "is not a new or different action, but a proceeding ancillary to the principal suit." *Rodgers*, 361 Mich at 67. To the contrary, several provisions make it clear that the garnishment proceeding is subordinate to the underlying action. See, e.g., MCR 3.101(O)(6) ("Execution against the garnishee may not be ordered by separate writ, but must always be ordered by endorsement on or by incorporation within the writ of execution against the defendant."); MCR 3.101(O)(7) ("Satisfaction of all or part of the judgment against the garnishee constitutes satisfaction of a judgment to the same extent against the defendant."). This latter provision prevents a double recovery against the judgment-debtor and the garnishee-defendant. It is noteworthy that there is no similar provision going the other way, i.e., providing that satisfaction of

("All courts recognize . . . that prejudgment interest rules have both substantive and procedural features, and that one rationale or the other may be more compelling depending on the legal context. . . . This is true regardless of whether the legislature or courts officially list prejudgment interest rules as procedural or substantive. Prejudgment interest does abridge, enlarge, or modify substantive rights by increasing damage awards, but it also promotes settlement and solves problems of congestion and delay, which are intrinsically procedural goals.") (citations omitted). In any event, it is unnecessary to decide the issue here because the court rule does not meaningfully conflict with the statute.

[7] See also MCR 3.101(M)(2) ("The defendant and other claimants . . . may plead their claims and defenses *as* in other civil actions.") (emphasis added); MCR 3.101(P) ("A judgment or order in a garnishment proceeding may be set aside or appealed in the same manner and with the same effect *as* judgments or orders in other civil actions.") (emphasis added); MCR 3.101(S)(1)(a) ("If the garnishee fails to disclose or do a required act within the time limit imposed, a default may be taken *as* in other civil actions.") (emphasis added).

a judgment against a judgment-debtor constitutes satisfaction of a judgment against the garnishee-defendant. Absent such a provision, it would appear that under the majority's interpretation, a garnishee-defendant could be liable for a double recovery of statutory interest.[8]

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[8] If an award of interest against the garnishee-defendant is permitted, the garnishor-plaintiff stands to reap at least a double recovery of interest. This is because in the typical garnishment proceeding—although not here, in light of the Empire policy's limitation on postjudgment interest, see note 9 of this statement—postjudgment interest from the original judgment will continue to run for the same period in which prejudgment interest against the garnishee-defendant is accruing. MCL 600.6013(10). So, during the same period, the original defendant will owe the postjudgment interest on the judgment and the garnishee-defendant will owe prejudgment interest on the garnishment judgment, which could be as much as the outstanding judgment balance. MCR 3.101(O)(1). And presumably the interest owed by the garnishee-defendant will be calculated based on not only the original judgment but also any interest that had accumulated at the time the writ of garnishment was sought or, in certain cases, on the outstanding balance of the judgment. See MCR 3.101(D)(2) (providing that the writ of garnishment includes "the total amount of postjudgment interest accrued to date" and "the amount of the unsatisfied judgment now due (including interest and costs)"); MCR 3.101(G)(2) (providing that the garnishee can be liable for the accrued interest when the request for the writ was filed or, if the garnishor-plaintiff has provided the garnishee-defendant periodic statements, for the outstanding judgment balance in the most recent statement). This means that the garnishee-defendant will owe interest on interest—it owes interest on a sum that includes prior interest. Thus, the garnishor-plaintiff might obtain more than double interest.

Not only does this produce a windfall to the garnishee-plaintiff, it goes against the plain text of MCR 3.101(G). That rule establishes the maximum liability of the garnishee-defendant:

> The garnishee is liable for no more than the amount of the unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment unless a statement is sent to the garnishee in accordance with MCL 600.4012(5)(a), in which case the garnishee is liable for the amount of the remaining judgment balance as provided in the most recent statement. [MCR 3.101(G)(2).]

Nothing in this language—which caps the garnishee-defendant's liability—suggests the possibility that the garnishee-defendant might be liable, out of its own funds, for interest. As if to punctuate this, the court rule's provision on what the garnishee-defendant must actually pay out repeats the basic elements of the provision block-quoted above. See MCR 3.101(J)(4). Thus, contrary to the majority's conclusion, there

Finally, while the majority may have been swayed by the length of time it has taken to satisfy the consent judgments in this case, it is worth noting that the majority's holding will allow a separate award of judgment interest against a garnishee-defendant regardless of whether the delay in paying the garnishment amount is due to the garnishee's wrongful conduct. Thus, the claim recognized by the Court today is even more robust than similar protections enacted by legislatures in our sister states. See, e.g., *Thompson v Catlin Ins Co (UK) Ltd*, 431 P3d 224, 231-232 (Colo, 2018).

Because a garnishment proceeding does not constitute a separate civil action, I would hold that Empire is liable only for prejudgment interest from the date of filing of the complaint in the underlying action until the consent judgments were entered on March 14, 2000.[9] I would deny leave because the Court of Appeals reached this result in a thorough and thoughtful published opinion. For these reasons, I respectfully dissent.

CLEMENT, J., joins the statement of VIVIANO, J.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

WELCH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE V PARKINS, No. 161042; Court of Appeals No. 345687. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, vacate the sentence of the Macomb Circuit Court, and remand this case to the trial court for resentencing. As noted by dissenting Judge SHAPIRO, the trial court did not justify its sentence with appropriate reasons for sentencing the defendant as it did. The trial court simply stated that the sentencing

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is no basis in MCR 3.101 for concluding that the garnishee-defendant is somehow liable for a separate award of interest.

[9] As previously mentioned, Empire's insurance policy provided that it would pay postjudgment interest only for underlying cases that it defended. It is uncontroverted that Empire did not defend the underlying suit, thereby triggering this limitation. See *Matich*, 430 Mich at 24 (recognizing that, in the context of postjudgment interest, an "insurer may limit the risk that it assumes") (quotation marks and citation omitted). Garnishor-plaintiffs do not contest the validity of this exclusion, relying instead on a contention that Empire breached its duty to defend. However, this argument fails because, as the Court of Appeals concluded, the issue of whether a breach of contract occurred was neither litigated in nor decided by the trial court. See *Stockdale v Jamison*, 416 Mich 217 (1982) (holding that a garnishee-defendant may be liable for breaching a "duty to defend" when the parties litigate, and a court decides, whether a breach of contract occurred). Therefore, while this provision does not limit Empire's liability for prejudgment interest that accrued before March 14, 2000, it does limit its liability for postjudgment interest that accrued after that date.

guidelines range was inappropriate, but failed to explain how the guidelines variables did not adequately account for the seriousness of the offense or the character of the offender. See *People v Milbourn*, 435 Mich 630, 660 (1990). Nor did the trial court adequately explain, for purposes of enabling appellate review, how the extent of the departure —a life sentence out of a guidelines range of 51 to 85 months—was justified, particularly in light of the defendant's minimal prior record. *People v Smith*, 482 Mich 292, 304 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Judgment of the Court of Appeals Affirmed by Equal Division April 9, 2021:

AHMAD V UNIVERSITY OF MICHIGAN, No. 160012; Court of Appeals No. 341299.

On order of the Court, leave to appeal having been granted and the Court having considered the briefs and oral arguments of the parties, the judgment of the Court of Appeals is affirmed by equal division of the Court.

ZAHRA and CLEMENT, JJ., would vacate this Court's March 6, 2020 order granting leave and deny the application for leave to appeal because of the interlocutory posture of this case.

VIVIANO, J. (*concurring*). I would vacate our order granting leave to appeal in this case. I am inclined to believe that the Court of Appeals reached the correct result regarding the meaning and application of MCL 15.232(i)—a provision of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.—but as the dissent below demonstrates, the application of that provision is not entirely clear. It defines as a public record one "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function . . . ." MCL 15.232(i). The question here is whether a private individual's archives, given to the University of Michigan Bentley Historical Library under the condition that the contents not be made publicly available for a period of time, is subject to FOIA as a public record. Rather than resort to the broad purposes behind FOIA to determine the definition of "public record" and resolve the case today, I would wait until we could assess whether the materials here, even if deemed public records, fall within FOIA's personal-privacy exemption, MCL 15.243(1)(a). That statutory exemption could provide critical context for interpreting MCL 15.232(i) or obviate the need for such an interpretation altogether.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent. The University of Michigan Bentley Historical Library's storage of a private citizen's personal writings and papers, subject to a limited-use agreement, does not transform those documents into public records for purposes of the Michigan Freedom of Information Act (the FOIA), MCL 15.231 *et seq*. The Court's affirmance by equal division means that litigation will proceed and the university will presumably invoke the FOIA's personal-

privacy exemption, MCL 15.243(1)(a), to prevent disclosure, but it should not have to do so because the materials are not within the FOIA's scope.

The Legislature helpfully stated the FOIA's purpose in its opening text: to provide the public with "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2). Since its enactment, we have repeatedly recognized that "the core purpose of FOIA [is] shedding light on the workings of government." *State News v Mich State Univ*, 481 Mich 692, 697 (2008). The FOIA defines a public record as a writing that is "prepared, owned, used, in the possession of, or retained by a public body *in the performance of an official function* . . . ." MCL 15.232(i) (emphasis added).

The Court of Appeals held that since an official function of a library is collecting and preserving archival materials, the private donor's writings, once accessioned into the collection—even if contractually under seal—are public records. Bad logic. And nobody claims that the sealed documents will shed any light on the Bentley Library's or the university's official functions. To compel the Bentley Library to disclose a private donor's writings would shed as much light on the affairs of government as requiring the nearby Ann Arbor District Library to disclose its copy of *Goodnight Moon* pursuant to a FOIA request. Neither disclosure would tell the public anything about the government entity housing the writing.

Adding insult to injury, the disclosure of archival materials acquired subject to certain donor-imposed restrictions undercuts the very function of collecting and preserving. It limits future public access to those primary sources that let a society know its own history. "Archivists fear the smell of burnt letters." Bilder, *The Shrinking Back: The Law of Biography*, 43 Stan L Rev 299, 330 n 176 (1992). For institutions like the Bentley Library, agreeing to temporary access restrictions for sensitive material is an important means of effectively fulfilling its mission of collecting and preserving. If Michigan's public institutions can't honor donor agreements, some people may simply opt to donate to private or federal archives. But capacity is limited, and many will instead withhold, censor, abandon, or even destroy historically significant documents. There will be a materially adverse impact on Michigan's public libraries, museums, and archives.

We should avoid a myopic textualism that rips a word or phrase from its context and purpose in the statute. The Court of Appeals confused disclosure of the Library's policies and practices with disclosure of the contents of materials subject to limited-use agreements. The former are relevant to the library's public functions and thus subject to FOIA; the latter shed no light on government's workings at all. The Court of Appeals' miscarriage of logic will work to impede agreements like this one and inhibit public libraries and other public institutions from collecting certain types of materials going forward. I would have reversed the Court of Appeals and reinstated the Court of Claims' grant of summary disposition to the University.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In April 2010, Dr. John Tanton, an influential anti-immigration activist, donated 25 boxes of his personal papers to the University of Michigan's Bentley Historical Library. In accordance with the gift agreement between Dr. Tanton and the university, Boxes 15 through 25 were designated to be closed to the public, students, and faculty for 25 years. This is a common practice: the Bentley Library, like countless other public libraries, routinely enters into such gift agreements to ensure that important documents are preserved while mitigating any harm to living people from the release of those documents.

In December 2016, the plaintiff, immigration attorney Hassan Ahmad, sought to unseal these materials. Mr. Ahmad filed a FOIA request with the university for the release of "all documents donated by Dr. John Tanton, Donor #7087, located in Boxes 15-25 and any others marked 'closed' at the Bentley Historical Archive (BHA) [sic] at the University of Michigan." The university denied the request, and Mr. Ahmad sued in the Court of Claims. In response, the university moved for summary disposition under MCR 2.116(C)(8), arguing that Mr. Ahmad failed to state a claim for release of public records under the FOIA. The Court of Claims granted summary disposition to the university. But the Court of Appeals reversed, holding that the library's possession of the Tanton Papers was in the performance of its official function of collecting, preserving, and making available important documents for research purposes. As a result, the Court of Appeals concluded that the plaintiff had sufficiently pled that the Tanton Papers were "public records" under the FOIA. The university then appealed here, and we granted leave.

II. LEGAL BACKGROUND

The FOIA tells us not just how the public may gain access to government documents, but also why the government grants that access. The statute states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2)].

Unless a statutory exemption applies, see MCL 15.243, a person who "provid[es] a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record" is entitled "to inspect, copy, or receive copies of the requested public record of the public body," MCL 15.233(1). This access "protects a citizen's right to examine and to participate in the political process." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 231 (1993). The FOIA, then, functions as an accountability guard-

rail. If "[s]unlight is said to be the best of disinfectants [and] electric light the most efficient policeman," Brandeis, *Other People's Money—and How the Bankers Use It* (New York: Frederick A. Stokes Co, 1914), p 92, then the FOIA's pro-disclosure statutory scheme aims to strengthen our democracy by supporting a well-informed citizenry.

Without a statutory exemption, public records must be disclosed. But because government entities do not have to disclose nonpublic records under the FOIA, the determination of what constitutes a "public record" is the first inquiry in FOIA litigation. The Legislature defines a public record as "[a] writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). Here, the dispute centers on whether the Tanton Papers themselves—not the policies and practices through which the library acquired or maintains them—are somehow employed "in the performance of an official function." They are not.

III. ANALYSIS

In construing a statute, it is always our goal to discover and give effect to the Legislature's intent. See, e.g., *Bisio v Village of Clarkston*, 506 Mich 37, 44 (2020); *People v Sharpe*, 502 Mich 313, 326 (2018); *People v Hardy*, 494 Mich 430, 439 (2013). We have tools for this. We start with the statute's text. When the text is clear, there is no need for us to do more work. *People v Lewis*, 503 Mich 162, 165 (2018); *Madugula v Taub*, 496 Mich 685, 696 (2014). When the text is less clear, courts resort to various canons of statutory construction and other tools for help: we consider a term's precise placement within a statutory scheme, see, e.g., *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999); look to similar statutes, construing the language *in pari materia*, see, e.g., *Potter v McLeary*, 484 Mich 397, 419 (2009); review the amendment history of a statute, see, e.g., *Bush v Shabahang*, 484 Mich 156, 167 (2009); or consider the legislative history to find meaning in proposed but ultimately rejected alternate wordings, see, e.g., *In re MCI Telecom Complaint*, 460 Mich 396, 415 (1999).

Sometimes, though, the Legislature makes it easy for us. When the Legislature embeds a public-policy provision or a "purpose clause" in the statute's text, no crystal ball is needed. MCL 15.231(2) offers that clarity. The FOIA intends to provide the public with "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees[.]" *Id*. That overriding purpose—though not dispositive, see *Int'l Union, United Plant Guard Workers of America v Dep't of State Police*, 422 Mich 432, 443 (1985)—provides a prism through which courts should interpret the FOIA's substantive provisions. Indeed, this Court has consistently relied on the FOIA's purpose clause to inform our understanding of the statute and its underlying legislative intent. See *Amberg v City of Dearborn*, 497 Mich 28, 33 n 4 (2014) (quoting the purpose clause to support the finding that the plaintiff was still entitled to fees and costs despite the intervening release of public records because of FOIA's purpose in "ensuring that people have 'complete information regarding

the affairs of government' "); *Herald Co v Bay City*, 463 Mich 111, 121 (2000) (relying on the broadly worded phrase that all persons are entitled to "full and complete information" in the purpose clause to support its conclusion that the Legislature did not impose detailed or technical requirements that requestors describe the specific public records to be disclosed); *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 304 (1997) (finding that the government's heavy redaction of a document disclosed in response to a FOIA request was "entirely at cross purposes with the FOIA," quoting the purpose clause's goal of providing "full and complete information" to those who request it).

To be sure, the FOIA's purpose provision is often invoked to support a broad reading that correctly categorizes the FOIA as a "prodisclosure" statute. See, e.g., *Herald Co*, 452 Mich at 121; *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360 n 13 (2000); *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544 (1991). But that prodisclosure policy preference is in service of providing "full and complete information regarding *the affairs of government* and *the official acts of those who represent them as public officials and public employees* . . . ." MCL 15.231(2) (emphasis added). Nobody claims that Dr. Tanton's papers provide any insight into the affairs or official acts of the Bentley Library or the university; their contents remain a mystery to Mr. Ahmad and the staff at the Bentley Library. It is, to put it mildly, difficult to be influenced by documents that you are contractually barred from reading for more than two decades.[1] Mr. Ahmad's FOIA request for the Tanton Papers is "entirely unrelated to any inquiry regarding the inner working of government, or how well the [University] is fulfilling its statutory functions . . . ." *Mager v Dep't of State Police*, 460 Mich 134, 146 (1999).

It is not a novel or remarkable conclusion that certain documents—despite being owned, possessed, used, or retained by a public entity—are not public records subject to disclosure under the FOIA. "[M]ere possession" of privately created records "is not sufficient to make them public records." *Amberg*, 497 Mich at 31; see also *Hopkins v Duncan Twp*, 294 Mich App 401, 409 (2011) ("Mere possession of a record by a public body does not, however, render it a public record . . . ."); *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228 (2010)

[1] At oral argument, the plaintiff's counsel suggested that because Dr. Tanton's advocacy and writings broadly affected immigration policy, the purpose clause cuts in the plaintiff's favor. Under this construction, the purpose clause's reference to "the affairs of government and the official acts of those who represent them as public officials and public employees" is a reference to government writ large, not the governmental entity that possesses or uses the sought documents. While the purpose clause uses the broad term "the affairs of government," I am not persuaded that a FOIA request seeking documents that purportedly shed light on a distinct governmental entity at a different level of government falls within the statute's ambit. Even a prodisclosure statute has its reasonable limits.

(same). The statute says so: A writing is not a "public record" unless the public body prepares, owns, uses, possesses, or retains it "*in the performance of an official function*." MCL 15.232(i). The statute's purpose clause, this Court's jurisprudence, and not least of all common sense support my view that the university's storage of the Tanton Papers is not in the performance of an official function.

We have addressed "performance of an official function" before. In *Amberg*, a criminal defense attorney filed a FOIA request with the city of Dearborn and the Dearborn Police Department, seeking copies of video surveillance tapes of his client that those government agencies had obtained from local restaurants. *Amberg*, 497 Mich at 30-31. The city and the police refused to provide the tapes, claiming they were not public records. *Id*. at 31. We disagreed because the city was not merely possessing the recordings, it was using them "as relevant evidence in a pending misdemeanor criminal matter." *Id*. at 32.

The *Amberg* Court approvingly cited a 1994 Court of Appeals opinion, *Detroit News, Inc v Detroit*, 204 Mich App 720 (1994). There, a newspaper filed a FOIA request seeking " 'records of all telephone calls to and from the office of Mayor Coleman A. Young and to and from [the Mayor's] Mansion.' " *Id*. at 721. The city took the view that the telephone bills were not public records, arguing that a public body's mere possession of the bills did not make them a public record. The city argued that it did not generate the bills, gather them, or use them and that they were unrelated to "the performance of an official function." *Id*. at 723. The Court of Appeals acknowledged that "mere possession of a record by a public body" does not make it a public record. *Id*. at 724-725. But the telephone bills—while prepared by a private entity—were obtained by public officials and used to pay and document expenses incurred by public employees, which was conduct in the performance of an official function. *Id*. at 725.

Amberg and *Detroit News* show that possession alone is insufficient. In *Amberg*, 497 Mich at 32, the Dearborn Police Department not only possessed the video recordings, it relied on them to support its decision to issue a misdemeanor citation—an official function of government. In *Detroit News*, 204 Mich App at 725, the mayor's office not only possessed the telephone bills of public officials and employees, it used public funds to pay them, and the "[p]ayment and documentation of expenses incurred by public officials and employees is conduct in the performance of an official function."

In contrast, Mr. Ahmad asserts that the Bentley Library's act of possessing the Tanton Papers by itself constitutes the performance of an official function. Yes, the primary function of a library, unlike a mayor's office or a police department, is to store and make available documents for the benefit of the public. But unlike the records in *Amberg* and *Detroit News*, the university does not and will not—could not possibly —use the Tanton Papers to inform its governance, policy-setting, or

decision-making in the performance of an official function. Indeed, no university official knows what the Tanton Papers contain.

The Court of Appeals broadly construed the university's purpose in a manner that would define "public records" to include any document that the Bentley Library possesses and makes available and any document that the Bentley Library intends to one day in the future make available to its students, researchers, and the public. The books that a university library makes available to students—or, in this case, the writings and archival materials a library warehouses for 25 years to make available in the future—are instrumentalities to further the university's function. But there is a significant distinction between such documents and the types of documents on which university officials rely to execute that educational function, like monthly financial statements, audits, minutes from library council meetings, and internal guidance documents about library management and the policies and practices according to which a library decides to enter into an agreement (like the one in this case). This latter set of documents reveals something about how the university functions and carries out its mission. Not so for a biology textbook found in the library stacks or several boxes of unopened Tanton Papers.

How a governmental entity uses the writing matters. In *Howell Ed Ass'n*, 287 Mich App 228, the plaintiff submitted a FOIA request to the Howell Public Schools seeking all e-mails, including personal e-mails, that had been sent to and from three teachers who were also union officials. The Court of Appeals sided with the defendant school district, observing that the FOIA "was not intended to render all personal e-mails public records simply because they are captured by the computer system's storage mechanism as a matter of technological convenience." *Id*. at 247. Though "purely personal documents can become public documents based on how they are utilized by public bodies," that "subsequent use or retention" of the documents by the public body must be " 'in the performance of an official function.' " *Id*. at 243, quoting MCL 15.232(i). The university's "retention" of "purely personal documents" is not in the performance of any official function.

The Court of Appeals' analytical framework is premised on where the Tanton Papers are stored, not how they are used. Had Dr. Tanton donated his papers to the Ford School of Public Policy under the same agreement, the documents would not be "public records" under the Court of Appeals' analysis because the Ford School, unlike the Bentley Library, does not make it its central mission to collect, preserve, and make available archives to its students, researchers, and the general public. The Court of Appeals' analytical framework transforms the contents of the same unopened, unused boxes into public records when moved from the Ford School to the Bentley Library. That arbitrary distinction reveals the untenable foundation of the Court of Appeals' analysis.

IV. CONCLUSION

When the Legislature speaks, courts listen. Or at least we're supposed to. I am concerned that in this case, the Court of Appeals missed

the text that matters most in this dispute. The Legislature explained that it enacted the FOIA to provide Michiganders with "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees . . . ." MCL 15.231(2). A private individual's sealed, donated writings to a library do no such thing. I would reverse.

CAVANAGH and WELCH, JJ., join the statement of MCCORMACK, C.J.

BERNSTEIN, J., did not participate due to a familial relationship.

Oral Argument Ordered on the Application for Leave to Appeal April 9, 2021:

PEOPLE V HAMIN DIXON, No. 162221; reported below: 333 Mich App 566. On order of the Court, the application for leave to appeal the September 10, 2020 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

We further order the Chippewa Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel addressing: (1) whether attempted violation of MCL 800.283a necessarily requires a score of 25 points for Offense Variable (OV) 19; and if not, (2) whether there is sufficient evidence to score OV 19 at 25 points on this record. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 9, 2021:

PEOPLE V JUSTIN BEACH, No. 162654; Court of Appeals No. 355432.

In re OFF, MINOR, No. 162665; Court of Appeals No. 354195.

PARAMOUNT RESIDENTIAL MORTGAGE GROUP, INC V DUKIC, No. 162756; Court of Appeals No. 351468.

Leave to Appeal Granted April 16, 2021:

PEOPLE V MEAD, No. 162230; Court of Appeals No. 350046.

CLEMENT, J. (*dissenting*). Two years ago, this Court held that the evidence at issue in this case was gathered in violation of the Fourth Amendment. However, we did *not* hold that the evidence was subject to the exclusionary rule or that the charges against defendant should be dismissed. Because the Court of Appeals erred by invoking the law-of-the-case doctrine to suppress this evidence, I would reverse the Court of Appeals and remand for it to consider on the merits the People's argument that this evidence should be admitted.

Defendant was originally charged with possession of methamphetamine that was recovered from his backpack during a traffic stop. During the stop, the police asked the driver of the vehicle defendant was riding in if they could search the vehicle, and when the driver consented, the police proceeded to search defendant's backpack—which was inside the automobile—even though they knew that the backpack belonged to defendant rather than the driver. In the lower courts, defendant challenged the admission into evidence of the drugs discovered in the backpack, but his challenge was rejected on the basis of our order in *People v Labelle*, 478 Mich 891 (2007), which held that a search under similar circumstances was valid. When the case reached us, we overruled *Labelle* and held that controlling law was instead the rule from *Illinois v Rodriguez*, 497 US 177 (1990), requiring that consent to search must be given by someone with either actual or apparent authority over the property. Because the driver had no apparent authority over the backpack, we held that "the search of the backpack was not based on valid consent and is per se unreasonable unless another exception to the warrant requirement applies," and we went on to hold that "none of the other exceptions to the warrant requirement has been satisfied." *People v Mead*, 503 Mich 205, 220, reh den 503 Mich 1041 (2019).

Notably, however, we did *not* hold that the evidence against defendant should be suppressed. Instead, we "vacate[d] the trial court order denying the defendant's motion to suppress" and "remand[ed] to the trial court for further proceedings not inconsistent with this opinion." *Id*. This was not random—in this Court, the People had argued that the police had in any event relied in good faith on our *Labelle* order, such that even if *Labelle* were to be overruled, *this* evidence should be admissible. Our prior ruling pointedly left open the question of whether the good-faith exception to the exclusionary rule applied. Indeed, the People filed a motion for rehearing or clarification asking us the precise question of whether they could make a good-faith exception argument on remand, which I thought was denied because our opinion was already sufficiently clear on this point. In the remand proceedings we ordered, the People maintained their position that the evidence should be admitted under the good-faith exception, but the trial court held that the evidence was to be suppressed and dismissed the charges against defendant, and the Court of Appeals affirmed on law-of-the-case grounds.

The Court of Appeals clearly erred by invoking the law-of-the-case doctrine here. It held that we "implicitly ruled that the good faith exception did not apply in this case" because it "is a well-known exception to the warrant requirement," and when this Court held that no exceptions to the warrant requirement applied, we had "concluded that the good faith exception did not apply in this case." *People v Mead*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2020 (Docket No. 350046), p 4. This is incorrect, however. The good-faith exception is not an exception to the warrant requirement; it is an exception to the exclusionary rule. "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Mincey v Arizona*, 437 US 385, 390 (1978), quoting *Katz v United States*, 389 US 347, 357 (1967). However, "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *United States v Leon*, 468 US 897, 906 (1984), quoting *Illinois v Gates*, 462 US 213, 223 (1983). We have similarly referred to *Leon* as having "adopted a good-faith exception to the exclusionary rule." *People v Goldston*, 470 Mich 523, 528 (2004). While *Leon* was about good-faith reliance on a search warrant that was ultimately found not to have been supported by adequate probable cause, the Supreme Court has also held "that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Davis v United States*, 564 US 229, 249-250 (2011).

I have no view on whether this evidence should be admitted. Indeed, given that we overruled *Labelle* in deference to *Rodriguez*, even though *Rodriguez* predated *Labelle* by nearly two decades, I believe we are eliding the very interesting question of what "reasonable reliance" would look like in that context. Are the police free to take the courts at face value, and assume that seemingly contradictory directives in *Labelle* and *Rodriguez* must be reconcilable if they were allowed to coexist by the judicial institutions responsible for articulating the meaning of the law? Or should they, in essence, have anticipated that our *Labelle* decision was incorrect under binding precedent from a higher authority? For that matter, did the People invoke the good-faith exception in an adequately timely manner in these proceedings, or should this evidence be excluded on that basis? I do not have answers to these questions—but I do know that nothing this Court has done up to now has resolved them, and the law-of-the-case doctrine should therefore not apply. I would reverse the decision of the Court of Appeals and remand for it to consider these arguments, and I therefore dissent.

ZAHRA, J., joins the statement of CLEMENT, J.

Leave to Appeal Denied April 16, 2021:

In re BANKS, MINORS, No. 162642; Court of Appeals No. 352940.

Summary Disposition April 21, 2021:

PEOPLE V BENTZ, No. 161796; Court of Appeals No. 346529. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the defendant's argument that the testimony of Dr. N. Debra Simms that the complainant suffered "probable pediatric sexual abuse" requires reversal of the defendant's convictions under the plain-error analysis of *People v Carines*, 460 Mich 750, 763-764 (1999), and this Court's decision in *People v Harbison*, 504 Mich 230 (2019). While the Court of Appeals was correct that this issue was not before it, given that our remand to the trial court was limited to the defendant's ineffective assistance claims, we believe it prudent for the Court of Appeals to consider this issue in the first instance.

Leave to Appeal Denied April 21, 2021:

JEWETT V MESICK CONSOLIDATED SCHOOL DISTRICT, No. 161643; Court of Appeals No. 348407.

SWAIN V MORSE, No. 161716; reported below: 332 Mich App 510.

PEOPLE V JAMES REED, No. 162043; Court of Appeals No. 349566.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN V HYDER, No. 162063; Court of Appeals No. 347918.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN V KHAN, No. 162068; Court of Appeals No. 348004.

PEOPLE V JAMES TATE, No. 162093; Court of Appeals No. 354149.

PEOPLE V MONDY, No. 162131; Court of Appeals No. 347333.

PEOPLE V JOHNNY STANLEY, No. 162249; Court of Appeals No. 353958.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN V KHAN, No. 162261; Court of Appeals No. 347987.

Application for Leave to Appeal Dismissed on Stipulation April 21, 2021:

BELL V CIVIL SERVICE COMMISSION, No. 161907; Court of Appeals No. 347929. On order of the Court, by stipulation of the parties to withdraw the application for leave to appeal, the application is dismissed without costs and without prejudice to the defendants-appellants reinstating the application by filing a notice with this Court within seven days of an order of the Wayne Circuit Court denying approval of the settlement

agreement. The plaintiffs-appellees' answer to the application will be due within 21 days after the filing of such notice.

Summary Disposition April 23, 2021:

POHLMAN V POHLMAN, No. 161262; Court of Appeals No. 344121. On November 25, 2020, the Court ordered oral argument on the application for leave to appeal the January 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In light of the appellee's decision not to contest the appellant's application for leave to appeal, we remand this case to the Oakland Circuit Court and direct that court to conduct an evidentiary hearing within 56 days of the date of this order. The hearing shall focus on, and the circuit court shall make factual findings as to, the appellant's allegation that her signature on the parties' January 31, 2018 settlement agreement was involuntary because: (1) it was obtained under duress, and (2) it was obtained without the mandatory domestic violence screening required by MCL 600.1035(2) and (3) and MCR 3.216(H)(2). We further order the circuit court to submit a transcript of the hearing, together with its findings, to the Clerk of this Court, within 28 days of the conclusion of the hearing. We retain jurisdiction.

PEOPLE V SAMUELS, No. 161845; Court of Appeals No. 353302. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals shall address: (1) whether a trial court is required to hold an evidentiary hearing on the voluntariness of a guilty plea that is induced in part by an offer of leniency to a relative, see *People v James*, 393 Mich 807 (1975); and if so, (2) how a trial court is to determine whether an offer of leniency to a relative "rendered the defendant's plea involuntary in fact." *Id.*

Oral Argument Ordered on the Application for Leave to Appeal April 23, 2021:

SOLE V MICHIGAN ECONOMIC DEVELOPMENT CORP, No. 161598; Court of Appeals No. 350764. The appellant shall file a supplemental brief addressing: (1) whether, at the time of the request and pursuant to MCL 125.2005, the total value of tax credits extended to General Motors was exempt from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*., as "financial or proprietary information" or as "[a] record or portion of a record, material, or other data received, prepared, used, or retained by the fund . . . in connection with an application to or with . . . an award, grant, loan, or investment that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the board or a designee of the board as confidential"; and (2) whether MCL 125.2005(11) requires the full disclosure, without redaction, of the tax credit agreement because "[a]ny document to which the fund is a party evidencing a loan,

insurance, mortgage, lease, venture, or other type of agreement the fund is authorized to enter into shall not be considered financial or proprietary information that may be exempt from disclosure under subsection (9)." The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Mackinac Center for Public Policy, the Government Law Section of the State Bar of Michigan, and the Michigan Chamber of Commerce are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition April 27, 2021:

PEOPLE V WORKMAN, No. 161606; Court of Appeals No. 340893. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part VI of the judgment of the Court of Appeals. The defendant preserved his objection to the admission of unauthenticated business records. Although the Court of Appeals cited the standard for preserved evidentiary error, see *People v Lukity*, 460 Mich 484, 495-496 (1999), it appeared to apply the plain-error standard governing unpreserved claims, see *People v Carines*, 460 Mich 750, 764 (1999). We remand this case to the Court of Appeals for reconsideration of this issue under the *Lukity* standard. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE V PICKENS, No. 162389; Court of Appeals No. 346072. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for correction of the judgment of sentence to reflect one first-degree murder conviction. The judgment of sentence inaccurately reflects two first-degree murder convictions, notwithstanding that only one person was murdered. See *People v Perry*, 497 Mich 1023 (2015). We further order the trial court to ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE V MORAN-DOPICO, No. 162432; Court of Appeals No. 355115. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's application for a delayed appeal as having been filed within the deadline set forth in MCR 7.205(G) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2).

Leave to Appeal Denied April 27, 2021:

PEOPLE v WATKINS, No. 161251; Court of Appeals No. 351521.

PEOPLE v HOLLIS, No. 161382; Court of Appeals No. 352412.

PEOPLE v BALE, No. 161469; Court of Appeals No. 351691.

In re ROBERT CHARLES COOK, No. 161596; Court of Appeals No. 353431.

PEOPLE v ALDOLEMY, No. 161662; Court of Appeals No. 344447.

FRANCE v EDWARDS, No. 161675; Court of Appeals No. 347343.

PEOPLE v SCHWAB, No. 161706; Court of Appeals No. 353282.

THREE RIVERS METAL RECYCLERS, LLC v TOWNSHIP OF FABIUS, No. 161717; Court of Appeals No. 347583.

PEOPLE v PATEL, No. 161722; Court of Appeals No. 353390.

DAVIS v SUNOCO PIPELINE LIMITED PARTNERSHIP, No. 161751; Court of Appeals No. 346729.

PEOPLE v MASTERS, No. 161789; Court of Appeals No. 344970.

PEOPLE v LARRY DAVIS, No. 161823; Court of Appeals No. 352432.

COSTNER v BURNIAC, No. 161867; Court of Appeals No. 345464.

PEOPLE v POSEY, No. 161902; Court of Appeals No. 353143.

In re LOUIS G BASSO, JR REVOCABLE TRUST, No. 161943; Court of Appeals No. 349986.

PEOPLE v MUEHLENBEIN, No. 161972; Court of Appeals No. 353242.

PEOPLE v BANCROFT, No. 161978; Court of Appeals No. 353530.

PEOPLE v DESHANE REED, No. 161991; Court of Appeals No. 353632.

PEOPLE v SUTPHIN, No. 162013; Court of Appeals No. 354259.

TRAVERSE VICTORIAN ASSISTED LIVING, LLC v BANTON, No. 162026; Court of Appeals No. 349377.

PEOPLE v CONLEY, No. 162036; Court of Appeals No. 339093.

SEDLECKY v SUN COMMUNITIES, INC, No. 162060; Court of Appeals No. 348520.

PEOPLE v LESURE, No. 162070; Court of Appeals No. 348873.

PEOPLE v CASTILLO, No. 162072; Court of Appeals No. 338754.

PEOPLE v SHERON WILLIAMS, No. 162081; Court of Appeals No. 352075.

PEOPLE v KEYANEE TURNER, No. 162097; Court of Appeals No. 348859.

COURTRIGHT v INDIANWOOD GOLF & COUNTRY CLUB, INC, No. 162106; Court of Appeals No. 350773.

PEOPLE v ADAM BALCER, No. 162107; Court of Appeals No. 348132.

PEOPLE v PAUL LOJEWSKI, No. 162116; Court of Appeals No. 347111.

PEOPLE v MAHAN, No. 162124; Court of Appeals No. 354263.

PEOPLE v KELLY, No. 162128; Court of Appeals No. 353717.

WELLS FARGO BANK, NA v VICKY RICHTER ENTERPRISES, No. 162143; Court of Appeals No. 348033.

PEOPLE v PRESCOTT, No. 162160; Court of Appeals No. 353743.

PEOPLE v RODNEY HUBBARD, No. 162178; Court of Appeals No. 353769.

PEOPLE v TONY WALKER, No. 162182; Court of Appeals No. 348615.

PEOPLE v HART, No. 162201; Court of Appeals No. 354241.

PEOPLE v STAFFORD, No. 162204; Court of Appeals No. 353502.

PEOPLE v RIEMAN, No. 162207; Court of Appeals No. 341041.

PEOPLE v MYRON WILLIAMS, No. 162215; Court of Appeals No. 353932.

PEOPLE v ERVING, No. 162217; Court of Appeals No. 347728.

PEOPLE v TRIPLETT, No. 162234; Court of Appeals No. 354442.

PEOPLE v ANTHONY BOLES, No. 162241; Court of Appeals No. 354015.

PEOPLE v WARE, No. 162242; Court of Appeals No. 348310.

PEOPLE v BRAD JORDAN, No. 162270; Court of Appeals No. 354628.

PEOPLE v RAY JACKSON, No. 162277; Court of Appeals No. 348678.

PEOPLE v JEFFREY ALLISON, No. 162279; Court of Appeals No. 354191.

PEOPLE v ROWE, No. 162283; Court of Appeals No. 354070.

PEOPLE v MAURICE MORROW, No. 162292; Court of Appeals No. 354160.

PEOPLE v SAMUEL JACKSON, No. 162293; Court of Appeals No. 354484.

PEOPLE v BOZEMAN, No. 162294; Court of Appeals No. 354246.

PEOPLE v DIALLO, No. 162296; Court of Appeals No. 354810.

HEASLEY v TSATUROVA, Nos. 162300 and 162301; Court of Appeals Nos. 349236 and 349239.

PEOPLE v SLUSSER, No. 162305; Court of Appeals No. 354741.

PEOPLE v WHITBY, No. 162308; Court of Appeals No. 353624.

PEOPLE v JACOBSON, No. 162309; Court of Appeals No. 354172.

PEOPLE v HEINEY, No. 162316; Court of Appeals No. 354145.

PEOPLE v VILLALOBOS, No. 162317; Court of Appeals No. 349356.

MCMICHAEL v DEPARTMENT OF CORRECTIONS, No. 162319; Court of Appeals No. 352772.

PEOPLE v MCCLAIN, No. 162322; Court of Appeals No. 348372.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v BEST, No. 162336; Court of Appeals No. 350558.

PEOPLE v TYREE JACKSON, No. 162340; Court of Appeals No. 348466.

PEOPLE v BADGLEY, No. 162342; Court of Appeals No. 354883.

PEOPLE v FORTENBERRY, No. 162357; Court of Appeals No. 353986.

PEOPLE v LESNESKIE, No. 162361; Court of Appeals No. 354383.

NEW COVERT GENERATING COMPANY, LLC v TOWNSHIP OF COVERT, No. 162368; reported below: 334 Mich App 24.

RAPHAEL v BENNETT, No. 162376; Court of Appeals No. 349232.

PEOPLE v VYVERMAN, No. 162385; Court of Appeals No. 354529.

PEOPLE v JOHN BUCHANAN, No. 162387; Court of Appeals No. 354942.

PEOPLE v ROSS, No. 162395; Court of Appeals No. 354793.

MOTON v CITY OF SAGINAW, No. 162399; Court of Appeals No. 351679.

PEOPLE v ALEXANDER, No. 162402; Court of Appeals No. 353782.

PEOPLE v MORIO OLIVER, No. 162403; Court of Appeals No. 349739.

RAHAMAN v AMERIPRISE INSURANCE COMPANY, No. 162408; Court of Appeals No. 349463.

PEOPLE v MIMS, No. 162409; Court of Appeals No. 348311.

TOWNSHIP OF PORT HURON v CHURCHILL, No. 162411; Court of Appeals No. 354211.

PEOPLE v LANGSTON, No. 162417; Court of Appeals No. 354894.

SIKKEMA v PROFESSIONAL BENEFITS SERVICES, INC, No. 162418; Court of Appeals No. 352295.

WELCH, J., did not participate because of her prior involvement as counsel for a party.

RANDALL v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, No. 162420; reported below: 334 Mich App 697.

CARTER v DEPARTMENT OF CORRECTIONS, No. 162423; Court of Appeals No. 354650.

STOMBER v SANILAC COUNTY DRAIN COMMISSIONER, No. 162426; Court of Appeals No. 347360.

RANDALL v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, No. 162427; reported below: 334 Mich App 697.

LAMKIN v HAMBURG TOWNSHIP BOARD OF TRUSTEES, No. 162428; Court of Appeals No. 347064.

LAFAVE v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 162433; Court of Appeals No. 349227.

PEOPLE v GILLIES, No. 162439; Court of Appeals No. 342182.

PEOPLE v FIELD, No. 162447; Court of Appeals No. 354296.

PEOPLE v LOGAN JOHNSON, No. 162452; Court of Appeals No. 355122.

MCGEE v GEORGE, No. 162453; Court of Appeals No. 352362.

PEOPLE v SUZOR, No. 162457; Court of Appeals No. 354521.

PEOPLE v VOELKERT, No. 162458; Court of Appeals No. 355280.

LYONS v LEGACY ENTITY, LLC, No. 162460; Court of Appeals No. 354651.

PEOPLE v DEON JOHNSON, No. 162461; Court of Appeals No. 349447.

PEOPLE v GRAVES, No. 162462; Court of Appeals No. 348295.

PARTYKA v USAA CASUALTY INSURANCE COMPANY, No. 162464; Court of Appeals No. 354779.

PEOPLE v MCDONAGH, No. 162469; Court of Appeals No. 355112.

DAOUD v DEPARTMENT OF TREASURY, No. 162470; Court of Appeals No. 351087.

PEOPLE v HOGSETT, No. 162471; Court of Appeals No. 355198.

PEOPLE v DALY, No. 162475; Court of Appeals No. 347213.

PEOPLE v MONTGOMERY, No. 162478; Court of Appeals No. 349690.

PEOPLE v DEANGELO JONES, No. 162480; Court of Appeals No. 354328.

PEOPLE v FALL, No. 162484; Court of Appeals No. 355045.

PEOPLE v MICHAEL TERPENING, No. 162486; Court of Appeals No. 354591.

PEOPLE v WHITESIDE, No. 162488; Court of Appeals No. 350040.

PEOPLE v CHARLES GARNER, No. 162495; Court of Appeals No. 354368.

PEOPLE v KENNEDY, No. 162502; Court of Appeals No. 323741.

RUZA v KRIGER, No. 162509; Court of Appeals No. 355747.

PEOPLE v PATRICK JOHNSON, No. 162513; Court of Appeals No. 354799.

PEOPLE v DECARLO, No. 162520; Court of Appeals No. 339803.

PEOPLE v LEWIN, No. 162533; Court of Appeals No. 355707.

PEOPLE v TOWNS, No. 162548; Court of Appeals No. 351931.

PEOPLE v SCOTT ALLEN, No. 162553; Court of Appeals No. 355359.

JPMORGAN CHASE BANK, NA v ERWIN PROPERTIES, LLC, No. 162560; Court of Appeals No. 351512.

PEOPLE v GALLOWAY, No. 162602; reported below: 335 Mich App 629.

In re PAROLE OF TINA TALBOT, No. 162694; Court of Appeals No. 355813.

PEOPLE v ROMERO, No. 162775; Court of Appeals No. 350395.

Reconsideration Denied April 27, 2021:

PEOPLE v STEVENS, No. 161711; Court of Appeals No. 352374. Leave to appeal denied at 507 Mich 882.

PEOPLE v PNIEWSKI, No. 161814; Court of Appeals No. 352296. Leave to appeal denied at 507 Mich 882.

CALLAHAN v MAROTA, No. 161890; Court of Appeals No. 349454. Leave to appeal denied at 507 Mich 869.

PEOPLE v ALPHONSO RUSSELL, No. 162080; Court of Appeals No. 344890. Leave to appeal denied at 507 Mich 882.

GRIEVANCE ADMINISTRATOR v KOSELKA, No. 162162. Leave to appeal denied at 507 Mich 870.
CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

SWANSON v BRADLEY, No. 162255; Court of Appeals No. 350004. Leave to appeal denied at 507 Mich 870.

IW v MM, No. 162441; Court of Appeals No. 350711. Order administratively dismissing the application for leave to appeal entered at 507 Mich 873.

Summary Disposition April 28, 2021:

JL LEWIS & ASSOCIATES, INC v MAGNA MIRRORS OF AMERICA, INC, No. 161929; Court of Appeals No. 347057. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Section II.A. of the judgment of the Court of Appeals addressing "Ownership of the '946 Patent," together with all conclusions and holdings derived from this section, and we remand this case to the Court of Appeals, which shall hold this case

in abeyance pending the United States Court of Appeals for the Federal Circuit's decision in *Omni MedSci, Inc v Apple Inc* (Case No. 20-1715). After *Omni MedSci* is decided, the Court of Appeals shall reconsider this case in light of *Omni MedSci*. We do not retain jurisdiction.

PEOPLE V REGINALD DAVIS, No. 162887; Court of Appeals No. 354927. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the April 16, 2021 order staying the effect of the Wayne Circuit Court's order granting pretrial release to the appellant pending the resolution of the appellee's appeal of that order. MCR 6.106(H)(1) states that "[t]he reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion." The April 16, 2021 stay order did not find that the trial court abused its discretion. And in the Court of Appeals April 22, 2021 judgment affirming the trial court, it expressly held that the trial court did not abuse its discretion by granting the appellant's motion for pretrial release. Accordingly, MCR 6.106(H)(1) precludes the Court of Appeals from staying the effect of the trial court's release decision. We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal April 28, 2021:

CHAMPINE V DEPARTMENT OF TRANSPORTATION, No. 161683; Court of Appeals No. 347398. The appellant shall file a supplemental brief addressing whether the appellant's timely filed complaint against the state constituted compliance with the notice requirement of MCL 691.1404. See also MCL 600.6431. The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 28, 2021:

PEOPLE V BORNS, No. 160998; Court of Appeals No. 350898.

HARKINS V SUN PHARMACEUTICAL INDUSTRIES, INC, No. 161103; Court of Appeals No. 344505.

PEOPLE V DERICO THOMPSON, No. 161140; Court of Appeals No. 351013.

LAFAVE V ALLIANCE HEALTHCARE SERVICES, INC, No. 161313; reported below: 331 Mich App 726.

AYLER v LIBERTY MUTUAL INSURANCE COMPANY, No. 161611; Court of Appeals No. 347007.

PEOPLE v NIXON, No. 161828; Court of Appeals No. 348877.

PEOPLE v RICKS, No. 162110; Court of Appeals No. 353810.

HUTCHINSON FLUID MANAGEMENT SYSTEMS, INC v DH HOLDINGS CORPORATION, No. 162291; Court of Appeals No. 351647.

CONFORTI v CORNELL, No. 162334; Court of Appeals No. 348745.

PEOPLE v CLEMENTS, No. 162347; Court of Appeals No. 348517.

Summary Disposition April 30, 2021:

PEOPLE v JOSEPH FOX, No. 162210; Court of Appeals No. 344253. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals addressing the defendant's claim that he was denied a fair trial because the Dickinson Circuit Court denied the defendant's request for a jury instruction on assault and battery.

Defendant was charged with assault with intent to do great bodily harm (AWIGBH), MCL 750.84(1)(a). He filed a pretrial motion requesting that the jury be instructed on the offense of assault and battery, MCL 750.81(1). Defendant took the position that assault and battery is a lesser included offense of AWIGBH and that a rational view of the evidence would support the instruction. See *People v Cornell*, 466 Mich 335, 356-357 (2002). The circuit court heard argument on the motion after the close of proofs. At that time, the prosecutor agreed that assault and battery *is* a necessarily included lesser offense of AWIGBH. The prosecutor nevertheless objected to the motion on the ground that the intent element of AWIGBH (to do great bodily harm less than murder) was not disputed because the defense was a general denial that any assault occurred. See *id*. at 356 ("A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for a conviction of the lesser-included offense.") (quotation marks and citation omitted). The circuit court agreed with the prosecutor and denied defendant's motion for that reason.

Defendant was convicted of AWIGBH. The Court of Appeals affirmed the conviction. Addressing the circuit court's ruling on the requested instruction, the Court of Appeals held that assault and battery *is not* a necessarily included lesser offense of AWIGBH but rather a cognate offense for which a trial court is not required to give jury instructions. *People v Fox*, unpublished per curiam opinion of the Court of Appeals, issued September 10, 2020 (Docket No. 344253), pp 3-4.

The Court of Appeals noted that this Court granted leave to appeal on a similar question in *People v Haynie*, 504 Mich 974 (2019), regarding whether assault and battery is a lesser included offense of assault with intent to murder (AWIM), MCL 750.83. The Court of Appeals explained

that "in *Haynie* our Supreme Court chose not to address whether assault and battery is a necessarily included lesser included offense of AWIM and instead relied on the prosecution's concession in that case that assault and battery is a lesser included offense of AWIM. *The prosecution has made no such concession in this case and, therefore, we will address the issue based on the existing jurisprudence regarding jury instructions for necessarily included lesser offenses*." *Fox*, unpub op at 3 n 2 (citation omitted; emphasis added). Although the Court of Appeals correctly described our resolution of *Haynie*, see *People v Haynie*, 505 Mich 1096 (2020), the Court of Appeals failed to acknowledge the prosecution's concession in the trial court. While it is well established that an appellee can argue in support of an alternative ground for affirmance, in this case the trial prosecution's concession that assault and battery is a lesser included offense of AWIGBH waived its appellate argument to the contrary. See *People v Carter*, 462 Mich 206, 214 (2000).

For that reason, like we did in *Haynie*, we assume without deciding that assault and battery is a lesser included offense of AWIGBH. And on this record, we conclude that a rational view of the evidence supported the requested instruction and that the trial court erred by refusing to give it. See *Cornell*, 466 Mich at 357. To the extent the prosecution relies on evidence of injury to argue otherwise, we repeat our observation in *Haynie* that "[w]hile the severity of injury bears on intent, it is not necessarily dispositive, and the jury should be free to make its own determination after weighing the evidence." *Haynie*, 505 Mich at 1097.

Regarding the defense theory of the case, while defense counsel asserted in opening argument that the prosecution would not be able to prove that an assault occurred, an attorney's arguments are not evidence, and the general denial does not lead to the conclusion that the intent element of AWIGBH was not disputed. A criminal defendant is generally permitted to present inconsistent defenses, and so long as there is sufficient evidence to support a proposed jury instruction, the instruction should be given. See *People v Lemons*, 454 Mich 234, 245-248 (1997). Similarly, when a rational view of the evidence would support a conviction on assault and battery for a defendant charged with AWIGBH, it is error to prevent the defendant from arguing that no assault occurred, but that if one did, the defendant did not act with the intent to cause great bodily harm less than murder. We further conclude that this error was not harmless. *Haynie*, 505 Mich at 1097 (holding that the failure to give a requested instruction on a lesser included offense was not harmless because "the evidence clearly supported an instruction on assault and battery").

Accordingly, we remand this case to the Dickinson Circuit Court for a new trial. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I dissent from this Court's order peremptorily reversing the September 10, 2020 judgment of the Court of Appeals. I agree with this Court's conclusion that the prosecution waived its argument that assault and battery, MCL 750.81(1), is not a lesser included offense of assault with intent to do great bodily harm, MCL

750.84(1)(a), by advancing a contrary position in the trial court. I disagree, however, with the Court's decision to grant defendant a new trial without plenary review of the record and the remaining issues regarding whether the trial court abused its discretion in denying defendant's requested jury instruction for the charge of assault and battery. Instead, I would remand this case to the Court of Appeals to consider (1) whether a rational view of the evidence supported defendant's requested instruction, see *People v Cornell*, 466 Mich 335, 357 (2002) ("[A] requested [jury] instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense *and a rational view of the evidence would support it*.") (emphasis added), and (2) if so, whether any error that may have occurred in failing to give that instruction was harmless, see *People v Haynie*, 505 Mich 1096, 1103 (ZAHRA, J., concurring in part and dissenting in part) ("Under this Court's guidance in *People v Cornell*, if an instruction on a lesser included offense should have been given to the jury at trial, but was not, reversal is not warranted unless the instructional error was not harmless."). Because this Court disposes of this case without plenary review of those issues, I dissent.

Leave to Appeal Granted April 30, 2021:

PEOPLE V STOVALL, No. 162425; reported below: 334 Mich App 553. The parties shall include among the issues to be briefed: (1) whether the defendant's parolable life sentences for second-degree murder were the result of an illusory plea bargain; (2) whether the defendant's sentences violate the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution, and/or the prohibition against "cruel or unusual punishment" found in Const 1963, art 1, § 16, where he was under the age of 18 at the time of the offenses; (3) whether the Parole Board's "life means life" policy renders the defendant's sentences unconstitutional under *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016); (4) whether, pursuant to *Miller* and *Montgomery*, the trial court was required to take the defendant's youth into consideration when accepting his plea and ruling on his motion for relief from judgment; and (5) whether the Parole Board is similarly required to take his youth into consideration when evaluating him for release on parole. The appellant's brief and appendix shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. The time for filing the remaining briefs shall be as set forth in MCR 7.312(E). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys of Michigan, Juvenile Law Center, the Juvenile Sentencing Project, and the American Civil Liberties Union Fund of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal April 30, 2021:

PEOPLE V MOSS, No. 162208; reported below: 333 Mich App 515. The appellant shall file a supplemental brief addressing whether the Court of Appeals erred in concluding on remand that the defendant and the complainant are effectively related by blood for purposes of MCL 750.520d(1)(d), such that there was an adequate factual basis for the defendant's no-contest plea.

The appellant's brief shall be filed by August 30, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 30, 2021:

PEOPLE V STOKES, Nos. 162125 and 162126; reported below: 333 Mich App 304.

MCCORMACK, C.J. (*concurring*). I concur in the order denying leave to appeal. It is not clear to me that the defendant is correct to argue that this case implicates the prohibition on using acquitted conduct to increase a defendant's sentence from our decision in *People v Beck*, 504 Mich 605 (2019). Nowhere in its summary of the defendant's presentence investigation reports (PSIRs) did the trial court refer to acquitted conduct. After reviewing the defendant's juvenile and criminal history, the court stated, "I do not see anything—I've not seen anything in this new report, from what I've heard today that would cause me to change my sentences." Thus, the court made clear that nothing in the new PSIRs persuaded it to deviate from its original sentences, suggesting that it did not rely on the acquitted conduct. I agree with the Court of Appeals that finding a *Beck* violation here would rest on speculation, not evidence in the record.

Another reason to doubt *Beck*'s applicability is that the trial court didn't *increase* the defendant's sentences at all; in fact, despite the references in the PSIRs to the acquitted conduct, the court declined to increase the sentences and instead imposed the same sentences it had originally. Thus, the trial court did not punish the defendant more

severely by finding by a preponderance of the evidence that he committed the acquitted offenses and sentencing him accordingly.[1]

And the defendant did not preserve these arguments in the trial court, so our review is limited to plain error. Since *Beck* does not plainly apply, the defendant cannot prevail. For all these reasons, I do not believe this case presents a good vehicle for considering the parameters of the *Beck* rule. But I would clarify the *Beck* rule in an appropriate case. I am not convinced that the Court of Appeals' observations about the limits of the *Beck* rule are correct: The panel cited *People v Roberts (On Remand)*, 331 Mich App 680, 691 (2020), rev'd *People v Roberts*, 506 Mich 938; 949 NW2d 455 (2020),[2] for the proposition that sentencing courts do not violate *Beck* by "considering the entire res gestae of an acquitted offense . . . ." *People v Stokes*, 333 Mich App 304, 310 (2020). And it held that "a sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant." *Id*. at 311.

I am not confident that either statement is correct or consistent with our caselaw. The line between a trial court "considering" aspects of an acquitted offense and relying on acquitted conduct is a fine one, and may be an entirely artificial or nonexistent one. And the panel's holding that a PSIR may contain acquitted conduct as long as the sentencing court doesn't rely on it is in tension with our holding that "[a] judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234 (1997).

Cases such as this one and *Roberts* make plain that the Court of Appeals is struggling with the boundaries of our holding in *Beck*. I look

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[1] In *Beck*, despite the jury's acquittal on a murder charge, the court expressly stated on the record that it had concluded by a preponderance of the evidence that the defendant committed the murder. The court used that finding as a basis to depart upward from the applicable guidelines range for being a felon in possession of a firearm, the convicted offense (22 to 76 months), and impose a 240- to 400-month sentence.

[2] In *Roberts*, the jury acquitted the defendant of assault with intent to murder, meaning the jury had not determined beyond a reasonable doubt that the defendant had "passed a gun to another individual, who it is undisputed then fired the gun into a crowd on a city street." *Roberts*, 506 Mich at 938; 949 NW2d at 455. We reversed the Court of Appeals judgment, holding that the trial court improperly relied on acquitted conduct when it "assigned 25 points to Offense Variable 9, MCL 777.39(1)(b), for endangering the crowd, and when it departed upward from the recommended guidelines range in order to deter gun violence on the city's streets . . . ." *Id.*

forward to clarifying the law in this area when the right case comes along. This isn't it. For these reasons, I concur with the Court's order denying leave to appeal.

WELCH, J., joins the statement of MCCORMACK, C.J.

Leave to Appeal Before Decision by the Court of Appeals Denied May 12, 2021:

ANDARY v USAA CASUALTY INSURANCE COMPANY, No. 162878; Court of Appeals No. 356487.

Leave to Appeal Denied May 14, 2021:

MARQUARDT v UMASHANKAR, No. 160772; Court of Appeals No. 343248. On May 5, 2021, the Court heard oral argument on the application for leave to appeal the November 26, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v BIESZKA, No. 161838; Court of Appeals No. 349349. On May 5, 2021, the Court heard oral argument on the application for leave to appeal the June 18, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Summary Disposition May 19, 2021:

PEOPLE v KVAM, No. 162166; Court of Appeals No. 353879. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decisions in *People v Nye* (Court of Appeals Docket No. 351480) and *People v Terry* (Court of Appeals Docket No. 353663). After *Nye* and *Terry* are decided, the Court of Appeals shall reconsider this case.

Oral Argument Ordered on the Application for Leave to Appeal May 19, 2021:

GRIFFIN v TRUMBALL INSURANCE COMPANY, No. 162419; reported below: 334 Mich App 1. The appellant shall file a supplemental brief addressing: (1) whether a lower-priority insurer, who was provided timely notice under MCL 500.3145(1), can be held liable for personal protection insurance benefits under the no-fault act if the higher-priority insurer was not identified until after the one-year statutory notice period under MCL 500.3145(1) expired; if so, (2) whether the

insured must prove that he or she exercised reasonable, due, or some other degree of, diligence in searching for the higher-priority insurer; and, if so, (3) whether the appellant exercised the requisite degree of diligence in searching for the higher-priority insurer. The appellant's brief shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 19, 2021:

PEOPLE V CROYLE, No. 160879; Court of Appeals No. 344450.

SABAN V HENRY FORD HEALTH SYSTEM, No. 161681; Court of Appeals No. 347844.

SAMPSON V SHOREPOINTE NURSING CENTER, No. 161885; Court of Appeals No. 346927.

WHITE V DIVA NAILS, LLC, No. 161964; Court of Appeals No. 347847.

WHITE V DIVA NAILS, LLC, No. 162008; Court of Appeals No. 347847.

LAPEER PLATING & PLASTICS, INC V GLOBAL PARTS, INC, No. 162307; Court of Appeals No. 354215.

Oral Argument Ordered on the Petition for Relief May 20, 2021:

In re INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR STATE LEGISLATIVE AND CONGRESSIONAL DISTRICT'S DUTY TO REDRAW DISTRICTS BY NOVEMBER 1, 2021, No. 162891. On order of the Court, the motion for immediate consideration is granted. The petition for relief is considered. We direct the Clerk to schedule oral argument on the petition for June 21, 2021, at 9:30 a.m. MCR 7.303(B)(6).

The petitioners shall file a supplemental brief addressing: (1) whether the petition properly invokes this Court's original jurisdiction under Const 1963, art 6, § 4 or Const 1963, art 4, § 6(19); (2) whether this Court has the authority to deem a constitutional timing requirement as directory instead of mandatory; and, if so; (3) whether the unprecedented delay in the transmission of federal decennial census data justifies a deviation from the constitutional timeline. See, e.g., *Ferency v Secretary of State*, 409 Mich 569, 602 (1980); *Attorney General ex rel Miller v Miller*, 266 Mich 127, 133 (1934). The petitioners' brief shall be filed by June 2, 2021, with no extensions except upon a showing of good cause.

We respectfully request the Attorney General to submit separate briefs arguing both sides of the above questions. The briefs shall be filed

by June 2, 2021, with no extensions except upon a showing of good cause. Responses to the briefs of the petitioners and the Attorney General shall be filed no later than June 9, 2021.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition May 21, 2021:

In re AS-K SIMONETTA, MINOR, No. 162710; Court of Appeals No. 354081. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that the trial court made the requisite judicial determination that the respondent subjected AS to the circumstances provided for in MCL 722.638(1) and (2), and satisfied the requirements of MCR 3.977(E) necessary to terminate the respondent's parental rights without requiring reasonable efforts at reunification. We reverse the St. Clair Circuit Court's March 10, 2020 order terminating the respondent's parental rights and we remand this case to that court. Reasonable efforts to reunify the child and family must be made in all cases except those involving the circumstances delineated in MCL 712A.19a(2). *In re Mason*, 486 Mich 142, 152 (2010). On remand, the circuit court shall either order that the petitioner provide reasonable services to the respondent, or articulate a factual finding based on clear and convincing evidence that aggravated circumstances exist such that services are not required. The proceedings on remand are limited to these issues. The trial court shall decide the issues on remand within 56 days of this order. We do not retain jurisdiction.

ZAHRA and VIVIANO, JJ., would deny leave to appeal.

Oral Argument Ordered on the Application for Leave to Appeal May 21, 2021:

FILIZETTI V GWINN AREA COMMUNITY SCHOOLS, No. 162092; Court of Appeals No. 344878. The appellants shall file a supplemental brief addressing whether appellee Gwinn Area Community Schools was entitled to summary disposition on appellants' claim under the public building exception to the Governmental Tort Liability Act, MCL 691.1401 *et seq*. The appellants' brief shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Appellee Gwinn Area Community Schools shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 21, 2021:

TRECHA v REMILLARD, No. 161232; Court of Appeals No. 347695. On April 7, 2021, the Court heard oral argument on the application for leave to appeal the March 5, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal. Plaintiff was injured when a coparticipant in a high school tennis practice, in an outburst of anger, blindly launched a ball with his racket. The ball struck plaintiff in the eye, causing severe damage. The circuit court granted summary disposition to defendant under MCR 2.116(C)(10), and the Court of Appeals affirmed. But the lower courts erred by relying on a factual conclusion unsupported by the record and by concluding that defendant's blowup was reasonably foreseeable.

Plaintiff Bradley Trecha and defendant Brenden Remillard were teammates on the Fenton High School tennis team in September 2016. Near the end of a practice, plaintiff was picking up balls while defendant was finishing a match. Defendant hit a ball into the net; then, out of frustration, he took a ball from his pocket and hit it behind him toward the fence. He did not look before hitting the ball and struck it directly at plaintiff, who was 10 to 15 feet away. Defendant described the incident as follows:

> I would say the match was being played, the point was being played out. I hit the ball into the net to end the point, losing the point, and then had another ball in my pocket. Had the ball out in a quick motion, turned around and hit it toward the fence, I guess. And then he was there hunched over, kind of squatting down as he was picking up balls maybe, and then when the ball was struck he had turned at the same time, I assume, and that's when he was hit.

Plaintiff was struck in the eye and, as mentioned above, suffered severe injury. Plaintiff sued, arguing that defendant was either negligent or grossly negligent. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the applicable standard of care was recklessness because the parties were coparticipants in a recreational activity and defendant's conduct was not reckless.

The circuit court granted defendant's motion, holding that the injury was reasonably foreseeable under *Bertin v Mann*, 502 Mich 603 (2018). The court began its analysis quoting *Chryczyk v Juhas*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2011 (Docket No. 294348), p 4, for the proposition that "[g]etting hit by an errant ball was a risk inherent to tennis practice[.]" The court discussed "regular departures from the rules or other practices" and said the team's coach "regularly reminded the team members not to hit balls into the fence." From that assertion, the court reasoned, "[t]he Court has to question if team members didn't routinely hit balls, striking balls into the fence

without being closely monitored, why would there be a need for the coach to be regularly reminding them to refrain from doing that? This all goes to the foreseeability of this occurring." The court then concluded that defendant's conduct was not reckless and that summary disposition was appropriate.

The Court of Appeals affirmed, observing:

> The very nature of tennis is that tennis balls, for better or worse, will leave the actual bounds of the court, such that a person standing near, but not on, the court risks being hit from a ball. This risk comes not only from tennis balls being hit to score points, but also tennis balls hit as practice or, in this case, out of frustration—especially when the sport is being undertaken competitively by high-school students. [*Trecha v Remillard*, unpublished per curiam opinion of the Court of Appeals, issued March 5, 2020 (Docket No. 347695), p 3.]

The Court of Appeals also relied on the conclusion that tantrums of this sort were a regular occurrence at the team's practices: "The team's coach testified that he had to repeatedly remind players not to hit balls into the fence, indicating, as the trial court found, that the practice was fairly common." *Id*. The Court of Appeals concluded that, as a general matter, "being hit with a tennis ball while in the bounded tennis area near the fence" was foreseeable. *Id*.

In *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 87, 89 (1999), we adopted the "reckless misconduct" standard of care for coparticipants in recreational activities with regard to "certain risks inherent in that activity." We reasoned that participants in recreational activities do not expect to be sued for mere carelessness, that the recklessness standard "lends itself to common-sense application," and that the recklessness standard "encourages vigorous participation in recreational activities, while still providing protection from egregious conduct." *Id*. at 89.

In *Bertin*, we explained that *Ritchie-Gamester*'s holding was not limited to risks necessarily entailed in a given activity, but rather extended to situations in which "a reasonable person under the circumstances would have foreseen the particular risk that led to injury." *Bertin*, 502 Mich at 619. Of particular importance, *Bertin* discussed how to define the applicable risk, stating that "[t]he risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the 'mechanism' it resulted from." *Id*. at 620-621. We offered a nonexhaustive list of factors to consider in that inquiry: "the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport," "[t]he general rules of the activity," "whether the participants engaged in any regular departures from the rules or other practices not accounted for by the rules," and "any regulations prescribed by the venue at which the activity is taking place." *Id*. at 621-622. "The foreseeability of the risk is a question of fact" that is generally resolved by the jury, not the court. *Id*. at 619; see also

id. at n 49. When reviewing a motion under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester*, 461 Mich at 76.

As an initial matter, the lower courts erred by finding that the members of the Fenton High School boys' tennis team regularly exhibited this type of behavior. The circuit court stated that the coach testified he "regularly reminded the team members not to hit balls into the fence," and the Court of Appeals repeated the assertion. This assertion is completely without support in the record. At one point the coach was asked, "Is it important that once a practice has ended that balls not be hit in the direction of others whether looking or not?" He answered, "Oh, yeah." The only other comment the coach made in regard to this sort of behavior was the general statement "it's kind of—I guess, I mean you'd call it, some of it, common sense. I don't allow—I don't allow horseplay. You know, I don't let some kind of bedlam, you know, go on during practice, you know." Defense counsel was asked at oral argument to identify where the record supported this assertion, and counsel candidly confirmed that the record did not. We review a trial court's factual findings for clear error. *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249 (2005). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Mason*, 486 Mich 142, 152 (2010) (quotation marks, brackets, and citation omitted). It's obvious a mistake has been made here, as there is *no evidence* of the factual finding both lower courts relied on.

Even viewing the circuit court's reasoning in the most favorable light possible, it did not mention any evidence of players behaving as defendant did here. The circuit court opined that because there was a rule against this dangerous behavior, the behavior must be commonplace. That conclusion simply does not follow from the premise. A past dangerous behavior might require a prohibition, and an effective prohibition might end the behavior. Or a behavior that is dangerous enough might prompt a preemptive prohibition. I cannot agree that evidence that a behavior is prohibited implies that the behavior is ongoing. But again, in this case, there is not even evidence of such a prohibition.

Without that erroneous factual finding, the lower courts have little analysis remaining to support their position. There is the notion that "an errant ball [is] a risk inherent to tennis practice." *Chryczyk*, unpub op at 4. It is true that balls leave the field of play in tennis with some regularity. Indeed, getting the ball to leave the court in a particular manner is the object of the game. But it matters how the ball leaves the field of play. A helpful analogy is to consider baseball, where balls leave the field with some regularity. Anyone attending a baseball game should be aware that home runs and foul balls leave the field of play. Spectators, players, and others at a game might find themselves watching more carefully as a pitch is delivered, and preparing for the risk of the ball leaving the bat. But suppose a first baseman, angry that

a baserunner has been ruled safe, hurls the ball blindly and strikes a spectator or groundsperson from a distance of 10 to 15 feet. This is a very different risk, and not one that is reasonably foreseeable.

With that in mind, in keeping with *Bertin*, I would not define the relevant risk here as simply an "errant ball." Viewing the relevant risk as simply an "errant ball" does not capture the relevant "mechanism" *Bertin* discussed. *Bertin*, 502 Mich at 621. Rather, paying attention to "the factual circumstances of the case," *id*., the relevant "mechanism" is the risk of a coparticipant lashing out and launching balls randomly. Like the hypothetical spectator at a baseball game, plaintiff would have had the familiar cues of the rhythm of a tennis game to prepare for the risk of errant balls from a game of tennis. But there would have been no way to predict defendant's regrettable display here.

Considering *Bertin*'s factors in this context, there does not seem to be much relevance to the characteristics of the participants. With regard to the "general rules of the activity," *id*., postmatch behavior of this kind is clearly something that would not be viewed favorably at any level of tennis. If the applicable rules include sportsmanship principles enforced through the parties' team or throughout high school sports generally in Michigan, then this conduct is clearly further out of bounds. *Bertin*'s third factor is "regular departures from the rules or other practices not accounted for by the rules," *id*., and as discussed earlier, there is no record evidence that this behavior was a regular departure of which plaintiff should have been on notice. Lastly, with regard to "regulations prescribed by the venue at which the activity is taking place," *id*. at 621-622, while there was no evidence of a particular rule about hitting balls at the fence or evidence that players broke such a rule, the coach did testify, "I don't allow—I don't allow horseplay. You know, I don't let some kind of bedlam, you know, go on during practice, you know." The coach made the team run after practice as punishment for the incident. Thus, viewing the evidence in the light most favorable to plaintiff, defendant's conduct was prohibited during Fenton High School tennis practices. In sum, the *Bertin* factors break in favor of plaintiff.

Ritchie-Gamester emphasized that this standard should be applied in a "common-sense" manner. But I do not believe that people in Michigan foresee being subjected to the risk of a player angrily and blindly striking a ball while playing tennis in their local park. I do not think that keeping this case from a jury either "encourages vigorous participation in recreational activities" or provides "protection from egregious conduct." *Ritchie-Gamester*, 461 Mich at 89. Consequently, I would reverse and remand to the circuit court.

BERNSTEIN and WELCH, JJ., join the statement of CAVANAGH, J.

VILLAGE OF NEW HAVEN v NEW HAVEN TOWN CENTER, LLC, No. 162957; Court of Appeals No. 356169.

Summary Disposition May 26, 2021:

TRICKEY v LEWIS, No. 162504; Court of Appeals No. 354530. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied May 26, 2021:

PEOPLE v PERSKI, No. 161731; Court of Appeals No. 348561.

BERNARDI v ROCK, No. 161975; Court of Appeals No. 347134.

ADAMS v TRAVERSE CITY LIGHT AND POWER, No. 162209; Court of Appeals No. 341472.

PEOPLE v OLNEY, No. 162225; reported below: 333 Mich App 575.

PEOPLE v KING, No. 162285; Court of Appeals No. 354122.

ADVISACARE HEALTHCARE SOLUTIONS v AUTO-OWNERS INSURANCE COMPANY, Nos. 162287 and 162288; Court of Appeals Nos. 349756 and 350221.

PEOPLE v BROOME, No. 162356; Court of Appeals No. 348261.

SIMPSON v AMERIPRISE INSURANCE COMPANY, Nos. 162406 and 162407; Court of Appeals Nos. 348279 and 348977.

SPIKES v SMITH, No. 162437; Court of Appeals No. 346524.

PEOPLE v GARRISON, No. 162582; Court of Appeals No. 334063.

NAILS v ASMAR, No. 162690; Court of Appeals No. 355933. On order of the Court, the application for leave to appeal the February 4, 2021 order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. To appeal by leave, the plaintiff-appellant must file an application for leave to appeal in the Court of Appeals within six months of the date of the December 6, 2020 circuit court order pursuant to MCR 7.205(G)(1) and (G)(3).

PEOPLE v JACK, No. 162767; reported below: 336 Mich App 316.
ZAHRA, J., would direct oral argument on the application.

Request to Answer Certified Question Declined May 26, 2021:

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, No. 162121. On order of the Court, the question certified by the United States District Court for the Eastern District of Michigan is considered, and the Court respectfully declines the request to answer the certified question. The motions for oral argument are denied.
BERNSTEIN, J., would answer the certified question.

Summary Disposition May 28, 2021:

PEOPLE V SHANE HAWKINS, No. 161243; Court of Appeals No. 339020. On May 5, 2021, the Court heard oral argument on the application for leave to appeal the March 3, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals correctly held that the police detective's testimony in this case was improper. However, the Court of Appeals erred by holding that there was not a reasonable probability that the outcome of the trial would have been different had trial counsel objected to its admission.

In this case, the prosecution called a police detective who testified that he had years of experience investigating child sexual assault cases, that he was trained in forensic interviewing of child sexual assault complainants, and that he had conducted hundreds of such interviews over the course of his career. The detective then testified that the complainant's demeanor during her interview was consistent with that of a typical child sexual assault victim and that, given his specialized training, the complainant's testimony "seemed authentic to [him]." In addition, the detective testified that he tried but was unable to find inconsistencies in the complainant's allegations, stating, "[I]f I can't prove that [the abuse] didn't happen, then there's a good possibility that it did," seemingly shifting the burden of proof to defendant to prove his innocence. The detective also testified that, on the basis of his investigation, he found defendant's suggestion that the complainant made up the abuse allegations to get her father's attention to be "[n]ot true." As the Court of Appeals in this case recognized, this testimony by a police officer witness improperly vouched for the complainant's credibility and improperly commented on the defendant's guilt. See *People v Peterson*, 450 Mich 349, 369, 374 (1995) (affirming that "an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty" and that "an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child"), amended 450 Mich 1212 (1995); *People v Musser*, 494 Mich 337, 349 (2013) (affirming that "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial"); *People v Douglas*, 496 Mich 557, 583 (2014) (finding to be improper testimony by a forensic interviewer that she found that the complainant's " 'allegations had been substantiated' " and that there was no indication that the complainant " 'was coached or being untruthful' "). We can conceive of no strategic reason for defense counsel to fail to object to this improper testimony. See *Douglas*, 496 Mich at 586-587.

We further conclude that, but for this deficiency in defense counsel's performance, there is a reasonable probability that the outcome of the trial would have been different. See *Strickland v Washington*, 466 US 668, 693-694 (1984) (stating that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case" and that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of

counsel cannot be shown by a preponderance of the evidence to have determined the outcome"); *People v Trakhtenberg*, 493 Mich 38, 42-43 (2012). With no third-party witnesses or physical evidence, this case came down to a credibility contest between defendant and the complainant. The prosecution's case, therefore, hinged heavily on whether the jury believed the complainant's version of events. On the facts of this case, and given the nature of the detective's testimony, there is a reasonable probability that the wrongful admission of the testimony affected the outcome of the trial. See *People v Anderson (After Remand)*, 446 Mich 392, 407 n 37 (1994) ("While credibility contests are not uncommon in criminal sexual conduct cases, the wrongful admission of corroborating testimony on either side could tip the scales and result in harmful error.") (quotation marks and citations omitted); *Musser*, 494 Mich at 358 (noting that statements "made by an investigating officer may be given undue weight by the jury where the determination of a defendant's guilt or innocence hinges on who the jury determines is more credible—the complainant or the defendant") (quotation marks and citation omitted); *Douglas*, 496 Mich at 581-583 (finding prejudice where there were no third-party witnesses or any physical evidence of the alleged abuse and the forensic interviewer's testimony added legitimacy to the complainant's testimony); *People v Tomasik*, 498 Mich 953 (2015). Accordingly, we vacate the defendant's convictions and remand this case to the Monroe Circuit Court for further proceedings not inconsistent with this order.

ZAHRA, J. (*dissenting*). I respectfully dissent from this Court's order reversing the judgment of the Court of Appeals. Unlike the cases cited in this Court's order, the improper testimony here was limited to a single witness, a police detective, whose statements bearing on the parties' credibility were sporadic and relatively minor in the context of the trial as a whole, which lasted three days. The parties did not draw attention to the improper testimony at any other point during the trial, and the prosecution framed its closing arguments as a credibility contest between the victim and defendant and his family without mentioning the detective's improper testimony. For these reasons, I conclude defendant has failed to show that, but for his trial counsel's failure to object to the improper testimony, a different result would have been reasonably probable. See *People v Armstrong*, 490 Mich 281, 290 (2011). Accordingly, I would deny leave.

VIVIANO, J., joins the statement of ZAHRA, J.

TRUGREEN LIMITED PARTNERSHIP V DEPARTMENT OF TREASURY, No. 161652; reported below: 332 Mich App 73. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the April 10, 2020 judgment of the Court of Appeals and we remand this case to that court for reconsideration in light of *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333 (2020). We do not retain jurisdiction.

In re BS, MINOR, No. 162564; Court of Appeals No. 354103. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court

of Appeals for reconsideration in light of *In re MGR*, 504 Mich 852 (2019), and *In re LMB*, 504 Mich 869 (2019). We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). I would deny leave to appeal and am perplexed—as I suspect the Court of Appeals panel on remand will be—by the Court's order today remanding this case for reconsideration in light of *In re MGR*, 504 Mich 852 (2019), and *In re LMB*, 504 Mich 869 (2019). The Court's orders in both of those cases were expressly limited to the particular facts of those cases.[1] The Court's order today implies something very different, i.e., that general principles of law can be derived from the orders that can (and, indeed, should) be applied to other cases.

I will let the Court of Appeals attempt to glean the meaning of those cases all on its own.[2] But even if some precedential value could be gleaned from *In re MGR* or *In re LMB* and applied to the present case,

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[1] See *In re MGR*, 504 Mich at 854 n 1 (explaining that the majority's decision was "based in the very specific facts of this case alone"); *In re LMB*, 504 Mich at 869 n 1 (similarly denying that the Court's order created a per se rule).

[2] As the interplay between the majority's order and my separate statement in *In re MGR* makes clear, the majority has expressly disclaimed the only general principle that I could decipher from the orders. Compare *In re MGR*, 504 Mich at 864 (VIVIANO, J., dissenting) ("I believe [the majority's apparent requirement that the putative father file a motion to stay the adoption proceeding] elevates form over substance since, as the majority's order acknowledges, good cause was at issue each time a stay of the paternity action was sought. Since the very same issue is implicated whether one of the parties is seeking to stay the paternity action or another party is seeking to stay the adoption proceeding, I would not require the putative father to file a separate motion to stay the adoption proceeding that specifically alleges good cause in order to preserve the issue. . . . Until the Legislature provides more guidance, I believe the *In re MKK*[, 286 Mich App 546 (2009),] framework should be used by the trial court to determine whether to allow a paternity action to reach its natural conclusion before a contemporaneously filed adoption proceeding, regardless of which action was filed first, and regardless of which party filed a motion to stay or whether, like here, the stay is entered *sua sponte* by the trial court."), and *id*. at 864 n 4 ("The majority, by contrast, appears to create a per se rule that, unless a putative father files a motion to stay the adoption proceeding, a trial court must always stay the paternity action in favor of a competing adoption proceeding."), with *id*. at 854 n 1 (order of the Court) ("[W]e respectfully disagree that this order creates any per se rule; our decision today is based in the very specific facts of this case alone.").

it is hard to understand how the Court of Appeals could grant relief under the current procedural posture of the paternity action. Specifically, there does not appear to be a mechanism for the Court of Appeals to grant petitioner any relief as to the denial of her motion for a stay in the paternity case. In *In re MGR*, the mother of the child at issue appealed the trial court's denial of her motion for a stay in the paternity case to this Court. This Court vacated the denial of her motion for a stay in an opinion released at the same time as its opinion in the adoption case. See *Brown v Ross*, 504 Mich 871 (2019).[3] In the present case, petitioner sought leave to appeal the denial of her motion for a stay in the paternity case as well as the order of filiation, but the Court of Appeals denied leave to appeal for lack of merit in the grounds presented. See *Sterk v Speyer*, unpublished order of the Court of Appeals, entered August 20, 2020 (Docket No. 354518). Petitioner never sought leave to appeal that decision in this Court. Thus, unlike in *In re MGR*, there is currently no pending appeal in the paternity action through which either this Court or the Court of Appeals could vacate or reverse any of the decisions by the trial court in that case.

Because I would take the Court at its word that *In re MGR* and *In re LMB* are limited to their facts, I respectfully dissent and would instead deny leave to appeal. On remand, in addition to determining what applicability those cases might have here, the Court of Appeals will need to make a threshold determination of whether it can grant any relief at all to petitioner given the procedural posture of the paternity action.

Oral Argument Ordered on the Application for Leave to Appeal May 28, 2021:

PEOPLE V CHRISTIAN, PEOPLE V EDWARDS, and PEOPLE V HINTON, Nos. 162354, 162355, and 162374; Court of Appeals Nos. 348807, 348753, and 349585. The appellants shall each file a supplemental brief addressing whether the lower courts erred by holding that the suppressed October 16, 2007 interview transcript was not material to their guilt such that they were not entitled to relief under *Brady v Maryland*, 373 US 83, 87 (1963), and *People v Chenault*, 495 Mich 142, 149-150, 155 (2014). Additionally, appellant Hinton shall address his claim of ineffective assistance of trial counsel. The appellants' briefs shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. In the briefs, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with each of the appellant's briefs. A reply, if any, must be filed by each appellant within

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[3] There was no need for us to take such action in *In re LMB* because in that case the Court of Appeals had already reversed the trial court's denial of a stay in the paternity case. See *Sarna v Healy*, unpublished order of the Court of Appeals, entered December 18, 2017 (Docket No. 341211).

14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 50 minutes: 30 minutes for the appellants, to be divided at their discretion, and 20 minutes for the appellee. MCR 7.314(B)(2).

Leave to Appeal Denied May 28, 2021:

PEOPLE V JERRY ANDERSON, No. 162769; Court of Appeals No. 355189.

PEOPLE V LAHDIR, No. 163002; Court of Appeals No. 356403.

Summary Disposition June 1, 2021:

PEOPLE V ANTHONY HUBBARD, No. 161866; Court of Appeals No. 353356. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 29, 2020 order of the Court of Appeals and remand this case to the Jackson Circuit Court for reconsideration of the defendant's motion for relief from judgment. The circuit court erred in applying *People v Cress*, 468 Mich 678 (2003), to an analysis of whether the defendant's motion was successive under MCR 6.502(G). See *People v Swain*, 499 Mich 920 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

13400 MOUNT ELLIOTT, LLC V STATE TAX COMMISSION, No. 162541; Court of Appeals No. 355110. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied June 1, 2021:

PALAKURTHI V COUNTY OF WAYNE, No. 159347; Court of Appeals No. 342533.

PEOPLE V MCQUIRTER, No. 161608; Court of Appeals No. 351729.

PEOPLE V KNOTT, No. 161630; Court of Appeals No. 341418.

MYERS V ANTONIO'S OF DEARBORN HEIGHTS, INC, Nos. 161656 and 161657; Court of Appeals Nos. 345673 and 346089.

PEOPLE V ODUM, No. 161665; Court of Appeals No. 341969.

DBD KAZOO, LLC V WESTERN MICHIGAN, LLC, No. 161689; Court of Appeals No. 345707.

PEOPLE V ALVIN JACKSON, No. 161824; Court of Appeals No. 347886.

PEOPLE V JAMES WALKER, No. 161862; Court of Appeals No. 353650.

PEOPLE V SCARBERRY, No. 161888; Court of Appeals No. 353352.

PEOPLE V TYLER ALLEN, No. 161893; Court of Appeals No. 345977.

PEOPLE V GIBSON, No. 161919; Court of Appeals No. 348041.

JOHNSON V JACKSON, No. 161967; Court of Appeals No. 346734.
CAVANAGH, J., did not participate because of her prior involvement in this case.

HUFF V DOYLE, No. 161976; Court of Appeals No. 349528.

ALLEN V EVEREST NATIONAL INSURANCE COMPANY, No. 162010; Court of Appeals No. 348961.

TEACHOUT V TEACHOUT, No. 162045; Court of Appeals No. 349692.

BANDA-TAVARES V MURPHY, No. 162065; Court of Appeals No. 350022.

PEOPLE V DON WRIGHT, No. 162084; Court of Appeals No. 353664.

PEOPLE V TOWER, No. 162095; Court of Appeals No. 347367.

PEOPLE V WITHERELL, No. 162158; Court of Appeals No. 353451.

PEOPLE V SAENZ, No. 162196; Court of Appeals No. 353916.

MOORE V GLYNN, No. 162246; Court of Appeals No. 349505.

PEOPLE V RULEAU, Nos. 162247 and 162248; Court of Appeals Nos. 347091 and 347092.

PEOPLE V GERORD ROBINSON, No. 162269; Court of Appeals No. 354336.

PEOPLE V PRITCHETT, No. 162274; Court of Appeals No. 347598.

PEOPLE V MICHAEL FISHER, No. 162290; Court of Appeals No. 354485.

DETROIT WATER AND SEWERAGE DEPARTMENT V SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION, No. 162304; Court of Appeals No. 350171.

PEOPLE V DENHAM, No. 162323; Court of Appeals No. 354058.

PEOPLE V DONAHOO, No. 162325; Court of Appeals No. 346514.

PEOPLE V FRANKS, No. 162350; Court of Appeals No. 354737.

PEOPLE V PETTES, No. 162360; Court of Appeals No. 354421.

PEOPLE V TALLEY-ELLIS, No. 162362; Court of Appeals No. 349112.

PEOPLE V TYRONE ANDERSON, No. 162382; Court of Appeals No. 354885.

THAMILSELVAN V THAMILSELVAN, No. 162388; Court of Appeals No. 349037.

PEOPLE V TEDDY BROWN, No. 162394; Court of Appeals No. 346891.

In re CONSERVATORSHIP OF ROBERTA MORE ASPLUND, No. 162436; Court of Appeals No. 350447.

PEOPLE V MUHAMMAD, No. 162455; Court of Appeals No. 349325.

PEOPLE V WILLIAM BROWN, No. 162456; Court of Appeals No. 346892.

PEOPLE V FLEMISTER, Nos. 162491 and 162492; Court of Appeals Nos. 349100 and 349101.

PEOPLE V WESLEY, No. 162493; Court of Appeals No. 347774.

MCCORMICK V GARLAND, No. 162501; Court of Appeals No. 354219.

PEOPLE V STEEL, No. 162506; Court of Appeals No. 354665.

ELDER V MCGEE, No. 162510; Court of Appeals No. 351112.

PEOPLE V DAVID PRICE, No. 162511; Court of Appeals No. 355473.

PEOPLE V STAUDAKER, No. 162512; Court of Appeals No. 355472.

PEOPLE V BUTTS, No. 162514; Court of Appeals No. 349017.

PEOPLE V CUMMINGS, No. 162515; Court of Appeals No. 350753.

PEOPLE V YONO, No. 162519; Court of Appeals No. 347399.

PERLES V SPARTANNASH COMPANY, No. 162531; Court of Appeals No. 350869.

MAGEE V YOUNG, No. 162534; Court of Appeals No. 352650.

PEOPLE V DERRICK SMITH, No. 162535; Court of Appeals No. 355048.

VILLAGE OF SPARTA V CLARK HILL, PLC, No. 162547; Court of Appeals No. 352837.

YELDER V NORFOLK SOUTHERN RAILWAY COMPANY AND PROFESSIONAL TRANSPORTATION, INC, No. 162550; Court of Appeals No. 355178.

PEOPLE V DUFFIE, No. 162555; Court of Appeals No. 354859.

PEOPLE V ZAGORODNYY, No. 162556; Court of Appeals No. 349778.

EARTHCOM, INC V CLARK, No. 162559; Court of Appeals No. 348504.

In re FORFEITURE OF BAIL BOND, Nos. 162565, 162566, and 162567; Court of Appeals Nos. 355245, 355246, and 355247.

PEOPLE V JMICHAEL JOHNSON, No. 162568; Court of Appeals No. 350222.

PEOPLE V TORON FISHER, No. 162572; Court of Appeals No. 348183.

PEOPLE V SIMMONS, No. 162574; Court of Appeals No. 347853.

PEOPLE V FREEMAN, No. 162575; Court of Appeals No. 350077.

PEOPLE V JINES, No. 162578; Court of Appeals No. 349675.

PEOPLE V CRESSMAN, No. 162580; Court of Appeals No. 355646.

PEOPLE V EMERY, No. 162584; Court of Appeals No. 348127.

PEOPLE V JOHNNY STANLEY, No. 162591; Court of Appeals No. 355187.

PEOPLE V IMPENS, No. 162595; Court of Appeals No. 355221.

PEOPLE V MOSBY, No. 162603; Court of Appeals No. 354483.

PEOPLE V MILLER, No. 162608; Court of Appeals No. 352992.

PEOPLE V RICHARD THOMAS, No. 162610; Court of Appeals No. 355013.

AUSTIN V MARK'S TIRE, INC, No. 162611; Court of Appeals No. 351929.

PEOPLE V MCMURTRIE, No. 162618; Court of Appeals No. 355268.

PEOPLE V JOSHUA DAVIS, No. 162620; Court of Appeals No. 347326.

PEOPLE V SPARKS, No. 162623; Court of Appeals No. 355269.

PEOPLE V LESHOCK, No. 162647; Court of Appeals No. 352480.

PEOPLE V MALLETT-RATHELL, No. 162651; Court of Appeals No. 355323.

TELEHOWSKI V TELEHOWSKI, No. 162657; Court of Appeals No. 356066.

PEOPLE V CHAD JOHNSON, No. 162678; Court of Appeals No. 349442.

PEOPLE V DWIGHT YOUNG, No. 162683; Court of Appeals No. 349880.

PEOPLE V BAYTOPS, No. 162685; Court of Appeals No. 350367.

PEOPLE V BLADES, No. 162701; Court of Appeals No. 354723.

PEOPLE V LABARGE, No. 162709; Court of Appeals No. 345100.

BRADLEY V FRYE-CHAIKEN, No. 162712; Court of Appeals No. 350387.

DAVIDSON V DAVIDSON, Nos. 162713 and 162714; Court of Appeals Nos. 348788 and 348808.

PEOPLE V REDDER, No. 162724; Court of Appeals No. 349200.

PEOPLE V BURRESS, No. 162730; Court of Appeals No. 350273.

PEOPLE V SINGLETARY, No. 162758; Court of Appeals No. 349530.

STURDAVENT V SPENCER and SPENCER V STURDAVENT, Nos. 162763 and 162764; Court of Appeals Nos. 351428 and 351745.

ADAMS V VHS HARPER UNIVERSITY HOSPITAL, No. 162788; Court of Appeals No. 354618.

GRIEVANCE ADMINISTRATOR V PATERSON, No. 162803.

Leave to Appeal Before Decision by the Court of Appeals Denied June 1, 2021:

SHEFFIELD V DETROIT CITY CLERK and LEWIS V DETROIT CITY CLERK, Nos. 163048 and 163049; Court of Appeals Nos. 357298 and 357299. On order

of the Court, the motion to expedite, motions for immediate consideration, and the motion for stay are granted. The May 26, 2021 order and opinion of the Wayne Circuit Court granting mandamus is stayed. The application for leave to appeal prior to decision by the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we deny the application for leave to appeal to allow the Court of Appeals to first address the questions presented, but direct the Court of Appeals to expedite consideration of the claim of appeal in this matter while maintaining the stay imposed by this Court. We do not retain jurisdiction.

VIVIANO, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to deny the application for leave to appeal prior to decision by the Court of Appeals, but dissent from its decision to grant the motion for stay. In light of this Court's decision to deny the application, I would not grant the motion for stay and would instead leave the decision of whether to enter a stay to be resolved by the Court of Appeals in conjunction with the pending claim of appeal.

Reconsideration Denied June 1, 2021:

PEOPLE V AMBER MERCER, No. 161816; Court of Appeals No. 352659.

PEOPLE V ROBERT MORLEY, No. 161903; Court of Appeals No. 353400.

BRADLEY V STRIEGLE, No. 161995; Court of Appeals No. 353627.

KANTOS V MAJOR, No. 162050; Court of Appeals No. 346680.

FREEMAN V DILORENZO, No. 162117; Court of Appeals No. 348115.

GRIEVANCE ADMINISTRATOR V REIZEN, No. 162176.

KAUFMAN V CRANBERRY LAKE, No. 162200; Court of Appeals No. 353318.

PEOPLE V SAMUEL LEE, No. 162265; Court of Appeals No. 353600.

Summary Disposition June 2, 2021:

PEOPLE V MCPHERSON, No. 161521; Court of Appeals No. 347184. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. We remand this case to the Jackson Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), regarding whether the defendant's trial counsel rendered constitutionally ineffective assistance by: (1) failing to object under MRE 404(b) to the prosecutor's questions during the cross-examination of the defendant, see *People v Wilder*, 502 Mich 57 (2018); (2) presenting a diminished capacity defense, see *People v Carpenter*, 464 Mich 223, 241 (2001); and (3) failing to investigate and pursue an insanity defense based on the defendant's post-traumatic stress disorder. The motion to remand and motion to expand the record are denied.

We further order the Jackson Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant. We do not retain jurisdiction.

PEOPLE V JOSEPH JONES, No. 161899; Court of Appeals No. 353209. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE V CAMERON, No. 162079; Court of Appeals No. 354314. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the Saginaw Circuit Court's March 5, 2020 order and we remand this case to that court for reconsideration of the defendant's successive motion for relief from judgment under MCR 6.504(B). On remand, the trial court shall accept the defendant's pleadings and resolve the motion on the merits. Moreover, because it appears that the defendant raised a different claim of new evidence in a 2019 motion for relief from judgment, the trial court may also consider that evidence in ruling on the defendant's current motion. *People v Johnson*, 502 Mich 541, 577 n 17 (2018). We do not retain jurisdiction.

Leave to Appeal Granted June 2, 2021:

MCMASTER V DTE ENERGY COMPANY, No. 162076; Court of Appeals No. 339271. The parties shall address: (1) whether the enactment of MCL 480.11a abrogated the appellee's common-law duty of ordinary care with respect to loading cargo for transport by a commercial motor vehicle operated by the appellant; and (2) whether the appellee owed a duty to the appellant under the "shipper's exception." See *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953). The appellant's brief and appendix shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. The time for filing the remaining briefs shall be as set forth in MCR 7.312(E). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Oral Argument Ordered on the Application for Leave to Appeal June 2, 2021:

MEYERS V RIECK, No. 162094; reported below: 333 Mich App 402. The appellant shall file a supplemental brief addressing: (1) whether the proposed claim based on a violation of the standing order sounds in medical malpractice or ordinary negligence; and (2) whether evidence of the standing order is admissible at trial. The appellant's brief shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14

days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Michigan Health and Hospital Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

BERNSTEIN, J., not participating because he has a family member with an interest that could be affected by the proceeding.

Leave to Appeal Denied June 2, 2021:

PEOPLE V VANECK, No. 160967; Court of Appeals No. 350635.

CHAKLOS V ST JOHN PROVIDENCE, No. 161641; Court of Appeals No. 352735.

HAYDAW V FARM BUREAU INSURANCE COMPANY, No. 162077; reported below: 332 Mich App 719.
ZAHRA and CLEMENT, JJ., would grant leave to appeal.

PEOPLE V ROMANTE ADAMS, No. 162098; Court of Appeals No. 347308.

PEOPLE V RONNIE WATERS, No. 162104; Court of Appeals No. 353676.

PEOPLE V SHERROD, No. 162105; Court of Appeals No. 347434.

FASHHO V LIBERTY MUTUAL INSURANCE COMPANY, No. 162183; reported below: 333 Mich App 612.
ZAHRA and CLEMENT, JJ., would grant leave to appeal.

BLAND V BOARD OF HOSPITAL MANAGERS OF HURLEY MEDICAL CENTER, No. 162194; Court of Appeals No. 347533.

FRICK V HURLEY MEDICAL CENTER, No. 162198; Court of Appeals No. 346747.

FRY V JOHNSON, No. 162219; Court of Appeals No. 354184.

PEOPLE OF THE CITY OF ST CLAIR SHORES V DORR, No. 162337; Court of Appeals No. 349910.
BERNSTEIN, J., would grant leave to appeal.

PEOPLE V RUTTY, No. 162366; Court of Appeals No. 348465.

PEOPLE V LATHAM, No. 162404; reported below: 334 Mich App 501.

BIRD V LOUISIANA GREAT LAKES HOLDINGS, LLC, No. 162410; Court of Appeals No. 350311.

PEOPLE V KONCELIK, No. 162415; Court of Appeals No. 355042.

PEOPLE V SIMS, No. 162431; Court of Appeals No. 354971.

CAVANAGH, J. (*concurring*). I concur with this Court's denial order. I note, however, that the defendant secured an affidavit from a key prosecution witness after the trial court denied his motion for relief from judgment. As this evidence was not considered by the trial court, it is not properly before this Court on appeal. I write separately simply to point out that our denial order does not preclude the defendant from filing a successive motion for relief from judgment in the trial court asserting that he has "a claim of new evidence that was not discovered before" he filed the instant motion for relief from judgment. MCR 6.502(G)(2).

PEOPLE V ZITKA, No. 162477; reported below: 335 Mich App 324.

PEOPLE V HERNANDEZ-ZITKA, No. 162479; reported below: 335 Mich App 324.

MCCANN V STATE OF MICHIGAN, No. 162540; Court of Appeals No. 350491.

In re PAROLE OF MARK WILLIAM MILLER, No. 162726; Court of Appeals No. 355366.

PEOPLE V MARSHA PLAFKIN, No. 162753; Court of Appeals No. 356143.

PEOPLE V MARSHA PLAFKIN, No. 162755; Court of Appeals No. 356405.

Supplemental Briefing Ordered June 2, 2021:

MAPLE MANOR REHAB CENTER, LLC V DEPARTMENT OF TREASURY, No. 161953; reported below: 333 Mich App 154. On order of the Court, the application for leave to appeal the July 23, 2020 judgment of the Court of Appeals is considered. We direct the parties to file supplemental briefs within 21 days of the date of this order identifying the authority empowering the Department of Health and Human Services to administer Michigan's Medicaid Long-Term Care Quality Assurance Assessment Program, MCL 333.20161. Compare MCL 333.1104(4) (" 'Department', except as provided in articles 8, 15, and 17, means the department of health and human services."); with MCL 333.20104(4) (located within article 17 of the Public Health Code, MCL 333.20101 to MCL 333.22260, stating, " 'Department' means the department of licensing and regulatory affairs."). The application for leave to appeal remains pending.

Oral Argument Ordered on the Application for Leave to Appeal June 4, 2021:

PEOPLE V BOYKIN, No. 157738; Court of Appeals No. 335862. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The appellant shall file a supplemental brief addressing: (1) whether the Court of Appeals correctly held in *People v Wines*, 323 Mich App 343 (2018), rev'd in nonrelevant part 506 Mich 954 (2020), that trial courts must consider the distinctive attributes of youth, such as those

discussed in *Miller v Alabama*, 567 US 460 (2012), when sentencing a minor to a term of years pursuant to MCL 769.25a; (2) if *Wines* was correctly decided, whether sentencing judges have an obligation to explicitly set forth their analysis of how the defendant's age impacted their sentencing discretion when proceeding under MCL 769.25a or MCL 769.25; and (3) if *Wines* applies to this case, whether the trial court complied with its requirements, and if it did not, what more the court was required to do. The appellant's brief shall be filed by September 27, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Tate* (Docket No. 158695).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE V TYLER TATE, No. 158695; Court of Appeals No. 338360. The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel or by September 27, 2021 whichever is later, addressing: (1) whether the Court of Appeals correctly held in *People v Wines*, 323 Mich App 343 (2018), rev'd in nonrelevant part 506 Mich 954 (2020), that trial courts must consider the distinctive attributes of youth, such as those discussed in *Miller v Alabama*, 567 US 460 (2012), when sentencing a minor to a term of years pursuant to MCL 769.25a; (2) if *Wines* was correctly decided, whether sentencing judges have an obligation to explicitly set forth their analysis of how the defendant's age impacted their sentencing discretion when proceeding under MCL 769.25a or MCL 769.25; and (3) if *Wines* applies to this case, whether the trial court complied with its requirements, and if it did not, what more the court was required to do. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Boykin* (Docket No. 157738).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 4, 2021:

DUCKWORTH V CHEROKEE INSURANCE COMPANY, No. 162009; reported below: 333 Mich App 202.

PEOPLE V MAAS, No. 162039; Court of Appeals No. 353684.

MICLEA V CHEROKEE INSURANCE COMPANY, No. 162163; reported below: 333 Mich App 661.

PALKA V AAA OF MICHIGAN, Nos. 162258 and 162259; Court of Appeals Nos. 350204 and 350207.
BERNSTEIN, J., did not participate due to a familial relationship.

JONES V TAYLOR CITY CLERK, No. 163083; Court of Appeals No. 357264.

Motion for Stay Pending Appeal Granted June 4, 2021:

SHEFFIELD V DETROIT CITY CLERK and LEWIS V DETROIT CITY CLERK, Nos. 163084 and 163085; Court of Appeals Nos. 357298 and 357299. On order of the Court, the motions for stay pending appeal and for immediate consideration of that motion are granted. The May 26, 2021 opinion and order of the Wayne Circuit Court granting mandamus is stayed pending the completion of this appeal. The application for leave to appeal the June 3, 2021 judgment of the Court of Appeals, the motion to expedite the application, and the motion for immediate consideration of the motion to expedite remain pending.
ZAHRA and VIVIANO, JJ., would deny the motion to stay.

Summary Disposition June 11, 2021:

RIVERA V SVRC INDUSTRIES, INC, No. 159857; reported below: 327 Mich App 446. On January 7, 2021, the Court heard oral argument on the application for leave to appeal the April 4, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we affirm in part, vacate in part, and reverse in part the judgment of the Court of Appeals and remand this case to that court for further consideration of plaintiff's public-policy claim.

We affirm the Court of Appeals' holding that "plaintiff has failed to prove that a genuine issue of material fact existed regarding whether she had engaged in a protected activity by being about to report a violation or suspected violation of law" to the police. *Rivera v SVRC Indus, Inc*, 327 Mich App 446, 461-462 (2019). Viewing the evidence in the light most favorable to plaintiff, the evidence does not demonstrate

that plaintiff herself was "about to report . . . a suspected violation of a law," MCL 15.362, but rather that she wanted defendant to so report and was upset that it would not. There is a legally significant distinction between being "about to report . . . a suspected violation of a law" and merely wanting someone else to so report; the former constitutes protected activity under the Whistleblowers' Protection Act (the WPA), MCL 15.361 *et seq*., while the latter does not. Accordingly, plaintiff has failed to establish a genuine issue of material fact that she was "about to report . . . a suspected violation of a law" to the police. MCL 15.362.[1]

Next, we affirm the Court of Appeals' holding that plaintiff did not establish a genuine issue of material fact that there was a causal connection between plaintiff's communication with defendant's attorney and her termination. However, we vacate the Court of Appeals' holding that plaintiff's communication with defendant's attorney was not a "report" under the WPA, as this holding was unnecessary in light of our agreement with its conclusion that summary disposition was warranted based on plaintiff's failure to establish a causal connection between plaintiff's communication with defendant's attorney and her termination. See *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 621 (1997) (holding that the plaintiff could not recover under the WPA because she "failed to establish a causal connection between her actions and her firing").

Finally, we reverse the Court of Appeals' holding in Part III(D) of its opinion that plaintiff's public-policy claim is preempted by the WPA. Plaintiff's complaint alleges two factual bases for her public-policy claim: (1) her attempt to report LS's actions to the police, and (2) her refusal to conceal and/or compound LS's violations of the law. Because plaintiff has not demonstrated a question of fact that this conduct entitles her to recover under the WPA, her public-policy claim based on this conduct is not preempted by the WPA. See *Pace v Edel-Harrelson*, 499 Mich 1, 10 & n 19 (2016), quoting *Anzaldua v Neogen Corp*, 292 Mich App 626, 631 (2011) (" '[I]f the WPA does not apply, it provides no

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[1] During oral argument in this Court, plaintiff suggested that she could show a question of fact on this claim because even if *she* was not "about to report . . . a suspected violation of a law," defendant was "about to report . . . a suspected violation of a law" to the police on her behalf. While an employee has engaged in protected activity under the WPA if "a person acting on behalf of the employee . . . is about to report . . . a suspected violation of a law," plaintiff's desire that defendant report LS's behavior is insufficient to show that defendant was actually "about to report" this behavior, and the evidence in the record suggests that defendant was not "on the verge of" reporting anything to the police. *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 612 (1997). Indeed, the evidence suggests that defendant expressly declined to report LS's behavior to the police. Thus, plaintiff has also failed to establish a genuine issue of material fact that defendant was "about to report . . . a suspected violation of a law" to the police on her behalf.

remedy and there is no preemption.' "). The Court of Appeals did not address whether these allegations stated an actionable claim for unlawful termination in violation of public policy. See *McNeil v Charlevoix Co*, 484 Mich 69, 79 (2009); *Pratt v Brown Machine Co*, 855 F2d 1225, 1236-1238 (CA 6, 1988). Moreover, while the Court of Appeals determined that some of plaintiff's allegations were not factually supported, it did not determine whether the allegations that were factually supported established a claim for unlawful termination in violation of public policy. We remand this case to the Court of Appeals to address whether, viewing the evidence in the light most favorable to plaintiff, there is a genuine issue of material fact that her termination was unlawful in violation of public policy, including, if necessary, whether she can establish a causal connection between her conduct and her termination.

ZAHRA, J. (*concurring*). I concur with this Court's order in full. I write separately because, for the reasons stated in *McNeill-Marks v Mid-Michigan Med Ctr-Gratiot*, 502 Mich 851, 856-857 n 13 (2018) (ZAHRA, J., dissenting), I continue to believe "a persuasive argument can be made that the [State Bar of Michigan (SBM)] is not a 'public body' under the [Whistleblowers' Protection Act (the WPA), MCL 15.361 *et seq*.]," in which case an attorney, as a member of the SBM, would not constitute a member of a public body for purposes of the WPA. See also *id*. at 867 ("The statutory definition of 'public body' is extremely expansive and may well exceed the scope of entities the Legislature intended to include as an entity or organization suitable to field a report of suspected illegal activity."). However, because it is unnecessary to reach that issue to resolve this case, I concur.

VIVIANO, J. (*concurring*). I fully concur in the Court's order and write only to highlight a curious interpretation that has been given to the Michigan Whistleblowers' Protection Act (the WPA), MCL 15.361 *et seq*., that was incidentally involved in the present case. That statute protects employees from retaliation when they "report[]" or are "about to report" a violation of the law "to a public body." MCL 15.362. "Public body," in turn, is defined expansively to include bodies "created" or "primarily funded" by state or local authority and "any *member* or employee of that body." MCL 15.361(d)(iv) (emphasis added). The WPA leaves the term "member" undefined.

The Court of Appeals has held that the State Bar of Michigan (the SBM) qualifies as a "public body" under the WPA. *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 23 (2016). Because of the statutory definition of "public body," every "member" of the SBM is likewise a "public body" for purposes of the WPA. *Id*. Because one cannot be licensed to practice law in this state without being a "member" of the SBM, MCL 600.901; SBR 2, the result of the Court's holding is that every licensed lawyer in the state is a "public body" to whom employees can make protected reports. In other words, an employee would gain the protections of the WPA by reporting or being about to report a suspected violation of law to any licensed attorney in the state—even if that employee had no prior relationship with that attorney.

Perhaps this result is compelled by a proper reading of the WPA's language, but I question whether the Legislature intended this result. This Court heard arguments in *McNeill-Marks* and ultimately denied leave to appeal. *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 502 Mich 851 (2018). At that time, however, only five justices were participating in the case. And none of the parties in that case had addressed the question that I believe the Court should closely consider in a future case: whether the relevant meaning of "member" as used in the WPA is narrower than that suggested by the Court of Appeals such that it only includes members of the SBM with some decision-making authority regarding that body but excludes the licensed lawyer who has no role in the SBM other than simply paying his or her dues to be a nominal member. The Court of Appeals in *McNeill-Marks* relied on the fact that the attorney at issue was a member of the SBM without first defining the word "member." One definition of "member," which aligns with how the Court of Appeals appears to have interpreted the word, is "one of the individuals composing a group." *Webster's New Collegiate Dictionary* (1981).[1] But narrower and more specialized definitions also exist, such as "[o]ne who has been formally elected to take part in the proceedings of a parliament" and "[a] component part, branch, of a political body." *The Oxford English Dictionary* (2d ed). Similarly, *Black's Law Dictionary* (10th ed) provides the following definition: "One of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participating in the organization—including the rights of making, debating, and voting on motions—except to the extent that the organization reserves those rights to certain classes of membership."[2] These narrower definitions indicate a stronger, constitutive

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[1] See also *The Oxford English Dictionary* (2d ed) ("Each of the individuals belonging to or forming a society or assembly.").

[2] The Court of Appeals has rejected a broad interpretation of "member" in the context of the SBM in at least one other case. In *State Bar of Mich v Cramer*, 56 Mich App 176, 178 (1974), rev'd in part on other grounds 399 Mich 116 (1976), the Court of Appeals rejected the argument that the judges assigned to the panel were "disqualified to hear this appeal because the State Bar of Michigan is a party and because each of us is a member of the State Bar of Michigan." The Court of Appeals noted that membership in the SBM is not voluntary and that all Court of Appeals judges are required to be SBM members. *State Bar of Mich*, 56 Mich App at 180. Implicit in the Court of Appeals decision was that the panel judges' membership was not constitutive of their interests such that they had to recuse themselves—i.e., being members of the SBM did not necessarily bias them in favor of the bar and against another member.

sense of membership in which a person must have some authority or deliberative power with regard to the body.[3]

If this is the proper interpretation of "member," the issue then becomes whether a simple dues-paying membership in the SBM meets this narrower definition. While I take no position here, I would note that in answering this question a useful starting point would be the Rules Concerning the State Bar of Michigan. Those rules prescribe the powers and duties of membership and also create separate bodies and offices that have more formal roles in managing the SBM.[4]

In an appropriate future case, I would consider whether the narrower definition of "member" applies to the WPA and whether dues-paying members of the SBM fall within this definition. Given our resolution of the present case, we do not need to address these questions here.

WELCH, J., joins the statement of VIVIANO, J.

KROLCZYK V HYUNDAI MOTOR AMERICA, No. 160606; Court of Appeals No. 343996. On April 7, 2021, the Court heard oral argument on the application for leave to appeal the October 17, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the March 24, 2017 judgment of the 46th District Court, and remand this case to the district court for further proceedings.

The Court of Appeals erred by concluding that the district court in this case lacked subject-matter jurisdiction over the action where the parties jointly stipulated in good faith to an amount in controversy less than $25,000. "[I]n civil actions where no other jurisdictional statute applies, the district court is limited to deciding cases in which the amount in controversy does not exceed $25,000." *Hodge v State Farm*

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[3] Among the problems with the Court of Appeals' broad interpretation of "member" in *McNeill-Marks* is that it might place some attorneys in an ethical dilemma. Consider an in-house corporation counsel attorney who receives a "report" under the WPA from an employee of the attorney's client. It would seem to me that the attorney might have some responsibility to the employee making the report, and that responsibility might materially limit the attorney's representation of the corporate client. See MRPC 1.7(b). Given the purpose of the WPA "to protect the public by facilitating employee reporting of illegal activity," *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54, 58 (2013), it would seem that many reports to an in-house attorney would place the interests of the attorney's client at odds with the interests of the reporting party.

[4] Compare SBR 13 and 14 (giving dues-paying members petition rights), with SBR 5 and 6 (creating the Board of Commissioners, staffed by members and tasked with "manag[ing] the State Bar," among other duties).

Mut Auto Ins Co, 499 Mich 211, 216 (2016). The general rule is that "in its subject-matter jurisdiction inquiry, a district court determines the amount in controversy using the prayer for relief set forth in the plaintiff's pleadings . . . ." *Id*. at 223. However, this Court has recognized that the amount in controversy alleged in a plaintiff's pleading does not govern a court's subject-matter jurisdiction if the amount in controversy alleged is " 'unjustifiable' " and "could not be proved." *Id*. at 222 n 31, quoting *Fix v Sissung*, 83 Mich 561, 563 (1890). Where the parties jointly stipulate in good faith to an amount in controversy and the court accepts that stipulation, it is binding on the parties and the court. Cf. *Dana Corp v Employment Security Comm*, 371 Mich 107, 110 (1963) ("[O]nce stipulations have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them.").[1] Accordingly, a joint stipulation in good faith to an amount in controversy that has been approved by the court necessarily governs a court's subject-matter jurisdiction, as any pleading that contradicts such a joint stipulation is " 'unjustifiable' " and "[can]not be proved."[2]

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[1] A joint stipulation to the amount in controversy does not contradict the well-established proposition that "[p]arties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction." *Bowie v Arder*, 441 Mich 23, 56 (1992). The parties here did not stipulate to giving the court jurisdiction by, for example, stipulating that the district court could try a case where the amount in controversy was more than $25,000. Rather, the parties stipulated in good faith that the amount in controversy was less than $25,000 and therefore they proceeded with the understanding that the case fell within the district court's jurisdiction. We are aware of no authority that would preclude the parties from entering a good-faith stipulation to the amount in controversy. To the contrary, where parties indisputably have the authority to stipulate to an appropriate amendment of the complaint to allege an amount in controversy that is within the district court's jurisdiction, see Administrative Order No. 1998-1, 457 Mich lxxxv-lxxxvi (1998), we see no reason why the parties' good-faith stipulation to an amount in controversy would be ineffective merely because it was not accompanied by a stipulation to amend the complaint.

[2] *Hodge*, 499 Mich at 222 n 31, quoting *Fix*, 83 Mich at 563. Plaintiffs assert that the parties believed in good faith when they stipulated to the amount in controversy that plaintiffs' recovery would not exceed the district court's jurisdictional limit, and defendants do not dispute that assertion. Moreover, the parties' stipulation as to the amount in controversy was not contradicted by other facts in the record at the time the stipulation was entered. See *People v Meloche*, 186 Mich 536, 539-540 (1915). Rather, this stipulation was supported by the $14,000 award given at case evaluation. That the proofs at trial ultimately supported a recovery for plaintiffs in excess of the district court's jurisdictional limit

Plaintiffs in this case originally filed a complaint in the circuit court alleging an amount in controversy in excess of $25,000. After defendants rejected a case-evaluation award of $14,000 to plaintiffs, the parties filed a stipulation in the circuit court that the amount in controversy was less than $25,000 and requested that the case be transferred to the district court pursuant to MCR 2.227. The circuit court accepted that stipulation and granted the motion to transfer the case, effectively depriving the circuit court of subject-matter jurisdiction over the action and vesting subject-matter jurisdiction over the action in the district court. The failure of the parties to explicitly stipulate to an appropriate amendment of the complaint when they requested that the circuit court transfer the case to the district court, as required by Administrative Order No. 1998-1, 457 Mich lxxxv-lxxxvi (1998), did not deprive the district court of subject-matter jurisdiction over the action. Assuming that the circuit court should not have transferred the case pursuant to AO 1998-1 without an express stipulation to an appropriate amendment of the complaint, any error in granting the transfer without such a stipulation was a procedural error that defendants waived by failing to challenge the transfer within a reasonable time after it occurred. See *Brooks v Mammo*, 254 Mich App 486, 494 (2002). Moreover, plaintiffs' failure to amend the pleadings before or immediately after the transfer was ordered did not deprive the district court of subject-matter jurisdiction, as the complaint's allegation of an amount in controversy above $25,000 was unjustifiable in light of the legally binding stipulation to an amount in controversy less than $25,000. The district court therefore had the authority to allow plaintiffs to amend their complaint to allege an amount in controversy consistent with the parties' joint stipulation before entering judgment in their favor. See MCR 2.118(A)(2); MCL 600.2301.[3]

In sum, the parties' good-faith joint stipulation to an amount in controversy less than $25,000 vested the district court with subject-matter jurisdiction over the action, as plaintiffs' pleading alleging an amount in controversy more than $25,000 was unjustifiable in light of that stipulation. Moreover, defendants waived any error that may have

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does not mean that the parties lacked a good-faith basis for stipulating before trial to an amount in controversy less than $25,000, nor did this fact deprive the district court of subject-matter jurisdiction over the action. Cf. *Hodge*, 499 Mich at 224. Accordingly, we do not address here whether a court has subject-matter jurisdiction if the parties knowingly stipulate to an unjustifiable amount in controversy in order to provide that court with subject-matter jurisdiction where it otherwise would not possess subject-matter jurisdiction over that action.

[3] Defendants argue only that the trial court erred in amending the complaint because it lacked subject-matter jurisdiction over the action; they do not argue that, assuming the court had such jurisdiction, the court erred by amending the complaint before the judgment was entered.

occurred when the circuit court transferred the case to the district court without an express stipulation to an appropriate amendment of the complaint. Finally, because the district court had subject-matter jurisdiction upon the parties' good-faith joint stipulation to the amount in controversy, it possessed the authority to allow plaintiffs to amend their complaint after the jury's verdict but before the entry of judgment. Accordingly, the district court had subject-matter jurisdiction over the action and had the authority to enter judgment in plaintiffs' favor.

CLEMENT, J. (*concurring*). I support the outcome reached by the Court in this case. But I disagree with much in the Court's order, primarily the assertion that parties can stipulate to a court's subject-matter jurisdiction. See *Bowie v Arder*, 441 Mich 23, 56 (1992) ("Parties cannot give a court jurisdiction by stipulation . . . ."). And even if the parties could stipulate to subject-matter jurisdiction, the *ad damnum* clause is not a fact about the world, and so I doubt it can be the subject of a stipulation. I further share Justice ZAHRA's concern about the Court's needless extension of the so-called "bad-faith exception." See *post* at 973-974. But I do agree with a fleeting statement in the Court's order: the trial court "possessed the authority to allow plaintiffs to amend their complaint after the jury's verdict but before the entry of judgment." *Ante* at 969. Below I explain why this statement resolves the case in plaintiffs' favor.

Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court." We have emphasized that leave "should be freely given" and "denied only for particularized reasons." *Miller v Chapman Contracting*, 477 Mich 102, 105 (2007) (per curiam); accord *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656 (1973) ("A motion to amend ordinarily should be granted . . . ."). But after the start of trial our rules sometimes impose "strict requirements for amending a pleading." *Dacon v Transue*, 441 Mich 315, 333 (1992). Those "strict requirements" are triggered by MCR 2.118(C)(2)—if "evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings," the leave-seeking party must show "that the amendment and the admission of the evidence would not prejudice the objecting party." The present case doesn't involve such an evidentiary objection.

It follows from the above that a party faces an uphill battle when it appeals from a judgment on the basis that the trial court mistakenly allowed amendment of the pleadings. But that battle is winnable here, defendants contend, because plaintiffs' amendment was necessary to bring their complaint within the district court's jurisdiction. See, e.g., *ante* at 967-968 n 2. In particular, the complaint initially filed in the district court contained an *ad damnum* clause seeking over $25,000, putting the case quite clearly outside the district court's subject-matter jurisdiction. See MCL 600.8301(1).

If society's laws were like physical laws, the district court here would have faced a paradox—would exercise of the court's power "unravel the very fabric of the space-time continuum"? *Back to the Future Part II* (Amblin Entertainment and Universal Pictures 1989). But our laws, thankfully, resist paradox, and even when a court lacks subject-matter jurisdiction, it can exercise a residuum of power, for example to inspect its subject-matter jurisdiction, to enlist the parties' aid in that inspec-

tion, and generally to administer the case. When it turns out that subject-matter jurisdiction is lacking and amendment would be futile (e.g., because the court lacked competence to consider the claim), that residuum clearly includes the power to dismiss. See *Fox v Bd of Regents of the University of Michigan*, 375 Mich 238, 242-243 (1965) (circuit court required to dismiss where claim could be heard only in court of claims). And when subject-matter jurisdiction is lacking because of a curable defect in the pleadings, that residuum includes the power to grant leave to amend the pleadings to cure that defect. See *Lehman v Lehman*, 312 Mich 102, 106 (1945) (circuit court lacks jurisdiction to grant a divorce judgment when the parties reside outside the county in which the divorce was filed but "[f]ailure to allege residence in the county could be cured by amendment"); see also MCL 600.2301.

The present case is one where the district court's subject-matter jurisdiction was lacking based on a curable defect in the pleadings. Without amendment, that defect prevented the district court from entering an enforceable judgment on the merits. But, unlike in *Fox*, the defect did not implicate the court's competence and so amendment would not be futile. Because our law allows liberal amendment of pleadings, with no exception applicable here, see MCL 600.2301, MCR 2.118, the defective prayer for relief could be, and was, amended, making the district court's judgment a proper exercise of its power.

For these reasons, I would reverse the Court of Appeals' judgment and offer the other relief set forth in the Court's order.

ZAHRA, J. (*dissenting*). I respectfully dissent from this Court's order reversing the judgment of the Court of Appeals and reinstating the judgment of the district court for plaintiff.

Subject-matter jurisdiction "concerns a court's 'abstract power to try a case of the kind or character of the one pending' and is not dependent on the particular facts of the case."[1] Any action taken by a court that lacks subject-matter jurisdiction, other than dismissal, is void irrespective of what actions have transpired.[2] "Jurisdiction does not inhere in a court, it is conferred upon it by the power which creates it."[3] Our

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[1] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204 (2001) (emphasis omitted), quoting *Campbell v St John Hosp*, 434 Mich 608, 613-614 (1990).

[2] *Bowie v Arder*, 441 Mich 23, 56 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."); *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544-545 (1935) ("When there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction . . . . They are of no more value than as though they did not exist.").

[3] *Detroit v Rabaut*, 389 Mich 329, 331 (1973) (quotation marks omitted).

Constitution establishes “one trial court of general jurisdiction known as the circuit court” and authorizes the Legislature to establish “courts of limited jurisdiction.”[4] The Legislature exercised that authority in establishing the district court, which “has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00.”[5]

Further, MCR 2.227—promulgated pursuant to this Court’s constitutional authority to “establish, modify, amend and simplify the practice and procedure in all courts of this state”[6]—permits a court that “determines that it lacks jurisdiction of the subject matter of the action” to transfer a case to “some other Michigan court [that] would have jurisdiction of the action . . . .”[7] Relevant to cases transferred under MCR 2.227 based on the amount in controversy is Administrative Order No. 1998-1, 457 Mich lxxxv-lxxxvi (1998), which states, in pertinent part:

> A circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) The parties stipulate to the transfer *and to an appropriate amendment of the complaint*, see MCR 2.111(B)(2)[8]; or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.[9]

In issuing AO 1998-1, this Court clearly recognized that, in order to vest jurisdiction in the district court where the case is transferred from the circuit court under MCR 2.227 based on the amount in controversy and where the original complaint alleges damages in excess of $25,000, it is not enough for the parties to merely stipulate to the transfer; they

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[4] Const 1963, art 6, § 1. See also MCL 600.605 (“Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court . . . .”).

[5] MCL 600.8301(1).

[6] Const 1963, art 6, § 5.

[7] MCR 2.227(A)(1). MCR 2.227 was amended effective January 1, 2020. 504 Mich cxcvi, cciv-ccvi (2019). The changes to the court rule do not affect the analysis, and this statement cites the preamendment version of the court rule.

[8] MCR 2.111(B)(2) states, in relevant part, that “[a] complaint, counterclaim, cross-claim, or third-party complaint must contain . . . [a] demand for judgment for the relief that the pleader seeks. If the pleader seeks an award of money, a specific amount must be stated if the claim is for a sum certain or a sum that can by computation be made certain, or if the amount sought is $25,000 or less.”

[9] Emphasis added.

must also stipulate to an appropriate amendment of the complaint that brings the case within the district court's jurisdictional amount. This is no small requirement. Our decision in *Hodge* reaffirmed the well-settled common-law rule that the amount in controversy, and thus the basis for the district court's subject-matter jurisdiction, is based on the amount alleged in the pleadings.[10] Applying *Hodge* here, the amount alleged in plaintiffs' original complaint filed in the circuit court continued to control the amount in controversy until amended. But without a stipulation to "an appropriate amendment of the complaint" under AO 1998-1, plaintiffs would have no basis upon which to file an amended complaint in the district court, as any action taken by the district court—including entering an order permitting an amendment of a complaint—would be void for lack of subject-matter jurisdiction.[11] Therefore, in cases transferred under MCR 2.227 from the circuit court to the district court based on the amount in controversy, a plaintiff seeking to amend his or her complaint to bring the case within the district court's jurisdictional amount must do so *pursuant to the parties' stipulation* to "an appropriate amendment of the complaint" as required by AO 1998-1; a plaintiff may not file an amended complaint pursuant to an order of the district court because, with the original complaint filed in the circuit court still controlling as to the amount in controversy, the district court, under *Hodge*, has no subject-matter jurisdiction over the case.[12]

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[10] *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 217-224 (2016).

[11] *Bowie*, 441 Mich at 56; *Matter of Hague*, 412 Mich 532, 544 (1982) ("An order entered by a court without jurisdiction is absolutely void.") (quotation marks and citation omitted).

[12] Indeed, this Court in *Hodge* rejected the Court of Appeals' assertion that "nothing in MCL 600.8301(1), *MCR 2.227(A)(1)*, or MCR 2.116(C)(4) 'requires that a court limit its jurisdiction query to the amount in controversy alleged in the pleadings,' " stating instead that "the statute and court rules are properly read as incorporating the long-settled rule that *the jurisdictional amount is determined on the face of the pleadings*." *Hodge*, 499 Mich at 219-220 (emphasis added). Given that *Hodge* expressly considered MCR 2.227 in rendering its decision, I disagree with the majority's assertion that "the parties' good-faith joint stipulation to an amount in controversy less than $25,000 vested the district court with subject-matter jurisdiction over the action," *ante* at 967-968, as this assertion is directly contrary to this Court's teachings in *Hodge* that the pleadings control the amount in controversy and, thus, a district court's subject-matter jurisdiction. See *id*. at 217 ("Our cases have long held that courts are to determine their subject-matter jurisdiction by reference *to the pleadings*. . . . Neither the parties nor our own research has revealed any case deviating from this common-law rule.") (emphasis added).

Here, while the parties stipulated to the transfer, they did not stipulate to an appropriate amendment of the complaint alleging that plaintiff's damages were less than $25,000. Absent such a stipulation, there was no authority upon which plaintiffs could file an appropriate amended complaint that would bring their case within the district court's jurisdictional amount. The district court's February 15, 2017 order granting plaintiffs leave to file their second-amended complaint was void because, under *Hodge*, jurisdiction had not yet vested in the district court. Accordingly, plaintiffs' second-amended complaint, filed pursuant to the district court's invalid order, was a nullity and did not vest the district court with subject-matter jurisdiction even though it alleged damages within the district court's jurisdictional amount. Because plaintiffs did not file a valid amended complaint in the district court alleging an amount in controversy within that court's jurisdictional amount, the district court never acquired subject-matter jurisdiction and could do nothing else but dismiss the case.[13]

Further, I disagree with the majority's extension of the limited "bad faith" exception discussed in *Hodge* to resolve this case. This Court stated in *Hodge* that "absent a finding of bad faith," concerns about

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[13] My conclusion does not run afoul of the general rule that parties may not stipulate to subject-matter jurisdiction. *Bowie*, 441 Mich at 56 ("Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction."). Instead, it is the *parties' stipulation* to "an appropriate amendment of the complaint" under AO 1998-1 that serves as the underlying authority permitting plaintiffs to file an amended complaint. It is then *the amended complaint* filed pursuant to that stipulation that *vests* the district court with subject-matter jurisdiction, so long as the amended complaint actually alleges damages within the district court's jurisdictional amount. It is incumbent on the circuit court ordering the transfer to ensure that adequate authority exists to amend the complaint after transfer so as to vest the district court with subject-matter jurisdiction. Moreover, even assuming, as the majority concludes here, that defendants could waive AO 1998-1's requirement that the parties stipulate to "an appropriate amendment of the complaint," the fact remains that plaintiffs filed their second-amended complaint *pursuant to* the district court's February 15, 2017 order that was void for lack of subject-matter jurisdiction. I do not dispute that the parties had the ability to stipulate to the amount in controversy. But absent a foundational base from which to file an appropriate amended complaint—which, as discussed, is the parties' stipulation to file an appropriate amended complaint—plaintiffs' second-amended complaint was a nullity. This Court's bare cites to MCR 2.118(A)(2) and MCL 600.2301 are unavailing for the same reason; without subject-matter jurisdiction, the district court had no authority to permit plaintiffs to amend their pleadings under either MCR 2.118(A)(2) or MCL 600.2301.

artful pleading that the common-law rule may create do not "affect the district court's jurisdiction, which has *always* been determined based on the amount alleged in the pleadings."[14] In expounding on the "bad faith" exception, this Court in *Hodge* explained that "a court will not *retain* subject-matter jurisdiction over a case 'when fraud upon the court is apparent' from *allegations pleaded in bad faith*," and cited—as an example of a situation that "would constitute bad faith sufficient to *oust* the court of jurisdiction"—a case in which "this Court dismissed the plaintiff's suit as being brought in bad faith because the amount claimed was 'unjustifiable' and could not be proved."[15] As is made clear from our decision in *Hodge*, the limited exception to the common-law rule applies only when a plaintiff pleads in *bad faith* such that the court is *divested* or *ousted* of subject-matter jurisdiction. Not only do plaintiffs readily admit that they did not plead in bad faith, but the exception outlined above has never before been used to *create* jurisdiction where none exists or to *restore* jurisdiction that has been lost. The majority's decision today, for all intents and purposes, creates a good-faith exception to the common-law rule reaffirmed in *Hodge* that simply cannot be gleaned from even the broadest reading of that decision, or any other decision from this Court. I question what ramifications this newly created exception will have on our subject-matter jurisdiction jurisprudence,[16] which until now, has been straightforward and firm.

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[14] *Hodge*, 499 Mich at 221-222 (emphasis added).

[15] *Id*. at 222 n 31 (emphasis added; ellipsis omitted), quoting *Fix v Sissung*, 83 Mich 561, 563 (1890). See also *Hodge*, 499 Mich at 228 (MARKMAN, J., concurring) ("This Court has long recognized that when a plaintiff's pleadings are clearly made in bad faith for the purpose of satisfying a trial court's subject-matter jurisdiction, the trial court is *ousted* of jurisdiction and must dismiss the matter.") (emphasis added), citing *Fix*, 83 Mich at 563.

[16] This Court in *Hodge* declined to address "whether a fully-informed plaintiff acts in bad faith by filing a claim in district court, thereby limiting his own recovery to $25,000." *Hodge*, 499 Mich at 222 n 31 (opinion of the Court). Here, after plaintiffs were permitted to file their second-amended complaint alleging damages of less than $25,000, the jury returned a verdict of $77,325 in favor of plaintiff. As we recognized in *Hodge*, a jury verdict exceeding a court's jurisdictional limit does not warrant a deviation from the common-law rule that the pleadings control the amount in controversy. *Id*. at 217, 223-224. Notably, however, plaintiffs then filed postverdict motions expressly seeking damages far in excess of the district court's jurisdictional amount, $51,575 to be exact, as well as attorney fees and costs in the amount of $169,951.67 —nearly seven times the $25,000 limit on plaintiffs' recovery in the district court. The district court reduced plaintiff's damages to $25,000 and awarded plaintiffs $92,944 in attorney fees and $19,656.01 in costs.

Ultimately, in cases transferred under MCR 2.227 from the circuit court to the district court based on the amount in controversy, subject-matter jurisdiction does not vest in the district court until the plaintiff files "an appropriate amendment of the complaint" alleging damages within the district court's jurisdictional amount pursuant to the parties' stipulation to that amendment, as required by AO 1998-1. Here, plaintiffs filed their second-amended complaint pursuant to the district court's February 15, 2017 order granting plaintiffs leave to amend their complaint. Because the district court lacked jurisdiction to enter that order in the first place, plaintiffs' second-amended complaint was a nullity and simply could not vest the district court with subject-matter jurisdiction. Accordingly, the Court of Appeals correctly concluded that the district court lacked jurisdiction to enter judgment in favor of plaintiffs. Because the majority concludes otherwise, I dissent.

HAAN V LAKE DOSTER LAKE ASSOCIATION, No. 161017; Court of Appeals No. 345282. On May 5, 2021, the Court heard oral argument on the application for leave to appeal the January 16, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Allegan Circuit Court's August 17, 2018 opinion and order granting summary disposition to defendant. We agree with dissenting Chief Judge MURRAY that plaintiffs' use and maintenance of their docks is subject to the oversight and regulation of the Lake Doster Lake Association (the LDLA) and is not a permanent and irrevocable property interest. "An easement is an interest in land that is subject to the statute of frauds." *Forge v Smith*, 458 Mich 198, 205 (1998). Plaintiffs can point to no written conveyance manifesting a clear intent to create an easement granting dock rights. See *id*. Rather, plaintiffs argue that a property

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Although the circuit court vacated the district court's award of attorney fees and costs, this Court in *Hodge* cautioned courts to beware of the "unscrupulous attorney" who may limit his client's recovery to $25,000 by proceeding with a case in the district court, but may "then seek attorney fees based on the full amount of damages returned by the jury, thereby sacrificing his client's interests to his own." *Id*. at 221 n 30. Ultimately, while no findings of bad faith were made here, plaintiffs' postverdict conduct arguably indicates an intent to impermissibly litigate a circuit court case in the district court. See *id*. at 245-246 (MARKMAN, J., concurring) ("[B]ecause *each* of the parties may, under some circumstances, view litigating a 'circuit court case' in the district court as being within the party's interest, the district court is obligated to be vigilant in identifying bad-faith conduct, and it must be prepared to question sua sponte its own jurisdiction . . . . Such jurisdiction may be questioned at any stage of the proceeding, and when the circumstances clearly demonstrate that jurisdiction has been obtained by a pleading in bad faith, the case must be dismissed.") (some quotation marks omitted; citations omitted).

interest was created when (1) the Lake Doster Development Corporation (the LDDC) orally approved plaintiffs' request or a predecessor's request to install a dock and (2) the LDLA agreed, as a benefit of membership, that it would agree to allow the continuance of "all past permitted rights." Neither of these bases, whether considered separately or in tandem, satisfies the requirements for establishing a permanent interest in realty.

Assuming the LDDC intended to convey an interest in real estate when it orally approved plaintiffs' or their predecessors' requests for dock installation, and absent any indication of fraud, an attempted conveyance of an interest in real estate is void if it is not in writing. See *Kitchen v Kitchen*, 465 Mich 654, 660 (2002). When there was no observance of the formalities required for creating an express easement, only a mere license was created. See *Morrill v Mackman*, 24 Mich 279, 283 (1872); 1 Cameron, Michigan Real Property Law (3d ed), Easements, § 6.2, p 212 ("A license may be created when the kind of interest that would normally be the subject of an easement is granted but the formal requirements for the creation of an easement are not met."). Although a license may grant permission to be on the land of the licensor, unlike easements, they are not interests in real estate and are generally revocable at will by the licensor. *Forge*, 458 Mich at 210. It makes no difference that plaintiffs or their predecessors might have relied on the oral approvals over the course of many years. Michigan does not recognize "irrevocable licenses" or "easements by estoppel" stemming from a licensee's expenditures made in reliance on representations about the duration of a license. See *Kitchen*, 465 Mich at 660.

Assuming the LDLA membership application is enforceable as a contract, it also cannot support the creation of a permanent and irrevocable property interest in the erection and maintenance of docks. Rather, the contractual agreement states only that the LDLA will allow the LDLA member and their successors-in-interest to continue "past permitted rights." The inclusion of this "past permitted rights" language, which is conditioned on plaintiffs and all future owners abiding by the LDLA's overall governance and control, is consistent with our conclusion that the prior oral approval process created a revocable license, i.e., "a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it." *Morrill*, 24 Mich at 282 (citations omitted). The membership application manifests no clear intent to create an easement granting dock rights. See *Forge*, 458 Mich at 205 ("Any ambiguities are resolved in favor of use of the land free of easements.").

O'BRIEN V D'ANNUNZIO, No. 161335; Court of Appeals No. 347830. On May 5, 2021, the Court heard oral argument on the application for leave to appeal the February 27, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we vacate the February 19, 2019 order of the Oakland Circuit Court and remand this case to that court for further proceedings. We direct the Oakland Circuit Court to assign a different judge to preside over further proceedings in this case.

The trial court erred by modifying the children's established custodial environment in its November 16, 2017 temporary order without first conducting an evidentiary hearing. That order suspended the appellant's parenting time, precluded her from initiating contact with the children, and continued granting the appellee full-time parenting time. By doing so, the order had the effect of modifying the children's established custodial environment. Therefore, MCL 722.27(1)(c) applied,[1] and the trial court should have first conducted an evidentiary hearing. *Grew v Knox*, 265 Mich App 333, 336 (2005) ("An evidentiary hearing is mandated before custody can be modified, even on a temporary basis."). Despite this Court's admonishment in *Daly v Ward*, 501 Mich 897, 898 (2017), that it is "critical . . . that trial courts fully comply with MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment," the trial court failed to do so. In *Daly*, we explained that full compliance with MCL 722.27(1)(c) is necessary because "[i]n many instances, it is difficult—if not altogether impossible—to effectively remedy [an error] on appeal, and to restore the *status quo ante*, . . . without causing undue harm to the child." *Daly*, 501 Mich at 898. To be sure, it is impossible to effectively remedy the error in entering the November 16, 2017 order when 15 months passed before an order properly based on an evidentiary hearing was issued. The trial court's February 19, 2019 final opinion and order relied on events that occurred in a custodial environment that was erroneously altered in November 2017. Therefore, we cannot conclude that the error was harmless.

On remand, the trial court shall conduct a hearing within 14 days of the date of this order to determine how the case should proceed. We further direct the trial court to expedite its consideration and resolution of this case. We do not retain jurisdiction.

CLEMENT, J. (*concurring*). I concur with the Court's remand order. While MCL 722.27a(12) to (14) allow for the issuance of ex parte orders concerning parenting time, the November 16, 2017 order did not, practically speaking, affect only parenting time. Though it was couched in those terms, the order changed the custodial environment by completely suspending appellant's parenting time and affording appellee full parenting time. Therefore, rather than falling under the allowance for ex parte orders as provided in MCL 722.27a(12) to (14), the November 16, 2017 order falls within the requirement in MCL 722.27(c)(1) that orders modifying the established custodial environment be entered after an evidentiary hearing. Nevertheless, the trial court ignored this procedural requirement.

It is true that an established custodial environment must be just that—established—hence why an established custodial environment

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[1] That provision reads, in relevant part: "The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."

exists only “if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” MCL 722.27(1)(c). An “appreciable time” is, of course, not a very precise phrase, and I can imagine borderline cases in which it is difficult to tell whether a custodial environment has been in place for long enough to be established. But this case is no such borderline case. I am certain that after 15 months, the children had an established custodial environment with the only parent they saw.

Moreover, I am hesitant to fault appellant for trying to resolve the dispute with appellee rather than immediately appeal the November 16, 2017 order. Even had she appealed immediately and not requested any adjournments, if the evidentiary hearings took the same amount of time as they did—almost a full year—the children’s established custodial environment still would have been improperly modified by the temporary order by the time a proper opinion and order was issued.

Setting aside any effect appellant’s actions might have had on the proceedings, it is important that lower courts follow the correct procedure when modifying a child’s established custodial environment. As the statutory scheme reflects, doing so is serious business. This Court has explained that the statute exemplifies a preference for stability in children’s lives: “In adopting [MCL 722.27(1)(c)], the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an ‘established custodial environment,’ except in the most compelling cases.” *Baker v Baker*, 411 Mich 567, 576-577 (1981). Therefore, we have warned trial courts how important it is to follow the requirements of MCL 722.27(1)(c). See *Daly v Ward*, 501 Mich 897, 898 (2017). But here the trial court entered a temporary order without an evidentiary hearing and then waited 15 months to issue an order that complied with the statute. By that time, the temporary order had changed the established custodial environment. Moreover, the trial court relied on events that occurred in that new established custodial environment when issuing its February 19, 2019 opinion and order.

I believe the original error in entering the November 16, 2017 order without an evidentiary hearing, and its effect on the February 19, 2019 order, justify vacating the 2019 order and remanding the case. While vacating the order will undo the custody arrangement put in place by that order, the parties remain free to file new motions regarding custody. I fully expect them to do so. I agree with Justice VIVIANO that during the course of the remand, the trial court should not disregard the children’s current living situation. See *Fletcher v Fletcher*, 447 Mich 871, 889 (1994) (holding that “on remand, the court should consider up-to-date information, including the children’s current and reasonable preferences, as well as the fact that the children have been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court’s original custody order”). I also share his concern about the trial court’s decision to completely suspend appellant’s parenting time, and I join him in encouraging the trial court to

facilitate the children's redevelopment of a relationship with appellant. I believe the majority's order lays the groundwork for these steps, so I concur in the vacatur and remand.

I also concur in the majority's decision to reassign the case to a different judge. For the reasons stated in Judge GLEICHER's dissent, I believe the original judge will have a difficult time setting aside her previous opinions; and because the error in entering the November 16, 2017 order had such longstanding effects, I think reassignment is necessary to preserve the appearance of justice. In light of those concerns, I do not believe reassignment will cause excessive waste. *Bayati v Bayati*, 264 Mich App 595, 603 (2004).

VIVIANO, J. (*concurring in part and dissenting in part*). I agree with much of the Court's order, so far as its reasoning can be discerned, but I dissent from its decision to reassign this case to another judge on remand and I write further to address its confusing and seemingly incomplete remedy of vacating the trial court's custody order. In fashioning this relief, the Court fails to give any real guidance on the effect of its order and what the trial court should do next. I would follow our precedent and remand for reevaluation while the status quo is maintained.

Plaintiff-father and defendant-mother shared custody of their two minor children for years without issue, but in 2017, the relationship between the teenage children and defendant began to break down. On November 6, 2017, after several instances in which police officers were called to intervene in confrontations between defendant and the children, plaintiff filed an ex parte motion to suspend defendant's parenting time and to grant him sole physical and legal custody of the children. The trial court granted that motion and, after holding a hearing in which no evidence was presented, decided on November 16, 2017, to continue the previous ex parte order as a temporary order. At the time plaintiff filed his ex parte motion, plaintiff and defendant shared custody and parenting time; after the court granted his motion, plaintiff alone had custody and parenting time. The court's decision changed the children's established custodial environment, i.e., the environment in which there is a person to whom the children looked for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). But the trial court did not complete the evidentiary hearing required by that subsection until October 2018 and did not enter a final order granting plaintiff sole physical and legal custody until February 2019. That order also suspended defendant's parenting time and conditioned future contact between defendant and the children on whether the children wished to reinstate contact with defendant.

I agree with the majority that the trial court erred by entering a series of orders that had the effect over time of modifying the children's established custodial environment without first conducting an evidentiary hearing. See *Daly v Ward*, 501 Mich 897 (2017). I also believe that the trial court erred by suspending defendant's parenting time for the duration of the proceedings and conditioning future contact on the children's wishes. The purpose of parenting time is "to foster a strong relationship between the child and the child's parents." *Shade v Wright*,

291 Mich App 17, 29 (2010). We presume that it is in the children's best interests to have a strong relationship with both parents. MCL 722.27a(1). Moreover, although the child's preference is a consideration, it is only one best-interest factor among many. See MCL 722.23; *Treutle v Treutle*, 197 Mich App 690, 694-695 (1992) ("The child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child.").

The majority here glosses over the next step of determining whether these errors were harmless. See *Fletcher v Fletcher*, 447 Mich 871, 889 (1994). In finding that they were harmless, the Court of Appeals majority engaged in a standard assessment of harmlessness. It noted that the trial court's later decision in 2019 purported to assess the issue of custody from the perspective of the circumstances existing at the time of the first order in November 2017. See *O'Brien v D'Annunzio*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2020 (Docket No. 347830), p 5. This might be enough to show harmlessness if it could convince a reviewing court that the initial error in changing the custodial environment, along with the circumstances resulting from that change, played no role in the trial court's later ratification of its initial improper decision. In those circumstances, the trial court might demonstrate that it would have reached the same decision irrespective of the error in failing to hold an earlier hearing.

But it is unclear whether such a demonstration will always be possible in this context. As the Court of Appeals majority admits, the trial court's later opinion "references and relies upon a number of events that occurred after it temporarily granted plaintiff physical custody . . . ." *Id*. And as the Court of Appeals dissent noted, the development and assessment of evidence is a critical part in combating biases that might creep into the decision-making process. *Id*. (GLEICHER, J., dissenting) at 3. Once initial impressions are formed and conclusions reached, decision-makers will naturally look for evidence that confirms the decision already made. See Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011), p 81. In addition, the consequences of the decision here were severe: the children were removed from defendant's home and were prevented from seeing her without supervision. *O'Brien* (GLEICHER, J., dissenting), unpub op at 4. As the dissent observed, this likely had inextricable effects of its own, especially on the children's relationship with defendant. *Id*. Although not every similar error in this setting will be harmful, here the trial court's reliance on intervening facts, the lengthy delay before it attempted to rectify its mistake, and the complete separation of the children and the mother make the errors harmful.

But finding an error, even a harmful one, does not end the analysis. Custody cases are perhaps unique in that remedying the harm to the wronged party risks causing even greater harm to the children caught in the middle. As this Court has recognized, "In many instances, it is difficult—if not altogether impossible—to effectively remedy on appeal, and to restore the *status quo ante*, following an erroneous order altering a child's established custodial environment without causing undue harm to the child." *Daly*, 501 Mich at 898. As a result, an error in

"entering an order that alters a child's established custodial environment . . . my have lasting consequences yet effectively be irreversible." *Id*.

Where I part company with the majority is in its decision to remand the case for further proceedings in front of a new judge unacquainted with the parties or the case only months before the children turn 18 and the case must conclude.[1] In addition, the legal effect of the majority's order to vacate is not apparent. It would seem, for example, that we are not simply inviting the trial court to revisit the conclusions it reached after the evidentiary hearing. One possible reading of the majority's order is that the parties and the children will return to the status quo as it existed before plaintiff was granted full-time parenting time on November 6, 2017. Under this scenario, the children would be thrust back to the physical custody of their mother despite having had virtually no contact with her for nearly 3½ years. Such a resolution would do nothing to meaningfully address the children's antagonism toward their mother but instead would seem primed to create a volatile situation. It is hard to imagine how this abrupt change would be in the children's best interests.

A better reading of the majority's order—one that is at least consistent with our precedent in this area—is that it allows for a more delicate remedy to balance the interests of the parties and the children. We have, in fact, prescribed such an approach for appellate courts upon determining that a harmful error was made in a custody determination. In *Fletcher*, 447 Mich at 889, we held that after finding that an error was not harmless, "an appellate court should remand the case for reevaluation . . . ." "[O]n remand," we continued, "the court should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children have been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court's original custody order." *Id*. This course of action does not require vacatur of the trial court order. Indeed, we rejected a rule that would allow an appellate court to order a "peremptory change of custody" precisely because that relief would not "secure custody decisions that are in the best interests of the child." *Id*.

Instead of the majority's confusing order, I would eliminate the guesswork and expressly order a *Fletcher* remand so that a reevaluation could immediately take place while the status quo is maintained. This would provide stability for the children while giving the trial court the flexibility to quickly address what I find to be the most troubling error

[1] The majority fails to provide any justification for its decision to remand this case to a new judge—a decision that I think is unwarranted and unwise at this stage of the proceedings. See, e.g., *Bayati v Bayati*, 264 Mich App 595, 603 (2004) (noting that an appellate court may remand a case to a different judge "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication").

below: the decision to completely suspend defendant's parenting time and to condition future parenting time on the children's wishes. Because time is short and the children's relationship with the mother is presumed to be in their best interests, I would explicitly order the trial court to conduct an expedited hearing on parenting time as a first step in the *Fletcher* reevaluation and to make every effort to encourage the children to develop a healthy relationship with their mother as they enter adulthood. See, e.g., *Ludwig v Ludwig*, 501 Mich 1075, 1075 (2018) (remanding for a hearing on whether reunification was in the children's best interests when the trial court's order "left up to the unfettered discretion of the [children's] therapists the 'frequency, duration, and method' of any additional contact between the defendant and the children") (citation omitted).

For these reasons, I concur in part and dissent in part.

ZAHRA, J. (*dissenting*). I respectfully dissent from the Court's order vacating the family court's February 19, 2019 final order that is based on the family court's November 16, 2017 temporary order awarding appellee full parenting time without first conducting an evidentiary hearing. Instead, I would deny appellant's application in this case.

The rules are plainly stated. Both the Child Custody Act, MCL 722.21 *et seq*., and the court rules expressly permit an ex parte order to be entered without a hearing. MCL 722.27a(12) expressly provides that a "parent may seek an ex parte interim order concerning parenting time." "If the opposing party objects to the ex parte interim order, he or she shall file with the clerk of the court within 14 days after receiving notice of the order a written objection . . . ." MCL 722.27a(13). If there is an objection, "the friend of the court shall attempt to resolve the dispute within 14 days after receiving it." MCL 722.27a(14). Then, "[i]f the opposing party wishes to proceed without assistance of counsel, the friend of the court shall schedule a hearing with the court that shall be held within 21 days after the filing of the motion. If the opposing party files a motion to modify or rescind the ex parte interim order and requests a hearing, the court shall resolve the dispute within 28 days after the hearing is requested." *Id*. The notice provided for an ex parte order clearly states that a written objection must be filed within 14 days.

The applicable court rules largely mirror the above statutes. See MCR 3.207(B)(1) through (5), (6)(a). The relevant statutes and court rules do not require a hearing before a family court suspends a party's parenting time. Together, they only provide for a hearing within 21 days after the objection to any change in parenting time is received.

I acknowledge that MCL 722.27(1)(c) provides that "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." I also acknowledge that *Daly v Ward*, 501 Mich 897, 898 (2017), cautions a family court not to enter an ex parte order "if it also alters the child's established custodial environment without first making the findings required by MCL 722.27(1)(c)." Importantly, though, MCL 722.27(1)(c) provides that "[t]he custodial environment of a child is established if over an *appreciable time* the child

naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." In my view, the above cited statutes and court rules contemplate a scheme in which timely adherence prevents an ex parte or temporary order from accruing the "appreciable time" required to alter the child's custodial environment. In this case, appellant did not seek to appeal the November 16, 2017 temporary order awarding appellee full parenting time until filing an emergency appeal on March 29, 2018. Instead, appellant first requested an adjournment at a November 15, 2017 hearing, and then on January 10, 2018, filed a motion seeking the restoration of her parenting time. At a January 17, 2018 hearing on the motion, the family court acknowledged that appellant had made "a very good argument." The court set a hearing to be held two days later:

> I'm going to set [a] hearing on Friday afternoon. I don't care what you guys have, you're coming in here Friday afternoon and I'm going to have a hearing on parenting time and custody.
>
> . . . I'm clearing my docket . . . and I know there's not going to be twenty-five days of discovery, you're going to put your parties on the stand, you're going to tell me what's going on and I'm going to make a decision.

But on that date, appellant, with appellee's consent, requested an adjournment until mid-March and entered into a stipulated order on January 26, 2018, to try to resolve the dispute in the meantime. An evidentiary hearing began on March 20, 2018. It was only after the evidentiary hearing had begun that appellant filed an emergency appeal on March 29, 2018. At this point, even if the Court of Appeals or this Court were to conclude that the November 16, 2017 order was entered in error, the remedy would have been to vacate the order and remand for an evidentiary hearing that was currently taking place. In sum, I would conclude that appellant's failure to appeal the November 16, 2017 order and her decision to instead request several adjournments of the evidentiary hearing renders her claim presented in this appeal either waived or harmless. I would deny appellant's application.

PEOPLE V DELISLE, No. 162422; Court of Appeals No. 355346. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the defendant's sentence in No. 19-004107-FH and remand this case to the Shiawassee Circuit Court for resentencing. The prosecutor has conceded error in the scoring of Offense Variable 19 and a clerical error in the judgment of sentence, which appears to refer to an incorrect docket number. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Mandamus Granted June 11, 2021:

UNLOCK MICHIGAN V BOARD OF STATE CANVASSERS, No. 162949. On order of the Court, the motion to intervene is granted. The complaint for

mandamus is considered, and mandamus is granted. We direct the Board of State Canvassers (the Board) to certify the Unlock Michigan petition as sufficient. The Board's duty with respect to petitions is "limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012). In reviewing the petition signatures, the Board's role is circumscribed to "canvass[ing] the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). In doing so, the Board may use "[t]he qualified voter file" and "the registration records by the clerk of any political subdivision" in order "to determine the validity of petition signatures by verifying the registration of signers and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures." MCL 168.476(1). The Board's investigatory powers under MCL 168.476(2) relate only to the objects of investigation listed in MCL 168.476(1), i.e., whether "the petitions have been signed by the requisite number of qualified and registered electors." Consequently, "an investigation that goes beyond the four corners of the petition itself (i.e., the validity of the signatures or registration status of the electors) into the circumstances by which the signatures were obtained . . . is clearly beyond the scope of the board's authority set forth under MCL 168.476(1)." *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 519-520 (2005).

In the present case, the Board approved the form and content of the petition in July 2020. The Bureau of Elections analyzed the signatures using a random sampling method and estimated that Unlock Michigan submitted at least 460,000 valid signatures when they only needed about 340,000. The Board rejected, by deadlocked vote, a motion to investigate the collection of signatures. The Board thus has a clear legal duty to certify the petition.

Order of Discipline Entered June 11, 2021:

In re BYRON J KONSCHUH, JUDGE 40TH CIRCUIT COURT, No. 159088. On March 3, 2021, the Court heard oral argument concerning the findings and recommendation of the Judicial Tenure Commission in this matter. This Court has conducted a de novo review of the commission's findings of fact, conclusions of law, and recommendations for discipline against respondent, Byron Konschuh, former 40th Circuit Court judge. We adopt in part the recommendations made by the commission. We reject as moot the commission's recommendation that we remove respondent from office because respondent no longer holds judicial office as of January 1, 2021. We impose a six-year conditional suspension without pay on respondent effective on the date of this decision. Should respondent be elected or appointed to judicial office during that time, respondent "will nevertheless be debarred from exercising the power and prerogatives of the office until at least the expiration of the suspension." *In re Probert*, 411 Mich 210, 237 (1981). Our order of discipline is based on the following misconduct alleged in the amended complaint:

- Respondent pled no contest to a crime in 2016 and later made false statements about whether he had done so (Count I);
- Respondent took several types of funds that belonged to Lapeer County and improperly handled them by depositing them in his and his family's personal bank accounts and by failing to keep any records related to those funds (Counts II-IV), though we decline to formally adopt the JTC's legal conclusion that respondent's actions constituted embezzlement;
- Respondent improperly failed to disclose his relationships with Michael Sharkey, Dave Richardson, and Tim Turkelson when he presided over cases in which those attorneys appeared, or to disqualify himself from those cases (Count VII); and
- Respondent testified falsely that he was unaware of Lapeer County's policy regarding public contracts and that he gave the entire payment for a Heartland money order to an employee of the Lapeer County Prosecutor's Office (part of Count VIII).

We adopt the commission's findings of fact and conclusions of law to the extent they are consistent with this order, as well as the commission's analysis of the appropriate sanction. The cumulative effect and pervasiveness of respondent's misconduct convinces this Court that respondent should not hold judicial office. Therefore, we conditionally suspend him without pay for a period of six years, with the suspension becoming effective only if respondent regains judicial office during that period.

On the basis of respondent's intentional misrepresentations and misleading statements, we find him liable under MCR 9.202(B), in an amount subject to review by this Court, for the costs, fees, and expenses incurred by the commission in prosecuting the complaint. We order the commission to submit an itemized bill of costs.

CAVANAGH, J. (*concurring*). I agree with the majority's factual findings and conclusion of misconduct. Moreover, I recognize that this Court held in *In re Probert*, 411 Mich 210 (1981), that it has the authority to impose a conditional suspension on one who is no longer a judge, and I agree with the majority that assuming the Court has such authority, a six-year conditional suspension without pay is a proportionate sanction for respondent's misconduct.

I write separately to express my doubts regarding *In re Probert*'s conclusion that this Court may discipline a former judge who is no longer serving his or her term in office. For the reasons stated in Justice CLEMENT's concurring statement in *In re Brennan*, I continue to question whether this Court has the authority to both remove and conditionally suspend an *active* judge. See *In re Brennan*, 504 Mich 80, 121-123 (2019) (CLEMENT, J., concurring). In my view, the authority of this Court to conditionally suspend a judge that has already left office is even more questionable. This Court indisputably has the authority to discipline an active judge. See Const 1963, art 6, § 30(2) (providing this Court with the authority to "censure, suspend with or without salary, retire or remove a *judge*" for misconduct in office) (emphasis added). In contrast, this Court indisputably does *not* have the authority under Article 6, § 30(2) to impose any discipline on one who was never a judge. In *In re*

Probert, relying on prior precedent and policy arguments, this Court concluded that it had the authority to discipline a *former* judge. See *In re Probert*, 411 Mich at 223-229.[1] Notably lacking from the Court's opinion was any analysis of whether the "common understanding" of Article 6, § 30(2) when enacted in 1968 included the authority to discipline one who is no longer serving on the bench. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61 (2018). I tend to agree with Justice LEVIN's dissent in *In re Probert* that the prior cases relied upon by the *In re Probert* majority are factually distinguishable and did not actually consider or decide whether Article 6, § 30(2) authorized the imposition of a conditional suspension on a former judge. See *In re Probert*, 411 Mich at 260-262 (LEVIN, J., dissenting). I also agree with Justice LEVIN that the majority's remaining arguments in support of the conclusion that this Court may discipline a former judge were "in the nature of what [Article 6, § 30(2)] should authorize, as a matter of policy and wisdom, rather than what [Article 6, § 30(2)] as adopted by the people does authorize, as a matter of construction of the language used and of the intent of the amendment." *Id*. at 262 (emphasis omitted). Put another way, I believe that the policy arguments raised by the *In re Probert* majority are insufficient standing alone to support the conclusion that this Court has the authority to discipline a former judge if the plain language of Article 6, § 30(2), read in light of the provision's history and structure, cannot reasonably support such an interpretation.[2]

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[1] In dissent, Justice LEVIN raised contrary policy arguments against the Court having the authority to discipline a former judge, arguing that a former judge may be subject to discipline by the Attorney Grievance Commission (AGC) and that, should a former judge ever regain a judicial office, this Court would once again have jurisdiction to discipline the judge. *In re Probert*, 411 Mich at 251-252 (LEVIN, J., dissenting). Building on this point, it is also worth noting that the AGC only has the authority to impose discipline on a former judge "for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court." MCR 9.116(B). Thus, it appears that the AGC lacks the authority under the court rules to discipline a former judge for any conduct that results in a conditional suspension but not removal from office.

[2] Notably, the definitional section of the court rules governing the proceedings of the Judicial Tenure Commission currently defines the term "judge" to include "a person who formerly held [a judicial] office if a request for investigation was filed during the person's term of office." MCR 9.201(B)(3). However, it is beyond dispute that this Court cannot enlarge its constitutional authority through a court rule. Cf. *McDougall v Schanz*, 461 Mich 15, 27 (1999) ("[T]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."). Moreover, the court rules did not define a "judge" to include a

In a future case, I would be open to considering whether *In re Probert* was correctly decided and, if it was not, whether the Court should nonetheless adhere to that decision under the doctrine of stare decisis. See *McCormick v Carrier*, 487 Mich 180, 211 (2010) (explaining that "there is a presumption in favor of upholding precedent, but this presumption may be rebutted if there is a special or compelling justification to overturn precedent. . . . [O]verturning precedent requires more than a mere belief that a case was wrongly decided."). However, respondent does not argue that this Court lacks the authority to discipline him because he is no longer a judge,[3] nor does he argue that this Court lacks the authority to impose a conditional suspension. Accordingly, I concur in this Court's imposition of a six-year conditional suspension without pay.

CLEMENT, J., joins the statement of CAVANAGH, J.

Oral Argument Ordered on the Application for Leave to Appeal June 11, 2021:

DOSTER V COVENANT MEDICAL CENTER, INC, Nos. 162332 and 162333; Court of Appeals Nos. 349560 and 350941. The appellant shall file a supplemental brief addressing whether, when reviewing the record existing at the time the Saginaw Circuit Court ruled on the appellee's motion for summary disposition and when that record is construed in the appellant's favor, the evidence was sufficient to permit a reasonable trier of fact to conclude that age discrimination was a motivating factor in the appellee's hiring decision and that its stated explanation was mere pretext for unlawful discrimination. See generally *Hazle v Ford Motor Co*, 464 Mich 456 (2001). In particular, the appellant should address any inferences arising from evidence that the hiring manager may have focused on job candidates' respective ages, that there were irregularities in the candidate scoring system, and that the appellee's stated rationale for its hiring decision varied from its originally-posted job description. See, e.g., *Krohn v Sedwick James of Mich, Inc*, 244 Mich App 289, 298 (2001) (considering the probative value of "stray remarks"); *George v Youngstown State Univ*, 966 F3d 446, 466 (CA 6, 2020) (recognizing that "evidence suggest[ing] irregularities with the search process . . . can raise a genuine issue of fact as to whether an employer's asserted reason is pretextual"). The appellant's brief shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix

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former judge until 2003, 45 years *after* Michigan's Constitution was amended in 1968 to include Article 6, § 30(2). Thus, this definition is of questionable value in determining whether the common understanding of Article 6, § 30(2) at the time of its enactment provided this Court with the authority to discipline a former judge.

[3] To the contrary, respondent specifically asks this Court to discipline him by imposing a public censure for his misconduct.

page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 11, 2021:

In re FOUST, MINORS, No. 162445; Court of Appeals No. 349545.

WELCH, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal.

It is now well settled that, unlike in child custody matters, Michigan law does not permit a trial court presiding over a termination of parental rights case to conduct an *in camera* interview of a minor for the purpose of determining that minor's best interests. See *In re Ferranti*, 504 Mich 1, 35 (2019) (explaining how there is " 'nothing in the juvenile code, the caselaw, the court rules, or otherwise [that] permits a trial court presiding over a termination of parental rights case to conduct in camera interviews for purposes of determining their best interests' ") (alteration in original), quoting approvingly *In re HRC*, 286 Mich App 444, 454 (2009). In *Ferranti*, we recognized the concern that "*in camera* interviews might unduly influence the trial court's factual findings and termination decision, and because the process provides no opportunity for cross-examination by respondents or their counsel, the practice also prejudices a respondent's ability to impeach the witness and forecloses meaningful review." *Ferranti*, 504 Mich at 32.

The current case highlights these exact concerns. The trial court returned one child to respondent-mother's care but terminated respondent-mother's parental rights to two other children. In supporting this split decision, the trial court focused on the relative advantages of the foster home, the possibility of adoption, and the preferences of the children as discerned from an *in camera* interview.[1] That *in camera* interview was attended by the children's guardian ad litem (who had advocated for termination of parental rights) while respondent-mother was able to view the proceedings by video. The Court of Appeals properly recognized that, under *Ferranti* and *HRC*, the trial court's use of an *in camera* interview violated respondent-mother's due-process rights. It nevertheless held that respondent-mother could not establish that the

[1] An *in camera* interview is one conducted "[i]n the judge's private chambers." *Black's Law Dictionary* (11th ed). The particular interview procedure employed in this case physically occurred in the trial court judge's chambers although it was not entirely "private" because it was transcribed and simultaneously broadcast into the courtroom for the benefit of the parties and, presumably, any public spectators.

due-process violation affected her substantial rights or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings as required for relief under the plain-error standard of review. I disagree because I believe that it is all too likely that the improper interview procedure unduly influenced the trial court's factual findings and termination decision.

Additionally, I believe the trial court's best-interest analysis did not provide enough detail to "provide a reasoned basis for its decision." Cf. *Mich Dep't of Transp v Randolph*, 461 Mich 757, 768 (2000). For a best-interest analysis, it is understood that "[t]he court should consider a wide variety of factors" such as (1) the child's bond to the parent; (2) the parent's parenting ability; (3) the child's need for permanency, stability, and finality; (4) the advantages of a foster home over the parent's home; (5) the parent's history of domestic violence; (6) the parent's compliance with his or her case service plan; (7) the parent's visitation history with the child; (8) the children's well-being in care, (9) the possibility of adoption; and (10) any of the best-interest factors in the child custody context as set forth in MCL 722.23. *In re Medina*, 317 Mich App 219, 237-238 (2016) (quotation marks and citations omitted). MCR 3.977(I)(1), which governs termination proceedings, provides that "[b]rief, definite, and pertinent findings and conclusions on contested matters are sufficient." While there is no expectation that every best-interest factor be analyzed, I find it troublesome in this matter that the trial court failed to address most of the factors, including the existence (or nonexistence) of a parent-child bond. When there is an inadequate basis to facilitate our understanding of the reasoning supporting a particular decision or outcome, we should not hesitate to remand for further proceedings rather than substituting our own views or assumptions. Cf. *People v Adkins*, 436 Mich 878, 878 (1990).

The trial court's limited reasoning is especially problematic in light of its improper reliance on the children's *in camera* interviews. The record reflects that the trial court and the minor children's lawyer-guardian ad litem joined together in a one-sided manner to ask the minor children (who were not placed under oath) questions without any opportunity for cross-examination. Cross-examination is the quintessential example of the procedural safeguards necessary to permit effective, accurate, and reliable fact-finding. Other witnesses' views are not its substitute. Absent the opportunity for a respondent-parent to ask direct follow-up questions to clarify a point or to cross-examine as to stated facts elicited by an opposing attorney's questioning, it is unknown whether the information obtained is worthy of reliance. For that exact reason, a respondent-parent is "afforded the opportunity to present evidence and witnesses at a hearing on the termination of parental rights and to confront and cross-examine evidence and witnesses used against the respondent." See *In re Trejo Minors*, 462 Mich 341, 355 (2000). Although the "primary beneficiary" of the best-interest inquiry is and must always be the child, the fact-finding related to the application of the best-interest test also serves to protect the respondent-parent. See *id*. at 356.

The trial court's analysis was too limited and irreversibly colored by a process that our precedent already recognizes as a violation of respondent-mother's due-process rights. This defect is especially concerning given that the trial court still thought well enough of respondent-mother to conclude that termination of parental rights was not in the best interests of one of the children, thereby splitting these brothers into different homes despite record evidence indicating that they maintained a preference for remaining together. Admittedly, the existence of a transcribed record and the fact that respondent-mother could view the examination simultaneously via video distinguishes this case from *Ferranti* and *HRC*. I do not think, however, that a transcribed record and video feed serve as a cure-all given the one-sided nature of the *in camera* examination. In any event, because *Ferranti* and *HRC* both held that a trial court cannot reasonably be expected to un-ring the bell and set aside any improper influence resulting from the *in camera* interview, I would have relied on the example of those precedents by vacating the trial court's best-interest determination and remanding for additional fact-finding. For these reasons, I respectfully dissent from the denial of leave.

Leave to Appeal Before Decision by the Court of Appeals Denied June 11, 2021:

HATHON V STATE OF MICHIGAN, No. 163003; Court of Appeals No. 356850.

Leave to Appeal Before Decision by the Court of Appeals Granted June 11, 2021:

HATHON V STATE OF MICHIGAN, No. 163020; Court of Appeals No. 356850.

Motion to Docket Application Denied June 11, 2021:

TYRRELL V UNIVERSITY OF MICHIGAN, No. 162707; reported below: 335 Mich App 254. On order of the Court, the motion to docket the application for leave to appeal is denied. See MCR 7.316(B) ("The Court will not accept for filing a motion to file a late application for leave to appeal under MCR 7.305(C)[.]"). Further, because late applications will not be accepted absent circumstances not present in this case, the late application for leave to appeal is dismissed. MCR 7.305(C)(5).

BERNSTEIN, J., did not participate due to a familial relationship.

Reconsideration Denied June 11, 2021:

PEOPLE V MANNING, No. 160034; Court of Appeals No. 345268.

Reconsideration Denied June 16, 2021:

SHEFFIELD V DETROIT CITY CLERK and LEWIS V DETROIT CITY CLERK, Nos. 163084 and 163085; Court of Appeals Nos. 357298 and 357299.

Summary Disposition June 18, 2021:

GRIEVANCE ADMINISTRATOR V LAWRENCE, No. 162155. On order of the Court, the motion to file a response to the amicus curiae brief is granted. The application for leave to appeal is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the Attorney Discipline Board's September 29, 2020 opinion, and reinstate the May 20, 2020 order of suspension and restitution with condition of the Tri-County Hearing Panel #101. "While we are mindful of the careful consideration that has been given to this matter by the Attorney Discipline Board, the power to regulate and discipline members of the bar rests ultimately with this Court pursuant to constitutional mandate." *In re August*, 441 Mich 1207 (1993), citing *Grievance Administrator v August*, 438 Mich 296, 304 (1991), and *In re Schlossberg v State Bar Grievance Board*, 388 Mich 389, 395 (1972); Const 1963, art 6, § 5. In *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the Court directed the Board and hearing panels to follow the ABA Standards for Imposing Lawyer Sanctions when determining the appropriate sanction for lawyer misconduct, *id*. at 238, and directed that "relevant aggravating and mitigating factors" should be considered prior to elevating or lowering a sanction, *id*. at 240. As stated in Standard 1.3, the "Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." Standards 4.11-4.13 (failure to preserve the client's property) are the governing standards in this case. They provide in relevant part:

> *Absent aggravating or mitigating circumstances*, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
>
> 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
>
> 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. [Emphasis added.]

We agree with the conclusion reached in the Report of Tri-County Hearing Panel #101 that "disbarment is too extreme given the particular facts and circumstances of this matter." The Hearing Panel found that respondent did not act with a fraudulent or larcenous intent and it concluded that his misconduct occurred as a result of gross mismanage-

ment and ignorance. The Board rejected this characterization, stating "the concepts at play here are not difficult to grasp. Simply put, the money deposited with a lawyer to secure payment for work is not the lawyer's until the work is done. This is not complicated or obscure." While we agree with the Board that respondent's actions of mishandling and spending his client's refundable advanced fee was a knowing violation of MRPC 1.15(d) and MRPC 1.15(g), the Board erred by applying "a rule of presumptive disbarment," instead of considering the range of reasonable outcomes to select the most appropriate sanction based on the facts and circumstances of the matter at hand.

While disbarment is generally the appropriate sanction for a Standard 4.11 violation, the Board did not adequately consider the presence of mitigating factors under Standard 9.3 or the absence of aggravating factors under Standard 9.2. Our review reflects that the mitigating factors—Standard 9.32(a), (d), (e), and (g)—in this matter clearly preponderate over aggravating factors, none of which were identified by the Hearing Panel or the Board as being applicable or material to their decisions. Under these circumstances, while perhaps reasonable minds could disagree as to whether respondent's conduct is better characterized as a 4.11 violation or a 4.12 violation or whether respondent moved quickly enough to make his client whole, the presence of several mitigating factors makes suspension a more appropriate sanction than disbarment. And while the Board was rightly concerned by the panel's mere 100-day suspension, we note that the respondent has effectively been suspended for over a year and that Hearing Panel's conditions will remain in place.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Leave to Appeal Denied June 18, 2021:

In re KI KILBOURNE, MINOR, No. 162668; Court of Appeals No. 353238.

PEOPLE V TIDMORE, No. 162874; Court of Appeals No. 348771.

Summary Disposition June 23, 2021:

PEOPLE V CASTILLO, No. 161342; Court of Appeals No. 351195. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE V DOUGLAS BROOKS, No. 161815; Court of Appeals No. 346615. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals opinion affirming the defendant's sentence, we vacate the sentence of the Shiawassee Circuit Court, and we remand this case to the trial court for resentencing. As explained by concurring and dissenting Judge GLEICHER, the reasons given for the departure did not adequately account for the extent of the significant departure (25 years beyond the mandatory minimum). In all other respects, leave to appeal is denied, because we are not persuaded that

the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V PENNELL, No. 162139; Court of Appeals No. 353434. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Grand Traverse Circuit Court, and we remand this case to that court for resentencing. Offense Variable 9 (OV 9) must be scored solely on the basis of conduct occurring during the sentencing offense. *People v McGraw*, 484 Mich 120, 122 (2009). The prosecuting attorney offered no evidence that the sentencing offense placed 4 to 19 victims in danger of property loss. See MCL 777.39(1)(c). Instead, the circuit court erroneously counted the victims of uncharged or dismissed offenses to assign 10 points to OV 9, altering the guidelines range.

The defendant has demonstrated both good cause for his failure to pursue a direct appeal and actual prejudice, entitling him to relief under MCR 6.508(D). The defendant submitted a timely request for the appointment of appellate counsel on the date of sentencing, but he neglected to complete the attached financial schedule. Under the version of MCR 6.425(G)(1)(a) in place at the time, the circuit court was required to rule on the defendant's request within 14 days of its submission. Yet the record contains no indication that the circuit court notified the defendant that his request was defective or that it would not be granted. By the time the unrepresented defendant submitted a second request for the appointment of appellate counsel, the deadline for pursuing an appeal by leave had expired. See MCR 7.205(A)(2)(a). Given the circumstances, we conclude that the defendant has satisfied the good cause requirement of MCR 6.508(D)(3)(a). He has also demonstrated actual prejudice by showing that "the sentence is invalid." MCR 6.508(D)(3)(b)(*iv*). "A sentence is invalid when a sentencing court relies on an inappropriate guidelines range." *McGraw*, 484 Mich at 131, citing *People v Kimble*, 470 Mich 305, 310 (2004). Accordingly, the defendant is entitled to relief from judgment and resentencing based on the error in the scoring of OV 9. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

Leave to Appeal Granted June 23, 2021:

PEOPLE V POOLE, No. 161529; Court of Appeals No. 352569. The defendant shall file a supplemental brief within 56 days of the date of the order appointing counsel or by October 25, 2021, whichever is later, with no extensions except upon a showing of good cause. The brief shall address: (1) whether the defendant's successive motion for relief from judgment is "based on a retroactive change in the law," MCR 6.502(G)(2), where the law relied upon does not automatically entitle him to relief; and (2) if so, whether the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016) should be applied to defendants who are over 17 years old at the time they commit a crime and who are convicted of murder and sentenced to mandatory life without parole, under the

Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both. The time for filing the remaining briefs shall be as set forth in MCR 7.312(E). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

ZAHRA, J.,would deny for the reasons stated in *People v Manning*, 506 Mich 1033 (2020) (MARKMAN, J., concurring).

Oral Argument Ordered on the Application for Leave to Appeal June 23, 2021:

SHEFFIELD V DETROIT CITY CLERK AND LEWIS V DETROIT CITY CLERK, Nos. 163084 and 163085; Court of Appeals Nos. 357298 and 357299.

Leave to Appeal Denied June 23, 2021:

PEOPLE V SANDOVAL, No. 162237; Court of Appeals No. 354230.

ROCHESTER ENDOSCOPY AND SURGERY CENTER, LLC V DESROSIERS ARCHITECTS, PC, No. 162315; Court of Appeals No. 349952.

PEOPLE V KOEHLER, No. 162328; Court of Appeals No. 354232.

PEOPLE V KORKIGIAN, No. 162390; reported below: 334 Mich App 481.

ZACKS V ZACKS, No. 162414; Court of Appeals No. 342274.
ZAHRA, J., would grant leave to appeal.

SOUTHFIELD METRO CENTER HOLDINGS, LLC V SKYMARK PROPERTIES II, LLC, No. 162717; Court of Appeals No. 350707.

In re C MICHALIK, MINOR, No. 162881; Court of Appeals No. 354399.

Oral Argument Ordered on the Application for Leave to Appeal June 25, 2021:

PEOPLE V MESHKIN, No. 161324; Court of Appeals No. 348831. The appellant shall file a supplemental brief addressing: (1) whether the defendant was denied his constitutional right to present a defense by the exclusion of expert testimony that the complainant suffered from Reactive Attachment Disorder (RAD); and (2) whether the defendant was denied a fair trial by the prosecutor's cross-examination of Albert Meshkin insinuating that the defendant had sexually assaulted his sister or sister-in-law, see *People v Whitfield*, 425 Mich 116, 128-134 (1986), and *People v Dorrikas*, 354 Mich 303 (1958). The appellant's brief shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

WEST v DEPARTMENT OF NATURAL RESOURCES and GOSS v DEPARTMENT OF NATURAL RESOURCES, Nos. 161948 and 161952; reported below: 333 Mich App 186. The Department of Natural Resources (DNR) shall file a supplemental brief addressing whether snowmobiles and John Deere Gator crossover utility vehicles are motor vehicles for purposes of MCL 691.1405, the motor vehicle exception to governmental immunity. The DNR's brief shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the DNR's brief. Replies, if any, must be filed by the DNR within 14 days of being served with the latter of the appellees' briefs. The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the DNR and 20 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(2).

Persons or groups interested in the determination of the issues presented in these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed only in *West v DNR*, Docket No. 161948, and served on the parties in both cases.

In re GUARDIANSHIP OF VERSALLE, MINORS, Nos. 162434 and 162435; reported below: 334 Mich App 173. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether MCL 700.5204(2)(b) is unconstitutional because it does not allow for a presumption that a fit parent's decision is in the best interest of the child, see *Troxel v Granville*, 530 US 57 (2000); and (2) whether the Muskegon Probate Court erred by granting the petitioner guardianship in this case. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Family Law Section and the Children's Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 25, 2021:

PEOPLE v GABRIEL, No. 162600; Court of Appeals No. 351570.

BERNSTEIN, J. (*concurring*). I concur with the majority's decision to deny leave in this case because nothing in the Court of Appeals opinion seems to suggest that the Muskegon County Prosecutor's Office may not take actions such as adding conflict walls or assigning the case to a new assistant prosecuting attorney to protect against any potential conflicts that may arise throughout the prosecution of this case if the Muskegon County Prosecutor finds validity in defendant's concerns.

Summary Disposition June 30, 2021:

MOORE V SHAFER, No. 161098; Court of Appeals No. 345101. On April 8, 2021, the Court heard oral argument on the application for leave to appeal the January 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Macomb Circuit Court's June 6, 2018 order granting the Shafer defendants' motion for summary disposition. Even assuming that knowledge of a lack of safety features can create an unreasonably dangerous condition, for the reasons explained in Judge SAWYER's opinion dissenting in part, the Court of Appeals majority relied on nothing but speculation regarding the Shafer defendants' knowledge of Lawrence Gill's failure to provide fall-protection equipment. The majority therefore erred by finding a genuine issue of material fact for the jury to resolve.

MCCORMACK, C.J. (*concurring*). I agree with the Court's order reversing the judgment of the Court of Appeals for the reasons stated in the partial dissent and write separately to offer additional reasons why the plaintiff's premises-liability claim must be dismissed. In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 19 (2002), we held that the Court of Appeals had confused general-contractor liability with the liability of the premises possessor and noted that "[t]he fact that defendant may have additional duties in its role as general contractor, however, does not alter the nature of the duties owed by virtue of its ownership of the premises."[1] The Court of Appeals made the same error in this case by confusing the duties of a contractor with the duties of a premises possessor. It then improperly relied on the lack of safety equipment and precautions as a basis for sustaining a premises-liability

[1] Although *Perkoviq* implied that a premises possessor could be held liable in a premises-liability case if he or she had a reason to believe the contractor wasn't taking fall-safety precautions, I am not certain that it was correct to do so, and I would reconsider the issue in an appropriate case. See, e.g., *Perkoviq*, 466 Mich at 18 ("In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site.").

claim despite the fact that the hazard itself—the roof—was open and obvious and lacked any special aspects rendering it unreasonably dangerous.

Moreover, the complaint does not allege that the roof alone constituted a dangerous condition on the property or that the absence of safety measures rendered the roof more dangerous. Thus, the plaintiff's allegation is not that Joseph Velez was injured due to a dangerous condition on the land (the roof); it is that the Shafer defendants' omission in not ensuring that fall-protection measures were provided caused the injury.

The plaintiff therefore seeks to hold the property owners liable on the basis that they knew that fall-protection measures were not being provided and didn't do anything about it. But that doesn't make anything about the fall hazard any less open and obvious—and an unguarded flat roof approximately 20 feet off the ground (with or without fall-protection measures) does not contain any "special aspects" making it unreasonably dangerous. The plaintiff also pled general-contractor liability under the common work area doctrine, but the lower courts dismissed that count, and the plaintiff did not cross-appeal that dismissal in this Court.

Because the Court of Appeals erred by concluding that the Shafer defendants' knowledge of the lack of safety precautions could be the basis of a premises-liability claim, I concur in the Court's order. See *Estate of Velez v Shafer*, unpublished per curiam opinion of the Court of Appeals, issued January 30, 2020 (Docket No. 345101), p 4 n 3, citing *Perkoviq*, 466 Mich at 18-19.

VIVIANO, J., joins the statement of MCCORMACK, C.J.

CARSON V BANDIT INDUSTRIES, INC, No. 162449; Court of Appeals No. 350257. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the December 17, 2020 judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration as on leave granted of those issues that the Court of Appeals previously declined to review. See *Carson v Bandit Industries, Inc*, unpublished order of the Court of Appeals, issued January 2, 2020 (Docket No. 350257). As consideration of the appellant's other issues may impact the Court of Appeals' decision on the issue of recoupment, the Court of Appeals should also reconsider the recoupment issue and address the arguments presented by the parties in this Court with respect to that issue. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court.

Oral Argument Ordered on the Application for Leave to Appeal June 30, 2021:

PEOPLE V FONTENOT, No. 162211; reported below: 333 Mich App 528. The appellant shall file a supplemental brief addressing: (1) whether the administrative logs documenting the routine inspection of the DataMaster machine used to determine the appellant's alcohol level, see Mich

Admin Code R 325.2653(3), are testimonial and thus inadmissible under the Confrontation Clauses, US Const, Am VI; Const 1963, art 1, § 20; see *Crawford v Washington*, 541 US 36 (2004); *Melendez-Diaz v Massachusetts*, 557 US 305 (2009); *Bullcoming v New Mexico*, 564 US 647 (2011); *Williams v Illinois*, 567 US 50 (2012); and *People v Nunley*, 491 Mich 686 (2012); and (2) whether the logs are admissible pursuant to MRE 803(6), the business-records exception to the hearsay rule. The appellant's brief shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The motion to remand remains pending.

The National College of DUI Defense, the Criminal Defense Attorneys of Michigan, the Michigan Association of OWI Attorneys and the Michigan Medical Marihuana Association are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

SCHAUMANN-BELTRAN V GEMMETE and SCHAUMANN-BELTRAN V UNIVERSITY OF MICHIGAN REGENTS, Nos. 162507 and 162508; reported below: 335 Mich App 41. The appellant shall file a supplemental brief addressing whether the Court of Appeals correctly held that the trial court was not authorized, under MCR 2.311(A), to permit video recording of the neuropsychological examination. The appellant's brief shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

BERNSTEIN, J., did not participate due to a familial relationship.

LEWIS V LEXAMAR CORP, No. 162692; Court of Appeals No. 350247. The appellant shall file a supplemental brief addressing whether the appellant's injuries arose out of and in the course of his employment with appellee LexaMar Corp. such that LexaMar Corp. is required to pay compensation under MCL 418.301(1). See *Smith v Chrysler Group, LLC*, 331 Mich App 492, 497-498 (2020); Larson, Workers' Compensation Law § 27.03(1)(c)(2019). The appellant's brief shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellant and 20 minutes for the appellees. MCR 7.314(B)(2).

Leave to Appeal Denied June 30, 2021:

PEOPLE V DANIELS, No. 161528; Court of Appeals No. 343919.

NAYYAR V OAKWOOD HEALTHCARE, INC, No. 161642; Court of Appeals No. 343676.

SPECTRUM HEALTH HOSPITALS V FARM BUREAU INSURANCE COMPANY OF MICHIGAN, No. 162129; reported below: 333 Mich App 457.

PEOPLE V HAWK, No. 162148; Court of Appeals No. 352574.

PEOPLE V DENNIS, No. 162169; Court of Appeals No. 353987.

Application for Leave to Appeal Dismissed on Stipulation June 30, 2021:

KELLEY V GENERAL MOTORS, LLC, No. 162700; reported below: 335 Mich App 349.

Leave to Appeal Granted July 2, 2021:

ROUCH WORLD, LLC V DEPARTMENT OF CIVIL RIGHTS, No. 162482; Court of Appeals No. 355868. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is granted, limited to the issue whether the prohibition on discrimination "because of . . . sex" in the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., applies to discrimination based on sexual orientation. The appellants' brief and appendix shall be filed by October 25, 2021, with no extensions except upon a showing of good cause. The time for filing the remaining briefs shall be as set forth in MCR 7.312(E). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The American Civil Liberties Union of Michigan, the American Civil Liberties Union, Affirmations LGBTQ+ Community Center, Equality Michigan, Freedom for All Americans, Human Rights Campaign, LGBT Detroit, National Center for Lesbian Rights, OutCenter of Southwest Michigan, OutFront Kalamazoo, Ruth Ellis Center, Southern Poverty Law Center, Stand With Trans, and Trans Sistas of Color Project are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

CLEMENT, J. (*dissenting*). One year ago, we denied a bypass application in which a branch of state government argued that a dispute over its institutional prerogatives was a vehicle by which the civil rights of all Michigan residents could indirectly be litigated. In light of the Governor's executive orders under 1945 PA 302 responding to the COVID-19

pandemic, the Legislature challenged the constitutionality of 1945 PA 302 as an unconstitutional delegation of legislative authority to the executive. When we denied the Legislature's bypass application seeking to expedite appellate review of the question, I noted that "the Legislature is not litigating the civil liberties of all Michiganders." *House of Representatives v Governor*, 505 Mich 1142, 1143 (2020) (CLEMENT, J., concurring). This was in the face of the fact that the case raised compelling questions that *implicated* the civil liberties of all Michiganders—just as this one does. We should deny this bypass application just like we denied that one.

First, I consider the question of whether we *can* take this case. As I noted a year ago, "whether [our] rules have been satisfied is seemingly of its own jurisdictional and constitutional significance." *Id*. Our rules require that, to grant a bypass application, the appellant "must show" either that "delay in final adjudication is likely to cause substantial harm" or that "the appeal is from a ruling that . . . any . . . action of the . . . executive branch[] of state government is invalid[.]" MCR 7.305(B)(4)(a) and (b). I do not believe the Department of Civil Rights can satisfy either requirement, which should preclude us from granting this bypass application.

The question under MCR 7.305(B)(4)(a) is whether the department can show that "delay in final adjudication is likely to cause substantial harm." Last year's reasoning makes clear that the department cannot satisfy this requirement. The department argues that "[d]elaying final adjudication would work 'substantial harm,' as many Michigan citizens will be unprotected by the law" and "others will be left in a state of uncertainty as to how to apply the challenged provision of the [Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.]." This is strikingly similar to the Legislature's argument a year ago that " 'Michiganders . . . are living under a cloud of ambiguity' given the debate over whether the Governor's executive orders responding to the COVID-19 pandemic are actually legal." Then, I rejected that argument because that case was "not a class action filed on behalf of all Michiganders to litigate their civil liberties—it [was] a suit filed by the Legislature asserting that certain of its institutional prerogatives ha[d] been infringed by the Governor's actions." *House of Representatives*, 505 Mich at 1143. The same point holds now. The instant case is, as a matter of form, a dispute about what institutional prerogatives the Department of Civil Rights enjoys under the Civil Rights Act—what sorts of actions qualify as discrimination it is empowered to investigate. A year ago, I said that "[t]he Legislature show[ed] no substantial harm *to the Legislature* caused by going through the ordinary appellate process" because "[a]s an institution, it [was] exactly as free to enact legislation . . . as it was before any of the Governor's executive orders were entered." *Id*. The same can be said of the department—it cannot show substantial harm *to the department* caused by going through the ordinary appellate process, and as an institution, it is exactly as free to exercise the established authority it possesses under the Civil Rights Act.

The question under MCR 7.305(B)(4)(b) is whether "the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan

statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid." It is indisputable that last year's reasoning under MCR 7.305(B)(4)(b) is not applicable, because the procedural posture of the cases is different, but it remains the case that the department cannot satisfy the rule's text—and, indeed, the department makes essentially no argument that it can satisfy this standard. The Court of Claims enjoined the department from investigating an allegation of discrimination on the basis of sexual orientation because it held that the Civil Rights Act did not prohibit discrimination on this basis. The investigation the department was enjoined from performing was certainly not "a provision of the Michigan Constitution, a Michigan statute, [or] a rule or regulation included in the Michigan Administrative Code," so to come within the terms of MCR 7.305(B)(4)(b), it must fall within the catchall of being "any other action of the . . . executive branch[] of state government." We have held that the *ejusdem generis* canon of interpretation guides how catchall provisions of this sort are construed. It provides that when "general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *People v Smith*, 393 Mich 432, 436 (1975). Or, in somewhat crisper prose:

> The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, horses, cattle, and other animals*. Does the phrase *and other animals* refer to wild animals as well as domesticated ones? What about a horsefly? What about protozoa? Are we to read *other animals* here as meaning *other similar animals*? The principle of *ejusdem generis* essentially says just that: It implies the addition of *similar* after the word *other*. [Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 199.]

In other words, when the rule refers to "any other action of the . . . executive branch[] of state government," it is not permitted to argue that " 'any' means 'any.' " Rather, *ejusdem generis* implies an unstated insertion of "similar" after "other"—"any other *similar* action of the . . . executive branch[] of state government."

Here, the specific examples—"a provision of the Michigan Constitution, a Michigan statute, [or] a rule or regulation included in the Michigan Administrative Code"—are all legislative or quasi-legislative actions. The investigation at issue is not at all legislative; it is an *enforcement* proceeding, comparable to an administrative safety inspection or licensing review. This is further emphasized by the rule's requirement that the appeal be from a ruling that an "action of the . . . executive branch[]" is "invalid." "Invalid" is defined as "[n]ot legally or factually valid; null: *an invalid license*," and "valid" is defined as "[h]aving legal force; effective or binding: *a valid title*." *The American Heritage Dictionary of the English Language* (5th ed). An investigation

cannot be meaningfully described as "null," "[h]aving legal force," "effective," or "binding"; it is an inquiry that has no validity or invalidity as such. Of course, the catchall must refer to something, and it is clearly applicable to examples such as executive reorganization orders entered under Const 1963, art 5, § 2, or executive orders authorized by statute. But I maintain that it does not apply to the investigation at issue.

Second, even if the rule were satisfied, I do not think it would be prudent for this Court to grant this bypass application. As I said a year ago, "[f]urther appellate review and development of the arguments will only assist this Court in reaching the best possible answers." *House of Representatives*, 505 Mich at 1146. Given that "this case presents extremely significant legal issues that affect the lives of everyone living in Michigan today," I believe we should deny the bypass application, "*because* I believe that a case this important deserves full and thorough appellate consideration." *Id*. at 1142 (BERNSTEIN, J., concurring). "Cases of the ultimate magnitude . . . necessitate the complete and comprehensive consideration that our judicial process avails." *Id*. "Because I believe the Court neither can nor should review this case before the Court of Appeals does," *id*. at 1143 (CLEMENT, J., concurring), I dissent from the Court's order granting this bypass application.

ZAHRA and VIVIANO, JJ., would deny the application for leave prior to decision by the Court of Appeals.

Leave to Appeal Denied July 2, 2021:

PEOPLE V HALL, No. 161955; Court of Appeals No. 353450.

ZAHRA and CLEMENT, JJ., would deny leave to appeal under MCR 6.502(G).

PEOPLE V KUIECK, No. 162023; Court of Appeals No. 348246.

CAVANAGH, J. (*concurring*). I concur in the order denying leave to appeal but write separately to address the application of MCL 333.7413. The sentencing court exercised its discretion under MCL 333.7413 to double defendant's sentence. As discussed by Judge SHAPIRO in a partial dissent, the sentencing court gave scant justification for the decision. *People v Kuieck*, unpublished per curiam opinion of the Court of Appeals, issued September 3, 2020 (Docket No. 348246) (SHAPIRO, J., concurring in part and dissenting in part). Judge SHAPIRO opined that the rationale of *People v Norfleet*, 317 Mich App 649 (2016)—that a sentencing court's decision to impose a discretionary consecutive sentence must be articulated on the record to facilitate appellate review—also applies in the context of MCL 333.7412 and that defendant was entitled to resentencing. While the point may have merit, given that defendant has not raised this issue before this Court, I concur with the order denying leave to appeal.

In *Norfleet*, the Court of Appeals highlighted the principle that sentences " 'imposed by the trial court . . . [should] be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Id*. at 662-663, quoting *People v Milbourn*, 435 Mich 630, 636 (1990). To ensure compliance with the principle of proportionality,

"discretionary sentencing decisions are subject to review by the appellate courts to ensure that the exercise of that discretion has not been abused." *Norfleet*, 317 Mich App at 663, citing *Milbourn*, 435 Mich at 662, 664-665. *Norfleet* reasoned that for an appellate court to effectively review a sentencing decision, the trial court must "set forth the reasons underlying its decision." *Norfleet*, 317 Mich App at 664.

Because defendant had a previous controlled-substance conviction, she was subject to MCL 333.7413, which "authorizes the trial court to double both the minimum and maximum sentences . . . ." *People v Lowe*, 484 Mich 718, 731-732 (2009). The statute states that "an individual convicted of a second or subsequent [drug-related] offense under this article *may* be imprisoned for a term not more than twice the term otherwise authorized . . . ." MCL 333.7413(1) (emphasis added). Therefore, a defendant's prior drug-related conviction allows, but does not require, a trial judge to double a sentence, leaving the decision to the sentencing judge's discretion. As with discretionary consecutive sentences, the principle of proportionality suggests that this sentencing decision should be reviewed for an abuse of discretion. *Norfleet*, 317 Mich App at 663. If that were so, continuing the logic of *Norfleet*, the sentencing court would be required to set out the reasons for its decision to impose a double sentence. *Id*. at 664. The trial court would need to go beyond simply stating that a defendant has a prior drug-related conviction. Prior drug-related convictions vest the sentencing court with the discretion to impose a double sentence, but the rationale for doing so would need to be specific to the "seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. However, defendant has not raised this issue in this Court. Accordingly, I concur in this Court's order denying leave to appeal.

WELCH, J., joins the statement of CAVANAGH, J.

In re JM COATES, MINOR, No. 163022; Court of Appeals No. 353857.

Summary Disposition July 6, 2021:

PEOPLE V FURMAN, No. 162586; Court of Appeals No. 355416. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction.

Leave to Appeal Denied July 6, 2021:

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC V CITY OF WESTLAND, No. 159262; Court of Appeals No. 339143.

BOHN V CITY OF TAYLOR, No. 159271; Court of Appeals No. 339306.

PEOPLE V STEPHAN WILSON, No. 161371; Court of Appeals No. 351896.

PEOPLE V HUGHES, No. 161482; Court of Appeals No. 351898.

PEOPLE V LIGGINS, No. 161544; Court of Appeals No. 353104.

HERNANSAIZ V BISBIKIS, No. 162048; Court of Appeals No. 348729.

PEOPLE V CRAIG, No. 162096; Court of Appeals No. 344840.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

MELVINDALE COMMUNITY INVESTMENT COALITION V MELVINDALE CITY CLERK, No. 162154; Court of Appeals No. 354751.

PEOPLE V CALVIN WARE, No. 162156; Court of Appeals No. 353616.

DUMIRE V EVENER, No. 162273; Court of Appeals No. 350270.

PEOPLE V LEWIS, No. 162306; Court of Appeals No. 348634.

BLACK V BOGNAR, No. 162314; Court of Appeals No. 350701.

PEOPLE V GRESHAM, No. 162343; Court of Appeals No. 354148.

PEOPLE V BRYAN THOMPSON, No. 162344; Court of Appeals No. 349026.

SHAH V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 162345; Court of Appeals No. 351156.

DE FILIPPIS V DEPARTMENT OF CIVIL RIGHTS, No. 162358; Court of Appeals No. 350894.

PEOPLE V SIMPSON, No. 162359; Court of Appeals No. 348293.

EXECUTIVE AMBULATORY SURGICAL CENTER V MEEMIC INSURANCE COMPANY, No. 162371; Court of Appeals No. 354473.

PEOPLE V KEVEZ WATERS, No. 162384; Court of Appeals No. 350290.

GREEN V ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, No. 162391; Court of Appeals No. 349235.

PEOPLE V LOZANO, No. 162393; Court of Appeals No. 355002.

PEOPLE V MCBEE, No. 162430; Court of Appeals No. 354904.

PEOPLE V ANTHONY BROWN, No. 162450; Court of Appeals No. 348677.

PEOPLE V BARTEE, No. 162454; Court of Appeals No. 354748.

PEOPLE V LOCKMILLER, No. 162465; Court of Appeals No. 348184.

EL-ACHKAR V SENTINEL INSURANCE COMPANY, LTD, No. 162468; Court of Appeals No. 348380.

PEOPLE V DEANDRE JOHNSON, No. 162476; Court of Appeals No. 348382.

PEOPLE V SCALES, No. 162490; Court of Appeals No. 349735.

PEOPLE V MCCONNELL, No. 162496; Court of Appeals No. 344498.

WELLS FARGO VENDOR FINANCIAL SERVICES, LLC V THE WORD NETWORK OPERATING COMPANY, INC, No. 162498; Court of Appeals No. 348998.

PEOPLE V JONATHAN THOMAS, No. 162524; Court of Appeals No. 355069.

PEOPLE V DILLARD, No. 162525; Court of Appeals No. 354566.

PEOPLE V DEANDRE BARNES, No. 162529; Court of Appeals No. 349652.

In re RUNYON ESTATE, No. 162539; Court of Appeals No. 350595.

PEOPLE V TAJUAN WILLIAMS, No. 162543; Court of Appeals No. 354632.

AKOURI V COMERICA BANK, No. 162551; Court of Appeals No. 349923.

PEOPLE V SPANN, No. 162554; Court of Appeals No. 355765.

PEOPLE V CORY WATSON, No. 162557; Court of Appeals No. 349242.

SETTLER V AUTO-OWNERS INSURANCE COMPANY, No. 162561; Court of Appeals No. 350925.

SCHAIBLE V ROBINSON, No. 162563; Court of Appeals No. 349645.

PEOPLE V MERCER GRAHAM, No. 162576; Court of Appeals No. 354601.

PEOPLE V DEIRBRA COLLIER, No. 162587; Court of Appeals No. 354589.

PEOPLE V MICHAEL DAVIS, No. 162588; Court of Appeals No. 349549.

PEOPLE V GONZALEZ-BARCENA, No. 162599; Court of Appeals No. 348429.

In re SYED, No. 162640; Court of Appeals No. 349533.

YOUMANS V CHARTER TOWNSHIP OF BLOOMFIELD, No. 162643; reported below: 336 Mich App 161.

PEOPLE V MCINTYRE, No. 162644; Court of Appeals No. 349130.

PEOPLE V BEAIRL, No. 162650; Court of Appeals No. 355285.

PEOPLE V JAKEWAY, No. 162653; Court of Appeals No. 350285.

JORDAN V KISSEL, No. 162659; Court of Appeals No. 355492.

HILL V CITY OF DETROIT, No. 162660; Court of Appeals No. 348798.

PRITCHARD V EVEREST NATIONAL INSURANCE COMPANY, No. 162661; Court of Appeals No. 350776.

JOHNSON V EVEREST NATIONAL INSURANCE COMPANY, No. 162663; Court of Appeals No. 350776.

PEOPLE V PAUL SMITH, No. 162666; Court of Appeals No. 347604.

PEOPLE V ARNOLD, No. 162670; Court of Appeals No. 351190.

PEOPLE V TEETS, No. 162673; Court of Appeals No. 355273.

PEOPLE V MAURICE JACKSON, No. 162677; Court of Appeals No. 349960.

PEOPLE V PALMER, No. 162679; Court of Appeals No. 345456.

HARGROW v MTGLQ INVESTORS, LP, No. 162682; Court of Appeals No. 350796.

MTGLQ INVESTORS, LP v HARGROW, No. 162687; Court of Appeals No. 350797.

PEOPLE v MATLOCK, No. 162689; Court of Appeals No. 351862.

PEOPLE v MITCHELL, No. 162693; Court of Appeals No. 355466.

HAYES v HAFRON, No. 162698; Court of Appeals No. 355054.

PEOPLE v SCHOENING, No. 162716; Court of Appeals No. 355566.

PEOPLE v YARBER, No. 162719; Court of Appeals No. 349467.

JENSEN v HADDEN, No. 162721; Court of Appeals No. 351591.

PEOPLE v JOSHUA LAWSON, No. 162725; Court of Appeals No. 355890.

PEOPLE v ROLLO, No. 162729; Court of Appeals No. 355686.

PEOPLE v GIOVONTAE JACKSON, No. 162735; Court of Appeals No. 350522.

PEOPLE v DELAROSA, No. 162736; Court of Appeals No. 351883.

PEOPLE v GREENLEE, No. 162750; Court of Appeals No. 355645.

BUSH v TAYLOR CHEVY, INC, No. 162751; Court of Appeals No. 355591.

MILANOV v UNIVERSITY OF MICHIGAN, No. 162752; Court of Appeals No. 354768.
BERNSTEIN, J., did not participate due to a familial relationship.

PEOPLE v RANDY JACKSON, No. 162760; Court of Appeals No. 350349.

PEOPLE v LOWE, No. 162762; Court of Appeals No. 352393.

PEOPLE v PEEK, No. 162771; Court of Appeals No. 354167.

LONSWAY v YALE UNIVERSITY, No. 162776; Court of Appeals No. 350759.

LONSWAY v YALE UNIVERSITY and LONSWAY v UNIVERSITY OF MICHIGAN REGENTS, Nos. 162778 and 162779; Court of Appeals Nos. 350759 and 350775.
BERNSTEIN, J., did not participate due to a familial relationship.

KIRCHER v BOYNE USA, INC, No. 162780; Court of Appeals No. 350975.

PEOPLE v HIRSCH, No. 162786; Court of Appeals No. 355520.

PEOPLE v COLEMAN, No. 162799; Court of Appeals No. 349544.

In re LOUIS G BASSO, JR REVOCABLE TRUST, No. 162801; Court of Appeals No. 355665.

PEOPLE v DUANE PETERSON, No. 162805; Court of Appeals No. 348923.

PEOPLE v BARNARD, No. 162807; Court of Appeals No. 355637.

PEOPLE v LITTLEJOHN, No. 162813; Court of Appeals No. 355040.

PEOPLE v MCKAY, No. 162814; Court of Appeals No. 350616.

PEOPLE v MORGAN, No. 162816; Court of Appeals No. 350619.

HAMILTON AVENUE PROPERTY HOLDINGS, LLC v RESNICK LAW, PC, No. 162828; Court of Appeals No. 355796.

PEOPLE v THELONIOUS SEARCY, No. 162829; Court of Appeals No. 349169.

PEOPLE v CRUZ-HERNANDEZ, No. 162834; Court of Appeals No. 355720.

PEOPLE v PHILLIP JONES, No. 162836; Court of Appeals No. 355343.

DJUROVIC v MEIJER, INC, No. 162839; Court of Appeals No. 351743.

PEOPLE v SAVAGE, No. 162840; Court of Appeals No. 355392.

PEOPLE v BOTLEY, No. 162850; Court of Appeals No. 354917.

PEOPLE v RICE-WHITE, No. 162890; Court of Appeals No. 350250.

PEOPLE v DAVONTE MARTIN, No. 162896; Court of Appeals No. 350499.

PEOPLE v LOYD, No. 162923; Court of Appeals No. 356110.

Application for Leave to Appeal Dismissed July 6, 2021:

PEOPLE v HURST, No. 162950; Court of Appeals No. 355734. On order of the Court, the motion to accept the application for leave to appeal is denied. See MCR 7.316(B) ("The Court will not accept for filing a motion to file a late application for leave to appeal under MCR 7.305(C)[.]"). Further, because late applications will not be accepted absent circumstances not present in this case, the defendant's late application for leave to appeal is dismissed. MCR 7.305(C)(5).

Reconsideration Denied July 6, 2021:

PEOPLE v MARK THOMPSON, No. 161461; Court of Appeals No. 352941.

In re APPLICATION OF DTE ELECTRIC COMPANY TO INCREASE RATES, Nos. 161932 and 161933; Court of Appeals Nos. 344811 and 344821.

HOLLAND v SPRINGER, No. 162011; Court of Appeals No. 347562.
BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v ADAM BALCER, No. 162107; Court of Appeals No. 348132.

VANDUINEN v COUNTY OF ALPENA, No. 162113; Court of Appeals No. 349618.

PEOPLE v KEVIN WARE, No. 162242; Court of Appeals No. 348310.

PEOPLE v RAY JACKSON, No. 162277; Court of Appeals No. 348678.

PEOPLE v JEFFREY ALLISON, No. 162279; Court of Appeals No. 354191.

PEOPLE v MAURICE MORROW, No. 162292; Court of Appeals No. 354160.

WHITE v MICHIGAN STATE UNIVERSITY, No. 162298; Court of Appeals No. 349812.

PEOPLE v DEANGLO JONES, No. 162480; Court of Appeals No. 354328.

PEOPLE v MICHAEL TERPENING, No. 162486; Court of Appeals No. 354591.

PEOPLE v CHARLES GARNER, No. 162495; Court of Appeals No. 354368.

JPMORGAN CHASE BANK, NA v ERWIN PROPERTIES, LLC, No. 162560; Court of Appeals No. 351512.

Summary Disposition July 9, 2021:

PEOPLE v STOCK, No. 160968; Court of Appeals No. 340541. On May 5, 2021, the Court heard oral argument on the application for leave to appeal the December 26, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals holding that the defendant's convictions for operating a motor vehicle while intoxicated causing death and operating a motor vehicle while intoxicated causing a serious impairment of a body function were supported by sufficient evidence on the record. The prosecution failed to present evidence that the presence of cocaine metabolites in the defendant's urine supports a reasonable inference that the defendant had cocaine in her body. MCL 257.625(8) states, in relevant part:

> A person, whether licensed or not, shall not operate a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles . . . if the person has in [their] body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214.

As noted by dissenting Judge SHAPIRO, the prosecution bears the burden of proof with regard to each element of an offense, including whether a controlled substance was in a defendant's body. In *People v Feezel*, 486 Mich 184 (2010), this Court held that 11-carboxy-THC, a metabolite of the main psychoactive chemical in marijuana, is not a Schedule 1 controlled substance for purposes of MCL 257.625(8). Therefore a person cannot be prosecuted under the statute for operating a motor vehicle with "any amount" of the metabolite in their system. In this case, the

prosecution presented evidence—the results of a toxicology screen—indicating the presence of an unidentified metabolite of cocaine in the defendant's urine. While the prosecution contends that *Feezel* can be distinguished, the prosecution argues for an interpretation of "controlled substance" that would include any metabolite of cocaine—the same argument this Court rejected in *Feezel* when we explained that 11-carboxy-THC is not a Schedule 1 controlled substance. *Id.* at 210-211 (opinion by M. F. CAVANAGH, J.); *id*. at 217 (opinion by WEAVER, J.). Here, the prosecution failed to identify the metabolite or demonstrate that the metabolite *itself* was a "controlled substance" for purposes of MCL 257.625(8). Further, the prosecution's evidence showing the mere presence of an unidentified metabolite, but nothing more, was not sufficient to prove that the defendant had *any amount* of cocaine in her body at the time of the motor vehicle collision. We therefore reverse the defendant's sentences for operating a motor vehicle while intoxicated causing death and operating a motor vehicle while intoxicated causing a serious impairment of a body function, and we remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order. On remand, the circuit court shall determine whether resentencing on the defendant's remaining convictions is required where the Court of Appeals has reversed the defendant's convictions of operating a motor vehicle while license suspended causing death and operating a motor vehicle while license suspended causing serious impairment of a body function and where this Court has reversed the defendant's sentences for operating a motor vehicle while intoxicated causing death and operating a motor vehicle while intoxicated causing a serious impairment of a body function. In all other respects, the application for leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I respectfully dissent from this Court's order reversing the decision of the Court of Appeals that there was sufficient evidence to convict defendant of operating a motor vehicle while intoxicated (OWI) causing death[1] and OWI causing a serious impairment of a body function[2] based on defendant's positive test for cocaine metabolites after her motor vehicle accident, as well as her behavior leading up to the accident.

"Challenges to the sufficiency of the evidence are reviewed de novo."[3] "In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt."[4] All

[1] MCL 257.625(4) and (8).

[2] MCL 257.625(5) and (8).

[3] *People v Wang*, 505 Mich 239, 251 (2020).

[4] *Id*. (quotation marks and citation omitted).

conflicts in the evidence are resolved in favor of the prosecution,[5] and circumstantial evidence and reasonable inferences drawn therefrom can constitute satisfactory proof of the crime.[6] "Circumstantial evidence is evidence of a fact, or a chain of facts or circumstances, that, by indirection or inference, carries conviction to the mind and logically or reasonably establishes the fact to be proved."[7]

MCL 257.625(8)[8] prohibits the operation of a vehicle on a highway if a "person has in his or her body *any amount* of a controlled substance listed in schedule 1 under [MCL 333.7212] . . . or of a controlled substance described in [MCL 333.7214(a)(*iv*)]."[9] MCL 333.7214(a)(*iv*) includes, as a Schedule 2 controlled substance:

> Coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances do not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine. The substances include cocaine, its salts, stereoisomers, and salts of stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.

Whether the presence of a cocaine metabolite in one's body is sufficient to sustain a conviction under MCL 257.625(8) first turns on whether a cocaine metabolite is a Schedule 2 drug under MCL 333.7214(a)(*iv*). Although this Court has not yet delved into the science of cocaine metabolites, it has done so with respect to the specific marijuana metabolite 11-carboxy-tetrahydrocannabinol (11-carboxy-THC), which is produced by the body naturally when it metabolizes THC—the psychoactive ingredient of marijuana. In *People v Feezel*, this Court held that 11-carboxy-THC is not a Schedule 1 controlled substance under MCL 333.7212 of the Public Health Code, MCL 333.1101 *et seq*., and thus "a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or

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[5] *People v Wolfe*, 440 Mich 508, 515 (1992).

[6] *People v Nowack*, 462 Mich 392, 400 (2000).

[7] *Wang*, 505 Mich at 251 (quotation marks, citations, and alterations omitted).

[8] OWI causing death and OWI causing serious impairment of a body function, which have the same elements except for the injury sustained, permit a conviction if defendant was operating her motor vehicle while she was intoxicated in violation of MCL 257.625(1), (3), or (8). See MCL 257.625(4) and (5); *People v Schaefer*, 473 Mich 418, 434 (2005) (setting forth the elements of OWI causing death). The parties and the Court of Appeals focused their analyses on MCL 257.625(8).

[9] Emphasis added.

her system."[10] In rendering its decision, the *Feezel* Court overruled its prior decision in *People v Derror*, which came to the opposite conclusion just four years earlier.[11]

Although I would not extend *Feezel*'s narrow holding here,[12] even applying *Feezel* to cocaine metabolites in general does not automatically

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[10] *People v Feezel*, 486 Mich 184, 205 (2010).

[11] *People v Derror*, 475 Mich 316 (2006), overruled by *Feezel*, 486 Mich 184. *Derror* focused on the term "derivative" in MCL 333.7212 to conclude that 11-carboxy-THC, which "has an identical chemical structure to THC except for the eleventh carbon atom," was a Schedule 1 controlled substance. *Id*. at 327. *Feezel*, on the other hand, relied on expert testimony that 11-carboxy-THC had no known pharmacological effect and lacked other characteristics of controlled substances to conclude that neither federal law nor the Public Health Code classified 11-carboxy-THC as a Schedule 1 controlled substance under MCL 333.7212. *Feezel*, 486 Mich at 207-212.

[12] Not only do we lack the sort of expert testimony presented in *Feezel* and *Derror*, we are also not reviewing a specific metabolite of cocaine. Absent record evidence or expert testimony establishing the specific metabolite at issue, I would not conclusively extend *Feezel*'s narrow holding regarding 11-carboxy-THC, a specific marijuana metabolite, to virtually all drug metabolites in general. See *People v Barkley*, 488 Mich 901, 902 (2010) (CORRIGAN, J., dissenting) (noting that "it is unclear from the record provided to this Court *which* metabolite or metabolites of THC were measured," that "[a]ll metabolites of THC indicate ingestion of marijuana, and [that] defendant did not contest at trial which metabolite or metabolites appeared in her system"). Further, it is important to note that, in between the time *Derror* and *Feezel* were decided, the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., was enacted into law "to allow a limited class of individuals the medical use of marijuana . . . ." *People v Kolanek*, 491 Mich 382, 393 (2012). In deciding to overrule *Derror*, the *Feezel* Court recognized the MMMA's seismic shift in the law and its profound impact on motorists who operate their vehicles long after the impairing effects of medical marijuana have worn off. See *Feezel*, 486 Mich at 215 n 16 (stating that *Derror* defies practical workability in part because, "under the *Derror* holding, those qualified individuals who lawfully use marijuana in accordance with the [MMMA] are prohibited from driving for an undetermined length of time given the potential of 11-carboxy-THC to remain in a person's system long after the person has consumed marijuana and is no longer impaired"). While Michigan has since legalized marijuana for medicinal and recreational purposes, cocaine remains illegal. There also appears to be a much "closer biological link between impairment and the presence of cocaine metabolites" than with

resolve this case. This Court's conclusion that "the prosecution's evidence showing the mere presence of an unidentified metabolite . . . was not sufficient to prove that the defendant had *any amount* of cocaine in her body at the time of the motor vehicle collision" ignores the rather elementary rule that "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[13] As the Court of Appeals explained below, the presence of cocaine metabolites in defendant's urine is "probative of the presence of cocaine" and may still be used as circumstantial and inferential evidence that defendant had cocaine in her body at the time of the accident.[14] Indeed, even the dissenters in *Derror*, who later formed the majority in *Feezel*, recognized that the presence of "11-carboxy-THC may be used as *circumstantial* evidence of a statutory violation[.]"[15] The presence of cocaine metabolites in a person's body is even stronger circumstantial evidence of a statutory violation given the closer biological link between its presence and impairment. Because a cocaine metabolite only ever appears in a person's body if the person has ingested cocaine, the presence of cocaine metabolites necessarily establishes that defendant ingested cocaine at some prior point in time. And given that defendant was taken to the hospital immediately after her accident, it is unlikely that she ingested cocaine in the roughly four and a half hours between the accident and her urine test. It was therefore reasonable for the jury to infer that defendant had ingested cocaine prior to her motor vehicle accident.

Further, defendant's behavior leading up to the accident is compelling circumstantial evidence that she operated her vehicle with cocaine in her body. An undercover police officer had observed defendant drive the wrong way down a one-way street and attempted to have nearby officers stop defendant's vehicle on that basis. Despite the police activating their vehicle's emergency lights and sirens, defendant refused to pull her vehicle over. Instead, defendant initiated a high-speed

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marijuana metabolites like 11-carboxy-THC. *Commonwealth v DiPanfilo*, 993 A2d 1262, 1267 (Pa Super, 2010). While actual intoxication is not necessary to prove OWI under MCL 257.625(8), I would not ignore the tenuous link between impairment and 11-carboxy-THC that played a crucial role in the *Feezel* Court's decision to overrule *Derror*. Accordingly, absent similar record evidence and expert testimony that this Court possessed in *Feezel* and *Derror* regarding the specific marijuana metabolite at issue, I would not conclusively extend *Feezel* beyond its own parameters to a whole new class of illicit substances as the Court does here.

[13] *Nowack*, 462 Mich at 400 (quotation marks and citation omitted).

[14] *People v Stock*, unpublished per curiam opinion of the Court of Appeals, issued December 26, 2019 (Docket No. 340541), p 5; see also *id*. at 6, 14.

[15] *Derror*, 475 Mich at 361 (CAVANAGH, J., dissenting).

police chase, in which she sped down Woodward Avenue in rush-hour traffic, ran a red light, and crashed into another vehicle. The accident resulted in the death of the driver of the other vehicle and left the passenger of defendant's vehicle, Classie Butler, seriously injured. At trial, Butler testified that when defendant observed what she believed to be an undercover police car behind her, she started speeding. Butler insisted that she be let out of the vehicle because she was scared by how fast defendant was driving. Defendant ignored Butler's complaints and sped even faster, stating that she had violated her parole and that she did not want to get into trouble. Defendant's reckless driving and her refusal to surrender despite commands from law enforcement and pleas from the passenger of her vehicle, coupled with her positive test for cocaine metabolites, provided sufficient circumstantial and inferential evidence for a rational jury to conclude that defendant had operated her vehicle with any amount of cocaine in her body and thus supported her OWI convictions.[16] Accordingly, this Court's conclusion that the prosecution failed to meet its burden of proof with respect to that element of the offense is simply incorrect.

Defendant cites caselaw discussing positive urine tests for both cocaine and cocaine metabolites,[17] as well as scientific literature suggesting that cocaine metabolites can pool in one's bladder and remain there for multiple days. The inferences defendant asks this Court to draw, then, are that because defendant's urine test revealed only the presence of cocaine metabolites, she (1) must have ingested cocaine well before the accident, and (2) must not have had cocaine in her body at the time of the accident. I disagree. The prosecution, "[e]ven in a case relying on circumstantial evidence, . . . need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide."[18] Viewing the evidence in a light most favorable to the prosecution and resolving all conflicts in the evidence in its favor—as we must do—the Court of Appeals did not err by concluding that there was sufficient evidence to support defendant's OWI convictions under MCL 257.625(8), and therefore under MCL 257.625(4) and (5).

Because I discern no error in the Court of Appeals' decision affirming defendant's OWI convictions, I respectfully dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

In re DAVID PETER JANKOWSKI, DO, No. 162592; reported below: 335 Mich App 273. Pursuant to MCR 7.305(H)(1), in lieu of granting

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[16] Although these facts may also support the conclusion that defendant was intoxicated at the time she operated her vehicle, actual intoxication is not necessary to prove OWI under MCL 257.625(8).

[17] See *People v Moore*, 189 Mich App 315, 317 (1991).

[18] *People v Hardiman*, 466 Mich 417, 423-424 (2002) (quotation marks and citation omitted).

leave to appeal, we vacate that part of the Court of Appeals' judgment relying on its caselaw to hold that "even without Dr. Cooke's testimony, the Board [of Osteopathic and Surgical Medicine Disciplinary Subcommittee (the Board)] could have determined, using its own expertise, that the evidence demonstrated that respondent engaged in violations of the Public Health Code." *In re Jankowski*, 335 Mich App 273, 288 (2020).

"Generally, expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard." *Sullivan v Russell*, 417 Mich 398, 407 (1983). "[A]n exception to the general rule exists when the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layman that the conduct was careless and not conformable to the standards of professional practice and care employed in the community." *Id*. (quotation marks and citation omitted). Although this case involves an administrative disciplinary proceeding rather than a medical malpractice action, the underlying issue is the same—whether respondent-physician complied with the applicable standard of care in documenting and prescribing pain medication for his patients. Because this is not an issue within the common knowledge and experience of the ordinary layman, expert testimony was required. And, given that the Board did have the benefit of Dr. Cooke's expert testimony, it was unnecessary to determine what the Board could have done without his testimony.

Further, the Court of Appeals cited its own caselaw in support of the conclusion that the Board could rely on its own expertise in finding a Public Health Code violation without the need for Dr. Cooke's expert testimony. See *Jankowski*, 335 Mich App at 2888 ("[A] disciplinary subcommittee may rely on its own expertise in determining violations of the Public Health Code. In that regard, this Court has previously concluded that a disciplinary subcommittee does not require expert testimony to determine that a respondent was negligent or lacking in good moral character when the conduct lacked basic elements of professional integrity."), citing *Dep't of Community Health v Anderson*, 299 Mich App 591, 600 (2013), and *Sillery v Mich Dep't of Licensing & Regulation Bd of Med*, 145 Mich App 681, 688-689 (1985). Although the Court of Appeals accurately described the rulings of *Anderson* and *Sillery*, we conclude that those cases do not support the broader propositions that a disciplinary subcommittee may rely exclusively on its own expertise in determining violations of the Public Health Code or that expert testimony is never required to support such violations. See *Anderson*, 299 Mich App at 600 (holding that the disciplinary subcommittee's facts and conclusions were supported by competent, material, and substantial evidence on the whole record when the standard of care was undisputed, the only issue was whether the respondent-veterinarian actually committed the misconduct, and the disciplinary subcommittee relied on its own expertise *and record evidence* to support its finding of a Public Health Code violation); *Sillery*, 145 Mich App at 688-689 (explaining that expert testimony was not necessary because the petitioner-pathologist's misconduct—falsifying findings in an au-

topsy report—plainly lacked basic integrity and truthfulness such that it was "within the province of the layperson to determine that the conduct constitutes a failure to exercise due care"), citing *Sullivan*, 417 Mich 398. Accordingly, we vacate that part of the Court of Appeals' judgment that mistakenly relies on *Anderson* and *Sillery* to conclude that the Board, without Dr. Cooke's expert testimony, could rely on its own expertise to find that respondent engaged in violations of the Public Health Code.

In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Reconsideration Granted in Part and Complaint for Mandamus Granted July 9, 2021:

UNLOCK MICHIGAN V BOARD OF STATE CANVASSERS, No. 162949. On order of the Court, the motion for leave to file a brief amicus curiae is granted. The request for immediate consideration is granted, and the motion to strike is denied. The motion for rehearing, which is treated as a motion for reconsideration of this Court's June 11, 2021 order, is considered, and it is granted in part and denied in part. MCR 7.311(G). Accordingly, we vacate our order dated June 11, 2021.

On reconsideration, the motion to intervene is granted. The complaint for mandamus is considered, and mandamus is granted. We direct the Board of State Canvassers (the Board) to certify the Unlock Michigan petition as sufficient. The Board's duty with respect to petitions is "limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012). In reviewing the petition signatures, the Board "shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). In the present case, the Board approved the form and content of the petition in July 2020. The Bureau of Elections analyzed the signatures using a random sampling method and estimated that Unlock Michigan submitted at least 460,000 valid signatures when it only needed about 340,000. The Board rejected, by deadlocked vote, a motion to investigate the collection of signatures. Therefore, the Board has a clear legal duty to certify the petition. MCL 168.477(1).

Leave to Appeal Denied July 9, 2021:

PEOPLE V BEAN, No. 159384; Court of Appeals No. 342953. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of October 4, 2019. The application for leave to appeal the February 14, 2019 judgment of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court.

CLEMENT, J. (*dissenting*). I respectfully dissent from this Court's order denying the prosecutor's application for leave to appeal. Because I believe that second-degree child abuse, MCL 750.136b(3)(b), is an adequate predicate "other felony" to sustain a charge of first-degree criminal sexual conduct (CSC) under MCL 750.520b(1)(c), even where the same alleged act supports both the child-abuse and the CSC charges, I would have reversed the Court of Appeals' decision.

I. FACTS AND PROCEDURAL HISTORY

Defendant was initially charged with third-degree CSC for allegedly sexually assaulting the then 15-year-old stepdaughter of his brother-in-law. Later, the prosecutor sought to amend the information to elevate the charge to first-degree CSC. The prosecutor set forth two alternate theories supporting the charge elevation: (1) that the sexual penetration occurred under circumstances involving the commission of any other felony, MCL 750.520b(1)(c)—namely, second-degree child abuse, MCL 750.136b(3)(b)—and (2) that defendant and the victim were related by affinity, MCL 750.520b(1)(b)(*ii*).

The district court bound defendant over on first-degree CSC under both theories. Defendant subsequently moved to quash the information at the circuit court, which granted defendant's motion on the affinity ground but rejected defendant's motion on the other-felony ground. Both parties appealed, and the Court of Appeals granted full relief to defendant in an unpublished, per curiam opinion. This Court later granted the prosecutor's application for leave to appeal, limited to "[w]hether second-degree child abuse, MCL 750.136b(3)(b), is an adequate predicate 'other felony' to sustain a charge of CSC-I, MCL 750.520b(1)(c), when the alleged act of child abuse is a sexual penetration that is the same sexual penetration that forms the basis of the CSC-I charge." *People v Bean*, 504 Mich 975 (2019).

II. ANALYSIS

When the Michigan Legislature reformed the state's rape laws in 1974, it redefined unlawful sexual conduct and divided such conduct into four degrees. First- and third-degree criminal sexual conduct concern unlawful sexual penetration, while second- and fourth-degree CSC concern unlawful sexual touching short of penetration. See MCL 750.520b through MCL 750.520e. The statutory scheme provides several aggravating circumstances by which conduct that would otherwise constitute fourth- or third-degree CSC may instead be deemed second- or first-degree CSC, which impose increased penalties on a defendant. See MCL 750.520b and MCL 750.520c.

MCL 750.520b(1)(c) is one such provision by which conduct that would normally constitute third-degree CSC may be elevated to first-degree CSC. The statute provides that a person is guilty of first-degree CSC when the person "engages in sexual penetration with another person . . . under circumstances involving the commission of any other

felony." By categorizing these circumstances as first-degree CSC subject to increased penalties, the Legislature sought to address the "increased risks" and "debasing indignities" faced by victims who not only endure an unlawful sexual penetration, but also a coexistent felony. *People v Jones*, 144 Mich App 1, 4 (1985).

The prosecutor asks this Court to determine whether second-degree child abuse is such "any other felony" whose coexistent commission would elevate a third-degree CSC to a first-degree CSC.[1] Neither MCL 750.520b(1)(c) nor the remainder of its statutory scheme defines the phrase "any other felony"; accordingly, we may refer to a dictionary to help establish its plain meaning. See *People v Rea*, 500 Mich 422, 428 (2017). Because the phrase "any other felony" is not a term of art, we use a lay dictionary to aid with interpretation. See *People v Thompson*, 477 Mich 146, 151-152 (2007). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "any" as "every" or "unmeasured or unlimited in amount, number, or extent." We have previously recognized the same in the context of other statutory provisions. See, e.g., *In re Forfeiture of $5,264*, 432 Mich 242, 249-250 (1989); *Gibson v Agricultural Life Ins Co*, 282 Mich 282, 289 (1937). *Merriam-Webster* also defines "other" as "being the one (as of two or more) remaining or not included"; "being the one or ones distinct from that or those first mentioned or implied"; or "not the same: DIFFERENT." Pursuant to these dictionary definitions and the common understanding of these terms, "any other felony" should be understood to mean every felony different from the CSC charge.

Defendant's charge of second-degree child abuse fulfills the statutory definition of "any other felony." First, it is a felony. MCL 750.136b(4). Second, it is a felony distinct from third-degree CSC. Second-degree child abuse occurs when a "person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results." MCL 750.136b(3)(b). In contrast, third-degree CSC occurs when a "person engages in sexual penetration with another person" and another statutorily identified circumstance is present—here, that circumstance is where "[t]hat other person is at least 13 years of age and under 16 years of age." MCL 750.520d(1)(a).

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[1] As we explained in *People v Sharpe*, 502 Mich 313, 326-327 (2018):

> When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). In so doing, we assign each word and phrase its plain and ordinary meaning within the context of the statute. *People v Kowalski*, 489 Mich 488, 498; 803 NW2d 200 (2011); MCL 8.3a. We must also avoid any construction that would render any part of a statute surplusage or nugatory, if possible. *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017).

These felonies do not share common elements, let alone consist of the same elements. See *People v Ream*, 481 Mich 223, 238 (2008) (adopting the test set forth in *Blockburger v United States*, 284 US 299 (1932), by which offenses are deemed not to be the same so long as each requires proof of a fact that the other does not). Accordingly, because second-degree child abuse is a felony, and it is a felony different from third-degree CSC, it constitutes "any other felony" under MCL 750.520b(1)(c).

The Court of Appeals, while apparently acknowledging that second-degree child abuse constitutes "any other felony" linguistically, reversed on the basis that "there is no separate act underlying the 'other felony[.]' " *People v Bean*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2019 (Docket Nos. 342953 and 343008), p 3. But the plain language of MCL 750.520b(1)(c) contains no such requirement. It requires only that "[s]exual penetration occurs under circumstances involving the commission of any other felony." Had the Legislature intended to impose a separate-act requirement, it could have done so. For example, the Legislature could have focused on the commission of a separate felonious act rather than the commission of another felony generally. However, the Legislature did not do so, and second-degree child abuse is encompassed by the language it did choose.

Further, the rationale behind this conclusion is suspect. Citing *Jones*, the Court of Appeals reasoned that where there is no separate felonious act, the victim is not subject to the "increased risks" and "debasing indignities" that MCL 750.520b(1)(c) was designed to protect against. I disagree. If the allegations here are proven, the victim was not only subject to unlawful digital penetration, but suffered additionally the debasing indignity of having a "person who cares for, has custody of, or has authority over" her commit this act that was likely to cause her "serious physical or mental harm." MCL 750.136b(1)(d), (3)(b).[2]

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[2] The Court of Appeals also reasoned that *People v Waltonen*, 272 Mich App 678 (2006), requires the prosecutor to prove "a direct interrelationship between the felony and the sexual penetration," *id*. at 693, and that the prosecutor here cannot do so because the "the felony *is* the sexual penetration," *Bean*, unpub op at 3. In *Waltonen*, the Court of Appeals considered whether the unlawful sexual penetration occurred "under circumstances involving the commission of any other felony" where the other felony occurred after the sexual penetration. *Waltonen*, 272 Mich App at 679. The *Waltonen* Court interpreted the statutory phrase " 'under circumstances involving' " to require "a direct interrelationship between the felony and the sexual penetration" rather than require that the sexual penetration occur *during* the commission of the other felony. *Id*. at 692-693. The *Waltonen* Court was not presented with, and provided no analysis regarding, a situation like the one presented in this case, wherein both felonies resulted from the same alleged act. And again, the language of MCL 750.520b(1)(c) does not impose a requirement of a separate felonious act.

The Court of Appeals also commented that "[t]he prosecution's interpretation of the statutory language would automatically elevate every CSC-III charge to CSC-I" and that "[t]his cannot be the intent of the [L]egislature." *Bean*, unpub op at 3 n 1. This is patently false. MCL 750.520d(1) provides several means by which third-degree CSC is committed. See MCL 750.520d(1)(a) through (g). Under some of these provisions, a person may commit third-degree CSC by the unlawful sexual penetration of a person over the age of 18. See, e.g., MCL 750.520d(1)(b) (stating that a person is guilty of third-degree CSC if the person engages in sexual penetration with another person and "[f]orce or coercion is used to accomplish the sexual penetration"). In that circumstance, the perpetrator cannot concurrently commit the felony of child abuse, as all degrees of child abuse require that the victim be "a person less than 18 years of age . . . ." MCL 750.136b(1)(a).

Had the Court of Appeals' statement instead narrowly posited that defining child abuse as "any other felony" under MCL 750.520b(1)(c) would elevate every third-degree CSC charge brought under MCL 750.520d(1)(a)—wherein the victim "is at least 13 years of age and under 16 years of age"—it would avoid the specific issue discussed above, as the victim of a third-degree CSC under MCL 750.520d(1)(a) meets the child-abuse statute's definition of a "child." See MCL 750.136b(1)(a). However, the child-abuse statute also narrowly defines an offender as "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(1)(d). A person may engage in sexual penetration of a 13- to under 16-year-old child without falling in the category of offenders specified in the child-abuse statute. For example, consider the stereotypical "Romeo and Juliet" example of third-degree CSC: an 18-year-old has sexual intercourse with his 15-year-old girlfriend. While this satisfies the elements of third-degree CSC, under most circumstances, that 18-year-old perpetrator did not also commit child abuse because he does not care for, have custody of, or authority over the victim, as the child-abuse statute requires. Accordingly, every third-degree CSC under MCL 750.520d(1)(a) will not also constitute child abuse,[3] and the Court of Appeals was incorrect in so asserting.

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[3] Defense counsel also posited during oral argument that every third-degree CSC charge could be elevated to first-degree CSC under MCL 750.520b(1)(c) because unlawful sexual penetration is nearly always accompanied by unlawful sexual touching, which is fourth-degree CSC. However, fourth-degree CSC is a misdemeanor, not a felony, MCL 750.520e(2), and so would not satisfy the requirement in MCL 750.520b(1)(c) that unlawful sexual penetration occur "under circumstances involving the commission of any other *felony*." (Emphasis added.)

III. CONCLUSION

In my opinion, the Court of Appeals erred in its determination that second-degree child abuse cannot serve as a predicate "other felony" to sustain a charge of first-degree CSC under MCL 750.520b(1)(c). Second-degree child abuse satisfies the statutory language, being both a felony and a felony distinct from the charged CSC, and the remaining justifications offered by the Court of Appeals for its decision are unconvincing. Accordingly, I would have reversed the Court of Appeals' decision and ordered the reinstatement of CSC-I charges against defendant.

ZAHRA, J., joins the statement of CLEMENT, J.

BOFYSIL V BOFYSIL, No. 161674; Court of Appeals No. 351004.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's decision to deny leave to appeal. In this child custody case, the Court of Appeals appears to have run roughshod over the standard of review in its haste to issue a published opinion rebuking the trial court for its "improper reliance on [plaintiff's] relationship with a married woman and its bias against [plaintiff's] role as a working parent . . . ." *Bofysil v Bofysil*, 332 Mich App 232, 248 (2020). In addition to erroneously substituting its own factual findings for those of the trial court, the Court of Appeals mischaracterized the trial court's findings and misapprehended the applicable law. For these reasons, I would affirm in part, vacate in part, and reverse in part the judgment of the Court of Appeals.

The trial court in this case issued a judgment of divorce that granted defendant primary physical and sole legal custody of the parties' minor child but awarded plaintiff parenting time on alternating weekends. Regarding physical custody, the trial court found that the child had an established custodial environment (ECE) with defendant but not plaintiff, stating, in relevant part, as follows:

> [Defendant] was the stay at home mom while the parties were together and she has had primary physical custody continuously since they separated. [The child] naturally looks currently to the parent she is with for love, affection and the necessities of life. Since that parent is usually Defendant, as she is with her the majority of the time, the Court finds an established custodial environment exists with Defendant.

The trial court also indicated that its decision would have been the same even if it had found that an ECE existed with both parents. The court believed that the evidence supported granting primary physical custody to defendant under both the preponderance-of-the-evidence standard and the clear-and-convincing-evidence standard.

After reviewing the best-interest factors, MCL 722.23, the trial court determined that there was clear and convincing evidence that its custody and parenting-time awards were in the child's best interests. Turning to legal custody, the trial court found that the parties failed to agree on anything pertaining to the child, that plaintiff had refused to engage in joint parenting, and that plaintiff was harsh and abusive in

her communications. For those reasons, it awarded sole legal custody to defendant because it awarded her primary physical custody.

The Court of Appeals affirmed in part the judgment of divorce but vacated the custody award and remanded for further proceedings, holding that (1) the evidence preponderated against the trial court's ECE finding, (2) the trial court abused its discretion in its physical-custody award, and (3) the trial court abused its discretion in awarding sole legal custody to defendant. The Court of Appeals believed that it was an error for the trial court to "discount the role" of plaintiff simply because she "worked outside the home to support her family" and that the "error influenced the applicable burden of proof and permeated the court's assessment of the child's best interests." *Bofysil*, 332 Mich App at 236. The Court of Appeals clearly viewed the evidence differently than the trial court and would have made different findings if it had acted as the finder of fact.

The findings of a trial court in child custody cases are ordinarily entitled to great deference. See *Pierron v Pierron*, 486 Mich 81, 85 (2010) ("Under the Child Custody Act, MCL 722.21 *et seq*., 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' MCL 722.28. Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination *clearly preponderates* in the opposite direction.") (some citations and quotation marks omitted; emphasis added); *Maier v Maier*, 311 Mich App 218, 221 (2015) ("In child custody cases, an abuse of discretion occurs if the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.") (cleaned up).

First, it is important to note that the Court of Appeals applied the wrong standard. The Court of Appeals held that "[t]he evidence preponderates against the circuit court's [ECE] finding." *Bofysil*, 332 Mich App at 243. But the correct standard is whether the factual determination *clearly preponderates* against the finding below, not just whether it *preponderates* against that finding. *Pierron*, 486 Mich at 85.[1]

Second, I disagree that the evidence clearly preponderates against the trial court's ECE finding, as the trial court indicated that it would have made the same decision regarding custody even if an ECE existed with both parents, and the trial court made clear that it believed that the evidence supported its custody determination even under the clear-and-convincing-evidence standard. Contrary to the assertion of the Court of Appeals, the trial court's ECE determination did not "permeate[] the court's assessment of the child's best interests." *Bofysil*,

[1] Although it stated the correct standard in the standard-of-review section, the Court either made a clerical error when applying that standard or made a substantive error by applying the wrong standard and reversing without meeting the appropriate standard.

332 Mich App at 236. In light of the explanation from the trial court regarding its ECE determination, and given the Court of Appeals' error in applying the proper standard of review, I would vacate Part III of the Court of Appeals opinion.[2]

Third, in rebuking the trial court for looking at the fact that plaintiff worked outside the home in making a decision about physical custody, the Court of Appeals appears to have approached the case with a presumption that each parent should have joint physical custody. But the Child Custody Act contains no such presumption. *Wellman v Wellman*, 203 Mich App 277, 285 (1994). Rather, a trial court "shall determine whether joint custody is in the best interest of the child by considering the [best-interest] factors" enumerated in MCL 722.23. MCL 722.26a(1).

Fourth, the Court of Appeals mischaracterized the trial court's findings with respect to Best-Interest Factors (a), (b), and (c).[3] Regard-

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[2] I question whether the trial court even needed to establish whether an ECE existed. MCL 722.27(1)(c) states, in relevant part, "*The court shall not modify or amend its previous judgments or orders or issue a new order* so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." (Emphasis added.) Based on the language of the statute alone, it is not clear to me that a court must determine whether an ECE exists before entering a *judgment* of divorce. The statute distinguishes between judgments and orders. The court must determine whether an ECE exists before modifying or amending a *previous* judgment or order or a *new* order. But the statute does not indicate that the initial entry of a judgment is also subject to this requirement. However, the Court of Appeals has stated that MCL 722.27 requires a trial court "to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61 (2011). In at least one case, the Court of Appeals held that "an original action in circuit court involving the determination of custody" is not subject to the ECE requirement of MCL 722.27(1)(c). *Helms v Helms*, 185 Mich App 680, 682 (1990). But since then, multiple panels have held that a trial court is required to make a finding regarding whether an ECE existed if a temporary custody order existed, even when the judgment being challenged is not an amended judgment. See, e.g., *Jack v Jack*, 239 Mich App 668, 670 (2000); *Bowers v Bowers*, 190 Mich App 51, 53-54 (1991). This seeming conflict between the statute and appellate decisions is an issue that should be reviewed in an appropriate future case.

[3] Factor (a) requires consideration of the following: "The love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). Factor (b) focuses on "[t]he capacity and disposition of the parties involved to give the child love, affection, and

ing Factors (a) and (b), the Court of Appeals opined that defendant staying home to raise the child while plaintiff worked to "support the family does not equate with one parent loving the child more or having more affection for the child." *Bofysil*, 332 Mich App at 246. The Court of Appeals' observation is no doubt correct, but it is beside the point. The trial court said nothing about which parent loved the child more or had more affection for the child, and Factors (a) and (b) do not look at who has more love or affection.[4] As for Factor (c), contrary to the Court of Appeals' assertion, the trial court did not "fail to credit [plaintiff] for financially supporting . . . her family." *Bofysil*, 332 Mich App at 246. Rather, the trial court simply noted defendant's capacity and disposition to also support the child due to receiving child support—and there is no evidence to support the conclusion that the trial court was incorrect in that assessment.

Fifth, the Court of Appeals' determination that the trial court erred in relying on plaintiff's infidelity in its determination of Factors (d) and (e) conflicts with prior caselaw from this Court.[5] We have previously held that extramarital relationships cannot be considered in the analy-

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guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). And Factor (c) considers "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c).

[4] I disagree with the underlying premise of the Court of Appeals that a trial court is precluded from factoring in the amount of time that a parent spends with the child in its findings regarding Factors (a) and (b). Indeed, it is hard to understand how the love, affection, and emotional ties between a parent and her child would not be impacted by the amount of time the two spend together. See, e.g., *Argel v Argel*, unpublished per curiam opinion of the Court of Appeals, issued June 12, 2018 (Docket No. 340148), p 5 (rejecting the defendant's argument "that the trial court placed too much emphasis on how much time the child spent with plaintiff without regard to the child's bond with defendant" and explaining "that the plaintiff shared a stronger bond, given her daily and consistent contact with the child as the child's primary caregiver"); Miller, *Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations*, 33 Ind L Rev 691, 733 (2000) (listing "spends time with the child" as one of the factors that indicate bonding between a parent and child).

[5] Those factors are, respectively, "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), and "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e).

sis of Factor (f) (moral fitness) because they "are not necessarily a reliable indicator of how one will function within the parent-child relationship." *Fletcher v Fletcher*, 447 Mich 871, 887-888 (1994). In the present case, the Court of Appeals thought that it was improper for the trial court to consider plaintiff's new relationship in analyzing Factors (d) and (e), stating that it "was improper under any factor." *Bofysil*, 332 Mich App at 247, citing *Fletcher*, 447 Mich at 886-887. But in *Fletcher* we clarified that "[t]o the extent that one's marital misconduct actually does have an identifiable adverse effect on a particular person's ability or disposition to raise a child, those parental shortcomings often may be reflected in other relevant statutory factors." *Fletcher*, 447 Mich at 887. Thus, it was not improper for the trial court to look at plaintiff's new relationship in its analysis of Factors (d) and (e). And plaintiff's parental shortcomings due to her infidelity were reflected in other factors—specifically Factors (d) and (e)—as explained by the trial court. The Court of Appeals' analysis of these factors is clearly erroneous and in direct conflict with the limitation we placed on our holding in *Fletcher*.

Finally, I do not believe that the Court of Appeals clearly erred by finding that the trial court abused its discretion in awarding sole legal custody to defendant.[6] But I believe that it was improper for the Court of Appeals to impose a requirement that on remand the trial court "must take into account alternative communication methods, if feasible" in assessing the parties' ability and willingness to communicate for purposes of making a decision as to legal custody. *Bofysil*, 332 Mich App at 250. The Court cited no authority for the proposition that a trial court must consider alternative means of communication, and nothing in MCL 722.26a references alternative means of communication. The Court of Appeals exceeded its mandate by imposing this requirement on remand.

The Court of Appeals opinion is wrong as a matter of fact, as a matter of law, and in its application of the standard of review. For these reasons, I would (1) vacate Part III of the Court of Appeals opinion; (2) reverse the Court of Appeals' analysis of Best-Interest Factors (a) through (e); and (3) affirm the Court of Appeals' holding that the trial court abused its discretion in awarding sole legal custody, but vacate the portion of its opinion regarding alternative communication methods.

PEOPLE V CHAMBERS, No. 162352; Court of Appeals No. 350998.

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal because I think granting an evidentiary hearing is premature at this point. However, the document defendant offers indicates that prosecutors declined to seek a warrant against someone because the complainant had indicated that that person was not the one who had threatened her. The document is incomplete, and we do not know whom it refers to. If the document refers to defendant, then there may be evidence that defendant was not the person who threatened the complainant. If the

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[6] Although there were some disagreements, the record did not support the trial court's statement that "the parties have demonstrated a total failure to agree on anything that pertains to the minor child."

document refers to someone else, then there may be an additional suspect. In either case, further corroboration might entitle defendant to an evidentiary hearing.

Petition for Relief Denied July 9, 2021:

In re INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR STATE LEGISLATIVE AND CONGRESSIONAL DISTRICT'S DUTY TO REDRAW DISTRICTS BY NOVEMBER 1, 2021, No. 162891. On order of the Court, the motion for immediate consideration having been granted and the Court having considered the briefs and oral arguments of the parties, the petition for relief is considered, and it is denied, because the Court is not persuaded that it should grant the requested relief.

WELCH, J. (*concurring*). Our system of government is premised on "a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed." *In re Apportionment of State Legislature—1982*, 413 Mich 96, 136 (1982). In 2018, this state's voters overwhelmingly rejected the traditional method of partisan redistricting and, through a voter-initiated constitutional amendment, agreed to replace it with the Independent Citizens Redistricting Commission. See generally Const 1963, art 4, § 6. By all appearances, the commission has been acting diligently pursuant to its constitutional mandate as the only body entitled to "promulgate and adopt a redistricting plan or plans for this state." Const 1963, art 4, § 6(19). Now, *through no fault of its own*, the commission is in the difficult and unenviable position of undertaking its inaugural redistricting cycle without the full benefit of tabulated decennial census data. Under federal law, that tabulated decennial census data should have been "completed, reported, and transmitted" no later than April 1, 2021. 13 USC 141(c). Citing the challenges for the national enumeration presented by the COVID-19 pandemic, hurricanes, and wildfires, the United States Census Bureau now expects to transmit that tabulated decennial census data by September 30, 2021—six months late.

Their work disrupted by the U.S. Census Bureau's six-month delay, the commission and the Secretary of State made the sensible decision to alert this Court and the public that the unforeseen absence of the tabulated decennial census data will necessarily affect the expected timeline for completing redistricting. With an eye toward preserving public confidence and expressing concern that any delay might be grounds for a potential legal challenge to the validity of their work, they filed the present petition asking us to extend our Constitution's direction that the commission adopt a plan no later than November 1, 2021. See Const 1963, art 4, § 6(7). They maintain that this preemptive relief would "ensure that fair maps are drawn" and "protect the adopted plans from challenges based on the Commission's inability to adhere to the constitutional timeline." By our decision today, we have declined the invitation to clothe the commission or the Secretary of State with any lawsuit-proof vest. The risk of *future* lawsuits—however likely and however inconvenient to the commission's ongoing work—is insufficient reason to justify the relief requested. Nor should we provide binding

direction when it appears that the commission, an independent constitutional actor, has already decided that delay is necessary. At oral argument, the commission's counsel implied that the commission intends to follow its delayed schedule with or without our advance imprimatur, a path it believes is most consistent with its competing obligation of ensuring a fair and transparent redistricting process that allows for meaningful public participation.

It is true that this Court has in times past accepted something less than strict-to-the-letter compliance with a constitutional requirement when doing so was more faithful to the purpose and intention of those who ratified the requirement. See, e.g., *Ferency v Secretary of State*, 409 Mich 569, 601-602 (1980) (concluding that in "the most extreme circumstances" certain constitutional timing requirements "designed to facilitate the electoral process" are directory and not mandatory); *Rosenbrock v School Dist No 3, Fractional*, 344 Mich 335, 339 (1955) (rejecting a "mandatory" construction of a constitutional requirement absent a "provision indicating that a failure to strictly observe" renders the action "void"); *Carman v Secretary of State*, 384 Mich 443, 456 (1971) (cautioning that "if a too strict adherence" is given to a constitutional requirement then " 'the will of the people of the state would be defeated by an unimportant accident over which they had no control' " and reaffirming the primacy of " 'the substance rather than the letter of such requirements' ") (citation omitted). Other cases have, perhaps, been less forgiving. See, e.g., *People v Dettenthaler*, 118 Mich 595, 600-601 (1898) ("If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only[.]"). Although the words in the constitutional text are important to determining intent, the "primary and fundamental rule" of interpretation is that "it is not the meaning of the particular words only in the abstract or their strictly grammatical construction alone that governs." *White v Ann Arbor*, 406 Mich 554, 562 (1979). Rather, "[t]he words are to be applied to the subject matter and to the general scope of the provision, and they are to be considered in light of the general purpose sought to be accomplished or the evil sought to be remedied by the constitution . . . ." *Id*. Whether or how these concepts might apply to the present situation is a question that we leave for another day.

The Court's decision is not a reflection on the merits of the questions briefed or how this Court might resolve a future case raising similar issues. It is indicative only that a majority of this Court believes that the anticipatory relief sought is unwarranted. No matter how the commission chooses to proceed, if its work is challenged then it will ultimately fall to this Court "to determine what are the requirements of th[e] constitution and to define the meaning of those requirements in specific applications." *In re Apportionment of State Legislature—1982*, 413 Mich at 114; see also Const 1963, art 4, § 6(19). We will not shirk that duty.

CAVANAGH, J., joins the statement of WELCH, J.

Leave to Appeal Denied July 14, 2021:

PEOPLE V PLAFKIN, No. 163220; Court of Appeals No. 357389.

Summary Disposition July 16, 2021:

PEOPLE V BEATY, No. 162747; Court of Appeals No. 349821. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentence of the Otsego Circuit Court, and remand this case to the trial court for resentencing. The reasons given for the departure did not adequately account for the extent of that departure (95 months beyond the top of the applicable range of 51 to 85 months). In imposing the sentence for delivery of heroin causing death, MCL 750.317a, the trial court treated defendant as if his sentencing guidelines range was calculated from the B-V cell for Class A offenses, as is appropriate for Prior Offense Variable (PRV) Level B defendants scoring 80 to 99 Offense Variable (OV) points. MCL 777.62. Given that defendant actually scored 41 OV points and placed in the B-III cell, this departure represents at least an additional 39 OV points. In finding that the amount of drugs at issue and defendant's delivery of heroin after the victim's death was effectively equivalent to a 39-point OV increase, the trial court treated these circumstances as more serious than circumstances that would have resulted in a smaller OV-point increase. For example, having the mental state necessary for conviction of second-degree murder would only have resulted in a 25-point increase. See MCL 777.36(1)(b).

On resentencing, we further direct the trial court to correct defendant's Sentencing Information Report to reflect defendant's status as PRV Level B and a zero-point assessment for PRV 7. *People v Francisco*, 474 Mich 82, 88 (2006). We do not retain jurisdiction.

ZAHRA, J., would deny leave to appeal.

VIVIANO, J. (*concurring in part and dissenting in part*). I take no issue with the portion of this Court's order directing the trial court to correct defendant's Sentencing Information Report, but I respectfully dissent from the remainder of the Court's decision to reverse the judgment of the Court of Appeals, vacate defendant's sentence, and remand this case for resentencing for a third time—in what will now amount to the fourth sentencing in this case.[1] As we have stated, "the relevant question for appellate courts reviewing a sentence for reasonableness" is "whether the trial court abused its discretion by violating the principle of proportionality . . . ." *People v Steanhouse*, 500 Mich 453, 471 (2017).

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[1] Defendant was first sentenced to 240 to 600 months in prison. At his second sentencing, he received a sentence of 210 to 600 months in prison. At his third sentencing, his minimum sentence was reduced to 180 months, which was a departure of 95 months. Defendant appealed each sentence, and each time the Court of Appeals denied leave, but this Court remanded for further proceedings.

" '[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *Id*. at 472, quoting *People v Milbourn*, 435 Mich 630, 661 (1990). In my opinion, the sentence imposed was proportionate in light of defendant's decision to continue selling heroin even after he sold heroin to the victim and knew that her death was caused by the use of heroin. Thus, the trial court did not abuse its discretion. See *Steanhouse*, 500 Mich at 471.

It is important to remember that a resentencing has impacts beyond just the defendant, the prosecution, and the trial court. Resentencings also have significant emotional and psychological effects on victims and their families. See Davis, *Getting a Second Chance—Again*, 101 ABA J 19, 20 (Sept 2015) (noting the emotional impact a resentencing hearing can have on victims' families); cf. Gibbons, *Victims Again—Survivors Suffer Through Capital Appeals*, 74 ABA J 64, 67 (1988) (describing the impacts that violent crime can have on victims and their families in the context of capital appeals). Of course, sympathy for a victim's family would not justify upholding an unreasonable sentence. But the majority today prolongs these proceedings once again, impinging on the trial court's discretion, without providing any real guidance on what it believes would be a proportionate sentence in this case. I therefore respectfully dissent in part.

Motion for Clarification Granted July 16, 2021:

CARSON V BANDIT INDUSTRIES, INC, No. 162449; Court of Appeals No. 350257. By order of June 30, 2021, we vacated the December 17, 2020 judgment of the Court of Appeals and remanded this case to the Court of Appeals for consideration as on leave granted of those issues that the Court of Appeals previously declined to review. On order of the Court, the motion for clarification of this Court's June 30, 2021 order is considered, and it is granted. On remand, the Court of Appeals shall consider as on leave granted those issues that the Court of Appeals previously declined to review in its January 2, 2020 order. As set out in the appellant's application for leave to appeal in that court, those issues are:

> I. Did the appellate commission violate MCL 418.861a(3) when it reversed the magistrate's finding of a work-related injury?
>
> II. Did the appellate commission misapply the legal standard articulated by the Supreme Court in *Rakestraw v General Dynamics Land System*, 469 Mich 220 (2003) in finding that the plaintiff failed to demonstrate a work-related injury?

This Court did not previously deny leave to appeal on these issues, and the appellant timely raised them in an application filed within 42 days of the Court of Appeals opinion resolving the appeal pursuant to MCR 7.305(C)(2)(a). As consideration of the above issues may impact the Court of Appeals' decision on the issue of recoupment (the appellant's

Issue III), the Court of Appeals should also reconsider the recoupment issue and address the arguments presented by the parties in this Court with respect to that issue.

Reconsideration Denied July 16, 2021:

CYR V FORD MOTOR COMPANY, No. 160927; Court of Appeals No. 345751.

WELCH, J. (*concurring*). I agree that denial of plaintiffs' motion for reconsideration of this Court's November 4, 2020 order denying leave to appeal is appropriate under MCR 7.311(G). I write separately because I am persuaded, with the input of the amici curiae in this case, that this Court should examine whether our previous decisions in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), and *Liss v Lewiston-Richards*, *Inc*, 478 Mich 203 (2007), properly interpreted the safe-harbor provision in the Michigan Consumer Protection Act, MCL 445.901 *et seq*. I look forward to the opportunity to review this issue in a future matter.

BERNSTEIN, J., joins the statement of WELCH, J.

MCCORMACK, C.J., did not participate due to a familial relationship with general counsel for the defendant.

Rehearing Denied July 16, 2021:

PEOPLE V KABONGO, No. 159346; Court of Appeals No. 338733. Opinion at 507 Mich 78.

LAW OFFICES OF JEFFREY SHERBOW, PC V FIEGER & FIEGER, PC, No. 159450; Court of Appeals No. 338997; opinion at 507 Mich 272; reported below: 326 Mich App 684.

Leave to Appeal Denied July 23, 2021:

PEOPLE V CANEDO, No. 161915; Court of Appeals No. 353965.

CAVANAGH, J. (*concurring*). I concur in the order denying leave in this case, but write separately to discuss some questions regarding the use of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software tool during a defendant's sentencing. Generally, the Michigan Department of Corrections (MDOC) has used risk assessment to make internal decisions about programming and placement. However, the extension of that practice from informing the MDOC's work after sentencing to informing the sentencing decision seems consequential.

The COMPAS software tool creates a risk assessment "intended to measure the 'likelihood of future Violent or Non-Violent Felony Offenses.' " *People v Younglove*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2019 (Docket Nos. 341901, 342497, 342598, and 344475), quoting MDOC, Field Operations Administration, *Administration and Use of COMPAS in the Presentence Investigation Report* (March 2017), p 10, available at

<https://www.michbar.org/file/news/releases/archives17/COMPAS-at-PSI-Manual-2-27-17-Combined.pdf> (accessed July 15, 2021) [https://perma.cc/YB5S-D3WL]. This assessment is created through a proprietary algorithm that takes data inputs including criminal history, age, employment status, education level, community ties, substance abuse, and more. The algorithm's output is an assessment that purports to represent the probability a defendant will engage in future criminal conduct. See generally *Administration and Use of COMPAS*; see also *State v Loomis*, 371 Wis 2d 235, 245 (2015).

Due process requires that a defendant be sentenced on the basis of accurate information, *People v Francisco*, 474 Mich 82, 88 (2006), and a defendant must have "a reasonable opportunity at sentencing to challenge the information" contained in the presentence investigation report (PSIR), *People v Zinn*, 217 Mich App 340, 347-348 (1996). However, in the context of COMPAS risk assessments, it is unclear to me what it might mean to measure the accuracy of a prediction about an individual's future conduct and how that prediction might be challenged without knowing how it was formulated. See *Loomis*, 371 Wis 2d 235 (limiting the use of COMPAS at sentencing and mandating that written warnings accompany any COMPAS attached to a PSIR). One evaluation of the COMPAS tool, which was prepared for the California Department of Corrections and Rehabilitation (CDCR), concluded there was " 'no sound evidence that the COMPAS can be rated consistently by different evaluators, that it assesses the criminogenic needs it purports to assess, and (most importantly) that it predicts inmates' recidivism for CDCR offenders.' " *Id*. at 262, quoting Skeem and Loudon, *Assessment of Evidence on the Quality of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)* (2007), p 5, available at <http://risk-resilience.berkeley.edu/journal-article/assessment-evidence-quality-correctional-offender-management-profiling-alternative> (accessed July 15, 2021) [https://perma.cc/PR5D-6N6A].

The algorithm COMPAS employs is proprietary, and undisclosed. *Loomis*, 371 Wis 2d at 258. The secretive nature of the algorithm raises questions. Without knowing what the algorithm is, it is difficult to know whether and how race, class, and other personal factors influence a potentially biased score. One investigation, for example, concluded that Black defendants " 'were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism.' " *Id*. at 263, quoting Larson et al, ProPublica, *How We Analyzed the COMPAS Recidivism Algorithm* (May 23, 2016), available at <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> (accessed July 15, 2021) [https://perma.cc/AP85-5EDE]. Additionally, in order to be accurate and mitigate these possible errors, risk assessment tools " 'must be constantly re-normed for changing populations and subpopulations.' " *Loomis*, 371 Wis 2d at 263-264, quoting Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 Notre Dame L Rev 537, 576 (2015). It is unclear whether COMPAS regularly updates its software accordingly.

The many criticisms that such risk assessments have drawn from public officials and scholars create concerns about the use of COMPAS in

sentencing. However, defendant has not fully raised these issues in this Court. Accordingly, I concur in the order denying leave to appeal.

MCCARTY V AKINS, No. 162674; Court of Appeals No. 350052. On order of the Court, the application for leave to appeal the January 21, 2021 judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

AMR V COX, No. 163112; Court of Appeals No. 357234.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered March 10, 2021:

PROPOSED AMENDMENT OF MCR 1.109.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1) Definitions. For purposes of this subrule:

(a) "Authorized user" means a user of the e-filing system who is registered to file, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach. If an authorized user needs to change user accounts, he or she must provide notice to the court and the other authorized users on the case in accordance with MCR 1.109(G)(3)(j).

(b)-(f) [Unchanged.]

(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(i) [Unchanged.]

(j) An authorized user must notify the court and other authorized users on the case regarding any change to the user account, including a

change of email address. The notice must be in writing and filed with the court with service on the parties immediately after the user account is changed. Once the notice is filed with the court, all future e-service must be served using the updated user account information.

(j)-(l) [Relettered (k)-(m) but otherwise unchanged.]

(4)-(5) [Unchanged.]

(6) Electronic-Service Process.

(a) General Provisions.

(i)-(iii) [Unchanged.]

(iv) If a document is electronically served to a party's known email address but is returned to the filer as undeliverable, this will constitute proper service when the transmission to the recipient's email address is sent, in accordance with MCR 1.109(G)(6)(b). Neither the filer nor the court will need to take any further action regarding the undeliverable message.

(iv)-(vi) [Renumbered but otherwise unchanged.]

(b)-(c) [Unchanged.]

(7) [Unchanged.]

Staff Comment: The proposed amendment of MCR 1.109 would address e-Filing issues relating to updating authorized user accounts and e-service of documents that are returned as undeliverable to a registered e-mail address.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered March 10, 2021:

PROPOSED AMENDMENTS OF MCR 3.903, 3.966, 3.975, AND 3.976.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.903. DEFINITIONS.

(A)-(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1)-(13) [Unchanged.]

(14) "Qualified Residential Treatment Program" means a residential program that has met all of the following criteria:

(a) Use of a trauma-informed treatment model;

(b) Registered or licensed nursing staff and other licensed clinical staff must be on-site or available 24 hours a day, 7 days a week;

(c) Accredited by an independent not-for-profit organization as described in 42 USC 672(k)(4)(G);

(d) Integration of families into treatment, including sibling connections;

(e) Discharge planning and aftercare support for at least six months post discharge; and

(f) Does not include a detention center, forestry camp training school, or other facility operated primarily for minor children determined to be delinquent.

(15) "Qualified Individual" means a trained professional or licensed clinician who is not an employee of the department and who is not connected to, or affiliated with, any placement setting in which children are placed by the department, and who is responsible for conducting an assessment of a child placed in a qualified residential treatment program pursuant to MCL 722.123a.

(D)-(F) [Unchanged.]

RULE 3.966. OTHER PLACEMENT REVIEW PROCEEDINGS.

(A)-(C) [Unchanged.]

(D) Review of Child's Placement in a Qualified Residential Treatment Program

(1) Ex Parte Motion for Review. Within 45 days of the child's initial placement in a qualified residential treatment program, the Agency shall file an ex parte motion requesting the court to approve or disapprove of the placement.

(a) Supporting Documents. The motion shall be accompanied by the assessment, determination, and documentation made by the qualified individual.

(b) Service. The Agency shall serve the ex parte motion and accompanying documentation on all parties.

(2) Judicial Determination. Within 14 days of filing, the court, or an administrative body appointed or approved by the court independently, shall review the motion, and any supporting documentation filed pursuant to this subrule, and issue an order approving or disapproving of the placement. The order shall include individualized findings by the court or administrative body as to:

(a) whether the needs of the child can be met in a foster family home, or if not,

(b) whether the placement of the child provides the most effective and appropriate level of care for the child in the least restrictive environment, and

(c) whether the placement is consistent with the goals in the permanency plan for the child.

The court shall serve the order on parties. The court is not required to hold a hearing on the ex parte motion under this subrule.

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A) Dispositional Review Hearings. A dispositional review hearing is conducted to permit court review of the progress made to comply with any order of disposition and with the case service plan prepared pursuant to MCL 712A.18f and court evaluation of the continued need and appropriateness for the child to be in foster care; and to permit the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment program.

(B)-(E) [Unchanged.]

(F) Criteria.

(1)-(2) [Unchanged.]

(3) Review of Placement in Qualified Residential Treatment Program. Where a child remains placed in a qualified residential treatment program, the court shall review the evidence submitted by the Agency, approve or disapprove of the placement, and make individualized findings as to:

(a) whether the needs of the child can be met through placement in a foster home; or if not,

(b) whether the placement provides the most effective and appropriate level of care for the child in the least restrictive environment; and

(c) whether the placement is consistent with the short- and long-term goals for the child, as specified in the permanency plan for the child.

(G)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(D) [Unchanged.]

(E) Determinations; Permanency Options.

(1) [Unchanged.]

(2) Determining Whether to Return Child Home. At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child. Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being. In addition, the court shall consider any condition or circumstance of the child that may be evidence that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being. If the court does not order the child returned home, and the child remains in a qualified residential treatment program, the court shall:

(a) review the evidence submitted by the Agency, approve or disapprove of the placement, and make individualized findings as to:

(i) whether the needs of the child can be met through placement in a family foster home; or if not,

(ii) whether the placement provides the most effective and appropriate level of care for the child in the least restrictive environment; and

(iii) whether the placement is consistent with the short- and long-term goals for the child, as specified in the permanency plan of the child.

(3)-(4) [Unchanged.]

Staff comment: The proposed amendments of MCR 3.903, 3.966, 3.975, and 3.976 would make procedural changes for cases involving the placement of foster care children in a qualified residential treatment program as required by state and federal statutory revisions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered March 25, 2021:

PROPOSED AMENDMENTS OF MCR 6.302 AND 6.610.

The Court, having given an opportunity for comment in writing and at a public hearing, again seeks public comment regarding proposed amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules to eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to the offense to

which defendant is pleading guilty or nolo contendere. During the initial comment period, the Court received comments opposed to the proposal, generally noting that the current procedure moves cases along and promotes efficiency for all concerned. But the Court is interested in comment that also addresses the propriety and effectiveness of such a system. Some commentators have characterized a plea in which a defendant provides a factual basis to a crime other than the one to which he or she ultimately pleads guilty or nolo contendere as a "fictional plea" and have raised concerns about courts accepting such pleas. See, e.g., Johnson, *Fictional Pleas*, 94 Ind LJ 855 (2019). In particular, the Court is interested in receiving additional comments addressing the impacts, if any, of so-called fictional pleas on (1) the truth-seeking process; (2) sentencing goals, including rehabilitation and crime deterrence; (3) the scoring of sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility; (4) determining collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender; (5) compilation of crime statistics; and (6) the constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime.

On order of the Court, this is to advise that the Court is again considering amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also may be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) [Unchanged.]

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(E)-(F) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Pleas of Guilty and Nolo Contendere. Before accepting a please of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading, or

(b) [Unchanged.]

(2)-(6) [Unchanged.]

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the ~~offense charged or~~ the offense to which the defendant is pleading if

(a)-(c) [Unchanged.]

A "writing" includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8)-(9) [Unchanged.]

(G)-(I) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the "sentencing offense alone," not the charged offense. Further, an "offense to which defendant is pleading" would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the "charged offense" clause may well be unnecessary.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-29. Your comments and the

comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 1, 2021:

PROPOSED AMENDMENTS OF MCR 3.945 AND PROPOSED ADOPTION OF MCR 3.947.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.945 and a proposed addition of Rule 3.947 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 3.947 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.945. DISPOSITIONAL REVIEW.

(A) Dispositional Review Hearings

(1) Generally. The court must conduct periodic hearings to review the dispositional orders in delinquency cases in which the juvenile has been placed outside the home. Such review hearings must be conducted at intervals designated by the court, or may be requested at any time by a party or by a probation officer or caseworker. The victim has a right to make a statement at the hearing or submit a written statement for use at the hearing, or both. At a dispositional review hearing, the court may modify or amend the dispositional order or treatment plan to include any disposition permitted by MCL 712A.18 and MCL 712A.18a or as otherwise permitted by law; and shall permit the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.

(2) Required Review Hearings.

(a)-(b) [Unchanged.]

(c) At a review hearing held under this section, the court shall approve or disapprove of a child's initial placement or continued placement in a qualified residential treatment program.

(B)-(D) [Unchanged.]

RULE 3.947. OTHER PLACEMENT REVIEW PROCEEDINGS.

(A) Review of Juvenile's Placement in A Qualified Residential Treatment Program.

(1) Ex Parte Petition for Review. Within 45 days of the juvenile's initial placement in a qualified residential treatment program, the Agency shall file an ex parte petition requesting the court approve or disapprove the placement.

(a) Supporting Documents. The petition shall be accompanied by the assessment, determination, and documentation made by the qualified individual.

(b) Service. The Agency shall serve the ex parte petition and accompanying documentation on all parties.

(2) Judicial Determination. Within 14 days of filing, the court, or an administrative body appointed or approved by the court independently, shall review the petition, and any supporting documentation filed pursuant to this subrule, and issue an order approving or disapproving of the placement. The order shall include individualized findings by the court or administrative body as to whether:

(a) the needs of the juvenile can be met in a foster family home, and if not,

(b) whether placement of the juvenile provides the most effective and appropriate level of care for the juvenile in the least restrictive environment, and

(c) whether that placement is consistent with the goals in the permanency plan for the juvenile.

The court shall serve the order on parties. The court is not required to hold a hearing on the ex parte petition under this subrule.

Staff comment: The proposed amendment of MCR 3.945 and the proposed addition of MCR 3.947 would make procedural changes involving the placement of foster care children in a qualified residential treatment program as required by newly-enacted 2021 PA 5.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 14, 2021:

PROPOSED AMENDMENT OF MCR 6.302 AND 6.310.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) [Unchanged.]

(2) the maximum possible prison sentence for the offense~~, including, if applicable, whether the law permits or requires consecutive sentences,~~ and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3)-(5) [Unchanged.]

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

(a) [Unchanged.]

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the

defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose~~.~~; or (c) a consecutive sentence will be imposed and the defendant was not advised at the time of his or her plea that the law permits or requires consecutive sentencing in his or her case.

(3) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.302 would eliminate the Court's previously-adopted language requiring a trial court to advise defendant whether the law permits or requires the court to sentence defendant consecutively. This language was added following the Court's opinion in *People v Warren*. However, in considering the practical application of that language, it may be more appropriate to allow a defendant to withdraw a plea under MCR 6.310 if such advisement is not given rather than require an advisement in all cases. Thus, the proposal would add language providing for such an outcome in MCR 6.310 instead of imposing an advisement in all cases under MCR 6.302.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the amendment may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 14, 2021:

PROPOSED AMENDMENT OF MCR 2 AND PROPOSED ADOPTION OF RULE 21 OF THE RULES CONCERNING THE STATE BAR OF MICHIGAN AND PROPOSED AMENDMENT OF MCR 9.119 AND PROPOSED ADOPTION OF MCR 9.1XX.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2 and an addition of Rule 21 of the Rules Concerning the State Bar of Michigan and an amendment of Rule 9.119 and an addition of Rule 9.1XX of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [http://courts.mi.gov/courts/michigan supremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 21 and Rule 9.1XX are proposed new rules and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2. MEMBERSHIP.

Those persons who are licensed to practice law in this state shall constitute the membership of the State Bar of Michigan, subject to the provisions of these rules. Law students may become section members of the State Bar Law Student Section. None other than a member's correct name shall be entered upon the official register of attorneys of this state. Each member, upon admission to the State Bar and in the annual licensing statement~~dues notice~~, must provide the State Bar with

(A) T~~t~~he member's correct name, physical address, and email address, that can be used, among other things, for the annual licensing statement~~dues notice~~ and to effectuate electronic service as authorized by court rule, and such additional information as may be required. If the physical address provided is a mailing address only, the member also must provide a street or building address for the member's business or residence. No member shall practice law in this state until the information required in this Rule has been provided. Members shall promptly notify~~update~~ the State Bar promptly in writing of~~with~~ any change of name, physical address, or email address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member's name. The name and address on file with the State Bar at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office.

(B) ~~Every active member shall annually provide a~~A certification as to whether the member is in private practice. The signed certification shall be placed on the annual licensing statement and shall require the member's signature or electronic signature. If the member is in private practice, the certification must also include:

(1) whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and third-party funds; and~~.~~

(2) a designation of the attorney's Interim Administrator, as required by SBR 21, by either

(a) providing the name and an address of an active Michigan attorney in good standing or a Michigan law firm that includes at least one other Michigan attorney in good standing, who will serve, if needed, as the member's Interim Administrator; or

(b) enrolling in the State Bar of Michigan Interim Administrator Program, as defined in SBR 21, by paying an annual assessment.

~~The certification shall be included on the annual dues notice and shall require the member's signature or electronic signature.~~

RULE 21. MANDATORY INTERIM ADMINISTRATOR PLANNING.

Section 1. An attorneys [sic] in private practice must designate an interim administrator to protect clients by winding down or temporarily managing the attorney's practice if the attorney becomes unexpectedly unable to practice law as set forth in MCR 9.1XX and pursuant to Rule 2(C) of the Rules Concerning the State Bar of Michigan. On the State Bar of Michigan annual licensing statement, the attorney shall:

(a) choose either to designate another active Michigan attorney in good standing or law firm with at least one other active Michigan attorney in good standing to serve as the attorney's Interim Administrator, or to enroll in the State Bar Interim Administrator Program for an annual fee; and

(b) identify a person with knowledge of the location of the attorney's professional paper and electronic files and records and knowledge of the location of passwords and other security protocols required to access the attorney's professional electronic records and files. The person so designated may be the same person designated as the Interim Administrator.

The State Bar of Michigan shall create a confirmation process for designated Interim Administrators to confirm that they are willing to serve as Interim Administrator and will comply with the terms of the State Bar approved agreement.

Section 2. The State Bar of Michigan shall administer a State Bar Interim Administrator Program and charge an annual fee for enrollment. The Program shall include the following components:

(a) For attorneys who elect to enroll in the State Bar Interim Administrator Program, the State Bar will be responsible for ensuring that an Interim Administrator is appointed and the requirements of MCR 9.1XX are met if a Program participant becomes unexpectedly unable to practice law.

(b) The State Bar shall establish and administer a Trust to collect and disburse fees collected from attorneys who elect to enroll in the State Bar Interim Administrator Program. The Trust shall be used to pay the expenses of the State Bar Interim Administrator Program, including compensation for Interim Administrators acting on behalf of the State Bar Interim Administrator Program, as set forth in MCR 9.1XX(G)(2).

Section 3. State Bar staff and its agents and the State Bar of Michigan Board of Commissioners are absolutely immune from suit for conduct arising out of the performance of their duties and responsibilities regarding the Interim Administrator Program.

RULE 9.119. CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEY.

(A)-(F) [Unchanged.]

~~(G) Receivership.~~

~~(1) Attorney with a firm. If an attorney who is a member of a firm is disbarred, suspended, is transferred to inactive status pursuant to MCR 9.121, or resigns his or her license to practice law, the firm may continue to represent each client with the client's express written consent. Copies of the signed consents shall be maintained with the client file.~~

~~(2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including:~~

~~(a) to obtain and inventory the attorney's files;~~

~~(b) to take any action necessary to protect the interests of the attorney and the attorney's clients;~~

~~(c) to change the address at which the attorney's mail is delivered and to open the mail; or~~

~~(d) to secure (garner) the lawyer's bank accounts. The person appointed is analogous to a receiver operating under the direction of the circuit court.~~

~~(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.~~

~~(4) Publication of Notice. Upon receipt of notification from the receiver, the state bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.~~

RULE 9.1XX. APPOINTMENT OF AN INTERIM ADMINISTRATOR WHEN AN ATTORNEY BECOMES UNABLE TO CONTINUE THE PRACTICE OF LAW.

(A) Definitions.

(1) "Affected Attorney" means an attorney who is either temporarily or permanently unable to practice law because the attorney has:

(a) resigned;

(b) been disbarred or suspended;

(c) disappeared;

(d) been imprisoned;

(e) abandoned the practice of law;

(f) become temporarily or permanently disabled or incapacitated;

(g) been transferred to disability inactive status pursuant to MCR 9.121; or

(h) died.

(2) "Affected Attorney's Clients" are clients to whom the Affected Attorney is the attorney of record, regardless of whether the retainer agreement is with the Affected Attorney or the Affected Attorney's Law Firm.

(3) "Appointed Interim Administrator" means an Interim Administrator who is appointed by the circuit court pursuant to (C)(2) of this Rule to serve on behalf of the Affected Attorney.

(4) "Bar Proposed Interim Administrator" means an Interim Administrator who is proposed by the State Bar of Michigan pursuant the State Bar Interim Administrator Program to serve in the event a Program Participant becomes an Affected Attorney under this Rule.

(5) "Designated Interim Administrator" means an Interim Administrator that a Private Practice Attorney has designated to serve and who has accepted the designation in the event the Private Practice Attorney should become an Affected Attorney.

(6) "Interim Administrator" means a general term for an active Michigan attorney in good standing who, or law firm with at least one other active Michigan attorney that is designated to serve on behalf of a Private Practice Attorney who becomes an Affected Attorney.

(7) "Law Firm" means the entity in which the Affected Attorney carries out of the profession of being a lawyer.

(8) "Private Practice Attorney" means an attorney who is an active Michigan attorney in good standing and who is subject to State Bar Rule 21, Mandatory Interim Administrator Planning.

(9) "Program Participant" means a Private Practice Attorney who elects to enroll in the State Bar Interim Administrator Program.

(10) "State Bar Interim Administrator Program" means the program authorized by the Michigan Supreme Court set forth in Rule 21 of the Rules Concerning the State Bar of Michigan.

(B) Affected Attorney with a firm. The firm of an attorney who becomes an Affected Attorney may continue to represent each of the Affected Attorney's Clients without a circuit court appointment as Interim Administrator, provided:

(1) the firm is the Affected Attorney's Designated Interim Administrator;

(2) the firm has at least one active Michigan attorney in good standing capable of competently representing the Affected Attorney's Clients; and

(3) each Affected Client gives express written consent to the representation. Copies of the signed consents must be maintained with the client file.

(C) Appointment of Interim Administrator.

(1) Commencement of Proceeding for Appointment of Interim Administrator; Service of Process. A proceeding for the appointment of an Interim Administrator is commenced by the filing of an ex parte petition by the State Bar of Michigan or the [sic] by the Designated Interim

Administrator in the circuit court for the county in which the Affected Attorney lives, last lived, or maintains or last maintained an office for the practice of law.

(a) The petition must set forth facts proving that

(i) the attorney is an Affected Attorney as defined in (A)(1).

(ii) the appointment of an Interim Administrator is necessary to protect the interests of the Affected Attorney's Clients or the interests of the Affected Attorney.

(iii) the attorney proposed to be appointed as Interim Administrator is qualified under this rule.

(b) The petition must be verified or accompanied by an affidavit or declaration under penalty of perjury of a person having personal knowledge of the facts.

(c) The petition and any supporting documents must be served upon the Affected Attorney if the whereabouts of the Affected Attorney are known, and on the fiduciary for the Affected Attorney, if one has been appointed. See MCR 2.103 — 2.108. If the petition is filed by the Designated Interim Administrator, it must also be served upon the State Bar of Michigan by email at an address designed by the State Bar of Michigan pursuant to MCR 2.107(C)(4) or by electronic service pursuant to MCR 1.109(G)(6).

(2) Order of Appointment. If the circuit court determines that the petitioner has proven by a preponderance of the evidence that the attorney is an Affected Attorney as defined in (A)(1) and the appointment of an Interim Administrator is necessary to protect the interests of the Affected Attorney's Clients or the interests of the Affected Attorney, the circuit court shall appoint one or more Interim Administrators, as follows:

(a) If the Affected Attorney has a Designated Interim Administrator, the circuit court must appoint the Designated Interim Administrator unless good cause exists to appoint a different Interim Administrator.

(b) If the Affected Attorney is participating in the State Bar Interim Administrator Program, the circuit court must appoint the Bar Appointed Interim Administrator proposed by the State Bar unless good cause exists to appoint a different Interim Administrator.

(c) If good cause exists, the circuit court may appoint additional Interim Administrators.

(d) The order appointing an Interim Administrator shall specifically authorize the Interim Administrator to:

(i) take custody of and act as signatory on any bank or investment accounts, safe deposit boxes, and other depositories maintained by the Affected Attorney in connection with the Law Firm, including all lawyer trust accounts, escrow accounts, payroll accounts, operating accounts, and special accounts;

(ii) disburse funds to clients of the Affected Attorney or others entitled thereto; and

(iii) take all appropriate actions with respect to the accounts.

(e) The order appointing an Interim Administrator shall provide that, for all matters pending in Michigan state courts, all statute of

limitations, deadlines, time limits, and return dates for filings in matters of the Affected Attorney's Clients are tolled from the date that the circuit court determines that the Affected Attorney became unable to practice law until at least ninety (90) calendar days after the date of the entry of the order.

(f) The order appointing an Interim Administrator takes effect immediately upon entry unless the circuit court orders otherwise.

(g) The circuit court may order the Interim Administrator to submit interim and final accountings and reports, as it deems appropriate. The circuit court may allow or direct portions of any accounting relating to the funds and confidential information of the clients of the Affected Attorney to be filed under seal.

(3) Service of Notice of Interim Administrator's Appointment. Upon receipt of an order of appointment of an Interim Administrator, the petitioner must serve the Notice of Appointment of an Interim Administrator's appointment, including the name and address of the Affected Attorney, and the name, business address, business telephone number, business email address, and P number of the Interim Administrator on the Affected Attorney, the Affected Attorney's fiduciary, and the State Bar of Michigan. The State Bar of Michigan must publish the notice in the Michigan Bar Journal and on the State Bar of Michigan website.

(4) Objection to Appointment. Within 14 days after service of the Notice of Appointment, any interested person may file objections to the order of appointment of an Interim Administrator specifying the grounds upon which the objection is based. Although the filing of one or more objections does not automatically stay the order appointing Interim Administrator, the court may order that the appointment be stayed pending resolution of the objection(s).

(D) Duties and Powers of the Interim Administrator.

(1) The general duties of the Interim Administrator are to:

(a) take control of the Law Firm, whether it be a sole proprietorship, professional corporation, professional company, or other similar entity.

(b) take custody of the files, records, and other property of the Law Firm.

(c) take control of accounts, including lawyer trust accounts and operating accounts.

(d) review the files and other papers to identify any pending matters.

(e) promptly notify all clients represented by the Affected Attorney in pending matters of the appointment of the Interim Administrator. Notification shall be made in writing, where practicable.

(f) promptly notify all courts and counsel involved in any pending matters, to the extent they can be reasonably identified, of the appointment of an Interim Administrator for the Affected Attorney. Notification shall be made in writing, where practicable.

(g) deliver the files, funds, and other property belonging to the Affected Attorney's Clients pursuant to the clients' directions, subject to

the right to retain copies of such files or assert a retaining or charging lien against such files, money, or other property to the extent permitted by law.

(h) take steps to protect the interests of the clients, the public, and, to the extent possible and not inconsistent with the protection of the Affected Attorney's Clients, to protect the interests of the Affected Attorney.

(i) take all steps necessary continue [sic] or wind down the Law Firm, including payment of overhead and staff out of the Affected Attorney's accounts. The Interim Administrator is not required to expend his or her own resources to maintain the Law Firm.

(j) make reasonable efforts to safeguard all property in the offices of the Affected Attorney and to collect any outstanding attorney's fees, costs, and expenses to which the Affected Attorney is entitled and make appropriate arrangements for the prompt resolution of any disputes concerning outstanding attorney's fees, costs, and expenses.

(k) comply with the terms of the agreement between the Affected Attorney and the Interim Administrator.

(2) If the Interim Administrator determines that there is a conflict of interest between the Interim Administrator and an Affected Attorney's Client, the Interim Administrator must notify the client and the circuit court that made the appointment and take all appropriate action under the Michigan Rules of Professional Conduct.

(3) To the extent possible, the Interim Administrator must assist and cooperate with the Affected Attorney and/or the Affected Attorney's fiduciary in the continuance, transition, sale, or winding up of the Law Firm.

(4) The Interim Administrator may purchase the Law Firm only upon the circuit court's approval of the sale.

(E) Protection of Client Information and Privilege. The appointment of the Interim Administrator does not automatically create an attorney and client relationship between the Interim Administrator and any of the Affected Attorney's Clients. However, the attorney-client privilege applies to all communications by or to the Interim Administrator and the Affected Attorney's Clients to the same extent as it would have applied to any communications by or to the Affected Attorney with those same clients. The Interim Administrator is governed by Michigan Rule of Professional Conduct 1.6 with respect to all information contained in the files of the Affected Attorney's Clients and any information relating to the matters in which the clients were being represented by the Affected Attorney.

(F) Protection of Client Files and Property. The circuit court has jurisdiction over all of the files, records, and property of clients of the Affected Attorney and may make any appropriate orders to protect the interests of the clients of the Affected Attorney and, to the extent possible and not inconsistent with the protection of clients, the interests of the Affected Attorney, including, but not limited to, orders relating to the delivery, storage, or destruction of the client files of the Affected Attorney. The Interim Administrator may maintain client documents in paper or electronic format. The Interim Administrator may destroy any

client document pursuant to the law office file retention policy or older than six years from the date closed, whichever is shorter, without returning to the court for permission to do so.

(G) Compensation and Expenses of Interim Administrator.

(1) Compensation. The Interim Administrator, except as otherwise provided by an agreement with Affected Attorney, is entitled to reasonable compensation for the performance of the Interim Administrator's duties and reimbursement for actual and reasonable costs incurred in connection with the performance of the Interim Administrator's duties. Reasonable compensation shall be determined in consultation with any Interim Administrator Compensation guidelines provided by the State Bar of Michigan. Reimbursable expenses include, but are not limited to, the costs incurred in connection with maintaining the staff, offices, and operation of the Law Firm and the employment of attorneys, accountants, and others retained by the Interim Administrator in connection with carrying out the Interim Administrator's duties.

(2) Application for Compensation. Unless the Interim Administrator and the Affected Attorney or the Affected Attorney's estate have reached an agreement otherwise, the Interim Administrator will be paid from the Law Firm if funds are available; if funds are not available from the practice, the attorney may file an application for compensation and expenses with the circuit court, which will determine the amount of compensation and expenses. The application must include an accounting of all receipts, disbursements, and distributions of money and property of the Law Firm.

(3) Award of Compensation. The circuit court may enter an order awarding compensation and expenses to the Interim Administrator against the Law Firm, Affected Attorney, estate of the Affected Attorney, or any other available sources as the court may direct. The order will be a lien upon all property of any applicable Law Firm, Affected Attorney, or estate or trust of the Affected Attorney retroactive to the date of filing of the petition for the appointment of an Interim Administrator under this Rule. The judgment lien is subordinate to possessory liens and to non-possessory liens and security interests created prior to it taking effect and may be foreclosed upon in the manner prescribed by law.

(4) Additional Source of Compensation for Bar Proposed Interim Administrators Acting on Behalf of the State Bar Interim Administrator Program. A Bar Appointed Interim Administrator acting on behalf of the State Bar Interim Administrator Program may request compensation from the State Bar of Michigan Interim Administrator Program if the Law Firm, Affected Attorney, estate, or trust of the Affected Attorney is unable to fulfill the obligation. The Bar Proposed Interim Administrator must notify the circuit court of any compensation received from the State Bar Interim Administrator Program.

(H) Limitation of Liability. An Interim Administrator acting under this Rule is immune from suit for any conduct undertaken in good faith in the course of performing official duties as Interim Administrator.

(I) Employment of the Interim Administrator as Attorney for an Affected Client. An Interim Administrator shall not, without the informed written consent of the Affected Client represent such client in a

pending matter in which the client was represented by the Affected Attorney, other than to temporarily protect the interests of the client, or unless and until the Interim Administrator has concluded the purchase of the Law Firm. Any informed written consent by the Affected Client must include an acknowledgment that the client is not obligated to retain the Interim Administrator.

Staff Comment: This proposal, submitted by the State Bar of Michigan, would impose new obligations on attorneys and would create a new Interim Administrator Program within the State Bar of Michigan. The proposal would require an attorney in private practice to nominate another attorney or law firm to serve as interim administrator if the nominating attorney becomes unable to practice. The Bar would confirm the nomination with the identified attorney, and that attorney would acknowledge agreement. Alternatively, an attorney could pay an annual fee (unspecified in the Bar's proposal) to ensure that in the event of death or disability, the Bar would appoint an attorney to serve as interim administrator. The interim administrator would be eligible for compensation from the attorney's law practice or estate; those who participate in the SBM Interim Administrator Program could be reimbursed through that program as a secondary source of compensation.

In addition to comments about the breadth of the program and its particular provisions, the Court is interested in comment that addresses provisions that may go beyond the scope of authority for court rules. For example, under proposed MCR 9.1XX(C)(2)(e), the order appointing the Interim Administrator shall toll all statutes of limitation, deadlines, time limits, and return dates. But such deadlines, especially statutes of limitation, are purely a legislative creation and arguably not within the Court's ability to change by rule. Further, under proposed MCR 9.1XX(F), the circuit court purportedly has "jurisdiction over all of the files, records, and property of clients of the Affected Attorney, and may make any appropriate orders to protect the interest of the clients —" To the extent that this language could be interpreted to mean that a circuit court judge in one jurisdiction could issue an order affecting a case in another jurisdiction, it is questionable where such authority is derived. And finally, the role of the circuit court judge is more involved under this proposal, and it would be helpful to understand whether the circuit court judges support this expanded role.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-15. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigan supremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 14, 2021:

PROPOSED ADOPTION OF ADMINISTRATIVE ORDER, NO. 2021-X.

On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order that would require mandatory submission of case data to the Judicial Data Warehouse. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

ADMINISTRATIVE ORDER NO. 2021-X — MANDATORY SUBMISSION OF CASE DATA TO THE JUDICIAL WAREHOUSE.

For two decades, the Judicial Data Warehouse has been an essential tool allowing users to locate trial court records from throughout the state, informing judicial decisions, enhancing court administration, improving public policy through data-driven research, and promoting transparency.

Nearly all trial courts provide a daily or weekly feed of case-level data to the JDW, but frequently, certain data elements are missing or reported inconsistently by different courts, and several courts do not participate at all, creating problematic data gaps. To address these problems, courts should be required to submit data in a uniform manner and across all courts. Doing so will ensure the JDW contains uniformly reported data that will be more useful to courts, law enforcement, researchers, and other users. In addition, a more complete database will relieve courts of the requirement to submit certain reports that are currently prepared manually or with special programming, and ultimately is intended to be a resource for the general public about how courts in Michigan operate.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, § 4, which provides for the Supreme Court's general superintending control over all state courts, all trial courts must submit all case data including nonpublic and financial records to the Judicial Data Warehouse in a format and frequency defined by the SCAO . This order replaces all existing Memoranda of Understanding between SCAO and any trial courts regarding the JDW.

This order shall remain in effect until further order of the Court.

Staff Comment: This administrative order would make it mandatory for all courts to submit case information to the Judicial Data Warehouse in a uniform manner as required by SCAO.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-14. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 19, 2021:

PROPOSED AMENDMENTS OF RULE 2, RULE 3, RULE 4, RULE 5, RULE 6, AND RULE 7 AND PROPOSED ADDITION OF RULE 3a AND RULE 4a OF THE RULES FOR THE BOARD OF LAW EXAMINERS.

On order of the Court, this is to advise that the Court is considering amendments of Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and proposed additions of Rule 3a and Rule 4a of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings/].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 3a and Rule 4a are new rules and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2. ADMISSION BY EXAMINATION.

(A)-(C) [Unchanged.]

(D) Every applicant for admission must achieve a passing score, as determined by the board, on the Multistate Professional Responsibility Examination (MPRE) prepared and administered by the National Conference of Bar Examiners.

(E)-(F) [Unchanged.]

RULE 3. EXAMINATION ADMINISTRATION~~SUBJECTS AND GRADING~~.

(A) The examination shall be the Uniform Bar Examination (UBE) as prepared and defined by the NCBE and administered on dates and under regulations set by NCBE. The UBE consists of~~ two sections~~:

(1) The Multistate Bar Examination (MBE)~~prepared by the National Conference of Bar Examiners and administered on dates and under regulations set by the Conference.~~

(2) The Multistate Essay Examination (MEE)

(3) Two Multistate Performance Test items (MPT)

~~(2) An essay examination prepared by or under the supervision of the Board or by law professors selected by the Board, on these subjects:~~

~~(a) Real and Personal Property~~

~~(b) Wills and Trusts~~

~~(c) Contracts~~

~~(d) Constitutional Law~~

~~(e) Criminal Law and Procedure~~

~~(f) Corporations, Partnerships, and Agency~~

~~(g) Evidence~~

~~(h) Creditor's Rights, including mortgages, garnishments and attachments~~

~~(i) Practice and Procedure, trial and appellate, state and federal~~

~~(j) Equity~~

~~(k) Torts (including no-fault)~~

~~(l) The sales, negotiable instruments, and secured transactions articles of the Uniform Commercial Code~~

~~(m) Michigan Rules of Professional Conduct~~

~~(n) Domestic Relations~~

~~(o) Conflicts of Laws~~

~~(p) Worker's Compensation~~

(B) The NCBE~~National Conference of Bar Examiners~~ will grade the MBE~~Multistate section~~. The Board or its agents will grade the MEE and the MPT~~essay section~~, with the Board having final responsibility. The Board will adopt policies for grading that are consistent with the sound testing practices followed by all jurisdictions that administer the UBE. The policies shall include a provision for the NCBE to convert the raw scores on the written portion of an examination to the MBE scale by the methodology used for UBE jurisdictions. The Board will determine a method for ~~combining the grades and~~ selecting a passing score.

(C) To earn a portable UBE score that is transferable to other UBE jurisdictions, persons taking the UBE in Michigan shall sit for and take all components of the bar examination in a single administration.

(D) An applicant's raw bar examination score shall be provided to the NCBE to calculate scaled scores. Upon request by an applicant, the NCBE will certify and transfer the applicant's scaled score, scaled MBE score, and total UBE score to other UBE jurisdictions. The NCBE may also release to an applicant, upon request by the applicant, the applicant's scaled MBE score, scaled written score, and total UBE score.

RULE 3a. MICHIGAN LAW COMPONENT.

(A) Before being admitted to the practice of law in Michigan by UBE examination, by transferred UBE score, or on Application for Admission Without Examination, an applicant shall take any Michigan Law

Component course required by the Board and provide proof of completion to the Board of Law Examiner's office.

(B) If a Michigan Law Component course is required by the Board, the course shall contain relevant Michigan-specific topics attorneys licensed in Michigan are reasonably expected to know as determined by the Board. The course shall be in the form prescribed by the Board.

(C) An applicant shall pay any fee determined by the Board that is associated with taking the Michigan Law Component.

RULE 4. POST-EXAMINATION PROCEDURES; APPEAL; APPLICATION FOR RE-EXAMINATION.

(A) Except where a mathematical or clerical error has been made, scores determined in accordance with these rules shall be final. In the unlikely event of a mathematical or clerical error, the Board shall issue a corrected score.

(B~~A~~) The Executive Director will release examination results at the Board's direction. Any b~~B~~lue books will be kept for 3 months after results are released.

~~(B) Within 30 days after the day the results are released, the applicant may ask the Board to reconsider the applicant's essay grades. The applicant shall file with the Executive Director two (2) copies of~~

~~(1) the request;~~

~~(2) the answer given in the applicant's blue books; and~~

~~(3) an explanation why the applicant deserves a higher grade.~~

(C) An applicant who has failed and seeks to retake the UBE in Michigan shall file an Application for Reexamination. An applicant for re-examination may obtain an application from the Executive Director. The application must be filed at least sixty (60) days before the examination. If the applicant's character and fitness clearance is more than three (3) years old, the applicant must be approved by the State Bar Committee on Character and Fitness.

RULE 4a. ADMISSION BY TRANSFERRED UBE SCORE.

(A) An applicant may apply for admission to the practice of law in Michigan by filing an application to transfer a UBE score if all of the following apply:

(1) The applicant earned a UBE score that meets or exceeds the minimum score required by the Board of Law Examiners.

(2) The qualifying UBE score was earned in an administration of the UBE that occurred within three years before the date of the applicant's submission of an application under this rule, but no earlier than the date of the July 2022 administration of the UBE.

(3) The applicant has taken the MPRE prepared and administered by the NCBE and earned the scaled score required by the Board.

(4) The applicant has met all requirements of these rules, including successful completion of any Michigan Law Component.

(B) An applicant who desires to be admitted as a member of the Michigan bar shall file with the Board of Law Examiners an Application for Admission to the Practice of Law by Transferred UBE Score. The application shall include the following:

(1) An affidavit stating that the applicant has studied the Michigan Court Rules, the Michigan Rules of Professional Conduct, and the Michigan Code of Judicial Conduct.

(2) An application provided for use by the State Bar of Michigan Standing Committee on Character and Fitness for the purpose of conducting a character and fitness investigation of the applicant and the required fee;

(3) An application fee as prescribed by BLE Rule 6.

(C) An applicant under review shall have a continuing duty to update the information contained in the State Bar of Michigan Standing Committee on Character and Fitness application and to report promptly to the State Bar of Michigan Standing Committee on Character and Fitness all changes or additions to information in the application that occur prior to the applicant's admission to practice.

(D) An applicant under this section shall successfully complete any required Michigan Law Component within the time period required by the Board.

(E) An applicant under this section who has been approved for admission under this section shall be entitled to take the oath of office under Rule 15, section 3, of the Rules Concerning the State Bar of Michigan. An applicant under this section shall not engage in the practice of law in Michigan before approval and administration of the oath. An application under this section shall be considered withdrawn if the applicant does not take the oath of office within three years after being approved for admission to the practice of law in Michigan.

RULE 5. ADMISSION WITHOUT EXAMINATION.

(A) An applicant for admission without examination must

(1)-(4) [Unchanged.]

(5) have, after being licensed and for 3 of the 5 years preceding the application,

(a)-(c) [Unchanged.]

The Board~~Supreme Court~~ may, for good cause, increase the 5-year period. Active duty in the United States armed forces not satisfying Rule 5(A)(5)(c) may be excluded when computing the 5-year period.

(6) Complete any Michigan Law Component requirement set out in Rule 3a.

(B)-(C) [Unchanged.]

(D) An applicant for whom a certificate of admission is issued must take the oath and become a member of the State Bar of Michigan within three years of the date the certificate is issued. Otherwise, the applicant must reapply.

(D)-(E) [Relettered (E)-(F) but otherwise unchanged.]

RULE 6. FEES.

The fees are as follows:

(A) ~~an application for~~ examination under the Uniform Bar Exam, $400 and an additional fee for the late filing of an application or transfer of an application for examination, $100; an application for re-examination, $300;

(B) application for admission by transferred UBE score, $400;

(C) ~~an~~ application for recertification, $300;

(D) ~~an~~ application for admission without examination, $800 plus the requisite fee for the National Conference of Bar Examiners' character report. Certified checks or money orders must be payable to the State of Michigan. Online bar examination payments for first time takers must be paid by credit card.

(E) Any fee for a Michigan law component as determined by the Board.

RULE 7. EXCEPTIONS.

An applicant may ask the board to waive any requirement except the payment of fees and the administration of the UBE. The applicant must demonstrate why the request should be granted.

Staff comment: The proposed amendments would implement a Uniform Bar Examination in Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-34. Your comments and the comments of others will be posted under the chapter affected by this proposal at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules/].

Order Entered May 19, 2021:

PROPOSED AMENDMENTS OF MCR 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, AND 6.938.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, and 6.938 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings/].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.117. APPEARANCES.

(A) [Unchanged.]

(B) Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) Appearance by Notice of Appointment.

(a) In some actions, an appointing authority independent of the judiciary determines the attorney that will represent a party for the entirety of the action. In some actions, an appointing authority independent of the judiciary determines that an attorney will represent a party for a single hearing—like an arraignment.

(b) In actions where an attorney is appointed for the entirety of the action, the appointing authority's notice of appointment constitutes an appearance on behalf of the appointed attorney.

(c) In actions where an attorney is appointed for a single hearing, the attorney should orally inform the court of the limited appointment at the time of the hearing. It is not necessary for the appointing authority to file an order of appointment or for the attorney to file an appearance.

(4~~3~~) [Renumbered but otherwise unchanged.]

(C) Duration of Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) In appointed cases, substitute counsel shall file an appearance with the court after receiving the assignment from the appointing authority.

(4~~3~~) [Renumbered but otherwise unchanged.]

(D)-(E) [Unchanged.]

RULE 3.708. CONTEMPT PROCEEDINGS FOR VIOLATION OF PERSONAL PROTECTION ORDERS.

(A)-(C) [Unchanged.]

(D) Appearance or Arraignment; Advice to Respondent. At the respondent's first appearance before the circuit court, whether for arraignment under MCL 764.15b, enforcement under MCL 600.2950, 600.2950a, or 600.1701, or otherwise, the court must:

(1)-(2) [Unchanged.]

(3) advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated a personal protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one,

(4) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority,

(5)-(6) [Unchanged.]

(E)-(I) [Unchanged.]

RULE 3.951. INITIATING DESIGNATED PROCEEDINGS.

(A) Prosecutor-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition designating the case for trial in the same manner as an adult.

(1) [Unchanged.]

(2) Procedure.

(a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointing authority.

(b) The court shall read the allegations in the petition and advise the juvenile on the record in plain language:

(i) of the right to an attorney at all court proceedings, including the arraignment~~pursuant to MCR 3.915(A)(1)~~;

(ii)-(vi) [Unchanged.]

(c)-(d) [Unchanged.]

(3) [Unchanged.]

(B) Court-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition charging an offense other than a specified juvenile violation and requests the court to designate the case for trial in the same manner as an adult.

(1) [Unchanged.]

(2) Procedure.

(a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointing authority.

(b) The court shall read the allegations in the petition, and advise the juvenile on the record in plain language:

(i) of the right to an attorney at all court proceedings, including the arraignment~~pursuant to MCR 3.915(A)(1)~~;

(ii)-(vii) [Unchanged.]

(c)-(d) [Unchanged.]

(3) [Unchanged.]

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRANT JURY PROCEEDINGS.

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all ~~subsequent~~ court proceedings, and

(2) that the defendant is entitled to~~court will appoint~~ a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must ask~~question~~ the defendant ~~to determine~~ whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent unless the court's local funding unit has designated an appointing authority in its compliance plan with the Michigan Indigent Defense Commission. If there is an appointing authority, the court must refer the defendant to the appointing authority for indigency screening. If there is no appointing authority, or if the defendant seeks judicial review of the appointing authority's determination concerning indigency, t~~T~~he court's determination of indigency must be guided by the following factors:

(1)-(3) [Unchanged.]

(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned;~~ and~~

(5) the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and

(6~~5~~) [Renumbered but otherwise unchanged.]

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer. The court reviews an appointing authority's determination of indigency de novo and may consider information not presented to the appointing authority.

(C) [Unchanged.]

(D) Appointment or Waiver of a Lawyer. Where~~If~~ the court makes the determination~~determines~~ that a~~the~~ defendant is financially unable to retain a lawyer, it must promptly refer the defendant to the local indigent criminal defense system's appointing authority for appointment of a lawyer~~appoint a lawyer and promptly notify the lawyer of the appointment~~. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first.

(1)-(2) [Unchanged.]

The court should encourage any defendant who appears without counsel to be screened for indigency and potential appointment of counsel.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) [Unchanged.]

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of~~appoint~~ one; or

(3) [Unchanged.]

The court may refuse to adjourn a proceeding for the appointment of~~to appoint~~ counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

(F) Multiple Representation. When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the local indigent criminal defense system~~court~~ must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

(I) Assistance of Lawyer at Grand Jury Proceedings.

(1) [Unchanged.]

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request refer the witness to the local indigent criminal defense system for appointment of an attorney~~appoint one for the witness~~ at public expense.

RULE 6.104. ARRAIGNMENT ON THE WARRANT OR COMPLAINT.

(A) Arraignment Without Unnecessary Delay. Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A). The arrested person is entitled to the assistance of an attorney at arraignment unless

(1) the arrested person makes an informed waiver of counsel or

(2) the court issues a personal bond and will not accept a plea of guilty or no contest at arraignment.

(B)-(D) [Unchanged.]

(E) Arraignment Procedure; Judicial Responsibilities. The court at the arraignment must

(1) [Unchanged.]

(2) if the accused is not represented by a lawyer at the arraignment, advise the accused that

(a)-(c) [Unchanged.]

(d) if the accused does not have the money to hire a lawyer, the local indigent criminal defense system~~court~~ will appoint a lawyer for the accused;

(3) advise the accused of the right to a lawyer at all ~~subsequent~~ court proceedings~~ and, if appropriate, appoint a lawyer~~;

(4)-(6) [Unchanged.]

The court may not question the accused about the alleged offense or request that the accused enter a plea.

(F)-(G) [Unchanged.]

RULE 6.445. PROBATION REVOCATION.

(A) [Unchanged.]

(B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must

(1) [Unchanged.]

(2) advise the probationer that

(a) [Unchanged.]

(b) the probationer is entitled to a lawyer's assistance at the hearing and at all ~~subsequent~~ court proceedings, including the arraignment on the violation/bond hearing, and that a lawyer~~the court~~ will be appointed ~~a lawyer~~ at public expense if the probationer wants one and is financially unable to retain one,

(3) if requested and appropriate, refer the matter to the local indigent criminal defense system's appointing authority for appointment of a lawyer~~appoint a lawyer~~,

(4)-(5) [Unchanged.]

(C)-(H) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(C) [Unchanged.]

(D) Arraignment; District Court Offenses

(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction, the defendant must be informed of

(a)-(b) [Unchanged.]

(c) the defendant's right

(i) to the assistance of an attorney at all court proceedings, including arraignment, and to a trial;

(ii)-(iii) [Unchanged.]

The information may be given in a writing that is made a part of the file or by the court on the record.

(2) [Unchanged.]

(3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant

(a)-(b) [Unchanged.]

If the defendant has not waived the right to counsel, the court must refer the matter to the Appointing Authority for the assignment of counsel.

(4) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Sentencing.

(1)-(3) [Unchanged.]

(4) Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

(a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the local indigent criminal defense system's appointing authority~~court~~ will appoint a lawyer to represent the defendant on appeal, and

(b) [Unchanged.]

(H)-(I) [Unchanged.]

RULE 6.625. APPEAL; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the local indigent criminal defense system's appointing authority~~court~~ must ~~enter an order~~ appoint~~ing~~ a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. If the defendant makes a request on the record, the court shall inform the appointing authority of the request that same day. Unless there is a postjudgment motion pending, the appointing authority~~court~~ must act~~rule~~ on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the appointing authority~~court~~ must act~~rule~~ on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment.

(C) If indigency was not previously determined or there is a request for a redetermination of indigency, the court shall make an indigency determination unless the court's local funding unit has designated this duty to its appointing authority in its compliance plan with the Michigan Indigent Defense Commission. The determination of indigency and, if indigency is found, the appointment of counsel must occur with 14 days of the request unless a postjudgment motion is pending. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(D) If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day the notice of appointment is filed with the court.

RULE 6.905. ASSISTANCE OF ATTORNEY.

(A) [Unchanged.]

(B) ~~Court-~~Appointed Attorney. Unless the juvenile has a retained attorney, or has waived the right to an attorney, the magistrate or the court must <u>refer the matter to the local indigent criminal defense system's appointing authority for appointment of</u>~~appoint~~ an attorney to represent the juvenile.

(C)-(D) [Unchanged.]

RULE 6.907. ARRAIGNMENT ON COMPLAINT OR WARRANT.

(A)-(B) [Unchanged.]

(C) Procedure. At the arraignment on the complaint and warrant:

(1) The magistrate shall determine whether a parent, guardian, or an adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the <u>local funding unit's appointment authority</u>~~magistrate~~ appoints an attorney to appear at arraignment with the juvenile or provided an attorney has been retained and appears with the juvenile.

(2) [Unchanged.]

RULE 6.937. COMMITMENT REVIEW HEARING.

(A) Required Hearing Before Age 19 for Court-Committed Juveniles. The court shall schedule and hold, unless adjourned for good cause, a commitment review hearing as nearly as possible to, but before, the juvenile's 19th birthday.

(1) [Unchanged.]

(2) Appointment of an Attorney. The <u>local funding unit's appointing authority</u>~~court~~ must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or is waived pursuant to MCR 6.905(C).

(3)-(4) [Unchanged.]

(B) Other Commitment Review Hearings. The court, on motion of the institution, agency, or facility to which the juvenile is committed, may release a juvenile at any time upon a showing by a preponderance of evidence that the juvenile has been rehabilitated and is not a risk to public safety. The notice provision in subrule (A), other than the requirement that the court clearly indicate that it may extend jurisdiction over the juvenile until the age of 21, and the criteria in subrule (A) shall apply. The rules of evidence shall not apply. The <u>local funding unit's appointing authority</u>~~court~~ must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or the right to counsel waived. The court, upon notice and opportunity to be heard as provided in this rule, may also move the juvenile to a more restrictive placement or treatment program.

RULE 6.938. FINAL REVIEW HEARINGS.

(A)-(B) [Unchanged.]

(C) Appointment of Counsel. If an attorney has not been retained or appointed to represent the juvenile, the <u>local funding unit's appointing authority</u>~~court~~ must appoint an attorney and <u>the court</u> may assess the cost of providing an attorney as costs against the juvenile or those

responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply.

(D)-(E) [Unchanged.]

Staff comment: The proposed amendments would generally shift the responsibility for appointment of counsel for an indigent defendant in a criminal proceeding to the local funding unit's appointing authority. These proposed amendments were submitted by the Michigan Indigent Defense Commission, and are intended to implement recently-approved Standard Five of the MIDC Standards.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules/].

Order Entered June 9, 2021:

PROPOSED AMENDMENT OF MCR 6.005.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.005 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings/].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS.

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities.

(1) The responsibilities of the trial lawyer who represents the defendant include

(a~~1~~) representing the defendant in all trial court proceedings through initial sentencing,

(b~~2~~) filing of interlocutory appeals the lawyer deems appropriate, and

(c~~3~~) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, ~~T~~the defendant's trial lawyer must either:

(i) file a ~~substantive brief in~~ response to ~~the prosecutor's interlocutory~~any application for leave to appeal, appellant's brief, or substantive motion; or

(ii) notify the Court of Appeals ~~that the lawyer will not be filing a brief in response to the application~~in writing that the defendant has knowingly elected not to file a response.

(2~~4~~) [Renumbered by otherwise unchanged.]

(3~~5~~) W~~w~~hen an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available ~~for copying~~ upon request of the appellate~~that~~ lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff comment: The proposed amendment of MCR 6.005 would clarify the duties of attorneys in preconviction appeals.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules/].

WELCH, J. (*concurring*). I concur in the Court's order publishing for comment proposed changes to MCR 6.005 that are designed to clarify a criminal-defense trial attorney's responsibilities in handling preconviction appeals. I write separately because, while I recognize several longstanding problems linked to defendants being unrepresented before the Court of Appeals during preconviction appeals, I am concerned that the proposed amendments may not get to the root of the problem and may have unintended consequences. Currently, a criminal-defense trial attorney can withdraw from representing his or her client in a precon-

viction appeal, MCR 6.005(H)(4), or simply "notify the Court of Appeals that the lawyer will not be filing a brief in response to the application." MCR 6.005(H)(3)(ii). While I support a higher level of responsibility than what is set forth in our current rule, I question whether the proposed amendment may create additional problems. For example:

(1) Can an attorney, who has only been paid to handle trial court proceedings and whose client is unwilling to pay more for the preconviction appeal (but who is not indigent), withdraw as counsel and notify the Court of Appeals that the lawyer or the defendant will not file a response?

(2) What if an attorney petitions the trial court for extra funding to handle an appeal for a retained but poor client and the trial court rejects the request? Is that attorney still required to handle the appeal?

(3) Can an attorney (whether court-appointed or retained) make a referral to appellate counsel and opt out of handling the appeal even if the client decides not to hire the recommended appellate counsel? Would this be a basis to notify the Court of Appeals that the defendant has knowingly elected to not file a response?

(4) Can an attorney, who prefers to focus on trial-level work only, make it clear in an engagement agreement that the attorney does not handle appeals and will refer such matters out if needed? If so, would such an agreement be enforceable in light of the proposed amendments?

As a final matter, it is not clear to me how the proposed rule would mesh with MRPC 1.1, which states that an attorney has an ethical obligation not to litigate matters he or she is not competent to handle, or with MRPC 1.16, which discusses an attorney's obligation to withdraw in certain circumstances and discretion to withdraw in others (including a client's failure to abide by payment terms in a retention agreement).

I applaud the Court's efforts to help ensure that defendants in criminal cases will have representation during preconviction appeals. While I recognize that in most cases a transition to or partnership with appellate counsel will likely occur, it also seems predictable that there will be situations in which one of the scenarios I have outlined above could arise. I hope that the public comment process will, at a minimum, address and clarify the concerns that I have outlined above.

Order Entered June 9, 2021:

PROPOSED AMENDMENT OF RULE 410 OF THE MICHIGAN RULES OF EVIDENCE.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 410 of the Michigan Rules of Evidence. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings/].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn or vacated;

(2) [Unchanged.]

(3) Any statement made in the course of any proceedings under MCR 6.302 or MCR 6.310 or comparable state or federal procedure regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn or vacated.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Staff Comment: The proposed amendments in this file would add vacated pleas to the list of guilty pleas that may not be used against defendant. Also, the proposed addition of a reference to MCR 6.310 in subsection (3) would add a prohibition on using a statement made during defendant's *withdrawal* of plea to the prohibition on using statements made under MCR 6.302 in *entering* a plea, which would make the rule more consistent with FRE 410.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules/].