MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

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[1] To August 30, 2019.

[2] From August 5, 2019.

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PEOPLE v SPEARS-EVERETT

Docket No. 341860. Submitted June 5, 2019, at Grand Rapids. Decided July 2, 2019, at 9:00 a.m.

Regina L. Spears-Everett was convicted following a jury trial in the Kalamazoo Circuit Court, Alexander C. Lipsey, J., of embezzling $20,000 or more from a vulnerable adult, MCL 750.174a(5)(a). Defendant was sentenced to five years' probation, with the first nine months to be spent in jail. Defendant was also ordered to pay $169,374.18 in restitution, with payments of $2,830 per month beginning in September 2014. Defendant appealed her conviction. The Court of Appeals, BOONSTRA, P.J., and SAWYER and MARKEY, JJ., affirmed both the conviction and the amount of restitution in an unpublished per curiam opinion issued on January 12, 2016 (Docket No. 324134). In August 2016, defendant was arraigned for failure to make the requisite restitution payments; defendant had been paying only $20 per month. The trial court, Gary C. Giguere Jr., J., held a probation hearing on September 21, 2016, during which defendant testified about her assets, liabilities, and life events that had affected her employment and income. The trial court found defendant guilty of a probation violation but requested that a debtor's examination be scheduled to determine whether defendant could comply with the restitution order without manifest hardship. At the debtor's examination, defendant testified about both her income and her husband's income. In January 2017, the court held a probation-violation sentencing hearing. Defendant's husband testified that his income was between $4,600 and $4,700 per month. Defendant's income was between $800 and $900 per month. The trial court issued a written opinion and order on May 10, 2017, concluding that defendant could not have made restitution payments of $2,830 per month without a manifest hardship and that defendant had made a good-faith effort to comply with repayment when she consistently paid $20 per month. The court then ordered defendant "to pay 15% of her family's gross income, or $2,830 (whichever is lesser) per month in restitution." Defendant moved to modify the restitution payment schedule, arguing that the new repayment schedule impermissibly required her husband to pay some of the restitution and improperly considered the family's gross—rather than net—income. The trial court held a hearing and issued an oral opinion on December 5, 2017,

concluding that the language of the May 10, 2017 order unambiguously directed defendant alone to make the restitution payments and that the family's income was the best way to determine the payment schedule. The court denied defendant's motion on December 19, 2017. Defendant appealed by leave granted.

The Court of Appeals *held*:

Two statutes in Michigan provide authority for the trial court to order a defendant to pay restitution: the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. Multiple subsections in both MCL 780.766 and MCL 769.1a specifically refer to "the defendant" when describing the obligation to pay restitution. Additionally, the CVRA defines "defendant" as a person charged with, convicted of, or found not guilty by reason of insanity of committing a crime against a victim. Finally, the applicable court rule, MCR 6.425(E)(3), also specifically and repeatedly refers to the "defendant" as the party responsible for fulfilling an obligation to pay restitution. In this case, while the trial court acknowledged that its May 10, 2017 order was not intended to subject defendant's husband to restitution payments arising from defendant's crime, the trial court's written directive requiring defendant to pay 15% of her family's gross income was worded in a manner that could be interpreted to require that defendant's husband's income be used to satisfy defendant's restitution obligation. A review of MCL 780.766, MCL 769.1a, and MCR 6.425(E)(3) revealed that defendant's husband's income may not be used to satisfy restitution; therefore, any indication in the trial court's order, even if unintentional, that defendant's husband may be held liable for defendant's restitution payments was improper. Accordingly, the trial court erred by denying defendant's motion to modify the restitution payment schedule. However, the language of MCL 780.766, MCL 769.1a, and MCR 6.425(E)(3) did not support defendant's assertion that the trial court was required to use her net income in determining her ability to pay and setting her restitution payment schedule; accordingly, the trial court did not abuse its discretion by declining to do so. Remand was necessary to allow the trial court the opportunity to clarify the wording of its order to expressly confirm that only defendant, solely out of her own financial resources, is to satisfy her restitution obligation.

Trial court's December 19, 2017 order vacated; trial court's May 10, 2017 order vacated to the extent it provided that defendant's family's income could be used to satisfy defendant's restitution obligation.

REDFORD, J., dissenting, would have upheld both the trial court's December 19, 2017 order denying defendant's motion to modify her

restitution payment schedule and the trial court's May 10, 2017 order addressing the restitution repayment because the trial court, in both orders, unambiguously required that defendant alone pay the restitution and because the trial court's conclusion was factually supported by a mathematical analysis of the order, which revealed that defendant's income constituted 16% of the household income.

CRIMINAL LAW — CRIME VICTIMS — RESTITUTION — DEFENDANT'S OBLIGATION TO PAY RESTITUTION.

MCL 780.766, MCL 769.1a, and MCR 6.425(E)(3) outline a defendant's obligation to pay restitution; any indication in a trial court's order, even if unintentional, that another person may be held liable for a defendant's restitution payment is improper.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Mark A. Holsomback*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jason R. Eggert*) for defendant.

Before: K. F. KELLY, P.J., and FORT HOOD and REDFORD, JJ.

FORT HOOD, J. Defendant, Regina Lynne Spears-Everett, appeals by leave granted[1] the trial court's order denying her motion to modify her restitution payment schedule. We vacate the trial court's order denying defendant's motion and remand for proceedings consistent with this opinion.

I. BACKGROUND

In 2014, a jury convicted defendant of embezzling $20,000 or more from a vulnerable adult, MCL 750.174a(5)(a). Defendant was sentenced to five years'

[1] *People v Spears-Everett*, unpublished order of the Court of Appeals, entered July 3, 2018 (Docket No. 341860).

probation, with the first nine months to be spent in jail. Defendant was also ordered to pay $169,374.18 in restitution. Defendant's restitution was to be paid back in installments of $2,830 per month beginning in September 2014. Defendant appealed her conviction in this Court, and this Court affirmed both the conviction and the amount of restitution.[2]

On August 4, 2016, defendant's probation officer, Amy Hill, alleged that defendant had failed to make restitution payments. Defendant was arraigned on this probation violation on August 30, 2016. The trial court held a probation hearing on September 21, 2016, during which Hill testified that defendant, at that time, had paid only $196.99 in restitution and that she was currently only paying about $20 per month toward her restitution. Defendant testified generally about her assets, liabilities, and life events that had affected her employment and income. Defendant stated that she was paying "what [she] could afford" but was not paying the requisite $2,830 per month. The trial court found defendant guilty of a probation violation. However, the information presented to the trial court was not sufficient for it to determine whether defendant could comply with the restitution order without "manifest hardship," so the court requested that the prosecutor schedule a debtor's examination.

A debtor's examination was held on November 9, 2016. Defendant testified that she was married to Julius Everett and that the couple had four children between the ages of 10 and 17. The family lived together in a rental home. Everett was the only person listed on the rental agreement, and it appears that he

[2] *People v Spears-Everett*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2016 (Docket No. 324134).

alone paid the $1,200 per month rent. Three of defendant's children were enrolled in private schools at a cost of about $150 to $200 per month per child.

Defendant was a doctor of podiatric medicine, but her license had been suspended in 2014 after she was convicted of the offense giving rise to the order of restitution. Defendant hoped to apply for license reinstatement that week. Upon her release from prison, defendant had been employed at Pero Farms, where she earned $8.15 per hour. Defendant worked at Pero Farms until she was in a car accident in December 2015. After the accident, defendant was not able to work and did not receive any settlements, but she began to receive a $1,200 per month personal-injury benefit from her no-fault automobile-insurance company. Defendant had recently started working at Meijer making $9 per hour, so she expected the $1,200 stipend to end. Defendant did not have any other source of income.

According to defendant, Everett was employed full time as a pastor. His salary was about $4,700 per month. Everett's salary was deposited into a joint bank account with defendant, but he immediately transferred it into his personal bank account. Defendant had been sued by the estate of the embezzlement victim, and a $130,000 judgment had been entered against her individually as a result of that lawsuit. Defendant also had a $2,500 judgment against her from failure to pay a Best Buy credit card. Defendant and Everett had a joint $250,000 tax debt to the Internal Revenue Service.

The trial court held a probation-violation sentencing hearing on January 31, 2017, during which Everett also testified. Everett testified that he made about $4,600 per month before taxes. Before defendant went to jail, she and Everett combined their incomes to pay their

bills. After paying their monthly expenses, the couple had about $1,047 per month left to spend on clothing, food, and incidentals. Everett had to "consistently" borrow from a line of credit to "make those ends meet" while defendant was in jail. Everett borrowed about $1,000 per month while defendant was incarcerated and for a few months after her release. When defendant began working, she made about $800 or $900 per month. This helped Everett cover food and some incidentals, but he still borrowed money each month.

Defendant obtained a job at Meijer on October 31, 2016. When she began working, her personal-injury benefit checks decreased. Defendant's income was about $900 per month between Meijer and the personal-injury checks. Because defendant was making an income, Everett was able to borrow less from his line of credit, but he continued to borrow money to pay the bills. Defendant and Everett consistently made the $20 restitution payment monthly. A larger restitution payment was not made because there was never a surplus of money and Everett was borrowing money to pay the bills.

Everett testified that his paycheck was deposited into a joint bank account at Fifth Third Bank because that account was associated with the line of credit that he used to borrow money. When defendant was incarcerated, Everett opened up a separate individual bank account at Fifth Third Bank. He attempted to move the line of credit to that account, but Fifth Third Bank would not permit him to do so. So, to keep the line of credit, Everett had to keep using the joint account. This was why his paycheck was deposited into the joint account and then transferred to his personal account. When defendant was released from jail, Everett continued to transfer most of his paycheck out of the joint

account, but he would leave $500 to $700 in the joint account so that defendant could access that money.

The trial court issued a written opinion and order on May 10, 2017. The trial court noted that MCR 6.425(E)(3) controlled and that the trial court was tasked with determining whether defendant's compliance with the terms of her restitution order would cause defendant "manifest hardship." In its written opinion, the trial court rendered detailed findings of fact regarding defendant's employment status and history, employability and earning ability, willfulness of her failure to pay, financial resources, basic living expenses, and other circumstances that bore on her ability to pay. Ultimately, the trial court concluded that "there does not appear to have been any point in time when Defendant could have made restitution payments of $2,830 per month without a manifest hardship." Further, defendant had "technically made a good-faith effort to comply with the repayment of her court-ordered obligations considering that her initial probation officer informed her that payments of $20 per month were sufficient." The trial court then ordered defendant to pay restitution as follows:

> From June 1, 2017 onward, Defendant will be required to pay 15% of her family's gross monthly income, or $2,830 (whichever is lesser) per month in restitution. Future analysis of "good-faith effort to comply" will be based on this calculus, not on [defendant's probation officer's] "$20 per month" directive[3] which should no longer be relied upon by anyone.

On November 9, 2017, defendant moved to modify the restitution payment schedule pursuant to

[3] Defendant's probation officer testified that he had told defendant, after she informed him that she could not pay $2,830 per month for restitution, that she could make a $20 payment monthly.

MCL 780.766(12). Defendant stated that she sought this modification because the new repayment schedule impermissibly required Everett to pay some of the restitution and improperly considered the family's gross—rather than net—income. In response, the prosecution argued that because defendant and Everett had comingled their incomes and expenses, there was no way for the court to determine defendant's actual ability to pay individually. The prosecution also countered that defendant had not provided any authority supporting her assertion that net income, rather than gross income, should be used in determining the schedule of payments for her restitution. The trial court heard defendant's motion on December 5, 2017. After hearing argument from both parties, the trial court found that "the language in its May 10 order unambiguously directs Defendant and Defendant alone to make restitution payments, and that the family's income is merely the best measuring rod to determine what Defendant must pay from her own funds." Further, the trial court found that defendant's gross income was "the most reasonable basis [from which] to calculate Defendant's monthly [restitution] payment." Therefore, the trial court found that the modified restitution order did not create a manifest hardship for defendant, and defendant's motion was denied. Defendant now appeals by leave granted.

II. STANDARDS OF REVIEW

"A trial court's restitution order is reviewed for an abuse of discretion." *People v Turn*, 317 Mich App 475, 479; 896 NW2d 805 (2016). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

We review de novo "[q]uestions of statutory interpretation . . . ." *Turn*, 317 Mich App at 479. When interpreting statutes, this Court's paramount goal is to discern and effectuate the Legislature's intent. *People v Sharpe*, 502 Mich 313, 326; 918 NW2d 504 (2018).

> "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. [*Sharpe*, 502 Mich at 326-327.]

This Court is precluded from reading anything into the language of an unambiguous statute that is not intended by the Legislature as reflected by its plain language. *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003).

III. ANALYSIS

"Restitution in Michigan is afforded not only by statute, but also by Const 1963, art 1, § 24, which entitles victims of crime to restitution relief." *People v Grant*, 455 Mich 221, 229; 565 NW2d 389 (1997). Two statutes in Michigan provide authority for the trial court to order a defendant to pay restitution: the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. *People v Garrison*, 495 Mich 362, 365; 852 NW2d 45 (2014). MCL 769.1a provides, in pertinent part:

> (2) Except as provided in subsection (8), *when sentencing a defendant* convicted of a felony, misdemeanor, or ordinance violation, *the court shall order*, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, *that the*

defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

* * *

(11) *If the defendant is placed on probation* or paroled or the court imposes a conditional sentence under section 3 of this chapter, any restitution ordered under this section shall be a condition of that probation, parole, or sentence. The court may revoke probation or impose imprisonment under the conditional sentence and the parole board may revoke parole *if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order*. In determining whether to revoke probation or parole or impose imprisonment, the court or parole board shall consider *the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay*. [Emphasis added.]

A review of MCL 769.1a confirms that it is the defendant who bears the onus of satisfying the obligation to pay restitution arising from criminal conduct. See, e.g., MCL 769.1a(3) (specifying that certain requirements may be imposed on the *defendant* if the defendant's criminal conduct resulted in damage to or loss or destruction of property); MCL 769.1a(4) (directing that the order of restitution may require specific obligations of a *defendant* if the criminal conduct resulted in physical or psychological injury to the victim); MCL 769.1a(10) ("[R]estitution shall be made immediately. However, the court may require that the *defendant* make restitution under this section within a specified period or in specified installments.") (emphasis added); MCL 769.1a(13) ("An order of restitution is a judgment and lien against all property of the *defendant* for the amount specified in the order of restitu-

tion.") (emphasis added); MCL 769.1a(14) ("[A] *defendant* shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the *defendant* has the resources to pay the ordered restitution and has not made a good faith effort to do so.") (emphasis added).

Additionally, MCL 780.766, a provision of the CVRA, provides, in pertinent part:

> (2) Except as provided in subsection (8), *when sentencing a defendant convicted of a crime*, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, *that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate*. . . .
>
> * * *
>
> (11) *If the defendant is placed on probation or paroled* or the court imposes a conditional sentence as provided in section 3 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.3, any restitution ordered under this section shall be a condition of that probation, parole, or sentence. The court may revoke probation or impose imprisonment under the conditional sentence and the parole board may revoke parole *if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order*. In determining whether to revoke probation or parole or impose imprisonment, the court or parole board shall consider *the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay*.
>
> (12) Subject to subsection (18), *a defendant who is required to pay restitution* and who is not in willful default

> of the payment of the restitution may at any time petition the sentencing judge or his or her successor to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the defendant or his or her immediate family, and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim, the court may modify the method of payment.
>
> (13) An order of restitution entered under this section remains effective until it is satisfied in full. *An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution*. The lien may be recorded as provided by law. [Emphasis added.]

The CVRA specifically defines "defendant" as "a person charged with, convicted of, or found not guilty by reason of insanity of committing a crime against a victim." MCL 780.752(1)(d). Moreover, throughout MCL 780.766, the Legislature has expressly referred to a *defendant's* obligation to pay restitution. See, e.g., MCL 780.766(3) (specifying the *defendant's* obligations in an order of restitution if the defendant's crime resulted in damage to or loss or destruction of property); MCL 780.766(4) (stating what the *defendant* is obligated to pay pursuant to an order of restitution "[i]f a crime results in physical or psychological injury to a victim") (emphasis added); MCL 780.766(6) (stating that if the victim or the victim's estate gives consent, "the order of restitution may require that the *defendant* make restitution in services in lieu of money") (emphasis added); MCL 780.766(10) ("If not otherwise provided by the court under this subsection, restitution shall be made immediately. However, the court may require that the *defendant* make restitution under this section within a specified period or in specified installments.") (emphasis added); MCL 780.766(14) ("[A] defendant shall not be imprisoned, jailed, or incarcerated for a violation of

probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the *defendant* has the resources to pay the ordered restitution and has not made a good faith effort to do so.") (emphasis added).

The applicable court rule, MCR 6.425(E), also provides, in pertinent part:

> (3) Incarceration for Nonpayment.
>
> (a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, *that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order*.
>
> (b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount of money owed to the extent permitted by law.
>
> (c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:
>
> (i) *Defendant's* employment status and history.
>
> (ii) *Defendant's* employability and earning ability.
>
> (iii) The willfulness of the *defendant's* failure to pay.
>
> (iv) *Defendant's* financial resources.
>
> (v) *Defendant's* basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.
>
> (vi) Any other special circumstances that may have bearing on the *defendant's* ability to pay. [Emphasis added.]

On appeal, defendant claims that the wording of the trial court's order resulted in the invasion of her

husband's financial assets and required him to tender payment to honor her obligation to make restitution. Our review of the plain language of MCL 769.1a, MCL 780.766, and MCR 6.425(E)(3) supports defendant's argument. Notably, the pertinent statutes and court rule repeatedly refer to *defendant's* obligation to honor a restitution order. Moreover, in matters involving potential revocation of probation, the statutes and court rule make clear that the onus is on the trial court to weigh "the *defendant's* employment status, earning ability, and financial resources . . . ." MCL 769.1a(11) (emphasis added); see also MCL 780.766(11); MCR 6.425(E)(3)(c)(i), (ii), and (iv). Stated differently, the statutes and court rule make clear that Everett's income cannot be used to satisfy restitution. Accordingly, any indication in the trial court's order, even if unintentional, that Everett can be held liable for defendant's restitution payments is improper as inconsistent with statutory authority and the applicable court rule. Therefore, we agree with defendant that the trial court erred by denying her motion to modify the restitution payment schedule.

While this Court and the Michigan Supreme Court have not decided this precise issue—that being whether a trial court can require a defendant's spouse to tender financial resources to pay a defendant's restitution obligation—our conclusion is supported by federal caselaw that defendant cites in her brief on appeal.[4] In *United States v Corbett*, 357 F3d 194, 195 (CA 2, 2004), the defendant, convicted of mail fraud, was ordered to pay restitution. The United States District Court for

[4] This Court has recognized that federal-court interpretations of the Victim and Witness Protection Act, 18 USC 3663, can be persuasive when interpreting the CVRA. *People v Gubachy*, 272 Mich App 706, 712; 728 NW2d 891 (2006).

the Western District of New York set forth a schedule of restitution payments for the defendant and ordered him to tender monthly payments of " '75% of the household cash flow per month' . . . ." *Id*. As pertinent to this appeal, in *Corbett* the defendant argued that the requirement concerning household cash flow "illegally reached beyond his earnings to those of his spouse." *Id*. The United States Court of Appeals for the Second Circuit agreed with the defendant's argument and remanded for clarification of the restitution order. *Id*. at 196. Specifically, the *Corbett* court held:

> We agree that a remand is required at least for clarification. The schedule of restitution set by the court required monthly payments of "75% of the defendant's household cash flow." It is not clear what the court meant by that term. There are various ambiguities. First, it is not clear whether the term "household cash flow" was meant to serve solely as a measuring rod (including his wife's income), to ascertain the amount the defendant was required to pay out of his own personal funds, or whether it was meant to serve not only to measure the size of the required payment, but also to identify its source. The defendant correctly points out that if the latter meaning was intended, the order might improperly obligate the defendant's wife to pay part (or all) of the defendant's restitution obligation. We assume the court intended the former meaning. Under that interpretation, the defendant is obligated to pay solely out of his own funds, to the extent available, up to 75% of the combined household cash flow. Under no circumstances would the defendant's wife's earnings need to be used to pay the restitution. Although we believe in all likelihood that the court intended this meaning, there is no assurance the probation office would so understand it. The court should clarify. [*Id*.]

While the trial court acknowledged that its May 10, 2017 order was not intended to subject defendant's husband to restitution payments arising from defendant's crime, the trial court's written directive requir-

ing defendant to pay 15% of her family's gross income is worded in a manner that could be interpreted to require that Everett's income be used to satisfy defendant's restitution obligation. Accordingly, remand is necessary to allow the trial court the opportunity to clarify the wording of its order to expressly confirm that only defendant, solely out of her own financial resources, is to satisfy her restitution obligation.

Defendant next argues that the trial court erred when it used her gross income, rather than net income, in determining her restitution payment schedule. We disagree.

As noted earlier in this opinion, when determining whether a revocation of probation is required as a result of a defendant not making "a good faith effort" to satisfy a restitution order, MCL 769.1a(11) provides that "the court . . . shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay." MCL 780.766(11) contains identical language. Moreover, MCR 6.425 specifies that in determining whether the defendant has incurred a "manifest hardship" in having to comply with the restitution order, the trial court shall consider "[d]efendant's employment status and history," as well as "[d]efendant's employability and earning ability." MCR 6.425(E)(3)(c)(i) and (ii). Thus, the statutes and the court rule do not contain any requirement that a defendant's net income be considered in the trial court's decision. Consequently, our review of the pertinent statutes and court rule does not support defendant's contention that the trial court is *required* to consider a defendant's net income in determining whether to revoke a defendant's probation on

the basis of manifest hardship or lack of a good-faith effort to satisfy a restitution obligation.

We also decline defendant's invitation to adopt a bright-line rule that requires a trial court to consider only net income. Put simply, we are not permitted to read into the text of a statute a requirement that the Legislature did not intend as reflected by the plain language of the statute. *People v Mikulen*, 324 Mich App 14, 23; 919 NW2d 454 (2018). Similarly, this Court may not "read into an unambiguous court rule a provision not included by the Supreme Court." *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010). In contrast, MCL 769.1a(4)(c) states that if a defendant's felony, misdemeanor, or ordinance violation "results in physical or psychological injury to a victim," a restitution order may require that the defendant "[r]eimburse the victim or the victim's estate for *after-tax income loss* suffered by the victim as a result of the felony, misdemeanor, or ordinance violation." (Emphasis added.) MCL 780.766(4)(c) contains the same language concerning "after-tax income loss." Therefore, had the Legislature intended to limit the trial court's consideration under MCL 769.1a(11) and MCL 780.766(11) to defendant's "after-tax income," it certainly could have stated its intention in the statutes. Without such an indication, we cannot read that limitation into the statutes. We reach the same conclusion concerning the court rule given that the Supreme Court did not include such language in MCR 6.425(E)(3).

We also share the trial court's well-stated concern that if a trial court is limited to using a defendant's net income in determining a defendant's ability to pay as part of the analysis concerning "manifest hardship" required by MCR 6.425(E)(3)(a) and (c), and whether to revoke probation pursuant to MCL 769.1a(11) and MCL 780.766(11), the process is subject to abuse because a

defendant could potentially manipulate net income, using deductions for such things as a healthcare or retirement plan, to lower their income in an effort to evade the responsibility to pay restitution. Accordingly, because our reading of MCL 769.1a(11), MCL 780.766(11), and MCR 6.425(E)(3)(c) does not support defendant's assertion that the trial court was required to use her net income in determining her ability to pay and setting her restitution payment schedule, we are not persuaded that the trial court abused its discretion in declining to do so. *Turn*, 317 Mich App at 479.

IV. CONCLUSION

We vacate the trial court's December 19, 2017 order denying defendant's motion seeking a modification of her restitution payment schedule. The trial court's May 10, 2017 order addressing defendant's restitution payment schedule is also vacated to the extent it provides that defendant's family's income may be used to satisfy defendant's restitution obligation. On remand, the trial court is instructed to draft its restitution order in a manner that clarifies that defendant alone is responsible for paying her restitution obligation. We do not retain jurisdiction.

K. F. KELLY, P.J., concurred with FORT HOOD, J.

REDFORD, J. (*dissenting*). Because I conclude that the trial court did not abuse its discretion in its May 10, 2017 opinion and order or in its December 5, 2017 opinion from the bench, I respectfully dissent.

I. FACTUAL AND PROCEDURAL HISTORY

The matter at bar is the result of the embezzlement of more than $150,000 by a licensed healthcare pro-

vider from an elderly patient. At her sentencing on September 2, 2014, defendant was ordered, *inter alia*, to pay restitution of $169,374.18, at a rate of $2,830 per month. Upon her release from jail, defendant began to pay $20 per month toward restitution.[1]

The record reflects that while on probationary status and not incarcerated, defendant received between $500 and $1,700 per month income from employment or wage-loss income from a personal-injury claim. The record likewise reflects that defendant's spouse had an income of between $4,600 and $4,700 per month. All household monies were completely intermingled.

On August 4, 2016, a petition and order to show cause related to defendant's restitution payments was filed. In the ensuing nine months, the trial court conducted numerous hearings, took testimony, and gave all parties the opportunity to provide briefs as well as proposed findings of fact and conclusions of law.

On May 10, 2017, the court issued an 11-page opinion and order regarding defendant's probation violation for failure to pay restitution. On December 5, 2017, the court conducted a hearing on defendant's motion to modify restitution payment and issued an oral opinion. The court entered an order denying defendant's motion on December 19, 2017.

II. ANALYSIS

I agree with the majority's expression of the applicable standard of review and the applicable law. I

[1] In discussing restitution with her probation officer, it appears that defendant was told to at least pay something each month. Defendant paid $20 per month on a consistent basis. From the record on appeal, it appears that by May 23, 2017, defendant had paid a total of $1,034.99 in financial penalties, of which $582.60 was the total amount of restitution paid.

disagree, however, with the majority's analysis and conclusion based upon that law. On appeal, defendant claims that the wording of the trial court's order resulted in the invasion of her husband's financial assets and required him to tender payment to honor her obligation to make restitution. My review of the extensive trial court record in relation to the plain language of MCL 769.1a, MCL 780.766, and MCR 6.425(E)(3) leads me to conclude that defendant is incorrect.

The trial court—in both its May 10, 2017 opinion and order and in its oral opinion from the bench on December 5, 2017—plainly required defendant, and defendant alone, to pay the restitution in this matter. In the December opinion the trial court opined:

> This Court finds that the language in its May 10 order unambiguously directs Defendant and Defendant alone to make restitution payments, and that the family's income is merely the best measuring rod to determine what Defendant must pay from her own funds.
>
> * * *
>
> The court record reflects the Defendant's income and expenses were co-mingled. When evaluating the totality of the Defendant's financial circumstances using the family's gross income was to this Court the most reasonable basis to calculate Defendant's monthly payment. That is not to say, as Defendant's seem [sic] to assert in the pleadings, that this Court has not considered the true income Defendant has at her disposal to pay the restitution. Indeed, the Defendant's financial circumstances were completely considered pursuant to MCR 6.425 when this Court entered its May 10 order.

The trial court's conclusion is factually supported with a mathematical analysis of the order. In the December 2017 hearing, the trial court stated that

defendant had a monthly income of $900 and that her husband had a monthly income of $4,700. Combining the two incomes amounts to $5,600 per month. Defendant's income is thus 16% of the household income, and she was ordered to pay only 15% of her family's gross income.

Unlike the majority, respectfully, I do not conclude that the trial court committed error or abused its discretion. To the contrary, I believe that the trial court carefully and correctly applied the law to the facts and issued an appropriate order. In my opinion, the trial court did not require restitution to be paid by anyone other than defendant.

III. CONCLUSION

I would uphold the trial court's December 19, 2017 order denying defendant's motion to modify her restitution payment schedule and the trial court's May 10, 2017 order addressing defendant's restitution payment schedule.

2 CROOKED CREEK, LLC v CASS COUNTY TREASURER

Docket No. 342797. Submitted March 7, 2019, at Lansing. Decided March 14, 2019. Approved for publication July 2, 2019, at 9:05 a.m. Affirmed 507 Mich 1 (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 (the treasurer), seeking to recover monetary damages under MCL 211.78*l* in connection with the treasurer's foreclosure of certain property. In July 2010, 2CC purchased a parcel of vacant land located in Cass County and began constructing a house on the property; Sergei Antipov, the manager of 2CC and of KAVA Management Company, LLC, signed the purchase agreement, listing 2CC's address as 36 Bradford Lane, Chicago, Illinois; the deed, which was recorded by the register of deeds that month, provided that tax bills should be sent to 2CC at the Bradford Lane address in Chicago. According to Antipov, he lived at 36 Bradford Lane in Oak Brook, Illinois, until June 15, 2011, after which he moved; according to Antipov, he left a forwarding address with the United States Postal Service but never received any mail from the treasurer at the new address. In 2013, the treasurer initiated forfeiture and foreclosure proceedings under MCL 211.78 of the General Property Tax Act (the GPTA), MCL 211.1 *et seq*., after 2CC failed to pay the 2011 real estate taxes on the property. In January 2013, Title Check, LLC, the treasurer's agent, sent a notice of forfeiture by certified mail to the address listed on the deed. Delivery of the notice was delayed because the city was incorrectly listed as Chicago instead of Oak Brook; ultimately, the letter was returned to Title Check marked as unclaimed and unable to be forwarded. In May 2013, after the treasurer prepared a certificate of forfeiture, Title Check sent a notice of inspection to 2CC by first-class mail to the Oak Brook address, stating that the property was subject to inspection because of the unpaid taxes and that the property was in the process of being foreclosed. On June 3, 2013, according to a title search performed by Title Check, the only recorded interests in the property were 2CC's deed, a utility easement, and the treasurer's certificate of forfeiture; the treasurer petitioned for foreclosure of the property two days later. On June 18, 2013, after determining that the property appeared to be

occupied because of the house being built on the property, Title Check posted on a window notices of the show-cause hearing and the judicial-foreclosure hearing. The builder who was constructing the house for 2CC, as well as two other contractors, saw the posted notice around that date. The builder and the two contractors attested that the builder immediately contacted a representative of 2CC and informed the person of the posted notice; Antipov and 2CC's registered agent—Douglas Anderson—stated that the builder did not inform them of the notice. Although KAVA Holdings, LLC, of which 2CC is a wholly owned subsidiary, and RFA entered into a mortgage agreement in May 2013 regarding the property, the mortgage agreement was not recorded with the Cass County Register of Deeds until July 2013. Title Check sent a notice letter by first-class mail to the Bradford Lane address in August 2013 and October 2013; each letter notified the recipient of the hearings, and the latter notice also indicated that notice of foreclosure would be published between December 2013 and February 2014. On December 6 and December 20, Title Check sent a notice of show-cause hearing and a notice of judicial-foreclosure hearing by certified mail and first-class mail, respectively, to 2CC at the Bradford Lane address. The certified-mail notice, which was returned marked as refused and unable to be forwarded, informed 2CC that if it did not pay the delinquent taxes by March 31, 2014, title to the property would vest in the treasurer. The treasurer published a total of three notices of show-cause hearing and judicial-foreclosure hearing, two in December 2013 and one in January 2014. At the foreclosure hearing, Cass Circuit Court Judge Michael E. Dodge entered a foreclosure judgment against 2CC, finding that all persons entitled to notice had been provided the appropriate notice and afforded due process and that the treasurer had complied with the MCL 211.78i notice provisions. In July 2014, 2CC and RAF moved to set aside the judgment of foreclosure, claiming that they did not receive constitutionally sufficient notice of the foreclosure proceedings. The circuit court denied the motion. 2CC and RFA appealed that decision in the Court of Appeals. In an unpublished per curiam opinion, issued March 8, 2016 (Docket No. 324519), the Court of Appeals, METER, P.J., and BOONSTRA and RIORDAN, JJ., affirmed the circuit court's decision, concluding that the circuit court had not abused its discretion by denying the motion to set aside the judgment because the treasurer had met the minimum requirements of due process in providing notice to 2CC and that RFA had not been entitled to notice because the mortgage was filed after the certificate of foreclosure was entered; thereafter, 2CC and RFA filed the instant action in the Court of Claims, arguing that they had never received

notice of the foreclosure proceedings. After testimony was taken, the treasurer moved for a directed verdict. The court, MICHAEL J. TALBOT, J., construed the motion as a motion for involuntary dismissal under MCR 2.504(B)(2) and granted the motion. The Court of Claims noted that the issue of whether 2CC and RFA received due process had already been litigated in the earlier action and that 2CC and RFA were not entitled to monetary damages under MCL 211.78*l* because they had failed to establish a lack of any notice of the foreclosure as required by the statute. The court also concluded that RFA was not entitled to notice under the GPTA. 2CC and RFA moved for reconsideration; the court denied the motion. 2CC and RFA appealed.

The Court of Appeals *held*:

1. A motion for involuntary dismissal under MCR 2.504(B) requires a trial court to exercise its function as the fact-finder, weigh the evidence, pass on the credibility of witnesses, and select between conflicting inferences; although a plaintiff might move for a directed verdict, when a trial court sits as the fact-finder, the motion is actually one for involuntary dismissal. In this case, the Court of Claims correctly construed defendant's motion as one for an involuntary dismissal under MCR 2.504(B)(2).

2. MCL 211.78*l*(1) provides that if a judgment for foreclosure is entered under MCL 211.78 and all existing and unrecorded interests in a parcel of property are extinguished as provided in MCL 211.78, 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 may not bring an action for possession of the property against any subsequent owner but may only bring an action to recover monetary damages as provided in MCL 211.78*l*. Given the dictionary definition of the term "any" and that the word is commonly understood to encompass a wide range of things, the Legislature did not intend the MCL 211.78*l* notice requirement to be actual notice. Instead, to recover monetary damages under MCL 211.78*l*, a property owner must claim that it did not receive *any* notice required under the act; that is, the owner must be able to establish that the owner received no notice whatsoever. Constructive notice constitutes "any notice" for purposes of MCL 211.78*l*(1). Evidence of the receipt of any form of notice is sufficient to overcome a claim for damages under the statute; accordingly, it does not matter if a plaintiff can prove that the plaintiff did not receive certain notices required under the GPTA. MCL 211.78i(12) provides that the provisions of MCL 211.78i relating to notice of the show-cause hearing under MCL 211.78j and the foreclosure hearing under MCL 211.78k are

exclusive and exhaustive; other requirements relating to notice or proof of service under other law, rule, or legal requirement are not applicable to notice and proof of service under MCL 211.78i. Under MCL 211.78i, the governmental unit seeking foreclosure is not obligated to take additional notice measures that are not set forth in the statute; however, the governmental unit may attempt other forms of service in the event the form of service provided for in the statute fails. MCL 211.78i(4), in turn, provides that if the foreclosing governmental unit or its authorized representative discovers any deficiency in the provision of notice, the foreclosing governmental unit must take reasonable steps in good faith to correct that deficiency not later than 30 days before the show-cause hearing under MCL 211.78j if possible; when a foreclosing governmental unit's notice sent by certified mail is returned as unclaimed, resending the notice by first-class mail constitutes a reasonable step taken in good faith for purposes of MCL 211.78i(4).

3. Taken as a whole, the record and the findings made by the trial judge in the Cass Circuit Court action constituted sufficient evidence that 2CC had constructive notice of the foreclosure proceedings by publication. In addition, 2CC had constructive knowledge, and potentially actual knowledge, of the notice because the foreclosure notice was posted at the property when 2CC exercised control and dominion over the property during the construction of the home. MCL 211.78i only obligated the treasurer to send the notice required by the statute. In that regard, the treasurer's action of mailing a notice regarding the show-cause and foreclosure hearings by first-class mail to the Bradford Lane address in Oak Brook when the notice by certified mail went unclaimed was allowed under MCL 211.78i(4); thus, the notice by first-class mail constituted the notice required under the GPTA and served as a basis for the court's finding that 2CC received notice. Consequently, the Court of Claims did not err by concluding that because 2CC received some notice of the pending foreclosure, it could not recover damages under MCL 211.78*l*.

4. The recorded certificate of forfeiture provided constructive notice to RFA of the foreclosure proceedings and was sufficient for purposes of the MCL 211.78*l* notice requirement. RFA was not entitled to additional notice because the certificate of forfeiture was recorded before RFA received an interest in the property through the mortgage. The Court of Claims correctly concluded that RFA was not entitled to damages under MCL 211.78*l*.

Affirmed.

1. TAXATION — GENERAL PROPERTY TAX ACT — FORECLOSURE — NOTICE OF FORECLOSURE — MONETARY DAMAGES — WORDS AND PHRASES — "ANY NOTICE."

MCL 211.78*l*(1) provides that if a judgment for foreclosure is entered under MCL 211.78 and all existing and unrecorded interests in a parcel of property are extinguished as provided in MCL 211.78, 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 may not bring an action for possession of the property against any subsequent owner but may only bring an action to recover monetary damages as provided in MCL 211.78*l*; actual notice is not required; instead, to recover monetary damages, a property owner must claim that it did not receive any notice required under the act; constructive notice constitutes "any notice" for purposes of MCL 211.78*l*(1); evidence of the receipt of any form of notice is sufficient to overcome a claim for damages under the statute; accordingly, it does not matter if a plaintiff can prove that they did not receive certain notices required under the General Property Tax Act, MCL 211.1 *et seq*.

2. TAXATION — GENERAL PROPERTY TAX ACT — PROVISION OF NOTICE BY FORECLOSING GOVERNMENTAL UNIT — DEFICIENCIES IN NOTICE.

Under MCL 211.78i, a governmental unit seeking foreclosure is not obligated to take additional notice measures that are not set forth in the statute; the governmental unit may attempt other forms of service in the event the form of service provided for in the statute fails; under MCL 211.78i(4), if the foreclosing governmental unit or its authorized representative discovers any deficiency in the provision of notice the foreclosing governmental unit must take reasonable steps in good faith to correct that deficiency not later than 30 days before the show-cause hearing under MCL 211.78j if possible; when a foreclosing governmental unit's notice sent by certified mail is returned as unclaimed, resending the notice by first-class mail constitutes a reasonable step taken in good faith for purposes of MCL 211.78i(4).

Barnes & Thornburg LLP (by *Tracy D. Knox* and *Brian E. Casey*) and *Kus Ryan, PLLC* (by *Cindy Rhodes Victor*) for 2 Crooked Creek, LLC, and Russian Ferro Alloys, Inc.

Kreis, Enderle, Hudgins & Borsos, PC (by *Thomas G. King* and *Nicholas J. Spigiel*) for the Cass County Treasurer.

Before: SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. Plaintiffs, 2 Crooked Creek, LLC ("2CC") and Russian Ferro Alloys, Inc. ("RFA"), sought monetary damages under MCL 211.78*l* following defendant's tax foreclosure of certain property. Plaintiffs claimed that they had no notice of the foreclosure proceedings. The Court of Claims involuntarily dismissed plaintiffs' claims after considering plaintiffs' proofs during a bench trial, in accordance with MCR 2.504(B)(2). Plaintiffs now appeal by right. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

A. THE PRIOR APPEAL

A related case was previously before this Court and provides the relevant background to the case at bar. *In re Cass Co Treasurer Foreclosure Petition*, unpublished per curiam opinion of the Court of Appeals, issued March 8, 2016 (Docket No. 324519) (*In re Cass Co Treasurer*), was issued as a result of plaintiffs' appeal of the Cass Circuit Court decision in the underlying foreclosure action that plaintiffs assert gave rise to their claim for damages under MCL 211.78*l* in this case.[1]

In July 2010, 2CC, an Indiana limited-liability company, purchased a parcel of vacant land located in Penn Township, Cass County, Michigan, for $820,000. The real estate agreement effectuating the sale listed 2CC's address as "36 Bradford Lane, Chicago, IL 60523," was executed by Sergei Antipov as "the Manager of Kava Management Company, LLC, the Manager of 2 Crooked Creek LLC," and was subsequently filed with the Cass County Register of Deeds. On July 20, 2010,

[1] Defendant's cross-appeal asserts that this opinion required dismissal of plaintiffs' claims under res judicata and collateral estoppel.

the Cass County Register of Deeds recorded the Trustee's Deed, which provided that subsequent tax bills should be sent to "2 Crooked Creek LLC" at "36 Bradford Lane, Chicago, IL 60523." "Antipov later attested that he lived at 36 Bradford Lane, Oak Brook, Illinois 60523, until June 15, 2011." *Id*. at 2.

> Property taxes were not paid for the property for 2011. In 2013, [the Cass County Treasurer] initiated forfeiture and foreclosure proceedings on the property pursuant to the General Property Tax Act ("GPTA"), MCL 211.78 *et seq*. On January 14, 2013, Title Check, LLC (Title Check), acting as [the Cass County Treasurer's] agent, sent a notice of forfeiture regarding 2011 real property taxes for the property in question, as required by MCL 211.78f. The January 14, 2013 notice letter was sent by certified mail, return receipt requested, to 36 Bradford Lane, Chicago, IL 60523 (the address identified in the deed for the receipt of tax bills). Because 60523 is actually the zip code for Oak Brook, not Chicago, notice of the letter was delivered on January 16, 2013, to 36 Bradford Lane, Oak Brook, IL 60523. The letter was left unclaimed, and on February 15 the letter was returned to Title Check marked "Unclaimed—Unable to Forward."
>
> On April 9, 2013, [the Cass County Treasurer] prepared a certificate of forfeiture as required by MCL 211.78g, and recorded it with the Cass County Register of Deeds on April 12, 2013. On May 5, 2013, Title Check sent a notice of inspection via regular first class mail addressed to 2 Crooked Creek at 36 Bradford Ln, Oak Brook IL 60523.[2] The letter identified the property and stated that because of unpaid 2011 taxes, the property would be subject to inspection and posting of notice on June 17, 2013. The letter also stated that the property was in the process of foreclosure, and that anyone with an interest in the property should immediately contact [the Cass County Treasurer].

[2] After the January 14, 2013 notice letter was delivered to Oak Brook instead of Chicago, [the Cass County Treasurer] addressed all subsequent notices to Oak Brook, rather than Chicago.

Title Check performed a title search of the property, which was completed on June 3, 2013. [The Cass County Treasurer] represented in its brief before the trial court that the title search was initiated on or before May 1. The title search revealed that the only recorded interests in the property were the deed and real estate agreement, an easement in favor of Indiana Michigan Power Company, and the certificate of forfeiture.

On May 28, 2013, KAVA Holdings, LCC, an Alaska limited liability company, of which 2CC is a wholly owned subsidiary, and RFA, an Indiana corporation, entered into a mortgage agreement regarding the property, in the amount of $3,500,000. The mortgage agreement was subsequently recorded with the Cass County Register of Deeds on July 10, 2013.

On June 5, 2013, [the Cass County Treasurer] filed a petition for foreclosure which sought to foreclose (for unpaid taxes) on approximately 579 separate parcels of real property described in Schedule A of the petition pursuant to MCL 211.78h(1), including the property owned by 2CC. The trial court scheduled a hearing on the petition for February 18, 2014.

On June 18, 2013, Katelin Makay, a land examiner working for Title Check, visited the property and determined that the property appeared to be occupied. She was unable to personally meet with any occupant, however, so she posted on the property, in a conspicuous manner, a notice of show cause hearing and judicial foreclosure hearing. Makay posted the notice in a window next to a double door of the house on the property, took a photograph of the posted notice, and attached that photograph to her inspection worksheet.

James Frye, president of Shoreline Development Company, attested that he was at the property on or shortly after June 18, 2013, because his company was building a house there for 2CC. He saw the notice of the show cause hearing and the judicial foreclosure hearing on a window next to the front door of the house, and he then directly

contacted "a representative of 2 Crooked Creek, LLC by telephone and advised them of the posted notice and was advised by the representative of 2 Crooked Creek, LLC that the matter would be taken care of." Randy Bennett, principal of Bennett Painting, and Ed Lijewski, superintendent for Shoreline Development Company, both attested that they also were at the property on or shortly after June 18, 2013, saw the posted notice, and were present when Frye contacted a representative of 2CC about the notice.

However, Antipov stated in an affidavit that he and Douglas Anderson were the only representatives of 2CC, that Frye knew they were the only representatives of 2CC, and that Frye did not tell him at any time of any notice posted on the property. Anderson stated in an affidavit that he is the registered agent for 2CC, and that he regularly spoke with Frye, but that Frye at no time informed him of the notice posted on the property.

On August 20, 2013, Title Check sent a notice letter via first class mail of the show cause hearing and the judicial foreclosure hearing to 2CC at the 36 Bradford Lane address in Oak Brook. Title Check sent another notice letter via first class mail to the same address on October 30, 2013, which also indicated that notice of foreclosure would be published between December 2013 and February 2014.

On December 6, 2013, a notice of show cause hearing and judicial foreclosure hearing was sent via certified mail to 2CC at 36 Bradford Lane, Oak Brook, IL 60523. The December 6, 2013 notice letter, sent pursuant to MCL 211.78i(7), included the date the property was forfeited to [the Cass County Treasurer], a statement that 2CC could lose its interest in the property as a result of the foreclosure, a legal description, parcel number, and street address of the property, the person to whom the notice is addressed, the total amount to redeem the property as of March 1, 2013 ($14,743.24), the date and time of the show cause hearing (January 15, 2014), the date and time of the foreclosure hearing (February 18, 2014), and a statement that unless the forfeited delin-

quent taxes, penalties, interest and fees were paid on or before March 31, 2014, 2CC would lose its interest in the property and title to the property would absolutely vest with [the Cass County Treasurer]. Martin J. Spaulding, general manager of Title Check, stated in an affidavit that the December 6, 2013 notice letter was returned to Title Check on January 14, 2014 marked "Refused—Unable to Forward." On December 20, 2013, a copy of that same notice letter was sent via first class mail to 2CC at the same address.

On December 19, 2013, December 26, 2013, and January 2, 2014, a notice of show cause hearing and judicial foreclosure hearing was published in the Cassopolis Vigilant, a weekly newspaper circulated, printed, and published in Cass County, Michigan. The notice contained a list of properties subject to foreclosure, and indicated that 2CC owed $14,743.24 as of March 1, 2013, for the subject property, identified by parcel number. The notice also included the dates of the show cause hearing and the judicial foreclosure hearing, and indicated that title to the property would vest absolutely in the foreclosing governmental unit if the delinquent payments were not paid by March 31, 2014.

The show cause hearing took place in January 2014. The record does not indicate who did or did not appear at the hearing, but suggests that no one appeared on behalf of 2CC.

On February 18, 2014, the hearing on the petition for foreclosure was held as scheduled, at which no one appeared on behalf of 2CC to contest the foreclosure. The trial court made the following findings of fact:

> 1. that as required by MCL 211.78k(5)(f) all persons entitled to notice and an opportunity to be heard have been provided that notice and opportunity and have been afforded due process as required by MCL 211.78(2).
>
> 2. that the County Treasurer of the County of Cass or her Agents have complied with the proce-

> dures for provision of notice by mail, for visits to forfeited property, and for publication as found in MCL 211.78i, and
>
> 3. that each person entitled to notice was provided proper notice or if not so notified either:
>
> (i) had constructive notice of the hearing under this section by acquiring an interest in the property after the date of the notice of forfeiture was recorded under MCL 211.78g.
>
> (ii) appeared at the hearing or filed written objections with the clerk of the circuit court prior to the hearing or
>
> (iii) prior to the hearing had actual notice of the hearing

The trial court ordered that a judgment of foreclosure be entered based on forfeited unpaid delinquent taxes, interest, penalties, and fees for each of the listed properties, including the property owned by 2CC. The trial court further stated that fee simple title to the foreclosed property would vest absolutely in Cass County, with no further right of redemption, if the delinquent balance was not paid on or before March 31, 2014.

Anderson stated in his affidavit that he first learned of the judgment of foreclosure on April 18, 2014, when he received a telephone call from Spaulding on behalf of Title Check, in which Spaulding asked him about the forfeiture and foreclosure and inquired whether Anderson would be attending the auction for the property. Anderson further stated that the telephone number at which Spaulding called him is not a listed number, yet Spaulding was able to obtain it from some source, and that Spaulding could have called him prior to March 31, 2014, when the foreclosure became final. Anderson stated that he did not receive any notices of tax assessments, the certificate of foreclosure, the show cause hearing, or the foreclosure action on the property. Antipov also stated in his affidavit that he did not receive any notices of tax assessments, the certificate of foreclosure, the show cause hearing, or the

foreclosure action, and that he first learned of the judgment of foreclosure when Anderson advised him of the telephone call from Spaulding.

On July 3, 2014, [2CC and RFA] moved the trial court to set aside the judgment of foreclosure. They claimed that they did not receive constitutionally sufficient notice of the foreclosure proceedings, such that they were deprived of their property interests without due process of law. Specifically, [they] argued that [the Cass County Treasurer] knew that the 36 Bradford Lane address was not an address to which it could send a notice that was reasonably calculated to inform 2CC of the pending foreclosure. According to [2CC and RFA], [the Cass County Treasurer] did not make reasonable efforts to determine an address reasonably calculated to provide 2CC with notice, and did not perform a business records search as required by statute. Furthermore, the mortgage agreement with RFA recorded on July 10, 2013, contained correct addresses for [2CC and RFA], and if notice had been sent to those addresses [2CC and RFA] would have received notice of the foreclosure action. Finally, [2CC and RFA] argued that the deprivation of [their] due process rights was particularly egregious because Title Check had actual knowledge of how to contact 2CC, as evidenced by the telephone call made by Spaulding to Anderson shortly after the foreclosure became final.

The trial court denied [2CC and RFA's] motion, finding that [the Cass County Treasurer] met the initial statutory notice requirements under MCL 211.78i, and that [it] had no reason to believe notice was insufficient. The trial court held that [the Cass County Treasurer] had no statutory duty to search Indiana business records for 2CC's address. The trial court found that due process requirements were met . . . because [the Cass County Treasurer] sent certified mail to the address listed in the deed, sent several first class letters to that address, posted notice on the property, and published notice in a newspaper. The trial court found that taken together, those actions reflected efforts reasonably calculated to inform interested parties and complied with both statutory and case authority, and

> noted that the presence of actual notice is not a deciding factor in the analysis. Regarding RFA, the trial court found that because the mortgage had not yet been recorded when [the Cass County Treasurer] performed its title check, and because the certificate of foreclosure was recorded before the mortgage, [the Cass County Treasurer] had no duty to provide RFA with any additional notice of the foreclosure. [*Id*. at 2-6.]

Plaintiffs appealed to this Court, which determined that the relevant question was whether plaintiffs "were afforded notice that satisfies due process, not whether [defendant] met each provision and requirement of the GPTA." *Id*. at 7. This Court held that RFA was not entitled to notice beyond that contained in the certificate of foreclosure because the certificate was recorded before RFA obtained its interest in the property. *Id*. This Court then considered all of the measures taken by defendant to provide notice to 2CC, concluded that defendant "performed constitutionally sufficient follow-up measures to provide 2CC with the notice necessary to satisfy the minimum requirements of due process," and affirmed the trial court's denial of plaintiff's motion to set aside the judgment of foreclosure. *Id*. at 8-9. Plaintiffs' subsequent request for reconsideration, application for leave to our Supreme Court, request for reconsideration to our Supreme Court, and application for certiorari to the United States Supreme Court were all denied.

B. THE CURRENT APPEAL

Around the same time that plaintiffs filed their motion to set aside the judgment in Cass Circuit Court, plaintiffs initiated the instant litigation in the Court of Claims. The trial court issued a stay pending resolution of this Court's Docket No. 324519.

At trial, Spaulding, general manager of Title Check, testified that Title Check used first-class mail to test addresses "to see if we can find any bad addresses. If we find bad addresses or get information indicating that a parcel is—that the mail piece has been forwarded, we can incorporate those addresses into our system." Spaulding conceded that as of February 15, 2013, his office had notice that the mail was unable to be forwarded and was unclaimed. Spaulding agreed that the notice of show-cause hearing and notice of foreclosure hearing were sent by certified mail to the Oak Brook address and returned "refused" but that was not an indication of a bad address. He agreed that 2CC did not receive notice of the show cause by the certified letter but noted that Title Check sent the same notice to the address by first-class mail at the same time and that letter was not returned. He testified that it was "not uncommon with certified mail" and that "[u]nable to be forwarded" did "not necessarily indicate that address by any means is bad. It means there's no address forwarding order on file for anybody theoretically that has moved from that address." Spaulding indicated that there was no statutory requirement for locating another address and re-sending the notice when the notice came back returned and, in any case, he was not sure what purpose it would serve "because as far as we knew, this was a good address. It was simply unclaimed. There's no indication that they're not at this address so we had no reason to believe it was not a good address. It's very common for mail to be unclaimed."

Spaulding conceded that he wrote in an email after the foreclosure his "hunch" that "they may not be getting mail from the address for some reason." Spaulding was responding to an email from defendant indicating that plaintiffs were at the county getting

estimates and permits and defendant wanted to let them know they did not own the property anymore. After reviewing the file, it appeared to Spaulding that plaintiffs were not "acknowledging" their mail; he conceded that the email said "getting," and noted that "[i]n a perfect world maybe I would have phrased it as acknowledged." Spaulding also testified that not "getting" mail can include someone bringing it into the house and not giving it to the intended recipient, not that it's a bad address. Spaulding testified that the duty to follow up on an address would be triggered if the mail said something like "not at this address, forward order expired, [or] deceased," that the final letter came back refused did not indicate it was a bad address—it could have been a good address and they just refused. He testified that on notification from the post office that the address was Oak Brook and not Chicago, they had adjusted that in their records. He indicated that any mail that got returned to their office was placed in the file and that none of the first-class mail was returned.

Spaulding testified that Title Check searched through the Michigan Business Entity index to determine an address or registered agent for 2CC even though the title in this case indicated that the property was held by an Indiana company. He testified that state departments change names regularly and that a reference in MCL 211.78i(2)(d) to the Department of Labor and Economic Growth, (which no longer exists in Michigan as it is now known as the Department of Licensing and Regulatory Affairs (LARA)), was an indication to check the Michigan Business Entity index. The trial court ruled sua sponte that "Department of Labor and Economic Growth" meant Michigan and did not mean to check other states. Spaulding testified

that an Indiana company would only show up in LARA's records if it had a Michigan agent; otherwise it would be unregistered.

Spaulding stated that Title Check always erred on the side of posting the notice at a property to "remove the argument about the fact that I was camping there but my tent was not there that day." He further testified that, in addition to the site visit by Katelin Makay, publication occurred on December 19 and 26, 2013, and January 2, 2014.

Antipov testified that he lived at 50 Baybrook, Oak Brook, IL 60523 and had been there since August 2011. He had previously lived at 36 Bradford in Oak Brook for two years, leasing it while he built his house at 50 Baybrook. He clarified that it could have been June 2011, but that his lease ran out in August 2011, and he was moving things to the new house in the process. After moving from 36 Bradford, Antipov had arranged with the post office to forward his mail and that was supposed to last 12 months. Defendant's counsel attempted to impeach Antipov with evidence of Illinois car titles listing the 36 Bradford address; there was a dispute over whether the documents also evidenced registration. Antipov testified that he used the Baybrook address for any cars he purchased after his move.

Antipov testified that he never received any tax bills, notices about unpaid taxes, notice of a certificate of forfeiture, the notice with the inspection deadline, the letter notifying 2CC about publication deadlines, the notice of show-cause hearing and judicial foreclosure, or the judgment of foreclosure. He testified that he had never seen the certificate of foreclosure of real property before and neither he nor anyone on behalf of 2CC received it; if they had, he would have paid the

funds due. He testified that had the notice of the certificate of foreclosure reached him, he would have paid the taxes because what was due was "nothing compared to the value of the property"; he noted that he did remit the funds when he found out about it, but the check was returned as unaccepted. Antipov stated that he always claimed his certified mail, never refused it, and implied that if any notice had been delivered to him by certified mail, he would have accepted or claimed it.

Antipov testified that he learned of the foreclosure in mid-April 2014 when Anderson called him. Prior to that time, he had no notice, whatsoever, that the property was in danger of foreclosure. However, he admitted that he never updated his address with defendant for the property he owned in Michigan because he "didn't think that there was anything being issued to [him] to begin with. [He] was waiting for the occupancy correspondence." Antipov testified that he did not think he would get a tax bill until an occupant moved into the property.

Antipov was the owner and manager of KAVA Management, LLC, which itself is the manager of 2CC. He testified that Anderson became the registered agent for 2CC sometime in 2011 or 2012, and the address for 2CC was changed to Mishawaka, Indiana. Antipov signed the May 2013 mortgage on behalf of KAVA Holdings, LLC, and KAVA Management for 2CC; the address for KAVA provided in the mortgage was 50 Baybrook. The property was purchased vacant, and 2CC was to manage the building of a house on the property. Antipov opined that the $3.5 million mortgage represented the value of the house and the property itself. There was a general contractor on site, and Antipov believed that the contractor was interact-

ing with the township throughout the building process. Antipov testified that in June 2013, the house was not finished and there was no certificate of occupancy, but it was close to the end.

Anderson, the current president of RFA, testified that he never received notice of tax delinquency or deficiency with respect to RFA's mortgage. He conceded that nothing in the first paragraph of the mortgage mentioned 2CC. The money from the loan reflected in the mortgage was used to purchase a different property by a different subsidiary of KAVA; none of the money went to 2CC. He did not know whether an expert was going to testify that the foreclosed property was worth $1.65 million, but he believed it was worth more than that because they paid $820,000 for the land and almost $2.6 million for the house that was built. Anderson admitted that he did not do a title search before drafting and filing the mortgage, and the Board of Licensing was not consulted before the mortgage was recorded. Anderson agreed that the certificate of forfeiture had been recorded on April 12, 2013, and that if RFA, 2CC, or anyone else had done a title search, they would have known about the county's interest in the property for unpaid taxes.

Defendant moved for a directed verdict, arguing that it had shown that it provided proper notice, that 2CC received the notice required by statute, and that RFA was not entitled to notice. After requesting briefing, the trial court then issued its opinion and order on defendant's motion for directed verdict, construing it as a motion for involuntary dismissal under MCR 2.504(B)(2); the court granted the motion. In its opinion, the trial court noted that "the issue of whether plaintiff received due process has already been fully

litigated. The issue here, as discussed *infra*, is for monetary damages based on whether plaintiff received any notice required under the act." It noted that plaintiffs brought their action under MCL 211.78*l* of the GPTA, "which creates a cause of action in this Court for property owners who allege that they did not receive *any notice* under the GPTA." The opinion recognized that " 'statutory notice rights can be violated, giving rise to an action for money damages, yet minimum due process may have been satisfied.' " (Citation omitted.) Thus, the court concluded that plaintiffs had to establish that they did not receive any notice, notwithstanding the fact that the foreclosing governmental unit satisfied minimum due-process requirements.

The trial court then noted:

> By and large, plaintiffs' briefing in this case contends that defendant should have taken additional efforts to locate 2 Crooked Creek's address in light of the fact that the certified mailings were returned. They also argue, without citing any pertinent authority, that defendant should have continually checked the county register of deeds, thereby discovering the later-recorded mortgage with RFA, and thereafter should have known they needed to provide notice to RFA. They also contend that they never received any of the notices required under the GPTA.

The trial court determined that RFA was not entitled to notice under the GPTA. It further held that 2CC was not entitled to relief on the facts presented. It indicated that an additional reason to grant defendant's motion was that 2CC had failed to present any evidence of its damages because there was no testimony establishing the fair market value of 2CC's interest in the property at the time of the foreclosure. It noted that there was testimony about what was paid for the property and

about the loan, but no testimony regarding 2CC's interest in the property at the time of the foreclosure as that interest had been affected by the note and mortgage held by RFA.

The trial court denied plaintiffs' motion for reconsideration. Plaintiffs now appeal by right.

II. TREATING DEFENDANT'S MOTION AS ONE FOR "INVOLUNTARY DISMISSAL"

Plaintiffs first argue that the trial court erred when it re-characterized defendant's motion for directed verdict as a motion for involuntary dismissal. They argue that such a change in how the trial court reviewed the motion was significant because plaintiffs were not given the advantage of the most favorable interpretation of the evidence. We conclude that the trial court properly treated the motion as one for involuntary dismissal.

Plaintiffs are correct that the trial court's treatment of defendant's motion as one for involuntary dismissal as opposed to a directed verdict has significant consequences. The standard of review for a trial court's decision depends on the rule under which it was granted. *Williamston Twp v Hudson*, 311 Mich App 276, 286; 874 NW2d 419 (2015). Both motions for a directed verdict under MCR 2.516 and motions for involuntary dismissal under MCR 2.504(B) test the factual support for a claim. *Id*. at 287. However, a motion for a directed verdict requires all factual disputes to be resolved in favor of the nonmoving party and does not permit any credibility determinations. "In contrast, a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences. Plain-

tiff is not given the advantage of the most favorable interpretation of the evidence." *Id*. (quotation marks and citations omitted).

However, the fact remains that when a trial court, sitting as the finder of fact, is asked to direct a verdict, the motion is actually one for involuntary dismissal. *Id*. at 288-289; *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). In fact, even when the parties and the lower court erroneously categorize a motion as one for directed verdict, we will review as one for involuntary dismissal. *Williamston Twp*, 311 Mich App at 288 ("[W]here a court's opinion does not invoke the proper court rule supporting its ruling, we may look to the substance of the holding to determine which rule governs."); *Adair v Michigan*, 497 Mich 89, 99 n 18; 860 NW2d 93 (2014) ("[T]he appropriate label is one for involuntary dismissal because it is a case without a jury.") Where, as here, the court noted the applicable court rule, instead of waiting for this Court to do so, there is no error. The trial court properly construed defendant's motion as one for an involuntary dismissal under MCR 2.504(B)(2).

III. WHETHER 2CC RECEIVED THE NOTICE REQUIRED BY MCL 211.78*l*

Plaintiffs contend that the trial court erred when it concluded that 2CC received the notice required by MCL 211.78*l*. In effect, plaintiffs argue that MCL 211.78*l* requires that the owner of the interest in the property receive *actual* notice; constructive notice is insufficient. We disagree.

In order to determine whether the trial court erred, this Court must interpret the requirements of MCL 211.78*l*. "Statutory interpretation is a question of law subject to review de novo on appeal." *Sandy Pines*

Wilderness Trails, Inc v Salem Twp, 232 Mich App 1, 11; 591 NW2d 658 (1998) (quotation marks and citation omitted). "This Court reviews for clear error a trial court's decision on a motion for dismissal under MCR 2.504." *Rodenhiser v Duenas*, 296 Mich App 268, 272; 818 NW2d 465 (2012). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (quotation marks, citation, and ellipsis omitted).

MCL 211.78*l*(1) provides:

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

There is no dispute that plaintiffs received constitutionally adequate notice, as those claims were litigated in the previous appeal. However, plaintiffs assert MCL 211.78*l* awards damages for anything less than *actual* notice. Such an interpretation flies in the face of the statute's actual language.

> The principles of statutory interpretation are well established. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. And the statutory language is the best indicator of the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Importantly, statutory language should be construed reasonably, keeping in mind the purpose of the act. *Draprop Corp v City of Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001). [*In re*

Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes, 265 Mich App 285, 290-291; 698 NW2d 879 (2005).]

"If the language used is clear, then the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written." *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997).

MCL 211.78*l* does not use the term "actual" notice. It uses the term "any" notice. "[C]ourts must give 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." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). Additionally, this Court "will not read additional requirements into a clear and unambiguous statute that are not within the Legislature's manifest intent." *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 180; 775 NW2d 342 (2009). Interpreting MCL 211.78*l* to require actual notice would render the Legislature's choice of the word "any" nugatory and simultaneously read an additional requirement into the statute that simply is not present.

"The Legislature is deemed to be aware of the meaning given to the words it uses . . . ." *Anzaldua v Band*, 457 Mich 530, 543; 578 NW2d 306 (1998). In *People v Harris*, 495 Mich 120, 131; 845 NW2d 477 (2014), our Supreme Court considered the definition of "any" when interpreting a statute.

> " '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 . . . ." [*Id*., quoting *Random House Webster's College Dictionary* (1997).]

It noted that "it is difficult to imagine how the Legislature could have cast a broader net given the use of the words 'any act' . . . ." *Harris*, 495 Mich at 132. The same reasoning applies here. The Legislature could have used the term "actual" notice, but it did not. "Because 'any' is commonly understood to encompass a wide range of things," *id*., the Legislature did not intend to limit the notice referenced in MCL 211.78*l* to actual notice. Instead, when the Legislature stated that an owner must claim that it "did not receive any notice required under the act," it referred to the situation when an owner received no notice whatsoever.

Plaintiffs' conclusion that only actual notice is sufficient to preclude damages under MCL 211.78*l* is not based on the statute but comes from language in *In re Wayne Co Treasurer Petition*, 478 Mich 1; 732 NW2d 458 (2007) (*Perfecting Church*). In *Perfecting Church*, our Supreme Court considered the constitutionality of the GPTA and held that because MCL 211.78k encompassed all foreclosures, including those in which constitutionally inadequate notice was provided, the GPTA was unconstitutional as applied to property owners that did not receive constitutionally adequate notice. *Id*. at 10-11. In making this decision, the Supreme Court noted:

> [T]he plain language of [MCL 211.78k] 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. [*Id*. at 10 (emphasis added).]

Plaintiffs argue that because our Supreme Court distinguished between a failure to satisfy minimum due-process requirements and "those situations in which constitutional notice is provided but the property owner does not receive actual notice" and then referenced the monetary damage provision provided by MCL 211.78*l*, it necessarily held that actual notice is the standard required under the statute.

However, apart from the fact that the interpretation flies in the face of the statute's actual language, the statement suggesting that actual notice is required constitutes dictum. Language is "clearly dictum" when "the question was neither at issue nor expressly considered." *People v Aaron*, 409 Mich 672, 722; 299 NW2d 304 (1980). In *Perfecting Church*, our Supreme Court was looking generally at the GPTA as a whole, and MCL 211.78k specifically, to determine "the jurisdiction of circuit courts to modify judgments of foreclosure when the foreclosing governmental entity unit deprives the property owner of due process." *Perfecting Church*, 278 Mich at 4. It did not interpret the requirements of MCL 211.78*l* or determine what type of notice was necessary. "It is a well-settled principle that a point assumed without consideration is of course not decided." *Aaron*, 409 Mich at 722 (quotation marks and citations omitted). For that reason, "obiter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis." *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999). Thus, this Court need not hold that MCL 211.78*l* includes an actual-notice requirement just because the Supreme Court used that term in *Perfecting Church*.

Having rejected plaintiffs' position that only actual notice will prevent damages under MCL 211.78*l*, the next question is whether 2CC received "any notice required under the act . . . ."

In its recitation of the facts and trial testimony, the trial court noted:

> According to a Real Estate Agreement recorded with the Cass County Register of Deeds, the purchaser of the property was plaintiff "2 Crooked Creek LLC," "By: Kava Management Company, LLC." The agreement is signed by Sergei Antipov. At trial, Antipov testified that Kava Management is the manager of 2 Crooked Creek, and that "I'm Kava Management . . . I own the company." Antipov clarified that he managed the affairs of 2 Crooked Creek through Kava Management Company. . . .
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> * * *
>
> Antipov testified that he, on behalf of Kava Holdings, entered into a mortgage agreement with plaintiff Russian Ferro Alloys L.L.C. (RFA), another entity with which he is affiliated, for the 61320 Crooked Creek property. Under the agreement, Kava was listed as the mortgagor and was indebted to RFA in the amount of $3.5 million. The note was secured "by a mortgage upon land owned by 2 Crooked Creek, LLC," i.e., the land located at 61320 Crooked Creek. According to Joint Exhibit 6, Antipov—whose signature is the only signature on the document—signed the mortgage on behalf of 2 Crooked Creek and Kava. The mortgage was entered into on May 28, 2013, and recorded on July 10, 2013. The document indicates that it was prepared by Douglas D. Anderson.
>
> Anderson, the president of RFA and registered agent of 2 Crooked Creek, is an attorney who is licensed to practice in the state of Indiana. He recalled directing the filing of the mortgage on 61320 Crooked Creek. He testified that, prior to recording the mortgage, he did not perform a title search. Anderson testified he "[d]idn't see a need" to perform a title search before recording the mortgage. When asked if a title search would have informed him of the certificate of forfei-

> ture, Anderson conceded "I guess" it would have. Anderson testified that neither he nor RFA received notice of the foreclosure or tax delinquency, despite the fact that RFA held a mortgage interest in the property.

The trial court concluded that 2CC was not entitled to relief under MCL 211.78*l* under the facts presented. It noted that Antipov "steadfastly denied receiving any notice at any time" and that the issue of whether plaintiffs received any notice depended, in large part, on whether it found Antipov's denials credible. The trial court then held:

> Having the unique opportunity as the trier of fact to observe the testimony offered, both in terms of what the witnesses had to say and how they said it, the Court concludes that Antipov's assertion that he never received any notice of any kind at any time was simply not credible. In this sense, Antipov testified that he received mail and property tax bills for all of his other properties despite his move from Bradford Lane to Baybrook, but he never received a bill or notice for this particular property. This assertion was unconvincing. Adopting Antipov's view would require the conclusion that nearly everyone else involved in the process, including defendant, Title Check, and even the postal service, either failed in their responsibilities or conspired against him. While the Court believes that Antipov might not have appreciated the full extent of the consequences of some of the notices or that he otherwise took a cavalier attitude towards the same, the Court did not find his denial with regard to whether he received *any* notice to be credible. Consequently, the Court concludes that Antipov received *at least some* notice at some point. And, because of Antipov's assertion that he manages the affairs of 2 Crooked Creek, the latter's claim under MCL 211.78*l* must be dismissed.
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> * * *
>
> Furthermore, the Court concludes that Antipov and 2 Crooked Creek "received" the notice that was posted on

> the property. The GPTA provides that the foreclosing governmental unit—or its representative—"shall make a personal visit" to properties scheduled for foreclosure and shall attempt to personally serve occupants with notice of the statutory show-cause hearing or, at a minimum, post notice of the same in a "conspicuous manner on the property[.]" Here, by all accounts, a Title Check employee or representative made such a personal visit and posted the required notice on the property. The notice was posted on a conspicuous place on the property. Further, Title Check did so at a time when Antipov and/or 2 Crooked Creek was exercising dominion and control over the property by contracting for the construction of a home on the property. As a result, the Court concludes that 2 Crooked Creek "received" for purposes of MCL 211.78*l*, the notice posted on the property. Although 2 Crooked Creek contends it never saw this notice, there can be no dispute that the notice was received on the property in accordance with the mandates of the statute. Any purported removal of the notice—which satisfied all requirements of the statute—cannot be, and in fact has not been, attributed to defendant. Rather, the Court concludes plaintiff is charged with having received this duly executed notice under the statute. [Citations omitted.]

Plaintiffs contend that the trial court erred in both of its determinations that 2CC received notice. Plaintiffs argue that the notice by publication and by posting were insufficient because they are both forms of constructive notice and neither, by itself, is sufficient to satisfy due process. Whether either form of constructive notice can satisfy due process is irrelevant to the issue at hand. 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.

Constructive notice is a legally accepted form of notice and, therefore, sufficient to fall within the confines of "any notice" under MCL 211.78*l*. Plaintiffs assert that there is no evidence of notice by publication

in the record and that there was no first-hand testimony that any Title Check employee or representative posted the notice to the property. Plaintiffs' arguments misrepresent the record.

Spaulding testified that, in addition to the site visit by Makay, publication occurred on December 19 and 26, 2013, and January 2, 2014. Joint trial exhibit 9 is a publication deadline notice indicating that a newspaper notice was scheduled for publication to run three times between December 2013 and February 2014. Joint trial exhibit 12 consists of affidavits of publication attesting to the inclusion of the required notices in a daily newspaper on December 19 and 26, 2013, and January 2, 2014. Furthermore, both the trial court and this Court are permitted to take judicial notice of the facts contained in this Court's opinion in the previous appeal because such facts can no longer be disputed and are "capable of accurate and ready determination by resort to" a copy of the opinion, "whose accuracy cannot reasonably be questioned." MRE 201(b). Judicial notice can take place at any stage of the proceeding, MRE 201(e), including for the first time on appeal, *People v Burt*, 89 Mich App 293, 297; 279 NW2d 299 (1979) (noting that appellate courts "can even take judicial notice on their own initiative of facts not noticed below"). In the previous appeal, this Court held, "Petitioner [here, defendant] also published notice of the pending foreclosure in a local newspaper for three consecutive weeks." *In re Cass Co Treasurer*, unpub op at 8. Thus, the record contains sufficient evidence of constructive notice by publication.

Likewise, the record contains sufficient evidence of constructive notice, and potentially actual notice, through the posting of the notice on the property.

Plaintiffs contend that the only evidence of the "alleged" posting is joint trial exhibit 8 labeled, "AFFIDAVIT OF NOTICE OF FORFEITED PROPERTY — PERSONAL VISIT." Plaintiffs claim there is no evidence in the record that any Title Check employee or representative posted this notice on the property. Excluding the evidence contained in the notice itself—the pictures showing the document posted on the property and the fact that someone had to have personally gone to the property to discover that it was occupied by the construction of a residence—there was still sufficient evidence of the posting in the record. Spaulding testified regarding Makay's site visit. Antipov testified that he was familiar with James Frye, the general contractor for the home being built on the foreclosed property. Antipov knew that Frye had signed and filed an affidavit that indicated Frye had seen the posted foreclosure notice on the property and notified someone from 2CC with that information. Defendant's counsel asked Antipov whether he had sued Frye over the affidavit. Antipov responded:

> I sued him over the non-performance of the contract. *I sued him over the fact that he basically took the notice off*. There are several issues I had with him. *He's the only one that saw the notice*. *Why did he take it off the door?* Why did he lie about putting in cabinets that didn't exist? I don't know.

When defendant's counsel again asked whether Antipov had sued Frye over the affidavit specifically, Antipov stated: "I didn't sue him over the affidavit specifically. I sued him over the fact that he got involved and he didn't fulfill the contract obligations." Based on Antipov's testimony, there was evidence that the foreclosure notice was posted on the property, that Frye had seen the notice, and that Frye had removed the

notice from the door. And, again, taking judicial notice of the facts as recited from the previous appeal,

> a representative of [defendant] posted notice of the pending foreclosure at the actual property. The parties do not dispute that there was a house under construction on the property at the time, and that there was evidence of activity on the property. The record reflects that notice was posted over six months before the foreclosure hearing, and at least three witnesses indicated that they saw the posting. [*In re Cass Co Treasurer*, unpub op at 8.]

On the record, then, there was sufficient evidence to support the trial court's determination that 2CC " 'received' the notice that was posted on the property" because it "charged" 2CC "with having received this duly executed notice under the statute" given that the notice was posted "at a time when Antipov and/or 2 Crooked Creek was exercising dominion and control over the property by contracting for the construction of a home on the property."

Plaintiffs next argue that the trial court erred because it failed to consider what notices were "required under" the GPTA and argue that defendant's failure to provide testimony or evidence about certain pre-foreclosure notices meant that defendant had conceded that 2CC did not actually receive several required notices. However, under MCL 211.78*l*, it does not matter if plaintiffs can prove that they did not receive certain notices required under the GPTA. Plaintiffs have to prove that they did not receive *any* notice. Evidence of receipt of any form of notice is sufficient to overcome a claim for damages under the statute. Accordingly, the fact that there was no evidence in the record to show whether defendant sent out various pre-foreclosure notices regarding the status of delinquent, unpaid taxes on the property is insufficient to

entitle plaintiffs to relief or preclude involuntary dismissal. Moreover, proof that 2CC had received certain pre-foreclosure notices would not have furthered either side's position because "a party's knowledge of a tax delinquency does not equate to notice of a foreclosure proceeding." *Ligon v Detroit*, 276 Mich App 120, 126; 739 NW2d 900 (2007).

Plaintiffs next argue that MCL 211.78i does not require or allow "simply mailing a notice of the show cause and foreclosure hearings by first-class mail to the same address if certified mail is returned" and that MCL 211.78i(12) prevents first-class mail from being sufficient notice. Plaintiffs' argument fails for multiple reasons.

MCL 211.78i(12) provides:

> The provisions of this section relating to notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k are exclusive and exhaustive. Other requirements relating to notice or proof of service under other law, rule, or legal requirement are not applicable to notice and proof of service under this section.

This section does not prevent defendant from attempting other forms of service in the event the forms of service provided for in the statute fail. Rather, this section means that defendant is not obligated to take additional measures other than those described in the statute. Thus, this section actually precludes plaintiffs' argument that defendant should have done more to attempt to provide notice to plaintiffs.

As for defendant's practice of mailing documents by first-class mail when certified mail has gone unclaimed, this practice is permitted by MCL 211.78i(4), which provides:

> If the foreclosing governmental unit or its authorized representative discovers any deficiency in the provision of

> notice, the foreclosing governmental unit shall take reasonable steps in good faith to correct that deficiency not later than 30 days before the show cause hearing under section 78j, if possible.

The mailing of first-class mail when certified mail has gone unclaimed is a reasonable step taken in good faith. Indeed, this practice was recommended by the United States Supreme Court where statutory foreclosure notices are required to be sent by certified mail but come back unclaimed. *Jones v Flowers*, 547 US 220, 235; 126 S Ct 1708; 164 L Ed 2d 415 (2006) (concluding that this practice "increase[s] the chances of actual notice" because the letter can simply be left at the property rather than having to be retrieved from the post office and because if the recipient has moved, "[e]ven occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify [the owner] directly"). Notably, *Jones* involved an Arkansas statute that required notice by certified mail, *id*. at 226, as does the statute in this case. Defendant can hardly be deemed to have acted outside the bounds of MCL 211.78i(4) when such actions are essentially required by the United States Supreme Court under circumstances identical to the present case. Indeed, having been recommended by the highest judicial authority in our country, the sending of first-class letters to the same address to which the certified letters were sent must necessarily constitute a reasonable step taken in good faith, placing it squarely within MCL 211.78i(4). Thus, contrary to plaintiffs' assertion, it constitutes notice "required under" the GPTA and can serve as a basis for finding that 2CC received notice.

In sum, MCL 211.78*l* does not require a lack of actual notice, but a lack of any notice, meaning notice of any type or kind will suffice. Here, where there was evidence in the record that the foreclosure notice was posted to the property during a time when 2CC was exercising control and dominion over the property by the building of a home, the trial court did not clearly err by charging 2CC with knowledge of the notice.

IV. WHETHER RFA WAS ENTITLED TO NOTICE

Plaintiffs argue that the trial court erred when it concluded that RFA's claim failed because it was not entitled to notice under the GPTA. We disagree.

The trial court determined that RFA was not entitled to notice under the GPTA and, therefore, could not claim a failure to receive notice when no notice was required. Plaintiffs claim that this reasoning was erroneous because MCL 211.78*l* permits an owner who had an interest in the property, recorded or unrecorded, to seek money damages if the owner did not receive any notice. However, MCL 211.78*l*(1) requires that the owner of the interest not receive "any notice required under this act . . . ." This Court had already determined in the previous appeal that RFA had received all of the notice under the GPTA to which it was entitled:

> [B]ecause [defendant] recorded the certificate of forfeiture before RFA obtained its interest in the property, [defendant] *had no duty to send RFA any further notice of the foreclosure proceedings*. See *First* [*Nat'l*] *Bank of Chicago v Dep't of Treasury*, 280 Mich App 571, 592; 760 NW2d 775 (2008) (O'Connell, J., dissenting), adopted by reference in *First National Bank of Chicago v Dep't of Treasury*, 485 Mich 980; 774 NW2d 912 (2009) (stating that when a mortgage interest was acquired after the date that the county treasurer recorded the certificate of forfeiture, the

> treasurer was not required to provide any further notice of the foreclosure proceedings to the mortgage holder). The notice recorded in the certificate of forfeiture provided sufficient notice of the pending foreclosure to any interested parties whose interests arose after that certificate of forfeiture was recorded. *Id*. [*In re Cass Co Treasurer*, unpub op at 7-8 (emphasis added).]

Notably, the opinion states that defendant had no duty to send any *further* notice. Implied within that statement is the conclusion that RFA had *already* received notice of the foreclosure proceeding by way of the recorded certificate of forfeiture located in the property's chain of title. Such constructive notice is sufficient to satisfy the "any notice" requirement in MCL 211.78*l*.

"[I]t was incumbent upon [the holder of the mortgage interest] to review the register of deeds documents when it recorded its assignment, which would have alerted it to the pending proceedings." *First Nat'l Bank of Chicago*, 280 Mich App at 592-593 (O'CONNELL, J., dissenting). Here, Anderson conceded that had he checked the register of deeds, the certificate of forfeiture would have alerted him of the foreclosure proceedings. That RFA failed to do so and "essentially disregarded the costly and laborious record systems instituted to protect its rights in the property," *id*. at 593, should not result in it receiving a windfall in the form of an action for damages under MCL 211.78*l*. Indeed, to conclude that RFA could maintain an action for damages under these circumstances would only serve to encourage the recording of mortgages and other property interests without checking the register of deeds. A foreclosing governmental unit would never have notice of after-acquired interests absent an unduly burdensome requirement to daily check all title records, and the owners recording the after-acquired interests could always claim they received no notice

because they would never receive any notice other than the recorded certificate of forfeiture, of which they could remain forever ignorant based on their own failure to review the records. Constructive notice exists for precisely this reason—to encourage people and entities to investigate prospective property interests and prevent any legal incentive to remain ignorant of others' recorded and identifiable interests. RFA cannot insulate itself against notice by intentional ignorance. The certificate of forfeiture provided constructive notice to RFA of the foreclosure proceedings. That notice was sufficient to constitute receipt of "any notice required under the act . . . ."

Given the foregoing analysis, we need not address plaintiffs' remaining argument or defendant's cross-appeal.

Affirmed.

SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., concurred.

VARELA v SPANSKI

Docket No. 343137. Submitted July 9, 2019, at Detroit. Decided July 11, 2019, at 9:00 a.m.

Zachary A. Varela brought an action in the Wayne Circuit Court against Brad Spanski and Catherine Spanski, alleging various claims arising out of a partnership agreement in which plaintiff, who was registered as a qualifying patient and primary caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.16421 *et seq*., would grow and harvest marijuana; his business partner, Derek Powers, would sell it; and defendants would finance the start-up costs and operating expenses, including the purchase of a building in which to conduct the grow operation, in exchange for a portion of the profit from the sales. The following year, defendants informed plaintiff that new investors were taking over the property and ordered plaintiff to return his keys to the building. After plaintiff tried and failed to retrieve his possessions from the building, he filed a complaint alleging breach of the lease agreement, breach of the partnership agreement, tortious interference with contracts, conversion, misappropriation of trade secrets, unjust enrichment, and breach of the implied covenant of good faith and fair dealing. Plaintiff also sought injunctive relief. However, plaintiff failed to attach the lease agreement and the partnership agreement to his complaint, claiming that defendants had destroyed them. Defendants sought summary disposition under MCR 2.116(C)(8), arguing that plaintiff's claims were barred by the wrongful-conduct rule. The trial court, Craig S. Strong, J., agreed and granted the motion, noting that under the MMMA, plaintiff was precluded from growing marijuana for more than five patients, while the parties' agreement required plaintiff to pay defendants an amount that would have required him to grow more marijuana than he was authorized to grow. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court's reference to the legal standard for summary disposition motions brought under MCR 2.116(C)(10) when deciding defendants' motion for summary disposition under MCR 2.116(C)(8) was harmless error. A motion brought under MCR 2.116(C)(8) tests whether the opposing party has failed to state a

claim on which relief can be granted. A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Although the trial court repeatedly noted that no material questions of fact existed on the record, it did not appear to have considered evidence outside the pleadings. Although plaintiff suggested that the trial court erred by considering the partnership agreement because it was not attached to the complaint, under MCR 2.113(C)(1)(b) and (2), a document may become part of the pleadings if it is in the possession of the other party and the pleading so states. Plaintiff's complaint stated that both the lease agreement and the partnership agreement concerned the lease of the property and that defendants had destroyed evidence of the lease agreement. This gave rise to a reasonable inference that plaintiff had not attached either the lease agreement or the partnership agreement because they were in defendants' possession, and defendants in fact attached the partnership agreement to their reply brief in support of their motion for summary disposition. Therefore, the partnership agreement was part of the pleadings, and although the trial court articulated the wrong standard, it did not actually consider evidence outside the pleadings in deciding defendants' motion for summary disposition.

2. The trial court erroneously interpreted the MMMA when granting summary disposition in favor of defendants by focusing on § 8 of the MMMA, MCL 333.26428, rather than § 4 of the MMMA, MCL 333.26424. Section 4 grants broad immunity from criminal prosecution and civil penalties to qualifying patients and primary caregivers if certain conditions are met. When a party's conduct is in accordance with § 4, but another law would otherwise subject the party to arrest, prosecution, or penalty in any manner or deny the party any right or privilege, the MMMA operates to insulate that individual from such penalties and supersedes the competing law. By contrast, § 8 provides a statutory affirmative defense to criminal charges involving marijuana for its medical use in the event the individual facing those charges fails to establish the broader immunity under § 4. Because the present matter was not a criminal prosecution but rather a civil lawsuit, the trial court erred by granting defendants' motion for summary disposition on the ground that plain-

tiff had failed to establish each element of the affirmative defense in § 8. However, because plaintiff failed to plead facts showing that he was entitled to the protections found in § 4, reversal was not required. A trial court may dismiss a case on a summary disposition motion under MCR 2.116(C)(8) if a party fails to allege facts that qualify him or her for immunity under § 4 of the MMMA. Determining the effect of § 4 requires first establishing whether a plaintiff pleaded facts showing that he or she complied with the requirements of § 4, then determining whether the plaintiff was subject to a penalty in any manner, or the denial of any right or privilege, because of the medical use of marijuana. The first query mandates consideration of the elements necessary to establish immunity under the MMMA. Sections 4(a) and 4(b) of the MMMA contain parallel immunity provisions that apply to qualifying patients and registered caregivers, respectively. The Michigan Supreme Court examined the substantive requirements of these provisions in the criminal context in *People v Hartwick*, 498 Mich 192, 209-210 (2015), and articulated what elements a party claiming immunity must establish. While the procedural hurdles are different in the civil forum, the substantive requirements are the same. Accordingly, a qualifying patient seeking immunity in a civil suit must allege facts showing that, at the time that the claim accrued, he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under § 4(a); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was engaged in the medical use of marijuana. If the qualifying patient alleges sufficient facts to establish the first and second elements, then a presumption exists that the qualifying patient was engaged in the medical use of marijuana, thereby establishing the fourth element. Similarly, a primary caregiver seeking immunity in a civil suit must allege facts showing that, at the time that the claim accrued, he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under § 4(b); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was assisting connected qualifying patients with the medical use of marijuana. If the primary caregiver alleges sufficient facts to establish the first and second elements, then a presumption exists that the primary caregiver was engaged in the medical use of marijuana, thereby establishing the fourth element. In this case, plaintiff offered no facts to support the claim that he met the limitation requirements or that the marijuana was for medical use. In his complaint, plaintiff alleged that he was a registered patient, was a qualified caregiver to five patients, and possessed 70 plants when defendants terminated the agreement. However, given the

projected output of the grow operation, as well as the monthly rental payment, which was to be subtracted from the operation's revenue, no reasonable inference could be drawn from the pleadings that plaintiff met the volume limitations of § 4(a) and § 4(b), or that the production of marijuana under the partnership agreement was for purely medical use. Additionally, the partnership agreement indicated that plaintiff intended to transfer the marijuana to his business partner to manage the sale and distribution of the product, which was plainly not a permissible medical use. Accepting these factual allegations as true, including all reasonable inferences that can be drawn from them, and considering them in a light most favorable to plaintiff, plaintiff failed to plead facts to show that his acts were in compliance with the § 4 immunity requirements of the MMMA. Because the trial court reached the correct result, albeit for the wrong reasons, reversal was unwarranted.

3. The trial court properly relied on the wrongful-conduct rule in granting summary disposition in favor of defendants. The wrongful-conduct rule bars recovery if the plaintiff's conduct is prohibited or almost entirely prohibited under a penal or criminal statute, a sufficient causal nexus exists between the plaintiff's illegal conduct and the plaintiff's asserted damages, and the defendant's culpability is not greater than the plaintiff's culpability. In this case, plaintiff's conduct—manufacturing, possessing, and delivering marijuana—was prohibited under the Public Health Code, MCL 333.7401(d), and plaintiff failed to plead facts showing that his conduct warranted immunity under the MMMA. Further, a causal nexus existed between plaintiff's illegal conduct and all his claims, which related to the losses he suffered when defendants ended the illegal agreement to cultivate, possess, sell, and deliver marijuana. Finally, viewing the pleadings most favorably to plaintiff, the factual allegations did not indicate that defendants were more culpable than plaintiff. At most, the facts alleged showed that the parties were equally culpable, and when both parties are equally at fault, the wrongful-conduct rule still applies. Plaintiff's argument that the trial court erred by applying the wrongful-conduct rule because defendants had unclean hands was without merit. The wrongful-conduct rule is not an equitable defense; rather, it is a common-law maxim that operates to deny relief if the claim is based on the plaintiff's illegal conduct, a causal connection exists between that conduct and the damages sought, and the defendant is not more culpable than the plaintiff. Because plaintiff and defendant were equally in the wrong, the law does not afford relief to one as against the other but leaves them as it finds them. Moreover, even if the doctrine

had applied, it would not have functioned to estop defendants from asserting the wrongful-conduct rule because one who seeks equity must do so with clean hands, and plaintiff's conduct was likewise illegal.

4. The trial court did not erroneously dismiss plaintiff's noncontractual claims without providing any reasoning. Although the court did not expressly apply the wrongful-conduct rule to all plaintiff's claims when it granted summary disposition to defendants, even a cursory review of those claims showed that they related to the same illegal conduct on which plaintiff's contract actions were based. Plaintiff cited no law supporting the proposition that these other claims, based on the same illegal conduct, were not subject to the wrongful-conduct rule. Accordingly, application of the wrongful-conduct rule to all of plaintiff's claims was proper.

Affirmed.

1. STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — IMMUNITY — CIVIL ACTIONS — CONTRACTS — SUMMARY DISPOSITION.

In order to recover in a civil lawsuit for damages resulting from the termination of a contractual relationship involving the production of marijuana, a plaintiff must plead facts showing that he or she was entitled to immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, in order to avoid summary disposition under MCR 2.116(C)(8); to determine whether summary disposition is warranted, a court must establish first whether the plaintiff pleaded facts showing that he or she complied with the requirements of § 4 and, second, whether the plaintiff was subject to a penalty in any manner, or the denial of any right or privilege, because of the medical use of marijuana; it is not necessary for a plaintiff in these circumstances to establish the elements of the affirmative defense set forth in § 8 of the Michigan Medical Marihuana Act, MCL 333.26428, in order to avoid summary disposition under MCR 2.116(C)(8).

2. STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — CIVIL ACTIONS — IMMUNITY — ELEMENTS — QUALIFYING PATIENTS.

A qualifying patient seeking immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, in a civil suit must allege facts showing that, at the time that the claim accrued, he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under MCL 333.26424(a); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was engaged in the medical use of

marijuana; if the qualifying patient alleges sufficient facts of the first and second elements, then a presumption exists that the qualifying patient was engaged in the medical use of marijuana, thereby establishing the fourth element.

3. STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — CIVIL ACTIONS — IMMUNITY — ELEMENTS — PRIMARY CAREGIVERS.

A primary caregiver seeking immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, in a civil suit must allege facts showing that, at the time that the claim accrued, he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under MCL 333.26424(b); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was assisting connected qualifying patients with the medical use of marijuana; if the primary caregiver alleges sufficient facts of the first and second elements, then a presumption exists that the primary caregiver was engaged in the medical use of marijuana, thereby establishing the fourth element.

4. STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — CIVIL ACTIONS — WRONGFUL-CONDUCT RULE.

The wrongful-conduct rule bars recovery in a civil action if the plaintiff's conduct is prohibited or almost entirely prohibited under a penal or criminal statute, a sufficient causal nexus exists between the plaintiff's illegal conduct and the plaintiff's asserted damages, and the defendant's culpability is not greater than the plaintiff's culpability; the wrongful-conduct rule may apply to bar recovery in a civil lawsuit for damages resulting from the termination of a contractual relationship involving the production of marijuana if a plaintiff has not pleaded facts showing that he or she was entitled to immunity under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424.

James E. R. Fifelski for plaintiff.

Shyler Engel, PLLC (by *Shyler C. Engel*) for defendants.

Before: TUKEL, P.J., and JANSEN and RIORDAN, JJ.

JANSEN, J. In this civil action involving a contract for the cultivation and distribution of medical marijuana,

plaintiff appeals as of right the order granting summary disposition under MCR 2.116(C)(8) in favor of defendants. We affirm.

I. FACTUAL BACKGROUND

Plaintiff is registered as a qualifying patient and primary caregiver under the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*. In April 2016, defendants offered to purchase a two-story industrial warehouse building in the city of Detroit and lease it to plaintiff and his business partner, Derek Powers, "for the purpose of cultivating marihuana." Defendants also offered to enter into a partnership agreement in which defendants would finance the start-up costs and operating expenses of a marijuana growing operation in exchange for a return on the investment over a five-year period. In exchange, plaintiff would be in charge of growing and harvesting the marijuana. In September 2016, the parties entered into two agreements: a five-year lease agreement for the warehouse and a five-year partnership agreement. The whole of the partnership agreement provided:

> 1. Anticipated grow start date: July 15, 2016.
>
> 2. Revenue generated from harvests will be initially split as: Investors will calculate their total investment as of the first harvest less the cost of the building ($150,000) and divide this amount by 12 in order to generate a 1 year payback (i.e. $200,000 / 12 = $16,700 per month) — this amount will be fixed and subtracted from the total revenue generated from the harvests for this 1 year period, much like the operating expense. Once investors are fully compensated for their initial investment total (see investor expense spreadsheet) then revenue split reverts to 40% Investors and 60% growers. Investor payback shall commence January 2017.

3. Zach Varela and/or Zach's LLC will sign a building occupancy lease to be effective September 1, 2016 and run for 5 years with month to month renewal thereafter.

4. The express purpose of lease is to allow Investors to create a legal device to convert cash revenue from the grow operation into a financial institution deposit.

5. After each harvest has been monetized, all operating expenses (i.e. utilities, nutrients, soil, etc.) for the next grow cycle will be set aside prior to distribution of profits to Investors and Growers in an escrow account or other mutually agreed to account for the purpose of producing the next harvest. Investors will provide documentation of this operating expense (I.e. utilities, etc.).

6. Investors will pay all applicable taxes and building insurance through the term of the lease.

7. Should the cultivation operation be temporarily or permanently halted for any reason (I.e. Government Intervention, Act of God, etc.) prior to Investors being fully compensated for their initial investment, Investors will retain ownership of the building and cultivation equipment. Otherwise, Investors will transfer ownership of all grow equipment once reimbursement takes place.

8. It is estimated that each plant given a 15 week growing period will produce 2.2 lbs. per plant and have a market value of $2500 per pound based on initial economics provided to Investors.

9. The maximum number of plants will be strictly enforced based on the Medical Marihuana Act of Michigan (2008) or until such time the partners receive a state license to produce additional plants upon new legislation.

10. Grower's responsibilities: Zach will manage plants on a d-t-d basis along with necessary equipment maintenance. Derek will manage the sales and transfer of product to buyer(s) — Derek will also compensate Investors immediately after the sale of product or in another mutually agreeable method and timeframe.

Last, this document is personal and confidential and is a document to expressly state ownership and compensa-

> tion of the partnership and in no way shall be shared with anyone outside of the partnership as stated as "Investors" and "Growers" above.

The partnership agreement was signed and dated by plaintiff, his business partner, and defendants.

Initially, the parties' execution of their contractual obligations went smoothly: defendants purchased the subject property and cultivation equipment and hired contractors to build out the warehouse in a manner intended for marijuana cultivation; plaintiff oversaw the build-out and set up a specialized marijuana cultivation system. However, despite plaintiff's request to do so, defendants failed to install a security system, and in December 2016, a street gang allegedly robbed the building of plaintiff's first harvest.

After the robbery, plaintiff continued to cultivate 70 marijuana plants, for which he had valid MMMA registration cards. However, defendants began showing the property and, in March 2017, informed plaintiff that "new investors" were taking over the property. In April 2017, defendants ordered plaintiff to turn over his keys to the building and informed him that he no longer had authority to use or access the building. Plaintiff was not permitted to retrieve his marijuana plants or his personal belongings.

After failed attempts to resolve the dispute and retrieve his possessions, plaintiff filed an eight-count complaint alleging breach of the lease agreement, breach of the partnership agreement, tortious interference with contracts, conversion, misappropriation of trade secrets, unjust enrichment, and breach of the implied covenant of good faith and fair dealing. Plaintiff also sought injunctive relief. However, plaintiff failed to attach the lease agreement and the partnership agreement to his complaint, claiming that defen-

dants had destroyed evidence of the agreements in order to thwart all legal obligations to plaintiff.

Defendants sought summary disposition of all plaintiff's claims under MCR 2.116(C)(8), arguing that because plaintiff would have to rely on his illegal conduct to support his claims, the wrongful-conduct rule prohibited the trial court from granting him any relief. Moreover, defendants argued, plaintiff had failed to plead any exception to the wrongful-conduct rule, and therefore his complaint must be dismissed in its entirety.

The trial court agreed. Specifically, the trial court concluded that the parties' contracts "would be enforceable if they called for the production of marijuana consistent with the terms of the [MMMA]." However, it stated that the MMMA "does not grant caregivers and patients a license to possess, to manufacture or distribute marijuana" and that the MMMA "only grants an affirmative defense . . . against criminal charges." Moreover, the trial court noted that plaintiff was the only party to the contract with caregiver status under the MMMA and that under the statute, he was precluded from growing marijuana for more than five patients. Observing that the parties' agreement required plaintiff to pay more than $16,000 in rent each month, the trial court deduced that plaintiff would have to produce more than one pound of marijuana each month for each patient, which would not be consistent with conduct permitted by the MMMA. Finally, the trial court ruled that the allegations in plaintiff's complaint were conclusory and that plaintiff had "failed to establish even a question of fact as to whether the conduct called for in the party's [sic] agreement would be legal or other-

wise consistent with Michigan Public Policy." Accordingly, the trial court granted summary disposition in favor of defendants. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) de novo. *Bedford v White*, 318 Mich App 60, 64; 896 NW2d 69 (2016).

> A motion under MCR 2.116(C)(8) tests whether the opposing party has failed to state a claim on which relief can be granted. When deciding a motion under (C)(8), [the court] accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. A trial court may grant summary disposition under MCR 2.116(C)(8) only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Mendelson Orthopedics PC v Everest Nat'l Ins Co*, 328 Mich App 450, 457; 938 NW2d 739 (2019) (citations and quotation marks omitted).]

III. PROPER LEGAL STANDARD

Plaintiff first argues on appeal that the trial court erred by using the legal standard applicable to summary disposition motions brought under MCR 2.116(C)(10) when deciding defendants' summary disposition motion brought under MCR 2.116(C)(8). We disagree.

Plaintiff correctly notes that in deciding defendants' motion for summary disposition, the trial court used language implicating the legal standard applicable to motions under MCR 2.116(C)(10), repeatedly noting that no material questions of fact existed on

the record.[1] However, notwithstanding this slip of language, the trial court does not appear to have considered evidence outside the pleadings, and therefore the error is harmless.

The trial court's reference to the partnership agreement, which is part of the pleadings for purposes of plaintiff's claims, draws reasonable inferences from that document. Although plaintiff suggests that the partnership agreement is not part of the pleadings because it was not attached to the complaint, MCR 2.113(C)(1)(b) and (2) excuse this failure and make a contract part of the pleadings when the subject contract is in the possession of the other party and the pleading so states. Here, plaintiff's complaint stated that *both* the lease agreement *and* the partnership agreement concern the lease of the property and that defendants had "destroyed evidence of the lease agreement in an effort to thwart all legal obligations they have to Plaintiff." A reasonable inference arises from these allegations that plaintiff did not attach either the lease agreement or the partnership agreement because they were in defendants' possession. In fact, defendants did have the agreements in their possession, and they attached the partnership agreement to their reply brief in support of their motion for summary disposition. Therefore, the partnership agreement was part of the pleadings, and although the trial court articulated the wrong standard, it did not actually consider evi-

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[1] A motion brought under MCR 2.116(C)(10)

> tests the factual support of a plaintiff's claim and is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." [*Mendelson Orthopedics PC*, 328 Mich App at 456-457, quoting *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).]

dence outside the pleadings in deciding defendants' motion for summary disposition.

IV. SECTION 4 OR SECTION 8 OF THE MMMA

Second, plaintiff argues that the trial court erroneously interpreted the MMMA when granting summary disposition in favor of defendants. Specifically, plaintiff argues that the trial court focused on § 8 of the MMMA, MCL 333.26428, rather than § 4 of the MMMA, MCL 333.26424. We agree. However because we conclude that plaintiff has not pleaded facts showing that he is entitled to the protections found in § 4, reversal is not required.

Resolution of this dispute once again puts before this Court questions regarding the interpretation and application of § 4 and § 8 of the MMMA. While this Court and the Michigan Supreme Court have opined on this topic in numerous opinions, neither has expressly addressed the procedural aspects of these sections in the context of the summary disposition phase of a civil lawsuit between private parties.[2] We take the opportunity to do so now.

Because the MMMA was passed by ballot initiative, this Court "must therefore determine the intent of the

[2] In *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014), our Supreme Court considered whether the MMMA preempts a city ordinance creating civil penalties for medical use of marijuana, which the trial court below had decided on a MCR 2.116(C)(10) motion. Our Supreme Court, however, made no express comment on the application of (C)(10) standards to an assertion of § 4 immunity. This Court, in the context of an MCR 2.116(C)(8) motion, most recently considered whether the rescission of a governmental agency's conditional offer of employment allegedly for medical marijuana use was a "civil penalty." *Eplee v Lansing*, 327 Mich App 635, 641; 935 NW2d 104 (2019). The *Eplee* Court likewise made no comment regarding the application of MCR 2.116(C)(8) standards to an assertion of § 4 immunity.

electorate in approving the MMMA, rather than the intent of the Legislature." *People v Hartwick*, 498 Mich 192, 209-210; 870 NW2d 37 (2015). The most reliable evidence of the electorate's intent is the plain language of the statute, which this Court must interpret consistently with its ordinary meaning. See *id*. at 210. "If the statutory language is unambiguous, . . . no further judicial construction is required or permitted because [the Court] must conclude that the electors intended the meaning clearly expressed." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012) (citation, alterations, and quotation marks omitted).

Our Supreme Court first interpreted the MMMA in *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012), and explained:

> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of the MMMA." [*Kolanek*, 491 Mich at 394, quoting MCL 333.26427(a) (brackets and citations omitted).]

As a whole, "the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA." *Kolanek*, 491 Mich at 394.

The primary mechanism by which the MMMA permits marijuana use is through its immunity provision, found in § 4. Section 4 grants broad immunity from criminal prosecution and civil penalties to "qualifying

patients" and "primary caregivers" if certain conditions are met. MCL 333.26424. As our Supreme Court has explained, immunity such as that found in § 4 is "a unique creature in the law" that "excuses an alleged offender for engaging in otherwise illegal conduct . . . ." *Hartwick*, 498 Mich at 212. In other words, § 4 functions to provide an exception to otherwise illegal conduct; it does not create affirmative rights, and it does not grant registered patients carte blanche in their use of marijuana. *Eplee v Lansing*, 327 Mich App 635, 650; 935 NW2d 104 (2019); *People v Koon*, 494 Mich 1, 6; 832 NW2d 724 (2013). Both this Court and the Michigan Supreme Court have recognized that when a party's conduct is in accordance with § 4, but another law would otherwise subject the party to "arrest, prosecution, or penalty in any manner" or deny the party "any right or privilege," MCL 333.26424, the MMMA operates to insulate that individual from such penalties and supersedes the competing law. See *Koon*, 494 Mich at 8-9 (holding that "the MMMA is inconsistent with, and therefore supersedes, [the Michigan Vehicle Code's zero-tolerance provision,] MCL 257.625(8)[,] unless a registered qualifying patient loses immunity because of his or her failure to act in accordance with the MMMA"); *Ter Beek v City of Wyoming*, 495 Mich 1, 20; 846 NW2d 531 (2014) (noting that "individuals who satisfy the statutorily specified criteria [of § 4] 'shall not be subject to . . . penalty in any manner' " and holding that the MMMA preempts a city ordinance creating civil penalties for medical use of marijuana); *Braska v Challenge Mfg Co*, 307 Mich App 340, 355; 861 NW2d 289 (2014) (recognizing that "to the extent another law would penalize an individual for using medical marijuana in accordance with the MMMA, that law is superseded by the MMMA" and concluding that a denial of unemployment benefits

under the Michigan Employment Security Act, MCL 421.1 *et seq*., for a person who tests positive for marijuana is suspended if the individual is in compliance with the MMMA).

In this case, plaintiff argues that the trial court erred by granting summary disposition under MCR 2.116(C)(8) in favor of defendants because it predicated its ruling on an erroneous interpretation of the MMMA: that plaintiff must establish the elements of the MMMA's affirmative defense, § 8, MCL 333.26428, to avoid application of the wrongful-conduct rule. Section 8 provides a statutory affirmative defense to charges involving marijuana for its medical use in the event the individual facing criminal charges fails to establish the broader immunity under § 4. *Kolanek*, 491 Mich at 396. Because the MMMA is designed to benefit those who properly register and adhere to its requirements, the elements for establishing a § 8 defense are "more onerous" than those of § 4. *Hartwick*, 498 Mich at 228.

We agree with plaintiff that the trial court in this case erred by relying on § 8 in granting defendants' motion for summary disposition. Here, the trial court recognized that the partnership agreement would not be subject to the wrongful-conduct rule if the contract complied with the MMMA. The trial court then concluded that summary disposition was proper because plaintiff had to establish each element of the affirmative defense and had failed to do so. The affirmative defense found in § 8, however, is only applicable to criminal prosecutions. As our Supreme Court has explained, "by its own terms, § 8(a) only applies 'as a defense to any *prosecution* involving marihuana . . . .' The text and structure of § 8 establish that the drafters and voters intended that 'prosecution' refer only to a criminal proceeding." *Michigan v McQueen*, 493 Mich

135, 159; 828 NW2d 644 (2013). The present matter is not a criminal prosecution, but a civil lawsuit for damages stemming from the termination of the parties' contractual relationship. The trial court's focus, then, on the § 8 affirmative defense was legal error.

However, our analysis does not end there. Plaintiff asserted immunity under § 4 and, indeed, consistently with the language of the MMMA, Michigan courts have recognized that this immunity may insulate a plaintiff from civil penalties if that plaintiff is in compliance with the MMMA. See *Ter Beek*, 495 Mich at 20; *Braska*, 307 Mich App at 355; cf. *Koon*, 494 Mich at 8-9. Consequently, this Court must consider application of § 4 to the facts of this case. While the MMMA does not expressly provide for the type of financing arrangement between the parties in the instant case, plaintiff claims that his conduct falls within the immunity provision contained in § 4 of the MMMA and, therefore, application of the wrongful-conduct rule is a denial of a right and cannot be applied to bar his claims. Quoting our Supreme Court's most recent MMMA decision considering the application of § 4, *Hartwick*, plaintiff explains that his "well-pleaded factual allegations" satisfy the requirement that he prove by a "preponderance of the evidence" the elements necessary to establish immunity. *Hartwick* set out in exacting detail the procedural and substantive requirements of § 4, in relevant part, as follows:

> (1) entitlement to § 4 immunity is a question of law to be decided by the trial court before trial;
>
> (2) the trial court must resolve factual disputes relating to § 4 immunity, and such factual findings are reviewed on appeal for clear error;
>
> (3) the trial court's legal determinations under the MMMA are reviewed de novo on appeal;

> (4) a defendant may claim immunity under § 4 for each charged offense if the defendant shows by a preponderance of the evidence that, at the time of the charged offense, the defendant
>
> (i) possessed a valid registry identification card,
>
> (ii) complied with the requisite volume limitations of § 4(a) and § 4(b),
>
> (iii) stored any marijuana plants in an enclosed, locked facility, and
>
> (iv) was engaged in the medical use of marijuana[.] [*Hartwick*, 498 Mich at 201.]

Hartwick was decided in the criminal context; however, we conclude that its pronouncements as to the procedural application of § 4 can be extended to civil cases at the summary-disposition stage. Accordingly, we conclude that a trial court may dismiss a case on a summary-disposition motion if a party fails to allege facts that qualify him or her for immunity under § 4 of the MMMA. Stated differently, plaintiffs must plead facts showing that they were compliant with the MMMA to avoid summary disposition under MCR 2.116(C)(8).

Returning to the substantive requirements, § 4 of the MMMA grants broad immunity from civil penalties, or the denial of a right or privilege, to "qualifying patients" and "primary caregivers" if the individual complies with the MMMA. Determining the effect of this provision in the instant case contemplates a two-step analysis. See *Braska*, 307 Mich App at 356-358, and *Eplee*, 327 Mich App at 653-654 (employing a three-step analysis in the context of unemployment benefits). The first question this Court must answer is whether the plaintiff has pleaded facts showing that he or she complied with the requirements of § 4. If the plaintiff has successfully pleaded facts showing com-

pliance with the requirements of § 4, then this Court must next consider whether the plaintiff is subject to a "penalty in any manner, or [the denial of] any right or privilege," because of the medical use of marijuana. This latter inquiry in this case requires this Court to determine whether application of the common-law wrongful-conduct rule constitutes a civil penalty or denial of a right or privilege, such that the MMMA would suspend its application.

Under this framework, the first query mandates consideration of the elements necessary to establish immunity under the MMMA. Sections 4(a) and 4(b) of the MMMA contain parallel immunity provisions that apply to qualifying patients and registered caregivers, respectively. Section 4(a) provides, in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a).]

Similarly, § 4(b) provides:

> A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right

> or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. . . . This subsection applies only if the primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:
>
> (1) For each qualifying patient to whom he or she is connected through the department's registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.
>
> (2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.
>
> (3) Any incidental amount of seeds, stalks, and unusable roots. [MCL 333.26424(b).]

Our Supreme Court examined the substantive requirements of these provisions in the criminal context in *Hartwick* and articulated what elements a party claiming immunity must establish. We conclude that while the procedural hurdles are different in the civil forum, the substantive requirements are the same. Namely, a plaintiff seeking immunity in a civil suit must plead facts showing immunity, as follows:

> A qualifying patient must [allege facts showing] that, at the time [that the claim accrued,] he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under § 4(a); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was engaged in the medical use of marijuana. If the qualifying patient [alleges sufficient facts to establish] the first and second elements, then a presumption exists that the

> qualifying patient was engaged in the medical use of marijuana, thereby establishing the fourth element.
>
> Similarly, a primary caregiver . . . must [allege facts showing] that, at the time [that the claim accrued], he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under § 4(b); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was assisting connected qualifying patients with the medical use of marijuana. If the primary caregiver [alleges sufficient facts to establish] the first and second elements, then a presumption exists that the primary caregiver was engaged in the medical use of marijuana, thereby establishing the fourth element. [*Hartwick*, 498 Mich at 221 (alterations made to be consistent with civil rather than criminal procedure).]

Turning now to the instant case, plaintiff claims that he pleaded facts supporting the proposition that he met the substantive requirements of § 4 immunity. In particular, plaintiff quotes the following portions of his complaint in support:

> 10. On or about April 2016, Defendants offered to purchase real property located at 17507 Van Dyke Street, Detroit, Michigan 48236 (i.e., *2-story industrial warehouse building*) and lease such real property to Plaintiff and his business partner, Derek Powers, for the purpose of cultivating medical marihuana pursuant to the MMMA.
>
> * * *
>
> 17. Plaintiff subsequently cultivated medical marihuana plants as authorized by the MMMA inside of the locked, enclosed structure of the subject property.
>
> * * *
>
> 53. Plaintiff at all relevant times lawfully owned and possessed medical marihuana plants pursuant to the MMMA, along with other personal property and equipment at the subject property.

According to plaintiff, had the court applied the correct standard applicable to (C)(8) motions, it would have accepted these allegations as true and denied defendants' motion. It is plaintiff, however, who misunderstands his burden. A close reading of the above statements, and the complaint as a whole, shows that plaintiff does not make allegations of fact, but rather makes conclusory statements as well as conclusions of law that he acted in an MMMA-compliant manner. Plaintiff does not support these conclusory statements with any facts. A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994); *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519; 810 NW2d 95 (2011).

Indeed, a comprehensive review of plaintiff's complaint otherwise fails to show any factual allegations supporting the claim that plaintiff met the limitation requirements or that the marijuana was for medical use, as required under § 4. In his complaint, plaintiff alleged that he is a registered patient, is a qualified caregiver to five patients, and possessed 70 plants when defendants terminated the agreement. The partnership agreement, which is part of the pleadings for purposes of plaintiff's contract action and the motion under MCR 2.116(C)(8), indicated that plaintiff would pay defendants $16,700 per month, which would be subtracted from the grow operation's monthly revenue. The partnership agreement further specified that plaintiff was expected to produce 2.2 pounds of usable marijuana per plant every 15 weeks, which is approximately one-half pound per month per plant, or approximately 35 pounds per month for 70 plants. As a qualifying patient and caregiver to five qualifying patients, plaintiff could

possess no more than 15 ounces of usable marijuana and 72 plants at any given time. See *Hartwick*, 498 Mich at 219 n 54. Given the projected output of the grow operation, as well as the monthly rental payment, which was to be subtracted from the operation's revenue, no reasonable inference could be drawn from the pleadings that plaintiff met the volume limitations of § 4(a) and § 4(b), or that the production of marijuana under the partnership agreement was for purely medical use. Accordingly, on the basis of plaintiff's own "well pleaded allegations," plaintiff would be unable to qualify for immunity under the MMMA. Additionally, the partnership agreement indicates that plaintiff intended to transfer the marijuana to his business partner, Powers, for Powers to manage the sale and distribution of the product. Such a transfer to a third person, who is not a registered patient or a patient's primary caregiver, to facilitate sale and delivery is plainly not a permissible medical use. See *McQueen*, 493 Mich at 156 ("[Section] 4 immunity does not extend to a registered primary caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient with whom the caregiver is connected through the MDCH's registration process.") (emphasis omitted).

In sum, accepting the factual allegations of plaintiff's complaint as true, including all reasonable inferences that can be drawn from them, and considering them in a light most favorable to plaintiff, plaintiff has failed to plead facts to show that his acts were in compliance with the § 4 immunity requirements of the MMMA. It follows, even assuming without deciding that plaintiff has been denied a right, that plaintiff is not entitled to this immunity because his conduct was not MMMA-compliant.

Because the trial court reached the correct result, i.e., granting summary disposition in favor of defendants, albeit for the wrong reasons, we find that reversal is unwarranted and therefore affirm. *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (an appellate court may affirm the lower court if that court reached the right result for the wrong reason).

V. WRONGFUL-CONDUCT RULE

Third, plaintiff argues that the wrongful-conduct rule is inapplicable here and that the trial court erroneously relied on it in granting summary disposition in favor of defendants. We disagree.

The wrongful-conduct rule is well established in Michigan common law. *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). This rule, which bars a claim if a plaintiff must rely on his or her own illegal conduct for recovery, stems from the sound public policy that "courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Id*. at 559. This rule will bar recovery if (1) "the plaintiff's conduct [is] prohibited or almost entirely prohibited under a penal or criminal statute," (2) "a sufficient causal nexus . . . exist[s] between the plaintiff's illegal conduct and the plaintiff's asserted damages," and (3) the defendant's culpability is not greater than the plaintiff's culpability. *Id*. at 561, 564, 569.

Here, accepting the factual allegations of the complaint as true, and viewing them in a light most favorable to plaintiff, we conclude that plaintiff has failed to state a claim because the wrongful-conduct rule applies to bar recovery. First, plaintiff's conduct—manufacturing, possessing, and delivering marijuana—is prohibited under the Public Health Code, MCL 333.7401(d). These are serious illegal acts

that are punishable as felonies. And, contrary to plaintiff's argument on appeal, plaintiff has failed to plead facts showing that his conduct was lawfully protected medical marijuana activity that warrants immunity under the MMMA. The MMMA will not supersede the wrongful-conduct rule if plaintiff has not acted consistently with the MMMA. Therefore, plaintiff's claim that his conduct was lawful lacks merit.

Next, a causal nexus exists between plaintiff's illegal conduct and all plaintiff's claims, which at their core relate to the losses plaintiff suffered when defendants ended the illegal contractual relationship. Indeed, plaintiff's losses are a proximate result of entering into the illegal agreement to cultivate, possess, sell, and deliver marijuana. Absent the existence of this illegal arrangement and breach of it, plaintiff would have no injury whatsoever. Under these circumstances, where the illegal act is the source of both the civil right and plaintiff's criminal responsibility, a causal nexus is not lacking. Plaintiff, in asserting that a causal connection is absent, simply ignores that his recovery is dependent upon enforcement of illegal agreements he executed.

Finally, viewing the pleadings most favorably to plaintiff, the factual allegations do not indicate that defendants were more culpable than plaintiff. Both parties voluntarily entered into the illegal agreement. Defendants' role was to finance the operation, while plaintiff was to oversee the day-to-day operation and cultivate the marijuana. At most, the facts alleged show that the parties were equally culpable. When both parties are equally at fault, the wrongful-conduct rule still applies.

Relatedly, plaintiff argues that the trial court erred by applying the wrongful-conduct rule because defendants themselves had unclean hands. "It is well settled that one who seeks equitable relief must do so with clean hands." *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010). The unclean-hands doctrine is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [opposing party]," and is only relevant to equitable actions or defenses. *Rose v Nat'l Auction Group*, 466 Mich 453, 463, 468; 646 NW2d 455 (2002) (citation, quotation marks, and emphasis omitted).

However, the wrongful-conduct rule is not an equitable defense. Indeed, plaintiff cites no law supporting the proposition that the wrongful-conduct rule is a form of equitable relief. Instead, the rule is a common-law maxim that operates to deny relief if the claim is based on the plaintiff's illegal conduct, a causal connection exists between that conduct and the damages sought, and the defendant is not more culpable than the plaintiff. In situations like the present one, in which the plaintiff and the defendant are equally in the wrong, "the law will not lend itself to afford relief to one as against the other, . . . but will leave them as it finds them." *Orzel*, 449 Mich at 558 (citation and quotation marks omitted). Consequently, the unclean-hands doctrine is inapplicable to this matter. Moreover, even if the doctrine did apply, it would not function to estop defendants from asserting the wrongful-conduct rule because one who seeks equity must do so with clean hands and plaintiff's conduct was likewise illegal.

VI. PLAINTIFF'S NONCONTRACTUAL CLAIMS

Finally, plaintiff argues that the trial court erroneously dismissed his noncontractual claims without providing any reasoning. We disagree.

Plaintiff correctly observes that the trial court did not expressly apply the wrongful-conduct rule to all plaintiff's claims when it granted summary disposition to defendants. Instead, the court only referred to the parties' agreements in relation to the rule and provided no analysis as to plaintiff's remaining claims of tortious interference with contracts, conversion, misappropriation of trade secrets, unjust enrichment, and breach of the implied covenant of good faith and fair dealing, or as to plaintiff's request for injunctive relief. On appeal, plaintiff suggests that these other claims were not subject to the wrongful-conduct rule because a party may raise alternative and even inconsistent claims, which plaintiff asserts he has raised here. Even a cursory review of those claims, however, shows that they relate to the same illegal conduct on which plaintiff's contract actions were based. Plaintiff does not cite any law supporting the proposition that these other claims, which were based on the same illegal conduct, are not subject to the wrongful-conduct rule. Application of the wrongful-conduct rule to all plaintiff's claims was proper.

Affirmed.

TUKEL, P.J., and RIORDAN, J., concurred with JANSEN, J.

ESTATE OF LEWIS v ROSEBROOK

Docket No. 343765. Submitted May 8, 2019, at Lansing. Decided July 16, 2019, at 9:00 a.m.

Kathy J. Lewis, on behalf of the estate of her father, Robert G. Lewis, brought an action in the Montcalm Probate Court against Carol L. Rosebrook, alleging claims of conversion, breach of fiduciary duty, constructive trust, and oral trust over funds that Rosebrook had transferred from three joint accounts with the right of survivorship that Rosebrook held with Lewis. Rosebrook and Lewis had been a couple for approximately 24 years, living and socializing together, though they never married. Rosebrook and Lewis had several joint and individual financial accounts that were funded primarily, if not exclusively, by Lewis; however, the parties had equal ownership of the accounts and had equal rights to access and use the funds. The couple ended their relationship in January 2017, and they agreed to a 30-day period to sort out their affairs. Before that 30-day period, and while the parties were both still living, Rosebrook transferred substantially all of the funds from the joint accounts to her personal accounts. Lewis did not authorize or otherwise agree to the transfers, nor did he even know that the funds had been removed until he went to one of the banks and tried to access an account. Kathy brought the instant action in May 2017, and Lewis died in October 2017; his estate, with Kathy as the personal representative, became the plaintiff in this case. The probate court, Charles W. Simon, III, J., held a bench trial and concluded that the parties held the accounts as joint tenants with the right of survivorship under MCL 487.703. The court further concluded that there was not reasonably clear and persuasive proof to overcome the statutory presumption that title and access to the funds were intended to be shared jointly. Accordingly, the court held that plaintiff's claims were without merit. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 487.703, two or more parties may create a joint account in a banking institution with any funds in the account payable to the survivor, the parties hold the funds in the account as joint tenants for their exclusive use, and the funds

may be paid to any one of the named holders. Once funds are deposited and any additions accrued in the account, the assets are held by the parties as a joint tenancy. A joint account under MCL 487.703 provides two primary rights—a right of proportional share of the funds in the account and a right of survivorship. The parties, by their words or deeds, can agree to put conditions or restrictions on the account; for example, the parties may express an intent that the funds are to be held merely for the convenience of the depositor or are otherwise subject to revocation at the sole discretion of the depositor. Absent competent evidence to the contrary, however, the creation of a joint account with the right of survivorship actually fixes the ownership of the account in the persons named as joint tenants. Furthermore, the law presumes that joint tenants are equal contributors, have equal ownership shares, and have equal rights to access and use the funds; however, this presumption can be rebutted. In this case, the probate court concluded that Lewis did not establish the accounts for mere convenience but instead intended to convey a right in the funds to Rosebrook as a joint tenant with the right of survivorship under MCL 487.703, and a review of the record confirmed that this factual finding was not clearly erroneous. However, the probate court did not conclude—and the record did not support—that Lewis intended to convey a 100% interest in the funds to Rosebrook or that he intended to divest himself of all ownership interest in the funds during his lifetime.

2. MCL 487.703 permits a joint tenant to withdraw the entire account. Yet, the right to access is just one in the bundle of rights to funds in a joint account. The record showed that the parties had established a practice over the years that each party could access and use funds in the accounts without consulting the other party, at least with respect to all but the most costly expenses. However, there was nothing in the record to suggest that Lewis and Rosebrook ever agreed, by word or deed, that one of the parties could transfer all of the funds out of the three accounts and appropriate those funds for that party's personal use without concern for the other party. Additionally, there was nothing in MCL 487.703 to suggest that the withdrawing coowner is released and discharged from any liability to the nonwithdrawing coowner related to that payment. Similarly, nothing in Michigan's common law supported the proposition that a cotenant of a joint financial account with right of survivorship can appropriate the entire corpus of the tenancy without regard to—and, in fact, in direction contravention of—the ownership interest of the other cotenant. The mere act of

accessing the funds by one coowner does not destroy all the rights of the other coowner. When a coowner withdraws funds from the account, the payment in such case is made to the joint owner qua joint owner. In this case, when Rosebrook transferred substantially all the funds from the three accounts in early 2017, she was required to do so in her capacity as—"qua"—a coowner. But the transfers were not done with Lewis's authority or acquiescence. Although Lewis did not provide prior written notice to the banking institutions to block future withdrawals, the lack of written notice did not dissolve Lewis's coownership interests in the funds. Accordingly, although the probate court correctly recognized that Rosebrook had the right to withdraw all the funds in the three accounts, the probate court erred by conflating the right to withdraw with the right to retain and use the funds for her own benefit despite Lewis's coownership rights. The parties had undivided interests in all three accounts, but each party's proportional share could be determined. Because Rosebrook was an equal owner but she appropriated substantially all of the funds in early 2017, she was liable under a conversion theory to return the funds taken in excess of her 50% proportional share. The probate court's judgment that Rosebrook could retain 100% of the funds was reversed, the judgment on plaintiff's conversion claim was vacated, and the case was remanded for a determination of the monetary value of Lewis's share as well as any other applicable damages.

3. The probate court rejected plaintiff's claims of breach of fiduciary duty and constructive trust, erroneously reasoning that Rosebrook was entitled to retain substantially all of the funds in the joint accounts. Because the probate court's judgment with respect to Rosebrook's entitlement to retain the funds was reversed, its rulings with regard to the breach of fiduciary duty and constructive trust were vacated. Finally the probate court did not clearly err when it rejected plaintiff's claims regarding breach of an oral trust. Plaintiff's original oral-trust claim failed because the court did not clearly err by rejecting plaintiff's convenience theory, and plaintiff's claim on appeal that an oral trust was created when the parties agreed to a 30-day period to sort out their assets was unpreserved and without support in fact or law.

Probate-court judgment that Rosebrook could retain 100% of the funds reversed; probate-court judgment on plaintiff's claims of conversion, breach of fiduciary duty, and constructive trust vacated; and case remanded for a determination of the monetary

value of Lewis's share as well as any other applicable damages. Affirmed in all other respects.

BANKS AND BANKING — JOINT ACCOUNTS WITH THE RIGHT OF SURVIVORSHIP — COOWNERSHIP.

Under MCL 487.703, two or more parties can establish and deposit funds in a banking institution in a joint account with the right of survivorship; while living and in the absence of sufficient evidence to the contrary, parties to a joint banking account with the right of survivorship hold their interests as coowners and must act consistently with that coownership.

Chalgian & Tripp Law Offices, PLLC (by *Douglas G. Chalgian*) for plaintiff.

Varnum, LLP (by *Charyn K. Hain*) for defendant.

Before: SWARTZLE, P.J., and M. J. KELLY and TUKEL, JJ.

SWARTZLE, P.J. In Michigan, two or more parties can establish and deposit funds in a banking institution in a joint account with the right of survivorship. In doing so, the parties create a joint tenancy in the account. Under MCL 487.703, the banking institution is shielded from liability for any withdrawal of funds made by a coowner of the account, at least in the absence of prior written notice that withdrawals are not permitted. This statutory shield does not, however, also serve as a sword for the withdrawing coowner to pierce the nonwithdrawing coowner's rights. Instead, the withdrawing coowner must take the funds from the account *as a coowner* and, therefore, must use the funds in a manner consistent with the other coowner's rights.

Here, the parties had three joint accounts with the right of survivorship. The parties had equal ownership of the accounts and had equal rights to access and use the funds. While the parties were both still living,

defendant transferred substantially all of the funds from the joint accounts to her own personal accounts. In doing so, she acted in her own personal capacity, rather than in her capacity as a coowner in the joint tenancy, and this was unlawful. For the reasons set forth below, we reverse in part the judgment of the probate court and remand for further proceedings.

I. BACKGROUND

This case involves the actions of both Robert Lewis and his daughter, Kathy Lewis. To avoid confusion, we refer to Robert Lewis by his last name and to Kathy Lewis as his daughter or simply as plaintiff.

Carol Rosebrook and Lewis were a couple for approximately 24 years, living and socializing together, though they never married. They had several joint and individual financial accounts, three of which are relevant here. In 2001, 2003, and 2009, the parties opened joint accounts with the right of survivorship at Old Kent Bank (later Fifth Third Bank) and Sidney State Bank. All three accounts were funded primarily, if not exclusively, by Lewis. The couple used the funds to pay their ordinary day-to-day expenses, sometimes consulting each other and sometimes not, depending on the nature and amount of the expense. As the probate court concluded, "In all respects these accounts were held and used equally by both parties."

Lewis was diagnosed with a serious illness in 2013, and in October 2016, he moved into a care facility. The couple ended their relationship in late January 2017, and they agreed to a 30-day period to sort out their affairs. Immediately after the split, Lewis and his daughter went to Fifth Third Bank and asked that the bank "freeze" the joint accounts. They maintain that

they were told that the accounts could not be "frozen,"[1] and they left the bank without withdrawing any funds or closing the accounts.

Over the next two weeks, Rosebrook transferred approximately $255,000 from the three accounts to accounts solely in her own name; this total represented substantially all of the funds in the three accounts. At the time, she was a cotrustee of the Robert G. Lewis, Sr., Trust. Rosebrook also had the power to act on Lewis's financial behalf under a durable power of attorney. Lewis did not authorize or otherwise agree to the transfers, nor did he even know that the funds had been removed until he went to one of the banks and tried to access an account.

In May 2017, while Lewis was still living, the probate court appointed his daughter as his conservator. Lewis was mentally competent but, as a result of his physical condition, he needed assistance with his financial affairs. On Lewis's behalf, his daughter sued Rosebrook, alleging claims of conversion, breach of fiduciary duty, constructive trust, and oral trust over the funds that Rosebrook transferred from the joint accounts. Lewis died in October 2017 and subsequently his estate, with his daughter as the personal representative, became the plaintiff in this case.

The probate court held a bench trial. Plaintiff maintained that the accounts were established merely for Lewis's convenience or, at most, for the payment of

[1] Assuming the accuracy of the testimony, the bank's position was an incorrect statement of law, although it might have been a correct statement of the bank's internal policies. As our Supreme Court observed in *Esling v City Nat'l Bank & Trust Co of Battle Creek*, "While the statute [now MCL 487.703] provides for stopping payment by notice in writing; there is no provision in the statute which prevents the bank, if it sees fit to do so, from respecting an oral notice from one of the parties not to pay the other." 278 Mich 571, 580; 270 NW 791 (1936).

mutual household expenses, and that Lewis did not intend to gift all of the funds in the accounts to Rosebrook. Plaintiff also argued that Rosebrook's statutory authority to withdraw funds from the accounts as a joint-account holder did not necessarily give her the right to retain those funds irrespective of Lewis's interest in the funds. In contrast, Rosebrook argued that, as a joint-account holder, she had "complete and unlimited rights" to all funds in the accounts, even to the exclusion of Lewis during his lifetime.

The probate court issued a written opinion and entered judgment in favor of Rosebrook. The probate court concluded that the parties held the accounts as joint tenants with the right of survivorship under MCL 487.703. The probate court further concluded that there was not reasonably clear and persuasive proof to overcome the statutory presumption that title and access to the funds were intended to be shared jointly. Although Lewis testified during his deposition that the accounts were set up for his own convenience, the probate court noted Lewis's testimony that he wanted to take care of Rosebrook and that he gave her the proverbial "keys to the safe" by setting up the joint accounts. In fact, the relationship was a relatively long one, and the financial arrangements were created and maintained in different years and at different institutions. At all times, both parties had equal access to and equal use of the funds in the joint accounts. Moreover, Lewis was a successful businessman, and the accounts were established long before he became ill or needed assistance with his finances. In fact, while he later became physically frail, he appears to have retained his mental competency well past the filing of this lawsuit. Given all of this, the probate court concluded that these were not financial accounts set up jointly for Lewis's mere convenience.

With regard to the parties' respective interests, Rosebrook testified that they considered the funds in the joint accounts as "our money." The evidence presented at trial showed that both parties freely used the funds in the accounts to pay for their personal and mutual needs. Although they discussed larger withdrawals before making them, Rosebrook did not need Lewis's permission to access the accounts, and she regularly used the accounts to pay bills and her own expenses. Rosebrook even maintained that Lewis established the accounts as part of a plan for their retirements.

The probate court concluded that Rosebrook and Lewis were coowners of the accounts and had equal interests in them. The probate court reasoned that, because Rosebrook had the right to make withdrawals and transfers, and her rights were not limited to matters of Lewis's convenience, Rosebrook had the absolute right to withdraw and retain all of the funds from the joint accounts, notwithstanding any right Lewis had to the funds as a joint tenant. Similarly, had Lewis withdrawn all of the funds when he and his daughter went to the bank after the couple broke up, he would have been entitled to keep all of the funds and Rosebrook would have had no recourse, according to the probate court. Therefore, the probate court held that plaintiff's claims were without merit.

Plaintiff appeals as of right.

II. ANALYSIS

On appeal, plaintiff argues that the probate court clearly erred by finding that Lewis gifted Rosebrook an interest in the accounts during his lifetime. Plaintiff emphasizes that this is not a survivorship case and asserts that, during Lewis's life, Rosebrook's rights to

the funds were limited to matters of Lewis's convenience, such as paying his bills. Even if Rosebrook had an ownership interest in the funds during Lewis's lifetime, plaintiff argues that the probate court erred by allowing Rosebrook to retain substantially all of the funds from the accounts. According to plaintiff, the right to withdraw funds is not the same as the right to retain funds, and the probate court erred by failing to order Rosebrook to return at least a portion of the funds.

A. STANDARDS OF REVIEW

"This Court reviews for clear error the probate court's factual findings and reviews de novo its legal conclusions." *In re Brody Conservatorship*, 321 Mich App 332, 336; 909 NW2d 849 (2017). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (cleaned up). We "defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *Id*. (cleaned up). We review de novo any statutory interpretation by the probate court. *In re Redd Guardianship*, 321 Mich App 398, 404; 909 NW2d 289 (2017).

B. JOINT TENANCY WITH THE RIGHT OF SURVIVORSHIP UNDER MCL 487.703

Our Legislature has enacted a variety of statutes governing a party's financial arrangements. As one example, the Legislature enacted the Statutory Joint Account Act in 1978. MCL 487.711 *et seq*. A joint

financial account created under this act permits modification to suit the parties' particular needs, including identifying who can revoke the contractual arrangement and who owns the funds held in the account during the parties' lifetimes. MCL 487.715. An account subject to this act has the beneficial feature of making explicit what is often left implicit, unstated, or simply unknown. There is nothing in the record, however, to suggest that the three accounts in this dispute meet the conditions of the Statutory Joint Account Act.

Decades prior to its enactment of the Statutory Joint Account Act, the Legislature adopted a similar, albeit more basic statute regulating certain joint financial accounts. In its current form, the statute provides that two or more parties may create a joint account in a banking institution with any funds in the account (deposits and interest, dividends, or other additions, if any) payable to the survivor. MCL 487.703. The parties hold the funds in the account as "joint tenants . . . for the exclusive use of the persons so named" on the joint account. *Id*. The funds "may be paid to any 1 of said persons during the lifetime of said persons or to the survivor or survivors after the death of 1 of them." *Id*. Importantly for the banking institution, when the institution pays funds from the account to one of the parties, the institution is released from liability with respect to those funds unless and until the institution receives written notice not to make any payment from the account. *Id*.; *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 330; 506 NW2d 283 (1993). Finally, when a party makes a deposit into the account, the deposit is "prima facie evidence" of the party's intention "to vest title to such deposit and the additions thereto in such survivor or survivors," unless fraud or undue influence is shown. MCL 487.703.

Under this earlier statute, once funds are deposited and any additions accrued in the account, the assets are held by the parties as a joint tenancy. Broadly speaking, a joint account under MCL 487.703 provides two primary rights—a right of proportional share of the funds in the account and a right of survivorship. The parties, by their words or deeds, can agree to put conditions or restrictions on the account, for example, by expressing an intent that the funds are to be held merely for the convenience of the depositor or are otherwise subject to revocation at the sole discretion of the depositor. See generally Anno: *Power of One Party to Joint Bank Account to Terminate the Interests of the Other*, 161 ALR 71; see also *Mfr Nat'l Bank v Schirmer*, 303 Mich 598, 603; 6 NW2d 908 (1942); *Rasey v Currey's Estate*, 265 Mich 597, 601-602; 251 NW 784 (1933); *Sasanas v Mfr Nat'l Bank of Detroit*, 130 Mich App 812, 818-819; 345 NW2d 621 (1983). Absent "competent evidence to the contrary," however, the creation of a joint account with the right of survivorship "actually fix[es] the ownership" of the account "in the persons named as joint tenants." *Jacques v Jacques*, 352 Mich 127, 136; 89 NW2d 451 (1958) (quotation marks and citation omitted). This ownership remains joint between the parties until and unless there is a surviving party, in which case sole title vests in that survivor.

Considering the language in MCL 487.703, there are two facets of joint accounts often contested in disputes over such accounts. First, there is the right of survivorship, sometimes known as the "the poor man's will," involving whether a surviving joint tenant is vested with ownership of the whole account on the death of the other tenant. See, e.g., *Jacques*, 352 Mich at 134-135. Second, there is the question of contribution, ownership, access, and use of funds in the account

while the joint tenants are still living. See, e.g., *Esling*, 278 Mich at 576; *In re Cullmann Estate*, 169 Mich App 778, 785; 426 NW2d 811 (1988). As developed in caselaw, although a joint account with the right of survivorship is neither a will nor a common-law *inter vivos* gift, the account can accomplish a testamentary disposition as well as share some aspects of a gift during the lifetime of the joint tenants. See *Jacques*, 352 Mich at 134-135. Yet, the account need not necessarily provide both a right of survivorship *and* an unlimited right to the funds during the lifetime of the account holders. See, e.g., *Kirilloff v Glinisty*, 375 Mich 586, 589; 134 NW2d 707 (1965); *Cullmann*, 169 Mich App at 785. For instance, a party establishing the account may create a right of survivorship applicable at death without gifting an interest in the funds during the party's lifetime. See *Kirilloff*, 375 Mich at 589; *Cullmann*, 169 Mich App at 785-787.

With respect to the second facet, the law presumes that joint tenants are equal contributors, have equal ownership shares, and have equal rights to access and use the funds. See *Danielson v Lazoski*, 209 Mich App 623, 625; 531 NW2d 799 (1995); 16 Michigan Law & Practice (2d ed), Estates, § 44, p 136. The presumption can be rebutted, however, and this is a question of fact subject to clear-error review on appeal. *Danielson*, 209 Mich App at 629. "For the depositors themselves, the form [of the account] is not conclusive in any contest during their joint lives as to the title to the moneys, nor conclusive after the death of either as to moneys then withdrawn." *Esling*, 278 Mich at 577 (cleaned up). The "realities of ownership," not the form of the account, control in a dispute between parties to the joint tenancy. *Id*. at 578 (cleaned up). The rights are determined by the intent of the depositor at the time of the

deposit. *In re Pitre*, 202 Mich App 241, 244; 508 NW2d 140 (1993).

C. RESPECTIVE *INTER VIVOS* RIGHTS OF THE PARTIES

Applying the law to the facts of this case, we first note that the question here is not whether Rosebrook lawfully received the funds as a survivor because Lewis predeceased her. Although Lewis is now deceased, the probate court did not conclude that Rosebrook was entitled to the funds as a survivor. The statutory presumption that a decedent intended funds in a joint account to become the sole property of the survivor arises "based on evidence that the decedent created and maintained the accounts until [his] death." *In re Estate of Soltys*, 497 Mich 908, 909 (2014); see also *Kettler v Security Nat'l Bank of Sioux City*, 805 NW2d 817, 823 (Iowa App, 2011) ("Essentially, the right of survivorship is dependent on both joint tenants continuing to agree to hold the property in that fashion.").[2]

Rosebrook transferred substantially all of the funds out of the three accounts while Lewis was still alive, and Lewis sued Rosebrook for return of the funds before he died. Indeed, during his deposition, Lewis testified that Rosebrook's actions were contrary to his ownership and use rights. Thus, this is not a survivorship dispute.

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[2] As Justice MARKMAN has observed, any practical differences between a joint tenancy with right of survivorship and a standard joint tenancy (or even a tenancy by the entirety) largely collapse in the context of personal property, such as funds in a commercial bank account. The otherwise "indestructible contingent remainder" of the survivorship component in the typical joint tenancy with right of survivorship is essentially "nothing" if the account is depleted or closed. *Zavradinos v JTRB, Inc II, LLC*, 482 Mich 858, 879 n 4 (2008) (MARKMAN, J., dissenting).

Instead, the probate court concluded that Rosebrook was entitled to substantially all of the funds during Lewis's lifetime. This is a dispute, in other words, about the respective *inter vivos* rights of parties to a financial account held as a joint tenancy with the right of survivorship under MCL 487.703.

Plaintiff maintained in the probate court, and continues to assert on appeal, that Lewis was the sole owner of the funds in the joint accounts and that Rosebrook did not have any ownership interest but was added to the accounts merely for Lewis's convenience, i.e., to assist him with the payment of bills. Disputes involving the "realities of ownership" among joint-account holders have often arisen in cases involving a joint account established purely for the convenience of the person who opened the account. For example, in *Hazen v Elmendorf*, our Supreme Court determined that the money in a joint account belonged solely to the person who opened the account and that the other persons named on the account—who had the power to withdraw as joint-account holders—could use the funds for the depositor's benefit, but they could not invest the withdrawn money in property for themselves. 365 Mich 624, 631-632; 113 NW2d 892 (1962). Likewise, in *Allstaedt v Ochs*, the Court determined that a father did not make a gift of funds in a joint account to his daughter when the evidence showed that the joint account was established for "emergencies" and the daughter could only withdraw funds with her father's permission. 302 Mich 232, 237; 4 NW2d 530 (1942).

In this case, the probate court concluded that Lewis did not establish the accounts for mere convenience, and our review of the record confirms that this factual finding was not clearly erroneous. Lewis admitted

during his deposition that, when he set up the accounts, he intended to take care of Rosebrook financially. He was financially astute and business savvy, and he did not establish the accounts on short notice or a whim, but rather staggered over several years and well before he was diagnosed with an illness. Cf. *Jacques*, 352 Mich at 137 ("We have here an account established many years before death by a father completely mentally competent and during most of the succeeding years in good physical health."). Although Lewis funded the accounts, the record confirms that the couple treated the funds as "our money," and Rosebrook had relatively free access to and use of the funds. Cf. *Allstaedt*, 302 Mich at 237. Considering the record and deferring to the probate court's credibility determinations, we conclude that the probate court did not clearly err in finding that Lewis did not establish the accounts for his own convenience but instead intended to convey a right in the funds to Rosebrook as a joint tenant with the right of survivorship under MCL 487.703.

With that said, the probate court did not conclude—and the record does not support—that Lewis intended to convey a 100% interest in the funds to Rosebrook or that he intended to divest himself of all ownership interest in the funds during his lifetime. Indeed, on this record it would be absurd to suggest that, by establishing joint accounts used to pay household expenses, Lewis intended to divest himself of all ownership interests during his own lifetime and to make an absolute transfer of all of the funds, to take immediate effect, to Rosebrook. See *Rasey*, 265 Mich at 601-602 (concluding that a joint account was not an "absolute transfer" when the depositor was not stripped of all "ownership of and dominion over the deposit").

Rather, the probate court concluded that the parties intended to vest title to the funds in both of them, even though it is undisputed that Lewis primarily, if not exclusively, funded the accounts. The probate court further concluded that the accounts were held and used equally by both parties. This latter factual finding accords with the presumption under state law that joint-account holders are equal owners of the funds. *Danielson*, 209 Mich App at 626. Given the record evidence, the probate court did not clearly err by concluding that Lewis and Rosebrook were coowners of the funds in the accounts and that they had equal access to and use of the funds. Cf. *Murphy v Mich Trust Co*, 221 Mich 243, 246; 190 NW 698 (1922) (noting that the wife was "the principal contributor" to the married couple's joint account and holding that the wife should have been granted an interest in "one-half thereof").

D. ROSEBROOK APPROPRIATED THE FUNDS WITHOUT REGARD TO LEWIS'S COOWNERSHIP RIGHTS

Plaintiff next argues that even if Rosebrook was a coowner of the funds in the joint accounts, her right to access the funds did not grant her the separate and independent right to appropriate the entirety of the funds for her own use irrespective of Lewis's coownership rights. Plaintiff contends that Rosebrook as a coowner was entitled to keep, at most, half of the funds.

Before we turn to the merits of this argument, Rosebrook asserts that plaintiff failed to preserve the claim below. The assertion is without merit. Although plaintiff did not specifically claim during the bench trial that the parties should each take "half" of the disputed funds, plaintiff did argue that Rosebrook was not entitled to 100% of the funds and, during closing

arguments, plaintiff asked the probate court to consider whether Rosebrook should have to return a portion of the funds less than 100%. Moreover, plaintiff repeatedly argued that the right to withdraw was not commensurate with the right to retain. The probate court made a determination of the parties' respective ownership rights, concluding that title to the funds was vested in both, that they were joint owners, and that they enjoyed equal rights to access and use the funds; and yet, despite the coownership interests, the probate court ordered that Rosebrook had the right to retain 100% of the funds because she accessed the funds first. Thus, contrary to Rosebrook's assertions, the matter was raised before, addressed, and decided by the probate court, and it has been preserved for our review. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). In any event, on the facts of this case, we would overlook the preservation requirement and consider this question of law, for which the facts have been presented, to avoid manifest injustice and ensure a proper determination of the case. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

Turning to the merits, it is patently clear that Rosebrook had the right, under the statute as well as general principles governing joint tenancies, to access some or all of the funds in the accounts. As this Court has explained, MCL 487.703 permits a joint tenant to "withdraw the entire account." *Comerica Bank*, 201 Mich App at 325. Yet, the right to access is just one in the bundle of rights to funds in a joint account. See *Hazen*, 365 Mich at 631 (distinguishing a joint-account holder's "authority to withdraw funds from the joint accounts" with the joint-account holder's right to invest the money solely for her own gain without regard to the real ownership of the money); Anno: *Power of One*

Party to Joint Bank Account to Terminate the Interests of the Other, 161 ALR 71, 74, § I (explaining that "the power to withdraw is one thing, the power or right to destroy cointerests another").

The record reflects that the parties had established a practice over the years that each party could access and use funds in the accounts without consulting the other party, at least with respect to all but the most costly expenses. The record further shows that some of the uses were for mutual expenses and some were for personal expenses. Yet, this tacit agreement to forgo prior consultation on particular expenses does not clearly encompass, or even remotely suggest, an additional agreement that one party could access and appropriate the entire corpus of the accounts for that party's own use, while the other, nonwithdrawing party would disclaim any interest in the corpus. In other words, there is nothing in this record to suggest that Lewis and Rosebrook ever agreed, by word or deed, that one of the parties could transfer all of the funds out of the three accounts and appropriate those funds for that party's personal use without concern for the other party. Therefore, if Rosebrook had the right to appropriate the entire corpus for her own use without regard to Lewis as a coowner of the joint tenancy, then this right would have to exist by operation of statute or common law rather than by any established agreement of the parties.

We look first to the statute. With regard to the express language in MCL 487.703, it is clear that the Legislature intended to provide a liability shield to banking institutions with respect to withdrawals from this type of account. Specifically, the statute provides that the withdrawal payment "shall be a valid and sufficient release and discharge to said banking insti-

tution for all payments made," absent written notice halting any withdrawals. MCL 487.703; see also *Esling*, 278 Mich at 577-578.

The statute does also provide that payment may be made to any of the coowners. Yet, there is nothing in the statute to suggest that, similar to the banking institution that makes payment, the withdrawing coowner is released and discharged from any liability to the nonwithdrawing coowner related to that payment. Put differently, nothing in the statute indicates that a banking institution's payment of funds to one coowner divests the other then-living coowner of rights in the funds or otherwise vests property exclusively in the withdrawing coowner without regard to the realities of ownership. See *Esling*, 278 Mich at 577-578. Had the Legislature intended to provide a shield from liability for coowners as it did for banking institutions, it could have done so easily by adding language to that effect. It did not, and we will not read into the statute something that the Legislature did not see fit to include. See *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 561; 912 NW2d 593 (2018).

Similarly, we are unaware of—and Rosebrook has not pointed to—anything in Michigan's common law to support the proposition that a cotenant of a joint financial account with right of survivorship can appropriate the entire corpus of the tenancy without regard to—and, in fact, in direction contravention of—the ownership interest of the other cotenant. As explained by the editors of the American Law Reports, "Ordinarily, once it is admitted or established that both parties have substantial interests in the account, it follows that neither can appropriate the whole without liability" to the other. Anno: *Power of One Party to Joint Bank Account to Terminate the Interests of the Other*, 161 ALR

71, 74-75, § I. There are generally only two circumstances in which a party can appropriate the entire corpus without liability to the other, neither of which applies here: "(1) where in fact and in law the appropriator is the real owner of the money; and (2) where the interests acquired by the other are by implication or express contract subject to destruction—as, for example, in case a reserved power to revoke the gift of a joint interest." *Id*. at 72. This appears to be the majority position outside of this jurisdiction. See, e.g., *Kettler*, 805 NW2d at 825; *Rollings v Smith*, 716 NE2d 502, 506 (Ind App, 1999); *Dent v Wright*, 322 Ark 256, 262-263; 909 SW2d 302 (1995); *Johnson-Batchelor v Hawkins*, 450 NW2d 240, 241 (SD, 1990).

A minority of other jurisdictions treat the matter somewhat differently. For example, in *In re Rauh*, the federal bankruptcy court applied Massachusetts law and held that a "joint owner of a bank account . . . has the right to withdraw all of the funds, thereby totally divesting the other joint owner of all interest" in the funds. 164 BR 419, 424 (Bankr D Mass, 1994), citing *Heffernan v Wollaston Credit Union*, 30 Mass App 171; 567 NE2d 933 (1991). In support of this position, these minority jurisdictions appear to rely in part on the distinction between a joint tenancy in real property versus a joint tenancy in a financial account, see, e.g., *Heffernan*, 30 Mass App at 177-178, where in the latter the unilateral right to withdraw is found in statute and the funds that make up the corpus are, as all legal tender is, wholly fungible, thereby defeating any action to return the precise property taken. Yet, even in several of these minority jurisdictions, it is recognized that the other joint owner is not without legal recourse. As the bankruptcy court in *In re Rauh* observed, "It may be that the creator of a joint account has a cause of action against the other owner for having completely

withdrawn the funds, upon establishing that in creating the account the creator did not intend to transfer that measure of beneficial enjoyment." 164 BR at 424.

Michigan has long adhered to the rule that, in a dispute involving a joint account, the "realities of ownership" control "as to the title to the moneys," *Esling*, 278 Mich at 577-578 (quotation marks and citation omitted), and the "actual property rights of the respective parties" are "open to adjudication," *Schirmer*, 303 Mich at 603. Prior cases have recognized that a depositor may, under certain circumstances, withdraw all of the funds and revoke a joint account during the depositor's lifetime. See *id*. at 603-604; *Meigs v Thayer*, 289 Mich 680, 683; 287 NW 342 (1939); *Esling*, 278 Mich at 576; *Pitre*, 202 Mich App at 244. Yet, these cases do not lend any support to Rosebrook, as she was not the depositor and, more importantly, these and other cases consistently point out that it is the realities of ownership that govern the respective rights of the parties to a particular joint account. Here, although Lewis was the depositor of all three accounts, the record confirms that the parties intended that they be equal owners of the funds with equal rights to access and use the funds.

And yet, the mere act of accessing the funds by one coowner does not destroy all of the rights of the other coowner. When a coowner withdraws funds from the account, "the payment in such case is made to the joint owner *qua* joint owner." *LaValley v Pere Marquette Employes' Credit Union*, 342 Mich 639, 643; 70 NW2d 798 (1955) (emphasis added); cf. *Hazen*, 365 Mich at 631-632; *Woodington v Shokoohi*, 288 Mich App 352, 367-368; 792 NW2d 63 (2010) (recognizing, in the context of a divorce, that one spouse cannot dissipate funds from a joint account without explanation); *Com-*

erica Bank, 201 Mich App at 329 (recognizing that seizure of funds from a joint account by the Department of Treasury did not constitute "a final determination of rights to the property involved" and that the actual ownership rights of the account holders remained open to adjudication). In the past, when Lewis or Rosebrook withdrew funds from the accounts to pay expenses, they did so in their capacities as coowners. Given that there has not been a prior lawsuit over these accounts, presumably the withdrawals and payments by one coowner met the then-current expectations of the other coowner. When Rosebrook transferred substantially all of the funds from the three accounts in early 2017, she was required to do so in her capacity as—"*qua*"—a coowner. But, as Lewis and his daughter quickly made clear, the transfers were not done with Lewis's authority or acquiescence.

The probate court relied critically on the fact that Lewis did not provide prior written notice to the banking institutions to block future withdrawals. While doing so may have been advisable in retrospect, the lack of written notice did not somehow dissolve Lewis's coownership interests in the funds. Moreover, our Supreme Court has recognized that the realities of the parties' intentions and actions should control with regard to these types of accounts as long as they do not conflict with the express language of the statute. See, e.g., *Roach v Plank*, 300 Mich 43, 53; 1 NW2d 446 (1942); *Esling*, 278 Mich at 580; *Equitable & Central Trust Co v Zdziebko*, 260 Mich 366, 373; 244 NW 505 (1932); *State Savings Bank of Carleton v Baker*, 257 Mich 666, 669-670; 241 NW 842 (1932); *In re Taylor's Estate*, 213 Mich 497, 502-503; 182 NW 101 (1921).

Accordingly, although the probate court correctly recognized that Rosebrook had the right to withdraw

all of the funds in the three accounts, the probate court erred by conflating the right to withdraw with the right to retain and use the funds for her own benefit despite Lewis's coownership rights. The parties had undivided interests in all three accounts, but each party's proportional share could be determined. Because Rosebrook was an equal owner but she appropriated substantially all of the funds in early 2017, she is liable under a conversion theory to return the funds taken in excess of her 50% proportional share. We therefore reverse the probate court to the extent that it concluded that Rosebrook could retain 100% of the funds, vacate the judgment on plaintiff's conversion claim, and remand for a determination of the monetary value of Lewis's share as well as any other applicable damages.

E. PLAINTIFF'S REMAINING CLAIMS

Plaintiff raised several additional claims of error. The probate court rejected plaintiff's claims of breach of fiduciary duty and constructive trust, reasoning erroneously that Rosebrook was entitled to retain substantially all of the funds in the joint accounts. Because we reverse the probate court with respect to Rosebrook's entitlement to retain the funds, we likewise vacate its rulings with regard to the breach of fiduciary duty and constructive trust. We emphasize, however, that we do not reach the merits of either of these claims; on remand, the probate court might again conclude that the claims lack merit.

Plaintiff has also asserted a claim that the parties created an oral trust. In rejecting this claim, the probate court did not err. "It is a general principle of trust law that a trust is created only if the settlor manifests an intention to create a trust, and it is essential that there be an explicit declaration of trust

accompanied by a transfer of property to one for the benefit of another." *Osius v Dingell*, 375 Mich 605, 613; 134 NW2d 657 (1965). Plaintiff argues that Lewis created a trust by opening the accounts for his own convenience and allowing Rosebrook access as a trustee for his benefit. As already explained, the probate court did not clearly err by rejecting the convenience theory posited by plaintiff, and given this, plaintiff's original oral-trust claim fails.

For the first time on appeal, plaintiff proffers another oral-trust theory—Lewis created an oral trust when, following the end of their relationship, the parties agreed to wait 30 days to sort out their assets and separate their accounts. This issue is unpreserved and need not be considered and, in any event, is without support in fact or law. See *Smith*, 269 Mich App at 427.

III. CONCLUSION

While living and in the absence of sufficient evidence to the contrary, parties to a joint banking account with the right of survivorship hold their interests as coowners and must act consistent with that coownership. Rosebrook seized substantially all of the funds from the parties' three accounts and appropriated the funds for her own personal use, in contravention of the realities of her coownership with Lewis. For the reasons previously stated, the probate court erred as a matter of law when it held that Rosebrook could lawfully retain and use the funds.

Accordingly, we reverse the probate court with respect to this holding, vacate the judgment on plaintiff's claims of conversion, breach of fiduciary duty, and constructive trust, and remand the matter to the probate court for consideration of those claims consis-

tent with this opinion. In all other respects we affirm the decision of the probate court. We do not retain jurisdiction.

Appellant, as the prevailing party, is entitled to tax costs under MCR 7.219(F).

M. J. KELLY and TUKEL, JJ., concurred with SWARTZLE, P.J.

JOHNSON v JOHNSON

Docket Nos. 345803 and 345955. Submitted July 9, 2019, at Lansing. Decided July 18, 2019, at 9:00 a.m.

Plaintiff, Lieutenant Colonel Pamela J. L. Johnson, D.O., and defendant, Edgar Johnson III, divorced in 2011. Their divorce judgment awarded them joint legal custody of their minor children and awarded plaintiff primary physical custody. In 2016, plaintiff moved for a change of domicile to Springfield, Virginia, because she had been called for active duty as a medical review officer in the United States Army. In January 2017, the trial court allowed the move and entered a detailed parenting-time order. Defendant subsequently asserted that between January 11, 2017 and May 21, 2018, plaintiff failed to facilitate video parenting-time sessions between defendant and the children, failed to provide him the children for holiday breaks and summer parenting time, and failed to provide him with medical information about the children or information about their well-being. On multiple occasions, the Friend of the Court (FOC) petitioned the Clinton Circuit Court to issue an order to show cause for why plaintiff should not be held in contempt for violating the parenting-time schedule. After plaintiff failed to appear for a show-cause hearing scheduled for March 20, 2017, the hearing was changed to May 1, 2017, but plaintiff failed to appear for this hearing as well. Instead, on April 27, 2017, she submitted a letter to the court seeking the rights and protections offered by the Servicemembers Civil Relief Act (SCRA), 50 USC 3901 *et seq*., explaining that starting on April 28, 2017, she would be on active duty with an army agency in Arlington, Virginia. The trial court entered an order adjourning the show-cause hearing to June 5, 2017, and ordering plaintiff to appear telephonically, but she failed to do so. Another show-cause hearing was scheduled for February 5, 2018. On January 10, 2018, the FOC investigator sent plaintiff's commanding officer a letter explaining that plaintiff was required to appear for the February 5, 2018 hearing and requesting that plaintiff be made available. The February 5, 2018 show-cause hearing was rescheduled for April 16, 2018, and the FOC investigator advised plaintiff's commanding officer of the change in date and again requested that plaintiff appear. On

April 5, 2018, plaintiff submitted another letter seeking a stay of the proceeding under the SCRA. This letter provided an anticipated date that she would be available to participate in a hearing, and it was signed by her commanding officer. At the April 16, 2018 show-cause hearing, the court, Michelle M. Rick, J., ruled that plaintiff's letter did not satisfy the conditions for a mandatory stay of the proceedings under 50 USC 3932(b)(2) and denied plaintiff's request for a stay. The court also held plaintiff in contempt for failing to appear as directed, issued a bench warrant with a $15,000 cash bond, and ordered plaintiff to pay defendant $1,500 because he had appeared at three scheduled hearings that she had missed. The FOC then filed another show-cause petition that alleged additional violations of the parenting-time schedule. A hearing was scheduled for September 17, 2018, and although plaintiff made no formal request for a stay of the hearing under SCRA, at the hearing, plaintiff's lawyer requested permission to make a proper application under the SCRA. The court did not permit it. Following the hearing, the court entered an order increasing plaintiff's bench-warrant bond to $25,000 for her failure to appear. The court further ordered plaintiff to transfer the children to defendant by noon on September 21, 2018, and it directed that defendant would have temporary physical placement of the children. The court also suspended plaintiff's driver's license and any occupational licenses that she held. In Docket No. 345955, plaintiff appealed by leave granted the April 2018 order denying her request for an adjournment under the SCRA, holding her in contempt, issuing a bench warrant for her arrest with a cash bond of $15,000, and requiring her to pay $1,500 to defendant. In Docket No. 345803, plaintiff appealed by right the trial court's September 2018 order increasing her bench-warrant bond to $25,000, suspending her licenses, and awarding defendant temporary physical placement of the children.

The Court of Appeals *held*:

1. The trial court erred in its interpretation of the SCRA; however, it did not err by denying plaintiff's motion for a stay because she had not met the statutory requirements. Under the SCRA, a servicemember who has received notice of any civil action or proceeding, including any child custody proceeding, may apply for a stay of the action. To apply for a stay, 50 USC 3932(b)(2) states that the servicemember must provide the court with a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear, as well as a letter or

other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter. If these conditions are satisfied, a stay of the action for not less than 90 days is mandatory. In this case, plaintiff submitted a letter signed by herself and by her commanding officer stating that she was on active duty military orders in Arlington, Virginia; that military leave was not authorized at the time of the letter; and that an anticipated possible date of availability for hearings, telephonically only, would be September 5, 2018. The trial court erred by ruling that in order to satisfy the conditions in 50 USC 3932(b)(2), plaintiff had to submit two separate documents: one from herself and one from her commanding officer. As long as the servicemember's commanding officer makes the statements required in 50 USC 3932(b)(2)(B), only one document need be submitted. However, the trial court did not err by ruling that the content of the letter was insufficient to satisfy the conditions set forth in 50 USC 3932(b)(2). Contrary to 50 USC 3932(b)(2)(A), plaintiff failed to set forth facts stating the manner in which her current military duty materially affected her ability to appear for the show-cause hearing; instead, she stated only in general terms that her workload was dramatically increased, consistently high, and time-sensitive without explaining why or how her duties materially affected her ability to appear for the contempt proceedings. In addition, because 50 USC 3932(b)(2)(A) expressly requires that the application for a stay include a date when the servicemember will be available to appear, plaintiff's statement providing only an anticipated and possible date to appear by telephone was not sufficient.

2. Plaintiff's arguments that the trial court's adverse rulings under the SCRA were based on bias and entered without proper application of the entire statute, that defendant had made false statements at the September 2018 hearing, and that the trial court had erred by ordering her to pay defendant $1,500 were factually undeveloped, unsupported by law, and therefore abandoned on appeal.

3. The trial court abused its discretion by granting defendant temporary physical custody of the children without adequate consideration of the statutory best-interest factors. An evidentiary hearing must be held before custody can be modified, even on a temporary basis. Regardless of whether a court is establishing custody in an original matter or altering a prior custody order, the trial court must determine whether the change of custody is in the children's best interests and, to that end, must make specific

findings of fact regarding each of the 12 statutory best-interest factors. Although the trial court's September 18, 2018 order gave defendant only temporary physical placement, there is no meaningful distinction between placement and custody, and an evidentiary hearing was therefore required. The trial court did not hold an evidentiary hearing, did not determine whether there was proper cause or a change of circumstances or whether an established custodial environment existed, and did not evaluate the best-interest factors. The trial court also did not comply with the requirements for granting an ex parte custody order under MCR 3.207(B), which allows the court to enter an ex parte order if it is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued. Although the trial court did find that irreparable harm had been caused by depriving the children of contact with defendant and that plaintiff's blatant disregard for the law justified an immediate placement of the children with defendant, a trial court may not issue an ex parte order changing custody without any notice to the custodial parent or a hearing on the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interests. Accordingly, an ex parte order issued under MCR 3.207 that affects child custody must include a specific statement of notice set forth in MCR 3.207(B)(5), and under MCR 3.207(B)(6), the order must also state that it will automatically become a temporary order unless the required steps are taken. Therefore, even if the ex parte order was supported by admissible evidence, it nonetheless failed to comply with the notice requirements under MCR 3.207(B)(5) and (6). Furthermore, even if the initial ex parte order had been valid, the trial court was still required to hold an evidentiary hearing in the future and consider the children's best interests, and its failure to do so was clear error and plain error.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. STATUTES — SERVICEMEMBERS CIVIL RELIEF ACT — APPLICATIONS FOR STAY OF PROCEEDINGS — REQUIREMENTS.

To apply for a stay of civil proceedings under the Servicemembers Civil Relief Act, 50 USC 3901 *et seq*., a servicemember must provide the court with a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear, as well as a letter or other communication from the

servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter; in order to satisfy these requirements, which are set forth in 50 USC 3932(b)(2), the servicemember and the servicemember's commanding officer need not submit two separate documents.

2. STATUTES — SERVICEMEMBERS CIVIL RELIEF ACT — APPLICATIONS FOR STAY OF PROCEEDINGS — REQUIREMENTS — AVAILABILITY FOR APPEARANCE.

An application for a stay of civil proceedings under the Servicemembers Civil Relief Act, 50 USC 3901 *et seq*., requires the applicant to state a date when he or she will be able to appear; providing a date on which the servicemember might be able to appear telephonically is not sufficient (50 USC 3932(b)(2)(B)).

Pamela J. Lee Johnson *in propria persona*.

Before: M. J. KELLY, P.J., and MARKEY and GLEICHER, JJ.

PER CURIAM. These consolidated cases[1] involve post-judgment proceedings following the parties' 2011 divorce. In Docket No. 345955, plaintiff-mother, Lieutenant Colonel Pamela Joy Lee Johnson, D.O., appeals by leave granted[2] the trial court's April 2018 order denying her request for an adjournment under the Servicemembers Civil Relief Act (SCRA), 50 USC 3901 *et seq*. The April 2018 order also held plaintiff in contempt, issued a bench warrant for her arrest with a cash bond of $15,000, and required her to pay $1,500 to defendant-father, Edgar Johnson, III. In Docket No. 345803, plaintiff appeals by right the trial court's September 2018 order increasing her bench-warrant bond to $25,000, suspending her driver's license and any occupational license, and awarding defendant tem-

[1] *Johnson v Johnson*, unpublished order of the Court of Appeals, entered January 24, 2019 (Docket No. 345955).

[2] *Id*.

porary physical placement of the parties' minor children. For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

The parties divorced in 2011. Their divorce judgment awarded the parties joint legal custody of the minor children and awarded plaintiff primary physical custody. In 2016, plaintiff moved for a change of domicile to Springfield, Virginia, because she was called for active duty as a medical review officer in the United States Army. In January 2017, the trial court allowed the move and entered a detailed parenting-time order.[3] Relevant to this appeal, defendant asserts that between January 11, 2017, and May 21, 2018, plaintiff failed to facilitate Skype parenting-time sessions between defendant and the children, to provide the minor children to him for Thanksgiving break, to provide the children to him for Christmas break, to provide the children for defendant's summer parenting time, and to provide him with medical information regarding the children or information about their well-being. On multiple occasions, the Friend of the Court (FOC) petitioned the court to issue an order to show cause for why plaintiff should not be held in contempt for violating the parenting-time schedule.

Plaintiff failed to appear for a show-cause hearing scheduled for March 20, 2017, and the hearing was changed to May 1, 2017. Plaintiff did not appear for the May 1, 2017 hearing. Instead, on April 27, 2017, she

[3] Plaintiff appealed the portion of the January 2017 order setting forth the parenting-time schedule. This Court affirmed the trial court. *Johnson v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued August 8, 2017 (Docket No. 336827).

submitted a letter to the court stating that starting on April 28, 2017, she was "on active duty military orders assigned to the U.S. Army Physical Disability Agency (USAPDA) and serving at the National Capital Region (NCR)—Physical Evaluation Board (PEB) in Crystal City, Arlington, Virginia." She explained:

> The USAPDA is charged with evaluating physical disability cases of Soldiers. The NCR-PEB is one of three U.S. Army Physical Evaluation Boards. Cases pertain to both active duty and reserve component Soldiers. Our work load has dramatically increased due to the Global War on Terrorism and remains consistently high. My duties are directly related to processing Soldier disability cases which are very time-sensitive. Delays in case processing have a significantly detrimental effect on not only on [sic] Army readiness but also the Soldiers and their families.
>
> Accordingly, I most respectfully request that I be afforded the rights and protection offered under the [SCRA], as my military duties preclude proper representation in the court. Current required training for my new position minimally requires ninety days of uninterrupted training for mission success. Any delays or interruptions in training will adversely impact Soldier and military readiness.

Plaintiff submitted a copy of her orders, which confirmed that she was on active duty starting April 28, 2017. Without explanation, the trial court entered an order adjourning the show-cause hearing to June 5, 2017, and ordering plaintiff to appear telephonically. Plaintiff did not appear for the June 5, 2017 show-cause hearing.

Another show-cause hearing was scheduled for February 5, 2018. On January 10, 2018, approximately one month before the scheduled hearing, the FOC investigator and mediator sent plaintiff's commanding officer a letter explaining that plaintiff was required to appear for the February 5, 2018 hearing and requesting

that plaintiff be made available. The February 5, 2018 show-cause hearing was rescheduled for April 16, 2018, and the FOC investigator advised plaintiff's commanding officer of the change in date and again requested that plaintiff appear.

On April 5, 2018, plaintiff submitted another letter to the trial court, once again seeking a stay of the proceeding under the SCRA. The letter explained that plaintiff was on active duty, described the nature and importance of her duties, explained that plaintiff's commanding officer supported the request, stated that plaintiff's military duties precluded her participation in the court proceedings, and added that military leave was not authorized at the time of the letter. It also provided an "anticipated possible date of availability" for participation in any hearings away from plaintiff's duty station. Plaintiff's commanding officer signed the letter.

At the April 16, 2018 show-cause hearing, the trial court ruled that plaintiff's letter did not satisfy the conditions for a mandatory stay of the proceedings under 50 USC 3932(b)(2). Accordingly, it denied plaintiff's request for a stay. Furthermore, the court held plaintiff in contempt of court for failing to appear as directed and issued a bench warrant with a $15,000 cash bond. The court also ordered plaintiff to pay defendant $1,500 by May 15, 2018, based on the fact that defendant had appeared at three scheduled hearings that plaintiff had not attended.

Another show-cause hearing was scheduled for July 16, 2018, but it was never held. Instead, another show-cause petition was filed by the FOC, alleging additional violations of the parenting-time schedule and requesting a show-cause hearing on why plaintiff should not be held in contempt for her refusal to abide by the parenting-time schedule. A hearing was sched-

uled for September 17, 2018. Plaintiff made no formal request for a stay of the hearing under the SCRA. At the hearing, however, her lawyer requested permission from the court to make "a proper application" under the SCRA. The court did not permit it. Following the hearing, the court entered an order increasing plaintiff's bench-warrant bond to $25,000 for her failure to appear on September 17, 2018. The court also ordered that plaintiff transfer the minor children to defendant by noon on September 21, 2018, and it directed that defendant would have temporary physical placement of the minor children. The court also suspended plaintiff's driver's license and any occupational licenses that she held.

II. RELIEF UNDER THE SCRA

A. STANDARD OF REVIEW

Plaintiff argues that the trial court erred by denying her request for a stay under the SCRA. Questions of statutory interpretation, construction, and application are reviewed de novo. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). This standard also applies to the interpretation of federal statutes. *In re LFOC*, 319 Mich App 476, 480; 901 NW2d 906 (2017). This Court reviews for an abuse of discretion the trial court's decision whether to adjourn or continue a proceeding. *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990).

B. ANALYSIS

1. APPLICATION FOR A STAY

Resolution of the issues raised on appeal requires interpretation of the SCRA, which is a federal statute.

In *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019), our Supreme Court explained:

> "The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). When interpreting federal statutes, we strive to "give effect to the will of Congress[.]" *Walters* [*v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008)] (quotation marks and citations omitted).

Ascertaining legislative intent is accomplished "by giving the words selected by the [Congress] their plain and ordinary meanings, and by enforcing the statute as written." *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). This Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018) (quotation marks and citation omitted). Moreover, like its predecessor, the Soldiers' and Sailors' Civil Relief Act, 50 USC 501 *et seq*., the SCRA "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v Lightner*, 319 US 561, 575; 63 S Ct 1223; 87 L Ed 1587 (1943).[4]

The SCRA provides protection to United States servicemembers so that they may "devote their entire energy to the defense needs of the Nation" by providing "temporary suspension of judicial and administrative

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[4] The Soldiers' and Sailors' Civil Relief Act of 1940 was replaced by the SCRA in 2003. See PL 108-189, § 1; 117 Stat 2835.

proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." 50 USC 3902(1) and (2). The SCRA provides that a servicemember who "is in military service" and who "has received notice" of "any civil action or proceeding, including any child custody proceeding" may apply for a stay of the action "for a period of not less than 90 days." 50 USC 3932(a) and (b)(1).[5] In order to apply for a stay, the servicemember must provide the court with the following:

> (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
>
> (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter. [50 USC 3932(b)(2).]

If the conditions in 50 USC 3932(b)(2) are satisfied, a stay of the action for not less than 90 days is mandatory. See 50 USC 3932(b)(1) (stating that upon application by the servicemember and if the conditions in

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[5] In her brief on appeal, plaintiff relies on both § 3932 and § 3931 of the SCRA. However, § 3931(a) only applies to a civil action or proceeding (including a child custody proceeding) "in which the defendant does not make an appearance." 50 USC 3931(a). Here, because defendant made an appearance (and because he is not a servicemember), § 3931 clearly does not apply. Instead, § 3932 applies because at the time plaintiff filed her application for a stay she was "in military service" and had "received notice" of the proceedings. See 50 USC 3932(a). Accordingly, to the extent that plaintiff's arguments on appeal rely on an interpretation of § 3931, her arguments lack merit. Specifically, to the extent that plaintiff suggests the trial court erred by failing to appoint a lawyer under § 3931(b)(2), we find plaintiff's argument without merit. Section 3931 is wholly inapplicable to plaintiff's case.

§ 3932(b)(2) are met, the court "shall . . . stay the action for a period of not less than 90 days").[6]

In this case, plaintiff sought to invoke the protections of the SCRA on a number of occasions.[7] Relevant

[6] If a servicemember is granted a stay under 50 USC 3932(b), he or she "may apply for an additional stay based on continuing material affect [sic] of military duty on the servicemember's ability to appear." 50 USC 3932(d)(1). The application can be made either at the time of the initial application under § 3932(b) "or when it appears that the servicemember is unavailable to prosecute or defend the action." 50 USC 3932(d). In order to receive an additional stay, the servicemember must satisfy the conditions in 50 USC 3932(b)(2). Unlike the stay under § 3932(b), an additional stay under § 3932(d) is not mandatory; however, "[i]f the court refuses to grant an additional stay of proceedings . . . , the court shall appoint counsel to represent the servicemember in the action or proceeding." 50 USC 3932(d)(2).

[7] On December 19, 2016, plaintiff, through her lawyer, submitted a letter to the court indicating that plaintiff was seeking to invoke the SCRA. Based on the December 19, 2016 letter, at that time plaintiff did not seek a stay of the court-scheduled court proceedings. Instead, she sought to invoke it "regarding the Court's requirement that she appear in person for the Show Cause hearing." Plaintiff authorized her lawyer to appear on her behalf, however. At the hearing, the trial court expressly found that plaintiff had not properly invoked the protections of the SCRA, noting that "there certainly are actions that service person must undertake in order for the service person to request relief under S-C-R-A." The court added that the information required to invoke the SCRA needed to be conveyed by both the plaintiff and the plaintiff's commanding officer, which had not been done. Accordingly, the court declined to grant relief under the SCRA. Plaintiff does not challenge that decision.

On April 27, 2017, plaintiff submitted a letter to the court seeking a stay under the SCRA. Plaintiff also submitted a copy of her orders, which confirmed that she was on active duty starting April 28, 2017. However, plaintiff's April 27, 2017 application did not satisfy the conditions under 50 USC 3932(b)(2)(B) because there was not a "letter or other communication" from plaintiff's commanding officer "stating that the servicemember's current military duty prevents appearance and [stating] that military leave is not authorized for the servicemember at the time of the letter." Despite the apparent deficiency in the application, the trial court granted plaintiff a stay of the contempt

to this appeal, plaintiff was ordered to appear in person on April 16, 2018, for a show-cause hearing on her alleged failure to comply with the parenting-time schedule. In response, on April 5, 2018, plaintiff submitted a letter signed by herself and by her commanding officer. The letter provided that she was "on active duty military orders assigned to the U.S. Army Physical Disability Agency (USAPDA) and serving at the National Capital Region (NCR)—Physical Evaluation Board (PEB) in Crystal City, Arlington, Virginia." She explained:

> The USAPDA is charged with evaluating physical disability cases of Soldiers. The NCR-PEB is one of three U.S. Army Physical Evaluation Boards. Cases pertain to both active duty and reserve component Soldiers. Our work load has dramatically increased due to the continued Global War on Terrorism and remains consistently high. My duties are directly related to processing Soldier disability cases which are very time-sensitive. Delays in case processing have a significantly detrimental effect on [sic] not only on Army readiness but also the Soldiers and their families.
>
> Accordingly, I most respectfully request that I be afforded the rights and protection offered under the [SCRA] as my military duties preclude proper representation in the court. Additionally, my Commander further supports this request, as witnessed by her signature below. Military leave is not authorized at the time of this letter.
>
> An anticipated possible date of availability, telephonically only, for participation in any Hearings away from the duty station is 05 September 2018.

On appeal, plaintiff contends that the trial court erred by not staying the proceedings under the SCRA.

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proceedings. The court's order adjourned the hearing from May 1, 2017 until June 5, 2017, i.e., for a 35-day period. Plaintiff did not appear as directed, but no order was entered against her at that time.

The trial court stated that in order to satisfy the conditions in 50 USC 3932(b)(2), plaintiff had to submit two separate documents: one from herself and one from her commanding officer. The trial court erred in its interpretation of § 3932(b). The statute requires that four pieces of information be provided. First, in a "letter or other communication," there must be a factual statement "stating the manner in which current military duty requirements materially affect the servicemember's ability to appear . . . ." 50 USC 3932(b)(2)(A). Second, in a "letter or other communication," there must be a statement specifying "a date when the servicemember will be available to appear." *Id*. Third, in a letter or other communication "*from the servicemember's commanding officer*," there must be a statement "that the servicemember's current military duty prevents appearance . . . ." 50 USC 3932(b)(2)(B) (emphasis added). Fourth, and finally, in a letter or other communication "*from the servicemember's commanding officer*," there must be a statement providing "that military leave is not authorized for the servicemember at the time of the letter." *Id*. Neither the first nor the second condition set forth in the statute requires that a certain person make the required statements. Thus, under a liberal construction of the statute, the first and second conditions can be satisfied by statements made by the servicemember, the servicemember's commanding officer, or some other person. In addition, although the third and fourth conditions, set forth in § 3932(b)(2)(B), expressly state that they must be "from" the servicemember's commanding officer in the form of a letter or other communication, nothing in the statutory language precludes the servicemember's commanding officer from making those statements in a letter authored by the servicemember and adopted by the servicemember's commanding officer. Accordingly,

construing the statute liberally, it is plain that as long as the servicemember's commanding officer makes the statements required in § 3932(b)(2)(B), only one document need be submitted. Therefore, the trial court erred when it interpreted the statute as requiring two separate letters.

The trial court, however, also held that the content of the letter was insufficient to satisfy the conditions set forth in 50 USC 3932(b)(2). Contrary to 50 USC 3932(b)(2)(A), plaintiff failed to set forth facts stating the manner in which her current military duty *materially affected* her ability to appear for the show-cause hearing. Plaintiff only stated, in general terms, that the work load of the NCR-PEB was "dramatically increased due to the Global War on Terrorism and remains consistently high." With regard to her specific duties, she explained that they were "directly related to processing Soldier disability cases which are very time-sensitive," but she offered no explanation for why or how her duties materially affected her ability to appear for the contempt proceedings. As a result, plaintiff's letter did not satisfy the first condition in § 3932(b)(2)(A). See *Fazio v Fazio*, 91 Mass App 82, 86-87; 71 NE3d 157 (2017) (holding that the plaintiff's letter was insufficient to mandate a stay under § 3932(b)(2) because the letter submitted "did not explain how the requirements of the training mission prevented the husband from taking part of one day to attend a court hearing").[8]

In addition, plaintiff failed to state "a date when the servicemember will be available to appear." 50 USC 3932(b)(2)(A). Instead, she explained in her letter that

[8] Decisions from other states are not binding on this Court, but they can be considered persuasive. *Holton v Ward*, 303 Mich App 718, 727 n 11; 847 NW2d 1 (2014).

"[a]n anticipated possible date of availability, telephonically only, for participation in any Hearings away from the duty station is 05 September 2018." Because 50 USC 3932(b)(2)(A) expressly requires that the application for a stay include a date when the servicemember *will* be available to appear, plaintiff's statement providing only an anticipated and possible date to appear—telephonically only—is not sufficient to meet the condition set forth in 50 USC 3932(b)(2)(A).[9] See *In re Marriage of Herridge*, 169 Wash App 290, 301; 279 P3d 956 (2012) (holding that the appellant failed to meet the requirements of SCRA because, although he stated that he would be deployed overseas from November 2009 until June 2010, he "did not state a time at which he would again be available to appear"). Because the statutory conditions in 50 USC 3932(b)(2)(A) were not met, we detect no error in the trial court's denial of the stay.

The trial court's denial of a stay under 50 USC 3932(b)(2) is affirmed.

2. OTHER ARGUMENTS

Plaintiff offers a tangential argument that the trial court's bias against her caused it to rule against her with respect to the SCRA.[10] Plaintiff did not raise the

[9] Plaintiff's letter does contain a statement from her commanding officer that military leave was not authorized at the time of the letter and that plaintiff's military duties precluded her appearance in court. Accordingly, the conditions set forth in 50 USC 3932(b)(2)(B) were met by plaintiff's letter.

[10] The court made several statements that, at first glance, appear to show bias against plaintiff. For instance, the court stated that it was "candidly very displeased" with plaintiff, noting that it had "bent over backwards to ensure" that it did not violate the SCRA. The court then expressed that "this entire last year has been nothing but a manipulation," with defendant being deprived of ordered parenting time with his

issue of bias in the trial court. Arguments raised for the first time on appeal are unpreserved and "not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Furthermore, plaintiff completely fails to develop her argument or cite applicable law. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). When "a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Id*. (quotation marks and citation omitted). See also *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996) ("A party may not leave it to this Court to search for authority to sustain or reject its position."). Therefore, this argument is abandoned and will not be considered on appeal.

Next, plaintiff claims that defendant made false statements at the September 2018 hearing when he testified that he had not physically seen the children since July 2016 and had not had Skype contact since October 2016. In support, plaintiff cites what appears

children and plaintiff ignoring all orders to show cause as to why she should not be held in contempt. Yet the court's concerns appear to be well-placed. Plaintiff sought to change the children's domicile in June 2016. At the hearing on her motion, plaintiff testified that she was being ordered to "active duty" as of July 2016. At that time, she testified that she would be able to set her own work hours. She explained that she would only have to go to the office one day a week and that she would be able to telework the remaining days. It is not clear whether plaintiff's duties were drastically altered between June 2016 and April 2018 when she sought a stay under the SCRA. Given plaintiff's testimony in 2016, it is clear that the trial court had a basis to feel that plaintiff was manipulating the situation and was not genuinely precluded from appearing at the show-cause hearings because of her military duties.

to be a portion of the United States Code, but she does not provide a complete citation, she fails to show why federal law applies, and she fails to apply this law to the statements that defendant made. Without explanation or substantive analysis, she merely recites defendant's statements and claims that they were false. She also claims that defendant has been inconsistent with sending pension checks, another argument that she did not raise in the trial court or sufficiently brief on appeal. It is therefore abandoned. See *Bill & Dena Brown Trust*, 312 Mich App at 695.

Plaintiff also suggests that the trial court erred by ordering her to pay $1,500 to defendant, but she does not identify the nature of the court's error such that this Court can meaningfully analyze her claim. Plaintiff only briefly refers to the SCRA and provides no substantive analysis in support of her claim. As a result, this claim is abandoned. See *id*.

Finally, plaintiff also argues that the trial court's orders "were entered without proper procedural application of [the] SCRA in its entirety . . . ." In support, she quotes several sections of the SCRA, but she offers no explanation for how or why the sections are applicable. Therefore, we deem those arguments abandoned as well. See *id*.[11]

III. TEMPORARY CHANGE OF CUSTODY

A. STANDARD OF REVIEW

Plaintiff next argues that the trial court abused its discretion by granting defendant temporary physical custody of the children without adequate consideration of the statutory best-interest factors. This Court re-

[11] Specifically, we conclude that plaintiff abandoned her arguments as they pertain to the following sections of the SCRA:

views custody decisions for an abuse of discretion. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). "Questions of law are reviewed for clear legal error." *Id*. at 508 (quotation marks and citation omitted). Clear error occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Id*. (quotation marks and citation omitted).

B. ANALYSIS

"An evidentiary hearing is mandated before custody can be modified, *even on a temporary basis*." *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005) (emphasis added); see also MCR 3.207(C)(2). Regardless of whether a court is establishing custody in an original matter or altering a prior custody order, the trial court must determine whether the change of

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(1) 50 USC 3933, which applies only if "an action for compliance with the terms of a contract is stayed," 50 USC 3933(a);

(2) 50 USC 3934, which grants a court discretion to "stay the execution of any judgment or order entered against the servicemember" and "vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party" if, "in the opinion of the court," the servicemember "is materially affected by reason of military service" in complying with a court judgment or order, 50 UCS 3934(a);

(3) 50 USC 3936, which provides, generally, that "the period of a servicemember's military service may not be included in computing" an applicable statute of limitations, 50 USC 3936(a);

(4) 50 USC 4041, which permits the Attorney General to commence a civil action against any person who "engages in a pattern or practice of violating this chapter" or "engages in a violation of this chapter that raises an issue of significant public importance," 50 USC 4041(a);

(5) 50 USC 4042, which permits a person aggrieved by a violation of the SCRA to file a civil action to obtain relief; and

(6) 50 USC 4043, which provides that nothing in § 4041 or § 4042 "shall be construed to preclude or limit any remedy otherwise available under other law, including consequential and punitive damages."

custody is in the children's best interests and, to that end, must make specific findings of fact regarding each of the 12 statutory best-interest factors. *Grew*, 265 Mich App at 337.

Here, the trial court's September 18, 2018 order awarded defendant temporary physical custody of the children. Although the order gave defendant only "temporary physical placement," there is no meaningful distinction between placement and custody, and an evidentiary hearing was therefore required. See *id*. at 336. The trial court did not hold an evidentiary hearing. Furthermore, the trial court did not determine whether there was proper cause or a change of circumstances, or whether an established custodial environment existed, and it did not evaluate the 12 best-interest factors. The trial court, under *Grew*, clearly erred. Yet, although the September 18, 2018 order does not use the term "ex parte," the trial court may have granted temporary custody to defendant under MCR 3.207(B), which provides:

> Pending the entry of a temporary order, the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued. [MCR 3.207(B)(1).]

This rule has been applied to child custody proceedings. See *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991). Before making an ex parte decision on child custody, the trial court must consider "facts established by admissible evidence—whether by affidavits, live testimony, documents, or otherwise." *Id*. Here, the trial court found—on the basis of what appears to be admissible evidence—"that it is irrepa-

rable harm . . . to these children to have been deprived [of] any contact with their father since 2016, and that mother's blatant disregard for the law justifies an immediate placement of [the children] with their father."

However, this Court has stated that

> the trial court should [not] be allowed to circumvent and frustrate the purpose of the law by issuing an ex parte order changing custody *without any notice to the custodial parent* or a hearing on the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interest. [*Pluta v Pluta*, 165 Mich App 55, 60; 418 NW2d 400 (1987) (emphasis added).]

Accordingly, ex parte orders issued under MCR 3.207 that affect child custody must comply with specific notice requirements. Under MCR 3.207(B)(5),

> [a]n ex parte order providing for child support, custody, or visitation pursuant to MCL 722.27a, must include the following notice:
>
> "NOTICE:
>
> "1. You may file a written objection to this order or a motion to modify or rescind this order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.
>
> "2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.
>
> "3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order and a

> request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

Further, MCR 3.207(B)(6) provides:

> In all other cases, the ex parte order must state that it will automatically become a temporary order if the other party does not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing. The written objection or motion and the request for a hearing must be filed with the clerk of the court, and a true copy provided to the friend of the court and the other party, within 14 days after the order is served.

These notice requirements were not complied with in the September 18, 2018 order. The detailed notice format described in MCR 3.207(B)(5) is absent, and the order does not state that it will automatically become a temporary order unless plaintiff takes the required steps. Therefore, even if the ex parte order was supported by admissible evidence, it nonetheless failed to comply with the notice requirements under MCR 3.207(B)(5) and (6).

Furthermore, an ex parte order becomes a temporary order if no objection is made, see MCR 3.207(B)(5) and (6), and, as previously discussed, even temporary changes in custody require an evidentiary hearing at some point. See *Grew*, 265 Mich App at 333; *Pluta*, 165 Mich App at 60 (requiring an eventual hearing on the children's best interests even for ex parte orders). Therefore, even assuming that the initial ex parte order was valid and complied with the notice requirements, the trial court was still required to hold an evidentiary hearing in the future and consider the children's best interests. The failure to do so was clear error and plain error.

IV. CONCLUSION

The trial court did not err in its application of the SCRA, in its denial of plaintiff's request to stay proceedings, or in not appointing a lawyer for plaintiff at the April 2018 hearing. However, the trial court abused its discretion in modifying custody because it did not hold an evidentiary hearing, make the necessary determinations, or provide the required notice. Accordingly, we reverse the portion of the trial court's September 2018 order awarding defendant temporary placement of the children and remand for further proceedings consistent with this opinion.[12]

Affirmed in part, reversed in part, and remanded for further proceedings. No taxable costs are awarded. MCR 7.219(A). We do not retain jurisdiction.

M. J. KELLY, P.J., and MARKEY and GLEICHER, JJ., concurred.

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[12] Nothing in this opinion should be construed as prohibiting plaintiff from applying for a stay of the proceedings based on her military service under § 3932(b). In evaluating her request, the trial court should remain mindful that the SCRA is to be liberally construed.

TOWNSHIP OF GRAYLING v BERRY

Docket No. 344297. Submitted July 12, 2019, at Lansing. Decided July 23, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 1132 (2020).

The Township of Grayling brought an action in the Crawford Circuit Court against Alan Berry, Louis Scarpino, and five other residents of Grayling Township, seeking declaratory and injunctive relief regarding the scope of the dedications of three specific platted roads located in a subdivision of Grayling Township known as Portage Lake Park. After this lawsuit was filed, those seven residents, along with 22 other residents, filed a third-party claim against Grayling Township and the chairperson of the Crawford County Board of Road Commissioners, among others. The roads at issue are Walnut Plaisance, Lincoln Park Boulevard, and portions of Portage Lake Drive, which were recorded in 1901 under the first, second, and fourth additions of Portage Lake Park, and they were dedicated to and for the public's use. The Crawford County Road Commission formally accepted Walnut Plaisance and Lincoln Park Boulevard in 1937, by way of a resolution under the McNitt Act, formerly MCL 247.1 *et seq*., which specifically incorporated the two roads into the county road system. Portage Lake Drive, much of which has since been vacated by the road commission, runs parallel with and along the shoreline of what was then Portage Lake and is now known as Lake Margrethe. Walnut Plaisance runs north and south, intersecting Portage Lake Drive at the shoreline. Lincoln Park Boulevard runs east and west, intersecting where Portage Lake Drive and Walnut Plaisance meet. The end of Lincoln Park Boulevard, where the three roads as platted intersect, is now a dirt turnaround near the lake's edge that makes up the disputed area at issue. Owners of backlots in Portage Lake Park have historically used the disputed area for recreational purposes including swimming and picnicking, and they have also placed a dock for the mooring of their boats. Grayling Township sought declaratory and injunctive relief regarding the scope of the dedications of the roads, streets, alleys, and boulevards at issue, arguing that the recreational activities of the residents exceeded the scope of the dedications and violated MCL 324.30111b. The trial court, George J. Mertz, J., granted partial summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction)

and (C)(10) (no genuine issue of material fact) on the residents' amended counterclaim in favor of the road commission chairperson, and it granted summary disposition in favor of Grayling Township on its claims. The residents appealed.

The Court of Appeals *held*:

1. The trial court did not err by concluding that the road commission formally accepted Walnut Plaisance and Lincoln Park Boulevard by way of resolution. For a road to become public property there must be a statutory dedication and an acceptance on behalf of the public, a common-law dedication and acceptance, or a finding of highway by public user. The roads at issue here were dedicated by statute. To create a public road by statutory dedication, two elements are required: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority. Public acceptance must be timely and must be disclosed through a manifest act by the proper public authority either formally confirming or accepting the dedication and ordering the opening of the street, or informally by exercising authority over it, in some of the ordinary ways of improvement or regulation. A McNitt resolution cannot suffice to accept a road if it is a general resolution purporting to take over all dedicated roads in a county; instead, a McNitt resolution must expressly identify the platted road in dispute or the recorded plat in which the road was dedicated to effect manifest acceptance of the offer to dedicate the road to public use. As long as a McNitt resolution expressly identifies the street in question, the resolution suffices as evidence of a formal acceptance of the street. The 1937 McNitt resolution in this case expressly identified Walnut Plaisance and Lincoln Park Boulevard. This was sufficient evidence of a formal acceptance of the dedication of both roads by the road commission.

2. The trial court did not err by finding that there was no question of fact that the 1937 acceptance of the 1901 offers to dedicate was timely. Timely acceptance of dedicated lands in a plat requires that the acceptance of the dedication take place before the offer lapses or before the property owner withdraws the offer. Whether an offer to dedicate lapsed or continued depends on the circumstances of each case. While the outer limit for acceptance within a reasonable time has not been set, the Supreme Court has held that an acceptance made 87 years after the grant was unreasonably late, and the Court of Appeals has held that a 37-year span between grant and acceptance was not unreason-

ably late. In this case, the residents did not present evidence of any attempts to withdraw the offers to dedicate Walnut Plaisance and Lincoln Park Boulevard before the road commission's acceptance in 1937, meaning that the offers remained open at the time of the acceptance, and the 36-year time span between the offer and acceptance was not unreasonable. The cases on which the residents relied were inapposite because they involved situations in which a substantial period of time had elapsed between an offer of dedication and an attempted acceptance, the use of the dedicated property was inconsistent during that period, and ultimately the dedication was never accepted.

3. The trial court did not err by finding that there was no question of fact that the road commission accepted the portions of Walnut Plaisance and Lincoln Park Boulevard that intersect with Portage Lake Drive and the edge of the lake. The residents argued that because the 1937 McNitt resolution did not encompass the entire length of Walnut Plaisance and Lincoln Park Boulevard, the portion of the roads that terminated at the water's edge could not have been accepted into the county road system. However, a resolution that the road commission passed in 1956 specifically provided that all platted streets leading to the shore of Lake Margrethe and coinciding with Portage Lake Drive would remain open public streets giving access in the manner shown in the plats. Whether the McNitt resolution evidenced intent to accept the entire road or just the specified portion is a factual question. The trial court did not clearly err by concluding that, when the 1937 McNitt resolution and the 1956 resolution are read in conjunction with each other, the language supports a finding that even if the 1937 McNitt resolution did not intend to accept the entire portions of the roads, it did intend to accept the lakeward portions.

4. The trial court did not abuse its discretion by denying the residents' motion for leave to amend their amended counterclaim to include a claim for common-law abandonment. MCR 2.116(I)(5) provides that when the trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings as provided by MCR 2.118 unless the evidence then before the court shows that amendment would not be justified. However, MCR 2.118(A)(4) provides that the amendments must be filed in writing, and an oral request to amend the complaint under MCR 2.116(I)(5) must also be accompanied by a proposed amendment in writing. The residents failed to comply with this requirement.

5. The trial court correctly concluded that MCL 221.22 did not apply to the property at issue in this case under the Michigan Supreme Court's holding in *Rice v Clare Co Rd Comm*, 346 Mich 658 (1956), which held that MCL 221.22 did not apply to a road or street that was dedicated to the public on a recorded plat. *Rice* has not been overturned, and there are no other published decisions addressing the applicability of MCL 221.22 to roads dedicated in plats.

6. Walnut Plaisance and Lincoln Park Boulevard were open for the use of the public as a matter of law under the test set forth in *Colthurst v Bryan*, unpublished per curiam opinion of the Court of Appeals, issued June 14, 2016 (Docket No. 323539). To determine whether a road end was lawfully open to public use for purposes of MCL 324.30111b, the *Colthurst* Court considered (1) whether the plat clearly dedicated the road end to the use of the public, (2) whether backlot owners had access to the lake through the road end, and (3) whether subdivision rules contemplated the use of the road end by the public to access the lake. The fact that the road end was not an improved road but merely a grassy area of land was not relevant; rather, it was the availability of the area for the public to use that controlled. Because the analysis in *Colthurst* was factually similar, germane, instructive, and persuasive for the case at bar, the Court adopted its reasoning to conclude that, considering the undisputed facts as set forth by the trial court, Walnut Plaisance and Lincoln Park Boulevard were open for public use as a matter of law.

7. Grayling Township had the right to commence a civil action under MCL 324.30111b(5) for conduct that violated MCL 324.30111b. MCL 324.30111b(3) clearly gives a local unit of government, which includes townships, authority to prohibit a use of a public road end if that use violates MCL 324.30111b. MCL 324.30111b(4) provides that a peace officer may issue an appearance ticket to a person who violates MCL 324.30111b(1) or (2). And MCL 324.30111b(5) provides that a person or agency is not prohibited from commencing a civil action for conduct that violates this section. Nowhere does MCL 324.30111b(5) indicate that an entity is prohibited from bringing a civil action in reliance on the statute, or that the relief is limited to a select class of plaintiffs. Under a plain reading of the statute, MCL 324.30111b(5) does not prohibit a local unit of government from commencing a civil action; rather, it appears to clarify that civil actions are not limited to those local units of government who have authority to prohibit a use of a public road end if that use violates MCL 324.30111b.

Affirmed.

PROPERTY — DEDICATION — PLATS — LAKEFRONT ROAD ENDS — OPEN FOR PUBLIC USE.

To determine whether a lakefront road end is lawfully open to public use for purposes of MCL 324.30111b, a court may consider (1) whether the plat clearly dedicated the road end to the use of the public, (2) whether backlot owners had access to the lake through the road end, and (3) whether subdivision rules contemplated the use of the road end by the public to access the lake; in making its determination, the court should consider not whether the road end is improved but rather whether the area is available for the public to use.

Michael T. Edwards for John Gutkowski, James Bokhart, and other third-party plaintiffs.

Carey & Jaskowski, PLLC (by *William L. Carey* and *Richard J. Jaskowski*) for Grayling Township and the chairperson of the Crawford County Board of Road Commissioners.

Before: O'BRIEN, P.J., and FORT HOOD and CAMERON, JJ.

CAMERON, J. The Township of Grayling (hereinafter, Grayling) sued seven residents of Grayling, seeking declaratory and injunctive relief regarding the scope of the dedications of three specific platted roads located in a subdivision of Grayling known as Portage Lake Park. After this lawsuit was filed, those seven residents, along with 22 other residents (hereinafter referred to collectively as the residents), filed a third-party claim against Grayling and the chairperson of the Crawford County Board of Road Commissioners (hereinafter, the Road Commission Chairperson), among others. The residents appeal the trial court's order granting partial summary disposition in favor of the Road Commission Chairperson under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and

(C)(10) (no genuine issue of material fact) on the residents' amended counterclaim and a March 26, 2018 order granting summary disposition in favor of Grayling on its claims. Because we agree that the trial court properly granted summary disposition of the residents' claims, we affirm.

I. BACKGROUND

At the center of this case is a dispute involving three platted roads: Walnut Plaisance, Lincoln Park Boulevard, and portions of Portage Lake Drive, all of which are located in Portage Lake Park. The three roads were recorded in 1901 under three separate additions—the first, second, and fourth additions of Portage Lake Park. The roads were dedicated to and for the public's use. The Crawford County Board of Road Commissioners (hereinafter, the Road Commission) formally accepted Walnut Plaisance[1] and Lincoln Park Boulevard[2] in 1937, by way of a resolution under the McNitt Act, former MCL 247.1 *et seq*.,[3] which specifically incorporated the two roads into the county road system.

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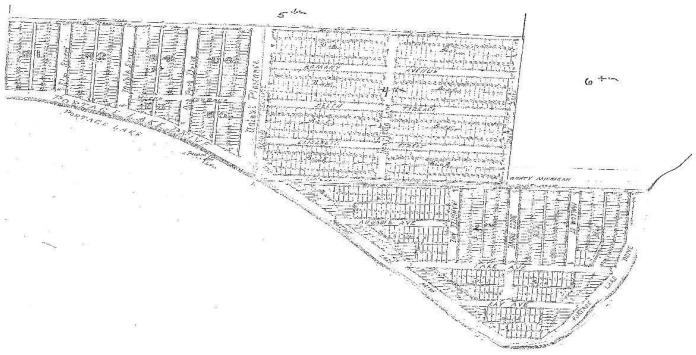
[1] The Road Commission accepted 1,050 feet of Walnut Plaisance that was platted in the first addition and 1,200 feet of Walnut Plaisance that was platted in the fifth addition. The Road Commission accepted 1,346 feet of Lincoln Park Boulevard that was platted in the fourth addition and 800 feet of Lincoln Park Boulevard that was platted in the sixth addition. Only the portions of roads platted in the first, second, and fourth additions are at issue in this case.

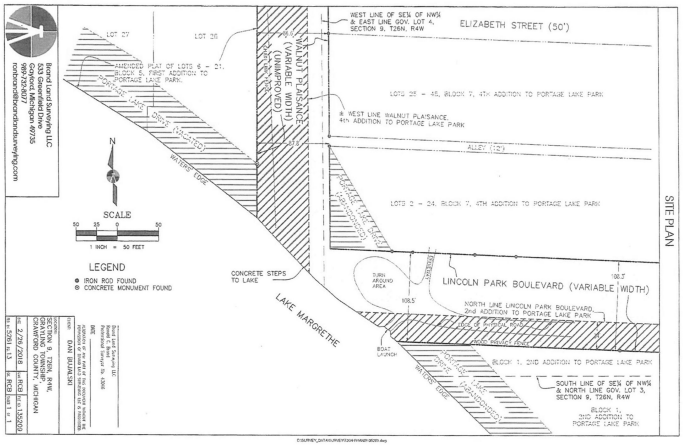
[2] The Road Commission did not accept Portage Lake Drive.

[3] The McNitt Act, 1931 PA 130, repealed by 1951 PA 51, § 21, allowed the county to take over township roads specified as public in recorded plats. The current law, see MCL 247.669, contains similar wording and similarly allows the takeover of roads designated as public in recorded plats by a county, even if a township did not first accept the roads.

The original plat was recorded as shown:



A survey performed in February 2018 depicts the improved portion of Lincoln Park Boulevard:



Portage Lake Drive, much of which has since been vacated by the Road Commission, runs parallel with and along the shoreline of what is now known as Lake Margrethe—originally named Portage Lake. Walnut Plaisance runs north and south, intersecting Portage

Lake Drive at the shoreline. Lincoln Park Boulevard runs east and west, intersecting where Portage Lake Drive and Walnut Plaisance meet. The area where the three roads converge is the area in dispute in this case.

Although there are large portions of the three roads that were intended to be developed as indicated in the 1901 plat, areas of Walnut Plaisance, Portage Lake Drive, and Lincoln Park Boulevard have remained undeveloped since being platted, and therefore, large portions of the roads that were intended to be developed do not actually exist. For instance, much of Walnut Plaisance is actually forested area, including the area that was intended to reach the shoreline. In response to a 1956 petition signed by 30 owners of real estate located in two of the additions, the Road Commission passed a resolution abandoning a portion of Portage Lake Drive for residential development. Although the original plat indicated that the two roads would meet at the shoreline—Walnut Plaisance was to extend to the shoreline, and Portage Lake Drive was to extend along the shoreline—the two were never developed and do not actually meet. However, a portion of Lincoln Park Boulevard was opened in the 1960s and is the only road in dispute that was developed and reaches the shoreline of the lake. The end of Lincoln Park Boulevard—the area in which the three roads as platted intersect—is now a dirt turnaround near the lake's edge and makes up the disputed area at issue.

Owners of backlots in Portage Lake Park have historically used the disputed area for recreational purposes including swimming and picnicking, and they have also placed a dock for the mooring of their boats. Grayling sought declaratory and injunctive relief regarding the scope of the dedications of the roads, streets, alleys, and boulevards at issue. Grayling main-

tained that the recreational activities of the residents exceeded the scope of the dedications and, therefore, Grayling sought a declaration as to the scope of the dedications. Grayling also maintained that the activities of the residents violated MCL 324.30111b, and Grayling sought to enjoin the individual residents from violating both the scope of the dedication and MCL 324.30111b. The residents have continually maintained that Grayling does not have an actual property interest or right in the disputed area because Walnut Plaisance and Lincoln Park Boulevard are not public roads, the roads do not terminate at the water's edge, and the residents' activities do not occur at the end of a public road.

II. ACCEPTANCE OF DEDICATIONS

The residents first argue that the Road Commission did not accept the dedications of Walnut Plaisance and Lincoln Park Boulevard platted in 1901 and, therefore, they are not public roads. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). Whether an offer of dedication has been accepted is a question of law. *Christiansen v Gerrish Twp*, 239 Mich App 380, 388; 608 NW2d 83 (2000). The question of timeliness amounts to a factual determination by the trial court because it depends on the circumstances of each individual case. *Kraus v Dep't of Commerce*, 451 Mich 420, 427; 547 NW2d 870 (1996). The trial court's factual findings are reviewed for clear error. *Vivian v Roscommon Co Bd of*

Rd Comm'rs, 164 Mich App 234, 238; 416 NW2d 394 (1987) (*Vivian I*), aff'd 433 Mich 511 (1989).

MCL 560.226(1) provides that before a court may consider vacation, correction, or revision of a platted roadway dedicated to a county or township, the governmental unit must relinquish its rights. The residents maintain that the Road Commission does not have rights over the roads at issue because the Road Commission did not timely accept the dedications. Thus, the residents claim that the Road Commission did not accept the offers of dedication, despite the 1937 McNitt resolution, because (1) the 1937 McNitt resolution, without further action by the Road Commission ordering that Walnut Plaisance or Lincoln Park Boulevard be opened, was insufficient to establish acceptance, and (2) the length of time between the offers and the resolution in this case caused the offer to lapse. They also argue that even if a McNitt resolution is sufficient to establish acceptance, parts of Walnut Plaisance and Lincoln Park Boulevard—specifically, the road ends—must nonetheless be vacated because the 1937 resolution referred to (1) Walnut Plaisance in the first addition as being only 1,050 feet long, when the road, in actuality, is 1,320 feet long; (2) Walnut Plaisance in the fourth addition as being 1,150 feet long, when the road, in actuality, is 1,320 feet long; and (3) Lincoln Park Boulevard in the second addition as being 1,750 feet long, when the road, in actuality, is 1,900 feet long.

A. ACCEPTANCE UNDER THE McNITT RESOLUTION

For a road to become public property there must be (a) a statutory dedication and an acceptance on behalf of the public, (b) a common-law dedication and acceptance, or (c) a finding of highway by public user. *Village*

of Grandville v Jenison, 84 Mich 54, 65-68; 47 NW 600 (1890), aff'd 86 Mich 567 (1891). The roads at issue here were dedicated by statute. To create a public road by statutory dedication, two elements are required: (a) "a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use," and (b) "acceptance by the proper public authority." *Kraus*, 451 Mich at 424.[4] Public acceptance must be timely and must be disclosed through a manifest act by the proper public authority " 'either formally confirming or accepting the dedication, and ordering the opening' " of the street, or informally by " 'exercising authority over it, in some of the ordinary ways of improvement or regulation.' " *Kraus*, 451 Mich at 424, quoting *Tillman v People*, 12 Mich 401, 405 (1864).

The residents assert that the 1937 McNitt resolution standing alone, without the Road Commission's ordering the opening of the roads, is insufficient to constitute acceptance. In support of their argument, the residents cite *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003). However, *Higgins Lake* did not hold, as the residents claim, that "in addition to a timely acceptance, something more than a McNitt Act Resolution is required to perfect the acceptance . . . ." Rather, this Court stated, "We need not consider whether the McNitt resolutions in this case were sufficient to constitute formal acceptance of Montrose Avenue" because the Court resolved the issue "on the basis of MCL 560.255b, the 1978

[4] In *Wayne Co v Miller*, 31 Mich 447, 448-449 (1875), the Supreme Court explained that the requirement of public acceptance by a manifest act, whether formally or informally, was necessary to prevent the public from becoming responsible for land that it did not want or need and to prevent land from becoming waste property, owned or developed by no one.

amendment of the Subdivision Control Act (formerly the Land Division Act) that creates a presumption of acceptance." *Id*. at 114-115.

In *Rice v Clare Co Rd Comm*, 346 Mich 658, 664; 78 NW2d 651 (1956), the county road commission adopted a resolution in 1937 and "[r]esolved that the streets and alleys in the several plats of the county described below" "are taken over by the county" under the McNitt Act. (Quotation marks omitted.) The plats were described as "Plat of Tompkins Resort, part of government lots 6-7, section 17, township 18 north, range 5 west, Clare [C]ounty, Michigan, total mileage of the streets and roads, 1.3792." *Id*. (quotation marks omitted). The Supreme Court held that the McNitt resolution, by itself, "constituted a valid acceptance of the offer to dedicate." *Id*. at 665.

In *Kraus*, 451 Mich at 427-430, the Court held that a McNitt resolution cannot suffice to accept a road if it is a general resolution purporting to take over all dedicated roads in a county. Instead, a McNitt resolution must expressly identify the platted road in dispute or the recorded plat in which the road was dedicated "to effect manifest acceptance of the offer to dedicate the road to public use." *Id*. at 430.

In Christiansen, 239 Mich App 380, the plaintiffs owned property in a subdivision in Gerrish Township that was bordered on the northern edge by Higgins Lake and bordered on the western edge by Grand Boulevard, which ran toward the lake. *Id*. at 382. The entire 505-foot length of Grand Boulevard was set forth in a 1903 plat of the subdivision and was offered to be dedicated for public use. *Id*. Approximately 280 feet of the boulevard was paved; the remainder of the boulevard was undeveloped from the midpoint of the plaintiffs' property to the shore of the lake. *Id*. The

plaintiffs argued that a McNitt resolution, by itself, was insufficient to establish acceptance of the undeveloped portion of the boulevard. *Id*. at 386-387. This Court, despite describing one footnote in *Kraus*, 451 Mich at 429 n 5, as "a wavering by the *Kraus* Court regarding whether a McNitt resolution that specifically identifies the road in question is sufficient evidence of a formal acceptance," noted that "the *Kraus* Court did not reject *Rice* but merely clarified its holding." *Christiansen*, 239 Mich App at 389. This Court concluded that *Rice*, as clarified by *Kraus*, remained good law and that "the current state of the law, until such time as the Supreme Court overrules *Rice*, is that such a resolution *does* suffice to accept the road." *Id*. This Court held, "Therefore, as long as a McNitt resolution expressly identifies the street in question, the resolution suffices as evidence of a formal acceptance of the street." *Id*. at 390. This Court concluded that the 1940 resolution specifically identifying Grand Boulevard was sufficient evidence of a formal acceptance by the county. *Id*.

The 1937 McNitt resolution in this case expressly identified Walnut Plaisance and Lincoln Park Boulevard. This is sufficient evidence of a formal acceptance of the dedication of both roads by the Road Commission. Accordingly, the trial court did not err by concluding that the Road Commission formally accepted Walnut Plaisance and Lincoln Park Boulevard by way of resolution.

B. TIMELINESS OF THE ACCEPTANCE

The residents argue that the 1937 acceptance of the 1901 offers to dedicate were untimely. "[T]imely acceptance of dedicated lands in a plat requires that the acceptance of the dedication 'must take place before

the offer lapses or before the property owner withdraws the offer.' "[5] *Pine Bluffs Ass'n v DeWitt Landing Ass'n*, 287 Mich App 690, 715; 792 NW2d 18 (2010), quoting *Marx v Dep't of Commerce*, 220 Mich App 66, 78; 558 NW2d 460 (1996). As long as the original proprietor or his or her successor takes no steps to withdraw the offer, the offer must be considered as continuing. *Kraus*, 451 Mich at 427; *White v Smith*, 37 Mich 291, 295-296 (1877). In *White*, the Court opined, "There is no doubt but that an acceptance must be made within a reasonable time, but what shall be considered such time must be largely governed by the surrounding circumstances in each case. And so long as the original proprietor, or those claiming through him, take no steps to withdraw the offer, we think it must be considered as continuing." *White*, 37 Mich at 295-296. Similarly, the *Kraus* Court held that "whether an offer to dedicate lapsed or continued depends on the circumstances of each case." *Kraus*, 451 Mich at 427. The *Kraus* Court noted, "While the outer limit for acceptance within a reasonable time has not been set, we note that this Court has held that a 1961 acceptance of an 1874 grant (eighty-seven years later) was unreasonably late." *Kraus*, 451 Mich at 427.

In this case, the residents did not present evidence of any attempts to withdraw the offers to dedicate Walnut Plaisance and Lincoln Park Boulevard before the Road Commission's acceptance in 1937. Accordingly, under *Kraus*, 451 Mich at 425-427, the offers remained open at the time of the acceptance.

In *Christiansen*, 239 Mich App at 391, this Court concluded that the 37-year span between the offer and acceptance was more in line with *Ackerman v Spring*

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[5] Withdrawal occurs "when the proprietors use the property in a way that is inconsistent with public ownership." *Kraus*, 451 Mich at 431.

Lake Twp, 12 Mich App 498, 501; 163 NW2d 230 (1968) (holding that a 26-year time span was not unreasonable), than with *Kraus*, 451 Mich at 435 (holding that an 86-year time span was unreasonable). In this case, the 36-year time span between the offer and acceptance is similar to that in *Christiansen* and, therefore, was not unreasonable.

The residents rely on *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511; 446 NW2d 161 (1989) (*Vivian II*), and the cases cited therein, to support their argument that a 36-year time span between dedication and acceptance is excessive. In *Vivian II*, the plaintiff brought an action against the Roscommon County Board of Road Commissioners and others seeking to vacate an alley, street, and boulevard dedicated to public use in a 1901 plat. *Id*. at 513. The plaintiff had fenced, cared for, and maintained the property for more than 40 years. *Id*. at 517. The dedication had not been accepted by any of the defendants. *Id*. The Supreme Court granted leave limited to the issue whether a 1978 amendment of the Subdivision Control Act of 1967,[6] 1967 PA 288, MCL 560.101 *et seq*.,[7] was applicable to the case. *Id*. at 513. The Court concluded that

[6] The Subdivision Control Act of 1967 is now referred to as the Land Division Act, 1996 PA 591.

[7] As the Supreme Court explained:

> The 1978 amendment added § 255b to the Subdivision Control Act. Section 255b provides that ten years after the date a plat is first recorded, land dedicated to the use of the public in a plat shall be presumed to have been accepted unless rebutted by evidence establishing either "(a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor" or "(b) That notice of the withdrawal of dedication is recorded" within ten years after the plat was first recorded and before acceptance of the dedicated lands. [*Vivian II*, 433 Mich at 513-514.]

there was sufficient evidence to show that the plaintiff had withdrawn the dedication before the effective dates of either the act or the 1978 amendment. *Id*. at 516. The cases cited in *Vivian II* involved situations in which a substantial amount of time had elapsed between an offer of dedication and an attempted acceptance, the use of the dedicated property was inconsistent during that period, and ultimately the dedication was never accepted. Those cases are inapposite to the issue in the present case, which is whether the dedications had lapsed before the Road Commission's acceptance of the dedications. Accordingly, the trial court did not err by finding that there was no question of fact that the acceptance of the dedications was timely.

C. ACCEPTANCE OF THE ENTIRE LENGTH OF WALNUT PLAISANCE AND LINCOLN PARK BOULEVARD

The residents argue that because the 1937 McNitt resolution did not encompass the entire length of Walnut Plaisance and Lincoln Park Boulevard, the portions of the roads that terminate at the water's edge could not be accepted into the county road system. In support of their argument, they assert that the 1937 resolution referred to a shorter length of the roads than their actual lengths.

Assuming that the 1937 McNitt resolution did, in fact, accept less than the entire portions of Walnut Plaisance and Lincoln Park Boulevard, the residents have simply "assumed" that it was the lake ends of these roads that were not accepted. In support of this assumption, they point out that none of Portage Lake Drive in the first, second, and fourth additions was accepted and that Portage Lake Drive was eventually abandoned in the 1956 resolution. They argue that the Road Commission never intended to accept the por-

tions of Walnut Plaisance and Lincoln Park Boulevard that end at the lake. The Road Commission Chairperson, on the other hand, principally relies on the language in the 1956 resolution, which specifically provides that "all platted streets leading to the shore of Lake Margrethe and coinciding with PORTAGE LAKE DRIVE shall remain open public streets giving access to said Lake in the manner shown in said Plats."

Whether or not the McNitt resolution evidenced an intent to accept the entire road or just the specified portion is a factual question. See *Christiansen*, 239 Mich App at 387. In *Christiansen*, the McNitt resolution specified a road length of 472 feet, while the actual road length was 505 feet. *Id*. The plaintiffs argued that the 33-foot difference had never been accepted by the resolution and therefore must be vacated. *Id*. This Court held that whether or not the McNitt resolution evidenced an intent to accept the entire road or just the specified portion was a factual question. *Id*. This Court held that the trial court did not err by finding that the road commission intended to accept the entire road length on the basis of a surveyor's explanation that it may have simply been an oversight, quoting the trial court's observation that the " 'record [was] devoid of any logical explanation to explain the [approximately thirty-three foot] difference.' " *Id*. at 387-388 (alterations in original).

In this case, the trial court opined as follows, in relevant part:

> This Court finds that when the 1937 McNitt resolution and the 1956 resolution are read in conjunction with each other, the language supports a finding that even if the 1937 McNitt resolution did not intend to accept the entire portions of the roads, it did intend to accept the lakeward portions. As in *Christiansen*, the McNitt resolution does not contain any explanation for the lengths specified or

> why the entire lengths were not listed. However, the 1956 resolution makes it clear that the Road Commission wanted to ensure that public access to the Lake was preserved on any platted street that ended at the Lake, and more importantly to make it clear that the abandonment of Portage Lake Drive was not to affect public access to the Lake over these roads. In the Court's view the 1956 resolution is directly contrary to [the residents'] assertion that in not accepting Portage Lake Drive in 1937, the Road Commission did not intend to accept roads leading to or along the Lake. As above, the [residents] have failed to bring forth any evidence to counter the plain language and intent of the 1956 resolution.

The trial court also found that because Portage Lake Park subdivision was platted as a lakefront subdivision, development of the lake area and access to the lake was of primary importance and, therefore, that it was reasonable to conclude that when the McNitt resolution was adopted, the Road Commission's primary concern would have been to address the portions of the streets and alleys that were closest to the lake. The court found that, "[a]s stated in *Christiansen*, no other logical explanation has been given for the discrepancies."

The trial court concluded:

> For purposes of this motion the Court finds that it does not need to determine whether the 1937 McNitt resolution accepted the entire portions of the roads at issue. The Court finds that based on the language in the 1956 resolution, there was an intent by the Road Commission to accept at least the portions of the roads that led to the shore of Lake Margrethe. To the extent that the 1937 McNitt resolution did not accept the entire portions of Walnut Plaisance and Lincoln Park Blvd., the Court finds that it did accept the portions of those roads that ended at Lake Margrethe or that coincided with Portage Lake Drive where it ran along Lake Margrethe. The [residents] have failed to provide any evidence to counter the plain

> language of the 1956 resolution or to provide evidence to support any other explanation for the discrepancy in measurements.

As the trial court found, in light of the 1956 resolution, there was no question of fact with respect to the Road Commission's intent to accept at least the portions of the roads that lead to the water's edge. Accordingly, the trial court did not err by finding that there was no question of fact that the Road Commission accepted the portions of Walnut Plaisance and Lincoln Park Boulevard that intersect with Portage Lake Drive and the edge of the lake.

III. AMENDMENT OF COMPLAINT

The residents also argue that the trial court abused its discretion when it denied their motion for leave to amend their amended counterclaim to include a claim for common-law abandonment. Because the residents failed to file a proposed amendment in writing, we disagree.

This Court reviews a trial court's decision regarding a motion to amend the pleadings for an abuse of discretion. *Sanders v Perfecting Church*, 303 Mich App 1, 8-9; 840 NW2d 401 (2013). A trial court abuses its discretion when its decision is outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

When the trial court grants summary disposition to a party "based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). "Amendments must be filed in writing . . . ." MCR 2.118(A)(4). When a party makes an oral request to amend the complaint

under MCR 2.116(I)(5), that party must also offer a proposed amendment in writing. *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999). If a plaintiff fails to do so, the plaintiff has failed to comply with the court rule and the trial court does not abuse its discretion by denying the request to amend. *Id*.; see also *Burse v Wayne Co Med Examiner*, 151 Mich App 761, 768; 391 NW2d 479 (1986). Accordingly, because the residents failed to file a proposed amendment in writing, the trial court did not abuse its discretion when it denied the residents' motion to amend.

IV. APPLICABILITY OF MCL 221.22

The residents argue that the trial court also erred when it concluded that MCL 221.22 did not apply to the property at issue in this case. We disagree.

Questions regarding the proper interpretation and application of a statute are reviewed de novo. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

Specifically, the residents argue that under MCL 221.22,[8] the roads ceased to be public roads because the Road Commission never opened or worked on Walnut Plaisance and Lincoln Park Boulevard within four years after the dedications in the various plats. This precise issue was addressed and decided in *Rice*, 346 Mich 658. The Court held in *Rice* that MCL 221.22 did not apply to a road or street that was dedicated to the public on a recorded plat. *Id*. at 662-663. As the trial

[8] MCL 221.22 provides that "[e]very public highway already laid out, or hereafter to be laid out, no part of which shall have been opened and worked within 4 years after the time of its being so laid out, shall cease to be a road for any purpose whatever."

court properly noted, *Rice* has not been overturned and there are no other published decisions addressing the applicability of MCL 221.22 to roads dedicated in plats. The trial court properly found that MCL 221.22 does not apply to the facts and issues in this case.

V. APPLICABILITY OF MCL 324.30111(b)

The residents argue that because Walnut Plaisance and Lincoln Park Boulevard as platted in the fourth addition have never been improved or opened and are not available for vehicular travel, the roads are not "lawfully open for public use" and not governed by MCL 324.30111b. We disagree.

Questions regarding the proper interpretation and application of a statute are reviewed de novo. *Spectrum Health Hosps*, 492 Mich at 515. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham*, 480 Mich at 111.

MCL 324.30111b provides:

> (1) A public road end shall not be used for any of the following unless a recorded deed, recorded easement, or other recorded dedication expressly provides otherwise:
>
> (a) Construction, installation, maintenance, or use of boat hoists or boat anchorage devices.
>
> (b) Mooring or docking of a vessel between 12 midnight and sunrise.
>
> (c) Any activity that obstructs ingress to or egress from the inland lake or stream.
>
> (2) A public road end shall not be used for the construction, installation, maintenance, or use of a dock or wharf other than a single seasonal public dock or wharf that is authorized by the local unit of government, subject to any permit required under this part. This subsection does not prohibit any use that is expressly authorized by a recorded deed, recorded easement, or other recorded dedication.

> This subsection does not permit any use that exceeds the uses authorized by a recorded deed, recorded easement, other recorded dedication, or a court order.
>
> (3) A local unit of government may prohibit a use of a public road end if that use violates this section.
>
> (4) A person who violates subsection (1) or (2) is guilty of a misdemeanor punishable by a fine of not more than $500.00. Each 24-hour period in which a violation exists represents a separate violation of this section. A peace officer may issue an appearance ticket as authorized by sections 9c to 9g of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.9c to 764.9g, to a person who violates subsection (1) or (2).
>
> (5) This section does not prohibit a person or agency from commencing a civil action for conduct that violates this section.
>
> (6) As used in this section:
>
> (a) "Local unit of government" means a township, city, or village in which the public road end is located.
>
> (b) "Public road end" means the terminus at an inland lake or stream of a road that is lawfully open for use by the public.

Despite the trial court's thorough analysis of this issue and the court's rejection of the residents' argument, the residents did not raise this argument in their statement of questions presented before this Court, nor did they address the trial court's ruling on this issue in their brief on appeal. Rather, in a reply brief, they simply announce, without any analysis of the issue, that "a review of the 4th Addition as a stand-alone Plat demonstrates that Walnut Plaisance and Lincoln Park Blvd do not terminate at any body of water." The residents have abandoned this issue by failing to adequately brief it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); see also *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004) ("An

appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

The residents also argue that the trial court erred by finding that the subject roads were lawfully open for use by the public because there was "no evidence presented that would establish that [the] subject area was ever improved, maintained or used by the general public." They contend that the test for determining whether a road is open for public travel for purposes of the highway exception to governmental immunity should be applied in determining whether a road is lawfully open for public use for purposes of MCL 324.30111b. Thus, they contend that the proper test is "whether a reasonable motorist, under all the circumstances, would believe that the road was open for travel." (Citation, emphasis, and quotation marks omitted.) The residents do not cite any authority in support of their argument that the test applied for purposes of governmental immunity is applicable for purposes of MCR 324.30111b.

The trial court properly noted that the only case to address the requirements of MCL 324.30111b in its current form is *Colthurst v Bryan*, unpublished per curiam opinion of the Court of Appeals, issued June 14, 2016 (Docket No. 323539). In *Colthurst*, the plaintiff owned a lot on Wamplers Lake next to a 50-foot-long right-of-way called Elm Court, which ended at the lakeshore. *Colthurst*, unpub op at 3. The plaintiff sought to enjoin the individual defendants' use of Elm Court to moor their boats, erect docks, install boat lifts, and store these various items. *Id*. The plaintiff argued that such uses exceeded the scope of the dedication in the plat and were prohibited by statute. *Id*. at 3-4. The defendants argued that Elm Court was not a road end

as contemplated by MCL 324.30111b and that such activities were not prohibited. *Id*. at 4. In part, the defendants argued that Elm Court was not a road end because it was not really a road but merely a grassy area. *Id*. at 8. The trial court visited the area, considered pictures and other documentary evidence, and concluded that there was no question of fact that Elm Court was a public road end under the statute. *Id*. In affirming the trial court's decision, this Court found several factors that were important to the determination: (1) the plat clearly dedicated Elm Court to "the use of the public," (2) backlot owners had access to the lake through Elm Court, (3) subdivision rules contemplated the use of Elm Court by the public to access the lake, and (4) the fact that Elm Court was not an improved road but merely a grassy area of land was not relevant; rather, it was the availability of the area for the public to use that controlled. *Id*.

In this case, the trial court found *Colthurst* persuasive because of the factual similarities between the two cases. The trial court opined:

> The [c]ourt has already ruled that [Walnut Plaisance and Lincoln Park Blvd.] remain public roads under the jurisdiction of the Road Commission. Here there is no question that backlot owners have used the area where both Walnut Plaisance and Lincoln Park Blvd. end to access Lake Margrethe. Here both parties acknowledged on the record that members of the public could travel down Lincoln Park Blvd. as it currently exists and access the Lake. Finally, there are no questions of fact regarding the character of the area where these roads end. [The residents'] Exhibits A and B show an aerial picture and a survey of the area. There is an obvious clearing and a turn-around for vehicles, as well as a boat launch area. The turn-around in particular is within the portion of Lincoln Park Blvd. that is contained in the 4th Addition plat. While there are some trees in the area where Walnut

> Plaisance ends that would prevent vehicular travel or the launching of watercraft, there is nothing that would prohibit the public from walking in that area or accessing the water there. Even if the rest of the length of Walnut Plaisance were found to be inaccessible by even foot traffic, the end of Walnut Plaisance where it meets the Lake certainly is accessible from Lincoln Park Blvd. Looking at all the evidence, this Court concludes, as did the trial court in *Colthurst*, that there could not be "any other way to look at this area as being other than the terminus of a public road at an inland lake." [*Colthurst*, unpub op at 8.] The [c]ourt finds that as a matter of law the road ends of Walnut Plaisance and Lincoln Park Blvd., whether in the 1st, 2nd, or 4th Additions, are lawfully open for the use of the public and are therefore public road ends for purposes of MCL 324.30111b.

While an unpublished opinion of this Court lacks precedential value, the analysis in *Colthurst* is factually similar, germane, instructive, and persuasive for the case at bar, and we adopt its reasoning. MCR 7.215(C)(1); *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Application of the analysis to the undisputed facts, as set forth by the trial court, demonstrates that Walnut Plaisance and Lincoln Park Boulevard are open for the use of the public as a matter of law.

VI. STANDING

The residents argue that Grayling does not have standing to bring this action for determination of the scope of the dedications of the various plats. We disagree.

"The question whether a party has standing presents a question of law reviewed de novo on appeal." *Tennine Corp v Boardwalk Commercial, LLC*, 315 Mich App 1, 7; 888 NW2d 267 (2016). Questions

regarding the proper interpretation and application of a statute are reviewed de novo. *Spectrum Health Hosps*, 492 Mich at 515.

"The concept of standing represents a party's interest in the outcome of litigation that ensures sincere and vigorous advocacy." *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993). A party must demonstrate more than just "a commitment to vigorous advocacy . . . ." *Id*. The party must also show that it has a substantial interest that "will be detrimentally affected in a manner different from the citizenry at large." *Id*. (citation and quotation marks omitted). That is, the plaintiff must demonstrate an actual injury or likely chance of immediate injury that is different from that of the general public. *Kuhn v Secretary of State*, 228 Mich App 319, 333; 579 NW2d 101 (1998). The plaintiff's suit is generally precluded if the plaintiff's interests are no different from those of the public. *Id*.

The residents have not cited any authority supporting their claim that Grayling lacks standing to bring a claim to enforce the scope of an accepted dedication of land for roads for public use. Grayling relies on the plain language of MCL 560.253(2)—part of the Land Division Act, MCL 560.101 *et seq*.—which states that "[t]he land intended for the streets, alleys, commons, parks or other public uses as designated on the plat shall be held by the municipality in which the plat is situated in trust to and for such uses and purposes." Grayling argues that because it holds the roads at issue in trust for the use of the public, it has a legal obligation to institute legal action to protect the property held in trust for the benefit of the public. Grayling contends that *Wayne Co v Miller*, 31 Mich 447, 448-449 (1875), "supports the statutory citation above." In

Miller, a strip of land that was recorded as part of a plat was recorded under the act of 1839, which "provided that a plat executed in accordance with its provisions should 'vest the fee of such parcels of land as are therein expressed, named or intended for public uses, in the county' in which such lands should lie." *Id*. at 448. The Court, noting that "[i]t is not very clear what sort of title the act of 1839 designed to vest in the county," stated, "[U]nquestionably the purpose was to vest in the county such a title as would enable the public authorities to devote the lands to all the public uses contemplated in making the plan, and to charge them with corresponding obligations when the title should vest." *Id*. at 448-449.

According to the plain language of MCL 560.253(2), Grayling has an obligation *to enforce the uses and purposes* of the "land intended for the streets, alleys, commons, parks or other public uses as designated on the plat[s] . . . ." Therefore, Grayling was the proper party to pursue a declaratory action concerning the scope of the dedications and to challenge any uses outside the scope of the dedications of the roads at issue. Accordingly, Grayling had standing to bring the action under MCL 560.253(2).

VII. GRAYLING'S RIGHT TO COMMENCE A CIVIL ACTION UNDER MCL 324.30111b(5)

Finally, the residents argue the trial court erred because Grayling was not allowed to commence a civil action as provided under MCL 324.30111b(5). We disagree.

Questions regarding the proper interpretation and application of a statute are reviewed de novo. *Spectrum Health Hosps*, 492 Mich at 515.

Grayling had the right to commence a civil action under MCL 324.30111b(5) for conduct that violated MCL 324.30111b. The residents sought a declaratory ruling as to whether MCL 324.30111b(5) grants townships a civil remedy or whether townships are limited to issuing appearance tickets under MCL 324.30111b(4). After a hearing on the request, the trial court treated the request "as a [(C)(8)] motion" because the request is "an argument that [Grayling] can't state a claim under the statute because the statute or any other authority doesn't give it the ability to do that." The trial court opined as follows:

> [I]t's apparent to me that the sections of the statute are in there to accomplish different things. Section 3, to me, is more about a local government's ability to control what does or doesn't happen at the public road ends. In other words, to set rules and guidelines and boundaries for what can and can't happen at road ends.
>
> It gives local governments the ability to prohibit uses. The converse of that, I think, is that it gives local governments the ability to issue permits for certain uses at road ends. But it gives local governments the ability to regulate. Section 4 and Section 5, in my view, is more about enforcements. Section 4 allows for the potential for criminal penalties as a way to enforce, and Section 5 allows for civil remedies as a way to enforce. And so I think there is a distinction between allowing local government the authority to regulate and allowing for enforcement. And so looking at it in that light, Section 5, to me, does not prohibit a local government, such as a township, from using its civil action to enforce. There's nothing that expressly excludes it. It uses pretty broad language. A person or agency, that's pretty broad. That could mean many different types of private and public entities and governmental entities.
>
> So for those reasons, the [c]ourt finds that [Grayling] is not prohibited under the plain language of the statute from bringing a civil action, as they have. And so to the

> extent that this is a [(C)(8)] motion, the [c]ourt is going to deny the request for declaratory relief, again, looking at it using a [(C)(8)] analysis.

MCL 324.30111b provides, in pertinent part, as follows:

> (3) A local unit of government may prohibit a use of a public road end if that use violates this section.
>
> (4) A person who violates subsection (1) or (2) is guilty of a misdemeanor punishable by a fine of not more than $500.00. Each 24-hour period in which a violation exists represents a separate violation of this section. A peace officer may issue an appearance ticket as authorized by sections 9c to 9g of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.9c to 764.9g, to a person who violates subsection (1) or (2).
>
> (5) This section does not prohibit a person or agency from commencing a civil action for conduct that violates this section.

The residents' sole argument is that under the plain language of the statute, Grayling is not a "person or agency," and it therefore cannot commence a civil action for conduct that violates MCL 324.30111b. This argument fails.

MCL 324.30111b(3) clearly gives a local unit of government—which includes townships, MCL 324.30111b(6)(a)—authority to prohibit a use of a public road end if that use violates MCL 324.30111b. MCL 324.30111b(4) provides that "[a] peace officer may issue an appearance ticket as authorized by sections 9c to 9g of chapter IV of the code of criminal procedure" to a person who violates Subsection (1) or (2). MCL 324.30111b(5) provides, "This section does not prohibit a person or agency from commencing a civil action for conduct that violates this section." Nowhere does Subsection 5 indicate that an entity is prohibited from

bringing a civil action in reliance on the statute, or that the relief is limited to a select class of plaintiffs. Under a plain reading of the statute, see *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011), Subsection 5 does not prohibit a local unit of government from commencing a civil action. Rather, Subsection 5 appears to clarify that civil actions are not limited to those local units of government who have authority to prohibit a use of a public road end if that use violates MCL 324.30111b. Grayling had a right to commence its civil action under MCL 324.30111b(5) for conduct that violated MCL 324.30111b.

Affirmed.

O'BRIEN, P.J., and FORT HOOD, J., concurred with CAMERON, J.

In re IMPLEMENTING SECTION 6w OF 2016 PA 341 FOR CLOVERLAND ELECTRIC COOPERATIVE

Docket No. 342552. Submitted July 11, 2019, at Lansing. Decided July 23, 2019, at 9:05 a.m.

In February 2017, the Michigan Public Service Commission (the PSC) initiated an action to implement MCL 460.6w, as enacted by 2016 PA 341. In July 2017, Cloverland Electric Cooperative, a member-regulated electric cooperative that generates, distributes, and sells electric energy to its member-customers, filed an application in the PSC, proposing the manner in which the state reliability mechanism (SRM)—that is, a plan adopted by the PSC in the absence of a prevailing state compensation mechanism to ensure the reliability of Michigan's electric grid—should be calculated, and, in turn, how the related SRM capacity charges should be determined under that mechanism. In addition, Cloverland proposed that it would not impose an SRM capacity charge on its member-customers who are full-service members but that it would apply an SRM charge on UP Paper, LLC, its only member that was a retail open access (ROA) customer; that is, the only customer that purchased a portion of its electric energy from an alternative electric supplier (AES). The PSC staff disagreed with Cloverland's proposal, arguing that Cloverland's proposed capacity charge did not satisfy the MCL 460.6w statutory requirements because it did not include all the capacity-related costs included in Cloverland's rates, as set forth in the cost-of-service study submitted by Cloverland; the PSC staff also disagreed with Cloverland's proposal to limit the SRM charge to ROA customers. In November 2017, following a contested hearing, the PSC ordered Cloverland to implement a certain SRM capacity charge for full-service member-customers using the PSC staff's rate design, which was calculated using Cloverland's cost-of-service study. The PSC also concluded that if an AES failed to make a satisfactory demonstration regarding its forward capacity obligation under MCL 460.6w(8), Cloverland would have to apply the SRM capacity charge on the ROA customers of that AES on a pro rata basis. Cloverland appealed that decision in the Court of Appeals. The PSC stayed enforcement of the November 2017 opinion and order pending resolution of this appeal. Subse-

quently, the PSC staff and Cloverland entered into a settlement agreement, agreeing that with regard to its full-service member-customers, Cloverland would voluntarily implement the SRM capacity charges proposed by the staff for service rendered on and after June 1, 2019, and that the stay of the November 2017 opinion would be extended and continued for services rendered through May 31, 2019.

The Court of Appeals *held*:

1. Under 2008 PA 167, MCL 460.31 *et seq*., a member-regulated electric cooperative has general authority to set its own rates; that power is not absolute, however, because under MCL 460.36(2), the PSC retains authority to set a member-regulated cooperative's rates for customers who choose to obtain service from an AES. 2016 PA 341 sets forth additional exceptions to a member-regulated electric cooperative's authority to self-govern. In that regard, MCL 460.6w(3), which prescribes a specific formula for the PSC to use when establishing an SRM capacity charge, provides that the PSC must ensure that the resulting capacity charge does not differ for full-service load and AES load. In other words, the statutory subsection authorizes and requires the PSC to annually set SRM capacity charges with respect to its member-regulated electric cooperatives, both for full-service member-customers and ROA customers of an AES; the capacity charge is imposed without exception on full-service member-customers regardless of whether under MCL 460w(6) an ROA customer of an AES is exempt from paying the charge because the AES serving that customer has demonstrated that it can meet the statutorily required capacity obligations. Any other interpretation would render nugatory the MCL 460.6w(3) requirement that the PSC use a specific formula and ensure that the resulting SRM capacity charge does not differ for full-service load and AES load. Moreover, 2016 PA 341 was more recently enacted and includes more specific provisions; specifically, it addresses a specific component of rates—that is, an SRM capacity charge—while 2008 PA 167 addresses the general authority of member-regulated cooperatives to set rates. In this case, the PSC correctly concluded that it possesses authority under MCL 460.6w to set SRM capacity charges for full-service member-customers of member-regulated electric cooperatives like Cloverland. Given that the SRM capacity charge is imposed on full-service member-customers under MCL 460.6w(3) without exception, the PSC correctly determined that Cloverland's full-service member-customers must pay the capacity charge regardless of whether the AES serving UP Paper met its capacity determination.

2. Cloverland's argument that the PSC acted unreasonably and unlawfully when setting Cloverland's SRM capacity was moot because the PSC's stay orders and the parties' settlement agreement made it impossible for the Court to grant any relief.

Affirmed.

1. PUBLIC UTILITIES — IMPOSITION OF STATE RELIABILITY MECHANISM CAPACITY CHARGES — NO EXCEPTION FOR FULL-SERVICE MEMBER-CUSTOMERS.

MCL 460.6w(3) authorizes and requires the Public Service Commission to annually set state reliability mechanism capacity charges with respect to its member-regulated electric cooperatives, both for full-service member-customers and retail open access (ROA) customers of an alternative electric supplier (AES); the capacity charge is imposed without exception on full-service member-customers regardless of whether under MCL 460w(6) an ROA customer of an AES is exempt from paying the charge.

2. PUBLIC UTILITIES — AUTHORITY TO SET STATE RELIABILITY MECHANISM CAPACITY CHARGES — FULL-SERVICE MEMBER-CUSTOMERS.

The Public Service Commission has authority under MCL 460.6w to set state reliability mechanism capacity charges for full-service member-customers of member-regulated electric cooperatives.

Loomis, Ewert, Parsley, Davis & Gotting, PC (by *Michael G. Oliva*) for Cloverland Electric Cooperative.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Amit T. Singh* and *Steven D. Hughey*, Assistant Attorneys General, for the Michigan Public Service Commission.

Before: O'BRIEN, P.J., and FORT HOOD and CAMERON, JJ.

CAMERON, J. Appellant, Cloverland Electric Cooperative (Cloverland), is a member-regulated electric cooperative that generates and delivers electricity to five counties in Michigan's Upper Peninsula. In 2016, the Michigan Legislature passed Public Act 341 to ensure

that alternative electric suppliers (AES)[1] demonstrate that they are able to generate enough electricity to meet their capacity obligations. If an AES cannot meet its obligations, then the electric utility, such as Cloverland, must provide the AES's customers with electric capacity and, in return, implement a State Reliability Mechanism (SRM) charge that must be paid by the AES's customers. After a hearing was held, appellee, the Public Service Commission (the PSC or the commission), issued an opinion and order on November 30, 2017, requiring Cloverland to also implement an SRM charge on Cloverland's full-service member-customers pursuant to the newly enacted law. On appeal, Cloverland challenges the PSC's decision to require the implementation of the SRM charge. We affirm.

I. BACKGROUND

As explained by Cloverland's chief financial officer, Robert J. Malaski, Cloverland is a member-regulated electric cooperative that generates, distributes, and sells electric energy to its

> member-customers in the counties of Chippewa, Delta, Luce, Mackinac and Schoolcraft in Michigan's Upper Peninsula, including the cities of Sault Ste. Marie, St. Ignace, Mackinac Island and Manistique. Cloverland has approximately 42,000 member-customers, consisting of residential, farm residential, seasonal, commercial, outdoor lighting and large power accounts.

Malaski testified that "Cloverland has a single member, UP Paper, LLC, ('UP Paper') which purchases a

[1] An AES is defined as: "[A] person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility." MCL 460.10g(a).

portion of its electric energy from an [AES]. Cloverland also serves UP Paper for the remainder of its electric energy needs under the terms of a special contract."

This case is about the legal requirements for ensuring the reliability of the electric grid in Michigan. In order for a summary of the proceedings in this case to make sense, it is necessary to quote pertinent language from the governing statute, MCL 460.6w, which was added by 2016 PA 341 (Act 341), effective April 20, 2017, and to explain a recent opinion of this Court, *In re Reliability Plans of Electric Utilities for 2017–2021*, 325 Mich App 207; 926 NW2d 584 (2018).

"At the end of 2016, our Legislature enacted new electric utility legislation that included Act 341. That act added, among other statutory sections, MCL 460.6w." *In re Reliability Plans*, 325 Mich App at 210-211.

> By way of background, Michigan's Legislature previously enacted what was known as the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., as enacted by 2000 PA 141 and 2000 PA 142, to further the deregulation of the electric utility industry. That act permitted customers to buy electricity from alternative electric suppliers instead of limiting customers to purchasing electricity from incumbent utilities . . . . Among the purposes of the act, as amended by Act 341, is the promotion of "financially healthy and competitive utilities in this state." MCL 460.10(b). [*Id*. at 211 (quotation marks and citation omitted).]

As additional background information, it is noted that

> the Midcontinent Independent System Operator (MISO) is the regional transmission organization responsible for managing the transmission of electric power in a large geographic area that spans portions of Michigan and 14 other states. To accomplish this, MISO combines the

> transmission facilities of several transmission owners into a single transmission system. In addition to the transmission of electricity, MISO's functions include capacity resource planning. MISO has established ten local resource zones; most of Michigan's Lower Peninsula is located in MISO's Local Resource Zone 7, while the Upper Peninsula is located in MISO's Local Resource Zone 2. [*Id*.]

Further, MISO "serves as a mechanism for suppliers to buy and sell electricity capacity through an auction. This allows for the exchange of capacity resources across energy providers and resource zones." *Id*. at 212.

"At the end of 2016, our Legislature enacted Act 341, in part adding MCL 460.6w, which imposes resource adequacy requirements on electric service providers in Michigan and imposes certain responsibilities on the [PSC]." *Id*. at 213. MCL 460.6w(2) provides, in relevant part, "If, by September 30, 2017, the Federal Energy Regulatory Commission [(FERC)] does not put into effect a resource adequacy tariff that includes a capacity forward auction[2] or a prevailing state compensation mechanism, then the commission shall establish [an SRM] under subsection (8)." It is undisputed here that the FERC did not implement by September 30, 2017, a resource adequacy tariff that included a capacity forward auction or a prevailing state compensation mechanism. Therefore, the PSC was required to establish an SRM under MCL 460.6w(8). See MCL 460.6w(2); *In re Reliability Plans*, 325 Mich App at 213 ("The parties agree that because the [FERC] did not put into effect the MISO-proposed tariff, the [PSC] is required by [MCL 460.6w(2)] to establish [an SRM].").

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[2] " 'Capacity forward auction' means an auction-based resource adequacy construct and the associated tariffs developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more." MCL 460.6w(12)(b).

An SRM "means a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8)." MCL 460.6w(12)(h).

When an AES fails to demonstrate that it has sufficient capacity to meet its capacity obligations, the electric utility must provide the AES's customer with electric capacity, and in return, an SRM charge must be paid.[3] In particular, MCL 460.6w(6) provides:

> A capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate that it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. Any electric provider that has previously demonstrated that it can meet all or a portion of its capacity obligations shall give notice to the commission by September 1 of the year 4 years before the beginning of the applicable planning year if it does not expect to meet that capacity obligation and instead expects to pay a capacity charge. The capacity charge in the utility service territory must be paid for the portion of its load taking service from the [AES] not covered by capacity as set forth in this subsection during the period that any such capacity charge is effective.

MCL 460.6w(7) states:

> An electric provider shall provide capacity to meet the capacity obligation for the portion of that load taking service from an [AES] in the electric provider's service territory that is covered by the capacity charge during the

[3] The SRM charge is sometimes referred to in this case as a state reliability charge or simply a capacity charge.

period that any such capacity charge is effective. The [AES] has the obligation to provide capacity for the portion of the load for which the alternative electric supplier has demonstrated an ability to meet its capacity obligations. If an [AES] ceases to provide service for a portion or all of its load, it shall allow, at a cost no higher than the determined capacity charge, the assignment of any right to that capacity in the applicable planning year to whatever electric provider accepts that load.

MCL 460.6w(8) states, in relevant part:

> If [an SRM] is required to be established under subsection (2), the commission shall do all of the following:
>
> (a) Require, by December 1 of each year, that each electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.
>
> (b) Require, by the seventh business day of February each year, that each [AES], cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the [AES], cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. . . . By the seventh business day of February in 2018, an [AES] shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the [AES] owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric

> provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:
>
> (*i*) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). If a capacity charge is required to be paid under this subdivision in the planning year beginning June 1, 2018 or any of the 3 subsequent planning years, the capacity charge is applicable for each of those planning years.

In short, an SRM charge is required to be paid when an AES fails to demonstrate the required capacity.

MCL 460.6w(3) requires an SRM charge to be determined in a contested case proceeding. Further, MCL 460.6w(3) sets forth a formula for determining an SRM charge as follows:

> In order to ensure that noncapacity electric generation services are not included in the capacity charge, in determining the capacity charge, the commission shall do both of the following and *ensure that the resulting capacity charge does not differ for full service load and* [AES] *load*:
>
> (a) For the applicable term of the capacity charge, include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors, regardless of whether those costs result from utility ownership of the capacity resources or the purchase or lease of the capacity resource from a third party.
>
> (b) For the applicable term of the capacity charge, subtract all non-capacity-related electric generation costs, including, but not limited to, costs previously set for recovery through net stranded cost recovery and securitization and the projected revenues, net of projected fuel costs, from all of the following:
>
> (*i*) All energy market sales.

(*ii*) Off-system energy sales.

(*iii*) Ancillary services sales.

(*iv*) Energy sales under unit-specific bilateral contracts. [Emphasis added.]

In July 2017, Cloverland filed what it called an "application" in the PSC. Cloverland argued, in relevant part:

> The SRM [charge] should be designed to compensate Cloverland for the capacity obligation it undertakes to meet the retail choice customer capacity needs that are not proven to be satisfied by the serving AES. In Cloverland's case, the cost of capacity can be determined based on the costs reflected in Cloverland's wholesale power supply agreement with Wisconsin Electric Power Company ("WEPCO"), and are intended to be revenue neutral based upon the assumption that no electric choice load will take capacity service from Cloverland.

In support of its claim, Cloverland attached the written testimony of Malaski, "which describes how Cloverland's proposed SRM charge meets the requirements of Act 341 in a reasonable and prudent manner, how a capacity charge under that mechanism should be calculated, and other related matters." Malaski testified that Cloverland was not proposing to impose an SRM charge on its member-customers, as distinguished from UP Paper, the customer of the AES.

In August 2017, the PSC Staff (the Staff) filed the written testimony of Nicholas M. Revere, who is employed by the PSC as "the Manager of the Rates and Tariff Section of the Regulated Energy Division." Revere stated that Cloverland's proposal to use the WEPCO capacity charges as a proxy did not satisfy "the requirements of the law, as it does not include all capacity-related costs included in [Cloverland's] rates." The Staff had gone "through the costs in the Cost of

Service Study (COSS) and identified those that are capacity-related." Revere stated that the Staff disagreed with Cloverland's proposal to not require its member-customers, also sometimes referred to as full-service customers or bundled customers, to pay the SRM charge; that is, the Staff did not approve Cloverland's suggestion to limit the SRM charge to customers of an AES, which customers are also sometimes referred to as Retail Open Access (ROA) customers.

After entertaining the parties' arguments through briefing, the PSC issued a 50-page opinion and order providing, in relevant part, that Cloverland "shall implement [an SRM] capacity charge of $228,891 per megawatt-year, or $627 per megawatt-day, for full-service customers, using the Commission Staff's rate design[.]" Also, if an AES "fails to make a satisfactory demonstration regarding its forward capacity obligations pursuant to MCL 460.6w(8), the resulting [SRM] capacity charge shall be levied by Cloverland . . . on the retail open access customers of that [AES] on a pro rata basis."

After filing an appeal in this Court, Cloverland filed in the PSC a motion for a stay of enforcement of the portion of the PSC's November 2017 opinion and order. The Staff filed a response to Cloverland's motion for a stay and agreed to a limited stay to avoid the unintended consequences of application of the November 2017 opinion and order. The Staff acknowledged that Cloverland's COSS was out of date and did not reflect the actual cost to serve current customers. Thus, the Staff did not dispute that implementation of the November 2017 opinion and order would cause some customers to be charged for capacity on the basis of outdated information. In the Staff's view, the stay should expire when the PSC issues an order in Clover-

land's pending annual SRM update case, PSC Case No. U-20144. The staff also argued that the stay should be conditioned on Cloverland's agreement to revise its application in PSC Case No. U-20144 to propose a method of recalculating SRM charges using one or more of certain methodologies suggested by the Staff. In May 2018, the PSC entered an order approving Cloverland's motion for a stay of enforcement of the November 2017 opinion and order, subject to conditions.

In September 2018, Cloverland filed in the PSC a copy of a written settlement agreement reached between Cloverland and the Staff regarding the stay in this case and regarding Cloverland's pending annual SRM update case, PSC Case No. U-20144. The settlement agreement noted that the Staff had proposed an SRM rate schedule that avoided the negative effect on Cloverland's member-customers and that used one of the possible methodologies set forth in the PSC's May 2018 stay order. Cloverland and the Staff agreed that Cloverland would voluntarily implement the SRM capacity charges proposed by the Staff for service rendered on and after June 1, 2019. Cloverland was "to offset the SRM capacity charges by identical reductions to its base rates to its full-service member/customers effective at the point in time the SRM capacity charges become effective to make the SRM capacity charges revenue neutral to its member/customers." The parties reserved the right to take different positions in future rate proceedings. The parties further agreed that the stay of the November 2017 opinion and order should be "extended and continued for service rendered through May 31, 2019." The settlement agreement provided that Cloverland would continue to pursue the instant appeal and that the settlement agreement did not constitute an admis-

sion or waiver regarding any of the parties' respective positions in this appeal. It was agreed that this Court's decision in this appeal would not affect the terms of the settlement agreement.

On appeal, Cloverland sets forth three arguments: (1) MCL 460.6w does not confer jurisdiction on the PSC to set SRM charges for full-service retail member-customers of an electric cooperative that is member-regulated, (2) the SRM charge was nonetheless unlawful because the sole customer taking from an AES is not paying an SRM charge and therefore a full-service customer cannot be subject to an SRM charge, and (3) the PSC acted unreasonably and unlawfully in setting SRM charges for Cloverland based on outdated cost studies that ignored its existing rate design. We consider each argument in order.

II. STANDARD OF REVIEW

This Court has explained:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). [*In re Application of Consumers Energy*

> *to Increase Electric Rates (On Remand)*, 316 Mich App 231, 236-237; 891 NW2d 871 (2016).]

Further, "[a] final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record." *Id*. at 237, citing Const 1963, art 6, § 28, and *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

This Court affords due deference to the administrative expertise of the PSC and may not substitute its judgment for that of the PSC. *Consumers Energy*, 316 Mich App at 237, citing *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

> We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and this Court will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103, 108; 754 NW2d 259 (2008). If the language of a statute is vague or obscure, the PSC's construction serves as an aid in determining the legislative intent and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. *Id*. at 103-104. However, the construction given to a statute by the PSC is not binding on us. *Id*. at 103. Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003). [*Consumers Energy*, 316 Mich App at 237.]

This Court has further explained:

> Ultimately, the statutory language itself is controlling, and this Court will neither abandon nor delegate its responsibility to determine legislative intent. Moreover, we review de novo issues of statutory interpretation, including the [PSC's] determinations regarding the scope

> of its own authority. In sum, when considering the construction given to a statute by an agency, our ultimate concern is the proper construction of the plain language of the statute regardless of the agency's interpretation, and our primary obligation is to discern and give effect to the Legislature's intent. [*In re Reliability Plans*, 325 Mich App at 221 (citations omitted).]

III. ANALYSIS

A. AUTHORITY UNDER MCL 460.6w TO SET SRM CHARGES

Cloverland first argues that MCL 460.6w does not confer jurisdiction on the PSC to set SRM charges for full-service retail member-customers of an electric cooperative that is member-regulated. We conclude that the PSC correctly determined that it possesses authority under MCL 460.6w to set SRM charges for full-service member-customers of a member-regulated electric cooperative such as Cloverland.

"The [PSC] has no common-law powers and possesses only the authority granted to it by the Legislature." *In re Reliability Plans*, 325 Mich App at 222. Further, this Court "strictly construe[s] the statutes that confer power on the [PSC], and that power must be conferred by clear and unmistakable language." *Id*. (quotation marks and citation omitted). Hence, "powers specifically conferred on an agency cannot be extended by inference; no other or greater power was given than that specified." *Id*. (quotation marks, ellipsis, and citation omitted).

The language of a statute provides the most reliable evidence of the Legislature's intent. *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017). " 'If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as

written. No further judicial construction is required or permitted.' " *Id*., quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Statutory language is accorded its ordinary meaning within the context in which it is used and must be read harmoniously to give effect to the statute as a whole. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). " 'Courts must give 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.' " *Coldwater*, 500 Mich at 167-168, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

> Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law to effectuate the legislative purpose as found in harmonious statutes. If two statutes lend themselves to a construction that avoids conflict, that construction should control. When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute. The rules of statutory construction also provide that a more recently enacted law has precedence over the older statute. This rule is particularly persuasive when one statute is both the more specific and the more recent. [*Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27-28; 811 NW2d 98 (2011) (quotation marks, ellipsis, brackets, and citations omitted).]

Under Act 167, which was enacted in 2008, a member-regulated electric cooperative has general authority to set its own rates. See MCL 460.36(1) ("A cooperative electing to be member-regulated under this act shall, by board action, establish, maintain, and apply all rates, charges, accounting standards, billing practices, and terms and conditions of service in accordance with this act."); MCL 460.33 ("The purpose of this act is to allow the board of directors to elect

member-regulation for rates, charges, accounting standards, billing practices, and terms and conditions of service."). But this general authority to self-govern is not absolute. For example, the PSC retains authority under Act 167 to set a member-regulated cooperative's rates for customers who choose to obtain service from an AES. See MCL 460.36(2).[4]

Act 341, which was enacted in 2016, added MCL 460.6w, which sets forth an additional exception to a member-regulated electric cooperative's authority to self-govern. MCL 460.6w applies to electric providers. This statute expressly defines "[e]lectric provider" to include "[a] cooperative electric utility in this state." MCL 460.6w(12)(c)(*iii*). MCL 460.6w(3), which prescribes a specific formula for the PSC to use in establishing an SRM charge, states that the PSC shall "ensure that the resulting capacity charge does not differ for full service load and [AES] load[.]" This statutory language clearly and unmistakably authorizes the PSC to set an SRM charge with respect to member-regulated electric cooperatives, both for "full

[4] In particular, MCL 460.36(2) provides:

> Notwithstanding the provisions of this act, the commission shall retain jurisdiction and control over all member-regulated cooperatives for matters involving safety, interconnection, code of conduct including, but not limited to, all relationships between a member-regulated cooperative and an affiliated [AES], customer choice including, but not limited to, the ability of customers to elect service from an [AES] under 1939 PA 3, MCL 460.1 to 460.10cc, and the member-regulated cooperative's rates, terms, and conditions of service for customers electing service from an [AES], service area, distribution performance standards, and quality of service, including interpretation of applicable commission rules and resolution of complaints and disputes, except any penalties pertaining to performance standards and quality of service shall be established by the cooperative's members when voting on the proposition for member-regulation or at an annual meeting of the cooperative.

service load," i.e., for full-service member-customers, as well as for "[AES] load," i.e., for choice or ROA customers of an AES. Any other interpretation would render nugatory the statutory language requiring the PSC to use a specific formula and to "ensure that the resulting capacity charge does not differ for full service load and [AES] load." MCL 460.6w(3).[5] Act 341, which was enacted in 2016, is more recent than Act 167, which was enacted in 2008. MCL 460.6w(3) is also a more specific provision because it addresses a specific component of rates, i.e., a capacity charge, whereas Act 167 addresses the general authority of member-regulated cooperatives to set rates. Hence, a member-regulated cooperative's general authority to set its own rates under Act 167 is subject to the exception set forth in MCL 460.6w(3) regarding the PSC's authority to set

[5] Cloverland says that the PSC "can assure that capacity costs are the same for full-service customers as for alternative energy customers by determining how those costs are recovered in [Cloverland's] current rates without altering those rates." But that argument makes no sense because MCL 460.6w(3) prescribes a specific formula to use in determining the SRM charge and requires the PSC to ensure that the SRM charge does not differ for full-service and AES customers. In order to follow the statutory requirements, the PSC necessarily must have the authority to set the SRM charge for both types of customers. Also, as the PSC convincingly explains in its brief in connection with the third issue, Cloverland's

> rates do not break out the amounts included for various capacity costs so it is impossible to know what full-service customers are actually paying for capacity under Cloverland's current rates. The fact that Cloverland's current rates cover all of its costs, including capacity costs, is not sufficient evidence to allow the [PSC] to ensure that the capacity charges paid by full-service customers are the same as the capacity charge set by the methodology mandated in Act 341. MCL 460.6w(3). The [PSC] did not err in requiring that Cloverland state the capacity charge in its full-service tariff so that the [PSC] can compare and ensure that full-service and ROA load pay the same amount for capacity.

a capacity charge. Therefore, Cloverland's argument is without merit, and the PSC had the authority to set the SRM charge.

B. SUBJECTING FULL-SERVICE CUSTOMERS TO AN SRM CHARGE

Cloverland also argues that the SRM charge was nonetheless unlawful because the sole customer taking from an AES—UP Paper—is not paying an SRM charge and therefore Cloverland, as a full-service customer, cannot be subject to an SRM charge. We conclude that the PSC correctly determined that it was required to impose the SRM charge on full-service customers regardless of whether the AES serving UP Paper makes the required capacity demonstration.

MCL 460.6w(3) states, in relevant part, "After the effective date of [Act 341], the commission shall establish a capacity charge as provided in this section." This determination must be conducted annually. See *id*. (requiring a determination of an SRM charge to be conducted as a contested case and be concluded "by December 1 of each year"). The PSC is required to "provide notice to the public of the single capacity charge as determined for each territory." *Id*. Further, "[t]he capacity charge must be applied to alternative electric load that is not exempt as set forth under subsections (6) and (7)." *Id*. In short, MCL 460.6w(3) requires the PSC to impose an SRM charge each year. There is no triggering mechanism that must be met before an SRM charge is imposed on full-service customers. Although an AES customer is exempt from paying the charge if the AES serving that customer has made the required capacity demonstration, see MCL 460.6w(3) and (6), there is no statutory language indicating that the exemption applies to full-service customers. The language of MCL 460.6w(3) directing

the PSC to ensure that the "capacity charge does not differ for full service load and [AES] load" requires the charge to be the same for full-service customers and ROA customers, but this does not mean that a statutory exemption for customers of an AES must somehow be extended to full-service customers. Requiring a charge to be the same does not equate with expanding a statutory exemption. The PSC thus properly determined that Cloverland's full-service customers are required to pay the SRM charge regardless of whether the AES serving UP Paper met its capacity demonstration.

C. SETTING SRM CHARGES

Finally, Cloverland argues that the PSC acted unreasonably and unlawfully in setting SRM charges for Cloverland based on outdated cost studies and ignoring its existing rate design. We conclude that this issue is moot, and in any event, the PSC did not act unreasonably or unlawfully in setting the SRM charge.

"This Court does not decide moot issues. A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy." *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) (quotation marks and citations omitted). Also, "[a]n issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy." *Id*. at 450 (quotation marks and citation omitted). In this case, the PSC's stay orders and the parties' settlement agreement have made it impossible for this Court to grant any relief on this issue. The PSC entered an initial stay order in May 2018 and subsequently extended the stay to May 31, 2019, after the parties settled the annual SRM update case regarding the SRM charge for service rendered on

and after June 1, 2019. As a result, no customer of Cloverland, whether full-service or ROA, will ever pay the particular charge ordered in the November 2017 opinion and order from which the present appeal arises. Because the issue is moot, this Court does not reach it. This case does not fall within the exception to the mootness doctrine for issues that are capable of repetition while evading review. See *City of Warren v Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004) ("We will only review a moot issue if the issue is publicly significant and is likely to recur, yet also is likely to evade judicial review.") (quotation marks and citation omitted). The issue here is moot because of the stay orders and the parties' settlement; there is no indication that such events will recur and cause the issue to evade review.

Even if the issue were not moot, Cloverland has not established that the PSC acted unreasonably or unlawfully in setting the SRM charge set forth in the November 2017 opinion and order. Cloverland asserts that the 2015 COSS upon which the PSC relied was out of date, but the COSS was submitted by Cloverland itself, and there was not sufficient updated evidence upon which the PSC could rely in making its statutorily required calculations. Cloverland also says that capacity costs were already embedded in Cloverland's existing rates, but as noted in the first issue, the PSC was required by MCL 460.6w(3) to use a specific formula and to ensure that the SRM charge does not differ for full-service customers and AES customers. There is no indication that Cloverland broke down the capacity costs purportedly embedded in its existing rates with sufficient clarity such that the PSC could carry out its statutory duty without setting a separate SRM charge. Further, as noted by the PSC, Cloverland

was free to alter its existing rates to remove any embedded capacity costs after the PSC imposed the SRM charge.

Affirmed.

O'BRIEN, P.J., and FORT HOOD, J., concurred with CAMERON, J.

PEOPLE v CAMPBELL

Docket No. 344078. Submitted June 5, 2019, at Detroit. Decided July 23, 2019, at 9:10 a.m.

Jason S. Campbell was charged in the Mackinac Circuit Court with three counts of carrying a concealed weapon, MCL 750.227, after he disclosed the presence of the weapons during a traffic stop. Defendant was pulled over for a nonfunctioning taillight while driving a pickup truck that was pulling a trailer; a welding truck he had purchased for use in his business was on the trailer. Even though a carrier identification was not displayed on defendant's truck, the motor carrier officer (the MCO) who stopped defendant believed that the truck was a commercial vehicle as defined by MCL 257.7—and that he therefore had authority under MCL 28.6d to pull the vehicle over—because of the size of the truck, the equipment being hauled on the trailer, and the presence of a business name, a symbol, and a telephone number on the truck's tailgate. Defendant explained the nature of his travel, and because defendant appeared nervous and had his hands placed on the steering wheel—which in his experience, was consistent with individuals who have a concealed pistol license (CPL)—the MCO asked defendant whether he had any weapons in the truck. Defendant admitted that he had one firearm in the truck and admitted upon further questioning that he did not have a CPL. Because the MCO was unsure whether defendant's truck was, in fact, a commercial vehicle and whether he therefore had jurisdiction to conduct the traffic stop, he contacted the sheriff's department for assistance and then his own sergeant for guidance. Forty minutes later, the MCO arrested defendant for carrying a concealed weapon without a CPL. After being asked whether he had additional weapons in his truck, defendant disclosed that he had two more guns. Defendant was handcuffed, placed in the back of the patrol car, read the rights mandated by *Miranda v Arizona*, 384 US 436 (1966), and questioned further about the guns. Defendant moved to suppress his statements and the firearms. The court, William M. Carmody, J., granted the motion, noting that the truck was not a commercial vehicle and that the MCO quickly understood that it was not. The court reasoned that there was no evidence to support the MCO's justification for initially

questioning defendant about weapons in the vehicle—i.e., that defendant appeared nervous and kept his hands on the steering wheel—and that the MCO's subsequent questioning about additional weapons constituted custodial interrogation without the required *Miranda* warnings. On that basis, the court suppressed all evidence from the traffic stop, including defendant's admissions about the weapons and the weapons themselves. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. MCL 28.6d(1) provides that the director of the Michigan State Police may appoint officers with limited arrest powers for motor carrier enforcement; the officers have the powers conferred upon peace officers for the purpose of enforcing the general laws of Michigan as they pertain to commercial vehicles. Under MCL 257.7, the term "commercial vehicle" includes all motor vehicles used for the transportation of passengers for hire; all motor vehicles constructed or used for transportation of goods, wares, or merchandise; and all motor vehicles designed and used for drawing other vehicles that are not constructed to carry a load independently or any part of the weight of a vehicle or load being drawn. In that regard, MCL 257.33 defines the term "motor vehicle" as a vehicle that is self-propelled, and MCL 257.79 defines the word "vehicle" as every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks. In this case, defendant's truck was a commercial vehicle for purposes of MCL 257.7 because (1) the trailer was clearly used to transport property under the power of the pickup truck to which it was attached and (2) the pickup truck was a motor vehicle designed and used for drawing other vehicles—that is, the trailer—that are not constructed to carry a load independently or any part of the weight of a vehicle or load being drawn. But even if defendant was not operating a commercial vehicle and the MCO did not have authority to initially detain defendant, the evidence would not be automatically excluded.

2. The Fourth Amendment of the United States Constitution protects against unlawful searches and seizures. For purposes of the Fourth Amendment, a seizure occurs when in view of all the circumstances, a reasonable person would conclude that he or she was not free to leave. A traffic stop constitutes a seizure and is justified if the officer has an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law. A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask

reasonable questions concerning the violation of law and its context for a reasonable period; the tolerable duration of police inquiries in a traffic stop is determined by the seizure's mission. Beyond determining whether to issue a traffic ticket, an officer's mission includes (1) ordinary inquiries incident to the traffic stop and (2) attending to related safety concerns, including taking certain negligibly burdensome precautions to complete the mission safely; inquiries unrelated to the mission of the seizure withstand constitutional scrutiny only when they do not measurably extend the duration of the stop. The credibility of an officer's beliefs underlying why the officer inquired about the presence of weapons during a traffic stop is not related to the legality of asking such a question. A police officer may question a lawfully detained person about the presence of weapons in his or her vehicle because the inquiry relates to the officer's ability to conduct the traffic stop in a safe manner. When a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised. In this case, the MCO appropriately initiated the traffic stop because defendant had a broken taillight. The MCO properly asked defendant whether he had weapons in his truck because the question was designed to ensure that the MCO could complete the stop safely, which was related to the mission of the stop. Although questioning defendant whether he had a CPL was not strictly related to the purpose of the stop, the question did not unreasonably prolong the duration of the stop and, as a result, did not render the otherwise lawful stop unconstitutional. Given defendant's statement that he had a gun in his truck, the MCO had probable cause to believe that defendant had committed the offense of carrying a concealed weapon and, on that basis, lawfully extended the stop. The trial court erred by suppressing evidence of defendant's admissions regarding the first gun and his lack of a CPL as well as the evidence of the seizure of the first gun because that evidence was not the product of an unconstitutional search or seizure.

3. The Fifth Amendment of the United States Constitution provides that no person shall be compelled to be a witness against himself. To protect that right, the police must advise a defendant of his or her *Miranda* rights before a custodial interrogation. In general, a motorist detained for a routine traffic stop or investigative stop is not in custody for purposes of *Miranda*. Whether a defendant is in custody for purposes of *Miranda* at the time of an interrogation is determined by looking at the totality of the circumstances; the key question is whether the accused reasonably could have believed that he or she was free to leave. If a

custodial interrogation is not preceded by an adequate warning, statements made during the custodial interrogation may not be introduced into evidence at the accused's criminal trial. However, the right against compelled self-incrimination is not violated when nontestimonial evidence obtained as a result of voluntary statements is introduced because there is no risk that a defendant's coerced statement will be used against the defendant in a criminal trial. The exclusion of unwarned statements is a sufficient remedy for any perceived *Miranda* violation, and there is no need to extend the prophylactic rule of *Miranda* to physical evidence obtained as a result of an unwarned but voluntary statement. In this case, defendant was in custody when the MCO informed him he would be arrested for having a gun in his truck without a CPL; at that point, no reasonable person could have believed he or she was free to leave. The trial court therefore correctly ruled that defendant's statement regarding the second and third guns was inadmissible because he was in custody and had not yet received the required *Miranda* warnings when the MCO questioned him about additional weapons. However, the trial court did not find that defendant's second admission related to the two additional guns was involuntary. Accordingly, because the admission was voluntary, the court erred by suppressing the additional guns even though they were discovered on the basis of an inadmissible statement.

Trial court order suppressing defendant's statement that he had additional weapons in the truck affirmed, trial court order suppressing the three guns and defendant's statement about the first gun in his truck reversed, and case remanded for further proceedings.

SEARCHES AND SEIZURES — TRAFFIC STOPS — MISSION OF TRAFFIC STOPS — SAFETY CONCERNS — QUESTIONS RELATED TO WEAPONS IN A MOTOR VEHICLE.

A traffic stop constitutes a seizure and is justified if the police officer has an articulable and reasonable suspicion that the vehicle or one of its occupants is subject to seizure for a violation of law; a traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period; a reasonable period for police inquiries in a traffic stop is determined by the seizure's mission; beyond determining whether to issue a traffic ticket, the mission of a traffic stop includes (1) ordinary inquiries incident to the traffic stop and (2) attending to related safety concerns, including taking certain negligibly burdensome precautions to complete the mission

safely; a police officer may question a lawfully detained person about the presence of weapons in his or her vehicle because the inquiry relates to the officer's ability to conduct the traffic stop in a safe manner (US Const, Am IV).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *J. Stuart Spencer*, Prosecuting Attorney, and *Zackary A. Sylvain*, Assistant Prosecuting Attorney, for the people.

Before: SAWYER, P.J., and O'BRIEN and LETICA, JJ.

PER CURIAM. In this interlocutory appeal, the prosecution appeals by leave granted[1] an order granting a motion in limine filed by defendant, Jason Scott Campbell. The prosecution charged Campbell with three counts of carrying a concealed weapon in a vehicle, MCL 750.227, after Campbell disclosed the presence of the weapons in his vehicle in response to officer questioning during a traffic stop. On Campbell's motion, the trial court suppressed all three firearms and Campbell's statements concerning the same. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On January 19, 2018, Campbell was traveling in a pickup truck and pulling a trailer, on which sat a welding truck he had recently purchased in Minnesota for use in his business. A motor carrier officer (MCO) noticed that a taillight on Campbell's trailer was not working and signaled for Campbell to pull over. The MCO testified that he believed Campbell's vehicle was commercial because of its size and the equipment

[1] *People v Campbell*, unpublished order of the Court of Appeals, entered October 12, 2018 (Docket No. 344078).

Campbell was pulling (the welding truck), which the MCO described as similar to a truck but with unusual equipment mounted to it. The MCO testified that Campbell's pickup truck also had the name of a business, a symbol, and a phone number displayed on the tailgate, but it did not have carrier identification displayed on the sides as required by state and federal regulations.[2] The absence of proper carrier identification did not lead the MCO to believe the vehicle was noncommercial because, in his experience, some drivers are unaware of the requirements applicable to commercial vehicles traveling across state lines.

The traffic stop was recorded, although some of Campbell's responses are difficult to hear. The MCO approached Campbell's vehicle at 7:52 a.m., introduced himself, and advised Campbell that the right taillight on his trailer was out. The MCO asked Campbell about the nature of his travel, and Campbell explained that he was traveling from Minnesota to West Branch, Michigan, to pick up a Bobcat for a friend. The MCO then asked Campbell whether he had any guns or weapons in the vehicle. The MCO testified that he asked Campbell about the presence of weapons because Campbell seemed nervous and Campbell's hands remained on the steering wheel. In the MCO's experience, individuals who have a concealed pistol license (CPL) often exhibit similar behavior. Campbell admitted that he had a firearm, prompting the MCO to ask if Campbell had a CPL. Campbell answered that he did not but explained that he lived in New Mexico, where he did not need a license or permit to carry a firearm in

[2] The MCO later learned that despite the business logo and information appearing on the tailgate, Campbell's pickup truck and the attached trailer were registered to Campbell personally.

his vehicle.[3] The MCO confirmed that the gun was loaded and advised Campbell that he intended to verify the gun's registration. The MCO retrieved the gun as well as Campbell's license and registration.

From the patrol car, the MCO radioed a sheriff's deputy for assistance. The MCO summarized his discovery of the gun and made different statements about whether Campbell's vehicle was commercial. Specifically, the MCO stated his uncertainty about whether Campbell's vehicle was commercial and, therefore, whether the MCO had jurisdiction to conduct the traffic stop;[4] but the MCO also expressed his belief that Campbell might be lying to him. When the sheriff's deputy arrived and indicated that he could not "take over" a traffic stop initiated by the MCO, the MCO remained uncertain regarding how to proceed and radioed his sergeant for guidance.

After consulting with his sergeant, the MCO returned to Campbell's vehicle and advised Campbell that he would be taken to jail for carrying a concealed

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[3] In its written decision granting Campbell's motion and suppressing evidence obtained during the traffic stop, the trial court repeated Campbell's assertion. In its appellate brief, the prosecution questions whether the trial court erred by considering New Mexico gun laws when evaluating the legality of the detention. The prosecution provides no argument on this issue, and we do not read the trial court's decision as drawing a legal conclusion on the basis of its observation about New Mexico gun laws. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we decline to address this issue.

[4] MCOs have "all powers conferred upon peace officers for the purpose of enforcing the general laws of this state as they pertain to commercial vehicles." MCL 28.6d(1). While on duty, an MCO is also authorized to make an arrest without a warrant if the MCO "has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person [arrested] committed it." MCL 28.6d(2)(b).

gun without a CPL. The MCO asked Campbell if he had any more weapons in the vehicle, and Campbell disclosed two additional guns. After handcuffing Campbell and placing him in the patrol car, the MCO and the sheriff's deputy searched Campbell's vehicle and located the two additional weapons. The MCO then read Campbell his *Miranda*[5] rights and questioned Campbell further about the guns.

The trial court granted Campbell's motion in limine, noting that "[t]here was no insignia on [Campbell's] vehicle to suggest [it] was registered as a commercial vehicle" and that the MCO quickly came to the conclusion that Campbell was not a commercial carrier. The trial court found no evidence to support the MCO's justification for initially asking Campbell about weapons in the vehicle, i.e., that Campbell was acting nervous, and determined that the MCO's subsequent questioning about additional weapons constituted custodial interrogation without the benefit of *Miranda* warnings. Accordingly, the trial court suppressed all the evidence from the traffic stop, including Campbell's admissions about the weapons and the weapons themselves.

II. STANDARDS OF REVIEW

We review de novo constitutional issues and the application of the exclusionary rule. *People v Jones*, 260 Mich App 424, 427; 678 NW2d 627 (2004). The trial court's factual findings with respect to a motion to suppress are reviewed for clear error. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). "A finding is clearly erroneous when it leaves this Court with a definite and firm conviction that the trial

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

court made a mistake." *Id*. When the record contains a video recording of the events in question, however, this Court "need not rely on the trial court's conclusions as to what the video contains." *People v Kavanaugh*, 320 Mich App 293, 298; 907 NW2d 845 (2017). We review de novo questions of statutory interpretation. *People v Anderson*, 501 Mich 175, 182; 912 NW2d 503 (2018).

III. ANALYSIS

A. COMMERCIAL VEHICLE

The prosecution first defends the MCO's authority to make the traffic stop, arguing that Campbell's vehicle was commercial and that the MCO made a reasonable mistake of fact or law when he determined that Campbell's vehicle was not commercial. Despite repeatedly referring to the MCO's conclusion that the vehicle was not commercial, the trial court did not analyze the relevant statutes or make that finding itself. Instead, the trial court premised suppression of the evidence on constitutional principles embodied in the Fourth and Fifth Amendments. Nonetheless, in the interest of judicial expediency and to provide guidance on remand, we will briefly address the prosecution's contention that Campbell was operating a commercial vehicle when he was pulled over by the MCO.

This Court's primary goal in construing a statute is to determine and give effect to the intent of the Legislature, turning first to the statutory language to ascertain that intent. *People v Baham*, 321 Mich App 228, 237; 909 NW2d 836 (2017). In construing a statute, we interpret defined terms in accordance with their statutory definitions and undefined terms in accordance with their ordinary and generally accepted meanings. *People v Giovannini*, 271 Mich App 409,

413; 722 NW2d 237 (2006). "[W]hen statutory language is unambiguous, judicial construction is not required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

MCL 28.6d(1) authorizes the director of the Michigan State Police to "appoint officers with limited arrest powers for motor carrier enforcement." "Such officers . . . shall have all powers conferred upon peace officers for the purpose of enforcing the general laws of this state as they pertain to commercial vehicles." *Id*. The Michigan Vehicle Code, MCL 257.1 *et seq*., defines the term "commercial vehicle" to include

> all motor vehicles used for the transportation of passengers for hire, or constructed or used for transportation of goods, wares, or merchandise, and all motor vehicles designed and used for drawing other vehicles that are not constructed to carry a load independently or any part of the weight of a vehicle or load being drawn. Commercial vehicle does not include a limousine operated by a limousine driver, a taxicab operated by a taxicab driver, or a personal vehicle operated by a transportation network company driver. [MCL 257.7.]

The prosecution contends that Campbell's pickup truck and trailer satisfied this definition of a commercial vehicle. We agree. Campbell's pickup truck was a "vehicle that is self-propelled" and was therefore a "motor vehicle." MCL 257.33. While the pickup truck itself may not have fully satisfied the quoted statutory definition of a commercial vehicle, it is highly relevant that Campbell was pulling a trailer at the time he was stopped by the MCO. In pertinent part, the Michigan Vehicle Code defines a "vehicle" as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices

exclusively moved by human power or used exclusively upon stationary rails or tracks . . . .” MCL 257.79. Although the evidence concerning the nature of the trailer is limited, it was clearly used to transport property under the power of the pickup truck to which it was attached. Additionally, it was neither self-propelled in any manner nor of a size or class that would permit transportation of its load without motive power from another vehicle or motor vehicle. Accordingly, we agree that Campbell's pickup truck was a “motor vehicle[] designed and used for drawing other vehicles that are not constructed to carry a load independently or any part of the weight of a vehicle or load being drawn.” MCL 257.7.

While we recognize that the Michigan Vehicle Code separately defines the term “commercial *motor* vehicle,” MCL 257.7a (emphasis added), and, in doing so, includes a personal-use exception, it is unnecessary at this juncture to consider whether that exception was applicable to Campbell. First, Campbell indicated that the welding truck he was transporting on the trailer was for use in his business. The pickup truck itself also bore a business name and telephone number on the tailgate, suggesting that it, too, was used in Campbell's business. Thus, he was not using the pickup truck and trailer “exclusively to transport personal possessions or family members for *nonbusiness* purposes.” MCL 257.7a(2) (emphasis added). Second, even if we were to determine that Campbell was not operating a commercial vehicle and that the MCO, therefore, did not have authority to initially detain Campbell under MCL 28.6d, exclusion of the evidence would not be the automatic remedy. See *People v Hamilton*, 465 Mich 526, 532-534; 638 NW2d 92 (2002) (stating that the “exclusionary rule only applies to constitutionally invalid arrests” and that “statutory violations do not

render police actions unconstitutional"), abrogated in part on other grounds by *Bright v Ailshie*, 465 Mich 770, 775 n 5; 641 NW2d 587 (2002). Consequently, we do not consider this issue dispositive.

B. INITIAL INQUIRIES LEADING TO DISCOVERY OF THE FIRST GUN

The prosecution next argues that the MCO could lawfully ask Campbell if he had a weapon in the vehicle at the beginning of the traffic stop and that the MCO had authority to extend the stop once Campbell admitted he had a loaded weapon in the vehicle and no CPL. We agree.

The Fourth Amendment protects against unlawful searches and seizures. *People v Stevens (After Remand)*, 460 Mich 626, 634; 597 NW2d 53 (1999). "[A] 'seizure' within the meaning of the Fourth Amendment occurs when, in view of all the circumstances, a reasonable person would conclude that he or she was not free to leave." *Kavanaugh*, 320 Mich App at 300. A traffic stop amounts to a seizure under the Fourth Amendment, and it is "justified if the officer has an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *People v Simmons*, 316 Mich App 322, 326; 894 NW2d 86 (2016) (quotation marks and citation omitted). Whether a reasonable suspicion justifies a traffic stop depends on a commonsense view of the totality of the circumstances. *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012). "An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience." *People v Steele*, 292 Mich App 308, 315; 806 NW2d 753 (2011).

Michigan has recognized that "[a] traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable ques-

tions concerning the violation of law and its context for a reasonable period." *People v Williams*, 472 Mich 308, 315; 696 NW2d 636 (2005). In *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015), the United States Supreme Court repeated this proposition, analogizing a routine traffic stop to a *Terry*[6] stop and stating that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission[.]' " Thus, authority for the traffic stop ends when "tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id*. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " *Id*. at 355 (citation omitted; alteration in original). The Court further held that the "mission" of a traffic stop includes attending to related safety concerns such that officers are permitted to "take certain negligibly burdensome precautions in order to complete [the] mission safely." *Id*. at 354, 356. On the other hand, when an officer's inquiries are unrelated to the mission of the seizure—that is, unrelated "to address[ing] the traffic violation that warranted the stop and attend[ing] to related safety concerns," *id*. at 354 (citation omitted)—those inquiries can withstand constitutional scrutiny only when they "do not measurably extend the duration of the stop," *id*. at 355 (quotation marks and citation omitted).

In a factually analogous case, the Supreme Court of Wisconsin recently considered whether in the absence of reasonable suspicion, an officer conducting a traffic stop could ask a detained motorist whether he or she had a weapon in the vehicle and whether the motorist held a permit to carry a concealed weapon. *State v*

[6] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Wright, 386 Wis 2d 495, 500; 2019 WI 45; 926 NW2d 157 (2019). Relying largely on *Rodriguez* and Wisconsin caselaw interpreting the same, the court held that the officer was free to question the motorist about the presence of weapons in the vehicle because the question pertained to part of the mission of the traffic stop—that is, it was "a negligibly burdensome precaution taken to ensure officer safety." *Id*. at 508. In contrast, the court determined that the officer's follow-up question regarding the motorist's concealed weapon permit did not relate to the purpose of the traffic stop. *Id*. at 509-510. The court explicitly rejected the state's argument that the inquiry was also related to officer safety, reasoning that "[i]t is the potential presence of a weapon that implicates the safety of the officer, not whether the weapon is being lawfully carried . . . ." *Id*. at 510. However, despite its determination that the permit inquiry was unrelated to the mission of the stop, the court still concluded that the question did not offend the constitutional prohibition against unreasonable search and seizure because the question was asked while "mission-related activities were occurring" and did not measurably extend the duration of the stop. *Id*. at 513-514.

Although we are not compelled to reach the same result, we agree with the *Wright* court's analysis of this issue. See *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011) ("We are not bound by the decisions of . . . courts of other states, but we may consider them to be persuasive authority."). The *Wright* court's opinion is well-reasoned and consistent with binding precedent from both the United States Supreme Court and the Supreme Court of this state. See *Rodriguez*, 575 US at 354-357 (explaining that the lawful duration of a traffic stop is determined by the time necessary to complete mission-related activities,

including those involving officer safety, and that the Fourth Amendment tolerates certain unrelated investigations that do not lengthen the roadside detention); *Williams*, 472 Mich at 315 ("A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period."). As the United States Supreme Court has repeatedly recognized, a police officer conducting a traffic stop is faced with legitimate dangers arising from the stop. See *Maryland v Wilson*, 519 US 408, 413; 117 S Ct 882; 137 L Ed 2d 41 (1997) (noting statistics concerning officer assaults and deaths during traffic pursuits and stops); *Michigan v Long*, 463 US 1032, 1049; 103 S Ct 3469; 77 L Ed 2d 1201 (1983) (noting that "roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect."); *Pennsylvania v Mimms*, 434 US 106, 110; 98 S Ct 330; 54 L Ed 2d 331 (1977) (recognizing the "inordinate risk confronting an officer as he approaches a person seated in an automobile"). The concern for officer safety in an inherently dangerous situation provides a compelling reason to permit police officers to take preventative action designed to ensure they are able to complete the traffic stop safely. We hold, therefore, that a police officer is free to question a lawfully detained person about the presence of weapons in his or her vehicle because such an inquiry relates to the officer's ability to conduct the traffic stop in a safe manner. *Rodriguez*, 575 US at 354-357.

In this case, the MCO initiated the traffic stop because Campbell had a broken taillight. Campbell has not contested this fact or the understanding that the broken taillight violated a requirement of the

Michigan Vehicle Code. See *People v Williams*, 236 Mich App 610, 615; 601 NW2d 138 (1999) (holding that "a motor vehicle equipped with multiple tail lamps is in violation of [MCL 257.686(2)] if one or more of its tail lamps is inoperative"). Less than 90 seconds after the MCO approached Campbell's vehicle and began conversing with him, the MCO became concerned that Campbell might be armed and asked if there were any weapons in the vehicle. After Campbell acknowledged having a handgun in his driver's-side door, the MCO asked Campbell if he had a CPL. Campbell answered no. The MCO then took possession of the gun to verify its registration and determine what course of action was appropriate. The trial court determined that the MCO's explanation for believing Campbell might be armed was incredible and impliedly held that the MCO's questions and resulting investigation caused an unreasonably long detention.

The trial court erred in this regard because the legality of the MCO's questions does not turn on the credibility of his beliefs. The MCO's first question concerning the presence of weapons in the vehicle was designed to ensure that he could complete the traffic stop safely and was, therefore, related to the purpose of the stop. *Rodriguez*, 575 US at 354, 356. And although the MCO's next question regarding whether Campbell possessed a CPL was not strictly related to the purpose of the stop, the question itself did not unreasonably prolong the duration of the stop. Consequently, it did not render the otherwise lawful stop unconstitutional. *Id*. at 354-355. See also *Wright*, 386 Wis 2d at 513-514. Thereafter, in light of Campbell's early admissions, there was probable cause to believe that Campbell had committed the felony of carrying a concealed weapon, and the MCO could lawfully extend the stop to investigate the matter.

Williams, 472 Mich at 315 ("[W]hen a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised."). See also MCL 28.6d(2)(b) (extending an MCO's limited arrest authority to circumstances in which the MCO "has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person committed it").

Having concluded that the MCO's initial questions at the outset of the stop did not violate the Fourth Amendment protection against unreasonable search and seizure, we further conclude that neither Campbell's responses to those questions nor the first gun should have been suppressed. "The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreasonable searches and seizures" by barring admission of "materials seized and observations made during an unconstitutional search." *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003). The trial court erred by suppressing evidence of Campbell's admissions regarding the first gun and his lack of a CPL as well as the evidence of the MCO's seizure of the first gun because that evidence was not the product of an unconstitutional search or seizure.

C. LATER QUESTIONING LEADING TO DISCOVERY OF SECOND AND THIRD GUNS

With respect to the MCO's later questioning and Campbell's admissions regarding the second and third guns in his vehicle, the trial court said:

> It is abundantly clear that [Campbell] was not read his *Miranda* rights until some time after his arrest and the admission of [Campbell] to the MCO . . . about the other two weapons in the vehicle. Given all of the events in the

> general sequence, as further described below and not withstanding [sic] an argument for inevitable discovery, . . . the Court finds that the admissions of [Campbell] as to the other weapons in the vehicle, and the seizure of the same, must be suppressed.

The prosecution does not challenge the suppression of Campbell's secondary, unwarned statements about the additional guns in the vehicle, which the trial court properly suppressed. Instead, the prosecution argues that the two additional guns themselves are admissible.

The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V. To protect this right, police officers must advise a defendant of certain rights before a custodial interrogation. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "[A] motorist detained for a routine traffic stop or investigative stop is ordinarily not in custody within the meaning of *Miranda*." *Steele*, 292 Mich App at 317. However, *Miranda* warnings "are required when a person is in custody or otherwise deprived of freedom of action in any significant manner." *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). "Whether a defendant is in custody for purposes of *Miranda* at the time of an interrogation is determined by looking at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he or she was free to leave." *People v Jones*, 301 Mich App 566, 580; 837 NW2d 7 (2013). "If the custodial interrogation is not preceded by an adequate warning, statements made during the custodial interrogation may not be introduced into evidence at the accused's criminal trial." *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013).

In this case, after a sergeant instructed the MCO to arrest Campbell, the MCO returned to Campbell's vehicle and advised Campbell that he would be arrested for having a gun in his vehicle without being licensed to carry a concealed weapon. Campbell was undoubtedly in custody at that point as no reasonable person could have believed he or she was free to leave. *Jones*, 301 Mich App at 580. Nonetheless, without advising Campbell of his rights as required by *Miranda*, the MCO proceeded to ask Campbell if he had any other weapons in the vehicle, prompting Campbell to disclose the location of two additional loaded guns. Because Campbell was clearly in custody when the MCO questioned him about additional weapons and had not received the necessary *Miranda* warnings, the trial court correctly ruled that Campbell's statement regarding the second and third guns was inadmissible. *Elliott*, 494 Mich at 301. However, it does not necessarily follow that the guns discovered following Campbell's unwarned admission are inadmissible. See *People v Frazier*, 478 Mich 231, 247; 733 NW2d 713 (2007) (explaining that suppression of evidence is a harsh remedy and used only as a last resort).

The prosecution, citing *United States v Patane*, 542 US 630; 124 S Ct 2620; 159 L Ed 2d 667 (2004), argues that the two additional guns were admissible because Campbell's statement about the additional weapons was voluntary, even though the statement was elicited in violation of *Miranda*. In *Patane*, the Supreme Court focused on the protection afforded by the Self-Incrimination Clause of the Fifth Amendment, which it described as "a prohibition on compelling a criminal defendant to testify against himself at trial." *Id*. at 637. The Court reasoned that the right against compelled self-incrimination "cannot be violated by the introduc-

tion of nontestimonial evidence obtained as a result of voluntary statements." *Id*. The Court further explained:

> Introduction of the nontestimonial fruit of a voluntary statement . . . does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy" for any perceived *Miranda* violation. There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to [the physical fruit of a voluntary, albeit unwarned, statement]. [*Id*. at 643 (citations omitted; first alteration in original).]

Even before *Patane*, the Michigan Supreme Court observed that application of the exclusionary rule to evidence obtained as a result of a *Miranda* violation is not a foregone conclusion because a violation of *Miranda* is not, in and of itself, a violation of the Constitution. *People v Kusowski*, 403 Mich 653, 660-661; 272 NW2d 503 (1978). Instead, when the prosecution failed to demonstrate that the defendant had adequately waived his privilege against self-incrimination and his right to counsel, but there was no evidence of coercive police conduct compelling the defendant's statements, the Court held that third-party testimony discovered as a result of the defendant's unwarned statements need not be suppressed. *Id*. at 659-662.

Given our own precedent in *Kusowski* and the Supreme Court's clear ruling on this issue in *Patane*, the trial court erred by suppressing the second and third guns as a result of the MCO's failure to give Campbell *Miranda* warnings before questioning him about the presence of additional weapons. As stated by the Supreme Court in *Patane*: "[P]olice do not violate a

suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." *Patane*, 542 US at 641. Physical evidence obtained as a result of an unwarned statement remains admissible as long as the statement was voluntary. *Id*. at 634, 637, 643-644. It is only the physical fruits of an actually coerced statement that must be suppressed to serve the deterrent purpose of the exclusionary rule. *Id*. at 643-644. The trial court made no finding that Campbell's second admission was involuntary and, therefore, erred by suppressing the second and third guns on the basis of a *Miranda* violation.

IV. CONCLUSION

We affirm the trial court's suppression of Campbell's statement that he had additional weapons in the vehicle. We reverse the trial court's suppression of the three guns and Campbell's statement about the first gun in the vehicle. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAWYER, P.J., and O'BRIEN and LETICA, JJ., concurred.

HERNANDEZ v MAYORAL-MARTINEZ

Docket No. 347131. Submitted July 10, 2019, at Grand Rapids. Decided July 23, 2019, at 9:15 a.m.

Jose G. Hernandez brought an action in the Kent Circuit Court against Victoria Mayoral-Martinez for custody of the parties' minor child. Plaintiff and defendant never married but were in a romantic relationship for several years. In June 2016, defendant gave birth to a child in Michigan. Plaintiff signed an affidavit of parentage the next day. The parties' relationship ended sometime after the child's birth. In May 2017, defendant went with the child to Mexico to visit relatives. Defendant returned to Michigan in November 2017 without the child. In November 2018, plaintiff brought the instant action for custody and requested that the circuit court order the child's return to Michigan. The circuit court, Deborah L. McNabb, J., found that Michigan was the child's home state under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., and ordered defendant to arrange for the child's return to Michigan. Defendant moved to vacate the order, arguing that Mexico had home-state jurisdiction because the child had been living there since May 2017. Defendant asserted that the maternal grandmother had initiated proceedings in Mexico regarding the child and that the Mexico court would likely find jurisdiction over the child. The circuit court held a hearing on defendant's motion and found that Mexico was the child's home state. The court therefore vacated its prior orders and dismissed the case for lack of subject-matter jurisdiction. Plaintiff appealed.

The Court of Appeals *held*:

1. The UCCJEA governs child custody proceedings involving Michigan and a proceeding or party outside the state. The UCCJEA treats foreign countries as another "state" for jurisdictional purposes. The primary jurisdictional basis is MCL 722.1201(1)(a), which provides that a court can assert jurisdiction when Michigan is the child's home state or was the home state within six months of the commencement of the proceedings. MCL 722.1102(g) defines "home state" as the state in which a child lived with a parent or a person acting as a parent for at least six

consecutive months immediately before the commencement of a child custody proceeding. In this case, the child had lived in Mexico since May 2017, so when the proceedings commenced in November 2018, Michigan was not the child's home state nor had it been in the prior six months. Accordingly, the circuit court correctly concluded that it did not have home-state jurisdiction.

2. Under MCL 722.1201(1)(b), when Michigan is not the child's home state, the next question is whether another state is the child's home state, which occurs when the court finds both of the following: the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and substantial evidence is available with this state concerning the child's care, protection, training, and personal relationships. Under MCL 722.1102(m), a "person acting as a parent" means a person, other than a parent, who meets both of the following: the person has physical custody of the child or has had physical custody for a period of six consecutive months, including a temporary absence, within one year immediately before the commencement of a child custody proceeding; and the person has been awarded legal custody by a court or claims a right to legal custody under the law of this state. In this case, the circuit court determined that Mexico was the child's home state because she had been living there with "a person acting as a parent," i.e., the maternal grandmother. However, at the time the circuit court made its ruling, the grandmother had not been awarded legal custody of the child. Although there were suggestions that the grandmother was seeking custody in Mexico, that did not amount to the grandmother claiming "a right of custody under the law of this state." Accordingly, under the UCCJEA, the child had not been living in Mexico with a person acting as a parent. The circuit court erred by ruling that Mexico was the child's home state.

3. When there is no home state, the next step is to consider whether Michigan has "significant connection" jurisdiction under MCL 722.1201(1)(b). In this case, the circuit court found in its order dismissing the case that the child "no longer has significant connections with the State of Michigan other than her parents being present in this state." However, this finding was erroneous. The child did have a significant connection with Michigan because she was born in Michigan and lived in Michigan for almost the entire first year of her life. Further, the child's parents continue to live in Michigan. The circuit court only partially considered whether it had significant-connection jurisdiction.

Accordingly, remand was necessary for the trial court to fully consider whether it has jurisdiction under MCL 722.1201(1)(b).

Reversed and remanded; jurisdiction retained.

Avanti Law Group, PLLC (by *Amy Grauman*) for plaintiff.

Victoria Mayoral-Martinez *in propria persona*.

Before: SAWYER, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. Plaintiff-father appeals the circuit court's order dismissing this case for lack of subject-matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. The court's ruling was based on its conclusion that Mexico was the minor child's "home state." However, in this case the child did not have a home state as that term is defined by the UCCJEA. Accordingly, we reverse and remand to the circuit court so that it may fully consider whether it has jurisdiction under the UCCJEA.

I. BACKGROUND

The parties never married but were in a romantic relationship for several years. In June 2016, defendant-mother gave birth to a daughter in Michigan. The next day plaintiff signed an affidavit of parentage, which granted defendant "initial custody" of the child. MCL 722.1006. The parties' relationship ended sometime after the child's birth. In May 2017, defendant went with the child to Mexico to visit relatives. According to plaintiff, in November 2017 defendant returned to Michigan without the child. The circuit court found that the child has been living with the maternal grandmother in Mexico since May 23, 2017.

In November 2018, plaintiff filed a complaint for custody and requested that the circuit court order the child's return to Michigan. He asserted that the court had subject-matter jurisdiction under the UCCJEA. Defendant appeared *in propria persona* for the hearing and said that she took the child to Mexico to keep her from plaintiff. Defendant considered plaintiff "a threat" to her and the child. The court found that Michigan was the child's home state under the UCCJEA and ordered defendant to arrange for the child's return to Michigan.

Defendant obtained counsel and moved the circuit court to vacate its prior order. Defendant argued that Mexico, not Michigan, had home-state jurisdiction because the child had been living there since May 2017. Defendant asserted that the maternal grandmother had initiated a "custody action" in Mexico but also referred to that matter as a "guardianship proceeding[]." Defendant argued that the Mexico court would likely find jurisdiction over the child and asked the circuit court to defer to those proceedings.

A hearing on defendant's motion was held in December 2018. Both parties presented arguments regarding jurisdiction under the UCCJEA. The circuit court found that Mexico was the child's home state and that there was no indication that Mexico had declined jurisdiction or was likely to do so. Accordingly, the court vacated its prior orders and dismissed the case for lack of subject-matter jurisdiction.

II. ANALYSIS

Plaintiff argues that the circuit court erred by determining that it lacked jurisdiction under the UCCJEA. We agree with plaintiff that the court erred by finding that Mexico was the child's home state. As

will be discussed, that ruling was erroneous because the child had not been living in Mexico with "a person acting as a parent" as that phrase is defined by the UCCJEA. Given its ruling, the circuit court did not fully consider the UCCJEA's other jurisdictional bases. Accordingly, we reverse the court's order and remand so that the court can decide whether it has jurisdiction under the provisions that apply when no state falls within the definition of home state.[1]

The UCCJEA governs child custody proceedings involving Michigan and a proceeding or party outside of the state. *Cheesman v Williams*, 311 Mich App 147, 151; 874 NW2d 385 (2015). The act treats foreign countries as another "state" for jurisdictional purposes. MCL 722.1105(1). Section 201 of the UCCJEA explains when a court has jurisdiction to make an "initial child-custody determination." MCL 722.1201. The primary jurisdictional basis is MCL 722.1201(1)(a), which provides that a court can assert jurisdiction when Michigan is the child's home state or was the home state within six months of the commencement of the proceedings. Home state is defined as "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding." MCL 722.1102(g). In this case, the child has lived in Mexico since May 2017. So when the proceedings commenced in November 2018, Michigan was not the child's home state nor had it been in the prior six months. The circuit court correctly concluded that it did not have home-state jurisdiction.

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[1] We review de novo whether a circuit court has jurisdiction under the UCCJEA. *Cheesman v Williams*, 311 Mich App 147, 150; 874 NW2d 385 (2015).

When Michigan is not the child's home state, the next question is whether another state is the child's home state. See MCL 722.1201(1)(b); *Cheesman*, 311 Mich App at 154. In this case, the circuit court determined that Mexico was the child's home state because she had been living there with "a person acting as a parent," i.e., the maternal grandmother. However, the phrase "person acting as a parent" has a unique meaning under the UCCJEA that the grandmother in this case does not meet. That phrase is defined as follows:

> (m) "Person acting as a parent" means a person, other than a parent, who meets both of the following criteria:
>
> (*i*) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.
>
> (*ii*) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state. [MCL 722.1102(m).]

At the time the circuit court made its ruling, the grandmother had not been awarded legal custody of the child. Although there were suggestions that the grandmother was seeking custody in Mexico, that does not amount to the grandmother claiming "a right to legal custody under the law of *this state*." MCL 722.1102(m)(*ii*) (emphasis added).[2] So according to the UCCJEA, the child has not been living in Mexico with a person acting as a parent. The circuit court therefore erred by ruling that Mexico was the child's home state.

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[2] We note that in Michigan a third party could not seek custody in this case because the parent who has custody, i.e., defendant, is not dead or missing. See MCL 722.26c(1)(b)(*ii*).

When there is no home state, the next step is to consider whether Michigan has "significant connection" jurisdiction under MCL 722.1201(1)(b). A court has jurisdiction pursuant to that provision when the following circumstances are present:

> (b) A court of another state does not have jurisdiction under subdivision (a) [i.e., there is no home state], . . . and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships. [MCL 722.1201(1)(b).]

The circuit court partially considered whether it had jurisdiction on this basis. The court found in its order dismissing the case that the child "no longer has significant connections with the State of Michigan other than her parents being present in this state." But this finding was clearly erroneous. The child has a significant connection with Michigan because she was born here and lived here for almost the entire first year of her life. Further, her parents continue to live in Michigan. The phrase "mere physical presence" indicates that presence alone is not enough for jurisdiction.[3] For instance, a state would not have significant connections to a family when a parent initiates custody proceedings upon first arrival. That is not to say, however, that the parents' continued presence in the state is insignificant. Clearly it is a relevant factor that strengthens the child's connection with the state. In this case, the

[3] See also MCL 722.1201(3) ("Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.").

fact that the child was born in Michigan, as well her parents' continued presence here, convinces us that she has a sufficient connection to the state for purposes of MCL 722.1201(1)(b).

At the hearing, the circuit court briefly considered whether there was "substantial evidence" relating to the child in Michigan, although it did not make any express findings on this matter in its order. Certainly evidence of the child's current care and well-being exists in Mexico. But defendant informed the court that she talks with the child daily and sends money to the child. Further, custody determinations depend in large part on the parents' fitness and ability to provide care. See MCL 722.23(a) through (*l*) (best-interest factors). And there is substantial evidence of those factors in Michigan, where the parents reside. The purpose of the substantial-evidence prong is clear: "The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination." 9 ULA § 201, comment, p 672. Given that both parents have resided in Michigan for some time, it would seem that there is sufficient evidence here for the circuit court to make such a determination.

In sum, the circuit court only partially considered whether it had significant-connection jurisdiction. Presumably, the court gave short shrift to that matter because it determined that Mexico was the child's home state. Given that the primary reason for the court's order was erroneous, we remand so that the trial court can fully consider whether it has jurisdiction under MCL 722.1201(1)(b). In making that determination, the court may receive evidence and additional arguments from the parties. See *Cheesman*, 311 Mich App at 154-155. If the court concludes that it does

not have jurisdiction under MCL 722.1201(1)(b), then it should consider whether MCL 722.1201(1)(d) applies.[4] *Id*. at 154.

If on remand the circuit court concludes that it has jurisdiction, it nonetheless has discretion to decline jurisdiction if it finds that it is an inconvenient forum for the custody dispute. MCL 722.1207. Before making that determination, however, the court is to consider various factors. MCL 722.1207(2). And even if the court finds that a court of another state is a more appropriate forum, the remedy is not a dismissal; rather, the court must "stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." MCL 722.1207(3).

Whether the circuit court is an appropriate forum for this dispute may arise on remand. In that event, the circuit court shall comply with MCL 722.1207 and make factual findings as necessary. We also note that the official comment to the UCCJEA recommends communication with the other forum in these circumstances. See 9 ULA § 207, comment, p 683. A clarification and update on the Mexico proceedings may prove helpful to the circuit court in making its decisions. On that note, we acknowledge the possibility that the Mexico court may have made a custody determination regarding the child. If so, the parties and the court should address whether that order would be enforceable in Michigan. See MCL 722.1105(2) (providing that a foreign country's child custody determination is enforceable only when it is made "under factual circum-

[4] MCL 722.1201(1)(d) provides a Michigan court with jurisdiction to make the initial custody determination when "[n]o court of another state would have jurisdiction under subdivision (a), (b), or (c)."

stances in substantial conformity with the jurisdictional standards of this act").

Reversed and remanded. We retain jurisdiction.

SAWYER, P.J., and BORRELLO, J., concurred with SHAPIRO, J.

MAZZOLA v DEEPLANDS DEVELOPMENT COMPANY LLC

Docket No. 343878. Submitted June 4, 2019, at Detroit. Decided July 25, 2019, at 9:00 a.m.

Thomas Mazzola and Kathryn Mazzola, Edward Schervish and Rhonda Schervish, and others, residents of subdivisions in the village of Grosse Pointe Shores known as Deeplands Subdivision One and Deeplands Subdivision Two, brought an action in the Wayne Circuit Court against Deeplands Development Company LLC, seeking to impose restrictive covenants on defendant to prevent the development of a cul-de-sac and residential buildings on real property adjacent to the subdivisions. The subdivisions and adjacent property (the subject property) originally had common owners. Following the death of the last surviving owner's heir, defendant purchased the subject property. The subdivisions were subject to certain deed restrictions pursuant to declarations made by the original owners. As part of the declarations and in consideration for her retention of the subject property, one of the original owners, Annette Stackpole, made additional commitments with respect to any future development of the subject property. The declarations applicable to the first subdivision provided that any building therein had to have street frontage of at least 100 feet, while the declarations applicable to the second subdivision required any building erected therein to have street frontage of 80 to 100 feet, depending on the street at issue. The commitments applicable to the subject property included stipulations regarding the minimum distance of the front building line from the street, minimum distances for construction of any dwelling from the dwelling owner's boundary lines, and required the minimum size of dwellings constructed on the property to conform to the minimum sizes stipulated in the declarations for the subdivisions. Plaintiffs argued that the subject property was subject to the declarations restricting the subdivisions as well as to the commitments and that defendant's development plan violated the declarations and commitments. Alternatively, plaintiffs argued that the doctrine of reciprocal negative easements precluded defendant from carrying out its development plan. Defendant moved for summary disposition, and the court, Sheila

A. Gibson, J., granted the motion, holding that the covenants did not limit the development of the subject property as described by plaintiffs. Plaintiffs appealed.

The Court of Appeals *held*:

1. Plaintiffs argued that the declarations and commitments encumbered the subject property in three ways. First, plaintiffs argued that no new streets could be constructed on the subject property. However, this argument was not supported by either the declarations or the commitments. According to plaintiffs, the requirement in the commitments that the front building line of any new development in the subject property be at least 35 feet from South Deeplands Road implied that any new buildings also had to face South Deeplands Road. Plaintiffs also noted that Lots 25 through 44 in the subdivisions faced South Deeplands Road and argued that the commitment requiring any new buildings on the subject property to conform to the minimum-size requirements of Lots 25 through 44 meant that any new buildings also had to face South Deeplands Road. The commitment did not, however, require that the building lot actually abut South Deeplands Road; the front building line could be on a lot that abuts a newly developed street as long as that front building line was at least 35 feet from South Deeplands Road. Additionally, the fact that Lots 25 through 44 faced South Deeplands Road had nothing to do with the fact that Stackpole committed the subject property to the same minimum-size requirements as the lots; therefore, the commitments did not require new buildings to face South Deeplands Road. When express restrictive covenants exist, courts may not infer restrictions that were not expressly provided in the controlling documents. Second, plaintiffs argued that any future lot divided from the subject property had to have minimum frontage of 100 feet on South Deeplands Road, but that was a misreading of the declarations and commitments. The 100 foot-minimum-frontage requirement appeared in two parts of the declarations. The first part, applicable to Subdivision One, stated only that a lot must have 100 feet of frontage on *a* street, with no stipulation that the street be South Deeplands Road. The second part, applicable to Subdivision Two, included a minimum frontage requirement of only 80 feet, and although it specifically referred to South Deeplands Road, it also referred to other streets in the subdivision. A fair reading of this covenant did not mandate that any new development *must have* frontage on one of the named streets; rather, *if* the new development has frontage on one of the named streets, *then* the minimum-frontage requirement would apply. Third, plaintiffs argued that a commitment

that the "portion" of the subject property directly abutting South Deeplands Road would be subject to certain building-frontage and lot-size requirements meant that the subject property could not be divided to create new parcels that did not abut South Deeplands Road. In other words, plaintiffs asserted that because all of the subject property abutted South Deeplands Road, Stackpole committed that all of the property would always abut South Deeplands Road. But the commitment in no way suggested that defendant could not divide the property and continue to maintain the building-frontage and lot-size requirements for those parcels abutting South Deeplands Road while also creating new parcels that did not abut South Deeplands Road. Further, plaintiffs' argument that a new street could not be built on the subject property because Stackpole did not expressly reserve that right was without merit. Absent a restrictive covenant or reciprocal negative easement, the property owner retains the free, lawful use of the property. Stackpole, as the property owner, did not need to expressly reserve the free and lawful use of her property; the property was hers to enjoy unless and until she voluntarily restricted its use.

2. In general, the doctrine of reciprocal negative easements applies when a property owner divides the parcel, retains some of the land, and includes a restriction on the land that is conveyed, but evidences a scheme or intent that the entire tract should be treated similarly. The doctrine was not applicable in this case because the parties agreed that the covenants were applicable to the subject property as well as to the subdivisions.

3. In order to show that summary disposition was premature, a party must show that further discovery presents a fair likelihood of uncovering factual support for the party's position. Plaintiff did not show that any disputed factual issues existed for which additional discovery would be helpful, so the trial court did not err by granting summary disposition prior to formal discovery.

Affirmed.

COVENANTS — RESTRICTIVE COVENANTS — RECIPROCAL NEGATIVE EASEMENTS.

The doctrine of reciprocal negative easements applies when a property owner subdivides the property, retains one of the subdivided lots, and places a restriction on the lots that are conveyed while evidencing an intent that the entire tract be treated similarly; the doctrine is not applicable in cases involving restrictive covenants that are expressly applicable to both the retained and conveyed parcels.

Giarmarco, Mullins & Horton, PC (by *Dennis M. Rauss*) and *John B. Lizza* for plaintiffs.

Abbott Nicholson, PC (by *William D. Gilbride, Jr.*, *Christopher R. Gura*, and *Erin R. Cobane*) for defendant.

Before: GADOLA, P.J., and BOONSTRA and SWARTZLE, JJ.

SWARTZLE, J. Restrictive covenants and negative reciprocal easements on real property implicate two fundamental freedoms—the freedom to contract and the freedom to use property. When an owner voluntarily agrees to restrict a particular use of real property, the owner need not, at the same time, also reserve all of the other, lawful uses of the property. The freedom to use real property is the baseline, and it is the restriction of that freedom through covenants and easements that must be made with clarity and particularity.

In this action, plaintiffs seek to impose a restrictive covenant or reciprocal negative easement on their neighbor's real property to prevent the development of a cul-de-sac and 18 residential buildings. Because the neighbor's proposed development plan does not run afoul of the actual restrictive covenants and there is no basis to impose a reciprocal negative easement, we affirm the trial court's grant of summary disposition to the neighbor.

I. BACKGROUND

Plaintiffs reside in the village of Grosse Pointe Shores in subdivisions known as Deeplands Subdivision One (Subdivision 1) and Deeplands Subdivision

Two (Subdivision 2). In the early 1950s, the land now occupied by the two subdivisions and the land at issue in this appeal (the subject property)—a 7.83-acre parcel of land located at 55 South Deeplands Road—were owned by common owners. In 1953, the owners chose to divide their property and create the subdivisions, and in so doing, the owners subjected the subdivisions to specific deed restrictions outlined in two formal declarations. With respect to Subdivision 1, the declarations provide:

> II A — Building Sites
>
> 1. Definition and Minimum Sizes — Nothing contained herein shall be so construed as to prevent any owner of property from erecting a permitted type of residential building on a site consisting of one full platted lot, plus all or any fraction of adjacent lots in the Grantors, without reference to the platted lot lines other than to observe the building line requirements set forth in Section III C hereof. The minimum size of building sites shall be, for each lot, the lot as shown on said plat except that in no case shall any site have smaller frontage on a street than one hundred (100) ft.

Subdivision 2 is subject to a similar, albeit more specific requirement:

> II A — Building Sites — Definition and Minimum Sizes
>
> Nothing contained herein shall be so construed as to prevent any owner of property from erecting a permitted type of residential building on a site consisting of one full platted lot, plus all or any fraction of adjacent lots in this subdivision and other adjacent subdivisions of the Grantor, without reference to the platted lot lines other than to observe the building line requirements set forth in Section III C hereof. The minimum size of building sites shall be, for each lot, the lot as shown on said plat except that in no case shall any site have smaller frontage on a street than as follows:

> 1) On South Deeplands Road — 100 ft.
>
> 2) On North Deeplands Road and on the west side of Ballantyne Road — 80 ft., providing 80 ft. sites become permissible under the Zoning Ordinance.

Not all of the original lots in Subdivision 2 have building frontage on South Deeplands Road, North Deeplands Road, or Ballantyne Road—for example, Lots 88 and 89 front Deeplands Court.

As part of the declarations and in consideration for her retention of the 7.83-acre subject property, one of the original owners, Annette Stackpole, made specific commitments with respect to any future development that might occur on the subject property:

> Annette S. Stackpole, one of the parties to these covenants and the sole owner of certain unplatted lands abutting South Deeplands Road to the south between Sheldon Road and Ballantyne Road, which lands are not included in the recorded plat referred to herein, does hereby, in consideration of valuable benefits to be derived from such mutual undertakings, agree to the following commitments regarding only the portion of said lands which directly abuts South Deeplands Road, namely:
>
> Not to build on said portion or to sell all or any part thereof for building purposes unless the following restrictions be imposed, namely:
>
> 1) The front building line shall be no less than thirty-five (35) ft. from South Deeplands Road.
>
> 2) Side building lines shall be such that no dwelling may be built closer to the dwelling owner's side boundary lines than 10% of the average width of site on one side and 15% on the other side.
>
> 3) Minimum sizes of building sites and of dwellings shall conform to those stipulated herein for lots 25-44 inclusive, Deeplands Subdivision.
>
> 4) Architectural Control will be provided for in no less restrictive form that [sic] set forth in Section III D hereof.

Defendant acknowledges that Condition 3 means that all of the declarations for building sites in Subdivisions 1 and 2 apply to the subject property.

Following the death of Stackpole's heir, defendant purchased the subject property and planned to develop it by adding a street with a cul-de-sac and dividing the 7.83-acre parcel into 18 parcels for the construction of single-family residences. Plaintiffs filed this action seeking to halt defendant's development. Plaintiffs argued that defendant's proposed development plan violated the declarations and commitments applicable to the subdivisions and the subject property. Specifically, plaintiffs argued that the covenants prohibited defendant from building a new street on the subject property and prohibited defendant from dividing the property to create smaller properties that did not directly abut South Deeplands Road, which borders the subject property to the east. Plaintiffs argued that the subject property could not be divided in a way that would create parcels of land that did not abut and face South Deeplands Road. Plaintiffs also argued in the alternative that the doctrine of reciprocal negative easements precluded defendant from carrying out its development plan.

Defendant filed a motion for summary disposition, arguing that the language of the declarations and commitments did not restrict the development of the subject property in the manner argued by plaintiffs. Plaintiffs opposed the motion, arguing that summary disposition was premature because the parties had not conducted discovery. The trial court agreed with defendant that the covenants did not limit the development of the subject property as described by plaintiffs. Without addressing the doctrine of reciprocal negative easements or plaintiffs' argument that summary dis-

position was premature, the trial court granted defendant's motion for summary disposition.

Plaintiffs appealed.

II. ANALYSIS

A. STANDARDS OF REVIEW

Defendant moved for summary disposition under MCR 2.116(C)(5), (C)(8), and (C)(10), but the trial court did not specify which rule formed the basis for its ruling. It is clear from the record, however, that the trial court did not grant summary disposition on the basis of (C)(5) (lack of legal capacity to sue), nor was it a ground for appeal.

When a motion seeks summary disposition under both (C)(8) and (C)(10), but the parties and trial court rely on matters outside of the pleadings, we review the matter through the lens of (C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). This Court reviews de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10). *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). " 'The interpretation of restrictive covenants is a question of law that this Court reviews de novo.' " *Eager v Peasley*, 322 Mich App 174, 179; 911 NW2d 470 (2017), quoting *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008).

B. RESTRICTIVE COVENANTS

Plaintiffs first argue that the trial court erred because it so misinterpreted the language of the restrictive covenants that it effectively rewrote and restated them. Restrictive covenants involve two fundamental freedoms—the freedom to contract and the freedom to

use property. In the context of restrictive covenants, a tension between the two can sometimes arise. The covenants are contracts pertaining to real property that Michigan courts perceive as having particular value: "Because of this Court's regard for parties' freedom to contract, we have consistently supported the right of property owners to create and enforce covenants affecting their own property." *Eager*, 322 Mich App at 180 (quotation marks and citation omitted). At the same time, by their very nature, restrictive covenants can also negatively impact the free use of property.

Accordingly, courts must apply unambiguous restrictive covenants as-written "unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations." *Id*. (quotation marks and citation omitted). "The general rule with regard to interpretation of restrictive covenants is that where no ambiguity is present, it is improper to enlarge or extend the meaning by judicial interpretation." *Webb v Smith (After Remand)*, 204 Mich App 564, 572; 516 NW2d 124 (1994), citing *Sampson v Kaufman*, 345 Mich 48, 50; 75 NW2d 64 (1956), *Brown v Hojnacki*, 270 Mich 557, 560; 259 NW 152 (1935), and *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982). "Restrictive covenants are construed strictly against those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 340; 591 NW2d 216 (1999), citing *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 325; 317 NW2d 611 (1982) (quotation marks omitted). Our Supreme Court has referred to this latter principle as "fundamental," and it has noted that courts must not "infer restrictions that are not expressly provided in the controlling

documents." *O'Connor*, 459 Mich at 341, citing *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955).

Plaintiffs argue that the declarations and commitments condition the subject property in three fundamental ways: (1) they prohibit the building of a new street on the property; (2) they require that all future lots divided from the subject property have at least 100 feet of frontage on South Deeplands Road; and (3) they originally applied to property that abutted South Deeplands Road and, therefore, any future lots must continue to abut that road. On a close reading of the restrictive covenants, however, plaintiffs' assertions lack merit.

New Street Prohibited on the Subject Property? First, plaintiffs argue that new streets are prohibited on the subject property. Plaintiffs cannot, however, point to any express language to that effect in the declarations or commitments. Instead, plaintiffs base their assertion on what are purportedly necessary implications of the actual language. Specifically, plaintiffs contend that the 35-foot building requirement implies that all buildings on the subject property must face South Deeplands Road, and, similarly, because any new buildings must conform to the minimum-size requirements of Lots 25 through 44, and those latter lots face South Deeplands Road, any new buildings must also face that street.

Plaintiffs read more into the text than what is there. The 35-foot building requirement in Stackpole's commitments means that any building developed on the subject property must have a front building line at least 35 feet from South Deeplands Road. The commitment does not, however, require that the building lot actually abut South Deeplands Road; for example, the

front building line could be on a lot that abuts a newly developed street, and as long as that front building line is also at least 35 feet from South Deeplands Road, the development would satisfy the plain meaning of the commitment. Similarly, the fact that Lots 25 through 44 face South Deeplands Road has nothing to do with the fact that Stackpole committed the subject property to the same size requirements as those properties. The minimum size of lots and which way buildings on those lots must face are two distinctly different characteristics of property development, and we will not conflate the two. Had Stackpole intended to make commitments that any future development must have front building lines on lots that abut South Deeplands Road, the buildings must face South Deeplands Road, and no new street could be constructed on the subject property, she could have easily done so with language similar to that in this very sentence. We must give effect to the fact that she did not include this or similar language in her commitments.

Must All Lots Have at Least 100 ft. of Frontage on South Deeplands Road? Plaintiffs next argue that, regardless of whether the declarations and commitments specifically prohibit the construction of a street on the subject property, defendant's development plan necessarily violates the restrictive covenants because any future lot divided from the subject property must have minimum frontage of 100 feet on South Deeplands Road. According to plaintiffs' reading, this means that the subject property cannot be bisected by a new street because doing so would mean that some lots would have frontage on a street other than South Deeplands Road.

This reading is also a misreading. The 100-feet-minimum-frontage requirement is found in two sepa-

rate parts of the declarations. The first part applies to Subdivision 1, and that condition merely states that a lot must not "have smaller frontage on a street than one hundred (100) ft." Suffice it to say that there is nothing in this part to suggest that "*a* street" means only *the* street that plaintiffs suggest, i.e., South Deeplands Road. Rather, any new development must be on lots with minimum street frontage of 100 feet, regardless of the particular street.

The second part applies to Subdivision 2, and in that part, there is specific reference to "South Deeplands Road." Yet, there are also references to "North Deeplands Road" and "Ballantyne Road," and the minimum frontage for lots on those streets is only 80 feet. Moreover, the covenant refers to "a street" followed by specific requirements if a lot is built with frontage on South Deeplands Road, North Deeplands Road, or Ballantyne Road. Fairly read, this covenant does not mandate that any new development *must have* frontage on one of those streets; rather, *if* the new development has frontage on one of those streets, *then* the specified minimum-size requirement would apply. This reading is consistent with the actual development of Subdivision 2, where Lots 88 and 89, for example, front a different street altogether, Deeplands Court.

Must Any Subdivided Lot Abut South Deeplands Road Because the Original Did? Plaintiffs next argue that the language used in Stackpole's commitments restricting future development of the subject property explicitly applied only to the portion of her land "which directly abut[ted] South Deeplands Road." Plaintiffs suggest that, because *all* of Stackpole's property—the subject property as a whole—abutted South Deeplands Road, Stackpole necessarily committed that *all* of the

property would always abut South Deeplands Road. This is, however, another strained reading of the text.

The commitment states that the "portion" of Stackpole's land directly abutting South Deeplands Road would be subject to certain building-frontage and lot-size requirements. The commitment says nothing that would suggest defendant could not divide the property, continue to maintain building-frontage and lot-size requirements for those parcels that continue to abut South Deeplands Road, and create new parcels that do not directly abut South Deeplands Road. Again, where express restrictive covenants exist, this Court will not infer restrictions not expressly provided in the controlling documents. *O'Connor*, 459 Mich at 341.

Finally, with respect to the declarations and commitments, plaintiffs broadly argue that a new street cannot be built on the subject property because Stackpole did not expressly reserve that right. In their words, "If Ms. Stackpole wanted to retain the right to allow new roads to be built on her remaining property in the future, she should have expressly stated that in her Commitments." This is not, however, how restrictive covenants generally work. Absent a specific covenant or reciprocal negative easement (see *infra*), the property owner retains the free, lawful use of her property. Put a slightly different way, the property owner need not expressly reserve the free, lawful use of her property—it is hers to enjoy unless and until she voluntarily restricts a particular use. See *O'Connor*, 459 Mich at 341.

Accordingly, plaintiffs' claim that the declarations and commitments prohibit construction of a new street on the subject property is without merit. With plaintiffs raising no questions on whether defendant's development plan complies with the actual, plainly inter-

preted restrictive covenants, the trial court properly granted summary disposition to defendant on this claim.

C. RECIPROCAL NEGATIVE EASEMENTS

In the alternative, plaintiffs argue that summary disposition was improper in light of the doctrine of reciprocal negative easements and that the trial court erred in declining to address the claim. The trial court did not err by passing over the claim, as the doctrine is not applicable given the actual restrictive covenants in place here.

In general, the doctrine of reciprocal negative easements applies when a property owner subdivides her property, retains one of the subdivided lots, and places a restriction on the other lots, but somehow also evidences a "scheme or intent that the *entire tract* should be similarly treated." *Coblentz v Novi*, 475 Mich 558, 562 n 1; 719 NW2d 73 (2006) (emphasis added; quotation marks and citation omitted). If there is sufficient evidence that the plan of subdivision envisioned that the restriction would apply to all of the subdivided lots, even the one retained by the original owner, then the burden placed on the other subdivided lots "is by operation of law reciprocally placed" on the lot retained. *Id*. (quotation marks and citation omitted). "In this way those who have purchased in reliance upon this particular restriction will be assured that the plan will be *completely* achieved." *Id*. at 562-563 n 1 (quotation marks and citation omitted).

The doctrine of reciprocal negative easements does not apply, however, in cases involving universally applicable restrictive covenants. See generally *Dwyer v Ann Arbor*, 79 Mich App 113, 118-119; 261 NW2d 231 (1977), rev'd in part on other grounds 402 Mich 915

(1978). The purpose of the doctrine is to "protect those who were expressly restricted in the use of their lots from uses by unrestricted lot owners that would adversely affect the character of the subdivision." *Id*. at 118. As noted earlier, defendant concedes that the covenants at issue here apply not only to Subdivisions 1 and 2, but also to the subject property originally retained by Stackpole. Rather, the dispute centers on the precise meaning and application of the relevant covenants. Therefore, the doctrine of reciprocal negative easements does not apply to the facts of this case.

D. SUMMARY DISPOSITION BEFORE DISCOVERY

Finally, plaintiffs maintain on appeal that the trial court should not have granted summary disposition before the parties were permitted to pursue formal discovery. To show that summary disposition was premature, "a party must show that further discovery presents a fair likelihood of uncovering factual support for the party's position." *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 723-724; 909 NW2d 890 (2017). Plaintiffs fail to identify, however, a disputed factual issue for which additional discovery would actually be helpful. There is no question, for example, that Stackpole intended for the covenants applicable to Subdivisions 1 and 2 to apply to the subject property. The questions are, rather, what those covenants mean and how to apply them to defendant's proposed development plan, and the declarations, commitments, and development plan are all in the record. Plaintiffs have failed to identify any material factual issue for which additional discovery would provide needed insight. See *id*. Thus, plaintiffs' contention that the trial court prematurely granted summary disposition fails.

III. CONCLUSION

An owner can agree to restrict her lawful use of real property through a restrictive covenant or, if evidenced by a common scheme or intent, by imposition of a reciprocal negative easement. In doing so, the owner retains the freedom to use the property in all of the lawful ways not restricted.

Here, the original owner agreed to certain restrictive covenants on the subject property. A plain reading of those covenants does not include the prohibition of a new street or the requirement that any subdivided lot front or abut a particular street. Accordingly, defendant's plan of development does not run afoul of the applicable restrictive covenants, and there is no basis for imposing a reciprocal negative easement. For the reasons stated above, we affirm summary disposition in favor of defendant. Having prevailed in full, defendant is entitled to tax costs under MCR 7.219(F).

GADOLA, P.J., and BOONSTRA, J., concurred with SWARTZLE, J.

In re RICHARDSON, MINOR

Docket Nos. 346903 and 346904. Submitted July 10, 2019, at Grand Rapids. Decided July 25, 2019, at 9:05 a.m.

The Department of Health and Human Services (the DHHS) petitioned the Saginaw Circuit Court, Family Division, to assume jurisdiction of SRR after the infant was born with marijuana in her system. The court, Barbara L. Meter, J., assumed jurisdiction of the child after mother admitted the petition allegations, including that mother had an extensive history of substance abuse that had resulted in the termination of her parental rights to her two older children in 2015, that mother had failed to benefit from prior services offered by the DHHS, and that mother had placed SRR at an unreasonable risk of harm by using marijuana while pregnant with SRR; father admitted that he was incarcerated at the time the petition was filed and that he was unable to provide care for SRR. At the initial dispositional hearing, mother stated that she had voluntarily placed herself in an inpatient substance-abuse treatment program and that she was working with doctors to find the medication dosage necessary to control her epileptic seizures. Mother ultimately obtained a registry identification card under the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., allowing her to use marijuana to reduce her seizures as well as help with chronic ankle pain. The referee, who wanted mother substance-free, held a hearing to allow mother to present evidence that medical marijuana was a viable treatment option for seizures. According to mother, her prescribed medications did not adequately control her seizures and marijuana significantly reduced them. The physician who prescribed medical marijuana for mother's seizures advocated its use for treatment of the condition; mother's neurologist stated that there is evidence that medical marijuana was helpful in certain circumstances and that although she did not see a clear need for medical marijuana in this case, she was not opposed to mother using it from a neurologic standpoint. The referee found that mother's physicians had not made it clear that marijuana was medically necessary and that mother was not using marijuana for medical purposes; on that basis, the referee ordered mother to stop using marijuana. The trial court terminated mother's parental rights under MCL 712A.19b(3)(c)(*i*), rea-

soning that the condition that led to the adjudication—that is, her substance abuse—continued to exist through her use of marijuana, that mother had been given the chance to achieve sobriety, that mother's seizures were being controlled with other medications, and that her marijuana use might lead to a harmful home environment for SRR. The court also terminated mother's parental rights under MCL 712A.19b(3)(g), reasoning that plaintiff failed to provide proper care or custody for SRR and that there was no reasonable expectation the she would be able to do so within a reasonable time given her use of marijuana, her failure to maintain employment even though she appeared to have the ability to work, and her decision in the alternative to seek Social Security benefits. The court terminated father's parental rights under the same provisions, reasoning that father moved in with mother even though he was aware of mother's substance-abuse issues and chose to work 16 to 18 hours a day, leaving SRR with mother in spite of mother's marijuana use. Mother appealed in Docket No. 346903, and father appealed in Docket No. 346904.

The Court of Appeals *held*:

Under MCL 712A.19b(3)(c)(*i*), the court may terminate a parent's parental rights to a child if the parent was a respondent in a child protective proceeding, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court finds by clear and convincing evidence that the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. Under MCL 712A.19b(3)(g), a trial court may also terminate a parent's parental rights if the court finds by clear and convincing evidence that although the parent has the financial ability to provide proper care or custody for the child, the parent has failed to do so and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. A parent's undesirable acts do not alone justify termination of a parent's parental rights to a child; there must be some showing of harm or actual risk of harm to the child that results from the parent's acts. Thus, in the absence of any connection to child abuse or neglect, drug use alone cannot justify termination solely on the basis of anticipatory neglect. In other words, not every ingestion of a substance constitutes abuse; there must be facts on the record demonstrating that the parent's acts are actually harming or presenting an articulable risk of harm to the child. With regard to a parent's use of medical marijuana, MCL 333.26424(d) provides that a person shall not be denied custody or visitation of a minor for

acting in accordance with the MMMA unless the person's behavior creates an unreasonable danger to the minor that can be clearly articulated and substantiated. A trial court may not presume a risk of harm from its own experiences or personal disapproval of a parent's choice, specifically with regard to a parent's substance abuse. In this case, the referee's factual findings were clearly erroneous, and the statutory grounds were not established by clear and convincing evidence. While the presence of marijuana in SRR at her birth led to the adjudication, there was no evidence at the time of the termination hearing that mother's use of medical marijuana had negatively affected her ability to parent or caused any risk of harm to the child. The referee clearly erred by placing too much emphasis on mother's use of medical marijuana and by substituting his judgment for that of the medical professionals with regard to whether she was using marijuana for a medical purpose. The referee also clearly erred by finding that statutory grounds existed for terminating father's parental rights; there was no clear and convincing evidence that father harmed or presented an articulable risk of harm to SRR, either through his own actions or his reliance on mother to care for the child in their joint home while he worked.

Termination orders vacated and cases remanded.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — EVIDENCE OF HARM OR ACTUAL RISK OF HARM — PARENT'S USE OF MEDICAL MARIJUANA.

A parent's undesirable acts, including substance abuse, do not alone justify termination of a parent's parental rights to a child; there must be some showing of harm or actual risk of harm to the child that results from the parent's acts; there must be facts on the record demonstrating that the parent's acts are actually harming or presenting an articulable risk of harm to the child; with regard to a parent's use of medical marijuana, MCL 333.26424(d) provides that a person shall not be denied custody or visitation of a minor for acting in accordance with the Michigan Medical Marihuana Act unless the person's behavior creates an unreasonable danger to the minor that can be clearly articulated and substantiated; a trial court may not presume a risk of harm from its own experiences or personal disapproval of a parent's choice, specifically with regard to a parent's substance abuse (MCL 333.26421 *et seq*.; MCL 712A.19b(3)).

Diane L. Thompson for respondent-mother.

Libby Kelly Dill for respondent-father.

Shinners & Ellsworth, PLLC (by *John J. Shinners*) for the minor child.

Before: SAWYER, P.J., and BORRELLO and SHAPIRO, JJ.

BORRELLO, J. In these consolidated appeals,[1] respondents appeal the termination of their parental rights under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist) and (g) (failure to provide proper care and custody). For the reasons set forth in this opinion, we vacate the trial court's order and remand this matter for further proceedings.

I. BACKGROUND

This case initially came to the trial court by way of a Department of Health and Human Services (DHHS) initiated child protective proceeding regarding SRR on June 26, 2017, after SRR tested positive for the presence of marijuana at birth. The petition alleged that mother had an extensive history of substance abuse that had resulted in the termination of her parental rights to her two older children. The prior terminations occurred in 2015 and were based on mother's substance abuse and methamphetamine production. Father was not the father of those two older children. The petition further alleged that mother had failed to benefit from the services the DHHS had provided, that mother had knowingly used marijuana while she was pregnant, and that mother had placed SRR at an unreasonable risk of harm through her substance abuse that resulted in SRR's prenatal marijuana exposure. The only petition allegation against father, other than that he was SRR's father, was added to the petition by oral amendment at

[1] *In re Richardson Minor*, unpublished order of the Court of Appeals, entered January 9, 2019 (Docket Nos. 346903 and 346904).

the adjudication plea hearing. This allegation stated that father was currently incarcerated with the Michigan Department of Corrections (MDOC) and unable to provide a care plan for SRR.

The trial court assumed jurisdiction on the basis of mother's and father's respective pleas of admission to the petition allegations. The petition had originally sought termination at the initial disposition. However, the referee noted at the adjudication hearing that mother had "shown some significant desires to make major changes in her life that weren't made during the termination back in 2015" and that "[g]iven her age and situation the Court is of the opinion that she deserves to have that opportunity based on the information I have at this point in time so I would be looking at having the termination taken off the table to both these individuals and work with them[.]" The referee warned mother that this was "a huge break" for her and that she was "on what we call a short leash." The referee also stated: "The key is—you understand—it's kind of your last straw given that you've had significant treatment—my understanding at least—or opportunities for treatment previously. And this is a chance for you to make that final step to completely get away from substances." The referee further indicated that termination could become an option again if mother did not "stay on the track of sobriety."

The initial disposition was held on August 28, 2017. Father was incarcerated, but the court was unable to secure his presence by video link because father had been transferred to a different facility, apparently unbeknownst to his attorney or the court. MDOC staff also apparently ignored the orders that had been sent out indicating that father was to be made available for the hearing. Nonetheless, father's attorney waived any

issue with regard to the lack of father's presence, stating that he had "no objection proceeding without him today" subject to maintaining father's "right to object" to anything "out of the ordinary."[2] The referee stated, "Being that this is original dispo[sition] with him in prison there isn't a whole lot we can do at this point for him . . . we'll get him up to speed and it will be probably the next hearing that's gonna be most important for him anyways."[3]

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[2] Regarding dispositional hearings, MCR 3.973(D)(2) states that the "respondent has the right to be present or may appear through an attorney." Notably, father had a right while he was incarcerated to participate in this hearing by telephone or videoconferencing technology, and this right is protected under these circumstances by placing certain obligations on the DHHS, the court, and the MDOC. See generally MCR 2.004. For example, it is incumbent upon the "party seeking an order regarding a minor child," in this case the DHHS, to "contact the [MDOC] to confirm the incarceration and the incarcerated party's prison number and location[.]" MCR 2.004(B)(1). As another example, the court must be satisfied that the requirements of MCR 2.004(B) were met before issuing each order requiring the MDOC to allow the incarcerated party to participate in the hearing by telephone or videoconference. MCR 2.004(C). Furthermore, the "court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts." MCR 2.004(G). "A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule," but "[t]his provision shall not apply . . . if the court determines that immediate action is necessary on a temporary basis to protect the minor child." MCR 2.004(F). In this case, although it seems that an attempt was made to give father the chance to participate in this hearing by videoconference, there is no indication that father declined or otherwise caused his inability to participate. It instead appears that father's ability to appear at the hearing was impaired by the negligence of institutional actors or other individuals involved with the case. It also does not appear that the referee's decision to proceed was based on a finding that immediate action was necessary on a temporary basis for the child's protection.

[3] While the referee's initial statement is at odds with our understanding of the law—our Supreme Court has held that the "state is not

Mother had begun an inpatient substance-abuse treatment program at Kairos Treatment Facility approximately one week before this hearing. Mother enrolled herself in this program. The court report also indicated that mother's parenting-time visits had been positive with no concerns. Mother indicated that she had enrolled in a parenting class, which she had personally arranged to be provided to her and other women at Kairos, and was "willing to take as many parenting classes as—as need be." Mother also stated that at Kairos, she was participating in therapy and was working with doctors to get her seizures under control through medication. Her seizures were not completely under control yet.

The referee then questioned mother as follows about her seizures:

> *Q*. . . . I am extremely knowledgeable and familiar with seizures. Obviously, do you—have they given you a diagnosis of—sometimes they call it epilepsy, sometime they call is [sic] seizure disorder.
>
> *A*. Epilepsy is my diagnosis.
>
> *Q*. Okay. All right. And are they working with a neurologist over there right now?
>
> *A*. Yes.
>
> *Q*. Okay, and who's the neurologist working on it?
>
> *A*. At—I believe it's Abbott.
>
> *Q*. Okay.
>
> *A*. Ah, that sounds about right.

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relieved of its duties to engage an absent parent merely because that parent is incarcerated," *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010)—it is clear that the referee correctly understood that the state's obligations were not completely negated by father's incarceration. The record reveals that the referee ordered the foster-care worker at the conclusion of the hearing to contact father in prison and work with him to immediately develop a parent-agency treatment plan.

Q. All right. Have you been working with a neurologist up to this point? 'Cause you said you have seizures.

A. I was not. I was using medical marijuana.

Q. Okay.

A. So.

Q. What you will probably find out in talking with a neurologist and everything, marijuana can exacerbate the seizures, depending on the types that you're having and everything because of fact—so it can make it worse for you. So, the question you want to maybe verify and everything with all the information I've been presented with is a problem for people with seizures.[4]

A. It was working for me but that's why I've got to try (inaudible)—

Q. Right.

A. —at the time, you know.

Q. Right.

A. I'm going—I will give it up. I want my baby back,—

Q. Right.

A. —so I'll play the battle with medication and do what I gotta do.

* * *

Q. Yes. . . . Grand mal, petit mal?

A. Grand mal.

Q. Okay. All right. How frequently were you having them?

A. Until now I wasn't having them har—hardly ever but now—

Q. Okay, so now that you're off and everything—and it may afford the frontal lobe have a different affect or

[4] Notably, the referee's statements about the effect of marijuana on people who suffer from seizures did not refer to any record evidence.

> anything, other areas that can exacerbate I know that, so but there's also other medications so you're right, they will prescribe medications and then if it's not stable, then they raise the dosage until such time as they figure we may need to try something. Usually it's finding the right dosage.

Mother indicated that she was on two different medications, one of which was already prescribed at the maximum dosage, and that her dosage for the other medication had been increased the previous night at the emergency room.

The referee stated, "Realistically, the issue I think we're looking at right now is sobriety." The referee noted mother's methamphetamine history and continued, "[Y]ou got into marijuana and it's not unusual for people who use to get that, but I'm just letting you know I'm aware, you know, and those are things you need you—you need to change all your friends—that's part of life." The referee subsequently stated the following to mother:

> Right now you're doing the right thing because as I indicated, you go into in-patient I'm w—I'm willing to work with you. I have—I took termination off the table. You know, they could have presented it, but I was gonna rule let's give you a shot.
>
> * * *
>
> My personal feeling is right now you need to focus on yourself and the issues that cause you to keep using, you know, substances. Right now it's my understanding marijuana. I have no information that you use anything else. So what sounds like is you gained some knowledge from the other case, haven't fully gotten there yet, now you're clear, we need to get you off the weed because you were still using, even after—here's what you have to realize. We

> worked out the plea, you continued to use.[5] That says to me you have a difficulty stopping using, okay? That what it says to me. I'm not gonna hold it against you but if you got out and you started to use again and everything, that's when it's going to be a problem.

At the hearing held on November 15, 2017,[6] foster-care worker Ryan Feldt reported that mother was released from Kairos on September 22, 2017, after completing 30 days of treatment. She last tested positive for marijuana on August 9, 2017, and drug screens on October 19 and 25, 2017, and November 6, 2017, were negative. Feldt stated that mother was attending counseling, and her therapist told Feldt that they were working on helping mother face her problems rather than run away from them. There were no concerns with mother's parenting time, which had recently been increased. Mother indicated that her seizure medication was regulated and that she had not had a seizure in two months. Mother also testified that someone else was always home with her and that because she could tell when she was about to have a seizure, she knew how to protect herself and the baby.

The referee stated:

> I need to know that you're done with this illegal drug lifestyle and anybody else around you. All right? I mean, that's a huge thing going from meth and losing your kids and cooking and all that stuff and now you're still back using marijuana and you lose your child and everything

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[5] The six drug screens that mother completed leading up to this hearing were all positive for marijuana.

[6] As with the previous hearing, father was still incarcerated and his presence by telephone or videoconference was not secured "for some reason." Father's attorney was present and waived father's right to be present at the hearing. Father's attorney stated with respect to the next hearing to be held, "I assume the Court will take the steps to have my client participate by video."

> else. That's the negative side. The flip side is you've gone after it with gangbusters. You jumped into Kairos, you did that program 30 days and they, you know, felt that that was sufficient for you—it may very well have been. It looks like you've gotten serious and really buckled down. I hope this is a life change and not let's get through this, get[] my kids back, get them out of my life and then go back and do things, okay? So we've got you on medication now with the doctor, appropriate actual treatment rather than, you know, the other thing in reference to your seizures, along that line, so things are moving well but we have to be cautious and we have to know that this is a lifetime. If you—let's see, you went in, you pled on the 7th of August, on the 22nd is when you entered Kairos and so you've been on—out on September 22nd, so we're a month and a half since you got out which is once you get out, that's when you wanna see how well are you going to do. And usually it's at the three month mark that we start to see people starting to also to fade; they were doing well and then they start fading. So we need to get there to see that, all right? So what I'm telling you is be patient because you got a huge break and everything, so let's be patient along those lines as far as returning.

By the time of the next review hearing on January 26, 2018,[7] mother had tested positive for marijuana, but she also had secured a medical marijuana card. The referee stated:

> It's my understanding that mom has obtained a medical marijuana card and the purpose for that is for seizures and what we're looking at at this point in time th—this Court is unaware of marijuana being used for seizures. I'm

[7] Father's attorney stated that father was not present because he was still incarcerated and that although he was scheduled to appear by videoconferencing, the previous hearing had gone longer than expected. Father's attorney represented that the court's deputy clerk contacted the facility where father was incarcerated and "they were unable to accommodate us for purposes of this morning's hearing[.]" Father's attorney again waived father's attendance.

> gonna give you the benefit of the doubt. I mean, I've actually—the information I have from my life experience is contrary.

The referee's skepticism became more apparent as the hearing progressed. The referee stated:

> It's hard for me to believe that her—that if it's an addiction that it's that strong that she would jeopardize her child, yet the Court has never heard of that medication being used for seizures, so I'm giving the opportunity for counsel to—and I'll be honest with you, you've got a written document, that's not gonna be sufficient for the Court. I need testimony.

The referee also told mother that "It—it doesn't matter what it's for. You suddenly decided to take on something that the Court had already said no and you're supposed to be substance abuse free so now this."

The referee nonetheless determined that an evidentiary hearing would be held to consider the matter, stating as follows:

> All right. And I will indicate for the record here that my understanding is she's testing positive for marijuana because she's got a medical marijuana card and the issue that we're gonna hear is is that appropriate or not. And just so you understand, it's one of the things that because substance abuse was an issue in the past and obviously methamphetamine, you know, so—something different. Any prescription medication at this point in time is going to come under—under some scrutiny. It's not just that it's marijuana. It's suddenly you came up with—I'm gonna pick Norco and everything and all of a sudden you're taking Norco for seizures and everything like that, I'd have the same question, okay? 'Cause I've not heard of that before. . . . The Court is open to hearing testimony concerning that issue and then we can resolve that and you can make your decisions after that hearing depending on how it works out.

At the hearing, mother called Dr. Anthony Schultz to testify about mother's use of medical marijuana. He had treated patients with seizures as an emergency physician and had been fully trained to manage all forms of seizure. Schultz currently practiced holistic and alternative medicine.

Schultz testified that he met with mother in January 2018 because she wanted to use medical marijuana to manage her seizures and treat her chronic ankle pain. According to Schultz, marijuana has been shown to help control grand mal seizures, and six states have approved the use of medical marijuana solely for the treatment of seizures even though those states do not allow medical marijuana to be used to treat other conditions. Schultz testified that as a medical doctor, he had concluded that marijuana was an allowable medication for mother's condition and that it was likely to help her condition. Schultz explained that by the time he met with her, mother had developed intolerances for the medication that she was currently using to control her seizures and she reported that her current medication was not working well by itself for her.

Schultz indicated that he considered a patient's substance-abuse history and that he knew mother had gone through a drug-rehabilitation program. However, he was unaware of her prior arrest for using methamphetamine. He explained that his opinion about the appropriateness of medical marijuana would be influenced by recent addiction issues and that he did not find it concerning if a patient had previous experience with marijuana.

Schultz stated that he advises patients with children to moderate their use of marijuana to ensure that they were not under the influence while caring for children, either by not using or by using only a small

amount. He noted that this level of caution was also necessary with other prescription antiseizure medications, which also could have "ill effects." Schultz testified that if mother used medical marijuana as she had been instructed, she could safely care for her child.

A letter from mother's neurologist, Dr. Margaret Frey, was admitted into evidence. This letter stated:

> [Mother] is a patient under my care for management of epilepsy. Her epilepsy is currently controlled with medications and she is compliant. She utilizes medical marijuana for other symptoms, though she states that her seizures are markedly improved when she uses it. There is evidence that medical marijuana is helpful for reducing breakthrough seizures in patients with intractable epilepsy and I do at times use it for this purpose. Though I do not see a clear need for medical marijuana for her epilepsy in this case, it will not worsen her seizures and I am not opposed to her using it from a neurologic standpoint.

Mother testified that she sought her medical marijuana card to treat her epilepsy and ankle pain. According to mother, her grand mal seizures were not adequately controlled by her other medication. Mother stated that she had fewer seizures once she started using medical marijuana and that the medical marijuana significantly improved her quality of life. She also stated that she tried to keep her marijuana use to a minimum, unless her pain was worse, as Schultz had recommended. Mother understood the importance of not being impaired while she was caring for her child, and her current safety plan was to have three other adults living with her so that someone could care for the child if mother needed to use her medicine. Mother admitted that she struggled with addiction, and she continued to participate in substance-abuse therapy to prevent her from relapsing. Mother agreed not to use

medical marijuana within eight hours of any parenting-time visit.

Feldt testified that despite Schultz's testimony about mother's medical marijuana use to control her seizures, the DHHS's stance was that mother "remain sober" and that his opinion had not changed. However, Feldt also admitted that there had not been any incident during mother's parenting time that would cause any concern about the child's safety in mother's care.

The referee ruled as follows:

> I don't find it's being used for the seizure purposes; I think it's being used for other reasons and we gave you the break in the first place to get off of the marijuana along those lines. Because we—because this Court is concerned that you're continuing and there is an addiction phase there with the marijuana and that more the for seizure purposes has been a secondary or third reason being put forward that there's other reasons starting with pain. So, that suggests to me, in all candor, that you're trying to find reasons to justify having it prescribed to you. And so for that reason at this point in time I am going to indicate that marijuana usage must stop.

In reaching this conclusion, the referee noted that marijuana was "the issue" at the beginning of the case. The referee claimed that at the beginning of the case "there was no discussion about it's being used for controlling of seizures or anything along those lines . . . ." However, the referee's recollection on this point was incorrect. As earlier cited, mother and the referee engaged in a lengthy conversation about mother's epilepsy and treatment at the initial disposition. During the course of that discussion, mother indicated that she had been using medical marijuana to control her seizures, the referee explained his belief that

medical marijuana was not a valid treatment for seizures and actually made them worse, and mother essentially agreed to try more traditional treatment options for a time in an attempt to comply with the court's wishes and regain custody of her child.

With respect to the referee's ruling on mother's use of medical marijuana at the conclusion of the evidentiary hearing on the matter, the referee found that the doctors did not make it clear that medical marijuana "is what is medically necessary." However, there is no medical authority cited in the record to support this conclusion. Additionally, this ruling runs contrary to the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., which states, in relevant part, "[A] person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated." MCL 333.26424(d). Furthermore, the MMMA provides a presumption in favor of medical use:

> There is a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver complies with both of the following:
>
> (1) Is in possession of a registry identification card.
>
> (2) Is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act. [MCL 333.26424(e).]

In this case, there is no dispute that mother had a medical marijuana card. Despite this evidence, the referee made a finding that mother's marijuana use

was not for a legitimate medical purpose because, in the referee's opinion, marijuana was not "medically necessary." But this is not the standard under MCL 333.26424(d) and (e). In addition, in order to reach this conclusion, the referee had to completely discount the unrebutted evidence submitted by *two doctors* that medical marijuana *is* a valid treatment for epilepsy, and the referee had to discredit mother's testimony that it was actually helping her manage her seizures. We also note that both seizures and epilepsy are included within the MMMA's definition of "debilitating medical condition." See MCL 333.26423(b)(2). Additionally, the referee gave undue weight to mother's substance-abuse history and mischaracterized the record with respect to mother's marijuana use at the beginning of this case. The referee essentially substituted his own judgment for that of the medical professionals and thus erred; the record simply does not support the referee's factual finding or legal conclusion.[8]

The trial court's decision to terminate the parental rights of mother and father, which occurred approximately four months later, was similarly focused on mother's medical marijuana use. The trial court terminated mother's and father's parental rights under MCL 712A.19b(3)(c)(*i*) and (g), which provide as follows:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *

[8] We review de novo questions of law. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). The trial court's factual findings are generally reviewed for clear error. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005); *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 56; 874 NW2d 205 (2015).

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (g) The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

With respect to mother, the referee found that termination was supported by MCL 712A.19b(3)(c)(*i*) because the condition that led to mother's adjudication was her substance-abuse addiction and mother had continued to use substances by using marijuana, which the referee did not believe was actually necessary for a medical purpose.[9] The referee's reasoning was focused on the fact that mother was continuing to use marijuana, but the referee did not explain how that continued use had actually had any negative effect on her current parenting ability. The referee found that mother was given a chance at the initial disposition to

[9] The referee also noted one instance in which mother had recently tested positive for cocaine. However, mother disputed the accuracy of this drug test, testified that she had observed her drug-testing samples not being properly sealed, and adamantly denied using cocaine. She admitted that she was using marijuana, but she maintained that she was using it for the medical purpose of controlling her seizures and pursuant to a valid medical marijuana card.

achieve sobriety and be reunited with SRR, that mother never mentioned at that time that she had a seizure disorder or that she needed to use marijuana to control her seizures, that mother never mentioned having chronic ankle pain that required use of marijuana, and that the letter from mother's neurologist indicated that mother's seizures were controlled without needing to use medical marijuana. The referee speculated that mother's marijuana use would lead to a harmful environment for SRR.

Regarding MCL 712A.19b(3)(g), the referee incorporated the above reasoning and found that this ground had also been established to support terminating mother's parental rights. The referee also found that mother "appeared to have the ability to work" but failed to maintain employment and instead was seeking Social Security benefits.

With respect to father, the referee maintained his focus on mother's medical marijuana use and also relied on MCL 712A.19b(3)(c)(*i*) and (g) to support terminating father's parental rights. Father had been released on parole less than six months before the termination hearing, and he had successfully obtained employment within two weeks of his release. The referee found that father knew about mother's issues with substance addiction and that he nonetheless decided to move in with mother, chose to work 16 to 18 hours a day for six days a week, and relied on mother to raise SRR without protecting SRR from mother's "severe addiction."

II. ANALYSIS

In matters regarding the termination of parental rights, we must simultaneously recognize the inherent authority of the trial court to control the proceedings,

and to some extent the behavior of the parties, to ensure that the parties are mindful of and demonstrate their ability to ensure the health, safety, and best interests of their minor children while also bearing in mind that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Furthermore, we must acknowledge that "[a] parent's right to control the custody and care of her children is not absolute, as the state has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor' and in some circumstances 'neglectful parents may be separated from their children.' " *In re Sanders*, 495 Mich 394, 409-410; 852 NW2d 524 (2014), quoting *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972). With these principles in mind, we examine the record to determine whether there was clear and convincing evidence presented in this matter sufficient to legally justify the termination of respondents' parental rights.

Our review of the record leads us to conclude that the referee's factual findings were clearly erroneous and that the cited statutory grounds were not established by clear and convincing evidence. See *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) ("We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses.") (quotation marks and citations omitted).

The condition that led to mother's adjudication was her use of marijuana during her pregnancy. However, by the termination hearing, there was no evidence that mother's use of medical marijuana was having any negative effect on her ability to parent or causing any risk of harm to SRR. In fact, the evidence was overwhelming that there were no significant concerns about mother's parenting-time visits and that mother appropriately cared for SRR during visits. There was no evidence that mother was impaired or "high" during her parenting-time visits, and mother indicated that she understood the importance of not being in an impaired state while caring for SRR. Further, mother testified that using medical marijuana reduced the frequency of her seizures and that her parenting ability would be negatively affected if she were subject to the likelihood of having seizures more frequently.[10] Mother testified that she was not using any illicit drugs. Regarding her ability to work, mother testified that she had applied for Supplemental Security Income (SSI) based on her epilepsy and mental disabilities.[11] She also testified that by the time of the termination hearing, she was living with father, who was employed, and that she stayed home and took care of the residence. Mother's name was on the lease.

Following our review of the record in this matter, we conclude that the referee placed far too great an emphasis on the fact that mother consumed medical marijuana. As illustrated herein, the referee felt it

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[10] Notably, mother testified that she had "quite a few" grand mal seizures while she was in her inpatient drug treatment program at Kairos. This testimony is contrary to the referee's assertion in his findings of fact that "[t]here is no doubt that had she had seizures there, Kairos would have not only noted it to DHHS and in their reports, but they would have transported [mother] to the hospital . . . ."

[11] These included bipolar disorder, depression, and anxiety.

important to share his opinions on the consumption of marijuana, regardless of whether consumption was for medical uses, and in instances when his assertions were factually inaccurate—i.e., the use of marijuana to control seizures—he nevertheless clung to his preconceived opinions. Lost in his discussions about the perils of consuming marijuana was the absence of any evidence demonstrating that mother's use of medical marijuana interfered with her parenting. Hence, the referee's preconceived opinions and overemphasis on mother's use of medical marijuana caused him to lose sight of the fact that it is not the mere undesirable acts (presuming, of course, that the use of a prescribed medicine constituted an undesirable act) of the parents alone that justifies the state in terminating parental rights; there must be some showing of harm or actual risk of harm to the child that results from the parents' acts. See *In re LaFrance Minors*, 306 Mich App 713, 731; 858 NW2d 143 (2014) ("[D]rug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect.");[12] cf. also *In re Curry*,

[12] In *LaFrance*, this Court dealt with a situation similar to the one presented here, in which little deference was shown for the medical judgment of a respondent's treating physicians. The *LaFrance* Court explained as follows:

> Indeed, an early signal that consumption of prescription medication would be overvalued in this case was when, at the initial dispositional hearing, the caseworker expressed her understanding that both respondents had prescriptions for hydrocodone, and that tests revealed concentrations of that drug well within therapeutic levels, but nonetheless insisted that respondents terminate what the witness understood to be respondents' respective physician-directed courses of treatment in deference to her own general concerns about the hazards of that pharmaceutical. [*In re LaFrance*, 306 Mich App at 731 n 7.]

In concluding that the respondents' failure to control their substance-abuse problems, standing alone, was not sufficient to support terminat-

113 Mich App 821, 830; 318 NW2d 567 (1982) ("In sum, we are persuaded that the criminal status alone of these respondents is not a sufficient basis for the probate court's assumption of jurisdiction. Some showing of unfitness of the custodial environment was necessary and no such showing was made in the instant case. The state should not inject itself into the lives of its citizens except when specifically authorized by law and when necessary to prevent abuse and neglect."). "Child protective proceedings are not criminal proceedings," and unlike criminal proceedings, the "purpose of child protective proceedings is *the protection of the child*" rather than to determine a defendant's guilt or innocence. *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993) (emphasis added). "The juvenile code is intended to protect children from unfit homes rather than to punish their parents." *Id*. at 108.

The record does not support the conclusion that there was clear and convincing evidence that mother continued to have an issue with substance abuse that presented an actual risk of harm to SRR. The concerns expressed in the proceedings below were based more on the referee's speculation that mother's use of medical marijuana *might* lead to creating a harmful environment for SRR even though the overwhelming evidence related to mother's current medical marijuana

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ing the respondents' parental rights to three children under MCL 712A.19b(3)(c)(*i*), (g), and (j), the *LaFrance* Court reasoned:

> Cases that come before this Court often dramatically illustrate that substance abuse can cause, or exacerbate, serious parenting deficiencies, but the instant case is a poor example. We do not mean to imply any approval of the protracted, and sometimes illegal, use of prescription medications so much in evidence in this case, even as we refrain from repeating the trial court's apparent mistake of simply assuming that overuse, or illegal acquisition, of such medications is itself ground for concluding child neglect or abuse will ever result from it. [*In re LaFrance*, 306 Mich App at 731.]

use and parenting skills indicated just the opposite. See *In re LaFrance*, 306 Mich App at 732 ("Termination of parental rights requires 'both a failure and an inability to provide proper care and custody,' which in turn requires more than 'speculative opinions . . . regarding what *might* happen in the future.' ") (citation omitted). While we are not downplaying mother's history of substance abuse, not every ingestion of a substance constitutes abuse, especially when viewed in the larger context of whether there is an effect of the substance use on the child or on the parent's parenting ability. There must be facts within the record demonstrating that the parent's acts are actually harming or presenting an articulable risk of harm to the child, and the trial court cannot simply presume a risk of harm from its own prior experiences or personal disapproval of a parent's choices. See MCL 333.26424(d) ("A person shall not be denied custody or visitation of a minor for acting in accordance with [the MMMA], *unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated*.") (emphasis added); *In re LaFrance*, 306 Mich App at 731-732; cf. also *In re Curry*, 113 Mich App at 830. Rather, in this case, the record reveals that the referee essentially placed the burden on mother to demonstrate her fitness as a parent and her ability to provide proper care and custody, which is an unconstitutional means of deciding whether to terminate parental rights. See *In re LaFlure*, 48 Mich App 377, 384-386; 210 NW2d 482 (1973); see also *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000) ("[I]t is well established that the petitioner for the termination of parental rights bears the burden of proving at least one ground for termination."), superseded by statute on other grounds as stated in *In re Moss*, 301 Mich App at 83, 88. Without such evidence, there was

not clear and convincing evidence to show that mother had not rectified the condition that led to her adjudication or that mother could not provide proper care and custody, and the trial court therefore committed clear error by terminating mother's parental rights.

With respect to father, whose parental rights were also terminated essentially because of mother's medical marijuana use as well, the record similarly does not support the referee's determination that statutory grounds had been proved by clear and convincing evidence.

As previously discussed, there was no evidence to suggest that mother presented a current risk of harm to the child despite her use of medical marijuana. Although the referee appeared to fault father for the nature of his work schedule and how it interfered with his ability to participate in various services, it seems commendable to us that father found significant employment rather than remaining unemployed or underemployed.[13] Father testified that he was concerned about keeping his job, which "looked very good for [his] parole officer" and would allow him to remain out of prison. Father also testified that he would be laid off for a period of time in the winter, during which time he could participate in more services. Moreover, there was evidence that father had shown improvement in his parenting skills during his parenting-time visits following his release. The referee also supported his decision by referring to drug tests for father that were

[13] The referee's reasoning on this point illustrates the Catch-22 parents are often put in during child protective proceedings. They are considered neglectful either because they have inadequate employment or because they have employment that does not offer ideal flexibility or control regarding scheduling, without consideration for the nature of the employment for which the parent might actually be qualified.

positive for marijuana and cocaine. But father denied using these drugs, testified about the loose adherence to procedures at the drug-testing facility, and testified that he had had to complete drug screens as part of his parole and did not have any parole violations. As with mother, we conclude that there was not clear and convincing evidence that father was harming or presenting an articulable risk of harm to SRR, either based on his own actions or based on his plan of relying on mother to care for the child in their joint home while he worked. Thus, the trial court clearly erred by terminating his parental rights under MCL 712A.19b(3)(c)(*i*) and (g).

Accordingly, we vacate the trial court's order terminating the parental rights of mother and father, and we remand for further proceedings not inconsistent with this opinion.

Vacated and remanded. We do not retain jurisdiction.

SAWYER, P.J., and SHAPIRO, J., concurred with BORRELLO, J.

ZENTI v CITY OF MARQUETTE

Docket No. 344615. Submitted June 11, 2019, at Lansing. Decided July 25, 2019, at 9:10 a.m.

Rico Zenti filed a petition with the Tax Tribunal challenging the city of Marquette's determination that a parcel of real property he owned with his four siblings had been transferred in a manner that lifted the cap placed on its taxable value by the 1994 amendment of Const 1963, art 9, § 3 (commonly known as Proposal A). Zenti's mother, Rose Mary Zenti, conveyed title in the parcel to herself and her five children in 1996 as joint tenants with full rights of survivorship. When Rose Mary died in December 2015, her one-sixth interest passed by operation of law to her children. In January 2016, the children conveyed the property to themselves as tenants in common via quitclaim deed. In February 2017, Zenti and his siblings received notice from the city that the taxable value of the property had been uncapped because of the transfer of ownership in January 2016. In his petition to the tribunal, Zenti argued that the conveyance of the property from the siblings as joint tenants with rights of survivorship to themselves as tenants in common was not a "transfer of ownership" under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. The tribunal initially held that the January 2016 transfer was not exempted under MCL 211.27a(7)(i) because when the joint tenancy was terminated, none of the people involved in the joint tenancy was an original owner before the joint tenancy was created. Zenti moved for reconsideration, and the tribunal determined that it had erred in finding that the January 2016 conveyance was not exempt under MCL 211.27a(7). The tribunal ruled that the January 2016 quitclaim deed did not constitute a conveyance of title to or a present interest in the property to the value of the fee interest, as defined by MCL 211.27a(6), because petitioner and his siblings had merely given up the joint tenancy's right of survivorship. The tribunal ordered the city to reassess the property's taxable value. The city appealed.

The Court of Appeals *held*:

1. MCL 211.27a(2) and (3) of the GPTA provide the statutory framework to implement the capping and uncapping mechanisms required by Proposal A. Proposal A places a cap on the taxable

value of a property so that, based on the previous year's taxable value, any yearly increase in taxable value is limited to either the rate of inflation or 5%, whichever is less. A property's taxable value is uncapped upon a transfer of ownership of the property.

2. The Tax Tribunal correctly determined upon reconsideration of Zenti's petition that the January 2016 deed did not effect a transfer of ownership under the GPTA. MCL 211.27a(6) defines a transfer of ownership as a conveyance of title to or a present interest in property, the value of which is substantially equal to the value of the fee interest. Under the statute, the property must be transferred "to another," i.e., to a new party. Because no new parties were involved in the January 2016 deed and each party's interest in the property remained the same, there was no transfer or conveyance of ownership to another as defined by the statute.

Affirmed.

1. TAXATION — PROPERTY — JOINT TENANCIES — CONVEYANCES — TRANSFERS OF OWNERSHIP — IDENTICAL GRANTORS AND GRANTEES.

A conveyance that terminates a joint tenancy with right of survivorship and creates a tenancy in common is not a transfer of ownership under MCL 211.27a(6) if the grantors and grantees are the same and if the ownership interests of the parties are not changed by the conveyance.

2. TAXATION — PROPERTY — CAPPING OF TAXABLE VALUE OF REAL PROPERTY — CONVEYANCES — TRANSFERS OF OWNERSHIP — IDENTICAL GRANTORS AND GRANTEES.

A conveyance between the same grantors and grantees does not lift the cap placed on the taxable value of the property by the 1994 Amendment to Const 1963, art 9, § 3 (commonly called "Proposal A") when the ownership interests of the parties remain unchanged by the conveyance because it is not a transfer of ownership as defined by MCL 211.27a(6).

McDonald & Wolf, PLLC (by *William I. McDonald*) for petitioner.

Kendricks, Bordeau, Keefe, Seavoy & Larson, PC (by *Ronald D. Keefe*) for respondent.

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

TUKEL, P.J. Respondent, the city of Marquette, appeals as of right the final opinion and judgment of the Tax Tribunal. In its opinion, the Tax Tribunal held that the conveyance by five siblings, as joint tenants with rights of survivorship, to themselves, as tenants in common, was not a "transfer of property" under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. For the reasons provided below, we affirm.

I. BACKGROUND

The facts of this case are simple and uncontested. On April 25, 1996, Rose Mary Zenti, the owner of the property at issue in this case, executed a quitclaim deed, which conveyed title to herself and her children (Peter J. Zenti, Kathleen Fudjack, Marilyn Siegel, Christine Emmendorfer, and petitioner, Rico Zenti; collectively, the children) as joint tenants with full rights of survivorship. Rose Mary passed away on December 7, 2015, leaving the children as the sole joint tenants with full rights of survivorship; Rose Mary's one-sixth interest passed by operation of law to the children. On January 13, 2016, the children executed a quitclaim deed that conveyed the property to themselves as tenants in common.

On February 23, 2017, the children received a notice of assessment from respondent. The notice identified the new assessments for the taxable value, assessed value, and state equalized value for the property:

	PRIOR AMOUNT YEAR: 2016	CURRENT TENTATIVE AMOUNT YEAR: 2017	CHANGE FROM PRIOR YEAR TO CURRENT YEAR
1. TAXABLE VALUE (Current amount is tentative):	126,450	246,000	119,550
2. ASSESSED VALUE:	226,700	246,000	19,300
3. TENTATIVE EQUALIZATION FACTOR: 1.000			
4. STATE EQUALIZED VALUE (Current amount is tentative):	226,700	246,000	19,300

The notice further provided that there was a transfer of ownership of the property in 2016.

On May 22, 2017, petitioner filed a petition with the Michigan Tax Tribunal Small Claims Division. Petitioner challenged the "Uncapping of Taxable Value," arguing that the property had been "inappropriately uncapped by the city Assessor."[1] Petitioner maintained that, given that he and the other grantees were children of Rose Mary, the transfer of her interest after her death was exempt under MCL 211.27a(7)(d) and (7)(u). Moreover, petitioner contended that the January 2016 conveyance was not a "transfer of ownership" but instead was merely "a change in the type of ownership estate held by each of the" children.

The Tax Tribunal initially ruled that the 2016 transfer was not exempted and thus the property's assessments were properly uncapped. The tribunal rejected petitioner's contention that the January 2016 conveyance was not a transfer of ownership. The tribunal examined the definition of "transfer of ownership" and ruled that petitioner, by transferring his right of survivorship and terminating the joint tenancy, gave up a present interest. Accordingly, this was a conveyance and, because the conveyance occurred via a deed, it was a transfer of ownership.

The tribunal further held that the January 2016 transfer of ownership was not exempted under MCL 211.27a(7)(i) because when the joint tenancy was terminated, none of the people involved in the joint tenancy (i.e., the children) was an original owner of the property

[1] The 1994 passing of Proposal A amended "article 9, § 3 of the Michigan Constitution to limit the annual increase in property tax assessments. . . ." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). As explained herein, there normally is a "cap" on how much a property assessment can be increased. But "[a]fter certain 'transfers of ownership' occur, . . . property becomes uncapped and thus subject to reassessment based on actual property value." *Id*. at 297, quoting MCL 211.27a(3) (original brackets omitted).

before the joint tenancy was created; the only person who met that criterion was Rose Mary, and she already had passed away and was not involved in the January 2016 transfer.[2] The tribunal also rejected petitioner's argument that the transfer was exempted under MCL 211.27a(7)(u).[3] Although the transferees were all brothers and sisters, the tribunal noted that "[t]he transfer was . . . from themselves to themselves" and held that the exemption did not allow for a transfer to oneself, as was the case here.

Petitioner then filed a motion for reconsideration, which the Tax Tribunal granted. The Tax Tribunal ruled that it had erred when it found that the January 2016 transfer was not exempt under MCL 211.27a(7)(u). The tribunal ruled that under the definition of "transfer of ownership" in MCL 211.27a(6), the January 2016 transfer did "not constitute a conveyance of title to or a present interest in the property equal to the value of the fee interest" because petitioner and his siblings merely had given up the joint tenancy's right of survivorship.

II. STANDARD OF REVIEW

"This Court's authority to review a decision of the Tax Tribunal is very limited." *Mich Milk Producers Ass'n v*

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[2] MCL 211.27a(7)(i) exempts from the definition of a transfer of ownership instances in which, among other requirements, the transfer terminates a joint tenancy between two or more people and "at least 1 of the persons was an original owner of the property before the joint tenancy was initially created . . . ."

[3] For residential property that is not used for any commercial purpose following the conveyance, MCL 211.27a(7)(u) exempts from the definition of a transfer of ownership instances in which "the transferee is the transferor's or the transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter . . . ."

Dep't of Treasury, 242 Mich App 486, 490; 618 NW2d 917 (2000). "In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Klooster*, 488 Mich at 295 (quotation marks and citation omitted).

If this Court's "review requires the interpretation and application of a statute, that review is de novo." *Power v Dep't of Treasury*, 301 Mich App 226, 230; 835 NW2d 622 (2013). However, "[t]his Court will generally defer to the Tax Tribunal's interpretation of a statute that it is charged with administering and enforcing." *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 541; 716 NW2d 598 (2006) (quotation marks and citation omitted; alteration in original).

III. ANALYSIS

The sole issue on appeal is whether the January 2016 quitclaim deed, in which the children of Rose Mary, as joint tenants with full rights of survivorship, deeded the property to themselves as tenants in common, effected a "transfer of ownership" under the GPTA. We hold that the Tax Tribunal correctly found that the January 2016 transaction did not bring about such a transfer of ownership. Because a "transfer" is the threshold issue for all of respondent's arguments, its position on appeal fails.

"The purpose of Proposal A was to limit tax increases on property as long as it remains owned by the same party, even though the actual market value of the property may have risen at a greater rate." *Klooster*, 488 Mich at 296.

> Proposal A places a cap on the taxable value of a property so that, based on the previous year's taxable value, any yearly increase in taxable value is limited to either the rate of inflation or 5 percent, whichever is less. That cap on taxable value applies only to the current owner of the property, and the property's taxable value is uncapped when the property is transferred. The uncapped taxable value for the year after the transfer sets a new baseline value that is subject to a new cap. The GPTA is the enabling legislation that carries out the edicts of Proposal A. [*Mich Props, LLC v Meridian Twp*, 491 Mich 518, 529-530; 817 NW2d 548 (2012).]

"MCL 211.27a(2) and (3) provide the statutory framework to implement the capping and uncapping mechanisms required by Proposal A." *Id*. at 530. MCL 211.27a(2) establishes that the taxable value for each year after 1995 is the lesser of the value reached after applying the formula found in MCL 211.27(a)(2)(a), or the current state equalized value. MCL 211.27a(2); *Mich Props*, 491 Mich at 530-531. But "MCL 211.27a(3) sets forth an exception to the MCL 211.27a(2) calculation." *Mich Props*, 491 Mich at 531. MCL 211(a)(3) states the following:

> Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer.

"Accordingly, once the property is transferred, its taxable value is no longer predicated on the previous year's taxable value; rather, it is 'uncapped.' " *Mich Props*, 491 Mich at 531.

Therefore, in order to be able to invoke the uncapped computation of taxable value, there must have been a "transfer of ownership." MCL 211.27a(3). And MCL 211.27a(6) defines "transfer of ownership" as "the conveyance of title to or a present interest in property,

including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." The statute then goes on to explain that such a transfer of ownership can occur through various means, including through "[a] conveyance by deed." MCL 211.27a(6)(a).[4]

In ruling on petitioner's motion for reconsideration, the Tax Tribunal held that the January 2016 quitclaim deed did not effect a transfer of ownership. The tribunal stated: "Though the five children gave up their rights to survivorship under the joint tenancy, this does not constitute a conveyance of title to or a present interest in the property equal to the value of the fee interest . . . ." The tribunal noted that its previous decision was erroneous because it had "rel[ied] on a definition [of "transfer of ownership"] outside of that contained in the statutory language."[5] The tribunal's subsequent ruling on the motion for reconsideration was correct.

Our starting point is the statutory definition of "transfer of ownership" contained in MCL 211.27a(6), which defines "transfer of ownership" as "the conveyance of title to or a present interest in property . . . ." But because the term "the conveyance of title to or a present interest in property" is not further defined by statute, we may consult dictionary definitions. *Koontz*

[4] However, MCL 211.27a(7) lists numerous exceptions, identifying certain transfers that are not to be considered as "[t]ransfer[s] of ownership."

[5] While the Tax Tribunal also cited the statutory exception MCL 211.27a(7)(u) in its opinion, it is clear that the true basis of the tribunal's decision was that the transfer did not meet the statutory definition of "transfer of ownership" under MCL 211.27a(6). Because we agree that the deed here did not effect a "transfer of ownership" under that statutory definition, we need not address the exception contained in MCL 211.27a(7)(u).

v Ameritech Servs, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002); see also MCL 8.3a. "Conveyance" means "[t]he voluntary transfer of a right or of property." *Black's Law Dictionary* (11th ed); see also *Klooster*, 488 Mich at 304. And "transfer" means "[t]o convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of." *Black's Law Dictionary* (11th ed). Thus, when the various provisions are read together, "the conveyance of title to or a present interest in property" was required to have been from one person or group to "another" person or group. See MCL 211.27a(6). Here, however, the grantors and grantees of the January 2016 deed were *identical*; there was no conveyance or transfer to "another," because the same parties were owners at the end of the transaction as had been owners at the beginning. Further, each grantor held an undivided one-fifth interest in the property both before and after the execution of the deed, so not only were no new parties involved, but the extent of each party's interest remained the same. Accordingly, each grantor effectively conveyed to himself or herself without any other change in interests. Even if one considers the change in rights of survivorship which resulted from the transaction to have involved an interest in property "the value of which is substantially equal to the value of the fee interest," MCL 211.27a(6), that interest nevertheless involved no conveyance "to another," and thus fails to meet the statutory definition of "transfer of ownership."[6] Be-

[6] We note that our opinion is limited to these circumstances; our analysis would be different if the grantors and grantees were the same following the conveyance but their ownership proportions had changed. For example, if two grantors who owned equal 50% interests in the property conveyed to themselves such that one person subsequently owned a 75% interest in the property while the other person subse-

cause that threshold definition was not met, there is no basis for uncapping the valuation. Therefore, we hold that the Tax Tribunal properly concluded that the deed at issue did not effect a conveyance that met the statutory definition of "transfer of ownership" under MCL 211.27a(6).

Affirmed.

SERVITTO and RIORDAN, JJ., concurred with TUKEL, P.J.

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quently owned a 25% interest, then the grantor whose property interest was reduced can be said to have transferred part of his or her property interest to the other, i.e., to "another."

ESTATE OF EFFIE TAYLOR v UNIVERSITY PHYSICIAN GROUP

Docket No. 338801. Submitted January 10, 2019, at Detroit. Decided July 25, 2019, at 9:15 a.m. Leave to appeal denied 505 Mich 1016 (2020).

Oras Taylor, as personal representative for the estate of Effie Taylor, brought a medical malpractice action in the Oakland Circuit Court against University Physician Group; Franklin Medical Consultants, PC; Manuel Sklar, M.D.; and others. According to Dr. Sklar, while performing a colonoscopy on the decedent, he biopsied lesions in her colon that he suspected were alteriovenous malformations (AVMs). Prior to the procedure, the decedent had been taking Plavix, a blood thinner. Dr. Sklar testified at a deposition that he had instructed the decedent to discontinue taking Plavix five to seven days before the colonoscopy, but the medical record indicated that she had stopped taking it just three days before the procedure. A few days after Dr. Sklar performed the colonoscopy and the biopsies, the decedent developed colorectal bleeding. She underwent a second colonoscopy, performed by Dr. Veslav Stecevic, to try to determine the source of the bleeding. Dr. Stecevic believed that the source of the bleeding was a ruptured diverticulum, and he attempted to staunch the bleeding by injecting the diverticulum with epinephrine. However, the decedent continued to bleed and underwent emergency surgery to remove her colon in an unsuccessful attempt to save her life. Defendants moved for summary disposition on the basis of Dr. Stecevic's deposition testimony that the fatal bleed was caused by a ruptured diverticulum. Dr. Stecevic also testified that he had not seen any AVMs in the decedent's colon and that Dr. Sklar had not performed any biopsies of AVMs. Plaintiff's expert witness, Dr. Todd Eisner, testified that the source of the bleeding was likely the biopsied AVMs and that biopsies of AVMs were likely to cause bleeding, particularly in a patient who had been taking a blood thinner. The trial court, Denise Langford Morris, J., denied the motion, holding that plaintiff had produced sufficient expert testimony to establish a question of fact regarding whether Dr. Sklar had negligently performed biopsies that caused the fatal bleed. Defendants appealed.

The Court of Appeals *held*:

1. This case involved the eyewitness testimony of Dr. Stecevic regarding the source of the bleeding that caused Taylor's death. However, the Court would fall into error if it were to credit only Dr. Stecevic's testimony and disregard the testimony of Dr. Sklar that he had biopsied a suspected AVM. Dr. Eisner drew a reasonable inference that a biopsied AVM is likely to bleed profusely, especially when a patient has recently taken a blood thinner. Therefore, there was a question of fact regarding the source of the fatal bleed given Dr. Stecevic's testimony that there may have been multiple sources of bleeding, that he did not observe any AVMs in the decedent's colon, and that he found a bleeding diverticulum.

2. In a medical malpractice case, the plaintiff must present evidence demonstrating a causal link between the defendant's professional negligence and the plaintiff's injury; expert testimony is essential in establishing this link. Defendants argued that plaintiff failed to establish causation based on the testimony of Dr. Eisner. Moreover, defendants insisted that Dr. Eisner's testimony was inadmissible under *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278 (1999), because it was inconsistent with Dr. Stecevic's testimony and could not be reconciled with it other than by disparaging Dr. Stecevic's power of observation. Defendants' reliance on *Badalamenti* was misplaced. Viewed in the light most favorable to Taylor, the evidence supported several reasonable factual conclusions relevant to causation, including that the decedent's bleeding was caused by both a biopsied AVM and a ruptured diverticulum, or that Dr. Stecevic had incorrectly identified the source of the bleeding. Unlike in *Badalamenti*, Dr. Stecevic's opinion was not based on objective, technical measurements, but on his subjective interpretation of his own observations. Further, all of the expert witnesses in this case testified regarding their perceptions of visual images, unlike the unquestioned objective evidence in *Badalamenti*. Additionally, unlike the excluded expert testimony in *Badalamenti*, Dr. Eisner had a reasonable basis, grounded in the evidence, for questioning the accuracy of Dr. Stecevic's perception that the source of the bleeding was a diverticulum. A jury could believe that the bleeding came from a diverticulum, as Dr. Stecevic testified, or it could reject that testimony for the reasons delineated by Dr. Eisner.

3. A jury may decide to disbelieve an eyewitness's unrebutted testimony because all evidence rests on a witness's inference from their own perceptions. In this case, both Drs. Sklar and Stecevic

testified to their perceptions of visual images, and both opinions were subject to credibility challenges. Although Dr. Stecevic observed an abnormality he believed was an actively bleeding diverticulum, no objective evidence proved that it was in fact the source of the bleeding, just as no objective evidence proved that the lesions observed by Dr. Sklar were AVMs.

Affirmed and remanded.

O'BRIEN, J., dissenting, disagreed that there was a question of fact regarding the source of the bleeding. Dr. Stecevic testified that he searched the area of the decedent's colon that Dr. Sklar said he biopsied, but could not find any bleeding. Dr. Stecevic provided photographs of the areas of the decedent's colon that he had examined while looking for the source of the bleed, including photographs of the areas that Dr. Sklar biopsied. The photos showed that there was no active bleeding in those areas. In response, plaintiff offered only Dr. Eisner's testimony that Dr. Stecevic had not actually examined the same areas that Dr. Sklar had biopsied. But Dr. Eisner's testimony was speculation or conjecture, which cannot create a question of fact for a jury. The majority's assertion that a jury could believe Dr. Eisner's testimony that the decedent was bleeding from the biopsy sites because it could question Dr. Stecevic's power of observation violated the rule from *Badalamenti* that expert testimony is inadmissible if it is inconsistent with the testimony of a witness who personally observed an event in question and the expert is unable to reconcile their inconsistent testimony other than by disparaging the witness's power of observation.

Bendure & Thomas, PLC (by *Mark R. Bendure*) and *McKeen & Associates, P.C.* (by *Brian J. McKeen* and *Kenneth Lee*) for the estate of Effie Taylor.

Tanoury, Nauts, McKinney and Garbarino, PLLC (by *Anita Comorski*, *Linda M. Garbarino*, and *William A. Tanoury*) for Franklin Medical Consultants, PC, and Manuel Sklar, M.D.

Before: GLEICHER, P.J., and STEPHENS and O'BRIEN, JJ.

GLEICHER, P.J. This medical malpractice case arises from a colonoscopy performed by defendant Manuel

Sklar, M.D., on plaintiff's decedent, Effie Taylor. During the procedure, Dr. Sklar observed lesions in Taylor's colon that he believed were arteriovenous malformations (AVMs). Dr. Sklar biopsied the suspected AVMs. Three days later, Taylor developed colorectal bleeding. Despite the emergent removal of her entire colon, Taylor died.

Plaintiff claims that Dr. Sklar breached the standard of care by biopsying the AVMs, particularly since Taylor had recently taken Plavix, a blood thinner, and was a devout Jehovah's Witness who refused blood transfusions. Plaintiff's expert witness, Dr. Todd Eisner, testified that the improper and unindicated biopsies caused the bleeding that ultimately led to Taylor's death.

Dr. Sklar's defense focused on causation. His expert witness, Dr. Veslav Stecevic, performed an emergent colonoscopy on Taylor the day before she died, looking for the source of the bleeding in her colon. According to Dr. Stecevic, the bleeding originated at the site of a ruptured diverticulum, a "deep pocket" in the intestinal wall. Dr. Stecevic opined that the ruptured diverticulum was wholly incidental to the biopsies and conceded that it was a "random" event. Defendants assert that Dr. Stecevic's testimony must be believed. Crediting Dr. Stecevic, defendants reason, demands the entry of summary disposition in favor of Dr. Sklar.

The circuit court disagreed, and so do we. Given Dr. Sklar's testimony that he biopsied the suspected AVMs and Dr. Eisner's reasonable explanation that the biopsy of the AVMs likely caused Taylor's hemorrhage, Dr. Stecevic's testimony that the bleeding was caused by a ruptured diverticulum creates a fact question regarding the source of the fatal bleeding. As in every case involving eyewitness testimony, a jury is free to

believe or disbelieve the witness's account. That the eyewitness is a physician does not defeat this rule.

I

At his deposition, Dr. Sklar acknowledged awareness that Taylor, a 79-year-old woman and a Jehovah's Witness, had been taking Plavix before the colonoscopy. He had instructed her to discontinue the Plavix five to seven days before the procedure; however, according to the medical record, Taylor had stopped taking the drug only three days before. Dr. Eisner opined that Taylor still had Plavix in her system at the time of the colonoscopy, "which would be another reason not to take biopsies in a Jehovah's Witness, especially of what he thought was an AVM."

Dr. Sklar dictated the official operative report on the day of the colonoscopy. He noted that a segment of Taylor's ascending colon "had an appearance of multiple small blood vessels suggestive for an extensive AVM malformation." The report continues, "Biopsies were taken." Dr. Sklar's "final diagnoses," as recorded in the medical record, were "[d]iverticulosis and arteriovenous malformations." At his deposition, Dr. Sklar repeatedly confirmed that he biopsied "a vascular lesion" (an AVM is an abnormal collection of coalesced blood vessels). Dr. Sklar's records do not support that he biopsied a diverticulum, and he did not report any diverticular bleeding.

Three days after the colonoscopy, Taylor presented at Beaumont Hospital with rectal bleeding. An angiogram failed to locate the bleeding's source. Dr. Stecevic performed a colonoscopy to locate the source of the blood and to stem its flow. He claimed that he did not see any AVMs during his examination of Taylor's colon and asserted that there were none. According to Dr.

Stecevic, Dr. Sklar had not biopsied an AVM, despite that Dr. Sklar's records and testimony support that he did:

> *Q*. Do you believe that Dr. Sklar biopsied an [AVM]?
>
> *A*. No.
>
> *Q*. Why?
>
> *A*. Because there was no [AVM].

As noted, in Dr. Stecevic's opinion, the source of Taylor's bleeding was a ruptured diverticulum. That this occurred three days after undergoing biopsies of her colon was "simply a coincidence," Dr. Stecevic agreed, because a bleeding diverticulum is a "random event."

Dr. Stecevic recorded that he found "[r]ed blood . . . in the entire colon" during the second colonoscopy and performed a "[l]imited exam due to large amount of blood in the entire colon." Dr. Stecevic injected epinephrine into what he thought was a bleeding diverticulum. He noted that this successfully staunched the hemorrhage coming from Taylor's colon. But Taylor continued to bleed. To try to save her life, a surgeon removed her entire colon. Dr. Stecevic conceded that the surgery was performed because there may have been other sources of bleeding. Despite this effort, Taylor died.

II

Dr. Eisner disagreed with Dr. Stecevic's opinion about the source of the fatal bleed. Dr. Eisner testified that Dr. Sklar biopsied an AVM. This testimony is consistent with that of Dr. Sklar, who documented and testified that he had biopsied an AVM. Dr. Eisner explained that Dr. Sklar's description of the lesion he biopsied matched an AVM, and that it is common for

AVMs to be found in the right colon, where Dr. Sklar performed the biopsies. "I have no reason to doubt when he said it was an AVM that it was an AVM," Dr. Eisner declared.

Dr. Eisner explained that diverticular bleeding is "very rare, however old you are," and is not a reported complication of a colonoscopy. He offered several additional reasons for disbelieving that the bleeding observed by Dr. Stecevic came from a spontaneously ruptured diverticulum rather than a recently biopsied AVM. For instance, there was a considerable amount of blood in Taylor's colon, as Dr. Stecevic admitted. When there is a lot of blood in the colon, Dr. Eisner opined, "it's going to pool in the diverticular pockets and then it will come out of the pocket. It can look like the diverticulae are bleeding." Dr. Eisner posited that if the surgeon who removed Taylor's entire colon believed that the bleeding came from a single ruptured diverticulum, the surgeon would have removed only the portion of the colon surrounding that diverticulum. And Dr. Eisner questioned why the bleeding in Taylor's colon continued if it was only diverticular and had been effectively controlled by the shot of epinephrine, as claimed by Dr. Stecevic. He summarized, "It would be an unusual coincidence for her to have a bleeding diverticulum after what the gastroenterologist thought was an AVM, was biopsied when she took Plavix, and [then] she started to bleed after that."

III

Defendants filed a motion for summary disposition based on Dr. Stecevic's deposition testimony, contending that the evidence proved that Taylor's death was caused by a bleeding diverticulum rather than a biopsied AVM. According to defendants, Dr. Eisner ignored

this evidence when forming his opinion. Plaintiff pointed out that his claim involved informed consent as well as Dr. Sklar's negligence in biopsying an AVM. Plaintiff also cited the deposition of Dr. Michael Fishbein, a pathology expert from the University of California, Los Angeles, who allegedly reviewed pathological slides from the colonoscopy that revealed "widespread angiodysplasia," a term used interchangeably with AVM to mean "that the tissue contained abnormally formed blood vessels that involve both venous and arterial structures."[1]

The trial court denied defendants' motion, stating: "The Court finds that summary disposition is not appropriate. Plaintiff has produced sufficient expert witness testimony to establish a question of fact regarding whether Defendant negligently performed biopsies that caused the fatal bleed." Defendants filed an application for leave to appeal the trial court's order denying summary disposition, which this Court granted. *Estate of Effie Taylor v Univ Physician Group*, unpublished order of the Court of Appeals, entered November 15, 2017 (Docket No. 338801).

IV

We consider the circuit court's summary disposition decision de novo by familiarizing ourselves with the pleadings, admissions, affidavits, and other record documentary evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial."

[1] As defendants point out in their brief on appeal, Dr. Fishbein's deposition transcript was not provided below, and has not been provided on appeal. Defendants have not denied the accuracy of plaintiff's description of his testimony. Nevertheless, we have not considered it in reaching our decision.

Walsh v Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists, precluding summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Viewing the evidence in the light most favorable to the nonmoving party means that a court may not make findings of fact or assess the credibility of witnesses. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142-143; 753 NW2d 591 (2008). Summary disposition is improper when a trier of fact could reasonably draw an inference supporting causation from the established facts:

> It is a basic proposition of law that determination of disputed issues of fact is peculiarly the jury's province. Even where the evidentiary facts are undisputed, it is improper to decide the matter as one of law if a jury could draw conflicting inferences from the evidentiary facts and thereby reach differing conclusions as to ultimate facts. [*Nichol v Billot*, 406 Mich 284, 301-302; 279 NW2d 761 (1979) (citations omitted).]

The United States Supreme Court has underscored the reasons that summary judgment is inappropriate where witnesses to an event provide starkly different descriptions of what they saw, heard, or perceived.[2] *Tolan v Cotton*, 572 US 650, 651-654; 134 S Ct 1861; 188 L Ed 2d 895 (2014), arose from a police shooting at the home of a man suspected of having stolen a car. The legal issue presented was whether the officer was entitled to qualified immunity, which immunizes an officer from liability when the use of force is reason-

[2] Michigan's standards for summary disposition mirror the standards for summary judgment in federal court. See *Maiden v Rozwood*, 461 Mich 109, 123-124; 597 NW2d 817 (1999).

able. *Id*. at 651. Witnesses to the shooting disputed the lighting conditions, the words and tones of voice used by the participants, whether a threat was made, and the demeanor of the people present at the scene. *Id*. at 657-659. Despite these discrepancies, the federal district court granted summary judgment in favor of the defendant, and the United States Court of Appeals for the Fifth Circuit affirmed. *Id*. at 651.

The Supreme Court reversed, highlighting that at the summary judgment stage, courts must not sort through the evidence to find truth; that job is reserved for the jury. *Id*. at 651, 657-660. In language pertinent to the case before us, the Supreme Court emphasized the importance of viewing the evidence in the light most favorable to the nonmoving party:

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to [the plaintiff's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party. [*Id*. at 660.]

Like *Tolan*, this case involves the testimony of an eyewitness. Were we to credit only Dr. Stecevic's testimony and disregard Dr. Sklar's, we would fall into the same error condemned by the Supreme Court in *Tolan*. Dr. Sklar testified that he biopsied an AVM. Dr. Eisner drew a reasonable inference that a biopsied AVM is likely to bleed profusely, particularly when a patient has recently taken a blood thinner. Given Dr. Stecevic's admission at deposition that there may have been multiple bleeding sources in Taylor's colon, his claim that Taylor's colon contained no AVMs at all, and his

subjective judgment that he found a bleeding diverticulum create fact questions regarding the source of Taylor's fatal bleed.

V

A medical malpractice plaintiff must present evidence demonstrating a causal link between a defendant's professional negligence and the plaintiff's injury. Expert testimony is required. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006). As in every negligence case, two causation concepts work in tandem. First, a plaintiff must demonstrate that "but for" the defendant's negligence, the plaintiff's injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Once a plaintiff produces the factual support establishing a logical sequence of cause and effect, the plaintiff must also come forward with evidence supporting that the actual cause was proximate, meaning that it created a foreseeable risk of the injury the plaintiff suffered. *Id.*; *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). In a medical malpractice case, circumstantial evidence may suffice to demonstrate but-for causation, as long as the circumstantial evidence "lead[s] to a reasonable inference of causation and [is] not mere speculation." *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 87; 776 NW2d 114 (2009) (opinion by TALBOT, P.J.); *id*. at 115 (BANDSTRA, J., concurring). "While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004).

Defendants' causation argument in this case rests on the following language from *Green v Jerome-*

Duncan Ford, Inc, 195 Mich App 493, 498-499; 491 NW2d 243 (1992): "An expert witness need not rule out all alternative causes of the effect in question, but he must have an evidentiary basis for his own conclusions. This Court has held that an expert's opinion was objectionable because it was based on assumptions that did not accord with the established facts." (Citations omitted.) Relying on *Green*, this Court held in *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), that expert testimony is inadmissible when it "is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness'[s] power of observation." According to defendants, Dr. Eisner's expert testimony that Dr. Sklar biopsied an AVM is inconsistent with Dr. Stecevic's testimony that he found a bleeding diverticulum. *Badalamenti* is "[d]irectly on point," defendants insist, and compels that Dr. Eisner's testimony be stricken.

Defendants' logic harbors a critical flaw. Dr. Sklar documented in the medical record and testified at deposition that he biopsied an AVM. Dr. Stecevic disputed that Dr. Sklar had biopsied an AVM. Given this conflict in the evidence, the expert "disparaging" the eyewitness's power of observation is Dr. Stecevic, not Dr. Eisner. See *Badalamenti*, 237 Mich App at 286. Viewed in the light most favorable to plaintiff, the evidence supports several reasonable factual conclusions relevant to causation, including that Taylor had *both* an AVM that caused unchecked bleeding after it was biopsied and a bleeding diverticulum. Alternatively, based on evidence of record, a jury may reasonably conclude that Dr. Stecevic incorrectly identified the bleeding he saw as emanating from a diverticulum rather than from an AVM biopsy site. Multiple conflicts

in the evidence give rise to genuine issues of material fact regarding the cause of Taylor's fatal bleed, precluding summary disposition.

Defendants' reliance on *Badalamenti* is misplaced, as the facts of that case differ in critical ways from those presented here. In *Badalamenti*, 237 Mich App at 281, the plaintiff claimed that the defendant cardiologist negligently failed to timely diagnose and treat the plaintiff's cardiogenic shock. The defendants asserted that the plaintiff did not have cardiogenic shock and that his injuries instead stemmed from an unexpected and rare reaction to a drug, streptokinase. *Id*. at 282. The evidence relevant to whether the plaintiff had cardiogenic shock included *objective* hemodynamic measurements obtained by technical devices: the patient's wedge pressure, cardiac index, and systolic blood pressure. These objective measurements did not support that the plaintiff was in cardiogenic shock. *Id*. at 286-287. The plaintiff's expert witness, Dr. Wohlgelernter, conceded that these measurements were "contrary to a diagnosis of cardiogenic shock." *Id*. at 287. A cardiologist also performed an echocardiogram on the plaintiff, a procedure that includes a physician's interpretation of images on a screen. The echocardiogram demonstrated that the plaintiff's left ventricle was functioning in a nearly normal manner. This evidence, too, supported that the plaintiff was not suffering from cardiogenic shock. *Id*. Dr. Wohlgelernter agreed that the echocardiogram showed that the heart's left ventricle function was "fairly well-preserved." *Id*. at 288.

Notwithstanding this evidence, Dr. Wohlgelernter maintained that the plaintiff had cardiogenic shock. *Id*. at 287-288. According to this Court's opinion, he supported that belief only by expressing "skepticism" of the

results of the echocardiogram. *Id*. at 287. This Court concluded:

> Dr. Wohlgelernter had no reasonable basis in evidence to support his opinion that plaintiff's left ventricular heart wall function was significantly damaged on March 16, which he agreed was the pertinent time frame and the definitive component for a diagnosis of cardiogenic shock. Rather, as he explained, he based his opinion on his skepticism and disparagement of [the cardiologist's echocardiogram] findings. [*Id*. at 288.]

"Notably," this Court added, "Dr. Wohlgelernter specifically acknowledged that on the basis of the information in the record, a competent cardiologist might logically conclude that plaintiff did not have cardiogenic shock, and he agreed that a reaction to streptokinase could not be ruled out in this case." *Id*. at 289.

Badalamenti is a fact-driven case and is easily distinguishable from this one. There, evidence of causation rested largely on objective measurements obtained by machines rather than eyewitness observations.[3] The subjective component of the evidence—a physician's interpretation of the echocardiogram results—did involve a treating cardiologist's impression of what he saw. But Dr. Wohlgelernter agreed that the echocardiogram did not reflect "definite evidence of major damage to plaintiff's heart wall," and supported that the plaintiff's left ventricular systolic function "was fairly well-preserved." *Id*. at 288. Despite these concessions, Dr. Wohlgelernter insisted that the plaintiff had cardiogenic shock, a conclusion he reached by disparaging

[3] That is not to say that machines must be considered infallible as a matter of law. What if a living, healthy-appearing patient's temperature measured 115 degrees when taken by a thermometer? It would be entirely proper, from an evidentiary perspective, for an expert witness to question the accuracy of the thermometer. No such question regarding the technology was raised in *Badalamenti*.

the cardiologist's interpretation of the echocardiogram. See *id*. Dr. Wohlgelernter offered no explanation for how or why the cardiologist might have misinterpreted the echocardiogram. Instead, Dr. Wohlgelernter simply stated that the cardiologist who performed the echocardiogram was wrong about the ultimate conclusion. *Id*.

Unlike the hemodynamic measurements that figured prominently in *Badalamenti*, the evidence supporting that Taylor's bleed came from a diverticulum rather than a biopsied AVM is purely subjective—Dr. Stecevic's interpretation of what he saw. The physician who performed the biopsy—an eyewitness to that procedure—documented in the medical record and testified that he biopsied an AVM. This evidence supplied the facts underpinning Dr. Eisner's testimony. Were we to apply *Badalamenti* in the manner urged by defendants, we might question whether Dr. Stecevic should be permitted to testify that Dr. Sklar did *not* biopsy an AVM, as Dr. Stecevic's testimony contradicts that of an eyewitness to the procedure—Dr. Sklar. But doing so would be error for the same reason that disallowing Dr. Eisner's opinion is improper. Unlike in *Badalamenti*, the experts in this case have formed their opinions based on facts of record, and have drawn reasonable inferences from the evidence. Their opinions are consistent with the facts and the inferences, and are not grounded in mere speculation or baseless disdain for a contrary conclusion.

Moreover, a powerful strain of precedent is in tension with defendants' interpretation of *Badalamenti*. In *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987) (citation omitted), a medical malpractice case, this Court declared that a jury could disregard a physician's unrebutted testimony, reason-

ing that "a jury may disbelieve the most positive evidence even when it stands uncontradicted, and the judge cannot take from them their right of judgment." Two additional medical malpractice cases make the same point. In *Ykimoff*, 285 Mich App at 89-90 (opinion by TALBOT, P.J.), and *Martin v Ledingham*, 488 Mich 987, 987-988; 791 NW2d 122 (2010), the defendant physicians testified that they would have acted in a certain manner if provided with information about a patient's condition. The Courts held that a jury was entitled to disbelieve the physicians' testimony, even though it was unrebutted by other evidence.

The dissent takes issue with my concurring opinion in *Ykimoff*, despite that I have neither quoted from nor cited it in this opinion. The legal debate between the judges who decided *Ykimoff* centered on the soundness of *Martin v Ledingham*, 282 Mich App 158; 774 NW2d 328 (2009), in which this Court took a position mirroring the dissent's: that a medical malpractice expert cannot contradict an "eyewitness" regarding facts critical to causation. The Supreme Court resolved the debate by adopting the reasoning of my concurring opinion in *Ykimoff* rather than the contrary views of Judges TALBOT and BANDSTRA, holding, "the treating physician's averment that he would have acted in a manner contrary to this standard of care presents a question of fact and an issue of credibility for the jury to resolve." *Martin*, 488 Mich at 988. In *Martin*, the Supreme Court rejected the dissent's remarkable proposition that a fact-finder is duty-bound to accept an uncontroverted fact. A long line of caselaw buttresses the Supreme Court's *Martin* order. See *Ricketts v Froehlich*, 218 Mich 459; 188 NW 426 (1922), *Soule v Grimshaw* 266 Mich 117; 253 NW 237 (1934), and *Debano-Griffin v Lake Co*, 493 Mich 167; 828 NW2d

634 (2013), highlighting that when a witness's credibility is at issue, summary disposition is inappropriate.

Here, Dr. Eisner based his opinion that Taylor bled from a biopsied AVM on the operative report signed by Dr. Sklar, buttressed with Dr. Sklar's deposition testimony that the lesion he biopsied was an AVM. The evidence that Dr. Sklar biopsied an AVM is therefore neither speculative nor conjectural. Dr. Eisner's opinion that Dr. Sklar biopsied an AVM is well grounded in the facts and not the product of mere "skepticism" or disparagement. Similarly, Dr. Eisner's opinion that Taylor's bleeding was likely caused by the biopsied AVMs rests on unchallenged scientific reasoning.

Dr. Stecevic's testimony that a diverticulum was the source of Taylor's bleeding is subject to challenge for precisely the same reason that a jury may disbelieve that Dr. Sklar biopsied an AVM. Both Drs. Sklar and Stecevic testified to their *perceptions* of visual images; in other words, their opinions about what they had seen. Both are subject to credibility challenges: Dr. Sklar as a defendant, and Dr. Stecevic as a retained expert. Credibility aside, all evidence—even eyewitness testimony—rests on a witness's act of drawing an inference from a perception. Two people can watch a car drive by and give widely divergent estimates of its speed. One might infer that the car is speeding, while the other infers a legal rate of travel. Two physicians can view the same CT or MRI scan and render divergent opinions about what it reveals, one inferring an abnormality and the other a normal structure. See *Milam v State Farm Mut Auto Ins Co*, 972 F2d 166, 170 (CA 7, 1992) ("All evidence is probabilistic, and therefore uncertain; eyewitness testimony and other forms of 'direct' evidence have no categorical epistemological claim to precedence over circumstantial or even explicitly statistical evidence.").

Dr. Stecevic's disagreement with Dr. Sklar about whether Taylor actually had an AVM highlights the fundamental difference between this case and *Badalamenti*. Here, Dr. Stecevic offered an *opinion* about what Dr. Sklar saw during the first colonoscopy, and what he himself saw during the second. Dr. Stecevic observed an abnormality that he believed to be an actively bleeding diverticulum. No objective evidence *proves* that the lesion was an actively bleeding diverticulum. Similarly, no objective evidence of record proves that the lesions biopsied by Dr. Sklar were AVM's. Rather, both physicians expressed judgments about what they had seen through a colonoscope. Their assessments of what they saw (in Dr. Stecevic's case, under bloody conditions that limited his examination) are not analogous to the unquestioned objective evidence in *Badalamenti* proving that the plaintiff did not have cardiogenic shock. And in that case the experts agreed about the interpretation of even the *subjective* component of the evidence—the echocardiogram.

Here, defendants propose that Dr. Stecevic must be believed. That view flies in the face of basic evidentiary principles. That the physicians involved in this case are professional observers does not change the rule that their eyewitness testimony may be disbelieved by a jury. In *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), our Supreme Court reversed the grant of a verdict directed by the trial court on the basis of "undisputed" evidence that "probably ought to have satisfied any one . . . ." Writing for a unanimous Court, Justice COOLEY explained that despite the absence of any conflicting evidence, the jury "may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." *Id*. Our Supreme Court again empha-

sized that a witness need not be believed in *Yonkus v McKay*, 186 Mich 203, 210-211; 152 NW 1031 (1915), stating:

> To hold that in all cases when a witness swears to a certain fact the court must instruct the jury to accept that statement as proven, would be to establish a dangerous rule. Witnesses sometimes are mistaken and sometimes unfortunately are wilfully mendacious. The administration of justice does not require the establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make.

See also *Arndt v Grayewski*, 279 Mich 224, 231; 271 NW 740 (1937) (holding that eyewitness testimony "is not conclusive upon the court or a jury if the facts and circumstances of the case are such as irresistibly lead the mind to a different conclusion"). The credibility of eyewitness identification testimony is always a question of fact. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "In short, the jury is free to credit or discredit any testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001).

Our Supreme Court recently acknowledged the authority of medical literature attesting that a physician's misperception of anatomy during surgery is a well-accepted phenomenon. See *Elher v Misra*, 499 Mich 11, 15; 878 NW2d 790 (2016). Physicians may disagree regarding the interpretation of x-rays, see *Sawka v Prokopowycz*, 104 Mich App 829; 306 NW2d 354 (1981), the conclusions to be drawn from objective and undisputed autopsy findings, see *Robins v Garg (On Remand)*, 276 Mich App 351; 741 NW2d 49 (2007), and the meaning of an EKG tracing, see *Goldberg v Horowitz*, 901 NYS2d 95, 98; 73 AD3d 691 (2010). Dr. Stecevic's perception that he saw a bleeding diverticulum is precisely that, a perception. A jury may believe that the

bleeding Dr. Stecevic saw came from a diverticulum, or it may reject that testimony for the reasons expressed by Dr. Eisner.[4]

This case is distinguishable from *Badalamenti* for a second reason. Unlike Dr. Wohlgelernter, Dr. Eisner had a reasonable basis for calling into question the accuracy of Dr. Stecevic's perception that the bleeding was coming from a diverticulum. Here, the evidence supported that (1) Dr. Stecevic's view of Taylor's colon likely was obscured by blood, (2) blood emanating from a source other than a diverticulum may pool in a diverticulum and look like a bleeding diverticulum, (3) diverticular bleeding is rare, and its presence in Mrs. Taylor was coincidental to a procedure that carried a recognized risk of bleeding, and (4) if Dr. Stecevic had successfully stopped the diverticular bleeding as he claimed to have done, Taylor would not have continued to bleed so heavily that a total colectomy was required.[5] Dr. Eisner's opinion that a negligently biopsied AVM caused Taylor's death does not rest on "assumptions" contradicted by "established facts." Nor did Dr. Eisner support his opinions by merely disparaging Dr. Stecevic's "power of observation." Dr. Eisner's causation theory draws upon facts of record and describes a logical sequence of cause and effect.

The dissent posits that because Dr. Stecevic "could not find an active bleed until he reached the hepatic flexure," Taylor was not "actively bleeding from the areas biopsied by Dr. Sklar." And if Taylor was not

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[4] Dr. Stecevic's credibility may also be subject to question based on his status as a paid expert for the defense.

[5] Under defendants' logic, Dr. Stecevic's testimony that he successfully stopped Taylor's bleeding with the epinephrine injection would also have to be believed. This means that there must have been another source of the bleeding that killed Taylor.

bleeding from those sites, the dissent reasons, plaintiff "cannot establish that Dr. Sklar's biopsies caused Taylor's death." Respectfully, the dissent's position reinforces the importance of viewing the evidence in the light most favorable to the nonmoving party and the need to treat Dr. Stecevic's testimony like that of any other witness or eyewitness, i.e., capable of being questioned as to its validity.

That Taylor died due to massive blood loss from her colon is not in dispute. Accepting Dr. Stecevic's claim that the biopsy sites were not bleeding during the colonoscopy and that he successfully stopped the bleed from a diverticulum means that Taylor must have suffered yet another spontaneous, "random" bleed in her colon. As conceptualized by the dissent, Dr. Stecevic's testimony offers no explanation for the source of the bleeding that caused Taylor's death. The only rational conclusion the dissent offers is that Taylor experienced a second, entirely coincidental (and fatal) bleed in her colon.

There are obvious gaps in the dissent's one-sided view of the evidence. Dr. Stecevic admitted that Taylor had "massive bleeding" on admission to the hospital and that she bled profusely after the second colonoscopy. He also conceded that the surgery to remove her colon was performed because there "might have been other sources of bleeding." Viewing the evidence in Taylor's favor, a jury would have reason to question Dr. Stecevic's power of observation. If Dr. Stecevic stopped the bleeding from the diverticulum, as he claimed, where did the blood that killed Taylor originate? A jury could reasonably conclude that the "other sources" of the continued, massive bleeding were the sites of Dr. Sklar's biopsies, as according to Dr. Eisner, biopsying an AVM in a patient on Plavix causes bleeding.

That Dr. Stecevic claimed to have "discovered" only one source of bleeding in Taylor's colon during his colonoscopy does not rule out that there were more, given Dr. Stecevic's admissions that his examination was "limited . . . due to [the] large amount of blood in the entire colon" and that he had to end his procedure abruptly because Taylor's blood pressure dropped.[6]

Questions of fact abound in this case. Accordingly, the circuit court did not err by denying defendants' motion for summary disposition.

We affirm and remand for further proceedings. We do not retain jurisdiction.

STEPHENS, J., concurred with GLEICHER, P.J.

O'BRIEN, J. (*dissenting*). I respectfully dissent.

Plaintiff's theory of causation is that Dr. Manuel Sklar biopsied multiple AVMs during Effie Taylor's colonoscopy, causing bleeding at the biopsy sites that eventually led to Taylor's death. According to Dr. Sklar's report, the biopsies were "[j]ust proximal to the cecum" in the "ascending colon." Dr. Todd Eisner testified that the biopsies were in the "proximal ascending colon," which "would be closer to the cecum than to the hepatic flexure[.]" Three days after Dr. Sklar biopsied Taylor's colon, Taylor returned to the hospital with reports of colorectal bleeding, so Dr. Veslav Stecevic performed a second colonoscopy looking for sites with active bleeds. According to Dr. Stecevic, there was "[r]ed blood" throughout the colon. Dr. Stecevic "washed [areas of the colon] meticulously"—including the "terminal ileum, cecum, . . . the ascending colon and . . . the hepatic flexure"—but could not find an active bleed until he

[6] In his operative note, Dr. Stecevic noted, "Blood entire examined colon."

reached the hepatic flexure.[1] That is, Dr. Stecevic testified that he washed and looked for an active bleed at the sites where Dr. Sklar biopsied, but could not find one.[2] Dr. Stecevic took pictures of the areas where he searched—which included pictures of the ascending colon—and those pictures are included in the lower-court record. The pictures show that in the areas that Dr. Stecevic searched, he washed away the blood so that he had a clear view. Even assuming that Dr. Stecevic was mistaken about the bleed in the hepatic flexure, his testimony established that at the time of Taylor's second colonoscopy, she was not bleeding from the areas biopsied by Dr. Sklar. If Taylor was not bleeding from the biopsy sites, plaintiff cannot establish that Dr. Sklar's biopsies caused Taylor's death, and defendants are entitled to summary disposition.[3]

Plaintiff did not offer any evidence to establish a question of fact whether Taylor was bleeding from the biopsy sites during her second colonoscopy. See MCR 2.116(G)(4) ("When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial."). In-

[1] Dr. Stecevic explained that during a colonoscopy, a doctor begins at the back of the colon and makes his or her way towards the rectum. So the doctor begins in the terminal ileum, then works through the cecum, then the ascending colon, then the hepatic flexure, and so on.

[2] The majority emphasizes that Dr. Stecevic testified that he did not believe that Dr. Sklar biopsied any AVMs, but that does not affect that Dr. Stecevic testified that he searched for but could not find an active bleed at the sites that Dr. Sklar biopsied.

[3] Plaintiff does not offer an alternative theory of causation. Therefore, even if Dr. Stecevic was wrong about the bleed coming from the diverticulum, that error would not save plaintiff's claim.

stead, Dr. Eisner testified that he believed that the biopsy sites continued to bleed because it was the most likely explanation for the blood in Taylor's colon. But it is unclear why Dr. Eisner discredited Dr. Stecevic's testimony that he searched for but could not find an active bleed at the biopsy sites. As best I can discern, Dr. Eisner did not believe that Dr. Stecevic and/or Dr. Sklar "truly knew where [they] were" in the colon during the colonoscopies because "there is not a road map in there, so sometimes we don't know exactly where we are. Sometimes it's an estimate." In other words, Dr. Eisner opined that one or both of the doctors were mistaken about where they were in the colon, so Dr. Stecevic was not looking for an active bleed in the area that Dr. Sklar biopsied. This opinion, however, has no support in fact. Neither Dr. Stecevic nor Dr. Sklar testified that they had any doubt about where they were in the colon. Thus, Dr. Eisner's testimony that they may not have "truly" known where they were because that happens "sometimes" is speculation or conjecture, which cannot create a question of fact. See *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Because plaintiff failed to establish a question of fact whether the biopsy sites were bleeding during Taylor's second colonoscopy, defendants were entitled to summary disposition.

Contrary to the majority's characterization of my opinion, I am viewing the evidence in the light most favorable to plaintiff. The issue—and why defendants are entitled to summary disposition—is the *lack of evidence* that the biopsy sites were bleeding at the time of Taylor's second colonoscopy.[4] Dr. Stecevic testified that he washed the areas that Dr. Sklar biopsied and

[4] In a similar vein, the majority claims that I "offer[]" the "conclusion" that "Taylor experienced a second, entirely coincidental (and fatal) bleed

looked for but could not find an active bleed. Dr. Stecevic provided photos of some of the areas that he washed looking for the bleed, and those photos show that he had a clear view of the areas and that there were no active bleeds. In response, plaintiff only offered Dr. Eisner's testimony that he believed that the biopsy sites were bleeding because Dr. Stecevic was not looking for an active bleed where Dr. Sklar actually biopsied. This speculation cannot create a question of fact for a jury. It is this lack of evidence in response to defendants' motion—meaning plaintiff's failure to "set forth specific facts showing that there is a genuine issue for trial," MCR 2.116(G)(4)—that entitles defendants to summary disposition.

According to the majority, plaintiff established a question for trial because a jury could "question Dr. Stecevic's power of observation."[5] That is, the majority

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in her colon." That claim is simply wrong. I do not, nor do I need to, offer any conclusion for where Taylor was bleeding from.

[5] The majority appears to adopt the view from a concurring opinion in *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 122; 776 NW2d 114 (2009) (GLEICHER, J., concurring), that, in a motion for summary disposition, "the credibility of" a witness can "be questioned for any reason . . . ." Indeed, the majority's discussion on credibility at the summary-disposition stage largely mirrors the discussion in that concurrence. See *id*. at 125-128.

That portion of the concurring opinion, however, was rejected by a majority of this Court, and both members of the majority expressed firm disagreement with it. See, e.g., *id*. at 113 (opinion by TALBOT, P.J.) ("Specifically, I disagree with Judge GLEICHER's statement that 'the credibility of the treating physician could be questioned for any reason' . . . . Although I concur that a jury may accept or disregard testimony as the ultimate fact-finder, I do not agree that the fact-finder can ignore uncontroverted facts establishing the actual conduct or behavior of the physician."); *id*. at 117-118 (BANDSTRA, J., concurring) (opining that Judge GLEICHER's approach was "inconsistent with the usual understanding of a plaintiff's burden of proof. It would also subvert the usual summary disposition rule that protects a defendant

holds that a jury could believe Dr. Eisner's testimony that Taylor was bleeding from the biopsy sites during her second colonoscopy so long as it concludes that Dr. Stecevic missed an active bleed when he looked for one in the area of the biopsy sites.[6] I fail to see how that conclusion does not violate the rule from *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), that an expert's opinion—here, Dr. Eisner's—is inadmissible if it "is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony *other than by disparaging the witness'*[*s*] *power of observation*." (Emphasis added.)

In sum, defendants presented evidence establishing that at the time of Taylor's second colonoscopy, she did not have an active bleed in the area of the colon that Dr. Sklar biopsied. In response, plaintiff failed to carry

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from litigation if 'there is no genuine issue' on an element of a plaintiff's claim. MCR 2.116(C)(10). Even if the only available evidence undermines a plaintiff's claim, Judge GLEICHER would still apparently find a genuine issue arising from the possibility that the fact-finder could disbelieve that evidence."). I believe that many of the concerns expressed in Judge BANDSTRA's concurrence are particularly applicable here. See, e.g., *id*. at 119 ("[O]ur law places a burden of proof on a plaintiff seeking to recover damages. Thus, a plaintiff failing to come forward with any evidence in support of an element of a claim is properly subject to summary disposition for failing to shoulder that burden of proof. In other words, a plaintiff is penalized for failing to come forward with evidence precisely because the law imposes a burden of proof on a plaintiff.").

[6] The majority also states that "[a] jury could reasonably conclude that the 'other sources' of the continued, massive bleeding [that Dr. Stecevic conceded could exist] were the sites of Dr. Sklar's biopsies[.]" Yet directly after Dr. Stecevic conceded that there could have been "other sources of bleeding," plaintiff's counsel asked, "Like the area that was biopsied by Dr. Sklar a few days before, right?" To which Dr. Stecevic responded that he "cleared" the area that Dr. Sklar biopsied and "we didn't see bleeding in that area."

his burden of "showing that there is a genuine issue for trial." MCR 2.116(G)(4). Defendants were therefore entitled to summary disposition.

COUNTY OF INGHAM v MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL (ON REMAND)

Docket No. 334077. Submitted December 28, 2018, at Lansing. Decided July 25, 2019, at 9:20 a.m. Leave to appeal sought. Oral argument ordered on the application 506 Mich 913 (2020).

Plaintiffs, Ingham County, Jackson County, and Calhoun County, filed a four-count complaint in the Ingham Circuit Court, alleging that they were eligible for 10 years' worth of refunds for surplus contributions made to defendant, the Michigan County Road Commission Self-Insurance Pool (the Pool). The parties filed cross-motions for summary disposition, and the court, Rosemarie E. Aquilina, J., granted summary disposition to the Pool and rejected the counties' claims. The counties appealed. The Court of Appeals, TALBOT, C.J., and O'CONNELL and O'BRIEN, JJ., reversed, holding that the counties were successors in interest to their former road commissions. 321 Mich App 574 (2017) (*Ingham Co I*). The Court of Appeals held that because Jackson County did not sign a withdrawal agreement with the Pool, Jackson County did not withdraw from the Pool and therefore was eligible for refunds from prior-year contributions made by its road commission as a successor in interest. With regard to the two counties that did sign the withdrawal agreement, the Court of Appeals held that the language of the withdrawal agreement did not alter the counties' eligibility for the refunds. The Pool sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, issued an order remanding the case to the Court of Appeals to address whether, even if the counties were successors in interest to their road commissions, the Pool nevertheless could, in accordance with its governing documents, decline to issue the refunds. The Supreme Court further ordered that the Court of Appeals review five documents pertaining to the parties' agreement—the declaration of trust, the bylaws, the interlocal agreements, a refund overview, and a 1990 memorandum—to determine which of the documents were binding on the parties. 503 Mich 917 (2018) (*Ingham Co II*).

On remand, the Court of Appeals *held*:

1. Under the law-of-the-case doctrine, if an appellate court has passed on a legal question and remanded the case for further

proceedings, the legal question will not be differently determined in a subsequent appeal in the same case when the facts remain materially the same. An argument that a court's previous decision was wrong is not sufficient to justify ignoring the law-of-the-case doctrine. Accordingly, to the extent that the Supreme Court's remand order left intact the Court of Appeals' earlier legal conclusions in *Ingham Co I*, those conclusions—which included the Court of Appeals' previous holdings that the counties are successors in interest to their former road commissions and that Jackson County did not withdraw from the Pool—were binding under the law-of-the-case doctrine. Because Jackson County did not withdraw from the Pool, the provision that the Pool relied on to deny Jackson County refunds from prior-year contributions—that the Pool can treat members who withdraw from future Pool years differently—was inapplicable. Accordingly, because Jackson County did not withdraw from the Pool and was the successor in interest to its former road commission, Jackson County was entitled to refunds from prior-year contributions.

2. Under MCL 124.5, self-insurance pools are statutorily authorized under the intergovernmental contracts act, MCL 124.1 *et seq*., and may be formed by two or more municipal corporations. MCL 124.1(a) defines "municipal corporation" to include a county, charter county, or county road commission with the power to enter into contracts. To form a self-insurance pool, the contracting municipal corporations must enter into an intergovernmental contract that contains certain provisions. In this case, the declaration of trust formed the Pool; however, the intergovernmental contract was comprised of the interlocal agreements that each of the Pool's municipal members signed. The interlocal agreements referred to the declaration of trust and the bylaws; therefore, because two writings are to be construed together when one writing refers to another, including any modifications agreed to by the parties in subsequent writings, the parties' agreement constituted the interlocal agreements and all writings referred to in them, including the declaration of trust, the bylaws, and any rules or regulations that were later adopted pursuant to the trust agreement. In this case, a May 2012 e-mail was appended to the 1990 memorandum; the e-mail contained a statement from the Pool's administrator that the Pool board had adopted the policy summarized in the 1990 memorandum. Because the administrator could be called to testify about the truth of the e-mail's assertions, its contents were substantively admissible for purposes of summary disposition, and the policy set forth in the 1990 memorandum was properly considered as part of the parties' agreement. However, the refund overview did not qualify

as a rule or regulation; it was neither signed nor dated, and the Pool presented no substantively admissible evidence indicating that it was ever approved by the Pool's board or membership or otherwise properly promulgated pursuant to the declaration of trust or the bylaws. Accordingly, the refund overview was not properly considered as part of the parties' agreement.

3. MCL 124.5(6) enumerates the public-policy interests that are at stake regarding intergovernmental contracts; the Legislature intended governmental self-insurance pools to serve as a force that would spread—not concentrate—risk between municipal members and to minimize—not accentuate—fluctuations. Moreover, *Ingham Co I* provided that when a county dissolves its road commission, the county board of commissioners becomes the successor in interest to the former road commission, and the powers, duties, and functions of the dissolved county road commission pass to the county's boards of commissioners. In other words, in such situations, the county is more than merely its road commission's "successor in interest"; the county is effectively a continuation of the dissolved road commission, responsible for providing the same public services that were formerly provided by the road commission. In this case, the withdrawal policy provided that a withdrawing member "forfeits any and all rights to dividend, credits and/or accumulated interest that is to be paid or shall become payable after the effective date of the Member's withdrawal from the Pool." To permit the Pool to enforce the withdrawal policy against the counties would be to permit the Pool to penalize the counties for exercising their statutory rights to dissolve their road commissions. More importantly, the forfeiture called for in the withdrawal policy would directly undermine the public purposes that the Pool is required to serve under MCL 124.5(6), affording the remaining members of the Pool a comparatively small windfall (in the form of each one's pro rata share of the excess equity payments made by the counties' former road commissions), while imposing a large, unexpected forfeiture on the three withdrawing counties. In addition, the Legislature, in MCL 500.2016 of the Uniform Trade Practices Act, MCL 500.2001 *et seq*., classified self-insurers' conditioning of refunds of surplus insurance premiums on continued participation in the self-insurance pool as unfair and deceptive practices in the business of insurance. Accordingly, the Pool's withdrawal policy was unenforceable as against public policy.

4. The doctrine of severability provides that an unlawful term in a contract is severable from the whole unless that term is central to the parties' agreement. In this case, the withdrawal policy that the Pool sought to enforce was in no way central to the parties'

agreement. Furthermore, the parties intended for the terms of their agreement to be severable because the declaration of trust included an article providing that invalid or unenforceable provisions were severable from the agreement, leaving the remaining provisions fully effective. The withdrawal policy was first set forth by the Pool's board in 1990—years after the Pool was originally formed. Therefore, the withdrawal-policy portions of the parties' agreement were severed as unenforceable, and the counties, as successors in interest to their former road commissions, were all entitled to the refunds.

Reversed and remanded.

Cohl, Stoker & Toskey, PC (by *Bonnie G. Toskey* and *Mattis D. Nordfjord*) for plaintiffs.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg* and *D. Adam Tountas*) and *Bursch Law PLLC* (by *John J. Bursch*) for defendant.

ON REMAND

Before: O'BRIEN, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM. This case returns to this Court on remand from the Michigan Supreme Court. *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 503 Mich 917 (2018) (*Ingham Co II*). For the reasons explained in this opinion, we continue to hold that plaintiffs—Ingham County, Jackson County, and Calhoun County (collectively, the counties)—are entitled to refunds of their surplus premiums from prior-year contributions made by the counties' former road commissions to defendant, the Michigan County Road Commission Self-Insurance Pool (the Pool).

I. BACKGROUND

The facts of this case were outlined in this Court's previous opinion as follows:

A Declaration of Trust created the Pool in April 1984. The Pool's bylaws limit membership to county road commissions located in the state of Michigan and require each member to sign an interlocal agreement. The appointed road commissions for Ingham County, Jackson County, and Calhoun County joined the Pool soon after its formation.

Members of the Pool made annual premium contributions to cover the payment of claims and the Pool's operating and administrative expenses. The Pool's bylaws and the interlocal agreements permitted the refund of surplus funds more than one year after payment of a member's premium contribution. The counties alleged that the Pool had a longstanding practice of refunding excess contributions to members out of unused reserves in proportion to premiums paid, typically calculated and refunded several years later.

In February 2012, the Legislature amended MCL 224.6 to permit transfer of "the powers, duties, and functions that are otherwise provided by law for an appointed board of county road commissioners . . . to the county board of commissioners by resolution as allowed under . . . MCL 46.11." MCL 224.6(7), as amended by 2012 PA 14. At the same time, the Legislature amended MCL 46.11 to give a county board of commissioners the authority to pass a resolution dissolving an appointed road commission and transferring the road commission's "powers, duties, and functions" to the county board of commissioners. MCL 46.11(s), as amended by 2012 PA 15. Pursuant to these amendments, the Ingham County, Jackson County, and Calhoun County Boards of Commissioners adopted resolutions to dissolve their county road commissions and take over their roles.

Ingham County adopted the dissolution resolution on April 24, 2012, effective June 1, 2012. About two weeks before adopting the resolution, Ingham County paid its contribution to the Pool for the fiscal year beginning April 1, 2012, apparently with the understanding that the Pool intended to amend its rules to permit the county successors to the dissolved road commissions to participate in the Pool.

> Ingham County maintained that it only learned later in May that the Pool would not allow the county to remain a member of the Pool. On May 30 and 31, 2012, the Ingham County road commission signed two agreements—one to withdraw from the Pool and one to cancel insurance through the Pool—effective June 1, 2012.
>
> Calhoun County signed a similar withdrawal agreement on October 23, 2012, effective November 1, 2012. It appears that Jackson County did not sign a withdrawal agreement.
>
> At Ingham County's request, the Pool agreed to refund the unused pro rata portion of the former road commission's annual contribution for the 2012–2013 fiscal year. The Pool declined, however, to refund surplus equity flowing from prior-year contributions because of the road commission's withdrawal from membership in the Pool. [*Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 577-578; 909 NW2d 533 (2017) (*Ingham Co I*).]

The counties brought suit against the Pool, alleging that they were eligible for 10 years' worth of refunds because the Pool was still refunding contributions from 2002 premiums. The parties filed cross-motions for summary disposition, and the trial court granted summary disposition to the Pool and rejected the counties' claims. The trial court reasoned that the counties were not entitled to refunds possibly owed to their former road commissions because the counties were not successors in interest to their former road commissions.

On appeal, this Court disagreed and held that the counties were successors in interest to their former road commissions. *Id*. at 580-584. This Court then addressed "whether the counties could be members of the Pool and thereby be eligible for surplus refunds of prior-year contributions" and concluded "that the successor counties are eligible for Pool membership . . . ." *Id*. at 584.

This Court lastly addressed whether the counties were entitled to refunds because even though they were successors in interest, they withdrew from the Pool. *Id*. The Court first acknowledged that Jackson County was situated differently from the other counties because it did not sign a withdrawal agreement with the Pool. *Id*. at 585. This Court concluded that without a withdrawal agreement, Jackson County "did not withdraw from the Pool." *Id*. This Court also concluded that Jackson County's "dissolution of its road commission did not automatically result in withdrawal from the Pool." *Id*. This Court then held that because Jackson County (1) did not withdraw from the Pool and (2) "succeeded its dissolved road commission," it was "eligible for refunds from prior-year contributions made by its road commission." *Id*.

Turning to the other counties that *did* sign withdrawal agreements with the Pool, this Court looked to the language of the withdrawal agreements to determine their scopes. After reviewing the agreements' relevant language, this Court concluded:

> Accordingly, reading the withdrawal agreements as a whole and in light of the limitation on their scope, the withdrawal agreements did not alter eligibility for the refund of surplus premiums from prior-year contributions. Having determined that the counties are successors in interest to their former road commissions, we conclude that the counties are entitled to refunds of surplus premiums reflecting their former road commissions' prior-year contributions through the date listed in each withdrawal agreement. [*Id*.]

The Pool appealed this Court's decision, and our Supreme Court issued the following order:

> 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 issue raised by the defendant but not addressed by that court during its initial review of this case: Whether, even if the plaintiff counties are successors in interest to their road commissions, the defendant Michigan County Road Commission Self-Insurance Pool nevertheless may, in accordance with its governing documents, decline to issue to the counties refunds of surplus premiums from prior-year contributions. In addressing this question, the Court of Appeals shall consider, among other things, the following documents: the Declaration of Trust, By-Laws, Inter-Local Agreements, MCRCSIP Refund Overview, and the July 19, 1990 memorandum to the Pool members. The court shall address whether these documents are binding on the parties, and, if so, what effect they have on the plaintiffs' entitlement to refunds. [*Ingham Co II*, 503 Mich at 917.]

II. STANDARD OF REVIEW

A trial court's decision on summary disposition is reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). Because the trial court considered evidence outside the pleadings, we treat the trial court's grant of summary disposition as having been under MCR 2.116(C)(10). See *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves

> open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

"Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted).

III. ANALYSIS

On remand, we are tasked with deciding a single question: "Whether, even if the plaintiff counties are successors in interest to their road commissions, [the Pool] nevertheless may, in accordance with its governing documents, decline to issue to the counties refunds of surplus premiums from prior-year contributions." *Ingham Co II*, 503 Mich at 917. While this directive is relatively straightforward, the parties argue over to what extent, if any, this Court can disregard its earlier opinion. We address this dispute before turning to our task on remand.

A. LAW-OF-THE-CASE DOCTRINE

As explained by this Court,

> under the doctrine of the law of the case, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question will not be differently determined in a subsequent appeal in the same case where the facts remain materially the same. The primary purpose of the law-of-the-case doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. [*Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992).]

The Pool contends that we are not bound by the law-of-the-case doctrine because that doctrine is dis-

cretionary. The Pool is correct that courts have some discretion when applying the law-of-the-case doctrine under certain circumstances. See, e.g., *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991) (explaining that there are instances in which "the law of the case doctrine must yield to a competing doctrine"); *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994) (refusing to apply the law-of-the-case doctrine because there had been an intervening change in the law); *People v Phillips (After Second Remand)*, 227 Mich App 28, 34; 575 NW2d 784 (1997) ("[W]e decline to apply a doctrine designed for judicial convenience in fairly administering the obligation to do justice so as to work an injustice."). Yet the Pool's only argument for not applying the law-of-the-case doctrine is that, according to the Pool, our previous decision was wrong. As this Court has explained, such a reason is not sufficient to justify ignoring the law-of-the-case doctrine:

> [W]e do not believe that a conclusion that the prior decision was erroneous is sufficient by itself to justify ignoring the law-of-the-case doctrine. To do so would vitiate that doctrine because it would allow this Court to ignore a prior decision in a case merely because one panel concluded that the earlier panel had wrongly decided the matter. It would, therefore, reopen every case to relitigation of every issue previously decided in hopes that a subsequent panel of the Court would decide the issue differently than did the prior panel. Clearly, the law-of-the-case doctrine has no usefulness if it is only applied when a panel of this Court agrees with the decision reached by a prior panel. [*Bennett*, 197 Mich App at 500.]

We therefore conclude that to the extent that our Supreme Court's remand order left intact this Court's earlier legal conclusions, we are bound by those conclusions under the doctrine of the law of the case. This

includes this Court's previous holdings that the counties are successors in interest to their former road commissions and that Jackson County did not withdraw from the Pool.

B. DOCUMENTS TO CONSIDER ON REMAND

Our Supreme Court directed us to consider, among other things, five documents on remand: the declaration of trust, bylaws, interlocal agreements, the Pool's refund overview, and the July 19, 1990 memorandum to the Pool members. *Ingham Co II*, 503 Mich at 917.

1. DECLARATION OF TRUST

The declaration of trust created the Pool in 1984. As relevant here, the declaration of trust provides:

> ARTICLE VI
>
> POWERS AND DUTIES OF THE BOARD OF DIRECTORS
>
> * * *
>
> SECTION 9. Use of Funds. The Board of Directors shall set aside from the premiums collected during each fiscal year a reasonable sum for the operating expenses or administrative expenses of the Trust for that year. All remaining funds coming into its possession or under its control with respect to that fiscal year of the Trust shall be set aside and shall be used only for the following purposes:
>
> * * *
>
> (f) Distribution among the members during that fiscal year in such manner as the Members and the Board of Directors shall deem to be equitable, of any excess monies remaining after payment of claims and claims expenses and after provision has been made for open claims and outstanding reserves and a reserve for claims

> incurred but not reported; provided, however, that no such distributions shall be made earlier than twelve (12) months after the end of each Trust Year; and provided further, that undistributed funds from previous Trust Years may be distributed at any time if not required for loss funding and if approved for distribution by the Board of Directors. *The Board of Directors may treat members who withdraw from future Trust Years differently and less favorably than they treat members who continue in the Trust for future years*.
>
> * * *
>
> ARTICLE X
>
> MISCELLANEOUS
>
> * * *
>
> SECTION 12. Binding Effect. This Trust shall be binding upon and be fully enforceable as to each Member *and the successors and assigns of each Member*. [Emphasis added.]

2. INTERLOCAL AGREEMENT

All parties that became members of the Pool signed an "Inter-Local Agreement" pursuant to 1982 PA 138 (the intergovernmental contracts act, MCL 124.1 *et seq*.), under which certain governmental bodies are permitted to, among other things, "form a group self-insurance pool." See *Crawford Co v Secretary of State*, 160 Mich App 88, 91; 408 NW2d 112 (1987). These interlocal agreements provided, in relevant part:

> This Contract and Inter-Local Agreement is entered into by and between [the Pool] and the undersigned road commission of the State of Michigan (hereinafter "Member") for the purpose of making a self-insurance pooling

program available . . . pursuant to Act 138 of 1982 [the intergovernmental contracts act].

* * *

3. Member Contributions to Pool. . . . The Pool shall set aside from the premiums collected during each fiscal year a reasonable sum for the operating expenses or administrative expenses of the Pool for that year. All remaining funds coming into the possession of the Pool with respect to that fiscal year of the Pool shall be set aside and shall be used only for the following purposes:

* * *

H. Distribution among the members during that fiscal year in such manner as the Pool shall deem to be equitable, of any excess monies remaining after payment of claims and claims expenses and after provision has been made for open claims and outstanding reserves and a reserve for claims incurred but not reported; provided, however, that no such distribution shall be made than [sic] earlier than twelve (12) months after the end of each Pool Year; and provided, further, that undistributed excess funds from previous Pool Years may be distributed at any time if not required for loss funding and if approved for distribution by applicable Boards and authorities. *The Pool may treat members who withdraw from future Pool Years differently and less favorably than the Pool treats members who continue in the Pool for future years*.

* * *

24. Binding Effect. This Agreement is binding upon *the parties hereto*, *their successors and assigns*. [Emphasis added.]

3. BYLAWS

The Pool's bylaws provide, in relevant part:

ARTICLE VI

POWERS AND DUTIES OF THE BOARD

* * *

13. The Pool Board shall have the general power to make and enter into all contracts, leases, and agreements necessary or convenient to carry out any of the powers granted under the Trust Agreement, these By-laws or any other laws. All such contracts, leases, and agreements, or other legal documents herein authorized shall be approved by resolution of the Pool Board and shall be executed by those individuals designated in such resolution. In the absence of such a designation, all approved contracts shall be executed by the Chairperson or Vice Chairperson.

14. The Pool Board shall carry out all the duties necessary for the proper operation and administration of the Pool on behalf of the Members and to that end shall have all of the power necessary and desirable for the effective administration of the affairs of the Pool.

ARTICLE VII

ADMINISTRATION

There shall be an Administrator of the Pool (herein referred to as the "Administrator") to administer the financial and administrative affairs of the Pool. The Administrator shall be an employee of the Pool and shall be appointed by, and serve at the pleasure of the Pool Board. The Administrator shall have the power and authority to implement policy matters set forth by the Pool Board as they relate to the ongoing operation and supervision of the Pool and the provisions of the Trust Agreement establishing the Pool, the By-laws, the Inter-Local Agreement, applicable Federal and/or State statutes, and other applicable governmental rules and regulations.

* * *

ARTICLE X

DETERMINATION OF CONTRIBUTIONS BY MEMBERS OR REFUNDS TO MEMBERS

> The Pool Board shall determine the amount of contribution to be paid annually by each Member. Such contribution shall be calculated based on past experience, projected future losses, excess and stop loss insurance costs, administrative costs, loss prevention costs, and any other projected expenses to be incurred in the operation and administration of the Pool. Should deficiencies or surpluses occur within the funding of the Pool, the Pool Board shall determine the method of addressing these deficiencies or surpluses through the annual contribution mechanism. . . .

* * *

ARTICLE XII

WITHDRAWAL OR TERMINATION OF MEMBERSHIP

> Any Member may withdraw from the Pool by giving at least sixty days written notice to the Pool Board of its desire to so withdraw. The Pool Board shall develop procedures for addressing accumulated equity, if any, or accumulated funding deficiency. The Pool Board shall determine the short rate cancellation penalty for terminating prior to the annual renewal date.

4. REFUND OVERVIEW AND THE JULY 19, 1990 MEMORANDUM

The other two documents that this Court must consider on remand were both evidently drafted by the Pool's agents in 1990. The first is a memorandum from the Pool's administrator dated July 19, 1990 (the 1990 memorandum), informing the Pool's members that the Pool had adopted a new "policy" for the eligibility of withdrawing members to receive excess-contribution

refunds. In relevant part, the 1990 memorandum states, "A withdrawing member forfeits any and all rights to dividend, credits and/or accumulated interest that is to be paid or shall become payable after the effective date of the Member's withdrawal from the Pool."

The other document is a refund overview that the Pool says was disseminated to all its members in 1990.[1] The document is unsigned and undated. It provides a detailed explanation of the steps that the Pool's board of directors uses "to determine the proper allocation of the distribution to the members[.]"

With the content of these documents in mind, we must now decide whether these documents "are binding on the parties, and, if so, what effect they have on the plaintiffs' entitlement to refunds." *Ingham Co II*, 503 Mich at 917.

C. PRINCIPLES OF CONTRACT INTERPRETATION

As discussed in *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016):

> Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement. When interpreting a contract, our primary obligation is to give effect to the parties' intention at the time they entered into the contract. To do so, we examine the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written . . . . [Quotation marks and citations omitted.]

---

[1] Aside from a copy of the refund overview, the Pool has presented no evidence that the document was ever provided to plaintiffs—or their former road commissions—in 1990 or any time thereafter.

If a contract does not define a word or phrase used in the contract, it is proper to consult a dictionary "to ascertain the plain and ordinary meaning of" the word or phrase. *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015). "[C]ontracts must be read as a whole," *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 447; 886 NW2d 445 (2015), giving "effect to every word, phrase, and clause," while taking pains to "avoid an interpretation that would render any part of the contract surplusage or nugatory," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

D. WHAT COMPRISES THE PARTIES' AGREEMENT

We must now determine which of the documents listed by our Supreme Court—the declaration of trust, the bylaws, the interlocal agreements, the refund overview, and the 1990 memorandum—are binding on the parties. We conclude that with the exception of the refund overview, all the documents form part of the parties' agreement.

County road commissions are bodies corporate, and "[l]ike a municipal corporation, [a] road commission's existence is entirely dependent on the legislation that created it, and the Legislature that may also destroy it." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 609; 575 NW2d 751 (1998). As our Supreme Court recognized in *Wayne Co v Hathcock*, 471 Mich 445, 460; 684 NW2d 765 (2004), "Art 7, § 1 of our 1963 Constitution provides that '[e]ach organized county shall be a body corporate with powers and immunities provided by law,' " and legal powers conferred to the counties must be broadly construed in their favor. (Alteration in *Hathcock*.)

Self-insurance pools like the one at issue here are statutorily authorized under the intergovernmental contracts act and may be formed by two or more "municipal corporations." MCL 124.5; *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 210 n 5; 702 NW2d 106 (2005) (opinion by YOUNG, J.).[2] To form such a pool, the contracting municipal corporations must enter into an "intergovernmental contract" that contains certain provisions. MCL 124.5; MCL 124.7. MCL 124.5 provides:

> (1) Notwithstanding any other provision of law to the contrary, any 2 or more municipal corporations, by intergovernmental contract, may form a group self-insurance pool to provide for joint or cooperative action relative to their financial and administrative resources for the purpose of providing to the participating municipal corporations risk management and coverage for pool members and employees of pool members, for acts or omissions arising out of the scope of their employment . . . .
>
> * * *
>
> (5) In addition to any other powers granted by this act, the power to enter into intergovernmental contracts under this section specifically includes the power to establish the pool as a separate legal or administrative entity for purposes of effectuating group self-insurance pool agreements.
>
> * * *
>
> (7) Two or more municipal corporations shall not form a group self-insurance pool to provide the coverages de-

[2] For purposes of the act, the term "municipal corporation" is statutorily defined to include "a county, charter county, county road commission, . . . or any other local governmental authority or local agency with power to enter into contractual undertakings." MCL 124.1(a).

> scribed in subsection (1) other than pursuant to sections 5 to 12b.

Section 7 of the act, MCL 124.7, further provides:

> Any intergovernmental contract entered into under section 5 for the purpose of establishing a group self-insurance pool shall provide:
>
> (a) A financial plan . . . .
>
> * * *
>
> (b) A plan of management which provides for all of the following:
>
> (*i*) The means of establishing the governing authority of the pool.
>
> (*ii*) The responsibility of the governing authority with regard to fixing contributions to the pool, maintaining reserves, levying and collecting assessments for deficiencies, disposing of surpluses, and administering the pool in the event of termination or insolvency.
>
> (*iii*) The basis upon which new members may be admitted to, and existing members may leave, the pool.
>
> (*iv*) The identification of funds and reserves by exposure areas.
>
> (*v*) Other provisions necessary or desirable for the operation of the pool.
>
> (c) For election by pool members of a governing authority, which shall be a board of directors for the pool, a majority of whom shall be elected or appointed officers of pool members.

In this case, the declaration of trust formed the *Pool*—meaning the trust vessel that would hold the members' pooled self-insurance reserves—but the declaration of trust is seemingly not the "intergovernmental contract" between the members. Rather, the intergovernmental contract seems to be comprised of the

interlocal agreements that were signed by each of the Pool's municipal members, as evidenced by the fact that the preambles of those agreements explicitly refer to the intergovernmental contracts act.

The interlocal agreements, however, refer to the declaration of trust and the bylaws; the agreements state that the members agree "to participate in the formation and/or operation of [the Pool]" and that the "Pool shall be a separate legal entity consisting of a Trust Agreement . . . and such By-Laws, rules and regulations as are from time to time adopted pursuant to the Trust." The interlocal agreements go on to specify that "[t]he responsibility of the Pool with regard to . . . disposing of surpluses . . . shall be as set forth in the Trust creating the Pool, the Pool By-Laws, rules, regulations, coverage agreements and Inter-Local Agreements entered into between the Pool and participating county road commissions."

"[W]here one writing refers to another, the two writings are to be construed together, including any modifications agreed to by the parties in *subsequent* writings." *Smith Living Trust v Erickson Retirement Communities*, 326 Mich App 366, 387; 928 NW2d 227 (2018) (quotation marks and citations omitted). None of the documents at issue here contains merger or integration clauses. We therefore conclude that a proper construction of the parties' "agreement" must take into consideration the interlocal agreements and all writings referred to in them, including the declaration of trust, the bylaws, and any "rules or regulations" that were later adopted pursuant to the trust agreement.

This raises the question of what "rules or regulations" must be considered binding on the parties under their agreement. We conclude that the refund overview

does not qualify as such a rule or regulation, at least for purposes of summary disposition under MCR 2.116(C)(10). The refund overview is neither dated nor signed, and the Pool has presented no substantively admissible evidence indicating that the refund overview was ever approved by the Pool's board or membership or otherwise properly promulgated pursuant to the declaration of trust or the bylaws. Therefore, the refund overview is not properly considered as part of the parties' agreement.

We reach the opposite conclusion for the refund policy that the Pool announced in the 1990 memorandum. Appended to the 1990 memorandum is a May 2012 e-mail from the Pool's administrator, Gayle Pratt, in which she states that the policy summarized in the 1990 memorandum was adopted by the Pool's board. Assuming that Pratt's e-mail would not be admissible at trial to prove the truth of its assertions, its contents are *substantively* admissible for purposes of summary disposition because Pratt could be called to testify about those assertions at trial. See MCR 2.116(G)(6) ("Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1) [through] (7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion."); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). We therefore consider the policy set forth in the 1990 memorandum to be part of the parties' agreement.

Having determined that the parties' agreement includes the declaration of trust, the bylaws, the interlocal agreements, and the 1990 memorandum, we now reach the central question on remand: whether the

Pool may, "in accordance with its governing documents, decline to issue to the counties refunds of surplus premiums from prior-year contributions." *Ingham Co II*, 503 Mich at 917.

E. JACKSON COUNTY

As noted in *Ingham Co I*, Jackson County is situated differently than the other two counties because it did not sign a withdrawal agreement. Relevant to the issue on remand, this Court in *Ingham Co I* held:

> [T]he record contains no evidence that the Jackson County road commission signed a withdrawal agreement, and the Pool agrees that it did not. Thus, the Jackson County road commission did not withdraw from the Pool. Likewise, Jackson County's dissolution of its road commission did not automatically result in withdrawal from the Pool. Rather, Jackson County succeeded its dissolved road commission, so Jackson County is eligible for refunds from prior-year contributions made by its road commission. [*Ingham Co I*, 321 Mich App at 585.]

The Pool argues that Jackson County is not entitled to a refund based on (1) the language from the interlocal agreements and declaration of trust allowing the Pool to "treat members who withdraw from future Pool Years differently and less favorably than the Pool treats members who continue in the Pool for future years" and (2) the policy announced in the 1990 memorandum (which we will refer to as "the withdrawal policy") that "[a] withdrawing member forfeits any and all rights to dividend, credits and/or accumulated interest that is to be paid or shall become payable after the effective date of the Member's withdrawal from the Pool." We disagree.

Because this Court previously concluded that Jackson County did not withdraw from the Pool, and

because our Supreme Court's remand order in no way disturbed this holding, we are bound by the law-of-the-case doctrine to conclude that Jackson County did not withdraw from the Pool. And because Jackson County did not withdraw from the Pool, the provision that the Pool relies on to deny Jackson County refunds from prior-year contributions—that the Pool can treat members *who withdraw* from future Pool Years differently—is inapplicable. We therefore continue to hold that because Jackson County did not withdraw from the Pool and is the successor in interest to its former road commission, Jackson County is entitled to refunds from prior-year contributions.

F. OTHER COUNTIES

Unlike Jackson County, Ingham County and Calhoun County signed withdrawal agreements. And the withdrawal policy is clear—"[a] withdrawing member forfeits any and all *rights to dividend, credits and/or accumulated interest* that is to be paid or shall become payable after the effective date of the Member's withdrawal from the Pool." (Emphasis added.) In the insurance context, the term "dividend" is defined as "a share of surplus allocated to a policyholder in a participating insurance policy[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, the refunds that the counties seek—refunds of surplus self-insurance premiums—fall within the meaning that should be ascribed to the term "dividend" in the withdrawal policy.

The question then becomes whether the withdrawal policy is enforceable. Absent ambiguity, a contract must generally be enforced as written. *Innovation Ventures*, 499 Mich at 507. "However, contracts founded on acts prohibited by a statute, or contracts in

violation of public policy, are void." *Allard v Allard (On Remand)*, 318 Mich App 583, 598; 899 NW2d 420 (2017) (quotation marks and citation omitted). See also *Krause v Boraks*, 341 Mich 149, 155; 67 NW2d 202 (1954) (explaining that "neither law nor equity will enforce a contract made in violation of . . . a statute or one that is in violation of public policy") (quotation marks and citation omitted).

The counties argue that the withdrawal policy is unenforceable as a violation of public policy. "In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Rory v Continental Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005) (quotation marks and citation omitted). See also *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) ("In defining 'public policy,' it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.").

As noted earlier, the parties' agreement in this case is governed by the intergovernmental contracts act. In that act, the Legislature explicitly enumerated the public-policy interests that are at stake, providing in MCL 124.5(6):

> The legislature hereby finds and determines that insurance protection is essential to the proper functioning of municipal corporations; that the resources of municipal corporations are burdened by the securing of insurance protection through standards carriers; that proper risk management requires spreading risk to minimize fluctua-

> tion in insurance needs; and that, therefore, all contributions of financial and administrative resources made by a municipal corporation pursuant to an intergovernmental contract authorized under this act are made for a public and governmental purpose, and that those contributions benefit each contributing municipal corporation.

In light of MCL 124.5(6) and the statutory enactments discussed in *Ingham Co I*, 321 Mich App at 577, we hold that the withdrawal policy is unenforceable under these circumstances as contrary to public policy. See *Allard*, 318 Mich App at 601 ("Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state's laws and public policy."). As MCL 124.5(6) makes clear, the Legislature intended governmental self-insurance pools to serve as a force that would *spread*—not concentrate—risk between municipal members and to *minimize*—not accentuate—fluctuations. As recognized in *Ingham Co I*, 321 Mich App at 581-582, "when a county dissolves its road commission, the county board of commissioners becomes the successor in interest to the former road commission," and "the powers, duties, and functions of the dissolved county road commission[] pass[] to the [county's] boards of commissioners." In other words, in such situations, the county is more than merely its road commission's "successor in interest"; the county is effectively a continuation of the dissolved road commission, responsible for providing the same public services that the road commission formerly provided.

To permit the Pool to enforce the withdrawal policy against the counties would be to permit the Pool to penalize the counties for exercising their rights to dissolve their road commissions under MCL 46.11(s) and MCL 224.6(7). More importantly, the forfeiture called for in the withdrawal policy would directly

undermine the public purposes that the Pool is required to serve under MCL 124.5(6), affording the remaining members of the Pool a comparatively small windfall (in the form of each one's pro rata share of the excess equity payments made by the counties' former road commissions), while imposing a large, unexpected forfeiture on the three withdrawing counties. This scenario undercuts the basic principles of predictability and stability that the Legislature intended such self-insurance pools to promote.

We find further support for our conclusion that our state's public policy disfavors self-insurers conditioning refunds of surplus insurance premiums on continued participation in the self-insurance pool in the Uniform Trade Practices Act, MCL 500.2001 *et seq*. MCL 500.2016 provides, in relevant part:

> (1) In addition to other provisions of law, the following practices as applied to worker's compensation insurance including worker's compensation coverage provided through a self-insurer's group are defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (a) As a condition of receiving a dividend for the current or a previous year, requiring an insured to renew or maintain worker's compensation insurance with the insurer beyond the current policy's expiration date or requiring a member to continue participation with a worker's compensation self-insurer group.

While this statute, by its terms, only applies to workers' compensation insurance, we find it telling that our Legislature classified this type of act as "unfair and deceptive . . . practices in the business of insurance[.]" Based on our Legislature's clear condemnation of the Pool's practice—albeit in the context of workers' compensation insurance—combined with the public-policy

interests defined in MCL 124.5(6), we conclude that the Pool's withdrawal policy is unenforceable as against public policy.[3]

G. REMEDY

The next question is what remedy should be applied: do the offending provisions of the parties' agreement render the entire agreement voidable or void *ab initio*? See generally *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 536-539; 872 NW2d 412 (2015) (observing that a contract that is void *ab initio* is a nullity at the outset and, thus, is unenforceable by any party, whereas a voidable contract is one that may be rescinded or avoided at the option of a specific party). "The difficulty . . . is that courts have been known to be imprecise with their use of the term 'void,' and have on occasion mistakenly employed that term to describe a contract when what is actually meant is that a contract is voidable or otherwise unenforceable, and not that it is void *ab initio*." *Id*. at 543-544.

Like contractual terms, it has long been recognized that contractual *remedies* are subject to the demands of public policy. See, e.g., *Meech v Lee*, 82 Mich 274, 293; 46 NW 383 (1890) ("Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him.")

[3] For similar reasons that the Pool's withdrawal policy is unenforceable as against public policy, we conclude that the Pool's proposed construction of the "differently and less favorably" language in the interlocal agreements and declaration of trust would render *those* provisions contrary to public policy. If, as the Pool contends, that language should be interpreted as permitting what the withdrawal policy required, it would contravene the public policy set forth by our Legislature in MCL 124.5(6).

(quotation marks and citation omitted); *Bazzi v Sentinel Ins Co*, 502 Mich 390, 415; 919 NW2d 20 (2018) (MCCORMACK, J., dissenting) ("Contract remedies like rescission play by those same rules: they cannot be exercised in a manner contrary to law or public policy."). Thus, when deciding whether a contract drafted in contravention of a statute is void *ab initio* or merely subject to avoidance by a specific party, a reviewing court should resolve the issue by deciding what would best serve the statute's underlying legislative intent. *Epps*, 498 Mich at 546 ("[W]ith that overarching purpose in mind, we inquire whether this purpose would be better served by treating contracts between an innocent homeowner and an unlicensed builder as void or voidable.").

Holding that the parties' entire agreement here is void *ab initio*, and thus unenforceable by any party, would do *greater* damage to the policies set forth in MCL 124.5(6), effectively upending the entire Pool. That outcome can be avoided by applying the doctrine of severability. An unlawful term in a contract is severable from the whole unless that term is "central to the parties' agreement." *Stokes v Millen Roofing Co*, 466 Mich 660, 666; 649 NW2d 371 (2002). Hence, "[t]he failure of a distinct part of a contract does not void valid, severable provisions." *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). In determining severability, the "primary consideration . . . is the intent of the parties." *Id*.

As noted, the declaration of trust was incorporated by reference into the intergovernmental contract. Article X, § 11 of the declaration of trust provides:

> Severability. Should any provision of this Trust be or become invalid or unenforceable, the remaining provisions shall continue to be fully effective.

Thus, it seems that the parties intended for the terms of their agreement to be severable. Additionally, the withdrawal policy that the Pool seeks to enforce in this action is in no way "central" to the parties' agreement. It is undisputed that the withdrawal policy was first set forth by the Pool's board in 1990—years after the Pool was originally formed. We therefore conclude that the offending portions of the parties' agreement are severed as unenforceable. This, in our opinion, is the best remedy to effectuate the legislative policies announced in MCL 124.5(6). And because the withdrawal-policy portions of the parties' agreement are severed, the counties, as successors in interest to their former road commissions, are all entitled—under Article X, § 12 of the declaration of trust[4]—to the portion of future refunds of surplus equity to which their respective former road commissions would have been entitled.

IV. CONCLUSION

The Pool's withdrawal policy does not apply to Jackson County because Jackson County did not withdraw from the Pool. Regardless, the withdrawal policy is unenforceable against any of the counties because it is contrary to public policy. We therefore hold that the trial court erred when it held that the Pool was entitled to judgment as a matter of law.

Reversed and remanded. We do not retain jurisdiction.

O'BRIEN, P.J., and GLEICHER and STEPHENS, JJ., concurred.

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[4] Article X, § 12 of the declaration of trust provides, "This Trust shall be binding upon and be fully enforceable as to each Member *and the successors and assigns of each Member*." (Emphasis added.)

SABBAGH v HAMILTON PSYCHOLOGICAL SERVICES, PLC

Docket Nos. 342150 and 343204. Submitted July 9, 2019, at Detroit. Decided August 6, 2019, at 9:00 a.m.

Khaled Sabbagh and Fred Berry (collectively, plaintiffs) filed an action in the Macomb Circuit Court against Hamilton Psychological Services, PLC (Hamilton); Dennis Frendo; Sarah Guertin; and Ulliance, Inc. (Ulliance), asserting, in part, claims of gross negligence against Frendo, Guertin, and Hamilton; negligence and vicarious liability against Hamilton; and negligence against Ulliance. Plaintiffs were employed as deputy sheriffs for the Wayne County Sheriff's Department for numerous years before retiring; plaintiffs' respective mental health was never questioned during their tenure. In 2013, both plaintiffs applied to the Dearborn Police Department (the DPD) for part-time police officer positions. As part of the application process, the DPD required plaintiffs to undergo a psychological evaluation that was arranged through Ulliance, a human resources company. Ulliance selected Hamilton to perform the evaluations; in turn, Hamilton contracted with Guertin, a limited licensed psychologist (LLP) to conduct the assessments at Hamilton's office; however, Frendo—the licensed psychologist who established Hamilton—authored and signed plaintiffs' evaluation reports because Guertin was required to be supervised by a fully licensed psychologist. As a result of Frendo's conclusions, which raised concerns about emotional and physical health, neither Sabbagh nor Berry passed their pre-employment evaluations and the DPD did not continue the application process with either individual. Plaintiffs asserted that Ulliance negligently selected Hamilton to conduct the evaluations; that Hamilton negligently scheduled Sabbagh and another unknown individual for simultaneous assessments; that Guertin carelessly and unprofessionally left Sabbagh's interview to conduct the other evaluation; and that Frendo, Guertin, and Hamilton carelessly performed the psychological assessments, knowingly authored false psychological reports, and failed to verify the contents of the reports. In October 2017, Ulliance and Guertin, individually, and Hamilton and Frendo, jointly, moved for summary disposition. In November 2017, the parties participated in case evaluation under MCR 2.403; the panel issued

various awards to each plaintiff against each defendant; and defendants accepted and plaintiffs rejected the respective case-evaluation awards. Thereafter, in January 2018, the court, James M. Maceroni, J., granted defendants' motions for summary disposition, reasoning that plaintiffs' negligence claims were not, in fact, medical malpractice claims and that their claims lacked evidentiary and legal support under a common-law tort theory. Subsequently, defendants moved for actual costs as case-evaluation sanctions under MCR 2.403(O). The court refused to award sanctions to Guertin, Frendo, and Hamilton, reasoning that under MCR 2.403(O)(11), refusal was warranted in the interest of justice given that (1) application of the Court's holding in *Dyer v Trachtman*, 470 Mich 45 (2004), to psychologists and LLPs involved an issue of first impression, (2) there was a financial disparity between plaintiffs and defendants, and (3) plaintiffs possibly suffered harm from the poorly conducted or inaccurate evaluations. Although the court determined that Ulliance was entitled to actual costs, including reasonable attorney fees, it concluded that the unsigned billing summary attached to the attorney affidavit was inadmissible as a business record and that Ulliance, which had argued that an evidentiary hearing was unnecessary, failed to adequately support its claim for costs and attorney fees. In Docket No. 342150, plaintiffs appealed the trial court orders granting summary disposition in favor of each defendant. In Docket No. 343204, Ulliance appealed and Hamilton, Frendo, and Guertin cross-appealed the court's orders denying their respective motions for case-evaluation sanctions.

The Court of Appeals *held*:

1. The first issue in any purported medical malpractice case concerns whether it is being brought against someone who, or an entity that, is capable of malpractice. In that regard, MCL 600.5838a(1) provides that a medical malpractice claim may be made against a person or entity who is or who holds himself or herself out to be a licensed healthcare professional, licensed health facility or agency, or an employee or agency of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment. MCL 333.20106(1) lists those entities that qualify as a "health facility or agency"; in turn, MCL 600.5838a(1)(b) defines the term "licensed health care professional" as an individual licensed or registered under Article 15 of the Public Health Code, MCL 333.1101 *et seq*., and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional, corporation, or other business entity. The second issue in a medical malpractice action is whether the

alleged claim sounds in medical malpractice. Specifically, a court must determine whether there was a professional relationship and whether the claim raises questions involving medical judgment; that is, medical malpractice can occur only within the course of a professional relationship. A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed healthcare professional, licensed healthcare facility, or the agents or employees of a licensed healthcare facility were subject to a contractual duty that required that professional, that facility, or the agents or employees of the facility to render professional healthcare services to the plaintiff. In *Dyer*, the Court held that a physician conducting an independent medical examination (IME) has a limited physician-patient relationship with the examinee and owes the examinee a duty to not cause physical harm to the examinee. A breach of that duty may be actionable for medical malpractice if the facts raise issues involving medical judgment or for ordinary negligence if the facts raise issues within the common knowledge of a jury; in general, claims raise questions of medical judgment when the reasonableness of the actions can be evaluated by a jury only after having the standard of care explained by experts. Under *Dyer*, an IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the physician's conclusions or from those that the physician reports; the *Dyer* Court's reasons for finding a limited relationship between an IME physician and an examinee apply equally to all healthcare providers authorized to conduct IMEs or their functional equivalent, including preemployment evaluations. In this case, Hamilton, a psychological practice, and Ulliance, a human resources department, were not a health facility or agency for purposes of MCL 600.5838(1), and any claim against them had to sound in negligence as opposed to medical malpractice. Guertin and Frendo, however, were licensed healthcare professionals for purposes of MCL 600.5838a(1)(b) and were, therefore, capable of committing medical malpractice. Contrary to the trial court's conclusion, in accordance with *Dyer*, a professional relationship existed between plaintiffs and Frendo and Guertin. Plaintiffs' gross-negligence claims against Frendo and Guertin sounded in medical malpractice because whether their actions in conducting the evaluations and drafting the reports were negligent under the facts of the case raised questions of medical judgment. The trial court correctly granted summary disposition in favor of Frendo and Guertin but for the wrong reason. That is, because plaintiffs' claims sounded in medical malpractice, the trial court should have dismissed those claims given that plaintiffs filed the action outside the two-year

medical malpractice limitations period, not because their claims lacked evidentiary and legal support under a common-law tort theory. Plaintiffs' claim that Hamilton was vicariously liable for Frendo and Guertin's action necessarily failed because the claims against Frendo and Guertin failed.

2. Proximate cause is an essential element of a negligence claim. Mere speculation is not sufficient; instead, to be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation. In this case, the trial court correctly granted summary disposition of plaintiffs' direct negligence claim against Hamilton because plaintiffs failed to show that any potential harm to their earning capacity and career opportunities was proximately caused by Hamilton's alleged breach.

3. With regard to a negligence claim, the determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person; a relationship between the parties must exist and the harm must have been foreseeable for a duty to be imposed. In this case, plaintiffs did not have a relationship with Ulliance; instead, Ulliance had a contract with the city of Dearborn. The fact that Ulliance, as part of that contract, referred plaintiffs to Frendo for pre-employment evaluations was too tenuous of a connection to create any duty. Accordingly, the trial court correctly granted summary disposition of plaintiff's negligence claim against Ulliance.

4. MCR 2.403(O)(1) provides that if a party rejects a case-evaluation award and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation; any postjudgment fees causally connected to the rejection of a case-evaluation award, including those incurred in pursuit of case-evaluation sanctions, are properly included in a request for attorney fees. In turn, MCR 2.403(O)(6)(b) provides that "actual costs" include a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation; the term "verdict" includes a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. Under MCR 2.403(O)(11), if the verdict is the result of a motion after rejection of case evaluation, a trial court may decline to award actual costs in the interest of justice. Unusual circumstances must exist for a trial court to deny actual costs under the interest-of-justice exception, and the court must articulate the bases for its decision if it elects to apply the

exception. Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous are too common to constitute the unusual circumstances encompassed by the interest-of-justice exception; but it might be appropriate to apply the exception if there is an issue of first impression, if the law is unsettled and substantial damages are at issue, if a party is indigent and an issue should be decided by the trier of fact, or if there may be a significant effect on third persons. The party requesting attorney fees bears the burden of proving with evidentiary support that they were incurred and that they were reasonable. A trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed, but if the parties created a sufficient record to review the issue, an evidentiary hearing is not required. A billing summary detailing the dates various tasks were accomplished, the attorneys who completed the work, how much time each task took, and a description of the work itself is sufficiently detailed to support an initial request for an award of actual costs under MCR 2.403(O)(1), but if the opposing party objects to the reasonableness of the fees, the court must hold an evidentiary hearing and consider the factors set forth in *Smith v Khouri*, 481 Mich 519 (2008) (opinion by TAYLOR, C.J.), when evaluating the reasonableness of the fees. In this case, the trial court erred by determining that the billing summary provided by Ulliance's attorney, including an affidavit by the lead attorney regarding the bill, was inadmissible before an evidentiary hearing was even held; the summary was sufficient to support the initial request. Given that some of the reasonableness factors set forth in *Smith* could not be addressed from the billing summary submitted by Ulliance, the trial court abused its discretion by not conducting an evidentiary hearing on the issue. In addition, the trial court erred as a matter of law when it concluded that MCR 2.403(O) never permits the recovery of attorney fees incurred in the pursuit of case-evaluation sanctions; instead, the court should have determined whether the sought-after fee was causally connected to plaintiffs' rejection of the award. With regard to the trial court's denial of actual costs to Hamilton, Frendo, and Guertin under the interest-of-justice exception, only one of the court's reasons for its decision—i.e., that the case involved a question of first impression because there was no direct authority applying *Dyer* to nonphysicians in a published decision—was correctly considered. Although the court appropriately considered that factor, it inappropriately relied on two other factors—the financial disparity between the parties with no support for that finding and the possible harm suffered by plaintiffs because of the poorly conducted evaluations

—necessitating remand for the trial court to reconsider its decision in light of the fact that only the one factor was properly considered.

In Docket No. 342150, summary disposition affirmed. In Docket No. 343204, trial court order denying case-evaluation sanctions to Frendo, Guertin, and Hamilton vacated and case remanded for further consideration; remaining orders related to Ulliance's billing summary reversed.

1. NEGLIGENCE — MEDICAL MALPRACTICE — HEALTHCARE PROVIDERS — PRE-EMPLOYMENT EVALUATIONS — DUTY TO EXAMINEE.

A healthcare provider authorized to conduct an independent medical examination (IME) or its functional equivalent—like a pre-employment evaluation—has a limited healthcare provider-patient relationship with the examinee and owes the examinee a duty to not cause physical harm to the examinee; a healthcare provider conducting an IME or its functional equivalent, acting at the behest of a third party, is not liable to the examinee for damages resulting from the provider's conclusions or from those that the provider reports.

2. ACTIONS — CASE EVALUATIONS — CASE-EVALUATION SANCTIONS — ACTUAL COSTS — INTEREST-OF-JUSTICE EXCEPTION.

MCR 2.403(O)(1) provides that if a party rejects a case-evaluation award and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation; any postjudgment fees causally connected to the rejection of a case-evaluation award, including those incurred in pursuit of case-evaluation sanctions, are properly included in a request for attorney fees; under MCR 2.403(O)(11), a trial court may decline to award actual costs in the interest of justice if the verdict is the result of a motion after rejection of case evaluation; unusual circumstances must exist for a trial court to deny actual costs under the interest-of-justice exception, and the court must articulate the bases for its decision if it elects to apply the exception; factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous are too common to constitute the unusual circumstances encompassed by the interest-of-justice exception; instead, applying the exception might be appropriate if there is an issue of first impression, if the law is unsettled and substantial damages are at issue, if a party is indigent and an issue should be decided by the trier of fact, or if there may be a significant effect on third persons.

Ayad Law, PLLC (by *Nabih H. Ayad*) for Khaled Sabbagh and Fred Berry.

Zausmer, August & Caldwell, PC (by *Amy S. Applin* and *Daniel I. Jedell*) for Hamilton Psychological Services, PLC, and Dennis Frendo.

The Mike Cox Law Firm, PLLC (by *Michael A. Cox* and *Joseph R. Furton, Jr.*) for Sarah Guertin.

Starr, Butler, Alexopoulos & Stoner, PLLC (by *Kay Rivest Butler* and *William R. Thomas*) for Ulliance, Inc.

Before: TUKEL, P.J., and JANSEN and RIORDAN, JJ.

TUKEL, P.J. In Docket No. 342150, plaintiffs, Khaled Sabbagh and Fred Berry, appeal as of right three January 9, 2018 orders that granted summary disposition to defendants, Ulliance, Inc. (Ulliance), Dennis Frendo, Hamilton Psychological Services, PLC (Hamilton), and Sarah Guertin. In Docket No. 343204, defendant Ulliance appeals as of right the trial court's April 4, 2018 order denying its motion for case-evaluation sanctions against plaintiffs. Defendants Hamilton and Frendo and, separately, defendant Guertin cross-appeal the same order denying their motions for case-evaluation sanctions against plaintiffs. For the reasons provided below, we affirm in part, reverse in part, and remand.

I. DOCKET NO. 342150[1]

This case arises from defendants' involvement in psychological evaluations given to plaintiffs in the

[1] Because of the procedural posture of the case, for the purpose of presenting background information, we have accepted the allegations in the complaint as true.

course of plaintiffs' separate applications for employment with the Dearborn Police Department (DPD).

Sabbagh had been a deputy sheriff with the Wayne County Sheriff's Department for 26 years and, beginning in November 2015, worked there as a part-time project consultant. Berry also had been a Wayne County deputy sheriff from 1978 until his retirement. During his tenure, he also had been an assistant director of the Wayne County Sheriff's Homeland Security Section. During their careers, no questions had ever arisen regarding their mental health or capacity.

Both plaintiffs applied for a part-time police officer position with DPD, with Berry applying in September 2013 and Sabbagh applying in October 2013. As part of the application process, each was required to undergo a psychological evaluation to determine his mental and emotional condition. DPD contracted with Ulliance, a human resources company, to select licensed psychologists to perform the evaluations. Ulliance, in turn, selected Hamilton to conduct plaintiffs' evaluations for DPD.

Hamilton was established by Frendo in September 1994 as a "service-oriented outpatient independent practice providing a wide range of psychological services to children, families and adults." Frendo was a licensed psychologist with a doctorate degree who specialized in psychotherapy and both neuropsychological and psycho-educational assessments; he did not specialize in personalities of individuals in public safety or security.

In September 2013, Hamilton engaged Guertin as an independent contractor to provide outpatient counseling services at Hamilton's premises. Guertin was a limited licensed psychologist (LLP) with a master's degree. As an LLP, Guertin was required to be super-

vised by a fully licensed psychologist, in this case Frendo, who would sign off on all psychological examinations or evaluations. Guertin began performing law-enforcement psychological evaluations in December 2013.

Before Sabbagh's psychological exam, he had an interview with DPD that was extremely positive, and he was asked to consider a full-time position with DPD, rather than just part-time employment. On December 23, 2013, Sabbagh went to Hamilton for the evaluation. Sabbagh and another man entered the facility at the same time and were greeted by Guertin; the two men's appointments had been scheduled for the same time. Sabbagh offered to reschedule his appointment, but Guertin insisted on conducting both evaluations at the same time and placed the men in separate rooms.

Sabbagh's evaluation was Guertin's first law-enforcement psychological evaluation. Guertin began Sabbagh's evaluation by having him complete a questionnaire, participate in oral exams, and answer questions about his background and employment history. Throughout the evaluation, Guertin went back and forth between the two rooms every few minutes for extended periods of time to conduct the other man's evaluation. At the conclusion of the evaluation, Sabbagh provided his completed questionnaire to a receptionist and did not see Guertin again. Frendo did not conduct any part of the evaluation, although he authored Sabbagh's evaluation report, dated December 30, 2013. In that report, Frendo found Sabbagh to be "highly defensive" and concluded that his testing reflected a "number of attitudes and behaviors that reflect symptomatic depression." The report continued, "[Sabbagh] worries about his health and his physical symptoms may be

used to manipulate or control others." Frendo ultimately "ha[d] concerns regarding [Sabbagh's] emotional and physical status" and recommended "a complete physical evaluation to rule out any pre-existing condition that would interfere with his ability to perform his duties as a Police Officer."

On January 16, 2014, Berry went to Hamilton for his evaluation. Berry was taken to a room and interviewed by Guertin. Berry "was surprised to see that the interview conducted was highly informal, with no recording device in the room," and Guertin took no notes during the interview. Frendo did not interview Berry or take part in the evaluation, although he also authored the report, dated the same day as the evaluation. In that report, he stated that Berry was "a 59 year old Arab American male" who was "forced into retirement from the Wayne County Sheriff's Department" and the "target of an investigation" based on suspicions that he was well-compensated. Frendo concluded the report with "concerns" about Berry's "level of commitment as well as his history while a Wayne County Sheriff" and opined that Berry's "pattern of responses indicate[d] concerns regarding his physical health."

Months after the evaluation was administered, the director of human resources for the city of Dearborn contacted Berry and informed him that he had not passed his pre-employment evaluation, at which time Berry requested a copy of the report Hamilton had provided to Dearborn. Sabbagh heard back from DPD's human resources department in April 2014 and learned the contents of Frendo's report. Sabbagh and Berry both were shocked by the reports. Plaintiffs claimed that neither of them had indicated during the

course of their interviews that he was suffering from pain, neurological issues, or medical issues.

Plaintiffs filed their complaint on August 16, 2016. The complaint contained five counts. The counts at issue in this appeal are Count II—gross negligence as to defendants Frendo, Guertin, and Hamilton; Count IV—negligence and vicarious liability as to defendant Hamilton; and Count V—negligence as to defendant Ulliance.[2] Plaintiffs alleged that Ulliance negligently selected Hamilton to conduct the evaluations; Hamilton negligently scheduled Sabbagh and the other, unknown individual for simultaneous assessments; and Guertin carelessly and unprofessionally continued to leave Sabbagh's interview to conduct the other evaluation. Plaintiffs further alleged that Frendo, Guertin, and Hamilton carelessly performed the psychological assessments, knowingly authored false psychological-examination reports, and failed to verify the contents of the respective reports.

On October 16, 2017, Ulliance moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that the "professional negligence" count was actually a malpractice claim that was time-barred and that, in any event, there was no basis for an ordinary negligence claim because there was insufficient evidence to support a finding of duty, breach of duty, injury, or proximate causation. Hamilton and Frendo subsequently moved for summary disposition under both MCR 2.116(C)(7) and (10), arguing that plaintiffs'

[2] The parties agreed to dismiss plaintiffs' Count I, which was a claim of violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*. And the trial court found that plaintiffs had waived their Count III emotional-distress claims for failure to address them in their responses to the motions for summary disposition; plaintiffs have not challenged that decision on appeal.

claims sounded in malpractice and were time-barred and that there was no evidence that Hamilton or Frendo deviated from the standard of care. Guertin also moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that the claims sounded in malpractice and were time-barred. Guertin further argued that even if the claims were not time-barred, plaintiffs had failed to raise a genuine issue of material fact that Guertin's alleged actions rose to the level of reckless or wanton conduct necessary for gross negligence.

In separate opinions and orders, the trial court granted the three outstanding motions for summary disposition. The court rejected the argument that plaintiffs' negligence claims sounded in medical malpractice. Nevertheless, the court ruled that plaintiffs' claims lacked evidentiary and legal support under a common-law tort theory.

This Court reviews de novo a trial court's decision to grant summary disposition, *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009), including whether a cause of action is barred by a statute of limitations, *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). This Court also reviews de novo questions of statutory interpretation. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001).

Summary disposition under MCR 2.116(C)(7) is appropriate if a claim is barred because of the statute of limitations. Summary disposition is appropriate under MCR 2.116(C)(8) if the plaintiffs have failed to state a claim on which relief can be granted. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Under both (C)(7) and (C)(8), all well-pleaded allega-

tions must be both accepted as true and construed in the light most favorable to the nonmoving party. *Id*. at 162-163. However, under MCR 2.116(C)(7), the court must consider all of the documentary evidence submitted by the parties, while under MCR 2.116(C)(8), the court must test the legal sufficiency of the complaint considering only the pleadings. MCR 2.116(G)(5); *Wade*, 439 Mich at 162.

A. DO PLAINTIFFS' CLAIMS SOUND IN MEDICAL MALPRACTICE OR ORDINARY NEGLIGENCE?

1. WHICH DEFENDANTS HAVE THE LEGAL CAPACITY TO BE HELD LIABLE FOR MEDICAL MALPRACTICE?

"The first issue in any purported medical malpractice case concerns whether it is being brought against someone who, or an entity that, is capable of malpractice." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 420; 684 NW2d 864 (2004). Medical malpractice claims may be made against

> a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity[.] [MCL 600.5838a(1).]

A "licensed health facility or agency" is "a health facility or agency licensed under article 17 of the public health code . . . ." MCL 600.5838a(1)(a). MCL 333.20106(1) defines "health facility or agency" as follows:

> (a) An ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service.
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> (b) A county medical care facility.
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> (c) A freestanding surgical outpatient facility.
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> (d) A health maintenance organization.
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> (e) A home for the aged.
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> (f) A hospital.
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> (g) A nursing home.
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> (h) A hospice.
>
> (i) A hospice residence.
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> (j) A facility or agency listed in subdivisions (a) to (g) located in a university, college, or other educational institution.

Because Hamilton is a psychological practice and Ulliance is a human resources company, neither of which is included in the MCL 333.20106(1) definition of "health facility or agency," they "cannot be directly liable for medical malpractice in that capacity." *Kuznar v Raksha Corp*, 481 Mich 169, 178; 750 NW2d 121 (2008). Thus, any claims of negligence against Hamilton and Ulliance must sound in ordinary negligence as opposed to medical malpractice.

A "licensed health care professional" is "an individual licensed or registered under article 15 of the public health code . . . and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity." MCL 600.5838a(1)(b). Frendo and Guertin are licensed and registered under Article 15 of the Public Health Code, with Guertin being a licensed psychologist and Frendo holding a limited psychology license. MCL 333.18223(1) and (2). Therefore, they are both licensed healthcare professionals, MCL 600.5838a(1)(b), and thus "capable

of malpractice," *Bryant*, 471 Mich at 420. As our Supreme Court has noted, just because a party is capable of committing medical malpractice, it does not mean that a claim against that defendant "*certainly* sounds in medical malpractice." *Id*. at 421. To make this determination, a court must evaluate the nature of the claims themselves.

2. NATURE OF CLAIMS AGAINST FRENDO AND GUERTIN

"The second issue concerns whether the alleged claim sounds in medical malpractice." *Id*. at 422. To answer this question, courts make two determinations: whether there was a professional relationship and whether the claim raises questions involving medical judgment. *Id*. at 422-423.

"[M]edical malpractice can occur only within the course of a professional relationship." *Id*. at 422 (quotation marks and citation omitted).

> A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff. [*Id*.]

In granting summary disposition in favor of Frendo and Guertin, the trial court relied on and applied *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004). In *Dyer*, our Supreme Court held that in the context of an independent medical examination (IME), while no traditional physician-patient relationship exists between an IME examiner and an examinee, a limited

professional relationship does arise. *Id*. at 49-50.[3] Explaining the reasoning behind its conclusion that a limited relationship exists, the Supreme Court stated:

> In the particularized setting of an IME, the physician's goal is to gather information for the examinee or a third party for use in employment or related financial decisions. It is not to provide a diagnosis or treatment of medical conditions.
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> * * *
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> Likewise, other courts, including our Court of Appeals, have apparently recognized that the general duty of diagnosis and treatment is inappropriate in the IME setting given the purpose of the examination. [*Id*. at 51-52.]

And under this limited relationship, an examiner owes "fewer duties" to the examinee than would exist in a traditional physician-patient relationship. *Id*. at 53. But the limited relationship "still requires that the examiner conduct the examination in such a way as not to cause harm." *Id*. The Court explained:

> The patient is not in a traditional professional relationship with the physician. Nonetheless, he places his physical person in the hands of another who holds that position solely because of his training and experience. The recognition of a limited relationship preserves the principle that the IME physician has undertaken limited duties but that he has done so in a situation where he is expected to exercise reasonable care commensurate with his experi-

[3] The IME in *Dyer* was conducted pursuant to the discovery rules in an unrelated civil lawsuit between the plaintiff and a third party. *Dyer*, 470 Mich at 47. The third party had requested the IME as part of that litigation. *Id*. However, the plaintiff alleged that during the course of conducting the IME, the physician-defendant conducting the examination injured him physically. *Id*.

> ence and training. [*Id*. (quotation marks and citation omitted).]

Accordingly, an "IME physician, acting at the behest of a third party, *is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports*," *id*. at 50 (emphasis added), in part because "if the duties that arise in a regular physician-patient relationship were imposed on the IME physician, an unacceptable risk would exist," *id*. at 51. The Court continued, "The examinee, disagreeing with the diagnosis, could sue and recover from the IME physician." *Id*. The Supreme Court reasoned that permitting this type of lawsuit "would make it impossible to find any expert witness willing to risk a lawsuit based on his testimony as to his opinions and conclusions before any tribunal." *Id*. at 52 (quotation marks and citation omitted).

Plaintiffs argue that *Dyer* is inapplicable in this case because Guertin and Frendo are not physicians and because the pre-employment psychological evaluation was not an IME. Plaintiffs thus contend that Guertin and Frendo should be subject to being held liable for their conclusions arising from the evaluations.

As an initial matter, plaintiffs are correct that psychologists are not physicians. See *People v Beckley*, 434 Mich 691, 728; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.) (recognizing that psychologists are different than physicians), citing *People v LaLone*, 432 Mich 103, 109; 437 NW2d 611 (1989); see also MCL 600.2157 (identifying physician-patient privilege) and MCL 333.18237 (identifying psychologist-patient privilege). There also is no question that *Dyer* addressed physicians conducting IMEs. Thus, the salient issue before us is whether *Dyer*'s application properly is limited to physicians.

Plaintiffs note that the Supreme Court in *Dyer* used the word "physician" many times in its opinion and assert that "[t]he Supreme Court would not have bothered to draw the distinction between a physician performing an IME and a non-physician performing an IME (or, in this case, a psychological evaluation)" unless that distinction was intended to make the analysis inapplicable outside the context of a physician performing an IME. We disagree with plaintiffs' analysis of *Dyer*.

Contrary to plaintiffs' arguments, the Supreme Court's reasons for finding a limited relationship between an IME physician and an examinee apply equally to all healthcare providers authorized to conduct IMEs or their functional equivalent. First, as with a physician conducting an IME, a psychologist like Frendo or Guertin conducting a pre-employment evaluation does not have a traditional relationship with the examinee. Further, psychologists in Frendo and Guertin's position share the same goal as a physician conducting an IME: "to gather information for the examinee or a third party for use in employment or related financial decisions. It is not to provide a diagnosis or treatment of medical conditions." *Dyer*, 470 Mich at 51. And reading *Dyer* to cover all healthcare providers authorized to conduct IMEs, or their functional equivalent, provides the same policy benefit of "obviat[ing] the necessity of attempting to distinguish artificially between claims of malpractice by an independent medical examiner" and other healthcare providers. *Id*. at 53. This is particularly true now that MCL 600.5838a(1) has "expand[ed] the category of who may be subject to a malpractice action[.]" *Bryant*, 471 Mich at 420-421. Finally, we see no reason why a nonphysician expert should not receive the same protections that a physician expert does with regard to not

being liable to an examinee for any conclusions the expert makes. See *Dyer*, 470 Mich at 51-52.

In particular, plaintiffs cite a footnote in *Dyer* limiting the opinion's holding "to the relationship between an examinee and a *physician* who provides an IME but does not treat the examinee." *Id*. at 49 n 2 (emphasis added). However, when read in context, the clear purpose of the footnote was to limit the application of the opinion to situations in which a physician examines "*but does not treat the examinee*." *Id*. (emphasis added). This is readily apparent because immediately before that footnote, the *Dyer* Court stated, "The Court of Appeals correctly recognized that this Court has not yet directly determined what, if any, relationship should be recognized between a physician performing an IME and an examinee." *Id*. at 49. With the footnote, the Supreme Court left open the issue of the nature of the relationship in situations in which the physician conducting the IME provided treatment to the examinee, which, presumably, could give rise to a traditional physician-patient relationship.

Because applying *Dyer* to all healthcare providers authorized to conduct IMEs, including psychologists, is consistent with (1) the language in *Dyer* holding that the limited relationship requires "the examiner" not to harm the examinee, (2) the recognition that statutes expressly permit other healthcare providers to conduct IMEs, (3) the expanded category of those subject to medical malpractice actions, and (4) the *Dyer* Court's analysis of the Legislature's expressed policy objectives, the trial court was correct in applying *Dyer* in this case.

However, despite applying *Dyer*, the trial court concluded that "a 'professional relationship' did not exist" between plaintiffs and Frendo and Guertin; this was

erroneous because the holding of *Dyer* is that in the context of an IME, a limited duty arises under which the professional conducting the IME is required to "exercise care consistent with his professional training and expertise so as not to cause physical harm by negligently conducting the examination." *Id*. at 55. In this case, the trial court concluded that there was no professional relationship because plaintiffs did not allege that defendants' actions caused a physical injury. But regardless of whether plaintiffs alleged any particular injury, a limited professional relationship nonetheless existed, as explained in *Dyer*.

3. DO PLAINTIFFS' CLAIMS AGAINST FRENDO AND GUERTIN ALLEGE FACTS WITHIN THE REALM OF A JURY'S COMMON KNOWLEDGE AND EXPERIENCE?

Having satisfied the professional-relationship test, "the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience." *Bryant*, 471 Mich at 423. Plaintiffs alleged that Guertin did not properly conduct the interview and testing necessary for a law enforcement psychological evaluation, that Frendo negligently permitted Guertin, who was unqualified, to perform the evaluation; and that Guertin fraudulently authored the report even though he had not conducted the evaluation. Claims generally raise issues of medical judgment when "the reasonableness of the[se] action[s] can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts[.]" *Id*.

Lay jurors are not familiar with the various types and forms of psychological testing available and could not possibly know what information the various tests

provide, how they compare with other available tests, or which tests are appropriate to give during a pre-employment psychological evaluation for a law-enforcement applicant. In addition, a jury would not know, without expert testimony, whether it was appropriate or even usual for an LLP to proctor psychological testing in which the results would be interpreted by someone else; nor would a jury know whether it meets professional standards for a supervising licensed psychologist to interpret testing and notes generated by another psychologist and then prepare an evaluation report based on that testing without having met the person being tested. Similarly, an expert would need to explain to a jury why psychological testing for law-enforcement candidates is or ought to be different from more-generalized psychological testing. Simply put, the question whether Frendo's or Guertin's actions in conducting the evaluations and drafting the reports were negligent under the circumstances alleged raised questions of medical judgment, and plaintiffs' claims therefore sounded in medical malpractice. See *id*. at 424.

B. SUMMARY-DISPOSITION ANALYSIS

1. DEFENDANTS GUERTIN AND FRENDO

Having determined that Guertin and Frendo were capable of malpractice, that *Dyer* applied to create a professional relationship between plaintiffs and Guertin and Frendo, that plaintiffs' claims raised questions of medical judgment, and that the evaluations constituted IMEs, the trial court should have held that plaintiffs' Count II gross-negligence claims against Guertin and Frendo sounded in medical malpractice. And because it is clear that plaintiffs' claims were brought more than two years after the acts alleged—a

point that plaintiffs have never disputed—and thus were outside the two-year medical malpractice limitations period, see *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 310; 901 NW2d 577 (2017), citing MCL 600.5805(6), the trial court should have granted summary disposition under MCR 2.116(C)(7) on this basis. However, we will affirm the trial court's grant of summary disposition in favor of defendants, as long as it was the correct result, albeit for the wrong reason. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).[4]

Further, because plaintiffs' claims against Guertin and Frendo could not be sustained, plaintiffs' claim against Hamilton based on a vicarious-liability theory necessarily fails as well. See *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-297; 731 NW2d 29 (2007).

2. DEFENDANT HAMILTON

Plaintiffs next argue that the trial court erred by granting Hamilton's motion for summary disposition with respect to plaintiffs' direct claims of negligence against Hamilton. We disagree.

A party is entitled to summary disposition under MCR 2.116(C)(10)[5] when there are no genuine issues of

[4] Given that plaintiffs' claims against Guertin and Frendo fail because of the statute of limitations, and given that no one raised the issue on appeal, we do not decide the level of "harm" required to justify recovery under the limited-duty analysis of *Dyer*. Medical doctors engage in physical examinations that, as in *Dyer*, have the potential of causing physical injury; psychologists do not engage in such examinations and thus do not expose individuals being examined to physical harm in that manner. Delineation of the scope and contours of the limited duty as applied to psychologists will have to await future cases.

[5] Plaintiffs complain that the trial court failed to specify whether it dismissed their claims against Hamilton under MCR 2.116(C)(8) or (C)(10). However, given the trial court's explicit statement that plain-

material fact and the moving party is entitled to judgment as a matter of law. *Barnard Mfg*, 285 Mich App at 369. "[T]he moving party must support its motion with affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted." *Id*., citing MCR 2.116(G)(3). When a moving party properly supports its motion, the burden shifts to the nonmoving party to establish that a genuine issue of disputed material fact exists. *Id*. at 370. The trial court may not weigh evidence, make determinations of credibility, or otherwise decide questions of fact. *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 512-513; 892 NW2d 467 (2016).

In its motion for summary disposition, Hamilton argued, in pertinent part, that plaintiffs could not prove the essential element of proximate causation. See *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017) ("Proximate cause is an essential element of a negligence claim."). In other words, Hamilton argued that plaintiffs could not demonstrate that the breach of any duty it owed was the proximate cause of plaintiffs' purported injury, i.e., not being hired by DPD. Hamilton cited evidence that showed that assuming plaintiffs had passed the psychological evaluation, they would have only been " 'eligible to continue in the process,' " in which there were many more steps to complete. In other words, Hamilton argued that any causal link was too speculative. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). In response, plaintiffs did not address

tiffs' only evidence submitted with respect to proximate causation did not create an issue of fact, the record makes clear that the trial court decided this issue under (C)(10). See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

this argument. Accordingly, plaintiffs failed to meet their evidentiary burden in opposing Hamilton's motion with respect to their not obtaining employment with DPD. See *Barnard Mfg*, 285 Mich App at 369.

But plaintiffs assert that their damages were never solely related to the loss of employment at DPD but were, instead, for losses of "earning capacity" and "career opportunities" or, as the trial court stated, "employment prospects." According to plaintiffs, Hamilton's alleged breach resulted in this loss of earning capacity and career opportunities "because all potential police-employers ask if applicants have ever failed a psychological evaluation." Thus, according to plaintiffs, because every police application contains this question and because plaintiffs must now answer affirmatively that they failed a psychological examination and were rejected from employment because of it, "no reasonable potential law enforcement employer would ever hire Plaintiffs in light of these obvious liability concerns and because of the questions that will linger with Plaintiffs forever."

In support of their theory of causation, plaintiffs provided two unauthenticated pages allegedly from applications for DPD and the Wayne County Sheriff's Department, which they argue, again without any citation of legal or evidentiary authority, establish that "all potential police-employers ask if applicants have ever failed a psychological evaluation." However, all that these documents show is that both DPD and the Wayne County Sheriff's Department ask this question. There is no evidence from which either the trial court or this Court could reasonably infer that all Michigan law enforcement agencies, let alone all law-enforcement agencies nationwide, ask this question. Furthermore, both of these pages purportedly come

from jurisdictions from which plaintiffs have either retired or whose denial of employment forms the basis of the instant claim. Plaintiffs have cited no evidence showing that they have (1) applied to other law-enforcement departments, (2) been asked the question, (3) answered affirmatively, and (4) been summarily rejected on the basis of that answer alone. Given the complete absence of evidence that plaintiffs have applied for or been denied law enforcement positions other than the one at DPD, plaintiffs' claim of lost earning potential and employment opportunities is purely speculative. See *Skinner*, 445 Mich at 164.

As a result, the trial court properly granted Hamilton's motion for summary disposition related to any direct claims of negligence because plaintiffs failed to show proximate causation regarding any potential future harm to plaintiffs based on any alleged breach.

3. DEFENDANT ULLIANCE

The trial court granted summary disposition in favor of Ulliance on plaintiffs' Count V negligence claim on the basis of its determination that Ulliance had no duty to plaintiffs because there was no relationship between them. On appeal, plaintiffs argue that the trial court erred because it looked "for the existence of a normal relationship to establish third-party tort liability" when, in fact, "third-party tort liability is established through a 'special relationship.' " We disagree.

Generally, whether a defendant owes a plaintiff a duty of care is a question of law determined by the court. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). "[O]nce a party makes a properly supported motion under MCR 2.116, the adverse party 'may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or

as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.' " *Barnard Mfg*, 285 Mich App at 377, quoting MCR 2.116(G)(4) (emphasis omitted). The burden is on the party opposing the motion to establish a question of material fact; the trial court need not search the record for a basis to deny the moving party's motion. *Id*.

In its motion for summary disposition, Ulliance argued that it did not owe a duty to plaintiffs because it had no relationship with them, there was no contract with them, and it had never spoken with or contacted them. The burden then shifted to plaintiffs to explain the legal basis for the relationship it believed imposed a duty on Ulliance and to cite the facts in the record that established the existence of that relationship. In response, plaintiffs averred that Ulliance "had a duty to apply the knowledge, skill and ability that a reasonabl[y] careful professional in the field of human resources would exercise under the circumstances." With no explanation or citation of authority, plaintiffs argued that it was foreseeable that injury would result from breach of this duty. The trial court ruled that without any relationship between plaintiffs and Ulliance, Ulliance did not owe any common-law duty to plaintiffs.

> At common law, the determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person. The ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. Factors relevant to the determination whether a legal duty exists include the the [sic] relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the

> risk presented. [*Hill*, 492 Mich at 661 (quotation marks, citations, emphasis, and brackets omitted).]

However, "before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable." *Id*. (quotation marks, citation, and brackets omitted). "If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors." *Id*.

In this case, plaintiffs did not establish that they had a relationship with Ulliance. Ulliance is a human resources management company that had a contract with the city of Dearborn. Ulliance, as part of its contract, referred plaintiffs to Frendo for pre-employment psychological evaluations. We agree with the trial court that this "relationship" between plaintiffs and Ulliance was too tenuous to create any type of duty. While Ulliance had a contractual relationship with the city of Dearborn, and with it an obligation to select adequate providers, it had no such relationship with plaintiffs and therefore did not owe plaintiffs any duty or obligation.

In addition, plaintiffs' reliance on any purported failure of Ulliance to adhere to the guidelines of the Michigan Commission on Law Enforcement Standards (MCOLES) is misplaced. "Violation of an ordinance is not negligence per se, but only evidence of negligence." *Stevens v Drekich*, 178 Mich App 273, 278; 443 NW2d 401 (1989); see also *Hodgdon v Barr*, 334 Mich 60, 71; 53 NW2d 844 (1952). However, although a violation of an ordinance constitutes evidence of negligence, if no duty is owed by the defendant to the plaintiff, an ordinance violation committed by the defendant is not actionable as negligence. *Johnson v Davis*, 156 Mich App 550, 555-556; 402 NW2d 486 (1986). As the trial court noted, if an ordinance violation, standing alone,

cannot serve as a basis for imposing a legal duty under a theory of negligence, then *a fortiori*, a regulation violation, standing alone, cannot either. Thus, because we have already held that Ulliance owed no duty to plaintiffs because of the lack of a relationship between plaintiffs and Ulliance, any purported violation of MCOLES guidelines is not actionable by plaintiffs as negligence.

Plaintiffs invoke the term "vicarious liability" in their brief on appeal, but it is not clear how that principle of law applies here. "Vicarious liability is indirect responsibility imposed by operation of law." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) (quotation marks and citation omitted). "[T]o succeed on a vicarious liability claim, a plaintiff need only prove that an agent has acted negligently." *Laster v Henry Ford Health Sys*, 316 Mich App 726, 735; 892 NW2d 442 (2016) (quotation marks and citation omitted). But plaintiffs' complaint does not allege that Ulliance was vicariously liable because of the acts of Ulliance's employee or agent; instead, plaintiffs alleged *active* negligence on Ulliance's part. Thus, plaintiffs' reference to vicarious liability is entirely misplaced.

Consequently, for these reasons, the trial court properly granted Ulliance's motion for summary disposition.

II. DOCKET NO. 343204

On appeal, defendants all argue that the trial court should have awarded them actual costs as part of case-evaluation sanctions under MCR 2.403 given that plaintiffs rejected all the case-evaluation awards and ultimately did not better their positions in light of the subsequent grant of defendants' motions for summary disposition.

In October 2017, the parties participated in case evaluation. The evaluation panel unanimously issued various awards to each plaintiff against each defendant. Defendants accepted and plaintiffs rejected the respective case-evaluation awards applicable to each of them.

After the trial court's grant of summary disposition in January 2018, defendants sought case-evaluation sanctions and taxable costs against plaintiffs. Guertin sought $3,390 in attorney fees for approximately 11 hours of work and $1,500 in sanctions for plaintiffs' refusal to dismiss or defend the emotional-distress claims. Hamilton and Frendo sought $8,743.30 in attorney fees for about 30 hours of work and taxable costs of $70.13 for filing fees. Ulliance sought $7,045.10 in attorney fees for almost 26 hours of work and $4,025.12 in taxable costs for deposition transcripts and filing fees.

Plaintiffs argued that the trial court should refuse to award attorney fees under the "interest of justice" exception in MCR 2.403(O)(11) and that defendants were prohibited from seeking attorney fees incurred pursuing sanctions. With respect to Hamilton and Frendo, plaintiffs argued that their billing was unreasonable because it included hours for researching and drafting their motion to dismiss—which was filed in October 2017, well before the November 22, 2017 acceptance/rejection deadline. Plaintiffs disputed time billed to speak with codefendants (3.6 hours), asserting that it would amount to triple billing. Plaintiffs also requested an evidentiary hearing on the reasonableness of the attorney fees Hamilton and Frendo sought.

With respect to Ulliance, plaintiffs argued that Ulliance was not entitled to compensation for any time related to taking depositions. They noted that defen-

dants were seeking $4,025.12 in costs that were incurred in May 2017, well before the November 22, 2017 acceptance/rejection deadline. Plaintiffs repeated their complaint regarding attorney fees related to correspondence with codefendants, noting that Ulliance had two attorneys doing the same task, amounting to "quadruple billing." Also, plaintiffs wanted an evidentiary hearing on the matter of reasonableness in the event the trial court did not apply the interest-of-justice provision.

With respect to Guertin, plaintiffs challenged the compensation sought for drafting her motion for summary disposition, which occurred in late October 2017, before the late November acceptance/rejection deadline. Plaintiffs disputed that their emotional-distress claims were meritless and asserted that they excluded the issue from their briefing "to save both Defendants and this Court the effort of arguing it any further." (Emphasis omitted.) Plaintiffs argued that Guertin's claim for a $1,500 sanction was, itself, meritless and requested that Guertin be sanctioned "for this wanton attempt at imposing sanctions on Plaintiffs."

On April 4, 2018, the trial court issued its opinion regarding all three motions for sanctions. The trial court elected to apply the interest-of-justice exception to Guertin, Frendo, and Hamilton and thus denied sanctions, concluding that application of *Dyer*, 470 Mich 45, to the facts of this case was an issue of first impression. The trial court also noted a "financial disparity" between plaintiffs "who were denied employment" and "defendants who are professionals or established institutions." Finally, the trial court stated that it was "mindful of the fact that Plaintiffs possibly suffered harm from poorly conducted or inaccurate evaluations."

However, the trial court noted that the interest-of-justice exception did not apply to Ulliance, thereby entitling Ulliance to "actual costs," including reasonable attorney fees. The trial court determined that the unsigned billing summary attached to the attorney affidavit that Ulliance submitted was inadmissible as a business record because it was created in anticipation of litigation. It held that Ulliance was required to submit detailed billing records that the court could examine and that the opposing parties could contest for reasonableness. Because Ulliance had argued that an evidentiary hearing was unnecessary, the trial court determined that it was not satisfied that Ulliance had "adequately supported its claim for costs and attorney fees." Finally, the trial court held that this Court does not permit parties to recover fees for time spent pursuing case-evaluation sanctions; thus, even if Ulliance had adequately supported its fee requests, the trial court would have denied any fees that arose as a result of pursuing sanctions.

With respect to costs, the trial court noted that Guertin had not sought any costs, Frendo and Hamilton sought $70.13, and Ulliance sought $4,025.12. The trial court noted that deposition fees cannot be included in costs unless they were read into evidence or necessarily used. Removing those fees, Ulliance had $60 in fees, which the trial court awarded, along with $70.13 to Frendo and Hamilton.

A. MCR 2.403

MCR 2.403 governs the process for case evaluation and how sanctions are to be awarded. MCR 2.403(O)(1) provides, in pertinent part, that

> [i]f a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing

> party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

And MCR 2.403(O)(6)(b) provides that "actual costs" include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation . . . ."

Accordingly, because plaintiffs had rejected the case evaluations as to all defendants and because the trial court had entered a "verdict" in favor of all defendants when the court granted defendants' respective motions for summary disposition, see MCR 2.403(O)(2)(c), defendants were, as a matter of course, entitled to case-evaluation sanctions. However, with respect to defendants Hamilton, Frendo, and Guertin, the trial court invoked MCR 2.403(O)(11), which allows a court to decline to award case-evaluation sanctions "in the interest of justice." That provision specifically states, "If the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs."

B. ULLIANCE'S APPEAL

1. ADMISSIBILITY OF BILLING SUMMARY

Ulliance argues that the trial court erred when it determined that the billing summary Ulliance provided to support its claim for attorney fees was inadmissible. We agree. This Court reviews for an abuse of discretion a trial court's decision regarding the admission of evidence. *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable

and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The party requesting attorney fees bears the burden of proving that they were incurred and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). A "fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness." *Smith v Khouri*, 481 Mich 519, 532; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). "The fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Id*. Therefore, the issue here is whether Ulliance's billing summary constituted a reasonable evidentiary basis on which the trial court could evaluate and decide Ulliance's motion.

The summary was six pages long and was presented in a table format. The table's four columns described the date on which the work was performed, which attorney performed the work, a brief description of the work, and how many hours the attorney spent on the task. Ulliance argued at the motion hearing that given the information it had provided, an evidentiary hearing was not "required." Notably, plaintiffs did not argue that the billing summary was not admissible. Instead, plaintiffs argued that if the court did not use the interest-of-justice exception under MCR 2.403(O)(11), they were requesting an evidentiary hearing to challenge the reasonableness and appropriateness of the fees.

Although Ulliance otherwise would have been entitled to an award of actual costs under MCR 2.403(O)(1), the trial court declined to award any attorney fees because it determined that Ulliance's billing summary was not admissible. The court cited *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 17;

363 NW2d 712 (1985), for the principle that documents created in anticipation of litigation are not admissible as business records. Instead, the court stated that "detailed billing records" must be submitted to support a claim for attorney fees.

The trial court erred. First, it is important to note that no evidentiary hearing was held. Although the billing summary might have been inadmissible at an evidentiary hearing in its then-current form,[6] the trial court was not making a decision at an evidentiary hearing. Rather, at this prehearing stage, the parties were merely trying to show whether there was any evidence that, if believed, would support the award of fees. The proffered summary—detailing the dates various tasks were accomplished, the attorneys who completed the work, how much time each task took, and a description of the work itself—was sufficiently detailed to support an initial request for such an award. See MRE 1006 (allowing for summaries to be used as long as the materials from which the summaries were gathered are made available for examination); *Smith*, 481 Mich at 532 (opinion by TAYLOR, C.J.) (stating that "[t]he fee applicant bears the burden of supporting its claimed hours with evidentiary support" and, consistent with that obligation, "must submit detailed billing records"). Assuming a party satisfies that standard and the opposing party objects to the reasonableness of the fees, the trial court could then hold an evidentiary hearing, see *Smith*, 481 Mich at 532 (opinion by TAYLOR, C.J.), at which time it could make any necessary determination regarding credibility and reasonableness. Moreover, Ulliance also submitted an affidavit signed by the lead attorney in which the attorney averred that he had personal knowledge of the facts

[6] But see MRE 1006, allowing summaries under certain conditions.

and incorporated the contents of the summary into his affidavit. Therefore, even assuming that the billing summary was inadmissible per se, the affidavit, which incorporated the contents of the summary, was admissible at this stage of the proceedings to support Ulliance's motion. See MCR 2.119(B).

Plaintiffs' reliance on *Augustine v Allstate Ins Co*, 292 Mich App 408; 807 NW2d 77 (2011), is misplaced. In *Augustine*, this Court considered the defendant's argument that the trial court erred by admitting, over the defendant's objection, four letters written by other attorneys who had litigated similar cases, in which the attorneys discussed their hourly fees. *Id*. at 430. This Court determined that the trial court had abused its discretion by admitting the letters because they were hearsay, i.e., out-of-court statements offered to prove the truth of the matter asserted, see *id*. at 430, citing MRE 801(c), and not admissible under MRE 803(6) as business records, or under MRE 803(24) as an "other exception," *Augustine*, 292 Mich App at 431. But, critically, the evidence at issue in *Augustine* was admitted *at an evidentiary hearing*, *id*. at 430, which is not the case here.

Therefore, we hold that the trial court erred when it determined that the billing summary was "inadmissible" before the holding of an evidentiary hearing.

2. FAILURE TO HOLD AN EVIDENTIARY HEARING

Ulliance next argues that the trial court erred when it failed to hold an evidentiary hearing. We note that Ulliance did not seek an evidentiary hearing in the trial court. Instead, it merely averred that a hearing was not "required" because the court had all the information it needed to rule on the matter. "A party may not take a position in the trial court and subsequently seek redress

in an appellate court that is based on a position contrary to that taken in the trial court." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (quotation marks and citation omitted). However, we decline to view Ulliance's position at the trial court as waiving the issue on appeal. In the trial court, Ulliance merely argued that no hearing was needed because it thought the issue of case-evaluation sanctions could be resolved with reference to the information provided in its billing summary. Plaintiffs, in response, argued that a hearing was necessary. We do not think that Ulliance should be penalized under these circumstances for the trial court's error in ruling the summary inadmissible. Therefore, the issue is not waived, and we review for an abuse of discretion "[a] trial court's decision that an evidentiary hearing is not warranted . . . ." *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

"Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed." *Id*. "However, if the parties created a sufficient record to review the issue, an evidentiary hearing is not required." *Id*.

In this case, Ulliance supplied a billing summary, which summarized the attorney fees it thought it was entitled to as part of case-evaluation sanctions. Plaintiffs opposed the request for attorney fees and argued that (1) the hourly rate Ulliance charged (an average of $293 per hour) was well above the pertinent average rate for general civil litigators ($227 per hour); (2) Ulliance's billing amounted to "quadruple billing"; and (3) Ulliance was seeking to recover costs that were not recoverable under MCR 2.403, such as costs associated with the appeal in this Court.

While the last of plaintiffs' arguments seemingly could have been resolved with the record as it existed

at the time, the resolution of the other two arguments is much more involved. Whether the hourly rates that Ulliance was using were reasonable involves an examination of many factors.[7] While some of these factors may have been capable of being addressed without an evidentiary hearing, some clearly were not. For just one example, the record at the time of the court's decision was inadequate to evaluate "the experience, reputation, and ability of the lawyer or lawyers performing the services[.]" *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.) (quotation marks and citation omitted). Further, whether certain aspects of the billing constituted "quadruple billing" is not evident from the materials submitted.[8] Thus, it is clear that an

[7] The factors a court should consider when evaluating the reasonableness of an attorney fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.) (quotation marks and citation omitted); see also *Augustine*, 292 Mich App at 435.]

[8] It goes without saying that legal expenditures for duplicative work "are properly excluded when determining what constitutes a reasonable attorney fee[.]" *McAuley v Gen Motors Corp*, 457 Mich 513, 525; 578 NW2d 282 (1998).

evidentiary hearing was warranted, and the trial court abused its discretion when it failed to hold one.

3. ATTORNEY FEES INCURRED IN PURSUIT OF CASE-EVALUATION SANCTIONS

Ulliance also argues that the trial court erred when it ruled that even if the court had awarded attorney fees, it could not have awarded any fees associated with Ulliance's pursuit of case-evaluation sanctions. To the extent that any attorney fees were causally connected to plaintiffs' rejection of the case-evaluation award, we agree.

In its opinion and order, the trial court stated:

> Additionally, contrary to representations to the Court at oral argument, [t]he Court of Appeals has disallowed parties from recovering fees for time spent pursuing case evaluation sanctions. *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 304 Mich App 174, 219-220; 850 NW2d 537 (2014);[9] *Allard v State Farm Ins Co*, 271 Mich App 394, 405; 722 NW2d 268 (2006). Over half of the hours Ulliance claims concern case evaluation sanctions. Therefore, the Court would not have awarded those hours even if they had been properly supported with documentary evidence.

The trial court's reliance on *Allard* and *Fraser* was misplaced. In *Allard*, the Court agreed with the defendant that the plaintiff "was not entitled to the costs and fees associated with *attending* case evaluation." *Allard*, 271 Mich App at 405 (emphasis added). In this case, all parties agree that fees incurred before the November 22, 2017 rejection notification date are pre-

[9] The trial court did not note it, but this Court's opinion in *Fraser* was reversed in part in *Fraser Trebilock Davis & Dunlap, PC v Boyce Trust 2350*, 497 Mich 265; 870 NW2d 494 (2015).

cluded, which necessarily includes fees associated with attending case evaluation. Accordingly, the trial court erred by relying on *Allard*.

With respect to *Fraser*, both plaintiffs and Ulliance contend that it supports their respective positions. In *Fraser*, this Court considered whether the trial court had erred when it awarded the plaintiff "case-evaluation sanctions for postjudgment activities and by awarding attorney fees for time spent in obtaining case-evaluation sanctions." *Fraser*, 304 Mich App at 216, 220. The defendants had taken the position that the requirement in MCR 2.403(O)(8) to file any motion for case-evaluation sanctions within 28 days after entry of the judgment or order precluded recovery for costs that arose from proceedings occurring after that 28-day period. *Id*. at 216-217. This Court noted that it had previously "held that MCR 2.403(O) permitted attorney fees 'for *all* services necessitated by the rejection of the mediation award,' which included the post-trial proceedings that were necessitated by the plaintiffs' decision to reject the case evaluation and proceed to trial." *Id*. at 218, quoting *Troyanowski v Village of Kent City*, 175 Mich App 217, 227; 437 NW2d 266 (1988). This Court then explained that in *Young v Nandi*, 490 Mich 889 (2011), our Supreme Court issued a peremptory order reversing the portion of this Court's decision that had concluded that the plaintiff was entitled to attorney fees and costs for posttrial work that occurred in the circuit court after the appellate process. *Fraser*, 304 Mich App at 218-219. The Supreme Court had determined "that the plaintiff failed to demonstrate the requisite causal connection between the postappellate proceedings and the defendants' rejection of the case evaluation." *Id*. at 219. Considering these cases together, this Court held "that actual costs arising from postjudgment proceedings

that occur more than 28 days after judgment may be awarded as case-evaluation sanctions if the proceedings are causally connected to the party's rejection of the case evaluation." *Id*.

Reviewing the facts before it, this Court considered the trial court's award of sanctions "related both to its opposition to defendants' motion for a new trial and to its pursuit of case-evaluation sanctions." *Id*. Regarding the proceedings to obtain an award of case-evaluation sanctions, this Court determined that the case-evaluation proceedings had not been necessitated by the defendants' rejection of the case evaluation. *Id*. Instead, the proceedings had been "complicated" by the "close issue, not clearly settled by Michigan caselaw," of whether a law firm being represented by its own members was entitled to attorney fees *at all*. *Id*. at 219-220. Accordingly, this Court concluded that there was an "insufficient causal nexus between defendants' rejection of the case evaluation and the resources plaintiff expended claiming attorney fees." *Id*. at 220. Importantly, *Fraser* contains no per se ruling regarding whether attorney fees incurred for seeking case-evaluation sanctions are recoverable. Instead, this Court considered all fees against the test of whether there was a causal nexus between the work resulting in the fee and the rejection of the case-evaluation award to determine if they could be awarded as part of a reasonable attorney fee. *Id*.

In light of the foregoing, we hold that the trial court erred as a matter of law when it concluded that MCR 2.403(O) does not permit the recovery of attorney fees incurred pursuing case-evaluation sanctions and that it therefore abused its discretion. See *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012) ("A court by definition abuses its

discretion when it makes an error of law."). Rather, consistent with both the language and the purpose of MCR 2.403(O), any postjudgment fees causally connected to the rejection of a case-evaluation award, including those incurred in pursuit of case-evaluation sanctions, are properly included in a request of attorney fees. Again, not every fee accrued in the pursuit of case-evaluation sanctions necessarily will be recoverable. The key is whether the sought-after fee is causally connected to the rejection of the case-evaluation award. MCR 2.403(O)(6)(b); *Fraser*, 304 Mich App at 219. We therefore reverse the trial court's ruling that fees that were incurred in pursuit of case-evaluation sanctions *never* are recoverable under MCR 2.403(O).

C. HAMILTON'S, FRENDO'S, AND GUERTIN'S CROSS-APPEALS

Hamilton, Frendo, and Guertin argue that the trial court erred when it denied their requests for case-evaluation sanctions on the basis of the interest-of-justice exception in MCR 2.403.

This Court reviews for an abuse of discretion a trial court's decision to invoke the MCR 2.403(O)(11) interest-of-justice exception. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 390; 689 NW2d 145 (2004). The findings of fact underlying the decision are reviewed for clear error. *In re Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

As noted before, plaintiffs rejected the case-evaluation award, but because the verdict was not more favorable to them, they were responsible for defendants'

actual costs. MCR 2.403(O)(1) and (2)(c). However, under MCR 2.403(O)(11), "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c)[, i.e., a motion after rejection of case evaluation], the court may, in the interest of justice, refuse to award actual costs." The interest-of-justice exception found in MCR 2.403(O)(11) has been interpreted in the context of the analogous offer-of-judgment rule, MCR 2.405(D), because " 'both . . . serve identical purposes of deterring protracted litigation and encouraging settlement.' " *Haliw v Sterling Heights (On Remand)*, 266 Mich App 444, 448; 702 NW2d 637 (2005) (citation omitted).

> "Absent unusual circumstances," the "interest of justice" does not preclude an award of attorney fees under MCR 2.405. . . .
>
> "The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the 'interest of justice' exception to the point where it would render the rule ineffective." [*Derderian*, 263 Mich App at 390-391 (citations and brackets omitted).]

"Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Id*. at 391 (citation omitted). On the other hand, invocation of the exception might be appropriate if there is an issue of first impression; if the law is unsettled and substantial damages are at issue; if a party is indigent and an issue should be decided by a trier of fact; or if there may be a significant effect on third persons. *Haliw*, 266 Mich App at 448. If a trial court elects to apply the exception, it must articulate the bases for its decision. *Id*. at 449.

In this case, the trial court gave three reasons for its decision to apply the exception: (1) plaintiffs presented a question of first impression "because no direct authority addressed psychological evaluations in the context of a pre-employment screening," (2) "the financial disparity between Plaintiffs who were denied employment as part-time public servants and defendants who are professionals or established institutions," and (3) "the fact that Plaintiffs possibly suffered harm from poorly conducted or inaccurate evaluations." We consider these reasons in reverse order.

1. HARM

We will ignore for the moment that the trial court concluded that there was only a *mere possibility* that plaintiffs were harmed by poorly conducted or inaccurate evaluations. Assuming that there was solid proof that plaintiffs were harmed by the evaluations, their inability to recover under the law for that harm is not a reason to deny case-evaluation sanctions to defendants. Harms have always existed for which there was no recovery under the law. See, e.g., *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 87; 746 NW2d 847 (2008) (noting that government agencies are immune to loss-of-consortium claims); *Willett v Smith*, 260 Mich 101, 102; 244 NW 246 (1932) (explaining that there was no recovery for injuries caused by ordinary negligence; gross negligence was required under the statute); *Bouma v Dubois*, 169 Mich 422, 426; 135 NW 322 (1912) (holding that under the previous rule of contributory negligence, there would be no recovery for a plaintiff's injury even if the defendant was negligent if the plaintiff also was negligent). Thus, suffering a harm for which there is no legal recourse is not uncommon and does not qualify as an "unusual circum-

stance" that can justify application of the interest-of-justice exception. See *Derderian*, 263 Mich App at 391. Moreover, in light of the determination that most of plaintiffs' claims were barred by the two-year malpractice statute of limitations, plaintiffs' inability to seek redress for any harm they suffered also occurred because of their own failure to timely file their claims. Circumstances created by the party owing sanctions cannot constitute a basis for application of the exception that would absolve them of some or all of their liability.

2. FINANCIAL DISPARITY

The trial court "note[d] the financial disparity between Plaintiffs who were denied employment as part-time public servants and defendants who are professionals or established institutions." However, the relevant standard that this Court noted could be considered a sufficiently unusual circumstance to sustain application of the interest-of-justice exception was "a significant financial disparity between the parties." *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005) (quotation marks and citation omitted). We are left with a definite and firm conviction that the trial court erred when it concluded that there was a financial disparity between plaintiffs and defendants.

Simply put, there is no evidence to support the trial court's finding. Not only did the trial court fail to discuss or cite any evidence in the record to support the existence of any financial disparity, let alone a significant one, but none of the parties cited any evidence either. Defendants all argued in their motions that this case did not have any unusual circumstances to permit application of the exception. By way of response, plain-

tiffs filed three almost identical responses claiming that the financial disparity was "obvious," presumably because "[o]ne defendant is a large corporation and the other two are licensed professionals. The plaintiffs, on the other hand, are two retirees that must work low-wage jobs to supplement their meager pensions." Worse, plaintiffs provide the same three sentences, still without details or record citation, as their entire argument in all three of their briefs on appeal. On this record, plaintiffs completely failed to support their position of financial disparity before the trial court, the trial court erred by adopting that position without any evidence in support, and on appeal plaintiffs failed to provide any basis on which this Court could uphold the trial court's determination, given the complete lack of any such evidence in the pleadings or opinion. Accordingly, the trial court should not have relied on any supposed financial disparity between plaintiffs and defendants in declining to impose case-evaluation sanctions.

3. ISSUE OF FIRST IMPRESSION

Defendants insist that this is not an issue of first impression because other state courts have applied *Dyer* to individuals other than physicians. Although Michigan caselaw does not include a published opinion defining what qualifies as an issue or a case of first impression, *Black's Law Dictionary* (11th ed) defines a "case of first impression" as "[a] case that presents the court with an issue of law that has not previously been decided by any controlling legal authority *in that jurisdiction*." (Emphasis added.) Given that neither this Court nor our Supreme Court has answered the question of applying *Dyer* to nonphysicians in a published decision, this is appropriately considered an

issue of first impression for Michigan. Furthermore, in light of the conclusion in Part I(B) of this opinion that application of *Dyer* ought to have resulted in the trial court dismissing the claims against Hamilton, Frendo, and Guertin, as barred by the statute of limitations, those defendants' arguments that the issue of first impression was not dispositive of the claims against them lacks merit.

Consequently, because the issue of *Dyer* applying in this context was an issue of first impression in this state, the trial court did not abuse its discretion by considering this fact in its application of the interest-of-justice exception in MCR 2.403(O)(11) to deny Hamilton's, Frendo's, and Guertin's requests for case-evaluation sanctions. However, despite the trial court appropriately relying on the fact that the case presented an issue of first impression, the court also relied on two other facts that were not appropriate. Therefore, we cannot conclude that the trial court would have employed MCR 2.403(O)(11) to preclude Hamilton, Frendo, and Guertin from recovering case-evaluation sanctions, and we vacate the portion of its opinion denying sanctions to Hamilton, Frendo, and Guertin. On remand, the trial court is to reconsider its position, knowing that of the three reasons it supplied, only the fact that this presented an issue of first impression is a proper consideration.

III. CONCLUSION

In Docket No. 342150, we affirm the trial court's grant of summary disposition to all defendants.

In Docket No. 343204, we vacate the trial court's denial of case-evaluation sanctions to Frendo, Guertin, and Hamilton based on the MCR 2.403(O)(11) interest-of-justice exception and remand for the trial court to

reconsider its ruling, knowing that two of the three reasons it had relied on are not valid. We also reverse (1) the trial court's ruling that Ulliance's billing summary was inadmissible to support its motion for case-evaluation sanctions; (2) the trial court's decision to not hold any evidentiary hearing related to plaintiffs' challenges to Ulliance's fees; and (3) the court's ruling that as a matter of law, fees that were incurred in pursuit of case-evaluation sanctions never could be recovered under MCR 2.403(O). We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

JANSEN and RIORDAN, JJ., concurred with TUKEL, P.J.

In re ATTORNEY FEES OF MITCHELL T. FOSTER

Docket No. 343340. Submitted May 9, 2019, at Lansing. Decided May 21, 2019. Approved for publication August 6, 2019, at 9:05 a.m.

Attorney Mitchell T. Foster was appointed by the Kalamazoo Circuit Court as appellate counsel for Theresa L. Petto, who had pleaded guilty but mentally ill to felony murder, MCL 750.316(1)(b). The court, Alexander C. Lipsey, J., denied Petto's motion to withdraw her guilty plea, and the Court of Appeals denied Petto's delayed application for leave to appeal. The Supreme Court remanded to the Court of Appeals for consideration as on leave granted. 502 Mich 900 (2018). The Court of Appeals then remanded the case to the trial court for further proceedings. Foster petitioned the trial court for $2,820.31 in attorney fees for his work in preparing Petto's motion to withdraw her guilty plea and delayed application for leave to appeal, plus travel hours and additional expenses. The court awarded Foster $750 in attorney fees. Foster moved for reconsideration and requested an additional fee of $1,623.60 for his work in representing Petto. In the alternative, Foster asked the court to state its reasons on the record for denying his requested fees. The court granted the reconsideration motion, stating that it had deviated from the county's compensation protocol. The court set aside its previous order and awarded Foster the county's $500 maximum fee for representing Petto in her motion to withdraw her guilty plea and the $500 maximum for representing Petto in her appeal. Foster appealed.

The Court of Appeals *held*:

1. A previous version of MCL 775.16 provided a statutory right to reasonable compensation for those attorneys appointed to represent indigent defendants. Although MCL 775.16 no longer includes a reasonable-compensation requirement, this requirement is still applicable pursuant to *In re Ujlaky Attorney Fees*, 498 Mich 890 (2015). In *Ujlaky*, the Supreme Court ordered the trial court to either award the fees requested by the attorney or articulate on the record its basis for concluding that the fees were not reasonable.

2. The trial court abused its discretion when it capped the award of attorney fees pursuant to Kalamazoo County's fee schedule for similar types of appeals. The court was required to either award the requested fees or state why the requested fees were unreasonable in relation to the actual services rendered.

Reversed and remanded.

ATTORNEY AND CLIENT — COURT-APPOINTED COUNSEL — REASONABLE COMPENSATION — DETERMINATION OF REASONABLENESS.

An attorney appointed to represent an indigent client is entitled to a determination on the record of whether the attorney fees requested are reasonable for the services rendered.

Mitchell T. Foster *in propria persona*.

Before: SHAPIRO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM. Appellant, Mitchell T. Foster, appeals as of right the trial court's order granting, in part, his motion for reconsideration and awarding Foster $1,000 in attorney fees. For the reasons stated in this opinion, we reverse and remand for further proceedings.

Foster represented defendant, Theresa Lynne Petto, in her postconviction proceedings. Petto pleaded guilty but mentally ill to felony murder, MCL 750.316(1)(b), and was sentenced by the trial court to life imprisonment without the possibility of parole. The trial court appointed Foster to represent Petto in her appeal. Foster filed a motion in the trial court to withdraw Petto's guilty plea. The trial court denied that motion. Thereafter, Foster filed a delayed application for leave to appeal, which this Court denied. Foster appealed this Court's decision in the Michigan Supreme Court. In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to this Court for consideration as on leave granted. Foster then filed a

motion for a remand to the trial court for a *Ginther*[1] hearing, which was granted by this Court.

Foster filed a petition in the trial court for a total payment of $2,820.31 in attorney fees for the work he completed on Petto's case up until this Court denied Petto's delayed application for leave to appeal. Foster sought payment for 51.20 hours of work at a rate of $45 an hour (the scheduled rate in Kalamazoo County for appointed counsel in felony appeals), 5.80 travel hours at $12 an hour (the scheduled rate in Kalamazoo County), and he requested $446.71 in additional expenses. The trial court awarded Foster $750, which exceeded the $500 cap that Kalamazoo County placed on services rendered by appointed attorneys in appellate proceedings involving guilty pleas. Foster then filed a motion for reconsideration, requesting the approval of an additional $1,623.60 for his work on the case. In the alternative, Foster asked the trial court to state on the record its reasons for declining to award his requested attorney fees. Following a hearing, the trial court set aside its initial order awarding Foster $750 in attorney fees and ordered that Foster was entitled to the $500 maximum for representing Petto in her motion to withdraw the guilty plea and the $500 maximum for representing Petto in her appeal. This appeal followed.

Foster argues that the trial court abused its discretion by capping attorney fees pursuant to the Kalamazoo County fee schedule without considering whether his additional requested fees were reasonable. We agree.

"A trial court's determination regarding the reasonableness of compensation for services and expenses of court-appointed attorneys is reviewed for an abuse of

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

discretion." *In re Foster Attorney Fees*, 317 Mich App 372, 375; 894 NW2d 718 (2016). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted).

This Court has explained:

> "At common law," the burden of providing a defense to indigent defendants "was borne by members of the bar as part of the obligations assumed upon admission to practice law." *In re Recorder's Court Bar Ass'n*, 443 Mich 110, 121; 503 NW2d 885 (1993). However, in *Recorder's Court Bar Ass'n*, our Supreme Court, while noting that the validity and accuracy of this common-law rule was not without challenge, recognized that MCL 775.16 provides a statutory right to reasonable compensation for those attorneys appointed to represent indigent defendants. *Id*. at 122-123. Our Supreme Court held that while "what constitutes reasonable compensation may necessarily vary among circuits," "the Legislature clearly intended an individualized determination of reasonable compensation . . . ." *Id*. at 129-130. [*In re Foster Attorney Fees*, 317 Mich App at 375-376.]

Although MCL 775.16 has since been amended, effective July 1, 2013, and no longer contains the reasonable-compensation requirement, the Supreme Court has made clear that the requirement still applies.

In *In re Ujlaky Attorney Fees*, 498 Mich at 890, in lieu of granting leave to appeal, the Supreme Court reversed this Court's decision affirming the denial of an attorney's request for extraordinary fees and remanded the case to the trial court "for a determination of the reasonableness of the attorney fees requested." The order directed as follows:

> The trial court applied the county's fee schedule, which capped compensation for plea cases at $660, but did not

> address at all the reasonableness of the fee in relation to the actual services rendered, as itemized by the appellant. See *In re Recorder's Court Bar Ass'n*, 443 Mich 110, 131[; 503 NW2d 885] (1993). Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, ipso facto, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may. On remand, the trial court shall either award the requested fees, or articulate on the record its basis for concluding that such fees are not reasonable. See, e.g., *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 85-88[; 438 NW2d 878] (1989), and *In re Attorney Fees of Jamnik*, 176 Mich App 827, 831[; 440 NW2d 112] (1989). [*In re Ujlaky Attorney Fees*, 498 Mich at 890.]

See also *In re Foster Attorney Fees*, 317 Mich App at 376 n 1 (declining to specifically address the issue, but noting that the Michigan Supreme Court referred to the reasonable-compensation requirement in an order entered after MCL 775.16 was amended).

In this case, while the trial court expressed some concern about the number of hours spent on the delayed application for leave to appeal, the trial court did not conclude that this or any other amount of time that Foster spent on Petto's case was unreasonable. However, the court clearly relied on Kalamazoo County's policy of capping compensation for appeals involving guilty pleas at $500. At the hearing, Foster asked the trial court to consider whether the hours spent in each category on his itemized billing statement were reasonable. The trial court declined to do so on the record, but agreed instead to examine Foster's itemized hours and issue a written opinion. In its written opinion, the trial court concluded that Foster was entitled to the maximum amounts allotted by Kalamazoo County for representing Petto at her plea-withdrawal hearing and in her appeal, but it did not

determine that any of the additional time Foster spent on the case, for which he was requesting additional fees, was unreasonable.

As a result, we conclude that the trial court abused its discretion by failing to either award Foster the full amount of requested fees or articulate its basis for concluding that the amount was not reasonable. See *In re Attorney Fees of Ujlaky*, 498 Mich at 890; *In re Attorney Fees of Jamnik*, 176 Mich App at 831-832 (stating that "[w]hile the determination of what is reasonable compensation for such services is left to the sound discretion of the trial court, it is an abuse of discretion to simply deny any compensation for such services"). Accordingly, we remand to the trial court for such a determination.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

SHAPIRO, P.J., and BORRELLO and BECKERING, JJ., concurred.

PEOPLE v JUREWICZ

Docket No. 342193. Submitted July 12, 2019, at Lansing. Decided August 6, 2019, at 9:10 a.m. Vacated and remanded 506 Mich 914 (2020).

Scott R. Jurewicz was convicted following a jury trial in the Jackson Circuit Court of felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). On March 14, 2015, defendant put his then girlfriend's son, BH, to bed. Defendant's girlfriend also had two other children, EH and LH. Defendant admitted that BH became fussy so he "shook" him and put him back down "hard" on his bed. BH abruptly stopped crying, and defendant left the room. When he returned a few minutes later, BH was unresponsive and purple. BH was transported to the hospital, where he died three days later. Two months after BH's death, defendant was present when JP, the son of his new girlfriend, was found smothered to death in his crib. Following the death of BH, Child Protective Services (CPS) began investigating the home of EH and LH to ensure their safety. Following JP's death, CPS began investigating the home of JP's brother, SC, to ensure his safety. During separate forensic interviews conducted by CPS workers, SC and EH stated that defendant had choked them. The court, Thomas D. Wilson, J., admitted these statements at trial pursuant to MCL 768.27c. The court sentenced defendant to life without parole for felony murder and to 50 to 75 years in prison for first-degree murder. Defendant appealed.

The Court of Appeals held:

1. Defendant's trial counsel was not ineffective for failing to call two expert witnesses, Dr. Leslie Hamilton and Dr. Michael Pollanen, to testify for the defense. Dr. Hamilton wrote a report opining that it was not possible to conclude that BH's death was caused by "shaking" or "whiplash." Dr. Pollanen wrote a report concluding that the cause and manner of BH's death were indeterminable. Defendant was not prejudiced by his counsel's decision not to call Dr. Hamilton or Dr. Pollanen because their conclusions were presented through the testimony of other experts who appeared at trial. Defendant did not show that he was deprived of a substantial defense by counsel's decision because he

did not establish that either Dr. Hamilton or Dr. Pollanen would have provided any new information that would amount to a substantial defense that was not already offered at trial.

2. A defendant has a constitutional right to confront the witnesses against him or her during a criminal prosecution. The Confrontation Clause, US Const, Am VI, generally prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. Under *Ohio v Clark*, 576 US 237 (2015), a statement is testimonial when, in light of all the circumstances, the primary purpose of the statement was to create an out-of-court substitute for trial testimony. In this case, the statements made by SC and EH were not testimonial and were properly admitted. Although both children were interviewed by CPS after BH's death and after the investigation concerning his death had begun, the CPS interviews were conducted for the purpose of assessing the children's safety following the deaths of BH and JP, and not in order to obtain information regarding those deaths or defendant's involvement therein. In addition, both SC and EH were approximately three years old when they made the statements, and it is therefore highly unlikely that they intended for their statements to be a substitute for trial testimony because they were too young to understand the legal implications of their statements.

3. The prosecution's notice to defendant of its intent to introduce SC's and EH's hearsay statements was not timely under MCL 768.27c(3). However, the error was harmless because the evidence against defendant was overwhelming and the admission of the statements was not outcome-determinative.

Affirmed.

CONSTITUTIONAL LAW — RIGHT OF CONFRONTATION — EVIDENCE — HEARSAY — TESTIMONIAL STATEMENTS — YOUNG CHILDREN.

The out-of-court statements of very young children will rarely implicate the Confrontation Clause, especially when the statements were not made to the police, were not obtained to aid a police investigation, and the children were too young to understand the legal implications of their statements (US Const, Am VI).

Jerard M. Jarzynka, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Wendy Barnwell for defendant.

Before: O'BRIEN, P.J., and FORT HOOD and CAMERON, JJ.

FORT HOOD, J. Defendant appeals as of right his jury convictions for felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). Defendant was sentenced to life without the possibility of parole for his felony-murder conviction and to 50 to 75 years in prison for the child-abuse conviction. Defendant contends on appeal that he is entitled to a new trial because (1) his trial counsel was ineffective for failing to call expert witnesses, and (2) his constitutional right to confront the witnesses against him was violated by the admission of hearsay statements made by two approximately three-year-old children. We affirm.

I. FACTUAL BACKGROUND

This case arises out of defendant's murder of an 18-month-old child. On March 14, 2015, defendant ate a spaghetti dinner with his son, defendant's then girlfriend, and her three children, EH, LH, and BH. After dinner, defendant put BH to bed. BH became fussy and defendant became frustrated, so defendant "shook [BH] a little bit" and "put him back down . . . hard[]" in his crib. BH abruptly stopped crying, and defendant went downstairs. After a few minutes, defendant returned upstairs to check on BH. According to defendant, when he returned upstairs he discovered noodles spilling out of BH's mouth, and BH was lifeless and purple. First responders were able to restart BH's heart, but he was immediately placed on life support and died three days later. A CAT scan showed that an "overall loss of oxygen for a period of

time caused brain damage and the cells of the brain to die." BH had retinal hemorrhages in both eyes, and an MRI showed swelling in his spine.

After BH's death, BH's mother left defendant and defendant began dating again. Two months later, defendant was present when his new girlfriend's young son, JP, was found smothered to death in his crib. While BH's death was being investigated, Child Protective Services (CPS) was investigating EH and LH's home to ensure their safety. Following JP's death, CPS also began investigating the home of JP's brother, SC, to ensure SC's safety. During separate forensic interviews with CPS, SC and EH stated that they had been choked by defendant. Defendant was eventually charged and convicted with BH's murder on a theory that the cause of BH's death was homicide from blunt-force trauma. He now appeals his convictions. We affirm.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his trial counsel was ineffective for failing to call any witnesses to testify on defendant's behalf. Specifically, defendant contends that his trial attorney erred when he failed to call Dr. Leslie Hamilton and Dr. Michael Pollanen as expert witnesses. We disagree.

Generally, "[t]he question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). Because no *Ginther*[1] hearing was held, this Court's review is limited to

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Both the United States Constitution and the 1963 Michigan Constitution guarantee defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To obtain a new trial on the basis of ineffective assistance, a defendant must show that (1) trial 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. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that counsel's performance was sound trial strategy. *Strickland*, 466 US at 689. The defendant must also show that defense counsel's performance was so prejudicial that the defendant was deprived of a fair trial. *Pickens*, 446 Mich at 338. To establish prejudice, a defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *Strickland*, 466 US at 694. A reasonable probability need not be a preponderance of the evidence; rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

Defense attorneys retain the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" but have wide discretion as to matters of trial strategy. *Id*. at 691; *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Strickland*, 466 US at 689; *Payne*, 285

Mich App at 190. The fact that defense counsel's strategy ultimately failed does not render it ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defense counsel's decisions regarding whether to call a witness are presumptively matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). "The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. Similarly, the failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *Id*. (quotation marks, citations, and brackets omitted).

We first address defendant's argument that his trial counsel was ineffective because he failed to call Dr. Hamilton as an expert witness. Dr. Hamilton reviewed BH's medical records and authored a report opining that there was no evidence of trauma in BH's spine; rather, in Dr. Hamilton's opinion, the damage to BH's spine was caused by whatever unidentified event caused his brain to swell, which was not necessarily a "shaking-type trauma." Dr. Hamilton ultimately concluded that "it [was] not possible to make the neuropathologic diagnoses of 'shaking' or 'whiplash,' " which largely contradicted the prosecution's theory of the case. Defendant argues that defense counsel erred when he failed to call Dr. Hamilton as a witness to present these conclusions to the jury and that this failure prejudiced him. We disagree.

Defendant has not shown that Dr. Hamilton's testimony would have provided him a "substantial defense" not otherwise available given that the conclusions contained in Dr. Hamilton's report *were*, in fact, presented to the jury. See *Russell*, 297 Mich App at 716.

First, defendant's counsel presented Dr. Hamilton's report during the testimony of Dr. Carl Schmidt, and Dr. Schmidt confirmed more than once that Dr. Hamilton did not believe BH's injuries could have been "caused by shaking." Dr. Hamilton's report was then presented a second time during the testimony of Dr. Evan Matshes. Dr. Matshes confirmed that Dr. Hamilton had concluded there was no evidence of whiplash, shaking, or jerking. Because two experts testified regarding the conclusions reached in Dr. Hamilton's report, we fail to see how calling Dr. Hamilton as a witness would have provided any new information for the jury to consider. Indeed, trial counsel's tactic of not calling Dr. Hamilton as a witness enabled the defense to use her expert opinion to undermine the conclusions of the prosecution's expert witnesses without exposing Dr. Hamilton to cross-examination. Accordingly, we cannot conclude that defense counsel's decision not to call Dr. Hamilton deprived defendant of a substantial defense.

Defendant also argues that his counsel was ineffective for failing to call Dr. Pollanen. Dr. Pollanen authored a report concluding that the cause and manner of BH's death could not be determined. Again, defendant has not shown that Dr. Pollanen's testimony would have provided him a substantial defense not otherwise available. Dr. Pollanen's conclusions were also presented to the jury via the testimony of Dr. Matshes, as well as through the testimony of Dr. Jeffrey Jentzen. Dr. Matshes testified as to Dr. Pollanen's conclusion that the cause and manner of BH's death were indeterminable, even noting that he had initially agreed with that conclusion. Dr. Jentzen testified that he had reviewed Dr. Pollanen's report and explained that Dr. Pollanen "couldn't call [BH's death] a homicide." Thus, as with Dr. Hamilton, two expert

witnesses testified regarding Dr. Pollanen's conclusions, and defendant has failed to establish that Dr. Pollanen would have offered any new information that would amount to a substantial defense not otherwise provided.

Because it has not been shown that counsel's failure to call Dr. Hamilton and Dr. Pollanen deprived defendant of a substantial defense, we cannot conclude that defense counsel's actions fell below an objectively reasonable standard. Without needing to reach the issue of prejudice, we conclude that defendant's ineffective-assistance-of-counsel claim is without merit.[2]

III. THE CONFRONTATION CLAUSE

Defendant next argues that the trial court erred when it granted the prosecution's motion to introduce the hearsay statements of SC and EH because the statements were testimonial in nature and therefore violated defendant's right to confrontation. We disagree.

A defendant has the right to be confronted with the witnesses against him during criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Whether a defendant was denied his Sixth Amendment right of confrontation is a question of

[2] We note that defendant makes brief statements regarding his counsel's failures to file a witness list and to request an adjournment after receiving an unfavorable report from Dr. Matshes. Defendant does not flesh these issues out, and accordingly, we decline to address them. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The Confrontation Clause generally prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 US at 68.

In *Crawford*, the United States Supreme Court described testimonial statements generally:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . [and] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" . . . . These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. [*Id*. at 51-52 (citations omitted).]

In 2006, the Supreme Court further explained the distinction between testimonial and nontestimonial statements:

> Statements are nontestimonial when made . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no

> such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).]

Later, in *Michigan v Bryant*, 562 US 344; 131 S Ct 1143; 179 L Ed 2d 93 (2011), the Supreme Court "further expounded" on what had come to be known as the "primary purpose test." *Ohio v Clark*, 576 US 237, 244-245; 135 S Ct 2173; 192 L Ed 2d 306 (2015). The *Bryant* Court "noted that 'there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.' " *Id*. at 245, quoting *Bryant*, 562 US at 358. "[W]hether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Bryant*, 562 US at 366. The central question for determining whether a statement is testimonial with respect to the Confrontation Clause is "whether, in light of *all* the circumstances, viewed objectively, the 'primary purpose' of the conversation was to create an out-of-court substitute for trial testimony." *Clark*, 576 US at 245 (emphasis added; quotation marks, citation, and brackets omitted).

One additional factor is " 'the informality of the situation,' " as a " 'formal station-house-interrogation' . . . is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." *Id*. (citation omitted). Another factor is the identity of the hearsay witness: statements made to "individuals who are not law enforcement officers . . . are much less likely to be testimonial than statements to law enforcement officers." *Id*.

at 246. Finally, the Supreme Court recently noted that the age of the declarant may also be a factor. *Id*. at 247-248. In *Clark*, a three-year-old child made statements to his preschool teacher about abuse, and those statements were admissible against his abuser because the child did not make the statements with the primary purpose of creating evidence for the abuser's prosecution. *Id*. at 241, 248. Although the Court noted that the declarant in *Clark* had made the statements to his teacher rather than law enforcement officers, the Court also noted that young children will rarely "understand the details of our criminal justice system," and thus it is "extremely unlikely" that they would ever "intend [their] statements to be a substitute for trial testimony." *Id*. at 248. Michigan caselaw has yet to specifically address this idea.

In 2004, this Court recognized in dicta that a two-year-old child's statement that she had an "owie" was not testimonial in nature. *People v Geno*, 261 Mich App 624, 631; 683 NW2d 687 (2004). Rather than consider the child's young age, however, this Court reasoned that "[t]he child's statement was made to the executive director of the Children's Assessment Center, not to a government employee," and the statement was not "in the nature of *ex parte* in-court testimony or its functional equivalent[.]" *Id*., quoting *Crawford*, 541 US at 51 (quotation marks omitted). In 2009, this Court held that, in order to determine whether statements made by a four-year-old victim to a sexual assault nurse examiner (SANE) were testimonial in nature, "the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's

questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *People v Spangler*, 285 Mich App 136, 154; 774 NW2d 702 (2009). We now conclude, given the direction of the law since *Clark* and given the totality of the circumstances under which SC and EH made their statements, that the statements were not testimonial in nature and were properly admitted at trial.

Defendant contends that the statements from SC and EH are testimonial in nature because they were taken after the investigation into defendant was underway. Although it is true that EH and SC were both interviewed after BH's death and after the investigation concerning that death had begun, the children were not interviewed to obtain information about BH's death or defendant's involvement in his death. Both children were interviewed by CPS workers—not law enforcement officers—for the purpose of assessing their own safety in light of the deaths of BH and JP. It is also notable that both children were approximately three years old at the time of their statements, and it is thus highly unlikely that they intended for their statements to be a substitute for trial testimony. In light of all the circumstances, despite the formality of the interviews, it is clear that the children were interviewed in order to ensure their safety and not to aid a police investigation and that the children were too young to understand the legal implications of their statements; therefore, the statements were not testimonial.

We note that post-*Clark* cases from multiple other states support our conclusion and further endorse the principle that out-of-court statements by very young children are unlikely to implicate the Confrontation

Clause. See *State v Webb*, 569 SW3d 530, 534, 544 (Mo App, 2018) (a three-year-old victim's statements to his teachers were admissible given that the teachers were acting "out of concern for [the victim's] well-being and not for purposes of assisting in [the defendant's] prosecution" *and* because the age of the child tended to preclude him from having any "prosecutorial purpose in mind when expressing his thoughts"); *Schmidt v State*, 401 P3d 868, 872, 885; 2017 WY 101 (2017) (statements of a mildly cognitively impaired six-year-old to her school nurse were admissible because they were spontaneous, made in an informal setting, and there was "no indication that [the child] made her statements intending them to be used in a prosecution or even knew such a result was possible"); *State v Streepy*, 199 Wash App 487, 494-496; 400 P3d 339 (2017) (statements to a police officer were not testimonial, in part, because there was "little difference" between the "terrorized seven-year-old" declarant and "the preschooler discussed in *Clark*"); *State v Daise*, 421 SC 442, 455-456; 807 SE2d 710 (App, 2017) (two-year-old's statements in response to questioning by a paramedic were nontestimonial because the paramedic was inquiring as to the declarant's injuries during an ongoing medical emergency and because of the declarant's "very young age"); *State v Diaz*, 2016-Ohio-5523, ¶¶ 40-47; 69 NE3d 1182 (Ohio App, 2016) (three-year-old child's statements to a nurse and to a social worker were admissible because the statements were made for the purpose of medical diagnosis and treatment and because, pursuant to *Clark*, statements by young children very rarely implicate the Confrontation Clause).

Similarly, several federal circuits have applied *Clark*'s reasoning and would likely reach the same outcome in this case. In *United States v Barker*, 820

F3d 167, 169, 171 (CA 5, 2016), the United States Court of Appeals for the Fifth Circuit held that statements made by a four-and-a-half-year-old child to a SANE were not testimonial in nature because the primary purpose of the SANE interview was to medically evaluate the child and because the child "lacked the understanding of the criminal justice system to intend her comments to function as a substitute for trial testimony." The court noted that this would tend to be true of preschool-aged children who "generally lack an understanding of our criminal justice system, let alone the nuances of a prosecution . . . ." *Id*. at 171, citing *Clark*, 576 US at 247-248. Similarly, in *United States v Clifford*, 791 F3d 884, 888 (CA 8, 2015), the Eighth Circuit determined that statements made by a three-year-old child to a private citizen were not testimonial. First, the court noted that although *Clark* declined to adopt a categorical rule that statements made to private citizens were nontestimonial, those statements are nonetheless " 'much less likely to be testimonial than statements to law enforcement officers.' " *Id*., quoting *Clark*, 576 US at 246. Second, the court noted that the child's "age [was] *significant* since '[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause' because 'it is extremely unlikely that a three-year-old child . . . would intend his statements to be a substitute for trial testimony.' " *Clifford*, 791 F3d at 888 (emphasis added; second alteration in original), quoting *Clark*, 576 US at 247-248.

We found only one post-*Clark* case that concluded that the statements of a young child made to a private citizen outside of an interrogation were testimonial such that they implicated the Confrontation Clause. In *McCarley v Kelly*, 801 F3d 652, 655-659 (CA 6, 2015), a three-and-a-half-year-old child made statements to a

child psychologist incriminating the defendant in the murder of the child's mother. The court acknowledged that *Clark* addressed "whether a three-year-old's statements were testimonial," but concluded that *Clark* involved "vastly different circumstances." *Id*. at 662 n 1, citing *Clark*, 576 US at 246-247.[3] Unlike *Clark*, there was no ongoing emergency when the *McCarley* declarant spoke with the child psychologist, and perhaps most importantly, testimony from trial indicated that the *sole purpose* of the minor child's session with the child psychologist was to "see if [the psychologist] could extract any information from him that he remembered from th[e] evening" of his mother's murder. *McCarley*, 801 F3d at 664-665. Testimony "unambiguously" established that the main reason the minor child was interviewed by the child psychologist was so that the police could obtain information relevant to their investigation. *Id*. at 665. Thus, even though the psychologist was "not a member of the police department," she was acting as an agent of law enforcement "such that her acts could likewise be considered 'acts of the police.' " *Id*. at 664, quoting *Davis*, 547 US at 823 n 2.

In this case, SC was interviewed by a CPS employee when SC was approximately three years old in order to determine if his father's home was fit for children. The CPS employee testified that when she

[3] Importantly, *McCarley* was an appeal from a denial of a petition for a writ of habeas corpus pursuant to 28 USC 2254. *McCarley*, 801 F3d at 655. In such cases, when issues have already been decided on the merits by a state court, 28 USC 2254(d)(1) instructs federal courts to deny applications for writs of habeas corpus unless the issues decided on the merits were contrary to "clearly established Federal law." Because *Clark* had not been decided when the Ohio Court of Appeals admitted the minor child's statements in *McCarley*, the *McCarley* court explicitly noted that *Clark* did not apply to its analysis. *McCarley*, 801 F3d at 662 n 1.

asked SC if he knew defendant, SC replied, "yeah, him [sic] choked me." SC then frantically repeated the accusation a number of times while pointing to his neck. Similarly, EH's statement was given to a CPS employee during a forensic interview when she was three years old. The interviewer asked EH if she knew defendant, and she replied that she did. The interviewer then asked if there was "something that [defendant] does that [EH does not] like, does that sound right?" EH replied that defendant choked her. The interviewer asked if there was anything else defendant did that EH did not like, to which she replied that he "choked her siblings as well." With respect to EH, the CPS worker addressed a number of issues before ever asking if EH knew defendant, and it seems clear that the goal was to evaluate the ongoing emergency of abuse in the home in order to protect EH. The same is true for SC: a CPS worker was interviewing SC to determine if his father's home was a safe environment for a child. The interviewers were not directly investigating defendant's involvement in BH's or JP's deaths or attempting to extract testimony from the children.

The trial court correctly recognized that the hearsay statements derived from the forensic interview were nontestimonial in nature. The court examined the totality of the circumstances concerning each statement and noted that each statement was spontaneous, consistent, age appropriate, and given under circumstances indicating trustworthiness. The trial court permitted the statements only after concluding that they were not given for testimonial purposes but to address ongoing emergencies in the children's homes. See *Spangler*, 285 Mich App at 154. We agree with the trial court that the statements were not testimonial

and that their admission at trial did not violate defendant's right to confrontation.

IV. DISCLOSURE UNDER MCL 768.27c(3)

As an aside, we note that defendant's brief on appeal vaguely suggests that the prosecution did not provide adequate notice of SC's and EH's statements under MCL 768.27c(3). Although it is not the duty of this Court to discover and rationalize the basis for defendant's claims, *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998), we elect to briefly address this issue because, as it happens, the suggestion has merit. The hearsay statements at issue were admitted under MCL 768.27c(1), which provides:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer.

Subsection (3) of the statute then provides that prosecutors seeking to admit evidence under the statute must disclose the evidence to the defendant "not less than 15 days before the scheduled date of trial or at a later time

as allowed by the court for good cause shown." MCL 768.27c(3).

At trial, defendant's counsel objected to the admission of the hearsay statements as follows:

> Under 768.27, be it a, b[,] or c, th[ey] had to have been [sic] given notice to us at least 15 days in advance. The prosecution certainly gave notice under the hearsay exceptions, including the catch-all, but at no time was a written notice under the domestic violence statute ever given.

One might interpret this argument in one of two ways: (1) the prosecution failed to disclose the evidence within 15 days, or (2) the prosecution failed to file a written notice of their intent. The latter argument has no merit, as MCL 768.27c(3) does not require the prosecution to give written notice of its intent to offer evidence. Rather, and notably in contrast to other hearsay exceptions that require the offering party to inform the adverse party of their intent to offer the evidence (see, e.g., MRE 803(24); MRE 803A), the statute only requires that the prosecuting attorney *disclose* the evidence itself to the defendant at least 15 days in advance of trial. See MCL 768.27c(3).

It is apparent from our review of the record that the prosecution did not disclose SC's and EH's statements to defendant in a timely manner. The record reflects that the prosecution served on defendant the report containing EH's hearsay statements on October 23, 2017, and served on defendant the report containing SC's statements on October 26, 2017. Trial began on November 6, 2017, meaning EH's statements were disclosed 14 days before trial, and SC's statements were disclosed 11 days before trial. There is no indication from the lower-court record that there was ever a

discussion regarding whether the prosecution had good cause for its tardy disclosure, and accordingly, it would seem that admission of SC's and EH's hearsay statements violated MCL 768.27c(3).

Because this error is nonconstitutional, however, it is subject to the harmless-error rule. *People v Lukity*, 460 Mich 484, 491, 493; 596 NW2d 607 (1999). Michigan applies the rule via statute:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of . . . the improper admission or rejection of evidence, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26.]

"In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), citing *Lukity*, 460 Mich at 495-496. An error is not outcome-determinative unless it undermines the reliability of the verdict. *People v Young*, 472 Mich 130, 142; 693 NW2d 801 (2005).

In this case, the evidence against defendant was overwhelming, and we are not convinced that the admission of SC's and EH's statements was outcome-determinative. Testimony establishes that defendant was the only individual in the room when BH died, and the nine-day jury trial included testimony from six medical experts and written reports from seven medical experts that, for the most part, tended to show that BH's death was a homicide caused by blunt-force trauma. Evidence also suggested that defendant had a

history of engaging in abusive conduct with his girlfriends and their children. Moreover, even without the statements of SC and EH, testimony from Dr. Kevin Durell and EH's mother indicated that *both* children at one point in time had petechiae[4] on their faces—a sign consistent with being choked. Finally, defendant even admitted in a police interview to picking up BH, shaking him, and putting BH "back down on the bed harder than [he] should" have. There was no shortage of evidence against defendant in this case, and we cannot conclude that the failure to strictly comply with the disclosure provision of MCL 768.27c(3) was anything but harmless.

Affirmed.

O'BRIEN, P.J., and CAMERON, J., concurred with FORT HOOD, J.

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[4] Petechiae are "pinpoint, nonraised, perfectly round, purplish red spot[s] caused by intradermal or submucous hemorrhage." *Dorland's Illustrated Medical Dictionary* (26th ed).

In re APPLICATION OF INDIANA MICHIGAN POWER COMPANY TO INCREASE RATES

Docket No. 343767. Submitted August 7, 2019, at Detroit. Decided August 13, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 1080 (2020).

Indiana Michigan Power Company (IMPC) filed an application with the Public Service Commission (PSC) seeking authority to raise its rates for the sale of electric energy, approval of depreciation accrual rates, and other matters. IMPC claimed that it would suffer a revenue shortfall of $51,700,000 without rate relief. The PSC granted IMPC's request for rate relief and applied the "net CONE [Cost of New Entry]" method of calculation in determining the amount of the rate increase to adjust certain costs related to IMPC's provision of capacity services to alternative energy suppliers. As a result of its reliance on the net-CONE method, the PSC granted rate relief in the amount of $49,895,000; the PSC provided that the new rates would take effect two weeks after entry of the order. IMPC appealed the delayed implementation of the order approving the rate increase and argued that the delay violated the requirement in MCL 460.6a(5) that the PSC reach a "final decision" within 10 months after the filing of a petition or application. Further, IMPC argued that the PSC's use of the net-CONE methodology to calculate the capacity costs that IMPC was entitled to recoup was based on an erroneous interpretation of MCL 460.6w. According to IMPC, MCL 460.6w required the PSC to use a utility's actual costs in determining capacity charges. The Association of Businesses Advocating Tariff Equity (ABATE) and the Attorney General intervened. ABATE argued that the PSC's order was a "final decision" within the meaning of MCL 460.6a(5) and that the delayed implementation of the rate increase was not unlawful or unreasonable. Additionally, ABATE contended that the PSC had already addressed this issue in a previous case, so IMPC's challenge was an impermissible collateral attack of the previous decision. ABATE further argued that MCL 460.6w was not applicable in this case and that the PSC's use of the net-CONE methodology to determine IMPC's capacity charges was appropriate.

The Court of Appeals *held*:

1. IMPC was not barred from challenging the delayed implementation of the order by the doctrine of collateral attack. The previous case in which the PSC concluded that it was not required to implement a final decision within the time frame prescribed in MCL 460.6a(5) was not a contested rate case and did not decide any rights or responsibilities of IMPC or any other entity, nor was it clear that IMPC would have had standing to appeal the PSC's order in that case. Additionally, the matter was not actually litigated in the previous case. Rather, the PSC had merely asserted in the abstract that it believed it had the authority to delay implementation of a final order in a ratemaking case. Under these circumstances, the collateral-attack doctrine was not applicable in this case, and IMPC was not precluded on the basis of these facts from appealing the delayed implementation of the order.

2. The PSC was permitted to issue a final decision while delaying implementation of its order. The requirement in MCL 460.6a(5) that the PSC reach a final decision within 10 months of the filing of an application or petition does not mean that the decision must also be implemented within that time frame. Rather, a significant difference exists between a "final decision" and the ultimate implementation of that decision, such that the phrase "final decision" cannot reasonably be read to encompass full implementation. Additionally, the Supreme Court has held that whether an order has immediate and irreparable effect is not dispositive of the question of its finality and that there is nothing inherently inconsistent with an order being considered "final" for one purpose and not another. The plain language of MCL 460.6a(5) does not indicate that the Legislature intended to require that the PSC's decision on a petition or application be fully implemented within the prescribed time frame, and this Court will not read such a requirement into the statute.

3. IMPC did not show that it was damaged by the delayed implementation of the higher rates. IMPC's claim that it would sustain a $1.9 million shortfall because of the delay was speculative because it could not state with certainty that its inability to collect higher rates during the two-week delay caused a shortfall of that precise amount. Although IMPC argued that immediate implementation of rate relief was the more common practice of the PSC, the PSC was not required to follow that practice in this case. MCL 462.25 authorizes the PSC to prescribe rates but does not require a rate-relief order to be immediately implemented.

4. The PSC did not err by using the net-CONE methodology to calculate the capacity costs that IMPC was entitled to recoup.

Under MCL 460.6w, IMPC was required to maintain sufficient capacity to consistently meet the needs of customers supplied by alternative energy suppliers, and the PSC was directed to establish a capacity rate to be applied to this alternative energy load while excluding all non-capacity-related electric-generation costs. The language of the statute does not mandate the use of "actual costs" to determine capacity charges. MCL 460.6a(4) authorizes the PSC to decide utilities' petitions for raising rates, but it does not set forth a methodology or provide guidance for determining what costs are reasonable and prudent. This Court generally defers to the PSC's decisions concerning methodology and recognizes that the PSC is not bound by any single method or formula. The issue was extensively litigated, and the PSC set forth a lengthy explanation of its reasoning for using net-CONE methodology, including its recognition of the problem of isolating the costs of providing capacity from IMPC's ordinary operating costs. The PSC's reasoning was not unlawful, unreasonable, or unsupported by the evidence.

Affirmed.

1. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY — FINAL DECISION — DELAYED IMPLEMENTATION.

The Public Service Commission (PSC) need not provide for immediate implementation of an order granting rate relief to a petitioner in order to comply with the time period prescribed for issuing a final decision in MCL 460.6a(5); there is a difference between finality in the decision-making process and finality in the implementation of that decision, and MCL 460.6a(5) does not require that the PSC's decision on a petition or application be fully implemented within the time frame prescribed by the statute.

2. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY — CONFISCATORY RATES — DELAYED IMPLEMENTATION.

The power to decide whether any rate relief should be provided and whether immediate relief shall be provided is vested in the PSC; a delay in implementing a rate increase is not per se arbitrary, capricious, or an abuse of discretion.

3. PUBLIC UTILITIES — RATEMAKING AUTHORITY — METHODOLOGY.

MCL 460.6a(4) directs the PSC to authorize a utility to recover costs for fuel and purchased power to the extent that such costs are reasonable and prudent; the statute does not specify the methodology that the PSC is required to use to determine a utility's costs or which costs are reasonable and prudent; it is the

PSC's prerogative to choose among methodologies in calculating the appropriate amount of a rate increase.

Dana Nessel, Attorney General, *Ann M. Sherman*, Deputy Solicitor General, and *Spencer A. Sattler*, Assistant Attorney General, for Michigan Public Service Commission.

Dykema Gossett PLLC (by *Richard J. Aaron* and *Jason T. Hanselman*) and *Matthew S. McKenzie* for Indiana Michigan Power Company.

Clark Hill PLC (by *Sean P. Gallagher* and *Stephen A. Campbell*) for the Association of Businesses Advocating Tariff Equity.

Amicus Curiae:

James A. Ault for the Michigan Electric and Gas Association.

Before: LETICA, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J. Petitioner appeals by right the April 12, 2018 order of the Public Service Commission (PSC) authorizing petitioner to adopt a rate increase. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The issues in this case arise following the enactment of 2016 PA 341, sometimes informally called "Act 341," through which the Legislature amended the PSC's enabling act, MCL 460.1 *et seq*.[1] The PSC's April 12,

[1] The amendments included the addition of MCL 460.6w, in furtherance of this state's resolve to encourage both competition and alterna-

2018 order includes a concise summary of the proceedings that led to the decision below:

> On May 15, 2017, [petitioner] filed an application seeking authority to increase its rates for the sale of electric energy, approval of depreciation accrual rates, and other related matters. The rate increase sought in this proceeding is based on the company's projections for relevant items of investment, expenses, and revenues for a test year covering the calendar year ending December 31, 2018. In its application, [petitioner] averred that, without rate relief, the company will experience a jurisdictional electric revenue shortfall of $51,700,000, on an annual basis, during the test year.
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> * * *
>
> According to [petitioner], the net impact of all matters to be considered in this proceeding supports the company's requested rate relief of $51,700,000. The company maintained that, absent rate relief in this amount, it will experience revenues so low as to deprive it of a reasonable return on its investments in violation of the federal and state constitutions.
>
> Administrative Law Judge Mark E. Cummins (ALJ) held a prehearing conference on June 22, 2017. At the prehearing conference, the ALJ granted petitions to intervene filed by the Michigan Department of the Attorney General (Attorney General) and [the Association of Businesses Advocating Tariff Equity (ABATE)]. The Commission Staff (Staff) also participated.
>
> An evidentiary hearing was held on November 15, 2017, after which timely briefs and reply briefs were filed. On February 8, 2018, the ALJ issued his Proposal for Decision (PFD). The parties filed exceptions to the PFD on February 26, 2018, and replies to exceptions on March 8, 2018.

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tive energy sources in the provision of electricity, while guaranteeing reliability of service. We will discuss that provision in greater detail later in this opinion.

The PSC granted petitioner's request for rate relief, but applied the "net CONE [Cost of New Entry]" methodology to adjust certain costs related to petitioner's provision of "capacity" services to customers who have chosen an alternative electric supplier rather than the method proposed by petitioner based on its actual costs. It therefore granted rate relief in the amount of $49,895,000.[2] The order granting the rate relief further specified that the new rates would go into effect two weeks after the order was entered. This appeal followed.

On appeal, petitioner challenges two aspects of the PSC's order: (1) the two-week delay in implementation, and (2) the use of the net-CONE methodology. This Court granted the motion of the Michigan Electric and Gas Association (MEGA) to file a brief as amicus curiae.[3]

II. STANDARD OF REVIEW

This Court's standard of review for PSC orders is narrow and well defined. Under MCL 462.25, "[a]ll rates, fares, charges, classification and joint rates fixed by the [PSC] and all regulations, practices, and services prescribed by the [PSC]" are presumed to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A reviewing court should defer to the PSC's administrative expertise in reviewing an order setting rates and should not substitute its judgment for that of

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[2] The April 12, 2018 order authorized a rate increase in the amount of $49,118,000, but an April 27, 2018 amendatory order corrected the amount of the rate increase to $49,895,000.

[3] See *In re Application of Indiana Mich Power Co to Increase Rates*, unpublished order of the Court of Appeals, entered December 17, 2018 (Docket No. 343767).

the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However, a final order of the PSC must be authorized by law and must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003). This includes issues of statutory interpretation. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). We give an administrative agency's interpretation of relevant statutes respectful consideration, but not deference. *Id*. at 108.

III. DELAYED IMPLEMENTATION OF NEW RATES

Petitioner and amicus MEGA argue that the PSC erred by ordering that the rate relief it granted in its April 12, 2018 order applies only to service provided on and after April 26, 2018, i.e., that the order essentially not take effect until that later date. We disagree.

MCL 460.6a(1) provides that changes in rates or rate schedules by regulated gas or electric utilities are dependent upon PSC approval. MCL 460.6a(5) requires that the PSC make a "final decision with respect

to a completed petition or application to increase or decrease utility rates within the 10-month period following the filing of the completed petition or application"; otherwise, "the petition or application is considered approved." That subsection further provides that where the petitioning utility "makes any significant amendment to its filing, the commission has an additional 10 months after the date of the amendment to reach a final decision," and also that "[i]f the utility files for an extension of time, the commission shall extend the 10-month period by the amount of additional time requested by the utility." *Id*.

In this case, the parties stipulated to extend the 10-month period by 28 days, and the PSC entered its April 12, 2018 order granting rate relief precisely 10 months and 28 days after petitioner filed its petition, i.e., on the last day available for a timely decision under MCL 460.6a(5). Although that order, as adjusted by the April 27 amendatory order, substantially granted petitioner's request for a rate increase, it declared that petitioner "is authorized to implement the rates approved by this order on a service rendered basis for service provided on and after April 26, 2018." Petitioner argues that the two-week implementation delay will result in a revenue loss of $1.9 million; petitioner arrived at this amount by calculating the weekly average of the total annual increase and then doubling that value. Petitioner also argues that by delaying implementation of the new rates by two weeks, the PSC was attempting to extend the statutory period in which it was required to reach a decision and that the April 12, 2018 order, as amended, should therefore not be considered a "final decision" for purposes of MCL 460.6a(5). The result would be that petitioner's original petition should be deemed approved as filed. Both arguments hinge on the extent to

which the PSC may issue an order specifying that some of its provisions are not immediately effective. We conclude that the PSC acted within its authority in this case.

A. COLLATERAL ATTACK

Before addressing the issues raised by petitioner, we must first address the PSC's contention that petitioner's claim is an impermissible collateral attack on the PSC's earlier decision in *In re Standard Rate Application Filing Forms* (Case No. U-18238). In that case, the PSC reevaluated its standard filing requirements for rate cases following the enactment of Act 341. Among the issues considered was whether the PSC could give rates an effective date other than the date on which the rates were approved. In a footnote of a July 31, 2017 order, the PSC stated:

> MCL 460.6a(5) states that the Commission must "*reach* a *final decision* . . . within the 10-month period following the filing of [a] completed petition or application . . . ." (Emphasis added.) As a result, based on the Commission's legal interpretation of this directive, the Commission finds that an order settling the rights of the parties and disposing of all issues in controversy in a rate case, aside from enforcement of that decision (i.e., the issuance of tariff sheets, determining the appropriate rate design, etc.), will, at the very least, be issued by the Commission within 10 months. . . . The Commission further finds that the distinction between the Legislature's use of the words "reach a final decision" versus "issue a final order," the latter of which is, in fact, used in a different context elsewhere within MCL 460.6a, also provides additional support for the Commission's interpretation. [*In re Standard Rate Application Filing Forms*, order of the PSC, entered July 31, 2017 (Case No. U-18238), p 6 n 8 (Footnote 8).]

In other words, the PSC distinguished between issuing a final decision and implementing that decision, and concluded that it did not need to implement a decision within the time frame in which the decision itself needed to be made. MEGA and Consumers Energy Company (Consumers) filed petitions seeking rehearing and clarification of Footnote 8, resulting in the PSC's issuance of an order clarifying that statement on October 11, 2017. See *id*., order of the PSC, entered October 11, 2017.[4] Neither MEGA nor Consumers further challenged or appealed the October 11, 2017 order.

A collateral attack occurs when a party uses "a second proceeding to attack a tribunal's decision in a previous proceeding." *Worker's Compensation Agency Dir v MacDonald's Indus Prods, Inc (On Reconsideration)*, 305 Mich App 460, 474; 853 NW2d 467 (2014). A collateral attack on a previous decision is generally impermissible; a party aggrieved by a decision in an earlier proceeding instead has resort to the appellate process in the context of that same proceeding. See *id*. at 475. Only decisions that are void for lack of subject-matter or personal jurisdiction may be collaterally attacked. See *id*. The PSC argues that because petitioner did not raise any objections in connection with the orders in Case No. U-18238 and did not appeal the PSC's conclusions in Footnote 8, petitioner should be precluded in this case from attacking the PSC's determination that a timely final decision may include a

[4] In its October 11, 2017 order, the PSC referred to an earlier case in which its final order was issued 8 days after its final decision, clarifying that "footnote 8 was intended to be transparent in notifying stakeholders that the Commission plans on having the preparation, review, and approval of final tariff sheets conforming to the Commission's final decision handled in an expeditious manner after the issuance of the final decision."

provision for delayed implementation of its terms. In the context before us, we disagree.

The PSC acknowledges that Case No. U-18238 was not a contested rate case; instead, it was a unilateral revisiting by the PSC of certain of its procedures in the wake of the passage of Act 341. Although the PSC's decision in that case was issued with an extensive distribution list, which included petitioner, it did not actually decide any rights or responsibilities of petitioner or any other entity. Footnote 8 of its July 31, 2017 order, and the PSC's later clarification of that footnote, merely asserted in the abstract that the PSC believed it was able to delay implementation of a final decision in a ratemaking case. In fact, the PSC itself calls Case No. U-18238 a "case with no direct monetary impact" on petitioner and one in which "the stakes were low compared to a rate case with tens of millions of dollars at stake." At the time the orders in Case No. U-18238 were entered, petitioner was not a party to the case whose rights were being adjudicated; rather, petitioner was merely invited to submit comments or objections as an interested person. Moreover, petitioner was not "aggrieved" by the PSC's abstract statement of law found in Footnote 8 (or the later clarification), see *Worker's Compensation Agency Dir (On Reconsideration)*, 305 Mich App at 471, and it is far from clear that petitioner would have possessed standing to appeal the PSC's orders in that case. See MCR 7.203(A) and (B). Under these circumstances, we conclude that the collateral-attack doctrine does not bar petitioner's claim relating to delayed implementation.

The PSC further argues that if the collateral-attack doctrine does not apply, petitioner's claim is nonetheless barred by collateral estoppel. We disagree.

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), citing 1 Restatement Judgments, 2d, § 27, p 250. However, this Court has noted, and the PSC concedes, that "ratemaking is a legislative, rather than a judicial, function, and thus the doctrines of res judicata or collateral estoppel cannot apply in the pure sense." *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010) (quotation marks and citation omitted). Our Supreme Court has also noted that courts are reluctant to apply preclusion doctrines when questions of law are involved and the causes of action do not arise from the same subject matter or transaction. *Young v Edwards*, 389 Mich 333, 339; 207 NW2d 126 (1973). Further, "A question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined." *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988).

As noted, Case No. U-18238 was not a contested rate case and did not actually decide any rights or responsibilities of any party. Footnote 8 (and the later clarification) merely asserted as an abstract legal proposition, and without applying the conclusion to any set of facts, that the PSC was able to delay implementation of a final decision in a ratemaking case. The mere fact that no utility elected to expend resources to challenge that footnoted statement (beyond the clarification given by the PSC) does not mean that the issue was actually litigated. *Id*. We decline to apply preclusion principles to petitioner's claim in this case.

Accordingly, although the question of the PSC's prerogative to issue a final order that includes a delay in its implementation was abstractly addressed in Case No. U-18238, we conclude that petitioner's claim in this case is not an impermissible collateral attack on the PSC's decision in that earlier case. Further, the matter was not fully litigated in that case, and collateral estoppel would not apply in this situation even if the doctrine were fully applicable in this appeal of a ratemaking order. Accordingly, petitioner is not precluded from raising this issue.

B. FINAL DECISION

Notwithstanding that petitioner is not precluded from raising this issue, we conclude that the PSC was permitted to issue a final decision with delayed implementation in this case. Petitioner argues that the PSC erred by purporting to issue a final decision in the form of an order approving rate relief while delaying implementation of the new rates by two weeks. We disagree.

Resolution of this issue requires us to interpret the language of MCL 460.6a(5). When interpreting a statute, our goal is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). Our starting point is the language of the statute itself. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12-13; 795 NW2d 101 (2009). The Legislature is presumed to have intended the meaning it plainly expressed, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012); *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011).

MCL 460.6a(5) provides:

> Except as otherwise provided in this subsection and subsection (1), if the commission fails to reach a final decision with respect to a completed petition or application to increase or decrease utility rates within the 10-month period following the filing of the completed petition or application, the petition or application is considered approved. If a utility makes any significant amendment to its filing, the commission has an additional 10 months after the date of the amendment to reach a final decision on the petition or application. If the utility files for an extension of time, the commission shall extend the 10-month period by the amount of additional time requested by the utility.

The plain language of MCL 460.6a(5) provides that the PSC must "reach a final decision" on a petition or application within the prescribed time frame; it does not say that any increase or decrease in utility rates ordered in response to that petition or application must be fully implemented within that time frame. As discussed below, we conclude that a significant difference exists between a "final decision" and the ultimate implementation of that decision, such that the phrase "final decision" cannot reasonably be read to encompass full implementation.

While not binding on our statutory interpretation, the PSC in Footnote 8 of its July 31, 2017 order in Case No. U-18238 cited *Black's Law Dictionary* (7th ed) and distinguished "final decision" from "final order," stating that a "final decision" from the PSC is "an order settling the rights of the parties and disposing of all issues in controversy in a rate case, aside from enforcement of that decision." In its October 11, 2017 order, the PSC reaffirmed its conclusion that the terms "final decision" and "final order" have different meanings, noting that "[p]er Black's Law Dictionary, 'final deci-

sion' is defined as '[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment,' whereas 'final order' is defined as '[a]n order that is dispositive of the entire case.' " These definitions recognize a difference between finality in the decision-making process and finality in implementation of that decision.

Although our court rules do not distinguish between "final decision" and "final order," they do define a "final order" appealable by right as, but for exceptions not applicable here, "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." MCR 7.202(6)(a)(i). And, when considering the question of "finality" for purposes of appealability, our Supreme Court has held that whether an order has "immediate and irreparable effect" is not dispositive of the question, and that there is "nothing inherently inconsistent with an order being 'final' . . . for one purpose and not another." *Great Lakes Steel Div of Nat'l Steel Corp v Pub Serv Comm*, 416 Mich 166, 180; 330 NW2d 380 (1982).

In light of this, we conclude that the PSC's April 12, 2018 order was a "final decision" within the meaning of MCL 460.6a(5). Moreover, the statute required the PSC to reach a "final decision" within the prescribed time frame, not that its decision regarding rate relief be fully implemented within that time frame. If the Legislature had intended that the PSC's decision on a petition or application be fully implemented within the time frame prescribed in MCL 460.6a(5), it could have easily said so; we will not read such a requirement into the clear language of the statute. See *Mich*

Ed Ass'n, 489 Mich at 218. The PSC was not required to treat petitioner's petition as approved pursuant to MCL 460.6a(5) merely because it entered an order granting rate relief that would not take immediate effect.

C. CONFISCATORY RATES

Petitioner also argues that, even if the PSC acted within its authority in delaying implementation of the requested rate relief, it was damaged by that delay and should be compensated for what it argues were two weeks of "confiscatory" rates. We disagree.

"A public utility has a right to a just and reasonable rate of return on its investment," and such utilities "are protected from being limited to rates that are confiscatory." *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 208 Mich App 248, 269; 527 NW2d 533 (1994) (*ABATE*). As petitioner points out, our Supreme Court has stated that "[e]very day a warranted rate increase is withheld is a day in which justice has been denied . . . ." *Mich Consol Gas Co*, 389 Mich at 637. However, *Mich Consol Gas Co* does not stand for the proposition that a decision recognizing a utility's entitlement to a rate increase must be given immediate effect in all circumstances.[5] Our Supreme Court has acknowledged that "[a] public utility has a substantive right, set forth in the statutes and rooted in the constitution, to rate relief where the revenue produced by an existing rate structure is less than the

[5] The issue addressed in *Mich Consol Gas Co* was the constitutionality of a statutory limitation on judicial review of a PSC decision, and the Court in that case notably added the following qualifier to the above-quoted language: "unless judicial action, as in this case, can be taken." *Mich Consol Gas Co*, 389 Mich at 637. No such issue is present in this case.

amount required by the statutes or the constitution,"[6] and that this includes "a right to immediate rate relief where compelling circumstances indicate that such relief is necessary." *Consumers Power Co v Pub Serv Comm*, 415 Mich 134, 145; 327 NW2d 875 (1982) (citations omitted). The Court in *Consumers Power Co* ultimately approved the circuit court's decision to grant a temporary injunction to allow immediate collection of higher rates in order to prevent irreparable harm to a utility determined to be entitled to such rate relief. *Id*. at 154-156. However, the Court recognized the general principle that, absent compelling circumstances that demonstrate a utility's entitlement to immediate rate relief, "[t]he power to decide whether any rate relief should be provided and whether immediate relief shall be provided is vested in the commission." *Id*. at 145.

In this case, petitioner does not argue that the Supreme Court's statements in *Consumers Power Co* concerning the PSC's prerogative to decide whether to grant immediate rate relief do not apply. Instead, petitioner simply states that "rate relief without delay" was "the practice that existed before the decision" in that case and that it "remained the more common practice up until now." Even if immediate rate relief is indeed "the more common practice," petitioner does not explain why the PSC should have been required to follow that practice in this particular instance.

Petitioner notes that under MCL 462.25, "[a]ll rates, fares, charges, classification and joint rates fixed by

[6] "Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). See also US Const, Am XIV, § 1; Const 1963, art 1, § 17.

the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose . . . , or until changed or modified by the commission . . . ." However, the statutory language does not require a rate-relief order to be immediately implemented.

Petitioner argues that if we conclude that the PSC may delay implementation of rate relief it has granted, there is nothing to stop it in the future from exceeding the two-week delay at issue in this case and prescribing delays of much longer periods. However, a utility that is affected by a future order of the PSC that includes a delay in implementation remains free to argue that a particular delay is arbitrary, capricious, or an abuse of discretion. See MCL 24.306(1)(e). In this case, petitioner complains that the PSC offered no explanation for the two-week delay in question, but stops short of arguing that the lack of explanation rendered that delay arbitrary, capricious, or an abuse of discretion. Accordingly, the propriety of the reasons underlying the unexplained delay is not before this Court, nor does a delay of 14 days in implementing a decision that was 11 months in the making strike this Court as per se arbitrary, capricious, or an abuse of discretion.

Finally, appellee ABATE argues that petitioner's calculation that the two-week delay will cause it to incur a $1.9 million shortfall in revenue is speculative. We agree. Petitioner cannot state with certainty at this juncture, merely because it *could have* collected higher rates for those two weeks if the PSC had ordered immediate implementation, that its inability to do so would cause an actual shortfall of a particular amount,

or that the delay in implementation would deny it a "just and reasonable rate of return on its investment." *ABATE*, 208 Mich App at 269. We agree with ABATE that the delay at issue cannot necessarily be equated with a $1.9 million shortfall in revenue. Moreover, we cannot conclude that the two-week implementation delay necessarily imposes confiscatory rates in the interim.[7]

For these reasons, we hold that the PSC did not exceed its authority by including within its April 12, 2018 order granting rate relief, as amended, a two-week delay in implementation.

IV. METHODOLOGY FOR CALCULATING CAPACITY COSTS

Petitioner also argues that the PSC erred by applying the net-CONE methodology to calculate the capacity costs that petitioner was entitled to recoup. We disagree.

MCL 460.6a(4) authorizes the PSC to establish procedures for considering and deciding utilities' petitions to raise rates and requires the PSC to "authorize a utility to recover the cost of fuel, purchased gas, purchased steam, or purchased power only to the extent that the purchases are reasonable and prudent." The statute does not specify how the PSC is to determine a utility's costs, or what is reasonable and prudent, and so this Court has generally deferred to the PSC's decisions concerning such methodology. See *Attorney General v Pub Serv Comm*, 262 Mich App 649, 655, 658; 686 NW2d 804 (2004). "The PSC may con-

[7] The PSC notes that "although [it] found a rate increase appropriate to account for planned capital investments and increasing operating expenses," it "never suggested that [petitioner's] existing rate was confiscatory or lower than the lowest reasonable rate."

sider 'all lawful elements' in determining rates . . . ." *Detroit Edison Co v Pub Serv Comm*, 221 Mich App 370, 385; 562 NW2d 224 (1997), citing MCL 460.557(2); MCL 460.6a(2). Further, "[t]he PSC is not bound by any single formula or method and may make pragmatic adjustments when warranted by the circumstances." *Detroit Edison*, 221 Mich App at 375.

An "alternative electric supplier" (AES) is an entity other than a public utility selling electric-generation service to retail customers. MCL 460.10g(1)(a). "Capacity obligations" refers to an electric provider's duty to ensure that it has the means to provide electricity to its customers "as set by the appropriate independent system operator, or commission." MCL 460.6w(8)(a). Although some consumers in this state have the option of obtaining electricity from an AES, petitioner remains obligated to make available its transmission and distribution facilities for that purpose and also retains a role in ensuring that AESs have sufficient capacity to consistently meet their customers' needs during times of peak demand. Because petitioner incurs costs related to these AES customers, it is permitted to incorporate a "capacity charge" into its rates. See MCL 460.6w(3).

At issue in this dispute is whether the PSC correctly calculated the capacity charge to include costs that petitioner was entitled to recover while excluding charges that are not recoverable by means of a capacity charge. MCL 460.6w sets forth provisions intended to ensure that electric suppliers maintain sufficient capacity to meet their customers' needs consistently. MCL 460.6w(3) directs the PSC to establish a capacity rate to be applied to alternative electric load, and, in order to "ensure that noncapacity electric generation services are not included in the capacity charge," the

statute requires the PSC to "include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors," and "subtract all non-capacity-related electric generation costs . . . ." See MCL 460.6w(3)(a), (b).

We do not read this language as mandating the use of "actual costs" to determine capacity charges according to the method proposed by petitioner. Moreover, as ABATE notes, it is not clear that MCL 460.6w even applies to petitioner, inasmuch as it appears on its face to apply only to tariffs implemented by the Midcontinent Independent System Operator (MISO), a Regional Transmission Organization (RTO) that operates as an alternative to PJM Interconnection, LLC (PJM), which is the RTO within whose jurisdiction petitioner operates. See, e.g., MCL 460.6w(12)(a) (defining "[a]ppropriate independent system operator" to mean MISO). Indeed, MCL 460.6w(11) expressly states:

> Nothing in this act shall prevent the [PSC] from determining a generation capacity charge under the reliability assurance agreement, rate schedule FERC No. 44 of the independent system operator known as PJM Interconnection, LLC, as approved by the Federal Energy Regulatory Commission in docket no. ER10-2710 or similar successor tariff.

Accordingly, the PSC's April 12, 2018 order in this case indicated that the PSC "agrees with [petitioner] that nothing in Act 341 requires that [petitioner's] capacity rate be set using the mechanism set forth in the statute." Rather, the PSC concluded that "subsections (a) and (b) of Section 6w(3) provide guidance . . . for determining capacity costs and rates."

Petitioner does not contest this reading of the statute, but instead argues that MCL 460.11 in any event "requires the [PSC] to set rates based on cost of

service." MCL 460.11(1) states that, but for exceptions not here applicable, the PSC "shall ensure the establishment of electric rates equal to the cost of providing service to each customer class," and it sets forth a methodology for making such calculation while providing that the PSC "may modify this method if it determines that this method of cost allocation does not ensure that rates are equal to the cost of service."

In considering petitioner's calculation of recoverable capacity charges, the PSC expressed concern that petitioner's proposed methodology would include costs not actually related to capacity. The PSC determined, based on its staff's analysis, that the appropriate methodology was to "identify production costs and then only consider those corresponding to the cost of a [combustion-turbine plant] as capacity-related." The PSC further noted that its staff "contended that [petitioner] should be permitted to recover only the costs that are directly related to capacity service," which meant the "exclusion of some production-demand classified costs," and suggested that "the proper cost of capacity is the Cost of New Entry (CONE), or the cost to build a combustion turbine (CT)." The PSC quoted its staff in elaborating as follows:

> "The characteristics of a CT are such that it effectively supplies only capacity. A CT is relatively expensive to run to produce energy, but relatively inexpensive to build. Therefore, it is only economically utilized to supply energy in those hours when load is at its highest. These hours are also those which are considered to set the capacity need of the utility to serve its customers. Plants other than CTs are more expensive to build and less expensive to run, making them the most cost-effective choice only if they run enough hours a year so that the total cost is lower. Therefore, the difference between the cost to build a CT and any other type of plant is the capital cost expended to produce lower energy costs. In Staff's opinion, this cost

> should properly be considered an energy cost. However, the net sales to the market should be applied as an offset to the capacity-related costs. As all energy is bid into the market at the cost to run a plant, but plants are paid if dispatched at the highest bid called in the supply stack, these net-energy market sales (imperfectly) capture what Staff would consider to be the energy related portion of capacity costs. Therefore, to remove all costs above a CT and then apply an offset which effectively, if imperfectly, does the same, would be double counting the offset."

Petitioner argues that the PSC's chosen methodology deviated from the requirement to base rates on actual costs. However, the record shows that the PSC recognized the problem of isolating the costs that petitioner was entitled to recover, i.e., the costs of providing capacity to AESs to ensure their reliability, from ordinary operating costs, which petitioner was not entitled to recover. The PSC's chosen methodology was intended to address that issue. Again, we generally defer to the PSC regarding such decisions. See MCL 460.6a(4); *Attorney General*, 262 Mich App at 654-655.

Petitioner suggests that instead of resorting to the net CONE to calculate costs, the PSC should simply have stricken from petitioner's proposal any costs it deemed not properly part of the calculation and otherwise stayed with petitioner's approach. Even if petitioner's proposed methodology was a reasonable choice, it is the PSC's prerogative to choose among competing methodologies for such calculations. See MCL 460.6a(4); *Attorney General*, 262 Mich App at 655.

Petitioner protests that the use of net CONE constituted a departure from long prevailing precedent. Petitioner cites cases to show previously prevailing practice, but cites no authority for the proposition that

the PSC, having once applied a methodology, does not have discretion to reconsider the matter in subsequent cases. Instead, petitioner asserts that the PSC offered no reason for the change and, therefore, that the use of net CONE was arbitrary and capricious. We disagree.

As stated, the PSC noted that, under MCL 460.6w(11), the PSC retained the prerogative of "determining a generation capacity charge," and that "nothing in Act 341 requires that [petitioner's] capacity rate be set using the mechanism set forth in the statute." The PSC nonetheless took guidance from the direction in MCL 460.6w(3) that the PSC establish a capacity rate "to be applied to alternative electric load" and also to "ensure that noncapacity electric generation services are not included in the capacity charge" by requiring the PSC under Subdivision (a) to "include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors" and under Subdivision (b) to "subtract all non-capacity-related electric generation costs . . . ."

In this case, the PSC announced that it found it "appropriate to revisit the methodology" it had approved in an earlier case. It also set forth extensive explanations, including that not "all production capacity-related costs are incurred to provide capacity," and offered exhibits to show "that the rates calculated for [AES customers] and standard service customers using net CONE do not differ," in support of its conclusion that net CONE is reasonable because it "begins with total embedded production-related costs and subtracts non-capacity-related costs." The PSC also indicated that it "may revisit, in a future rate case, whether to retain this net CONE methodology" or revert to "using fixed costs offset by fuel and other revenues."

Our review of the record reflects that the issue of the appropriate methodology for determining capacity costs was extensively litigated in this case; was the subject of an extensive evidentiary record, including expert testimony; was thoroughly briefed by the parties; and was the subject of intense and detailed analysis by the PSC. In its order, the PSC presented at length the reasoning underlying its choice of methodology and the problems it was attempting to address; its reasoning was not unlawful, unreasonable, or unsupported by evidence. For these reasons, petitioner has not shown that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment when it chose to employ the net-CONE methodology for the purpose of separating petitioner's general operating costs from its costs in supplying capacity to AESs as required for the latter to guarantee their ability to meet their customers' needs at times of highest demand. Accordingly, we defer to that decision. *MCI Telecom Complaint*, 460 Mich at 427; *Attorney General*, 262 Mich App at 654-655.

Affirmed.

LETICA, P.J., and M. J. KELLY, J., concurred with BOONSTRA, J.

JACKSON v DIRECTOR OF DEPARTMENT OF CORRECTIONS

Docket No. 342882. Submitted August 7, 2019, at Detroit. Decided August 13, 2019, at 9:05 a.m.

Gary Jackson, an inmate at Ojibway Correctional Facility, filed an action in the Ingham Circuit Court against the Director of the Department of Corrections, challenging a Michigan Department of Corrections (MDOC) misconduct ruling. In 2017, the MDOC determined that plaintiff had received an unauthorized transfer of funds into his prisoner account from another prisoner in violation of MDOC policy; plaintiff was charged with Class II misconduct. An MDOC hearing officer found plaintiff guilty of that charge, removing his privileges for 15 days and confiscating $250 from his prisoner account; the funds were placed in a prisoner-benefit fund. Plaintiff appealed the decision to the deputy warden, arguing that the ruling violated his right to procedural due process and unconstitutionally deprived him of property. The deputy warden affirmed the hearing officer's decision, and plaintiff filed his appellate action in the trial court. The court, Rosemarie E. Aquilina, J., dismissed the action for lack of subject-matter jurisdiction, reasoning that only Class I misconduct findings were subject to judicial review. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case. A litigant seeking judicial review of a prisoner-misconduct appeal has three statutory avenues of relief: (1) review under MCL 791.255, which applies specifically to judicial review of decisions by MDOC hearing officers; (2) review under MCL 24.301 of the Administrative Procedures Act, MCL 24.201 *et seq*.; and (3) review under MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq*. In turn, Const 1963, art 6, § 28 provides that all final decisions, findings, rulings, and orders of any administrative officer or agency existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. Even though a litigant might not be entitled to review of an

agency's decision under one of the statutes, when the decision affects a litigant's private rights or licenses—for example, when a prisoner is deprived of life, liberty, or property without due process of law to which he or she entitled—the litigant has the right to constitutional review of the agency's decisions under Const 1963, art 6, § 28. A prisoner has a right to funds in his or her prisoner account, and an agency may not confiscate those funds without notice and a hearing regardless of how the sanction is labeled. Consequently, a circuit court has subject-matter jurisdiction over prisoner-misconduct appeals when the administrative decision affects a litigant's private rights or licenses. In this case, the circuit court erred by concluding that it lacked subject-matter jurisdiction. Although plaintiff was not found guilty of Class I misconduct, the confiscation of money from his prisoner account permanently deprived plaintiff of those funds. Accordingly, the trial court had jurisdiction to review the appeal under Const 1963, art 6, § 28.

Reversed and remanded for further proceedings.

ADMINISTRATIVE LAW — APPEAL — AVENUES OF RELIEF — PRISONS AND PRISONERS — PRISONER FUNDS.

Under Const 1963, art 6, § 28, a prisoner litigant has the right to constitutional review of an agency's decisions when the decision affects the litigant's private rights or licenses; a prisoner has a right to funds in his or her prisoner account, and an agency may not confiscate those funds without notice and a hearing; a circuit court has subject-matter jurisdiction over prisoner-misconduct appeals when the administrative decision affects a litigant's private rights or licenses.

Gary Jackson *in propria persona*.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Scott R. Rothermel*, Assistant Attorney General, for the Department of Corrections.

Before: M. J. KELLY, P.J., and BOONSTRA and RIORDAN, JJ.

BOONSTRA, J. Plaintiff appeals by delayed leave granted[1] the trial court's order dismissing for lack of subject-matter jurisdiction his appeal of a Michigan Department of Corrections (MDOC) misconduct ruling. We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff is an inmate confined at Ojibway Correctional Facility. In 2017, MDOC employees concluded that plaintiff had received an unauthorized transfer of funds to his prisoner account from another prisoner in violation of MDOC policy. Plaintiff was charged with Class II misconduct. After an informal hearing at which plaintiff pleaded not guilty, an MDOC hearing officer found plaintiff guilty of Class II misconduct and sanctioned plaintiff with a loss of privileges for 15 days and the confiscation of $250 from his prisoner account.[2] Plaintiff appealed the ruling to the deputy warden, arguing, in part, that plaintiff's right to procedural due process had been violated and that the violation resulted in his loss of property. The deputy warden denied his appeal. Plaintiff then appealed to the trial court, again asserting that his constitutional right to due process had been violated and that the violation had unconstitutionally deprived him of property. The trial court dismissed plaintiff's appeal for lack of subject-matter jurisdiction, stating that only Class I misconduct findings were subject to judicial review, citing an unpublished opinion of this Court.[3] The trial court denied plaintiff's motion for reconsideration.

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[1] *Jackson v Dir of Dep't of Corrections*, unpublished order of the Court of Appeals, entered August 22, 2018 (Docket No. 342882).

[2] MDOC states that in accordance with Mich Admin Code, R 791.6639, the funds were confiscated and placed in a prisoner-benefit fund.

[3] See *Lakin v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2012 (Docket No. 305154).

This appeal followed.

II. STANDARD OF REVIEW

We review de novo as a question of law whether a trial court has subject-matter jurisdiction over a claim. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

III. ANALYSIS

Plaintiff argues that the trial court erred by concluding that it lacked subject-matter jurisdiction over his appeal. We agree.

"Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case." *Forest Hills Coop v Ann Arbor*, 305 Mich App 572, 617; 854 NW2d 172 (2014). Michigan's circuit courts are courts of general jurisdiction. *Okrie v Michigan*, 306 Mich App 445, 467; 857 NW2d 254 (2014).

The trial court held that it lacked subject-matter jurisdiction because Class II prisoner-misconduct rulings are not subject to judicial review. Citing an unpublished decision of this Court, the trial court reasoned that plaintiff's loss of privileges for 15 days did not amount to a loss of good time or disciplinary credits, which would be subject to judicial review. The trial court did not consider, however, plaintiff's claimed loss of property or whether the circumstances of this case gave rise to a constitutional right of judicial review; nor did the unpublished decision on which the trial court relied have occasion to address those issues.[4]

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[4] The unpublished decision cited by the trial court related to a loss of privileges; it did not involve a confiscation of property.

The Michigan Constitution provides for judicial review of administrative decisions:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28.]

As this Court explained in *Martin v Stine*, 214 Mich App 403, 407-408; 542 NW2d 884 (1995), three statutes effectuate this right to judicial review as it relates to a prisoner-misconduct appeal: (1) MCL 791.255, which relates specifically to judicial review of MDOC hearing-officer decisions; (2) MCL 24.301 of the Administrative Procedures Act (the APA), MCL 24.201 *et seq*.; and (3) MCL 600.631 of the Revised Judicature Act (the RJA), MCL 600.101 *et seq*., which states:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

In *Martin*, this Court held that a prisoner was not entitled to judicial review of a minor misconduct sanction under MCL 791.255 because "minor misconduct charges that would not result in a loss of good time or

disciplinary credits, or placement in punitive segregation, are specifically excluded from those matters in which a prisoner is entitled to a hearing . . . ." *Martin*, 214 Mich App at 408-409. Moreover, he was not entitled to judicial review of the minor misconduct sanction under the APA because the prisoner did not have a right to a formal evidentiary hearing with respect to his minor misconduct charge and there was, therefore, not a "contested case." *Id*. at 409-410. Further, in the circumstances of that case, he was not entitled to judicial review under the RJA because the Legislature was entitled to "preclude judicial review where constitutional rights are not implicated," *id*. at 411, and the Legislature had, in fact, done so.

The Court in *Martin* stressed, however, that "[i]n rendering this decision, we are mindful of the constitutional right to the review of agency decisions under Const 1963, art 6, § 28[.]" *Id*. at 414. But it concluded under the circumstances of that case that the constitutional right was inapplicable because the plaintiff's "minor misconduct charge did not 'affect private rights or licenses.' " *Id*.

The MDOC in *Martin* had confiscated merchandise from the plaintiff's cell that he had purchased and possessed in violation of MDOC policy. But unlike in this case, the confiscated property had been mailed to the plaintiff's home, not permanently taken from him. Under those circumstances, the *Martin* Court concluded that the confiscation of property that was mailed to the prisoner's home did not trigger the constitutional jurisdictional provision, Const 1963, art 6, § 28. *Id*. at 414-415.

The Due Process Clause applies to prisoners, and "[t]hey may not be deprived of life, liberty, or property without due process of law." *Wolff v McDonnell*, 418

US 539, 556; 94 S Ct 2963; 41 L Ed 2d 935 (1974). This right, however, is "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id*. The protected interest at stake must be rooted in state law. *Meachum v Fano*, 427 US 215, 226; 96 S Ct 2532; 49 L Ed 2d 451 (1976).

Martin did not address whether the permanent confiscation of funds in a prisoner account implicated a property right. However, in *Wojnicz v Dep't of Corrections*, 32 Mich App 121, 123, 125; 188 NW2d 251 (1971),[5] this Court did recognize a prisoner's right to funds in his prisoner account, holding that the confiscation of funds from that account without notice and hearing deprived the prisoner of due process of law. Since *Wojnicz*, this Court and the Legislature have recognized that a prisoner has a protected right to funds in his prisoner account in the context of state claims for reimbursement. See, e.g., *State Treasurer v Snyder*, 294 Mich App 641, 643-644, 650; 823 NW2d 284 (2011); see also the State Correctional Facility Reimbursement Act, MCL 800.401 *et seq*. (requiring the state to give an inmate notice and the opportunity to respond to the state's complaint for reimbursement). The Michigan Administrative Code also provides support for the idea that a prisoner has a property interest in the funds in his account. See Mich Admin Code, R 771.6639.

We conclude that plaintiff possessed a right to the funds in his account that afforded the trial court subject-matter jurisdiction to review administrative decisions affecting the loss of that right. See Const 1963, art 6, § 28. Although plaintiff was not found guilty of Class I misconduct, the sanctions nonetheless resulted

[5] Opinions from this Court issued before November 1, 1990, are not binding upon this Court but may be persuasive. See MCR 7.215(J)(1).

in the permanent deprivation of property. Unlike the prisoner in *Martin*, his property was not merely removed from his cell and returned to his home; moreover, he was not subject to the mere loss or suspension of privileges that we have found to be unreviewable. Our decision in *Martin* resulted not merely from the label given to the misconduct charge but was informed by the generally transitory nature of the sanctions for minor misconducts and the absence in that case of any deprivation of constitutional rights. *Martin*, 214 Mich App at 411, 414 (noting that judicial review of an administrative decision may be precluded "where constitutional rights are not implicated" and concluding that the minor misconduct charge at issue " 'did not affect private rights or licenses' "), quoting Const 1963, art 6, § 28.[6] Consequently, we conclude that the trial court erred by applying the major-minor conduct distinction too formulaically and without consideration of the constitutional issues presented.

For these reasons, we reverse the trial court's order dismissing plaintiff's appeal and remand for further proceedings. We express no opinion regarding the ultimate success or failure of plaintiff's appeal before the trial court, but only conclude that the trial court possessed subject-matter jurisdiction over the appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

M. J. KELLY, P.J., and RIORDAN, J., concurred with BOONSTRA, J.

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[6] We note that plaintiff does not argue specifically that he was denied due process in connection with his loss of privileges for 15 days; nor, under *Martin*, is that sanction subject to judicial review. *Martin*, 214 Mich App at 408-409. Consequently, on remand, any relief that the trial court may grant to plaintiff would only relate to the confiscation of funds from his prisoner account.

ALLEN PARK RETIREES ASSOCIATION, INC v CITY OF ALLEN PARK

Docket No. 341567. Submitted May 8, 2019, at Detroit. Decided August 13, 2019, at 9:10 a.m. Leave to appeal denied 505 Mich 1039 (2020).

Allen Park Retirees Association, Inc., and Russell Pillar, on behalf of himself and others similarly situated, brought an action in the Ingham Circuit Court against the city of Allen Park, the state of Michigan, the Department of Treasury, and Joyce A. Parker acting in her capacity as emergency manager (EM) of the city of Allen Park. Pillar was an officer employed by the Allen Park Police Department and a member of the Allen Park Police Lieutenants and Sergeants Association collective-bargaining unit. Pillar retired in July 1993. At the time of his retirement, Pillar's employment was governed by a collective-bargaining agreement (CBA) in effect for the period of July 1, 1991 to June 30, 1994. That CBA provided for retiree healthcare benefits. Parker was appointed EM before March 28, 2013, at which time her rights and duties were governed by the Local Government Fiscal Responsibility Act, formerly MCL 141.1201 *et seq*. The Local Financial Stability and Choice Act (LFSCA), MCL 141.1541 *et seq*., 2012 PA 436, became effective March 28, 2013. Parker continued her duties as EM under the new legislation and notified city retirees in a March 8, 2013 letter that she was proposing changes to the retirees' healthcare program. Parker then issued an order (Order 15) outlining the retirees' healthcare plan. The city's receivership was terminated on January 27, 2017. Plaintiffs subsequently filed a six-count verified complaint in the Ingham Circuit Court, alleging that the LFSCA violated numerous provisions of the 1963 Michigan Constitution and asserting various contractual theories against Parker. The claims against the state and the Department of Treasury were transferred to the Court of Claims. Plaintiffs' claims against the city and Parker remained pending in the Ingham Circuit Court. The city and Parker moved for a change of venue to Wayne County, and the Ingham Circuit Court granted those motions. The Wayne Circuit Court granted the city's motion to stay proceedings pending resolution of the Court of Claims action. The Court of Claims granted summary disposition to the state defendants. Plaintiffs

appealed, and in an unpublished per curiam opinion issued on November 29, 2016 (Docket Nos. 327470 and 329593), the Court of Appeals, MURRAY, P.J., and CAVANAGH and WILDER, JJ., held that the Court of Claims properly transferred the claims against Parker back to the Wayne Circuit Court. The Court of Appeals further held that all of plaintiffs' claims—in both the original complaint and in an amended complaint that added claims asserting that 2012 PA 436 violated the Contracts Clause of the 1963 Michigan Constitution and violated constitutional due-process protections—were barred by MCL 600.6431. Therefore, the Court of Appeals did not address the substance of plaintiffs' constitutional claims. On September 7, 2017, plaintiffs moved to amend their complaint in the Wayne Circuit Court action, asserting that the applicable standard of review was recently modified by two Court of Appeals decisions and alleging various constitutional violations, claims for equitable estoppel, promissory estoppel, breach of contract, declaratory judgment, and injunctive relief. The Wayne Circuit Court denied the motion to amend. Parker and the city separately moved for summary disposition. The Wayne Circuit Court, Susan L. Hubbard, J., held that plaintiffs' claims against Parker were moot and granted the city's motion for summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court did not err by dismissing Parker on the basis that the claims against her were moot. An issue is moot when a subsequent event makes it impossible for a court to grant relief, and courts will not decide moot cases. However, an exception exists when an issue is moot but is one of public significance and is likely to recur, yet may evade judicial review. In this case, Parker was no longer EM, and the city no longer had an EM; therefore, it was impossible for relief to be granted against Parker. Moreover, while this issue was one that might potentially recur, it was not likely to evade judicial review.

2. Because any continuing modification of the retiree health-care benefits was the product of city action, and not that of the EM, plaintiffs' claims that the city improperly modified the benefits and that plaintiffs should have been allowed to amend their complaint to reflect these claims were not moot. However, the Supreme Court had recently reversed one of the Court of Appeals cases on which plaintiffs relied, and therefore the trial court did not have the opportunity to analyze the issue in light of that new precedent. Accordingly, the trial court's decision granting summary disposition to the city was reversed and the matter was remanded to the

trial court for reconsideration in light of the Supreme Court's decision in *Kendzierski v Macomb Co*, 503 Mich 296 (2019).

3. Res judicata applies if the prior action was decided on the merits, both actions involve the same parties or their privies, and the matter in the second case was, or could have been, resolved in the first. The trial court determined that plaintiffs' constitutional claims arising from Order 15 were barred by res judicata because the Court of Claims decided these claims on the merits with respect to the state defendants, and the Court of Claims concluded that Order 15 did not violate the Contracts Clause because retirees did not have a vested interest in contribution-free healthcare benefits. On appeal, however, the Court of Appeals in its unpublished opinion never addressed the substantive constitutional issue; instead, the Court of Appeals concluded that MCL 600.6431 barred plaintiffs' claims in both the original complaint and amended complaint. Because the previous Court of Appeals decision held that MCL 600.6431 barred plaintiffs' claims against the state, the Court of Claims unnecessarily analyzed the constitutional issue on the merits. Consequently, in analyzing the res judicata issue, only the previous Court of Appeals decision was considered. Because the previous Court of Appeals decision expressly declined to decide the constitutional issue, that issue was not decided on the merits. Accordingly, the trial court erred by applying the doctrine of res judicata in granting summary disposition.

4. Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. Generally, for collateral estoppel to apply, three elements must be satisfied: a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, the same parties must have had a full and fair opportunity to litigate the issue, and there must be mutuality of estoppel. In this case, the first element was not satisfied because the constitutional questions were not actually litigated in the Court of Claims action and determined by a valid and final judgment given that the previous Court of Appeals decision affirmed the dismissal of plaintiffs' complaints for noncompliance with MCL 600.6431 and expressly declined to decide the constitutional questions. Accordingly, the trial court erred by applying the doctrine of collateral estoppel in granting summary disposition.

Affirmed in part, reversed in part, and remanded for further proceedings.

SERVITTO, J., concurred in the result only.

Mark A. Porter & Associates PLLC (by *Mark A. Porter*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Erik A. Graney*, Assistant Attorney General, for Joyce A. Parker.

Secrest Wardle (by *Dennis R. Pollard* and *Mark S. Roberts*) for the city of Allen Park.

Before: SAWYER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM. Plaintiffs appeal an order of the circuit court granting summary disposition on plaintiffs' claims for retiree healthcare benefits under a collective-bargaining agreement. We affirm in part, reverse in part, and remand.

Plaintiff Pillar was a command officer employed by the Allen Park Police Department and a member of the Allen Park Police Lieutenants and Sergeants Association collective-bargaining unit. He retired from employment in July 1993. At the time of his retirement, Pillar's employment was governed by a collective-bargaining agreement (CBA) in effect for the period of July 1, 1991 to June 30, 1994. That CBA provided for retiree healthcare benefits. The CBA provided for specific coverages, though those coverages varied somewhat depending on the age at retirement and date of hire. The CBA provides that the city "reserves the right to change any and/or all insurance company(ies) and/or plan(s), providing the replacement program is equal to or better than the program available from the present company, subject to the mutual agreement of the City and the Union."

Defendant Parker was appointed emergency manager (EM) of the city before March 28, 2013. At that

time, the EM's rights and duties were governed by the Local Government Fiscal Responsibility Act, formerly MCL 141.1201 *et seq*. The Local Financial Stability and Choice Act (LFSCA), 2012 PA 436 (PA 436), became effective March 28, 2013. MCL 141.1541 *et seq*. EM Parker continued her duties as the city's EM under the new legislation. EM Parker notified city retirees in correspondence dated March 8, 2013, that she was "proposing changes in our healthcare program in an effort to reduce our expense, while making every effort to minimize the impact on retirees." She requested the retirees' "support of the changes that are proposed and outlined in this letter." The letter stated:

> Effective July 1, 2013, the health insurance for all retirees and dependents will be changing. The coverage you will be afforded as of our fiscal year is Blue Cross Blue Shield of Michigan (BCBSM) *Community Blue PPO Option 2*. Community Blue PPO features an extensive network of doctors, hospitals and other health care providers that agree to accept BCBSM's benefit and payment policies. The Blue Cross PPO operates nationwide and allows members to receive services from any health care provider that accepts the Community Blue PPO ID card. This plan does not require the selection of a primary care doctor or other health care provider. Your out-of-pocket expenses are less when health care services are rendered by PPO network providers.

Parker issued Order No. 2013 — 015 (Order 15), which declared:

> 1. All **Medicare** Part A and B enrolled/eligible retirees and their Medicare enrolled/eligible spouses and dependents.
>
> **Section 1. Health Coverage**
>
> Effective July 1, 2013, the City will provide enrolled/eligible retirees and dependents the following health coverage plan:

i. Blue Cross Blue Shield of Michigan Medicare Plus Group PPO with a $100.00 annual deductible, $1,000.00 annual In-Network out-of-pocket maximum, and with $10/20/30 copay prescription drug coverage.

ii. Plan coverage will be subject to the coverage terms and regulations of the carrier[.]

2. All **Non-Medicare** enrolled/eligible retirees and their enrolled/eligible spouses and dependents.

Section 1. Health Coverage

Effective July 1, 2013, the City will provide enrolled/eligible retirees and dependents the following health coverage plan:

i. Blue Cross Blue Shield of Michigan Community Blue PPO Option 2 with $100/$200 annual deductible, $500/$1,000 annual In-Network out-of-pocket maximum, and with $10/20/30 co-pay prescription drug coverage.

ii. Plan coverage will be subject to the coverage terms and regulations of the carrier.

The city's receivership was terminated on January 27, 2017. Although EM Parker asserts that Order 15 was terminated when the receivership terminated, the city indicates that the modification to plaintiffs' healthcare remains in effect.

Plaintiffs filed an action in the Ingham Circuit Court against the city, the state of Michigan, the Department of Treasury, and Parker acting in her capacity as EM. Plaintiffs described Allen Park Retirees Association (APRA) as "a non-profit corporation registered in the State of Michigan, whose membership is exclusively comprised of the employee pensioners, their beneficiary spouses, and qualified dependents." The claims

against the state and the Department of Treasury were transferred to the Court of Claims. Plaintiffs' claims against the city and EM Parker remained pending in the Ingham Circuit Court. The city and EM Parker moved for a change of venue to Wayne County. The Ingham Circuit Court granted those motions. The Wayne Circuit Court granted the city's motion to stay proceedings pending resolution of the Court of Claims action.

The Court of Claims granted summary disposition for the state defendants. The Court of Claims remarked that the only change to plaintiffs' healthcare insurance was the imposition of deductibles and co-pays in the amounts of $500 to $1,000 each year for retirees and dependents. The Court of Claims stated that it was "undisputed that the retirees will be provided health care insurance with the premiums paid by the City. However, as a consequence of changing insurance policies, the retirees will be responsible for some co-pays and deductibles. There is no allegation that the actual coverage has changed." The Court of Claims indicated that plaintiffs' first amended complaint in the Court of Claims asserted claims that PA 436 violated the Contracts Clause of the Michigan Constitution and violated constitutional due-process protections.

The Court of Claims acknowledged the state defendants' argument that they were entitled to summary disposition under MCR 2.116(C)(8) because plaintiffs failed to demonstrate that the state defendants were responsible for the healthcare plan modifications. The Court of Claims agreed that the EM's actions could not be imputed to the state. However, the Court of Claims decided that plaintiffs' constitutional claims were too important for the court to "rest its decision on the non-imputation of an emergency manager's actions to

the State . . . ." The Court of Claims agreed with the state defendants' substantive arguments that plaintiffs' constitutional challenges to PA 436 were without legal merit. With respect to plaintiffs' Contracts Clause challenge, the Court of Claims concluded that there was no impairment of contract. The Court of Claims based this analysis on the United States Supreme Court's decision in *M & G Polymers USA, LLC v Tackett*, 574 US 427; 135 S Ct 926; 190 L Ed 2d 809 (2015) (*Tackett*), in which the Court held that the CBA in that case was subject to the traditional principle that contractual obligations cease upon termination of the CBA. The Court of Claims also rejected various constitutional arguments raised by plaintiffs.

Plaintiffs appealed the Court of Claims order granting summary disposition for the state defendants in this Court in Docket No. 329593. This appeal was consolidated with plaintiffs' earlier appeal in Docket No. 327470. In Docket No. 327470, this Court held that the Court of Claims properly transferred the claims against EM Parker back to the Wayne Circuit Court. *Allen Park Retirees Ass'n, Inc v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2016 (Docket Nos. 327470 and 329593), pp 4-5. In Docket No. 329593, this Court rejected plaintiffs' argument that the Court of Claims erred by issuing judgment without first ruling on their motion for class certification. *Id*. at 5-6. This Court held that all of plaintiffs' claims, in both the original complaint and their amended complaint, were barred by MCL 600.6431. *Id*. at 6-7. This Court did not address the substance of plaintiffs' constitutional claims. This Court explained:

> Thus, the record establishes that plaintiffs failed to comply with MCL 600.6431. In consequence, summary

> dismissal of all of plaintiffs' claims against defendants was appropriate, see *Rusha* [*v Dep't of Corrections*], 307 Mich App [300,] 307[; 859 NW2d 735 (2014)], and we need not analyze the remaining issues raised by plaintiffs on appeal, *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009) ("[T]his Court will affirm where the trial court came to the right result even if for the wrong reason."). Indeed, as a matter of judicial restraint we refuse to do so. See *In re Forfeiture of 2000 GMC Denali and Contents*, [316] Mich App [562], [570] n 3; [892] NW2d [388] (2016) (Docket No. 328547); slip op at 4 n 3 (noting "the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (quotation marks and citations omitted); see also *In re MS*, 291 Mich App 439, 442; 805 NW2d 460 (2011) ("[W]e will not address constitutional issues when, as here, we can resolve an appeal on alternative grounds."). [*Allen Park Retirees Ass'n*, unpub op at 7-8.]

On September 7, 2017, plaintiffs moved to amend their complaint in the Wayne Circuit Court action. Plaintiffs stated that the applicable standard of review was recently modified by this Court's decisions in *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500; 879 NW2d 897 (2015), and *Kendzierski v Macomb Co*, 319 Mich App 278; 901 NW2d 111 (2017).[1] Plaintiffs stated that the applicable standard "requires the trial court to review each complete collective bargaining agreement and retirement contract, to determine the viability of each retiree's claims." In their proposed amended complaint, plaintiffs added allegations concerning "Fiduciary Relationship and

[1] This Court's decision was recently reversed by the Michigan Supreme Court. *Kendzierski v Macomb Co*, 503 Mich 296; 931 NW2d 604 (2019).

Concealment of Cause of Action." Plaintiffs asserted that the city created a fiduciary relationship with Pillar by "its consistent and uninterrupted payments of the health insurance benefits for him and his wife for 19-years." Plaintiffs included allegations under the subheading "Impairment *Versus* Breach of Contract." Plaintiffs stated that EM Parker and the city's actions were "legislative" actions that impaired their contractual relations by releasing the city from its contractual obligations. Plaintiffs alleged that the city's "refusal to continue to perform its obligations as ratified in 1993, after 19-years of routine payment, also constitute[d] breach of contract." Plaintiffs further asserted violations of the Michigan Constitution, Const 1963, art 1, § 10 (prohibiting laws impairing a contractual obligation and ex post facto laws) (Count I), and Const 1963, art 1, § 17 (violation of due process) (Count II), and claims for equitable estoppel (Count III), promissory estoppel (Count IV), breach of contract (Count V), declaratory judgment (Count VI), and injunctive relief (Count VII). The proposed amended complaint omitted the separation-of-powers claim stated in the original complaint. The trial court denied the motion to amend.

EM Parker moved for summary disposition pursuant to MCR 2.116(C)(7) (res judicata) and (8) (failure to state a claim on which relief can be granted). EM Parker stated that the transition advisory board was dissolved in early 2017. The office of the EM and the advisory board ceased to exist in the city. EM Parker argued that plaintiffs' claims against her were moot because she was no longer the EM and was no longer able to act in that capacity. EM Parker also argued that Order 15 was no longer in effect. She argued that if plaintiffs could pursue their claims, the city was the only proper defendant because it was the only party that could grant relief to plaintiffs.

The city moved for summary disposition under MCR 2.116(C)(8) and (10). The city asserted that the 1991–1994 CBA was the only CBA at issue because Pillar was the only named plaintiff. The city stated that the APRA had no contractual or other legally recognized relationship with the city. The city argued that the Court of Claims final decision was the law of the case and was binding under collateral estoppel. The city maintained that the Court of Claims decision established that plaintiffs had no contractual right to a specific health insurance plan for life because the contract was subject to modification and that collateral estoppel applied because there was "an identity of interest" between defendants in the circuit court action and the state defendants.

At the hearing on the summary-disposition motions, the trial court concluded that plaintiffs' claims against EM Parker were moot. The court stated that the statute did not include a retiree association as an interested party. The court stated that *Harper Woods Retirees* was not applicable to this case because that case did not involve an EM. The court concluded that plaintiffs' claim for breach of the CBA was the same claim decided by the Court of Claims. The trial court noted that plaintiffs' claims for promissory estoppel and equitable estoppel were redundant of the breach-of-contract claim. The court asked plaintiffs why collateral estoppel did not apply to prohibit the court from deciding these issues differently than the Court of Claims had. Plaintiffs argued that the EM did not have statutory authority to impose a permanent modification. This raised a question whether the city could rely on the EM's authority to continue the modification. Plaintiffs argued that the Court of Appeals did not issue "any final decision on the correct contract interpretation to use."

The city responded that under *Harper Woods Retirees*, 312 Mich App 500, the healthcare provision was subject to modification, either by the EM or the city government. The city stated that plaintiffs had a vested interest in health insurance but not in the particular aspects of the plan.

The trial court stated:

> So, the court is granting the City's motion. At the end of the day, if the city council were to terminate the health benefits of the retirees, they would definitely be held accountable, I would think on election day. But the point — the issue before me isn't that. It's really whether the same allegations were made — whether the state defendants were in privy with the city and were defending the exact same allegations in the Court of Claims. And this court finds they were. And so therefore I'm granting the motion.

Plaintiffs now appeal.

We first turn to plaintiffs' argument that the trial court erred by dismissing EM Parker on the basis that the claims against her are moot. We disagree. The main point of plaintiffs' argument is that we should review this issue because of the possibility that some future EM might claim the authority to cancel provisions in a CBA. We review de novo a trial court's decision on a motion for summary disposition. *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citations omitted).

EM Parker argues that this appeal is moot as to her because she is no longer EM and the city is no longer under receivership. She also states that Order 15 expired with the receivership. "Whether a case is moot is a threshold question that we address before reaching the substantive issues of a case." *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018). "An issue is moot when a subsequent event makes it impossible for this Court to grant relief." *Id*. "Because reviewing a moot question ordinarily would be a purposeless proceeding, we generally dismiss a moot case without reaching the underlying merits." *Id*. at 315 (quotation marks and citation omitted). "It is well recognized, however, that an exception exists when an issue is moot, but is one of public significance and is likely to recur, yet may evade judicial review." *Id*. (brackets, quotation marks, and citation omitted).

Parker is no longer EM. The city no longer has an EM. It is therefore not possible for this Court to grant plaintiffs relief against Parker. We agree that the trial court correctly concluded that this action is moot with respect to EM Parker individually. Moreover, while we agree that this represents an issue that might potentially recur, we are not persuaded that it will evade judicial review. Rather, if and when the issue recurs, the issue may be reviewed at that time.

Ultimately, plaintiffs argue that MCL 141.1552(1)(k)(*iv*) authorizes the EM to institute only a *temporary* rejection, modification, or termination of any condition of an existing CBA. EM Parker asserts that Order 15 was a temporary change. Because EM Parker issued the order, she should well know that her intent was for it only to be temporary and is now expired. Therefore, any claim against her is now moot. Accordingly, the trial court properly dismissed the claims against EM Parker.

This, of course, means that any continuing modification of the retiree healthcare benefits is the product of city action, not that of the EM. Thus, what is not moot is plaintiffs' claims that the city improperly modified the benefits and that plaintiffs should have been allowed to amend their complaint to reflect these claims. But plaintiffs' argument is complicated by the fact that one of the cases on which they rely, *Kendzierski*, has, as noted earlier, recently been reversed by the Supreme Court. It makes little sense to us to consider whether the trial court erred in light of an argument that has been altered by recent Supreme Court action. By the same token, however, we are reluctant to analyze the issue in light of this new precedent when the trial court did not have the opportunity to do so. We prefer to have the trial court analyze the issue in the first instance. Accordingly, the better route is to reverse the trial court's decision granting summary disposition to the city and remand the matter for reconsideration in light of the Supreme Court's decision in *Kendzierski*. Similarly, the trial court shall reconsider plaintiffs' motion to amend their complaint or, alternatively, consider a motion to file a new amended complaint if plaintiffs deem it appropriate in light of the decision in *Kendzierski*.

That leaves the question whether the trial court erred by applying the doctrines of collateral estoppel and res judicata in the claims against the city. We agree with plaintiffs that it did. "The applicability of legal doctrines such as res judicata and collateral estoppel are questions of law to be reviewed de novo." *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999). A trial court's decision on a motion for summary disposition is also reviewed de novo. Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by res judicata or collateral estoppel. *Washington v*

Sinai Hosp of Greater Detroit, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion brought under MCR 2.116(C)(7) "*may* be supported by affidavits, depositions, admissions, or other documentary evidence." *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 519 n 20; 918 NW2d 645 (2018) (quotation marks and citation omitted). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence, which must be viewed in a light most favorable to the nonmoving party. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). If there is no factual dispute, the determination whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law. *Id*.

"The preclusion doctrines of res judicata and collateral estoppel serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *William Beaumont Hosp v Wass*, 315 Mich App 392, 398; 889 NW2d 745 (2016) (quotation marks and citation omitted). Res judicata applies if "(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." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Unlike res judicata, which precludes reliti-

gation of claims, see *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 629; 808 NW2d 471 (2010) (stating that res judicata is also known as claim preclusion), collateral estoppel prevents relitigation of issues, *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001) (stating that collateral estoppel bars relitigation of an issue), which presumes the existence of an issue in the second proceeding that was present in the first proceeding. "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." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks, citation, and brackets omitted).

The trial court determined that plaintiffs' constitutional claims arising from Order 15 were barred by res judicata because the Court of Claims decided these claims on the merits with respect to the state defendants. The Court of Claims concluded that Order 15 did not violate the Contracts Clause because retirees did not have a vested interest in contribution-free healthcare benefits. On appeal, however, this Court never addressed this substantive issue. Instead, this Court concluded that plaintiffs' claims in both the original complaint and amended complaint were barred by MCL 600.6431. The Court cited principles disfavoring analysis of constitutional issues when appeals could be resolved on alternative grounds. *Allen Park Retirees Ass'n*, unpub op at 7-8. This Court's holding that plaintiffs' claims against the state were barred by MCL 600.6431 means that the Court of Claims unnecessarily analyzed the constitutional issue on the merits. Consequently, in analyzing the res

judicata issue, we consider only this Court's earlier decision. Because this Court expressly declined to decide the constitutional issue, the constitutional issue was not decided on the merits.

With respect to the collateral-estoppel analysis, the first element is not satisfied for the reasons stated in the res judicata analysis: the constitutional questions were not actually litigated in the Court of Claims action and determined by a valid and final judgment because this Court affirmed the dismissal of plaintiffs' complaints for noncompliance with MCL 600.6431 and expressly declined to decide the constitutional questions.

For these reasons, the trial court erred by relying on res judicata and collateral estoppel in granting summary disposition.

In sum, we affirm the trial court's dismissal of the claims against EM Parker, reverse the grant of summary disposition in favor of the city, and remand the matter to the trial court. On remand, the trial court shall reconsider the grant of summary disposition in favor of the city and plaintiffs' motion to amend their complaint. On remand, the trial court shall not consider the effect of Order 15 because it is no longer in effect. That is, any rights that plaintiffs might have under the CBA, as well as any rights that the city might have to alter those rights, have returned to the status that would exist as if Order 15 had never been entered. Moreover, the trial court shall not consider any effect of the Court of Claims decision. Finally, the trial court's reconsideration must be made in light of the Supreme Court's decision in *Kendzierski*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do

not retain jurisdiction. Only defendant Parker may tax costs, being the only party who has prevailed in full.

SAWYER, P.J., and CAVANAGH, J., concurred.

SERVITTO, J. (*concurring*). I concur in the result only.

GEORGE v ALLSTATE INSURANCE COMPANY

Docket No. 341876. Submitted August 7, 2019, at Detroit. Decided August 13, 2019, at 9:15 a.m.

Christina George brought an action against Allstate Insurance Company in the Wayne Circuit Court, asserting that Allstate was primarily responsible for payment of first-party personal protection insurance (PIP) benefits for injuries she sustained in a motor vehicle accident. George was not covered by a no-fault insurance policy, but she did have health insurance and wage disability insurance through a self-funded plan organized under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*., and administered by Aetna Life Insurance Company. George filed a claim for PIP benefits through the Michigan Assigned Claims Plan (MACP), which assigned her claim to Allstate. Allstate moved for partial summary disposition asserting that it was entitled to a setoff under MCL 500.3172(2) because George's ERISA plan provided benefits covering the same loss. George argued that MCL 500.3172(2) was preempted by ERISA, with the result that Allstate was primarily responsible for providing PIP benefits. The court, Leslie Kim Smith, J., granted partial summary disposition for Allstate, ruling that George's ERISA plan was primarily responsible for her medical expenses and wage-loss benefits and that Allstate was secondary. The court further held that MCL 500.3172(2) was not preempted by ERISA because George's no-fault benefits were only available through the MACP and not a no-fault policy. George appealed.

The Court of Appeals *held*:

1. Under *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358 (1993), and *American Med Security, Inc v Allstate Ins Co*, 235 Mich App 301 (1999), in order for an ERISA plan to preempt a state law on a coordination-of-benefits (COB) issue, the plan must be self-funded and contain an unambiguous clause. The ERISA plan preempted MCL 500.3172(2) in the instant case because it was self-funded and contained an unambiguous COB clause.

2. Although MCL 500.3172(2) provides for the coordination of benefits, Allstate was primarily responsible for the payment to plaintiff of no-fault benefits because the ERISA plan contained a

provision expressly disavowing primacy when a program provided by law exists to provide benefits. A contrary holding would have the effect of dictating the terms of the ERISA plan, which the state is not permitted to do under federal law.

Reversed and remanded.

INSURANCE — NO-FAULT — ERISA — COORDINATION OF BENEFITS — PREEMPTION.

A self-funded Employee Retirement Income Security Act plan that contains an unambiguous coordination-of-benefits clause disavowing primacy preempts a state-law provision on the coordination of benefits (29 USC 1001 *et seq.*; MCL 500.3172(2)).

Mike Morse Law Firm (by *Marc J. Mendelson*, *Donald J. Cummings*, and *Stacey L. Heinonen*) for plaintiff.

Anselmi, Mierzejewski, Ruth & Sowle PC (by *Michael D. Phillips*) for defendant.

Before: LETICA, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM. Plaintiff-appellant, Christina George, appeals by delayed leave granted[1] the trial court order granting defendant-appellee, Allstate Insurance Company, partial summary disposition under MCR 2.116(C)(10). For the reasons stated in this opinion, we reverse and remand.

I. BASIC FACTS

George was injured in a motor vehicle crash, but she did not have a policy of no-fault insurance available to her in her household. Accordingly, she filed a claim for no-fault personal protection insurance (PIP) benefits through the Michigan Assigned Claims Plan

[1] *George v Allstate Ins Co*, unpublished order of the Court of Appeals, entered May 24, 2018 (Docket No. 341876).

(MACP), which assigned her claim to Allstate. George also had health insurance and wage disability insurance under a self-funded plan organized under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*. The ERISA plan, which is administered by Aetna Life Insurance Company, provides in relevant part:

> **NON-DUPLICATION OF BENEFITS**
>
> If you and your spouse or domestic partner both work, your family may be covered by more than one group health plan. The Plan coordinates its payments with the payments you may receive from other group insurance plans under which you or your dependents are covered. The following types of plans are coordinated with your Plan coverage:
>
> * * *
>
> - Motor vehicle insurance (your own or any other responsible party's) . . . .
>
> * * *
>
> **HOW TO DETERMINE WHICH PLAN IS PRIMARY**
>
> In general, the Plan will be considered primary for:
>
> - Employees . . . .
>
> * * *
>
> **The Other Plan is Automatically Primary**
>
> Any other plan will be primary if it:
>
> - Does not have a coordination of benefits or non-duplication of benefits provision;
> - Is a program required or provided by law; or
> - Is a motor vehicle insurance policy. (In certain states, the motor vehicle insurance policy allows you to designate your group plan as primary. If this applies to you, you must submit written

> proof to Aetna that you have designated this Plan as primary.)[2]

Thus, benefits under the ERISA plan are primary, but under certain circumstances the ERISA plan expressly disavows primary coverage in favor of other insurance benefits, including benefits claimed under a program required or provided by law. As the assigned-claims insurer, Allstate is required to provide George with no-fault benefits pursuant to a program, i.e., MACP, and the program is required by law, see MCL 500.3171(1).[3] Therefore, under the terms of the ERISA plan, the benefits under the Plan are secondary to the benefits available to George under the no-fault act.

Yet, "benefits through the assigned claims carrier are coordinated under MCL 500.3172(2) . . . ." *Batts v Titan Ins Co*, 322 Mich App 278, 282; 911 NW2d 486 (2017). MCL 500.3172(2) provides:

> Except as otherwise provided in this subsection, *personal protection insurance benefits*, including benefits aris-

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[2] On appeal, Allstate argues that the ERISA plan language does not apply because the ERISA plan states that it is primary for employees and requires the existence of multiple insurance plans. Allstate equates an "insurance plan" with an insurance policy and, therefore, asserts that the coordination-of-benefits clause is not triggered. However, the ERISA plan provides that "motor vehicle insurance" plans coordinate with the ERISA plan, and it also provides that a program required or provided by law is primary to the ERISA plan. Taking those provisions together, it is clear that the ERISA plan expressly intended to coordinate coverage under circumstances in which a policy of insurance did not exist but the benefits were nevertheless available by law.

[3] The no-fault act, MCL 500.3101 *et seq*., was substantially amended by 2019 PA 21, effective June 11, 2019. This case was commenced before the amendment, and therefore, it is controlled by the former provisions of the no-fault act. See *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012) (stating that as a general rule amendments to statutes are presumed to operate prospectively only). All references to the no-fault act are to the version in effect at the time this action was commenced.

> ing from accidents occurring before March 29, 1985, *payable through the assigned claims plan shall be reduced to the extent that benefits covering the same loss are available from other sources*, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits, to a person claiming personal protection insurance benefits through the assigned claims plan. This subsection only applies if the personal protection insurance benefits are payable through the assigned claims plan because no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. As used in this subsection, "sources" and "benefit sources" do not include the program for medical assistance for the medically indigent under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, or insurance under the health insurance for the aged act, title XVIII of the social security act, 42 USC 1395 to 1395kkk-1. [Emphasis added.][4]

Therefore, under MCL 500.3172(2), an insurer providing benefits under the assigned-claims plan is generally entitled to a setoff for *any other benefits* covering the same loss that are received by or on behalf of the injured party. The only statutory exemption to the right to a setoff is if the benefits covering the loss are received under either Medicare or Medicaid. *Id*.

After George filed her complaint against Allstate asserting that it was primarily responsible for payment of her first-party PIP benefits, Allstate moved for partial summary disposition. Allstate asserted that because the ERISA plan was a benefit source that covered the same loss, it was entitled to a setoff under MCL 500.3172(2). In response, George asserted that

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[4] See 2012 PA 204.

MCL 500.3172(2) was preempted by ERISA. The trial court, however, reasoned that because George's no-fault benefits were only available through the assigned-claims plan and not a no-fault insurance policy, the state law, MCL 500.3172(2), was not preempted by ERISA. Accordingly, the court granted partial summary disposition in favor of Allstate, ruling that Allstate was secondary and that the ERISA plan was primary for medical expenses and wage-loss benefits.

II. FEDERAL PREEMPTION

A. PRESERVATION

Allstate asserts that George's arguments on appeal as they relate to the language of the ERISA plan are unpreserved. An issue is preserved for appeal if it was raised, addressed, and decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Based on our review of the lower-court proceedings, it is clear that George's primary argument was that because her health insurance was through a self-funded ERISA plan, the setoff provision in MCL 500.3172(2) was preempted by federal law. She did not directly refer to the coordination-of-benefits (COB) clause in the ERISA plan, nor did she provide a copy of the ERISA plan language until she filed a motion for reconsideration of the trial court's order granting summary disposition. The trial court granted summary disposition, concluding that MCL 500.3172(2) was not preempted by the preemption provision in the ERISA. As a result, the issue of federal preemption was raised before and decided by the trial court, so that part of the issue is undisputedly preserved.

Yet, to the extent that George's argument is reliant on the language in the ERISA plan, it is clear that those aspects of her argument were raised and supported for the first time on reconsideration. As a general rule, an issue is not preserved if it is raised for the first time in a motion for reconsideration in the trial court. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Still, as the ERISA plan was attached to a lower-court filing, it is part of the record and we may consider it on appeal. See MCR 7.210(A)(1). Moreover, to the extent that the aspects of the preemption issue relating to the language in the ERISA plan are unpreserved, we may overlook the preservation requirements in civil cases "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citation omitted). Because the facts necessary for resolution of the issue were presented below and are undisputed on appeal, and because the issue involves a question of law that was actually decided by the trial court in response to the primary argument raised by the parties, we will consider all aspects of George's argument on appeal.

B. STANDARD OF REVIEW

George argues that the trial court erred by granting partial summary disposition in Allstate's favor. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Under MCR 2.116(C)(10),

a party is entitled to summary disposition if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion for summary disposition, the trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), citing MCR 2.116(G)(5). All reasonable inferences must be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010).

C. ANALYSIS

"When determining whether federal law preempts a state statute, this Court must look to congressional intent." *American Med Security, Inc v Allstate Ins Co*, 235 Mich App 301, 305; 597 NW2d 244 (1999). The United States Supreme Court has explained that "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp v Holliday*, 498 US 52, 56-57; 111 S Ct 403; 112 L Ed 2d 356 (1990) (quotation marks and citation omitted). ERISA explicitly addresses the issue of preemption in three separate clauses:

> The preemption clause itself, 29 USC 1144(a), is extremely broad and provides that the provisions of the ERISA "shall

> supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." That clause is tempered by 29 USC 1144(b)(2)(A), commonly known as the "saving clause," which "returns to the States the power to enforce those state laws that 'regulate insurance.' " *FMC Corp*, *supra* at 58. Further, 29 USC 1144(b)(2)(B) sets out the "deemer" clause under which employee benefit plans themselves may not be deemed insurance companies for purposes of state laws "purporting to regulate" insurance companies or insurance contracts. *FMC Corp*, *supra* at 58. [*American Med Security, Inc*, 235 Mich App at 305.]

Our Supreme Court has previously addressed whether MCL 500.3109a is preempted by ERISA. See *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 383-384; 505 NW2d 820 (1993). In doing so, the Court recognized that under MCL 500.3109a, "a no-fault insurer is secondarily liable for insurance coverage where there is any other form of health care coverage and where the insurers both sought to escape liability through the use of competing coordination-of-benefits clauses." *Id*. at 384, citing *Fed Kemper Ins Co, Inc v Health Ins Admin, Inc*, 424 Mich 537, 546; 383 NW2d 590 (1986). In *Auto Club Ins Ass'n*, the ERISA plan and the no-fault policy contained competing COB clauses; therefore, under MCL 500.3109a and *Fed Kemper*, the no-fault policy would have been secondary to the ERISA plan. Our Supreme Court, however, determined that under principles of federal preemption, "MCL 500.3109a does not reach an ERISA plan with a COB clause where that clause is unambiguous." *Auto Club Ins Ass'n*, 443 Mich at 387-388 (citation omitted).

In reaching that conclusion, the Court examined a number of opinions from the United States Supreme Court:

> In *Alessi* [*v Raybestos-Manhattan, Inc*, 451 US 504; 101 S Ct 1895; 68 L Ed 2d 402 (1981)], the United States Supreme Court held that state law was preempted to the extent that it attempted to control the terms of an ERISA pension plan. In *Shaw* [*v Delta Air Lines, Inc*, 463 US 85; 103 S Ct 2890; 77 L Ed 2d 490 (1983)], the Court interpreted the preemption clause to prevent state regulation of welfare benefits in multibenefit ERISA plans, while noting the danger of the administrative difficulty that would result from piecemeal state legislation. Next, the Court defined the saving clause to preserve state law mandating certain minimum benefits in an ERISA plan as long as the state law regulates insurance law rather than an ERISA plan directly. *Metropolitan Life* [*Ins Co v Massachusetts*, 471 US 724; 105 S Ct 2380; 85 L Ed 2d 728 (1985)]. Although the Court majority in *Fort Halifax* [*Packing Co, Inc v Coyne*, 482 US 1; 107 S Ct 2211; 96 L Ed 2d 1 (1987)], concluded that a one-time severance payment required by state law did not relate to an ERISA plan so that it was preempted, the majority did reiterate the ERISA purpose of avoiding variable state regulation that would pose administrative burdens to plan administrators. Finally, the Court concluded in *FMC Corp* that states could not regulate the contractual terms of ERISA benefits plans in cases of self-funded plans. ERISA plans, however, are subject to indirect regulation in a case in which a state regulates an insurance carrier that has contracted with the plans to provide coverage for claims made on the plans. [*Id*. at 386.]

The *Auto Club* Court then explained:

> [T]he COB clause in an ERISA policy must be given its clear meaning without the creation of any artificial conflict based upon MCL 500.3109a. Therefore, because both plans provide that no-fault insurance is primary where the potential for duplication of benefits occurs, we hold that the ERISA plans' terms control. The no-fault insurer, ACIA, is primarily liable for the benefits at issue. Although the Michigan statute purports to regulate insurance and not ERISA plans, we conclude *that it has a direct*

> *effect on the administration of the plans in these cases because it would virtually write a primacy of coverage clause into the plans*. This is the type of state regulation that would lead to administrative burdens that the historical progression of federal cases recounted earlier forbids. [*Id*. at 387 (citation omitted; emphasis added).]

The ERISA plan in *Auto Club* was self-funded.[5] In *American Med*, this Court declined to extend the ruling in *Auto Club* to cases in which the ERISA plan was not self-funded. *American Med*, 235 Mich App at 304-307. The *American Med* Court explained:

> In *FMC Corp*, [498 US at 61,] the [United States Supreme] Court stated:
>
> > We read the deemer clause to exempt self-funded ERISA plans from state laws that "regulat[e] insurance" within the meaning of the saving clause. By forbidding States to deem employee benefit plans "to be an insurance company or other insurer . . . or to be engaged in the business of insurance," the deemer clause relieves plans from state laws "purporting to regulate insurance." As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation "relate[s] to" the plans. . . . State laws that directly regulate insurance are "saved" but do

[5] On appeal, Allstate asserts that there is no evidence that the ERISA plan in this case was self-funded. However, George attached a number of documents to her response to Allstate's motion for summary disposition. In particular, a March 14, 2017 letter from Aetna stated that George's medical benefits "were paid pursuant to an ERISA-qualified self-funded plan as defined by federal law." A trial court may consider "substantively admissible evidence" when ruling on a motion for summary disposition. *Barnard Mfg Co, Inc*, 285 Mich App at 373. Substantively admissible evidence is not required to be in an admissible form when a trial court rules on a motion for summary disposition, "[b]ut it must be admissible in content." *Id*. (quotation marks and citation omitted). We conclude that the letter is substantively admissible evidence that George's health insurance was through a self-funded ERISA plan.

> not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws. On the other hand, *employee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer*.
>
> The Supreme Court distinguished between insured and uninsured plans, "leaving the former open to indirect regulation while the latter are not." *Id*. at 62, citing *Metropolitan Life Ins Co v Massachusetts*, 471 US 724, 747, 105 S Ct 2380, 85 L Ed 2d 728 (1985). It emphasized that "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts." *FMC Corp*, *supra* at 64. See also *Lincoln Mut Casualty Co v Lectron Products, Inc, Employee Health Benefit Plan*, 970 F2d 206, 210 (CA 6, 1992).
>
> Section 3109a is not preempted under the circumstances of this case. The employee benefit plan at issue was not a self-funded plan, and plaintiff's insurer, United Wisconsin, was subject to Michigan insurance law and regulation, specifically § 3109a, even where that statute indirectly affects the plan. Our ruling does not allow our state law to control an ERISA plan, but simply recognizes that state law can regulate the insurer of an ERISA plan even if that regulation may indirectly affect the plan, which is the case here. [*American Med*, 235 Mich App at 305-307 (citation omitted).]

Consequently, in order to preempt a state law on a COB issue, an ERISA plan must be self-funded, *id*. at 306-307, and contain an unambiguous COB clause, *Auto Club*, 443 Mich at 389.

On appeal, Allstate seeks to avoid application of *Auto Club* by noting that, in that case, there were two competing COB clauses: one in the ERISA plan and one in the applicable no-fault policy. Allstate correctly points out that there is only one policy in this case: the ERISA plan. However, like a COB clause, MCL 500.3172(2) provides for the coordination of benefits. Specifically, it establishes that where duplicative benefits are available, i.e., where benefits from multiple sources cover the loss, the assigned-claims insurer is entitled to a setoff, meaning the insurer is *not* primarily liable. In this case, there is a state law expressly providing that George's ERISA plan is primary whereas the ERISA plan expressly disavows primacy under these circumstances. Because George's ERISA plan is self-funded and because it contains an unambiguous COB clause, Allstate is primarily liable for the benefits at issue here. To hold to the contrary would have the direct effect of dictating the terms of the ERISA plan, which the state is not permitted to do under federal law.[6] *Auto Club*, 443 Mich at 389-390.

Reversed and remanded for further proceedings. We do not retain jurisdiction. George may tax costs as the prevailing party. MCR 7.219(A).

LETICA, P.J., and M. J. KELLY and BOONSTRA, JJ., concurred.

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[6] Given our resolution, we need not address George's alternative arguments.

YANG v EVEREST NATIONAL INSURANCE COMPANY

Docket No. 344987. Submitted August 14, 2019, at Detroit. Decided August 27, 2019, at 9:00 a.m. Affirmed 507 Mich ___ (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 benefits (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 by leave granted.

The Court of Appeals *held*:

MCL 500.3020 imposes procedural requirements that an insurer must follow to cancel a policy; the objective of the statute is to make certain that every insured under a policy is afforded a statutorily required period of time either to satisfy whatever concerns prompted cancellation, and thus revive the policy, or to obtain other insurance. Thus, MCL 500.3020 controls what actions an insurer must take for notice of cancellation to be effective. In that regard, MCL 500.3020(1)(b) provides, in part, that a policy of casualty insurance, including all classes of motor vehicle coverage, shall not be issued or delivered in Michigan by an insurer authorized to do business in this state for which a premium or advance assessment is charged unless the policy contains a provision that, except as provided in MCL 500.3020(1)(d), 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; under MCL 500.3020(6), the cancellation notice must also contain a warning that a person may not operate an uninsured vehicle. A notice of cancellation is ineffective when the insurer sends the notice before the premium payment is due; in other words, for cancellation to take place, the event triggering the right to cancel—that is, the nonpayment of an insurance premium by the due date—must have taken place first. Therefore, under MCL 500.3020(1)(b), it is only after the nonpayment that the insurer may properly notify the insured of cancellation; otherwise, it would not be a notice of cancellation but merely a demand for payment. In this case, because Everest's notice of cancellation was sent before the date on which Yang's premium payment was due, the notice violated MCL 500.3020(1)(b) and was invalid. Everest's offer to reinstate the policy did not operate as a valid notice of cancellation for purposes of MCL 500.3020 because it was not presented as a notice of cancellation and it lacked the MCL 500.3020(6) warning that a person may not operate an

uninsured vehicle. Accordingly, the trial court correctly concluded that Yang's policy with Everest was in effect at the time plaintiffs were injured by a motor vehicle and properly dismissed Motorist from the action.

Affirmed and remanded for further proceedings.

SWARTZLE, J., concurring, agreed with the result reached by the majority but would have resolved the case on narrower grounds without analyzing the broader question of what MCL 500.3020 requires with respect to cancellation notices. Specifically, because the notice of cancellation was not unconditional, it was not effective. Regardless, the contract language would have led Yang to believe that failure to pay the premium on or before the due date would result only in the possibility of cancellation, and Everest could not unilaterally enlarge its contract rights by the notice—that is, the right to cancel the policy automatically—when the mutually agreed-upon language did not contain that right.

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, shall not be issued or delivered in Michigan by an insurer authorized to do business in this state for which a premium or advance assessment is charged unless the policy contains a provision that, except as provided in MCL 500.3020(1)(d), 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; notice of cancellation is ineffective when the insurer sends the notice before the premium payment is due; for purposes of the statute, an insurer may properly notify the insured of cancellation only after nonpayment of the premium has occurred.

Temrowski & Temrowski Law Office (by *Lee Roy H. Temrowski, Jr.*) for Wesley Zoo Yang and Viengkham Moualor.

Zausmer, August & Caldwell, PC (by *Karen E. Beach*, *Tali F. Wendrow*, and *James C. Wright*) for Everest National Insurance Company.

Garan Lucow Miller, PC (by *Christian C. Huffman*) for Motorist Mutual Insurance Company.

Before: SHAPIRO, P.J., and GLEICHER and SWARTZLE, JJ.

SHAPIRO, P.J. Defendant Everest National Insurance Company (Everest) sent plaintiff Wesley Yang (Yang) a bill requesting a premium payment for his no-fault insurance policy and informing him that the policy would be canceled if payment was not received by the due date. Yang did not make the payment, and he and his wife, plaintiff Viengkham Moualor, were subsequently injured in a pedestrian-automobile accident. Plaintiffs sought coverage under the policy, and Everest argued that it had effectively canceled the policy. The trial court disagreed and denied Everest's motion for summary disposition.

Everest appeals by leave granted. At issue in this case is whether an insurer may cancel a policy by sending the statutorily required "notice of cancellation" to the insured before the grounds for cancellation have occurred. We hold that such notice does not satisfy the Insurance Code, MCL 500.100 *et seq*., and is therefore ineffective to cancel the policy. Accordingly, we affirm the trial court.

I. BACKGROUND

On September 26, 2017, Yang made the first premium payment on a six-month policy issued by Everest. The policy term was from September 26, 2017, to March 26, 2018, and the subject accident occurred during that term. As required by MCL 500.3020, the policy included a cancellation provision that stated, in pertinent part:

> This Policy may be canceled during the policy period as follows:
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> * * *
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> 2. We may cancel by mailing you at the address last known by us or our agent:
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> a. at least 10 days notice by first class mail, if cancellation is for non-payment of premium[.] [Emphasis omitted.]

On October 9, 2017, Everest mailed Yang a bill for the second premium installment payment that contained a notice of cancellation for nonpayment of the premium. The document informed Yang that he must pay the premium by October 26, 2017. It stated that the failure to pay that amount by the due date "will result in the cancellation of your policy with the indicated Cancellation Effective Date," October 27, 2017. (Emphasis omitted.) Thus, the document provided that if the premium payment was not received by October 26, the policy would be canceled effective the next day. It also stated that the cancellation notice did not apply if the bill was paid by the due date.

On October 30, 2017, Everest, having not received the premium payment, sent Yang an offer to reinstate the policy. It informed Yang that his insurance was canceled as of October 27, 2017, because it did not receive the premium payment by the due date. The letter informed Yang that he could reinstate the "policy with a lapse in coverage" if it received payment by November 26, 2017.

Yang sent a payment for the premium on November 17, 2017, and Everest reinstated the policy, effective on that date. The notice of reinstatement informed Yang that there was a lapse in coverage from October 27, 2017, to November 17, 2017.

The accident in which plaintiffs were injured occurred on November 15, 2017, two days before Yang made the premium payment.[1] Plaintiffs filed this action to recover benefits, and Everest moved for summary disposition. It argued that plaintiffs are not entitled to benefits under the policy because the policy was canceled before the accident occurred. Everest asserted that the policy's cancellation provision was not inconsistent with MCL 500.3020. It argued that the policy provided that it could cancel the policy upon 10 days' notice for nonpayment of the premium and asserted that it had complied with this by sending the notice of cancellation for nonpayment of the premium even before the nonpayment occurred.

Defendant Motorist Mutual Insurance Company (Motorist) insured the driver of the vehicle that struck plaintiffs. It filed an answer to the motion for summary disposition challenging the notice of cancellation sent by Everest. Motorist moved for summary disposition under MCR 2.116(I)(2), arguing that the 10-day notice of cancellation cannot be triggered before the due date for payment of a premium passes without such payment. Motorist contended that Everest was required to wait until Yang defaulted on his premium payment before mailing the 10-day notice of cancellation and that because Everest failed to wait, the policy was not effectively canceled.

At the motion hearing, it was undisputed that plaintiffs failed to pay their insurance premium on time. But the trial court relied on an unpublished opinion of this Court[2] to hold that a notice of cancellation is not valid unless sent after nonpayment occurs. Accord-

[1] Plaintiffs were struck by a car while walking across a street.

[2] *Wilson v Titan Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued April 28, 2016 (Docket No. 326295).

ingly, the court entered an order denying Everest's motion for summary disposition. In that order, the court stated that Everest is the highest priority insurer for the payment of benefits to plaintiffs and dismissed Motorist from the action. The court denied Everest's motion for reconsideration.

II. ANALYSIS

Everest's primary argument on appeal is that neither MCL 500.3020 nor its policy required it to wait for nonpayment of the premium before it could properly send a notice of cancellation. We disagree. For the reasons discussed in this opinion, Everest's preemptive cancellation notice to Yang did not constitute a notice of cancellation under MCL 500.3020(1)(b).[3]

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Gleason v Kincaid*, 323 Mich App 308, 317-318; 917 NW2d 685 (2018). To do so, we interpret the words, phrases, and clauses in a statute according to their ordinary meaning. *State News v Mich State Univ*, 481 Mich 692, 699-700; 753 NW2d 20 (2008). "[W]here the statutory language is clear and unambiguous, the statute must be applied as written." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). "Insurance laws and policies are to be liberally construed in favor of policyholders, creditors, and the public." *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 441; 591 NW2d 344 (1998).

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[3] We review de novo a trial court's decision to deny summary disposition. See *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). We also review de novo questions of statutory interpretation. *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 138; 762 NW2d 178 (2009).

MCL 500.3020 governs the cancellation of insurance policies. It provides, in pertinent part:

> (1) A policy of casualty insurance, except worker's compensation and mortgage guaranty insurance, including all classes of motor vehicle coverage, shall not be issued or delivered in this state by an insurer authorized to do business in this state for which a premium or advance assessment is charged, unless the policy contains the following provisions:
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> * * *
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> (b) Except as otherwise provided in subdivision (d), that 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.

We have interpreted MCL 500.3020 as imposing procedural requirements that the insurer must follow to cancel a policy. See *Murphy v Seed-Roberts Agency, Inc*, 79 Mich App 1, 8; 261 NW2d 198 (1977) (concluding that MCL 500.3020 provides the "minimum procedural steps for cancellation" of a policy). Consistently with that ruling, in *Nowell v Titan Ins Co*, 466 Mich 478, 484; 648 NW2d 157 (2002), the Supreme Court looked to "the statute," i.e., MCL 500.3020(1)(b), to determine what actions the insurer must take for a notice of cancellation to be effective. The implication is clear: MCL 500.3020(1)(b) does not merely require that the insurer include a cancellation provision in the policy, it also imposes an affirmative duty on the insurer to comply with the notice requirements found in the statute. Thus, it is for the courts to decide what constitutes a notice of cancellation for purposes of MCL 500.3020(1)(b).

The majority of appellate courts that have addressed this issue have held that a notice of cancellation is ineffective when sent before the premium payment is due.[4] Some cases hold that such notice does not satisfy the state's respective notice statute, while others hold that the notice is ineffectual under the terms of the insurance policy. But the underlying rational for many of the decisions is the same. "For cancellation to be 'based' upon nonpayment, nonpayment must have occurred." *Blair v Perry Co Mut Ins Co*, 118 SW3d 605, 607 (Mo, 2003). Thus, when a notice of cancellation is sent before nonpayment of premium, it is not informing the insured that the policy is canceled, but rather that cancellation is contingent upon a "future event." *Conn v Motorist Mut Ins Co*, 190 W Va 553, 556; 439 SE2d 418 (1993). Stated differently, "a notice of cancellation which states that a policy will be cancelled on a specified date unless premiums due are sooner paid,

[4] See *Vietzen v Victoria Auto Ins Co*, 2014-Ohio-749 ¶¶ 15-20; 9 NE3d 500 (Ohio App, 2014); *Mackey v Bristol West Ins Serv of Cal, Inc*, 105 Cal App 4th 1247, 1257-1266; 130 Cal Rptr 2d 536 (2003); *Equity Ins Co v City of Jenks*, 184 P3d 541, 544-545; 2008 OK 27 (2008); *Blair v Perry Co Mut Ins Co*, 118 SW3d 605, 607 (Mo, 2003); *Conn v Motorist Mut Ins Co*, 190 W Va 553, 555-558; 439 SE2d 418 (1993); *Auto Club Ins Co v Donovan*, 550 A2d 622, 623-624 (RI, 1988); *Pennsylvania Nat'l Mut Cas Ins Co v Person*, 164 Ga App 488, 489; 297 SE2d 80 (1982); *Hart v MFA Ins Co*, 268 Ark 857, 859-864; 597 SW2d 105 (App, 1980); *Travelers Ins Co v Jenkins*, 285 So2d 839, 844 (La App, 1973). See also 2 Couch, Insurance, 3d, § 31:6, p 19 ("[E]ffective notice of cancellation for nonpayment of premiums cannot be given until the time for making payment of the premium has expired."). "Although not binding, authority from other jurisdictions may be considered for its persuasive value." *Voutsaras Estate v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019). We are aware of two appellate courts reaching the opposite conclusion—holding that a notice of cancellation sent before the premium due date is effective; there were dissents in both cases. See *Yacko v Curtis*, 339 Ill App 3d 299; 789 NE2d 1274 (2003); *Munoz v New Jersey Auto Full Ins Underwriting Ass'n*, 145 NJ 377; 678 A2d 1051 (1996).

is not a notice of cancellation, but merely a demand for payment." *Travelers Ins Co v Jenkins*, 285 So2d 839, 843 (La App, 1973).

We find this reasoning persuasive. For a cancellation to take place, the event triggering the right to cancel must have taken place first. In this case, the event that allowed for cancellation occurred on the date of nonpayment. Therefore, it is only after the nonpayment that the insurer may properly notify the insured of cancellation. In other words, it is not sufficient that the insurer warn the insured that a future failure to pay the premium will result in cancellation; rather, it must advise the insured that because of an already-occurred failure to pay, the policy will be canceled in ten days. This reasoning is consistent with the Michigan Supreme Court's understanding of MCL 500.3020. The Court has explained that

> [t]he 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) (emphasis added).]

Significantly, the Court did not refer to "concerns that could or would prompt cancellation" at some future date, but to concerns that "have prompted cancellation." *Id*. And in this case, the concern that prompted cancellation was not the fact that the premium was shortly coming due, but the actual failure to pay it when it was due. It was only at that point that the insured could be afforded the required ten days' notice to cure the reason for cancellation.

We must also construe statutes reasonably, "keeping in mind the purpose of the act, and to avoid absurd results." *Rogers v Wcisel*, 312 Mich App 79, 87; 877 NW2d 169 (2015). Taken to its logical conclusion, Everest's position would allow insurance companies to give notice of cancellation far in advance of premium payment dates. For instance, after the policy is issued, the insurance company could send a cancellation notice stating that failure to make timely premium payments by the listed due dates will result in next-day cancellation of the policy. This would be at odds with the statute's purpose to allow a postnotice opportunity to address the reason for cancellation and could readily lead to absurd results.[5]

Everest also argues that its offer to reinstate the policy functioned as a valid notice and that plaintiffs' coverage was still, therefore, properly canceled. On October 30, 2017, Everest sent Yang an offer to reinstate a policy. But this offer was not presented as a notice of cancellation, and it did not contain the statutorily required warning that a person may not operate an uninsured vehicle. See MCL 500.3020(6). And the lack of that warning renders a cancellation notice ineffective. *Depyper*, 232 Mich App at 441-442. For those reasons, Everest's offer to reinstate the policy is insufficient to constitute a notice of cancellation.

In sum, issuance of a notice of cancellation necessarily requires that the grounds for cancellation have

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[5] As the Missouri Supreme Court aptly reasoned:

> The insurance companies propose to give a conditional notice of cancellation at any time, if at least 10 days before cancellation. The companies concede that such anticipatory notice could be weeks, months, or even years before nonpayment. Their interpretation would render the policy provision illusory, absurd, and unreasonable. [*Blair*, 118 SW3d at 607.]

occurred before the notice is issued. That is the most natural reading of that phrase, as confirmed by the vast majority of appellate courts that have addressed this issue. We see no basis to conclude that the Legislature intended to depart from that ordinary meaning and to allow insurers to provide the statutorily required notice on the mere possibility that the insured might not make a premium payment. For those reasons, we hold that a notice of cancellation sent before the time for making the premium payment has passed does not satisfy MCL 500.3020(1)(b).

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, J., concurred with SHAPIRO, P.J.

SWARTZLE, J. (*concurring*). I concur in the result reached by my colleagues in this appeal. I write separately to explain that I would affirm on narrower grounds. First, it was conceded at oral argument that the notice of cancellation at issue here was a conditional notice, not an unconditional one. If the insured paid the premium by the future deadline, then the policy would not be canceled; if the insured did not pay by that deadline, then the policy would be canceled. Under existing caselaw, a notice of insurance cancellation must be unconditional to be effective. *American Fidelity Co v R L Ginsburg Sons' Co*, 187 Mich 264, 276; 153 NW 709 (1915). Because the notice of cancellation in this case was not unconditional, it was not effective.

Second, the relevant facts and contract language here are similar to those in *Equity Ins Co v City of Jenks*, 184 P3d 541; 2008 OK 27 (2008). For the reasons more fully explained by the Oklahoma court, I

would conclude that the contract language here "would lead the insured to believe that a failure to pay the premium on or before the due date does not automatically result in cancellation, but merely gives rise to the possibility of cancellation." *Id.* at 545. In general, a party cannot unilaterally enlarge its contract rights, and Everest could not do by notice what the mutually agreed-upon language of the contract did not anticipate. Thus, separate from whether the notice was conditional or not, the notice attempted to do something (pre-failure-to-pay notice of cancellation) that the contract, fairly read, did not permit.

Accordingly, I would affirm based on either (i) the language of the specific notice, or (ii) the language of the specific insurance contract, without reaching the broader question of what MCL 500.3020 does and does not permit with respect to cancellation notices in general.

MOOTE v MOOTE

Docket No. 346527. Submitted August 7, 2019, at Grand Rapids. Decided August 27, 2019, at 9:05 a.m.

Erica R. Moote brought an action for divorce in the Alger Circuit Court, Family Division, against Dustin E. Moote; plaintiff initially sought sole legal and physical custody of the parties' minor child but ultimately requested sole physical custody and shared legal custody. Plaintiff, who had primary physical custody of the child during the proceedings, moved to change the domicile of the parties' minor child to Alabama, arguing that her family would be able to provide support and childcare there while she worked and went to school in that location. Defendant objected to the relocation, arguing that the distance and lengthy periods between visitations would strain his relationship with the child. The court, Charles C. Nebel, J., granted plaintiff's motion within the judgment of divorce, reasoning that the change in domicile had the capacity to improve both plaintiff's and the child's lives. Defendant appealed.

The Court of Appeals *held*:

MCL 722.31(1) provides that a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued. Under MCL 722.31(4)—keeping the child as the primary focus in the court's deliberations—a court must consider five factors before permitting a change in legal residence more than 100 miles from that legal residence: (1) whether the change has the capacity to improve the quality of life for both the child and the relocating parent; (2) the degree to which each parent has complied with and used his or her time under a court order governing parenting time with the child and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting-time schedule; (3) the degree to which the court is satisfied that if the court permits the change, it is possible to order a modification of the parenting-time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering

the parental relationship between the child and each parent, and whether the parent is likely to comply with the modification; (4) the extent to which the parent opposing the change is motivated by a desire to secure a financial advantage with respect to a support obligation; and (5) domestic violence, regardless of whether the violence was directed against or witnessed by the child. A court must then consider a parent's change-in-domicile request by using a four-part analysis: (1) the court must determine whether the moving party has established by a preponderance of the evidence that the factors now set forth in MCL 722.31(4)—that is, the *D'Onofrio* factors that were set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200 (1976), and adopted by the Court of Appeals in *Henry v Henry*, 119 Mich App 319 (1982)—support a change of domicile; (2) if those factors support a change in domicile, the court must determine whether an established custodial environment exists; (3) if an established custodial environment exists, the court must determine whether the change of domicile would modify or alter that established custodial environment; and (4) if the trial court finds that a change of domicile would modify or alter the child's established custodial environment, the trial court must then determine whether the change in domicile would be in the child's best interests by considering whether the MCL 722.23 best-interest factors have been established by clear and convincing evidence. In this case, the trial court's findings were not against the great weight of the evidence when it concluded that plaintiff established by a preponderance of the evidence that the proposed relocation had the capacity to improve the quality of life for both AM and plaintiff, that plaintiff's request was not an attempt to defeat or frustrate the parenting-time schedule that the parties were exercising at the time, that the parenting-time schedule could be modified to preserve and foster the parental relationship between defendant and AM, and that plaintiff's motion was not motivated by a desire to secure a financial advantage with respect to a support obligation. Because an established custodial environment existed with plaintiff only, the trial court was not required to address the MCL 722.23 best-interest factors when considering plaintiff's change-of-domicile request.

Affirmed.

Hyde & Swajanen, PC (by *George W. Hyde III*) for plaintiff.

Superior Law, PLLC (by *Antonio R. Ruiz*) for defendant.

Before: GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. In this custody matter, defendant-father appeals by right the portion of the parties' judgment of divorce[1] that, in relevant part, granted plaintiff-mother's request to change the domicile of the parties' minor child, AM, by allowing plaintiff to move to Alabama with AM. We affirm.

I. BACKGROUND

Plaintiff and defendant were married in December 2008 and had one minor child born during the marriage, AM. Plaintiff also had a daughter from a prior marriage, who is not at issue in this matter. During the parties' marriage, plaintiff was primarily a stay-at-home parent while defendant was in the military until he began collecting disability benefits in 2014. However, the marriage was riddled with domestic violence, allegedly committed by both parties, and several periods of separation.

In March 2016, plaintiff filed a complaint for divorce requesting sole physical and legal custody of AM. Plaintiff later rescinded her request for sole legal custody and asked for joint legal custody to continue. Defendant responded that the parties should share joint legal and physical custody. During the pendency of the case, defendant began exercising parenting time

[1] This Court previously dismissed defendant's claim of appeal from the judgment of divorce for lack of jurisdiction because, under the circumstances, it was not a final judgment under MCR 7.202(6)(a). *Moote v Moote*, unpublished order of the Court of Appeals, entered October 17, 2018 (Docket No. 345744). Defendant claims an appeal in this matter from the trial court's later and final child support order. Substantively, however, defendant does not challenge the support order, only the change of domicile.

every other weekend with both children, although there was testimony at the parties' divorce hearing that he occasionally canceled visitations. Meanwhile, plaintiff had primary custody of the children, and she managed all of their educational and healthcare needs.

In May 2018, plaintiff moved for a change of domicile, requesting the trial court's approval to relocate with AM to plaintiff's home state of Alabama. The trial court took testimony on the matter during the parties' divorce hearing. At the hearing, plaintiff testified that her family resides in Alabama and could offer her support and childcare so that she could obtain an education and employment. She further suggested that both children could continue to have a relationship with defendant through electronic communication and extensive parenting time during the summer and holiday breaks. Defendant objected to the relocation, arguing that the distance and long periods between visitations would strain his relationship with AM. The trial court agreed with plaintiff that the change in domicile had the capacity to improve both plaintiff's and AM's lives, and it granted plaintiff's motion within the judgment of divorce.

On appeal, defendant argues that the trial court abused its direction by making findings and granting plaintiff's motion for change of domicile without sufficiently analyzing the best-interest factors in MCL 722.23 or the required considerations under MCL 722.31(4). We disagree.

II. STANDARD OF REVIEW

"This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a motion for change of domicile." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014). An abuse of discretion exists when the trial court's decision is " 'palpably and

grossly violative of fact and logic . . . .' " *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).[2]

In child custody disputes, " '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.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.28. Thus, a trial court's findings, including the trial court's findings in applying the MCL 722.31 factors, should be affirmed unless the evidence clearly preponderates in the opposite direction. *Pierron*, 486 Mich at 85; see also *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012). In reviewing a trial court's findings, this Court should defer to the trial court's determination of credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Further, this Court may not substitute its judgment on questions of fact "unless the facts clearly preponderate in the opposite direction." *Gagnon*, 295 Mich App at 565 (quotation marks and citation omitted).

III. APPLICABLE LAW

Under MCR 3.211(C)(3), "a parent whose custody or parenting time of a child is governed by [court] order shall not change the legal residence of the child except in compliance with . . . MCL 722.31." In pertinent part, MCL 722.31 states:

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[2] Although the "outside the range of reasonable and principled outcomes" standard is now the "default abuse of discretion standard," see *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), child custody cases specifically retain the historic *Spalding* standard, *Maier v Maier*, 311 Mich App 218, 221-223; 874 NW2d 725 (2015).

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Thus, when a parent moves for leave to change a child's domicile by a distance of more than 100 miles, the trial court must then consider the request using the following four-part analysis:

> First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called *D'Onofrio* factors,[3] support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence. [*Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013) (citation omitted).]

This four-part analysis requires that the trial court consider the factors "with the child as the primary focus in the court's deliberations[.]" MCL 722.31(4).

IV. ANALYSIS OF *D'ONOFRIO* FACTORS

As an initial matter, defendant does not clearly present an argument pertaining to the *D'Onofrio* fac-

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[3] See *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976). The "*D'Onofrio* factors" were adopted by this Court in *Henry v Henry*, 119 Mich App 319, 323-324; 326 NW2d 497 (1982), as the proper analysis when addressing removal petitions. See also *Costantini v Costantini*, 446 Mich 870, 871 (1994) (separate statement by RILEY, J.). Our Supreme Court does not appear to have addressed the propriety of relying on *D'Onofrio*. See *Marko v Marko*, 462 Mich 881 (2000), app dis 462 Mich 881, 882 (2000).

tors under MCL 722.31; instead, he directly cites only some of the best-interest factors under MCL 722.23. This may constitute abandonment of any challenge to the trial court's findings that the *D'Onofrio* factors support plaintiff's motion to change AM's domicile. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Nevertheless, we would, in any event, conclude that the trial court's findings were not against the great weight of the evidence.

Under the first *D'Onofrio* factor, MCL 722.31(4)(a), the trial court found that the proposed relocation had the capacity to improve the quality of life for both AM and plaintiff. In particular, the trial court determined that the move would provide plaintiff with a support system that would benefit AM. Both children expressed their preference to go to Alabama. There was evidence that plaintiff worked "odd jobs" and only worked when defendant had been available to provide care for the children or when the children were in school. Plaintiff testified that in Alabama she had free childcare available and that she intended to find employment and continue her education there. Defendant argues that plaintiff has demonstrated a lack of work ethic and would only depend on her family if allowed to relocate, but we defer to the trial court on issues of credibility. *Shann*, 293 Mich App at 305. The trial court was free to believe plaintiff's testimony that she would have no trouble finding employment opportunities in Alabama. Moreover, it is undisputed that plaintiff had not worked during the marriage primarily because she was a stay-at-home parent. Defendant recognized that plaintiff could have worked more during the marriage, but he stated that "it was better for the children that she didn't work." Defendant contends that he may have continued to assist plaintiff and assist in AM's care if AM remained in Michigan. Nevertheless, the

trial court's finding that the move had the *capacity* to improve AM's and plaintiff's quality of life was not against the great weight of the evidence. Even if the trial court's decision on this factor was a close call, the evidence did not clearly preponderate in the opposite direction. *Gagnon*, 295 Mich App at 565.

Under the second *D'Onofrio* factor, MCL 722.31(4)(b), defendant contends that "part of [plaintiff's] motivation is simply to hurt [defendant's] relationship with his daughter." We presume this to approximate an argument that plaintiff's request to change domicile was an attempt to defeat or frustrate the parenting-time schedule that the parties were exercising at the time. We disagree. Notably, plaintiff proposed a new parenting-time schedule that would still allow defendant to exercise substantial parenting time, and she expressly asked the court to "grant [defendant] extensive parenting time in the summer." Plaintiff also suggested that AM and defendant could maintain contact through videoconferencing software. Plaintiff's suggestions tend to indicate that she was not attempting to frustrate the parties' existing parenting-time schedule and that she would continue to facilitate defendant's parenting time and relationship with AM.

Under the third *D'Onofrio* factor, MCL 722.31(4)(c), the trial court opined that it was possible to modify the parenting-time schedule in a manner that could provide an adequate basis for preserving and fostering the parental relationship between defendant and AM. As noted, plaintiff proposed, and the trial court adopted, a schedule that granted defendant most of each summer, other school breaks, and one long weekend a month if he could travel to visit AM. The trial court also ordered that AM would have a right to communicate electronically with defendant. Notwithstanding defendant's

claim that the schedule would harm his relationship with AM, the trial court observed that defendant would exercise more overnights with AM under the new schedule than under the alternating-weekend schedule. The visiting-time schedule under MCL 722.31(4)(c) "need not be equal to the prior visitation plan in all respects." *Brown v Loveman*, 260 Mich App 576, 603; 680 NW2d 432 (2004) (quotation marks and citation omitted). Under the circumstances, "the proposed parenting-time schedule provides a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent." *McKimmy v Melling*, 291 Mich App 577, 584; 805 NW2d 615 (2011) (quotation marks and citation omitted). Accordingly, the trial court's finding that the parental relationship could be preserved with the modified parenting-time schedule was not against the great weight of the evidence.

Under the fourth *D'Onofrio* factor, MCL 722.31(4)(d), the record supports a conclusion that plaintiff's motion was not "motivated by a desire to secure a financial advantage with respect to a support obligation." Indeed, plaintiff testified that the move could prove financially challenging for her at first but that she wanted the children to be cared for by family whenever she had to work or attend school. Furthermore, the trial court specifically explained that it had not taken plaintiff's move to Alabama into account when addressing the issue of spousal support. Defendant does not present any argument that would support an opposite conclusion.

Finally, under the fifth *D'Onofrio* factor, MCL 722.31(4)(e), the record is clear that both parties alleged domestic violence during the marriage; however, there is no indication that this played a role in the trial

court's consideration of plaintiff's request for relocation. The court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *Fletcher*, 447 Mich at 883. Furthermore, defendant does not raise any arguments regarding this factor. Ultimately, the trial court determined that plaintiff's move to Alabama was warranted and would benefit AM. In light of the foregoing, the trial court's findings concerning the *D'Onofrio* factors as set forth in MCL 722.31(4) were not against the great weight of the evidence.

V. CUSTODIAL ENVIRONMENT AND BEST INTERESTS

If the trial court determines that the *D'Onofrio* factors support a requested change of domicile, the next step is for the court to determine whether an established custodial environment exists. *Rains*, 301 Mich App at 325. "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). Defendant does not challenge the trial court's finding that an established custodial environment existed with plaintiff. The evidence that AM lived with plaintiff and that plaintiff was responsible for AM's educational and health needs tends to indicate that no challenge would be appropriate in any event.

Defendant argues that the trial court failed to properly analyze the best-interest factors under MCL 722.23. However, the trial court was not required to address the best-interest factors. As this Court has explained,

> *if, and only if*, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence. [*Rains,* 301 Mich App at 325 (emphasis added).]

Plaintiff's move to Alabama with AM would only change AM's domicile. The move would not change AM's established custodial environment with plaintiff. Consequently, the trial court's failure to address the best-interest factors was neither erroneous nor an abuse of discretion. *Id*.

Affirmed.

GADOLA, P.J., and MARKEY, J., concurred with RONAYNE KRAUSE, J.

BUHL v CITY OF OAK PARK

Docket No. 340359. Submitted November 15, 2018, at Detroit. Decided August 29, 2019, at 9:00 a.m. Reversed and remanded 507 Mich ___ (2021).

Jennifer Buhl brought an action against the city of Oak Park under the defective-sidewalk exception to governmental immunity, MCL 691.1402a, in the Oakland Circuit Court after she twisted her ankle on a sidewalk with uneven cement slabs on May 4, 2016. On January 3, 2017, the Legislature enacted 2016 PA 419, which amended MCL 691.1402a and had an effective date of January 4, 2017. The amendment added a subsection to MCL 691.1402a providing that in a civil action, a municipal corporation that has a duty to maintain a sidewalk 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. Defendant moved for summary disposition, arguing that the defect was open and obvious. Plaintiff argued that it did not matter whether the defect was open and obvious because MCL 691.1402a(5), which permitted defendant to assert the open and obvious danger defense, was not enacted until after she was injured. Plaintiff further argued that regardless of the applicability of MCL 691.1402a(5), the condition was not open and obvious because the defect in the sidewalk was not clearly visible. The court, Phyllis C. McMillen, J., granted defendant's motion for summary disposition, holding that the statutory amendment was retroactive because it affected only the availability of a possible defense, not plaintiff's ability to bring a claim. The trial court further held that the condition was open and obvious because plaintiff's photographs clearly showed that the corner of the concrete slab where plaintiff claimed to have tripped was raised. Plaintiff appealed.

The Court of Appeals *held*:

1. There are four rules that a court must consider when determining whether a new statute applies retroactively. First, a court must consider whether there is specific language in the new act that states that it should be given retroactive or prospective application. Second, a statute is not regarded as operating retro-

actively solely because it relates to an antecedent event. Third, a retroactive law is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. Fourth, a remedial or procedural act that does not destroy a vested right will be given effect when the injury or claim is antecedent to the enactment of the statute. In this case, Rule 1 weighed in favor of prospective application, Rules 3 and 4 weighed in favor of retroactive application, and Rule 2 was not applicable because this case did not relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute. Under Rule 1, the statute did not include a future effective date but rather was given immediate effect; therefore the lack of any specific language regarding retroactivity weighed in favor of prospective application. However, Rules 3 and 4 weighed in favor of retroactive application. The statute at issue in this case did not totally bar or take away a cause of action; rather, it made available to municipal corporations common-law defenses, including the open and obvious danger doctrine. Even after the enactment of the amended statute, plaintiff could still assert the identical cause of action against defendant, and the full range of damages previously available to a prevailing plaintiff was unchanged by the statutory amendment. Only the abolition of an existing or accrued cause of action takes away or impairs a plaintiff's vested rights, and a cause of action can be totally barred by a new act only if the act extinguishes it as a matter of law. In this case, the cause of action against a municipality for a defective sidewalk was not rendered extinct by the enactment of 2016 PA 419. Plaintiff's cause of action was not barred by a new act but rather by the new act plus the particular facts relating to her injury; the dismissal based on factual infirmities was therefore a factual bar, not a legal bar. Additionally, plaintiff's allegations were of negligence leading to a slip and fall; a slip and fall is not something that is planned, and therefore plaintiff could not have had any reliance interest in avoiding a particular application of the law to such an occurrence. Accordingly, under Rule 3, plaintiff could not have reasonably relied on prior law, which weighed in favor of the statute applying retroactively. Under Rule 4, a statute is remedial or procedural in character if it is designed to correct an existing oversight in the law or redress an existing grievance. However, if the legislation enacts a substantive change to the law, it is to be given prospective application. In this case, the statutory amendment overturned legal doctrine that had made the open and obvious danger defense inapplicable to claims

against a municipality involving a statutory duty to maintain a sidewalk, and the statutory amendment restored the *status quo ante* of the repudiated legal doctrine. By enacting 2016 PA 419, the Legislature demonstrated what it intended the law to be all along—for the open and obvious danger doctrine to be available as a defense for municipalities; therefore, 2016 PA 419 did not enact a substantive change in the law. Accordingly, the Legislature's enactment of 2016 PA 419, which did not legally bar plaintiff's cause of action, and through which the Legislature overruled the prior legal doctrine and reinstated the *status quo ante* of the repudiated legal doctrine, overcame the presumption for prospective application and had retroactive effect to events that preceded its enactment, including plaintiff's injury.

2. A condition is open and obvious when an average person of ordinary intelligence would discover the danger and the risk it presented on casual inspection. This is an objective test. In this case, plaintiff argued that the defect was not open and obvious because she saw only the crack in the sidewalk, not the height difference in the cement slabs after the crack. Defendant argued that the defect was open and obvious because plaintiff testified that she was not looking at the ground as she walked and because she admitted that she was subsequently able to see the defect. Plaintiff provided photographs showing that the sidewalk was sloping at an upward angle. Plaintiff also testified that nothing was obscuring her view and that she did not discern the differing heights only because she was not looking at the ground; plaintiff admitted that she would have seen the condition of the sidewalk if she had been looking. Therefore, because plaintiff would have discovered the danger and the risk it presented on casual inspection, the condition was open and obvious and the trial court properly granted defendant's motion for summary disposition.

Affirmed.

LETICA, J., dissenting, would have held that the Legislature intended prospective application of the open and obvious danger doctrine and that this portion of the statutory amendment must apply only prospectively because it constituted a substantive change that impaired plaintiff's vested rights. Legislative intent is the primary and overriding rule; all other rules of construction and operation are subservient to this principle. In this case, the Legislature directed that the statutory amendment take immediate effect and used no retroactive language. Importantly, during the 2016 session alone, the Legislature passed several statutes that explicitly provided for retroactive application; however, the Legislature used no such language in 2016 PA 419. Additionally,

Michigan law is clear that once a cause of action accrues, i.e., all facts become operative and are known, it becomes a vested right. Plaintiff's cause of action accrued on May 4, 2016—the day she fell. Therefore, plaintiff's cause of action accrued well before the January 4, 2017 effective date of the statutory amendment. Finally, plaintiff's vested rights were impaired because the statutory amendment vitiated the municipal corporation's duty through application of the open and obvious danger doctrine, which resulted in the dismissal of plaintiff's lawsuit; in other words, plaintiff's accrued cause of action was totally barred by the new act. Accordingly, the statutory amendment was not remedial or procedural; it was a substantive change and should only apply prospectively.

GOVERNMENTAL IMMUNITY — DEFECTIVE-SIDEWALK EXCEPTION — OPEN AND OBVIOUS DANGER DOCTRINE — RETROACTIVE APPLICATION.

MCL 691.1402a provides a defective-sidewalk exception to governmental immunity under the governmental tort liability act, MCL 691.1401 *et seq*.; 2016 PA 419, which amended MCL 691.1402a, added a subsection to MCL 691.1402a providing that in a civil action, a municipal corporation that has a duty to maintain a sidewalk 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; this statutory amendment applies retroactively.

Miller Johnson (by *Christopher J. Schneider*) and *Michigan Advocacy Center, PLLC* (by *Matthew E. Bedikian*) for plaintiff.

Garan Lucow Miller, PC (by *Megan K. Cavanagh*, *John J. Gillooly*, and *Caryn A. Ford*) for defendant.

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

TUKEL, J. This case involves the question whether a legislative act, 2016 PA 419, which makes the open and obvious danger doctrine applicable to suits against municipalities, applies retroactively—that is, whether it applies " 'to events antedating its enactment . . . .' " *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich

578, 585; 624 NW2d 180 (2001), quoting *Landgraf v USI Film Prod*, 511 US 244, 283; 114 S Ct 1483; 128 L Ed 2d 229 (1994). The retroactivity question turns on whether the act impaired a "vested right," and our Supreme Court has long noted that "[t]he question of determining what is a vested right has always been a source of much difficulty to all courts." *Lahti v Fosterling*, 357 Mich 578, 588; 99 NW2d 490 (1959). The trial court found that the statutory amendment applied retroactively and, applying the open and obvious danger doctrine, granted summary disposition to defendant. We hold that because no vested right of plaintiff was impaired by the Legislature's actions and because the Legislature's actions were remedial in nature, the resulting grant of summary disposition to defendant on the basis of the open and obvious danger doctrine was correct; we therefore affirm the trial court's judgment.

Plaintiff was injured on May 4, 2016, when she twisted her ankle on a sidewalk outside of a store called Trend Express in Oak Park, Michigan. The sidewalk was under defendant's exclusive jurisdiction. On the date of the injury, it was raining. Plaintiff's husband dropped her off in front of the building, and plaintiff walked toward the front door. Plaintiff noticed a crack in the sidewalk and attempted to step over it. However, plaintiff was looking at the store and failed to notice the uneven cement slabs on the far side of the crack from where she was walking. Plaintiff testified that she did not see the drop-off because she was not looking at the sidewalk but admitted that she would have seen it if she had been watching where she was walking instead of looking at the store.

Plaintiff filed suit under the defective-sidewalk exception to governmental immunity, MCL 691.1402a. Defendant moved for summary disposition under MCR

2.116(C)(10), arguing that the defect was open and obvious.[1] Plaintiff argued that it did not matter whether the defect was open and obvious because MCL 691.1402a(5), which permitted defendant to assert the open and obvious danger defense, was not enacted until *after* she was injured.[2] Plaintiff also argued that irrespective of the applicability of this statutory amendment, the condition was not open and obvious because the drop-off was not clearly visible from the direction that plaintiff had approached the store. The trial court held that the statutory amendment was retroactive because it affected only the availability of a possible defense, not plaintiff's ability to bring a claim. Further, the trial court held that the condition was open and obvious because plaintiff's photographs clearly showed that the corner of the concrete slab where plaintiff claimed to have tripped was raised.

I. RETROACTIVITY OF AMENDMENT TO MCL 691.1402a

On appeal, plaintiff first argues that the trial court erred when it determined that the amendment of MCL

[1] Defendant also moved for summary disposition under MCR 2.116(C)(8), arguing that plaintiff's complaint did not identify the date of the accident. The trial court noted that even if it had agreed with defendant, it would have allowed plaintiff to amend her complaint to include the date. Because the trial court found that summary disposition was warranted under MCR 2.116(C)(10), it declined to rule on the basis of MCR 2.116(C)(8), and that aspect of the motion is not pertinent for our purposes on appeal.

[2] The relevant time line of events is as follows:

- May 4, 2016: plaintiff's injury;
- January 3, 2017: enactment of amended statute;
- January 4, 2017: effective date of amended statute;
- January 31, 2017: plaintiff's complaint filed.

691.1402a had retroactive effect. We disagree. This Court reviews de novo whether a statute applies retroactively. *Johnson v Pastoriza*, 491 Mich 417, 428-429; 818 NW2d 279 (2012).

A. STATUTORY BACKGROUND

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides immunity from tort liability to governmental agencies when they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). The GTLA waives immunity and allows suit against a governmental agency only if the suit falls within one of the statutory exceptions. *Moraccini*, 296 Mich App at 392. MCL 691.1402a, which allows a plaintiff to sue a municipal corporation under some circumstances when the municipal corporation fails to maintain a sidewalk, provides:

> (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.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.
>
> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.

> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.
>
> (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.
>
> (6) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

This current version of the statute was enacted on January 3, 2017, with the passage of 2016 PA 419, becoming effective on January 4, 2017. The only changes brought about by 2016 PA 419 were to add Subsection (5), and, although not relevant for purposes of this case, to renumber the previous Subsection (5) to Subsection (6).

B. RETROACTIVITY DEFINED

The United States Supreme Court has noted that "courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach." *Landgraf*, 511 US at 263-264.

> The first is the rule that "a court is to apply the law in effect at the time it renders its decision[.]" The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to

> have retroactive effect unless their language requires this result." [*Id*. at 264 (citations omitted).]

"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," *id*. at 269 (citation omitted), nor is it " 'made retroactive merely because it draws upon antecedent facts for its operation,' " *id*. at 269 n 24 (citation omitted). "[C]ourts should apply the law in effect at the time that they decide a case *unless* that law would have an impermissible retroactive effect as that concept is defined by the Supreme Court." *Bell-South Telecom, Inc v Southeast Tel, Inc*, 462 F3d 650, 657 (CA 6, 2006).

"[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 US at 269-270. "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 270. "Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have 'sound instincts,' and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id*. (citation, ellipsis, and brackets omitted).

There are four rules that a court must consider when determining whether a new statute applies retroactively. *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 570; 331 NW2d 456 (1982):

> First, is there specific language in the new act which states that it should be given retrospective or prospective application. Second, a statute is not regarded as operating retrospectively solely because it relates to an antecedent event. Third, a retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. Fourth, a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute. [*Id*. at 570-571 (quotation marks, citations, and brackets omitted).]

Under Rule 1, the intent of the Legislature governs the question whether a statute applies retroactively. *Johnson*, 491 Mich at 429. Indeed, our Supreme Court has stated that " '[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.' " *Lynch*, 463 Mich at 583 (citation omitted). Absent such clear indication that the Legislature intended retroactive application, it is presumed that a statute applies only prospectively. *Brewer v A D Transp Express, Inc*, 486 Mich 50, 56; 782 NW2d 475 (2010).

"Second rule cases relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," *In re Certified Questions*, 416 Mich at 571, which is not applicable here. "The third rule and the cases thereunder define those retrospective situations that *are not* legally acceptable, whereas the fourth rule defines those that *are* acceptable." *Id*. at 572 (emphasis added). Because the retroactivity analysis is based, in part, on reasonable reliance, the proper analysis is whether a new statute "would impair rights a party possessed when he acted . . . ." *Landgraf*, 511 US at 280.

C. APPLYING THE RETROACTIVITY TEST

1. STATUTORY TEXT

The first factor to consider is whether the text of the statute at issue provides that it is to be given retroactive or prospective effect. *In re Certified Questions*, 416 Mich at 570; see also *Johnson*, 491 Mich at 429. Our Supreme Court "has recognized that 'providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.' " *Johnson*, 491 Mich at 432 (citation omitted). In the present case, the statute did not include a future effective date but rather was given immediate effect. "Use of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively." *Id*. at 430. Rather, "immediate effect" means only "that the Legislature by a 2/3 vote expressed an intention that the amendatory act take effect on the date it was filed." *Id*. at 431 n 30. The lack of any language here regarding retroactivity weighs in favor of prospective application only.

2. TAKING AWAY OR IMPAIRING VESTED RIGHTS

"A cause of action becomes a vested right when it accrues and all the facts become operative and known." *Doe v Dep't of Corrections*, 249 Mich App 49, 61-62; 641 NW2d 269 (2001), citing *In re Certified Questions*, 416 Mich at 572-573. If the retroactive application of a law would take away or impair vested rights, then its retroactive application is prohibited by Rule 3; Rule 4 provides the mirror image, providing that "a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute." *In re Certified Questions*, 416 Mich at 571. As far as a plaintiff asserting a claim is

concerned, retroactive application is prohibited if an "accrued cause of action would be totally barred or taken away by a new act." *Id*. at 577.

In this case, the statute at issue did not totally bar or take away a cause of action; rather it made available to municipal corporations common-law defenses, including the open and obvious danger doctrine. Importantly, even after the enactment of the amended statute, plaintiff could still assert the identical cause of action against defendant, and the full range of damages previously available to a prevailing plaintiff is unchanged by the statutory amendment. Cf. *Johnson*, 491 Mich at 433-434 (holding that an amendment that created a new right of prevailing plaintiffs to receive damages for loss of consortium and other damages not previously available created a new legal burden on defendants, which could not be applied retroactively). By the plain language of *In re Certified Questions*, only the abolition of an existing or accrued cause of action takes away or impairs a plaintiff's vested rights. Moreover, *In re Certified Questions*, 416 Mich at 577, specifically noted that only a "legal bar" would implicate the "totally barred or taken away by the new act" language. The question in that case was whether the adoption of a comparative-negligence statute would apply to a cause of action for products liability, and if so, whether the comparative-negligence statute would be applied retroactively. See *id*. at 561. In analyzing the issue, our Supreme Court stated:

> While the total damages which plaintiff could have received were significantly reduced by [MCL 600.]2949, *plaintiff's cause of action was not legally barred or taken away.*
>
> *Section 2949 does not bar any claim, legal or equitable*, but it states that "damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence

> attributed to the plaintiff." Section 2949 *is not a legal bar*, but is a principle established by the Legislature which mitigates damages in products liability actions.
>
> In short, we hold that the applicability of the products liability statute in the instant case did not offend Michigan's general rule against the retrospective application of a statute which "take[s] away vested rights." [*Id*. at 577-578 (citations omitted; emphasis added).]

The Supreme Court's analysis was based on the plaintiff's cause of action not being "*legally* barred or taken away"; because the act at issue in that case was not "a legal bar," it did not deprive the plaintiff of a vested right.

Thus, under *In re Certified Questions*, a cause of action can be "totally barred or taken away by the new act" only if the act extinguishes it as a matter of law. For example, causes of action for alienation of affection that previously existed were totally barred by a new act when the Legislature repealed them because the legislative action rendered such causes of action extinct. See former MCL 551.301 to MCL 551.311, repealed by 1980 PA 180. The cause of action against a municipality for a defective sidewalk was not rendered extinct by the enactment of 2016 PA 419—the cause of action still exists.

The dissent seemingly understands this point when it cites the *In re Certified Questions* test that Rule 3 is implicated when an "accrued cause of action would be totally barred or taken away by a new act," but the dissent then goes on to argue for the misapplication of the test. The dissent argues that if the open and obvious danger doctrine is applied, plaintiff will lose her case; this, the dissent states, constitutes plaintiff's cause of action being " 'totally barred or taken away *by* [*the*] *new act*.' " (Emphasis added.) The dissent asserts,

contrary to *In re Certified Questions*, that "[w]hether the statutory amendment at issue abolishes Buhl's cause of action outright or its application results in dismissal of her lawsuit, albeit after a judicial finding on the question of whether the danger was open and obvious, makes no difference. Either way, Buhl's 'accrued cause of action [is] totally barred or taken away by a new act.' "

However, to the extent that plaintiff's case is subject to dismissal under the open and obvious danger doctrine, it is *not* "totally barred or taken away" "by a new act"; in this particular case, the hazard was readily apparent, and thus the *facts* preclude recovery. In other words, plaintiff's cause of action is barred not "by a new act" but rather by a new act *plus* the particular facts relating to her injury. A dismissal based on factual infirmities is not a "legal bar" but a "factual bar." Accordingly, Rule 3 is inapplicable because a cause of action being barred by application of a new act plus particular facts simply cannot be squared with the language used by our Supreme Court, or by its discussion of Rule 3, in *In re Certified Questions*.

Even setting aside the dissent's misreading of the "by a new act" language from *In re Certified Questions*, its position here is curious—it would decide a *legal* issue (the retroactive availability of the open and obvious danger doctrine to municipalities) on the basis of a purely *factual* determination (whether there is merit to a defense claim that a particular hazard was open and obvious). However, because it involves a legal doctrine, the question whether the statute is to be applied retroactively must apply equally in all cases; the statute either is retroactive or it is not. However, as a question of fact, the open and obvious danger doctrine surely will not apply in every case in which it is

invoked. Some defendants will argue that a particular plaintiff is barred from recovery because a hazard was open and obvious, but a jury nevertheless will find factually that the hazard was not so readily apparent. Applying the dissent's position, then, courts would have to decide on a case-by-case basis whether a particular plaintiff's case would be defeated by application of the open and obvious danger doctrine; if the answer is that it would be, that would mean, according to the dissent, that the cause of action would be "totally barred or taken away by the new act" and thus the act could not be applied retroactively to such a case. This approach never would settle the question presented here but instead would require the legal determination of the retroactivity question to be made in each lawsuit, on a case-by-case basis. The dissent cites no authority for the proposition that the retroactivity decision must be decided anew in each case and that the decision will turn on the factual vagaries of a particular case.

The distinction between a cause of action failing for legal reasons as opposed to factual reasons is so common that the Michigan Court Rules distinguish between them. See MCR 2.116(C)(8) (governing motions for summary disposition based on a legal failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (governing motions for summary disposition based on failure of proof). The *In re Certified Questions* analysis under Rule 3 applies the same distinction. Applying that analysis here, the cause of action for injuries sustained on a municipal sidewalk remains extant; no one would say, in light of the statutory amendment at issue, that plaintiff's complaint fails to state a claim upon which relief can be granted in that the cause of action no longer exists. Consequently, for purposes of applying the *In re Certi-*

fied Questions test, plaintiff's cause of action has not been "totally barred or taken away by a new act." And of course, as noted earlier, reading "totally barred or taken away by a new act" in this manner means that the retroactivity question will be decided by a single legal standard and will not vary from case to case based on the facts.

Moreover, as noted, a relevant consideration for determining whether a party had a vested right is whether the new statute "would impair rights a party possessed when he acted . . . ." *Landgraf*, 511 US at 280. As one federal court of appeals has noted, a strong consideration in determining whether a plaintiff's rights have been impaired is whether the plaintiff relied on the state of the law prior to the statutory amendment. *Southwest Ctr for Biological Diversity v US Dep't of Agriculture*, 314 F3d 1060, 1062 (CA 9, 2002). However, as the *Southwest Ctr* court noted, "Surely the [plaintiff's] expectation of success in its litigation is not the kind of settled expectation protected by *Landgraf*'s presumption against retroactivity. As the [defendant] points out, if that expectation were sufficient then no statute would ever apply to a pending case unless Congress expressly made it so applicable. The *Landgraf* inquiry would become pointless." *Id*. at 1062 n 1.[3] The dissent here commits exactly that error when it states that "[t]he legal question before us is whether the Legislature clearly

[3] Our courts have made the same point. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370-371; 803 NW2d 698 (2010) ("[A] vested right is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.") (quotation marks and citation omitted).

stated its intention to apply 2016 PA 419 retroactively." That would be true for a Rule 1 analysis; it is incorrect for the Rule 3 and Rule 4 analyses applicable here because it would override and therefore make pointless any analysis under those rules.[4]

In the present case, the only claimed reliance on plaintiff's part is to the nonapplicability of the open and obvious danger doctrine. In the words of the dissent, 2016 PA 419 is a "game-changer" because it so radically changed the " 'expectation of success' in [plaintiff's] ligitation." As *Southwest Ctr* held, however, that is not the kind of settled expectation protected by *Landsgraf*. To the contrary, the United States Supreme Court has noted that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 US at 271. This principle explains cases

[4] The dissent dismisses our reliance on *Southwest Ctr* as based on a distinction between a right of action and a right of recovery and states that its position is based only on a right of action. However, no such distinction exists. *Southwest Ctr* involved a Freedom of Information Act exemption that was enacted after the plaintiff had filed suit; if the exemption was applicable, it was undisputed that it would bar the suit completely. The court held: "The [plaintiff] contends that application of [the exemption] 'impairs [a] right the [plaintiff] possessed when it acted,' because the [plaintiff] had a right to the information when it filed its suit (or when it made its earlier request) and it loses that right by application of the new exemption. But the 'action' of the [plaintiff] was merely to request or sue for information; it was not to take a position in reliance upon existing law that would prejudice the [plaintiff] when that law was changed." *Southwest Ctr*, 314 F3d at 1062 (cleaned up). *Southwest Ctr* thus flatly rejected the argument accepted by the dissent here that plaintiff "has a vested right to continue her cause of action under the substantive law in existence before the statutory amendment." Because plaintiff had no vested right in the preexisting substantive law, this case falls within Rule 4 rather than Rule 3.

such as *Brewer*, which denied retroactive application. In *Brewer*, an amendment to the Workers' Disability Compensation Act created "*an entirely new jurisdictional standard*, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan." *Brewer*, 486 Mich at 57.[5] Retroactive application thus would have upset expectations regarding employers' potential liability based on existing law by imposing "a new legal burden on out-of-state employers not previously subject to the jurisdiction of the Workers' Compensation Agency," *id*. at 58, and "also potentially enlarged existing rights for Michigan residents injured in other states under contracts of hire not made in Michigan," *id*.

In this case, by contrast, the allegations were of negligence leading to a slip and fall. By definition, no one expects to slip and fall; thus, the "familiar considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf*, 511 US at 270, have significantly less force. In other words, because the statute at issue relates to acts that necessarily are unplanned, it is not unreasonable, at least in the abstract, to expect that 2016 PA 419 would apply to antecedent events or transactions that would not have been changed even if the participants had been aware that a different legal regime might attach.

As our Supreme Court has stated in a different context, "[T]o have reliance[,] the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the

[5] Part I(C)(3) of this opinion discusses how the legislation at issue in *Brewer* created an entirely new jurisdictional standard, which is relevant to discussion of why the present case falls within Rule 4. For present purposes, it is sufficient to note that the legislation in *Brewer* upset reliance interests.

triggering event." *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000). However, as noted, a slip and fall is not something that is planned, and therefore there could not have been any reliance interest in avoiding a particular application of the law to such an occurrence. " 'An act of the Legislature, though it have retrospective effect, is not necessarily invalid, and does not, for that reason, come into conflict with any constitutional provision, unless vested, not potential, rights are disturbed.' " *Lahti*, 357 Mich at 594 (citation omitted). Rights regarding a slip and fall that has not yet occurred are, of course, potential only. On the morning of May 4, 2016, the date of plaintiff's injury, it is inconceivable that she would have acted differently if she had known that eight months later the Legislature would make the open and obvious danger doctrine applicable to any slip and fall that might occur on that day; in other words, in no way could she have reasonably relied on the existing state of the law, i.e., the inapplicability of the open and obvious danger doctrine, in going about her business and conducting her affairs.

The dissent cites *Vartelas v Holder*, 566 US 257, 272; 132 S Ct 1479; 182 L Ed 2d 473 (2012), for the proposition that plaintiff "need not demonstrate reliance on the prior law in structuring her conduct. *Landgraf* contains no such requirement." The dissent misreads both *Landgraf* and our majority opinion.

> While the presumption against retroactive application of statutes does not require a showing of detrimental reliance, *reasonable reliance has been noted among the "familiar considerations" animating the presumption*, see *Landgraf*, [511 US at 270] (presumption reflects "familiar considerations of fair notice, reasonable reliance, and settled expectations"). *Although not a necessary predicate for invoking the antiretroactivity principle, the likelihood*

> *of reliance on prior law strengthens the case for reading a newly enacted law prospectively*. [*Vartelas*, 566 US at 273-274 (citations omitted; emphasis added).]

For the reasons stated, plaintiff could not have reasonably relied on prior law, thereby failing to "strengthen[] the case for reading [2016 PA 419] prospectively." *Id*. at 274.

3. A REMEDIAL OR PROCEDURAL ACT THAT DOES NOT DESTROY A VESTED RIGHT; LEGISLATIVE OVERRULING OF PRIOR JUDICIAL DECISIONS

a. REINSTATING THE PREVIOUS STATE OF THE LAW

Finally, under Rule 4, a remedial or procedural act that does not destroy a vested right will be given retroactive effect even in instances in which the injury or claim is antecedent to the enactment of the statute. *In re Certified Questions*, 416 Mich at 571. "A statute is remedial or procedural in character if it is designed to correct an existing oversight in the law or redress an existing grievance." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 158-159; 725 NW2d 56 (2006) (quotation marks, citation, and brackets omitted). On the other hand, if the legislation enacts a substantive change to the law, it is to be given prospective application. *Johnson*, 491 Mich at 430. Under this analysis, "[a]n amendment may apply retroactively where the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regarding its meaning." *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006). Thus, our Supreme Court recognizes that if 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. This is so because legislatively reversing an erroneous judicial decision and reinstating the *status quo ante* corrects "an existing oversight in the law" and "redress[es] an existing grievance," *Davis*, 272 Mich App at 159 (quotation marks and citation omitted), and also "clarif[ies] an existing statute" and "resolve[s] a controversy regarding its meaning," *Mtg Electronic Registration Sys*, 271 Mich App at 126.

Brewer provides an example of this principle. An earlier decision, *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), overruled by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010), had held that the previous statute provided for application of workers' compensation coverage regarding out-of-state injuries only if the contract of hire had been made in Michigan. As previously noted, the amendment "created *an entirely new jurisdictional standard*, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan," *Brewer*, 486 Mich at 57, and thus was plainly a substantive change in the law that could not be applied retroactively, *id*. at 56-57. Continuing its analysis, the *Brewer* Court noted:

> Further undermining any notion of a legislative intent to apply the amendment of MCL 418.845 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 enacted by 2008 PA 499 created an entirely new jurisdictional standard, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan. *That is, this amendment did not restore the status quo before* Karaczewski, which required a Michigan contract of hire for

> jurisdiction, *but instead created a new rule* under which either a Michigan contract of hire or Michigan residency would suffice. [*Id*. at 57 (emphasis added; emphasis in original omitted).]

The obvious teaching of this aspect of *Brewer* is that if the legislation that overruled *Karaczewski* also had restored the pre-*Karaczewski* status quo, then the new enactment would have applied retroactively.

The rationale of *Brewer* regarding reinstatement of a prior doctrine is clear. By overturning a particular judicial decision, the Legislature states that the decision was erroneous. However, that fact alone is insufficient for retroactive application because, as *Brewer* shows, even when a previous decision is repudiated, if the legislation rejecting it imposes new burdens not previously extant or enlarges existing rights, it unsettles legitimate expectations. See *Bd of Trustees of City of Pontiac Police v City of Pontiac*, 502 Mich 868, 872 (2018) (ZAHRA, J., dissenting) ("Retroactive application of legislation presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.") (quotation marks and citation omitted). But so long as no vested right is affected, as is the case here, retroactive application is warranted. This conclusion is reinforced by the fact that by limiting that aspect of *Brewer* to legislative changes that restore the prior state of the law, the rule vitiates the unfairness that could result from retroactive application because " 'no right is destroyed when the law restores a remedy which had been lost.' " *Lahti*, 357 Mich at 589 (citation omitted). Accordingly, the Legislature's reinstatement of a prior doctrine that "had been lost" through judicial decision and that, according to the Legislature, should have applied all along works no unfairness because it is "designed to correct an existing oversight in the law or

redress an existing grievance." *Davis*, 272 Mich App at 159 (quotation marks, citation, and brackets omitted). It is also a permissible mechanism by which "the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regarding its meaning." *Mtg Electronic Registration Sys*, 271 Mich App at 126.

The *Brewer* restoration rule applies to 2016 PA 419. In this case, the statutory amendment overturned legal doctrine that had made the open and obvious danger doctrine inapplicable to claims against a municipality involving a statutory duty to maintain a sidewalk, and as explained in detail later in this opinion, the act also restored the *status quo ante* of the repudiated legal doctrine.

b. THE CHANGES BROUGHT ABOUT BY 2016 PA 419, INCLUDING REINSTATEMENT OF THE 1964 ACT

At common law, municipalities such as defendant were not subject to liability at all. Rather, they were cloaked with "governmental immunity." See *Pohutski v City of Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002). In 1964, the Legislature enacted the GTLA. See 1964 PA 170. That act generally preserved governmental immunity involving sidewalks, providing that "[t]he duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed for vehicular travel and shall not include sidewalks, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel." *Id*. at § 2.

In 1999 PA 205, the Legislature enacted the first version of § 2a, the provision at issue here. The 1999 act generally maintained immunity for municipal cor-

porations for "injuries arising from[] a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk . . . ." 1999 PA 205, § 2a(1). However, the 1999 act also provided that there would be liability if, "[a]t least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk . . . ." *Id*. at § 2a(1)(a). And the act provided that "[a] discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." *Id*. at § 2a(2).

Importantly, § 12 of the GTLA provides that "[c]laims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons." MCL 691.1412. In fact, that provision has never been modified or repealed and has remained in force as enacted since the GTLA's inception in 1964. We interpret statutory language regarding the Legislature's intent as of the time of enactment. *Oole v Oosting*, 82 Mich App 291, 295; 266 NW2d 795 (1978). By using the word "available," the Legislature preserved defenses that, as of the date of passage of § 12, were legally recognized. As of 1964, when § 12 was enacted, it was well established that "claims sounding in tort brought against private persons" were subject to a common-law defense that the risk of a dangerous condition was open and obvious, and thus that a person who was injured under such circumstances was barred from recovering, see, e.g., *Kaukola v Oliver Iron Mining Co*, 159 Mich 689; 124 NW 591 (1910).

In *Jones v Enertel, Inc*, 467 Mich 266; 650 NW2d 334 (2002), in light of the statutory enactments, our Supreme Court addressed the availability of the open and obvious danger doctrine to a municipality that allegedly failed to maintain a sidewalk in reasonable repair. "The basic duty owed to an invitee by a premises possessor is 'to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.' " *Id*. at 269 (citation omitted). The Court noted that "this duty does not generally require a premises possessor to remove open and obvious conditions because, absent special aspects, such conditions are not unreasonably dangerous precisely because they are open and obvious." *Id*. The Court concluded:

> However, such reasoning cannot be applied to the statutory duty of a municipality to maintain sidewalks on public highways because the statute requires the sidewalks to be kept in "reasonable repair." The statutory language does not allow a municipality to forego such repairs because the defective condition of a sidewalk is open and obvious. Accordingly, we conclude that the open and obvious doctrine of common-law premises liability cannot bar a claim against a municipality under MCL 691.1402(1). [*Id*.][6]

The Court also held that municipal corporations could not rely on the statutory language of § 12 of 1964 PA 170, providing that "[c]laims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons," to invoke the open and obvious danger doctrine. The Supreme Court

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[6] This Court had reached the same result in other cases. See, e.g., *Walker v Flint*, 213 Mich App 18, 23; 539 NW2d 535 (1995). For ease of reference, this opinion uses the term "the *Jones* doctrine" to refer to all such cases, whether decided by our Supreme Court or this Court.

explained that because the open and obvious defense has no application to the statutory duty of a municipality for the reasons already explained in its opinion and discussed earlier, that defense simply did not apply, regardless of the general rule in § 12. *Jones*, 467 Mich at 270-271.

Accordingly, as a matter of law under the *Jones* doctrine, the open and obvious danger defense was not available to a municipality sued for injuries caused by a sidewalk that it had a statutory duty to maintain. And there things stood until the Legislature passed 2016 PA 419.

As noted, the language of 2016 PA 419, § 2a(5) provides, "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." Given the development of the law culminating in the *Jones* doctrine, it is readily apparent that the Legislature intended to abrogate that doctrine. "[A] general rule of statutory construction is that the Legislature is presumed to know of and legislate in harmony with existing laws." *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016) (quotation marks and citation omitted). The 1964 act provided that all defenses available to private parties were available under it; those defenses included the open and obvious danger doctrine. Nevertheless, and as a matter of law under the *Jones* doctrine, a hazard being open and obvious was inapplicable as a defense to claims involving a municipal corporation's statutory duty to maintain a sidewalk in reasonable repair. The Legislature then passed 2016

PA 419, providing that a municipal corporation "may assert . . . *any* defense available under the common law," and even though "any defense" necessarily includes the open and obvious danger doctrine, to further ensure that there were no ambiguities, the Legislature added the words "including, but not limited to, a defense that the condition was open and obvious." 2016 PA 419, § 2a(5) (emphasis added).

c. THE *BREWER* RETROACTIVITY RULE APPLIED TO 2016 PA 419

The sequence of events recited earlier shows that the Legislature abrogated the *Jones* doctrine, the first part of the *Brewer* retroactivity test. It would be difficult to think of words that more precisely reject the rationale of the *Jones* doctrine than do the words of § 5 of 2016 PA 419. The 1964 act had afforded municipalities sued under the act "*all* of the defenses available to claims sounding in tort brought against private persons," 1964 PA 170, § 12 (emphasis added); in the aftermath of *Jones*, the 2016 act afforded those same municipalities "*any* defense available under the common law with respect to a premises liability claim," 2016 PA 419, § 2a(5) (emphasis added). There is no material distinction in meaning between "all" and "any"; our Supreme Court has noted that the word " '[a]ny' is defined as 'every; all.' " *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 527; 734 NW2d 533 (2007) (citation omitted). Moreover, making "any" defenses applicable to claims against a municipality, expressly including the open and obvious danger doctrine, was the only substantive change the amendment wrought. Indeed, if 2016 PA 419 was *not* intended to overrule *Jones*, the Legislature had no discernable purpose in enacting it. "When construing a statute, the court should presume that every word

has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory." *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 543; 606 NW2d 45 (2000). Based on the language employed by the Legislature as well as the rule of statutory construction against surplusage, we find that the 2016 act directly repudiated and overruled the *Jones* doctrine by making clear that the open and obvious danger doctrine was to be available to municipal corporations that had a statutory duty to maintain a sidewalk.[7]

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[7] The dissent cites *Adrian Sch Dist v Mich Pub Sch Employees Retirement Sys*, 458 Mich 326, 337; 582 NW2d 767 (1998), for the proposition that the 2016 act cannot be construed to clarify the Legislature's intent because only "when a legislative amendment is enacted *soon* after a controversy arises regarding the meaning of an act" is it "logical to regard the amendment as a legislative interpretation of the original act . . . ." (Quotation marks and citation omitted; emphasis added.) The dissent states that the 14 years that passed between the Supreme Court's decision in *Jones* and the 2016 enactment is too lengthy a period of time to inform our analysis. However, *Adrian Sch Dist* involves a different point than did *Brewer*. In *Adrian Sch Dist*, the Legislature amended a statute "as a ratification of the position of the retirement board," *id*. at 337; see also *id*. at 338 n 11 ("We do not give the 1996 amendment retroactive effect. Rather, we give effect to the retirement board's 1993 declaratory ruling."), which did not necessarily reflect the position originally set forth by the Legislature. In *Brewer* and here, by contrast, the Legislature acted to conclusively reaffirm the position *it* had previously taken. The dissent cites no authority, and we have found none, to indicate that there is a temporal limit on the Legislature's authority to overrule a precedent with which it disagrees and to thereby reinstate its previous exposition of the law; and 14 years is not a particularly lengthy period preceding a legislature's decision to statutorily reverse a court decision. See Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L J 331, 425, 427, 428 (1991), citing the following: PL 100-703, § 201; 102 Stat 4674, 4676 (1988), overruling *United States v Morton Salt Co*, 338 US 632; 70 S Ct 357; 94 L Ed 401 (1950), after 38 years; PL 99-654, § 2; 100 Stat 3660, 3660-3663 (1986), overruling *Williams v United States*, 327 US 711; 66 S Ct 778; 90 L Ed 962 (1946), after 40 years; PL 99-628, § 5(b)(1); 100 Stat 3510-3511 (1986), overruling *Caminetti v United States*, 242

For retroactivity to apply, the second prong of the exception to the *Brewer* test requires not only that a statutory amendment overrule a prior judicial decision but also that in overruling the decision the Legislature return the state of the law to the predecision status quo. For the same reasons, 2016 PA 419 did so by reinstating for municipal corporations all common-law defenses as had been provided in the 1964 act.

Thus, by enacting 2016 PA 419, the Legislature has stated that the *Jones* doctrine was not what it had intended the law to be; rather, the amendment shows that it was the Legislature's intent for defenses available to private parties—as provided in the 1964 act—to have applied all along. In essence, the amendment states, "The *Jones* doctrine is overruled," thereby satisfying the first prong of *Brewer*. In addition, the remainder of the statute essentially states, "And we never intended for the *Jones* doctrine to be the law, so we are reinstating the law as it had been set forth in the 1964 act," thereby satisfying the second prong of *Brewer*. By so acting, the Legislature clarified its intent regarding the previous law and settled the controversy created by the *Jones* doctrine regarding its meaning; 2016 PA 419 is to be applied retroactively.

It is this second aspect of the amendment, in which the Legislature clarified that it never had intended for the *Jones* doctrine to be the law, that the dissent rejects, stating that "applying 2016 PA 419 retroactively eliminates the city's duty" and thereby impairs plaintiff's vested rights. The dissent states that *Brewer* stands for the rule that "[e]ven if the Legislature acts to invalidate a prior decision of [the Supreme] Court,

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US 470; 37 S Ct 192; 61 L Ed 442 (1917), and *Cleveland v United States*, 329 US 14; 67 S Ct 13; 91 L Ed 12 (1946), after 69 and 40 years respectively.

the amendment is limited to prospective application if it enacts a substantive *change* in the law." *Brewer*, 486 Mich at 56, citing *Hurd v Ford Motor Co*, 423 Mich 531, 533-534; 377 NW2d 300 (1985) (emphasis added). That is of course true but not relevant—the point of the reinstatement doctrine is that if the Legislature overrules a judicial decision by restoring the *status quo ante*, the Legislature demonstrates what it intended the law to be all along; under such circumstances, the new legislation does not enact a substantive change in the law.

This point demonstrates the fundamental disagreement between the majority and the dissent. The majority's view is that the Legislature, through the 1964 act and 2016 PA 419, clearly manifested what its intention was for the law to have been all along, i.e., the availability of the open and obvious danger doctrine to municipalities, and thus properly understood, the 2016 act did not effect a change in the law. The dissent's view is that the *Jones* doctrine was the law prior to the enactment of 2016 PA 419, notwithstanding that the Legislature has now clearly manifested its view that the *Jones* doctrine was erroneous all along. Thus, the dissent views retroactive application of 2016 PA 419 as improperly denying plaintiff a right because the act constituted a substantive change in the law; the majority's view is that allowing plaintiff to reap the benefits of a repudiated rule—a rule that the Legislature has conclusively stated was incorrect and never should have applied—would constitute an unwarranted windfall for plaintiff because 2016 PA 419 does not constitute a substantive change in the law and therefore does not impair a vested right.[8]

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[8] The dissent also states that the discussion in *Brewer* of the reinstatement rule is dicta. "[S]tatements concerning a principle of law not

While it might be true in some sense that the amendment changed the city's duty, as the dissent argues, that change only came about because of the Legislature's determination that courts had been misapplying that duty all along. Therefore, this change did not affect a vested right because " 'no right is destroyed when the law restores a remedy which had been lost.' " *Lahti*, 357 Mich at 589 (citation omitted). The Legislature's reinstatement of the prior legal standard, which "had been lost" through application of the *Jones* doctrine and which, according to the Legislature in 2016 PA 419, should have applied all along, works no unfairness and may be applied retroactively because it was "designed to correct an existing oversight in the law or redress an existing grievance." *Davis*, 272 Mich App at 159 (quotation marks, citation, and brackets omitted). Our analysis thus fully complies with the requirement that we look beyond the label of "remedial" to the substance of whether an amendment affects substantive rights:

> "[W]e have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as 'remedial.' In that regard, we agree with Chief Justice RILEY's plurality opinion in *White v General Motors Corp*, [431 Mich 387; 429 NW2d 576 (1988),] that the term 'remedial' in this context should *only be employed*

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essential to determination of the case are obiter dictum and lack the force of an adjudication." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007) (quotation marks and citation omitted). The discussion in *Brewer* is not dicta, given that it begins with the words "[f]urther undermining" and then continues the analysis, demonstrating that it was part of the Supreme Court's rationale. *Brewer*, 486 Mich at 57. The dissent's citation of *Hurd* also is unavailing because *Hurd* did not discuss the four-part test of the *In re Certified Questions* line of cases but merely relied on a lack of expressed legislative intent for retroactive application. See *Hurd*, 423 Mich at 535.

> *to describe legislation that does not affect substantive rights.* Otherwise, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent." [*Johnson*, 491 Mich at 433 (citation omitted).]

No one has a substantive right to litigate based on an erroneous legal rule; quite the contrary is true. The Legislature's action in repudiating and clarifying the correct interpretation of the *Jones* doctrine is therefore remedial and plainly cannot violate any substantive right of plaintiff.

Because the Legislature has told us that the *Jones* doctrine never should have applied, 2016 PA 419 did not enact a substantive change in the law. The dissent cannot explain how an abrogated doctrine, coupled with a legislative determination to instead impose the intended *status quo ante* and allow a defense that should have applied all along, can result in a duty and thus a vested right in plaintiff's favor, except by assuming that the *Jones* doctrine was the law all along. But by doing so, the dissent simply reiterates the rationale of *Jones*, implicitly rejecting the Legislature's authority to determine the propriety of *Jones* with regard to plaintiff under the circumstances applicable here.[9]

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[9] The dissent relies heavily on this Court's unpublished opinion in *Schilling v Lincoln Park*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019 (Docket No. 342448). Few rules are as clearly established as that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Therefore, it is beyond dispute that *Schilling* is not controlling. However, unpublished opinions may be cited for their persuasive value. See *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017). However, *Schilling* is not persuasive because it did not address the Legislature's overruling of the *Jones* doctrine, the reinstatement of the *status quo ante*, and the application of the *Brewer* rule, which are the major bases for the majority opinion here. Accordingly, it is not clear what value the dissent properly ascribes to *Schilling*.

Moreover, to reach its conclusion, the dissent disputes that the open and obvious danger doctrine is a "defense" within the meaning of 2016 PA 419 by reading it in a technical manner as affecting the duty of a municipal corporation. However, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. While the term "affirmative defense" has a technical legal meaning, the term "defense" does not. "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." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712; 550 NW2d 797 (1996), aff'd 457 Mich 593 (1998). "An affirmative defense presumes liability by definition." *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). A "defense," by contrast, is " '[t]hat which is offered and alleged by the party proceeded against in an action or suit . . . to diminish plaintiff's cause of action or defeat recovery,' " *Roberson Builders, Inc v Larson*, 482 Mich 1138, 1143 (2008) (MARKMAN, J., dissenting), quoting *Black's Law Dictionary* (6th ed), or "that which is alleged by the party proceeded against in a suit as a reason why plaintiff should not recover or establish what he seeks," *Gelman Sciences, Inc v Fireman's Fund Ins Cos*, 183 Mich App 445, 448; 455 NW2d 328 (1990). A defense, therefore, is a nontechnical concept that can be either factual, legal, or a combination. And because it is a nontechnical concept, it is construed through "common and approved usage of the language[.]" MCL 8.3a.

In this case, the Legislature created a statutory hybrid under which municipalities are obligated to maintain sidewalks but under which an injured party has no private right of recovery if a sidewalk nevertheless has an open and obvious defect because such an open and obvious defect is a "defense" to liability. 2016 PA 419, § 5. The Legislature is permitted to define terms and causes of action in such a manner, and by restoring the right to invoke as a "defense" the open and obvious danger doctrine, which had been lost through the *Jones* doctrine, the Legislature in no way impaired any substantive right of plaintiff. See *Lahti*, 357 Mich at 589 (" '[N]o right is destroyed when the law restores a remedy which had been lost.' ") (citation omitted).

Simply put, we find that the Legislature's enactment of 2016 PA 419, which did not legally bar plaintiff's cause of action, and through which the Legislature overruled the *Jones* doctrine and reinstated the pre-*Jones* state of the law, overcomes the presumption for prospective application and thus has retroactive effect to events that preceded its enactment, including plaintiff's injury. Therefore, defendant can avail itself of the open and obvious danger defense, and we next turn to an analysis of how the open and obvious danger doctrine applies to the facts of this case.

II. OPEN AND OBVIOUS

Because the amendment has retroactive effect, we must determine whether there is a genuine issue of material fact on the question whether the condition was open and obvious. Plaintiff argues that the trial court erred when it determined that the condition was open and obvious. We disagree.

This Court reviews de novo a lower-court decision on a motion for summary disposition. *Moraccini*, 296 Mich App at 391. Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In deciding a motion for summary disposition under this subrule, the moving party must "identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). If the moving party meets the required burden, the burden then shifts to the party opposing the motion to provide "specific facts" that show that there is "a genuine issue of disputed fact." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court evaluates all evidence "in the light most favorable to the party opposing the motion." *Id*.

A condition is open and obvious when "an average person of ordinary intelligence [would] discover the danger and the risk it presented on casual inspection[.]" *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009). This is an objective test. *Id*. Because the test is objective, a court is to focus on "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

In *Price*, the plaintiff was injured when she fell after walking into a "one-inch-long broken wire or 'barb' protruding from [a] bin at ankle level" at a grocery store. *Price*, 284 Mich App at 498-499. This Court held that there was a genuine issue of material fact regarding whether "an ordinary user upon casual inspection" could have discovered the wire because "[a] jury could

reasonably infer that a casual inspection of the premises in which plaintiff shopped would not have revealed the barb, in light of its small size, its location at close to floor level, the impediment to visibility posed by the bulk of the candy-filled bin, and [an employee's] failure to detect the anomaly . . . ." *Id*. at 501-502.

In this case, plaintiff argues that the defect was not open and obvious because she saw only the crack in the sidewalk, not the height difference in the cement slabs after the crack. Defendant argues that the defect was open and obvious because plaintiff testified that she was not looking at the ground as she walked toward the store and because she admitted that she was able to see the defect.

While defendant supplied photographs of the area where plaintiff fell, these photographs were taken at some point after the area had changed because a tree that had been there at the time of plaintiff's injury was cut down by the time defendant's photo was taken. Plaintiff provided a screenshot from Google Maps that showed that there was still a tree in that location on September 2016, several months after her injury. Plaintiff also provided a photograph in which the shade from the tree shows that the tree was still intact at the time of the photograph. However, plaintiff does not claim that the tree obscured her view of the defect at the time of her fall.

While plaintiff had been to Trend Express in the past, she testified that she had never entered the store through the front entrance prior to the date of her injury. It was raining and "darker" on the day of her injury, which could have obscured the dip in the sidewalk. However, plaintiff's photographs clearly show that the sidewalk was sloping at an upward angle (which was a different angle than the surrounding

slabs of sidewalk) where she testified that she tripped. Notably, plaintiff also testified that nothing was obscuring her view and that she did not discern the differing heights only because she was looking at the store rather than the ground, but not because the condition precluded her from being able to see the condition if she had looked. Indeed, plaintiff admitted that she would have seen the condition of the sidewalk if she had been looking. Thus, plaintiff would have "discover[ed] the danger and the risk it presented on casual inspection[.]" *Id*. at 501. Accordingly, the condition was open and obvious, and the trial court properly granted defendant's motion for summary disposition on this ground.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

O'BRIEN, P.J., concurred with TUKEL, J.

LETICA, J. (*dissenting*). I respectfully dissent. The sole question is whether the amendment allowing a municipality to employ an open and obvious danger defense to an action brought under the defective-sidewalk exception to governmental immunity, MCL 691.1402a, may be applied retroactively. In my opinion, the statutory language confirms that the Legislature intended prospective application. In addition, this portion of the statutory amendment must apply prospectively because it is a substantive change impairing Jennifer Buhl's vested rights, as plainly evidenced by the circuit court's dismissal.[1] I would reverse and remand for further proceedings.

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[1] Another panel of this Court earlier reached the same conclusion. *Schilling v Lincoln Park*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019 (Docket No. 342448). See also *Farley v United States*, unpublished opinion of the United States District Court for the Southern District of West Virginia, issued September 30, 2015

I. STANDARD OF REVIEW

The question whether the amendment of MCL 691.1402a, which added an open and obvious danger defense, applies retroactively is a question of law reviewed de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

II. THE APPLICABLE LEGAL PRINCIPLES

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v USI Film Prod*, 511 US 244, 265; 114 S Ct 1483; 128 L Ed 2d 229 (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id*. Applying legislation retroactively " 'presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.' " *Downriver Plaza Group v Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994), quoting *Gen Motors Corp v Romein*, 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

(Case No. 2:13-cv-17090) (following the state supreme court's abrogation of the open and obvious danger defense, the federal district court declined to retroactively apply a West Virginia statute, W Va Code 55-7-28, reinstating the plaintiff's preexisting cause of action). Also, a separate panel of this Court held that an earlier 2012 amendment, 2012 PA 50, applied prospectively; the 2012 amendment added a statutory presumption describing circumstances under which a municipality would have satisfied its duty to keep a sidewalk in reasonable repair. *Sufi v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued February 17, 2015 (Docket No. 312053), p 6 ("[T]he amended version of MCL 691.1402a is inapplicable to plaintiff's claims because it is prospective, not retroactive.").

For these reasons, our Supreme Court requires the Legislature to "make its intentions clear when it seeks to pass a law with retroactive effect." *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014). Moreover, in determining whether a law has retroactive effect, our courts keep four principles in mind:

> 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.[2] 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. [*Id*. at 38-39 (citations omitted).]

III. THE STATUTORY LANGUAGE SUPPORTS PROSPECTIVE APPLICATION

The first principle that this Court must consider is whether the amendment's language indicates that it is to have retroactive effect. "In determining whether a statute should be applied retroactively or prospectively only, '[t]he 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*, 463 Mich at 583, quoting *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715

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[2] I agree with the majority that the second principle "relate[s] to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," *In re Certified Questions from the US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982), and is not at issue here.

(1985) (alteration in original). "Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested." *Brewer v A D Transp Express, Inc*, 486 Mich 50, 56; 782 NW2d 475 (2010). Indeed, "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Frank W Lynch & Co*, 463 Mich at 584.[3] "Use of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively." *Johnson v Pastoriza*, 491 Mich 417, 430; 818 NW2d 279 (2012). To the contrary, when the Legislature provides that a law will take immediate effect, this "only confirms its textual prospectivity." *LaFontaine Saline, Inc*, 496 Mich at 40. In this case, the Legislature directed the statutory amendment "to take immediate effect" and used no retroactive language. 2016 PA 419. This weighs against retroactive effect and, instead, confirms that the statutory amendment applies prospectively.

IV. PROSPECTIVE APPLICATION IS ALSO REQUIRED BECAUSE THE AMENDMENT TAKES AWAY OR IMPAIRS PLAINTIFF'S PREEXISTING CAUSE OF ACTION

The third question to be answered in determining whether a statutory amendment may be applied retroactively is whether it "takes away or impairs vested rights acquired under existing laws, or creates a new

[3] During the 2016 session alone, the Legislature passed several statutes explicitly providing for retroactive application. See, e.g., 2016 PA 7, enacting § 1, amending MCL 205.92 ("This amendatory act is retroactive and is effective December 15, 2013."); 2016 PA 15, enacting § 1, adding MCL 600.6094a ("This amendatory act applies retroactively to all judgments entered after May 6, 2015."); 2016 PA 283, enacting § 2, amending the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. ("This amendatory act is curative and applies retroactively as to the following: . . . ."); 2016 PA 372, enacting § 1, amending MCL 205.54w ("This amendatory act is retroactive and effective for taxes levied after December 31, 2012.").

obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *In re Certified Questions from the US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982), quoting *Hughes v Judges' Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1979) (quotation marks omitted). Stated otherwise, "this rule is . . . triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act." *In re Certified Questions*, 416 Mich at 577.

The circuit court ruled that Buhl had no vested right in not having an open and obvious danger defense raised. The court explained that Buhl was "not getting left out in the cold" because she "still has the very claim that she had on the day that she fell and was injured." The circuit court added that the city's ability to raise the open and obvious danger defense was simply "a procedural change and not a substantive change in [Buhl's] ability to bring her claim . . . ." The majority accepts these conclusions, holding that the statutory amendment operates in a remedial or procedural manner and, therefore, may be applied retroactively.

However, the law is clear that "the term 'remedial' in this context should only be employed to describe legislation that *does not affect substantive rights*." *Frank W Lynch & Co*, 463 Mich at 585 (emphasis added). And the Michigan Supreme Court has held that when an amended statute is enacted to invalidate a prior decision of the Court, it "effect[ed] a substantive change in the law" and would apply prospectively. *Hurd v Ford Motor Co*, 423 Mich 531, 534; 377 NW2d 300 (1985). A substantive right is one "that can be protected or enforced by law; a right of substance rather than form." *Black's Law Dictionary* (10th ed), p 1520.

Michigan law is "clear that once a cause of action accrues,—*i.e.,* all the facts become operative and are known—it becomes a 'vested right'." *In re Certified Questions*, 416 Mich at 573. A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994). In this case, Buhl's cause of action accrued on May 4, 2016—the day she fell. This was well before the January 4, 2017 effective date of the statutory amendment.

The next question is not simply whether the statutory amendment destroyed Buhl's ability to sue, but also whether it *impaired* Buhl's vested right or her substantial rights. To answer this question it is helpful to understand how the open and obvious danger defense functions in a premises-liability action and how it previously functioned in a suit seeking recovery for an injury resulting from a municipal corporation's failure to maintain its sidewalk in reasonable repair.

In general, "whether a duty exists in a tort action is . . . a question of law to be decided by the court, and when a court determines that a duty was not owed, no jury-submissible question exists." *Hoffner v Lanctoe*, 492 Mich 450, 476; 821 NW2d 88 (2012) (citation omitted). A possessor of land owes no duty to an invitee to protect from, or to warn the invitee of, dangers that are open and obvious "because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*. at 460-461. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461. This is an objective standard that is

not dependent on whether the plaintiff actually discovered the hazard. *Id*. The open and obvious danger doctrine is not an exception to the duty or duties owed by a landowner; instead, it is an integral part of the definition of that duty or duties. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Accordingly, "establishing whether a duty exists in light of the open and obvious nature of a hazard is an issue within the province of the court." *Hoffner*, 492 Mich at 476.

Before the statutory amendment at issue in this case became effective, our appellate courts held that the open and obvious danger doctrine of common-law premises liability was "inapplicable to a claim that a municipality violated its statutory duty to maintain a sidewalk on a public highway in reasonable repair." *Jones v Enertel, Inc*, 467 Mich 266, 267; 650 NW2d 334 (2002). See also *Haas v Ionia*, 214 Mich App 361; 543 NW2d 21 (1996); *Walker v Flint*, 213 Mich App 18; 539 NW2d 535 (1995). Unlike a typical landowner, who had no duty to make repairs to protect invitees, the statutory exception to governmental immunity imposed a duty on a municipality to keep its sidewalks in good repair so as to be reasonably safe for public travel. *Jones*, 467 Mich at 268-269; *Haas*, 214 Mich App at 362; *Walker*, 213 Mich App at 22-23. As this Court explained, if the open and obvious danger doctrine applied, a municipality "could meet its statutory duty merely by allowing the . . . sidewalks to deteriorate until their appearance made any danger apparent to the public." *Haas*, 214 Mich App at 363. "Thus, absolving the city of liability in this situation would be tantamount to allowing the open and obvious danger rule to swallow the statutory duty to maintain . . . sidewalks[] in good repair." *Id*.[4] Finally,

[4] Although "the openness and obviousness of the danger does not absolve a municipality of its statutory obligation to repair its side-

the Supreme Court had no difficulty rejecting the city's argument that, under MCL 691.1412,[5] it must be allowed to advance "the open and obvious 'defense' . . . available to private parties," holding:

> We disagree. Assuming for purposes of discussion that MCL 691.1412 read in isolation would allow [the city] to use the open and obvious doctrine as a defense in the present case, we conclude that MCL 691.1412 would have to yield to the more specific statutory duty to maintain highways in reasonable repair under MCL 691.1402(1). "[W]here a statute contains a general provision and a specific provision, the specific provision controls." *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994). . . . MCL 691.1402(1) imposes a duty on municipalities specific to maintaining highways (including sidewalks on highways) in reasonable repair. In contrast, MCL 691.1412 applies generally to all claims under the [governmental tort liability act]. Thus, the specific provisions of MCL 691.1402(1) prevail over any arguable inconsistency with the more general rule of MCL 691.1412. [*Jones*, 467 Mich 270-271 (second alteration in original).]

In this case, the statutory amendment vitiates the municipal corporation's duty through application of the open and obvious danger doctrine, resulting in the dismissal of Buhl's lawsuit. Buhl's substantial rights and vested right were negatively impacted. As the *Schilling* panel succinctly explained when confronted with the identical question of how the statutory amendment adding an open and obvious danger defense applied:

> [P]laintiff had a vested right in her cause of action that accrued when her trip and fall accident occurred before the

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walks," it may establish comparative negligence on the plaintiff's part. *Haas*, 214 Mich App at 364.

[5] MCL 691.1412 provides that claims brought under the governmental tort liability act, MCL 691.1401 *et seq*., "are subject to all of the defenses available to claims sounding in tort brought against private persons."

effective date of the statutory amendment under 2016 PA 419. Under the applicable version of MCL 691.1402a, at the time her action accrued, the City was liable for a breach of its statutory duty to maintain its sidewalk in reasonable repair, so long as plaintiff could prove that the City had the requisite knowledge of the defect and could rebut the statutory presumption that the sidewalk was in reasonable repair. MCL 691.1402a(1)-(3). Before the amendment under 2016 PA 419, the municipality could not assert an open and obvious defense to claims brought pursuant to its statutory duty under MCL 691.1402a. *Jones*, 467 Mich at 269-270; *Walker*, 213 Mich App at 22-23.

The amendment, adding subsection (5) to permit a municipality to assert the open and obvious defense, in effect, now additionally absolves a municipality of liability stemming from a dangerous condition that is open and obvious, i.e., where "it is reasonable to expect that an average person with ordinary intelligence would have discovered [the condition] upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Accordingly, the amended version of MCL 691.1402a not only shields a municipality from liability for injuries caused by a vertical discontinuity defect of less than two inches, MCL 691.1402a(3), but additionally shields a municipality from liability if the dangerous condition of the sidewalk was open and obvious. MCL 691.1402a(5). Thus, *the amendment clearly further limits a municipality's liability for injuries arising from a defective sidewalk, and conversely, effectively precludes an injured party from bringing a claim, where he or she previously could, if the dangerous condition of the sidewalk was open and obvious*. The amendment under 2016 PA 419, thus, would impair and effectively destroy any claim resulting from a condition of the sidewalk that is open and obvious and not unreasonably dangerous. *Hoffner*, 492 Mich at 461-463. [*Schilling*, unpub op at 11 (emphasis added; second alteration in original).]

Just like the plaintiff in *Schilling*, Buhl may sue, but if the dangerous condition of the municipality's sidewalk is open and obvious, her suit is doomed to dis-

missal because she cannot establish that the municipality had a duty.[6] See *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006) (identifying a duty owed the plaintiff as an essential element of actions sounding in premises liability). Stated otherwise, Buhl's accrued cause of action is "totally barred or taken away by [the] new act." *In re Certified Questions*, 416 Mich at 577. This statutory amendment is not remedial or procedural; it is a substantive game-changer and applies prospectively.

V. RESPONSE TO THE MAJORITY

The majority reframes Buhl's argument, suggesting that she has no vested right but simply an " 'expecta-

[6] Other jurisdictions have recognized that a statute providing a defense that may operate to bar a plaintiff's cause of action applies prospectively. See, e.g., *Anagnost v Tomecek*, 390 P3d 707, 712; 2017 OK 7 (2017) (reversing the trial court's dismissal retroactively applying an amendment that "create[d] a new defense to causes of action involving first amendment rights [because it] effectively provide[d] immunity from suit and would act as a complete bar to the plaintiff's claim"); *Pollock v Highlands Ranch Community Ass'n, Inc*, 140 P3d 351, 354 (Colo App, 2006) (reversing the trial court's grant of summary disposition after retroactively applying a release statute that "recognizes a substantive defense to negligence claims that often will operate as a complete bar to relief"); *Cole v Silverado Foods, Inc*, 78 P3d 542, 548; 2003 OK 81 (2003) (reinstating the Workers' Compensation Court judge's refusal to retroactively apply an amendment that refashioned a statutory defense "into a different and more extensive liability-defeating mechanism" that "destroy[ed] the claimant's right to present her claim free from being subjected to new and more extensive instruments of destruction"); *Irvine v Salt Lake Co*, 785 P2d 411 (Utah, 1989) (reversing the trial court's dismissal via retroactive application of a statute providing for a governmental-immunity defense for flood-control activities when the conduct giving rise to the cause of action occurred before the amendment went into effect); *Brookins v Sargent Indus, Inc*, 717 F2d 1201, 1203 (CA 8, 1983) (reversing the trial court's application of a new defense because it "potentially cuts off a plaintiff's right to recover" and adding that "we have no difficulty in concluding that this is not a procedural change but is a substantive change in rights and obligations").

tion of success' " in her litigation. I recognize that there is a distinction between a right of action and a right of recovery. Accrual of a cause of action means the right to institute and maintain the action. On the other hand, recovery depends not only on successful litigation but also on the defendant's ability to pay. Buhl, however, does not argue that she has a vested right to recover damages from the municipality; instead, she contends that she has a vested right to continue her cause of action under the substantive law in existence before the statutory amendment. Again, the law recognizes that Buhl has a vested right in her cause of action. *Id*. at 573. Whether the statutory amendment at issue abolishes Buhl's cause of action outright or its application results in dismissal of her lawsuit, albeit after a judicial finding on the question whether the danger was open and obvious, makes no difference. Either way, Buhl's "accrued cause of action [is] totally barred or taken away by a new act." *Id*. at 577.

Moreover, the majority's discussion of the relevancy of reliance to determine the amendment's retroactivity is unpersuasive. Even if Buhl was not relying on the municipality's statutory duty when she fell, she need not demonstrate reliance on the prior law in structuring her conduct. *Landgraf* contains no such requirement. *Vartelas v Holder*, 566 US 257, 272; 132 S Ct 1479; 182 L Ed 2d 473 (2012). Rather, "[t]he essential inquiry . . . is 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Id*. at 273. That is precisely what happened here.

To buttress its conclusion that the Legislature's intent to overrule our Supreme Court's 2002 *Jones* decision renders the 2016 statutory amendment remedial and retroactive, the majority extracts from *Brewer* a

rule that substantive changes may be applied retroactively in one circumstance: "if 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." But in *Brewer*, the Supreme Court explained that "[e]ven if the Legislature acts to invalidate a prior decision of [the Supreme] Court, the amendment is limited to prospective application if it enacts a substantive change in the law." *Brewer*, 486 Mich at 56, citing *Hurd*, 423 Mich at 533. See also *Johnson*, 491 Mich at 430, quoting *Brewer*, 486 Mich at 56. The Supreme Court did not incorporate the majority's rule. See also *Frank W Lynch & Co*, 463 Mich at 585 ("[W]e have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as 'remedial.' "). Thus, while the majority applies a rule it derives from *Brewer*, I discern only nonbinding obiter dictum.[7] *Perry v Sied*, 461 Mich 680, 687 n 9; 611 NW2d 516 (2000) ("[O]bservations by way of obiter dicta are not binding.").

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[7] After concluding that there was no language clearly manifesting a legislative intent to apply the new statute retroactively, the Supreme Court held that "the amendment applies only to injuries occurring on or after" its effective date. *Brewer*, 486 Mich at 56. The Court also reviewed the effective-date language in 2008 PA 499 ("to take immediate effect") and held that it, too, supported the conclusion that the statute should be applied prospectively. *Id*. Only at that point did the Court mention that "[f]urther 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* [*v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), overruled by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010)], it did not reinstate the pre-*Karaczewski* state of the law" but instead opted for a new rule. *Brewer*, 486 Mich at 57.

The majority further buttresses its conclusion by describing this amendment as a clarification that resolved a controversy about the statute's meaning. But "[a]n amendment that affects substantive rights generally will not fall within this rule." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 372; 803 NW2d 698 (2010). And our Supreme Court has explained that this clarification rule applies "when a legislative amendment is enacted *soon* after a controversy arises regarding the meaning of an act [because] 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; emphasis added). Fourteen years is not "soon," and characterizing this amendment as clarifying ignores the Legislature's passage of the interim 2012 amendment before it added this "new defense." House Legislative Analysis, HB 4686 (December 9, 2015), p 2.

Finally, the majority repeatedly quotes *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959), quoting *Evans Prod Co v State Bd of Escheats*, 307 Mich 506, 545; 12 NW2d 448 (1943), for the proposition that " 'no right is destroyed when the law restores a remedy which had been lost.' " In *Lahti*, the Supreme Court retroactively applied an amendment to a workers' compensation statute that eliminated a two-year limitation on the payment of medical benefits for work-related injuries. *Id*. at 582-583. The Court explained that the workers' compensation law "was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, . . . the expense of the hospital and medical bills of the injured employee . . . ." *Id*. at 585. If the worker had been the plaintiff in a common-law tort action, he would have had the right to recover lifetime medical benefits, lead-

ing the Court to conclude that the amendment at issue simply "restored" this remedy. *Id*. at 589. The Court also determined that the amendment did not affect any vested rights because it "did not afford the employee a new cause of action, but merely expanded the remedies then in effect." *Id*. at 587. In other words, although the amendment reduced the statutory protections afforded to the employer, the employer was still in a better position than it would have been had it been subject to common-law tort liability. This is not true here—application of the open and obvious danger doctrine vitiates the municipality's duty, defeating Buhl's preexisting cause of action. Moreover, our Supreme Court later clarified that "[a]n amendment that affects substantive rights is not considered 'remedial' . . . ." *Brewer*, 486 Mich at 57. See also *Frank W Lynch & Co*, 463 Mich at 585 ("[W]e have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as 'remedial.' ").

The question here is not whether the Legislature may alter the law. It surely may. The legal question before us is whether the Legislature clearly stated its intention to apply 2016 PA 419 retroactively. Like my colleagues in *Schilling*, I answer "no." *Schilling*, unpub op at 10. A follow-up question before us is whether retroactive application of this statutory amendment would take away or impair a vested right. Again, like my colleagues in *Schilling*, I answer "yes." *Id*. at 10-11. So, like my colleagues in *Schilling*, I conclude that 2016 PA 419 applies prospectively. *Id*. at 12-13.

VI. THE CITY'S REMAINING ARGUMENT

The city also relies on *Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 (1954), for the proposition that

a statutory defense is not a vested right. In that case, the plaintiff was injured in an automobile accident while walking to lunch. *Id*. at 449. On the date of the accident, the workers' compensation law provided the plaintiff two mutually exclusive options: he could either sue the responsible tortfeasor, or he could seek recovery from his employer and leave his employer to pursue the tortfeasor. *Id*. at 448. The plaintiff opted to recover from his employer under the workers' compensation law. *Id*. at 449. Thereafter, the law was amended to allow the plaintiff to recover from the tortfeasor notwithstanding his choice to seek compensation under the workers' compensation law. *Id*. at 450. The plaintiff then sued the tortfeasor. *Id*. at 449. The tortfeasor argued that the earlier statute had given him " 'a substantive right, and that the statute [was] not retroactive,' " while the plaintiff maintained that the amended statute was remedial and afforded him both rights. *Id*. at 452.

The Supreme Court agreed with the plaintiff, discussing the remedial nature of the statute and noting that it had previously addressed the injustice of requiring this particular election, characterizing it "as working a hardship solely to the advantage of the third party tortfeasor." *Id*. at 453-454. Importantly, the Court noted that in amending the statute to eliminate the election requirement, the Legislature had rejected a proposal to limit its application to those employees who had not previously made an election. *Id*. at 454. The Court also explained that the amendment did not create "a new cause of action against the defendant, thereby affecting a vested or substantive right, nor [did] it impose a new liability upon the defendant where none existed before." *Id*. at 456. The Court further discussed the difficulty of determining what constituted a vested right but agreed that it was "a

right of which the individual could not be deprived without injustice" or one "of which the individual could not be deprived arbitrarily without injustice." *Id*. (quotation marks and citations omitted). Applying these definitions, the tortfeasor defendant "did not have a vested right in the statutory defense accorded him under the prior provision of the Workmen's Compensation Act. His right then . . . 'sprang from the kindness and grace of the legislature. And it is the general rule that that which the legislature gives, it may take away.' " *Id*. at 457, quoting *Wylie v City Comm of Grand Rapids*, 293 Mich 571, 588; 292 NW 668 (1940). The Court added that "[a] statutory defense, though a valuable right, is not a vested right and the holder thereof may be deprived of it after the cause of action to which it may be interposed has arisen." *Rookledge*, 340 Mich at 457.

Rookledge is easily distinguished. There, the statute removed a defense that was dependent on a choice made by the plaintiff in a situation in which the tortfeasor defendant did not have a right to avoid liability even before the amendment. In this case, the amendment added a new defense that abrogated the duty the city owed and resulted in dismissal of Buhl's suit.

VII. CONCLUSION

I have no doubt that the Legislature intended to extend the same protection and cost savings land possessors enjoy by employing the open and obvious danger defense to a municipal corporation's duty to maintain its sidewalks in reasonable repair.[8] But applying 2016 PA 419 retroactively eliminates the city's

[8] The following argument was made in support of the bill:

duty and impairs Buhl's substantive rights, namely, her ability to pursue her preexisting cause of action. In my opinion, the law and the Legislature's chosen language require us to apply this amendment prospectively.

> [It] extends cost savings already enjoyed by the private sector, to taxpayers in the public sector. How so? Proponents note that courts have permitted private enterprise to employ an 'open and obvious' defense for years, such that today it is routinely considered their first line of protection in such cases. So, while the private sector has a common law duty to make its premises reasonably safe, it is protected from liability if a visitor suffers an injury due to a dangerous condition that is an 'open and obvious' one. The same policy should apply in the public sector. [House Legislative Analysis, HB 4686 (December 9, 2015), p 2.]

NYMAN v THOMSON REUTERS HOLDINGS, INC

Docket No. 344213. Submitted August 6, 2019, at Detroit. Decided September 3, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 1069 (2020).

Adam and Sara Nyman filed an action in the Wayne Circuit Court against Thomson Reuters Holdings, Inc., doing business as Westlaw, for invasion of privacy and ordinary negligence. The Nymans alleged that they discovered the first five digits of their Social Security numbers listed on a website owned by Thomson Reuters on a page of the site that was available only to subscribers. The Nymans believed that the display of their information violated the Social Security Number Privacy Act (SSNPA), MCL 445.81 *et seq*., and they issued a written demand to Thomson Reuters to remove their information and to pay them $5,000, which included $3,000 in attorney fees and the $1,000 statutory penalty for each plaintiff as provided by MCL 445.86(2). Thomson Reuters denied violating the SSNPA and declined to pay the Nymans the requested $5,000. The Nymans then filed a complaint alleging violations of the SSNPA, invasion of privacy, and ordinary negligence. However, the Nymans did not allege in their complaint or in their written demand letter that they were entitled to actual damages. The trial court, Edward Ewell, Jr., J., granted Thomson Reuters's motion for summary disposition and dismissed the Nymans' claim without prejudice for failure to properly plead a claim under the SSNPA.

The Court of Appeals *held*:

1. MCL 445.83 of the SSNPA provides that a person shall not intentionally publicly display all or more than four sequential digits of a person's Social Security number. Under MCL 445.86, an individual may bring a civil action against a person who violates MCL 445.83 and may recover actual damages. Specifically, if the person knowingly violates MCL 445.83, an individual may recover actual damages or $1,000, whichever is greater. If the person knowingly violates MCL 445.83, an individual may also recover reasonable attorney fees. Except for good cause, not later than 60 days before filing a civil action, an individual must make a written demand to the person for a violation of MCL 445.83 for the amount of his or her actual damages with reasonable documentation of the violation and the actual damages

caused by the violation. The trial court properly dismissed the Nymans' complaint pursuant to MCR 2.116(C)(8) because they failed to plead actual damages as required by the plain language of MCL 445.86. The Nymans claimed that MCL 445.86(2) permitted them to elect recovery of statutory damages and that they had no obligation to plead actual damages. But the Nymans' reading of the statutory language would render nugatory the statutory presuit requirement that the person file a written demand for the amount of his or her actual damages. In order to state a viable claim under the SSNPA, a plaintiff must give the defendant 60 days' notice of actual damages along with reasonable documentation of the alleged violation before filing a civil action. The Nymans did not allege any actual damages in either their written demand letter or their complaint. Thus, they failed to comply with the requirements of the plain language of MCL 445.86(2). Nor did the good-cause provision in MCL 445.86(2) provide them an excuse for failing to plead actual damages. That provision only permits excusing a plaintiff from the requirement of submitting a written demand supported by documentation before bringing suit upon a showing of good cause. The provision provides no exception to a plaintiff's obligation to plead and prove actual damages. Thus, even if plaintiffs had a legally sufficient cause for failing to make a proper presuit written demand supported by documentation of the violation and actual damages, dismissal would still be appropriate under MCR 2.116(C)(8) because plaintiffs failed to plead actual damages in any fashion in their complaint.

2. The trial court also properly dismissed the Nymans' claims of invasion of privacy and ordinary negligence. The Nymans did not allege that Thomson Reuters actually disclosed their information to so many persons that it was substantially certain that their Social Security numbers would become public knowledge or that their Social Security numbers were "highly offensive" to a reasonable person. Rather, they alleged that subscribers to Thomson Reuters's website might be capable of accessing their private information and that reasonable persons might find Social Security number disclosure offensive. Because this did not establish an invasion of privacy, the court did not err by dismissing the Nymans' claim. Additionally, the Nymans did not establish a prima facie case of negligence because they did not allege that anyone actually accessed their information or that they suffered actual damages as a result of such access. Rather, the Nymans alleged that they might find actual damages through the process of discovery. This was insufficient. Plaintiffs needed to allege an actual, present injury in order to state a viable cause of action.

Affirmed.

ACTIONS — SOCIAL SECURITY NUMBER PRIVACY ACT — PRESUIT WRITTEN DEMAND — ACTUAL DAMAGES.

In order to state a viable claim under the Social Security Number Privacy Act, MCL 445.81 *et seq*., a plaintiff must give the defendant 60 days' notice of actual damages along with reasonable documentation of the alleged violation before filing a civil action.

Clark Hill PLC (by *Jordan S. Bolton*, *Stuart M. Schwartz*, and *Michael J. Pattwell*) and *Ian Bolton Law PLLC* (by *Ian S. Bolton*) for plaintiffs.

Holland & Knight LLP (by *Scott T. Lashway*) and *Kerr, Russell and Weber, PLC* (by *Joanne Geha Swanson* and *Katherine F. Cser*) for defendant.

Before: K. F. KELLY, P.J., and TUKEL and REDFORD, JJ.

REDFORD, J. In this putative class action primarily alleging violations of the Social Security Number Privacy Act (SSNPA), MCL 445.81 *et seq*., plaintiffs[1] appeal as of right the trial court's order dismissing their complaint without prejudice. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiffs allege in their complaint that they discovered the first five digits of their Social Security numbers listed on the "public records portal" of a webpage owned by defendant available only to subscribers. Plaintiffs, believing that defendant was violating the SSNPA, submitted a written demand letter to defendant, requesting removal of their information and payment of $5,000. Plaintiffs did not allege any actual damages or harm in the letter but requested $5,000

[1] Because the trial court dismissed this case before deciding whether to certify the proposed class, the term "plaintiffs" refers only to Adam and Sara Nyman.

under MCL 445.86(2) because it permits collection of $1,000 per plaintiff in statutory damages and reasonable attorney fees, which plaintiffs calculated at $3,000. Defendant eventually denied any violation of the SSNPA and refused to pay the requested damages. Plaintiffs responded with this litigation in which they alleged violations of the SSNPA, invasion of privacy, and ordinary negligence.

In lieu of answering the complaint, defendant moved for summary disposition under MCR 2.116(C)(8). Defendant argued that plaintiffs failed to plead actual damages and failed to comport with the presuit written demand procedure under MCL 445.86(2), which requires the individual filing suit to have made a written demand for "the amount of . . . actual damages with reasonable documentation of the violation and the actual damages" suffered. Defendant argued further that plaintiffs could not establish that defendant "publicly displayed" five digits of their Social Security numbers as defined under MCL 445.82(d). Defendant also made other arguments not relevant in this appeal regarding plaintiffs' alleged failures to plead a claim under the SSNPA. Respecting plaintiffs' alleged torts, defendant argued that those claims required plaintiffs to have pleaded some actual present injury to survive summary disposition, which plaintiffs did not do. Defendant also raised an array of other arguments regarding plaintiffs' tort claims that are not relevant to this appeal.

Plaintiffs countered that the SSNPA allowed them to elect statutory damages of $1,000 as an alternative to pleading and proving actual damages. Plaintiffs also asserted that they had generally pleaded injuries related to their tort claims sufficient to survive summary disposition under the MCR 2.116(C)(8) standard. The trial court agreed with defendant that plaintiffs failed to

properly plead their claim as required by the SSNPA and opined that defendant had not publicly displayed the first five digits of their Social Security numbers given the definition of "public display" in the act. The trial court granted defendant's motion for summary disposition and dismissed plaintiffs' complaint without prejudice. This appeal followed. For the reasons set forth below, we affirm.

II. STANDARD OF REVIEW

We review de novo a circuit court's summary disposition decision. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted." *Id*. (quotation marks and brackets omitted). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Id*. (citation omitted). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Id*. at 304-305. "Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id*. at 305 (quotation marks and citation omitted). "Questions of statutory interpretation are also reviewed de novo." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

III. ANALYSIS

A. SSNPA CLAIM

Plaintiffs first argue that the trial court erroneously interpreted the SSNPA to require proof of actual damages. We disagree.

This issue requires us to engage in statutory interpretation. "When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written." *Id*. (citation omitted). "We must examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018) (quotation marks and citation omitted). "In doing so, we consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id*. (quotation marks and citation omitted). Proper statutory interpretation requires: (1) reading the statute as a whole, (2) reading its words and phrases in the context of the entire legislative scheme, (3) while considering both the plain meaning of the critical words and phrases along with their placement and purpose within the statutory scheme, and (4) interpreting the statutory provisions in harmony with the entire statutory scheme. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *DeRuiter v Byron Twp*, 325 Mich App 275, 283; 926 NW2d 268 (2018) (citation omitted). "[W]e must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018) (quotation marks and citation omitted).

The SSNPA, in pertinent part, provides that "a person shall not intentionally . . . publicly display all

or more than 4 sequential digits of the social security number" of a person. MCL 445.83(1)(a). MCL 445.82(d) defines "publicly display" as "to exhibit, hold up, post, or make visible or set out for open view, including, but not limited to, open view on a computer device, computer network, website, or other electronic medium or device, to members of the public or in a public manner." Under MCL 445.86(1), the knowing and intentional violation of MCL 445.83 constitutes "a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both." In addition to those potential criminal penalties, the SSNPA permits a person to bring a civil action as follows:

> An individual may bring a civil action against a person who violates [MCL 445.83] and may recover actual damages. If the person knowingly violates [MCL 445.83], an individual may recover actual damages or $1,000.00, whichever is greater. If the person knowingly violates [MCL 445.83], an individual may also recover reasonable attorney fees. Except for good cause, not later than 60 days before filing a civil action, an individual must make a written demand to the person for a violation of [MCL 445.83] for the amount of his or her actual damages with reasonable documentation of the violation and the actual damages caused by the violation. [MCL 445.86(2).]

Plaintiffs claim that the trial court erred by reading the SSNPA to require pleading of actual damages by civil litigants to state a viable claim. According to plaintiffs, MCL 445.86(2) permitted them to elect recovery of statutory damages, and because they did so, they had no obligation to plead or prove actual damages. Defendant argues that MCL 445.86(2) must be read in its entirety, and when properly interpreted, the statute requires a plaintiff to plead and prove actual damages. Defendant further contends that the allow-

ance of the recovery of statutory damages does not relieve plaintiffs from the requirement to plead and prove that they suffered actual damages. Defendant is correct.

We find nothing ambiguous in the language of the SSNPA. The plain language of MCL 445.86(2) specifies the requirements for bringing a civil action and what damages may be recovered for a knowing violation of MCL 445.83. The first sentence of MCL 445.86(2) allows an individual to bring a civil suit against another person for recovery of actual damages when a defendant has intentionally violated MCL 445.83. The second sentence of MCL 445.86(2) provides for recovery of the actual damages suffered by the plaintiff or statutory damages of $1,000 if that statutory amount is greater than the plaintiff's actual damages when a defendant has knowingly and intentionally violated MCL 445.83. The third sentence also permits the recovery of reasonable attorney fees when a defendant has knowingly and intentionally violated MCL 445.83.

The first three sentences of MCL 445.86(2), when read together and understood in the context of the statutory scheme, plainly provide for two possible ways to compensate a plaintiff for a violation once actual damages have been pleaded and proven: where the defendant has committed an intentional violation of MCL 445.83, the plaintiff may recover actual damages; and more specifically, where the defendant has committed a knowing and intentional violation of MCL 445.83, the plaintiff may recover either actual damages or $1,000 per violation, "whichever is greater." MCL 445.86(2) also provides prerequisites for filing a civil action. The plain language of the statute requires a plaintiff to make a written demand that specifies the amount of actual damages supported by reasonable

documentation not only of the alleged violation but also of the actual damages caused by the violation. Read in its entirety, MCL 445.86(2) plainly sets forth what must be pleaded to recover. Absent pleading actual damages, a plaintiff fails to plead a cause of action for a violation of MCL 445.83.

The Legislature has addressed issues related to the protection of consumers in many statutory enactments and has provided for remedies and causes of action when an individual has experienced actual damages. Examples of statutes that require proof of actual damages and permit the recovery of actual or statutory damages, whichever is greater, upon proof of loss, include the Cooperative Identity Protection Act under MCL 445.55(2), the Shopping Reform and Modernization Act under MCL 445.322(2),[2] the Advertisements Act under MCL 445.815(2), and the Joe Gagnon Appliance Repair Act under MCL 445.837(2). The Legislature has also enacted statutes that provide individuals causes of action when actual damages are not a condition precedent to suit. An example is found in the Identity Theft Protection Act under MCL 445.67a(5), which allows a person to sue for recovery of actual damages or alternatively specified statutory damages in lieu of actual damages. Under MCL 445.869(1)(c) of the Retail Installment Sales Act, a person may recover a combination of statutory and actual damages. Examination of these statutory provisions makes clear that the Legislature purposefully sets forth the statutory requirements for pleading and proof of actual damages or expressly specifies that relief may be granted without such pleading and proof.

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[2] Similar to the statute at bar, under MCL 445.319(2) of the Shopping Reform and Modernization Act, a buyer must provide a seller notice and evidence of actual loss before bringing a civil action.

The statutory requirement that a written demand must set forth "the amount of . . . actual damages with reasonable documentation of the violation and the actual damages caused by the violation" is not mere surplusage. MCL 445.86(2). Logically, if a plaintiff seeking to bring a civil suit under the SSNPA is required to provide a written demand, and that written demand must be accompanied by documentation of actual damages suffered, then that plaintiff must have suffered actual damages and cannot merely elect statutory damages without proof of actual damages. Plaintiffs' reading of MCL 445.86(2) renders nugatory the presuit requirements—an impermissible interpretation violating this Court's well-settled rules regarding statutory interpretation. Contrary to plaintiffs' argument, the requirement in MCL 445.86(2) to plead and prove actual damages does not render the statutory-damages provision nugatory. Rather, upon proof of a knowing and intentional violation of MCL 445.83 and proof of some actual damages, even of a small amount, a plaintiff may recover $1,000 in statutory damages. The statute simply does not permit a plaintiff to bring a civil suit alleging only that a defendant violated MCL 445.83 but caused the plaintiff no actual damages.

If the Legislature intended that a plaintiff could plead and prove a per se violation of MCL 445.83 and collect $1,000 in statutory damages, we believe that the Legislature would have so stated. It did not do so. We conclude that the plain language of the statute requires pleading and proof of actual damages.

Plaintiffs make two additional arguments in their attempt to escape the statutory actual-damages requirement. First, plaintiffs argue that they pleaded actual damages in their complaint. We disagree.

"The primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Baker v Marshall*, 323 Mich App 590, 595; 919 NW2d 407 (2018) (quotation marks and brackets omitted). Under MCR 2.111(B)(1), "A complaint must contain '[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . . .' " *Dalley*, 287 Mich App at 305, quoting MCR 2.111(B)(1).

In this case, plaintiffs' demand letter said nothing about actual damages. Their complaint alleged violations of the SSNPA and that they were entitled to statutory damages, but it did not include allegations that either plaintiff suffered any actual damages from the alleged violations of the act. After defendant moved for summary disposition, plaintiffs argued that they suffered actual damages because a court could infer from their complaint that they would suffer apprehension of identity theft or some other form of mental anguish constituting injury from which damages might flow, including the cost of freezing their credit. Their complaint, however, contains no such allegations or any other allegations of specific facts from which defendant could ascertain any actual damages. Although under Subrule (C)(8) we must accept well-pleaded factual allegations as true and construe them in a light most favorable to the nonmoving party, we are not permitted to graft allegations a party has not made onto a pleading. Plaintiffs were required to plead actual damages, but they failed to do so. The trial court, therefore, did not err by granting defendant summary disposition under MCR 2.116(C)(8).

Plaintiffs also argue that the good-cause provision in MCL 445.86(2) provides them an excuse for their failure to plead actual damages. That provision, however, only excuses a plaintiff from the requirement of submitting a written demand supported by documentation before bringing suit upon a showing of good cause. The provision provides no exception to a plaintiff's obligation to plead and prove actual damages. Thus, even if plaintiffs had a legally sufficient cause[3] for failing to make a proper presuit written demand supported by documentation of the violation and actual damages, dismissal would still be appropriate under MCR 2.116(C)(8) because plaintiffs failed to plead actual damages in any fashion in their complaint. See *id*.

We hold that a party pursuing a cause of action under MCL 445.86(2) must plead and prove that he or she incurred actual damages. Likewise, under MCL 445.86(2), plaintiffs in the instant case were required to provide defendant with a written demand that complied with the statutory requirements 60 days before filing a complaint that alleged that they suffered actual damages. By failing to plead actual damages in their complaint, plaintiffs failed to plead a viable claim on which relief could be granted, necessitating summary disposition under MCR 2.116(C)(8).

B. PLAINTIFFS' TORT CLAIMS

Plaintiffs also argue that the trial court improperly dismissed their claims of invasion of privacy and ordinary negligence. We disagree.

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[3] Plaintiffs' explanations for good cause regarding the deficiencies in their presuit written demand also lack merit. Specifically, they argued that they were unable to calculate actual damages without conducting discovery during litigation. They also state that because defendant denied any statutory violation it would have declined to pay any alleged

There are four different types of "invasion of privacy": "(1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 69; 919 NW2d 439 (2018) (quotation marks and citation omitted). Plaintiffs' invasion-of-privacy claim relies on the second type of invasion-of-privacy tort—public disclosure of private facts. "A cause of action for public disclosure of embarrassing private facts requires (1) the disclosure of information (2) that is highly offensive to a reasonable person and (3) that is of no legitimate concern to the public." *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995). "[T]he term 'publicity' involves a communication to so many persons that the matter is substantially certain to become public knowledge." *Lansing Ass'n of Sch Administrators v Lansing Sch Dist Bd of Ed*, 216 Mich App 79, 89; 549 NW2d 15 (1996), rev'd in part on other grounds sub nom *Bradley v Saranac Bd of Ed*, 455 Mich 285 (1997). A defendant does not invade a plaintiff's right of privacy by communicating a fact "concerning the plaintiff's private life to a single person or even to a small group of persons." *Id*. (quotation marks and citation omitted). In this case, plaintiffs did not allege that defendant actually disclosed their private information to so many persons that made it substantially certain that their Social Security numbers would become public knowledge.

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actual damages. Such reasons fail because the statute specifically requires, except for good cause shown, a written demand to be sent 60 days before filing a civil action. MCL 445.86(2). This demand must not only state the person's actual damages but requires reasonable accompanying documentation of the violation and the actual damages.

Rather, they alleged that subscribers might be capable of accessing, duplicating, and disseminating that information. Plaintiffs also did not allege that their private information constituted information highly offensive to a reasonable person. Instead, plaintiffs alleged that reasonable persons might find Social Security number disclosure offensive. Therefore, plaintiffs failed to allege a claim of invasion of privacy by the public disclosure of embarrassing private facts. Accordingly, the trial court did not err by dismissing this claim without prejudice.

Plaintiffs also argue that the trial court erred by dismissing their claim of ordinary negligence. "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Chelik v Capitol Transp, LLC*, 313 Mich App 83, 89; 880 NW2d 350 (2015) (citation omitted).

In *Doe v Henry Ford Health Sys*, 308 Mich App 592, 594; 865 NW2d 915 (2014), an error by the hospital's transcription service resulted in the private information of certain former patients becoming available to the public on the Internet. "The information made accessible included the patient's name, medical record number, the date of the patient's visit, the location of the visit, the physician's name, and a summary of the visit." *Id*. at 594-595. In the plaintiff's particular case, the patient records disclosed diagnoses of a sexually transmitted disease and alopecia. *Id*. at 595. The patients brought a class action lawsuit against the hospital, asserting claims including invasion of privacy and ordinary negligence. *Id*. The complaint sought "all

damages" suffered by the plaintiff and those similarly situated, and the plaintiff "advanced a theory of 'presumed damages' " on the basis of the release of information itself—i.e., the invasion of privacy in and of itself damaged the plaintiff and the other patients whose information had been disclosed. *Id*. at 595-596. This Court specifically noted that "there is no indication in the lower court record that the information in question was viewed by a third party on the Internet or that it was used inappropriately." *Id*. at 595. The only actual damages identified "were those incurred for the procurement of monitoring to guard against identity theft." *Id*. at 596. The trial court certified the class and denied the hospital's motion for summary disposition. *Id*. On appeal, this Court reversed, agreeing with the hospital that, "in the absence of evidence of present injury to [the] plaintiff's person or property, such damages are not recoverable in negligence . . . or invasion of privacy." *Id*. at 599-600. The panel reasoned that the "plaintiff's identity-theft-protection services are not cognizable damages in the absence of a present injury." *Id*. at 600.

This case is similar to *Henry Ford*. Plaintiffs allege that five digits of their Social Security numbers were displayed on defendant's website. Plaintiffs, however, did not allege that anyone actually accessed that information, that it was viewed by a third party on the Internet, or that anyone used it inappropriately or for some improper purpose. Further, plaintiffs did not allege that anyone had accessed their information, resulting in some form of injury to plaintiffs or actual cognizable damages. Indeed, plaintiffs' complaint lacked any allegations that they had suffered any harm giving rise to actual damages proximately caused by defendant's conduct. In *Henry Ford*, this Court explained that "damages incurred in anticipa-

tion of possible future injury rather than in response to present injuries are not cognizable under Michigan law." *Id*. (quotation marks and citation omitted).

Moreover, because defendant moved for summary disposition under MCR 2.116(C)(8), the trial court necessarily limited its consideration to the allegations in plaintiffs' complaint. The trial court analyzed plaintiffs' allegation of public disclosure and inquired whether plaintiffs had suffered any injury giving rise to damages. Plaintiffs' counsel conceded that plaintiffs had no identifiable actual damages and only surmised that they might have some in the future or find some through discovery. The trial court essentially concluded that defendant did not make plaintiffs' information publicly available because access to the information could only be obtained by subscription to defendant's service. More importantly, the trial court could discern no allegation of injury or harm that caused plaintiffs any actual damages and concluded that their common-law claims were dependent on the statutory claims that they failed to properly plead. Like the plaintiff in *Henry Ford*, plaintiffs in this case failed to allege an actual, present injury, which they needed to plead in order to state viable causes of action. Accordingly, the trial court properly granted defendant summary disposition of plaintiffs' invasion-of-privacy and ordinary-negligence tort claims under MCR 2.116(C)(8). Because our decision is dispositive, we decline to consider plaintiffs' remaining arguments.

Affirmed.

K. F. KELLY, P.J., and TUKEL, J., concurred with REDFORD, J.

FISHER v KALAMAZOO REGIONAL PSYCHIATRIC HOSPITAL

Docket No. 343283. Submitted September 5, 2019, at Grand Rapids. Decided September 10, 2019, at 9:00 a.m.

Plaintiff sustained an injury in the course of her employment, and her employer voluntarily paid her workers' disability compensation benefits. Defendants later filed a petition for recoupment of benefits, asserting that they had paid benefits to plaintiff at an incorrect rate for the three-month period that she received them, resulting in an overpayment. A magistrate from the Michigan Compensation Appellate Commission found that defendants were not entitled to recoup the overpayment because it had not occurred as the result of any fraud by plaintiff. Defendants appealed to the commission, arguing that an employer or insurance carrier has a right to recoup an overpayment of benefits under MCL 418.354(9) of the Worker's Disability Compensation Act, MCL 418.101 *et seq*., limited only by the one-year-back rule in MCL 418.833(2). The commission disagreed, and defendants appealed.

The Court of Appeals *held*:

Under MCL 418.833(2), when an employer or insurance carrier takes action to recover overpayment of benefits, the recoupment is limited to the amount overpaid within the year preceding the recoupment action, limiting the financial impact of recoupment on the employee. To provide additional relief to employees, the commission further qualified the right of reimbursement by strictly limiting it to cases in which the employee engaged in fraud to obtain the overpayment. Yet, nowhere in the act is there a requirement that an employer or carrier show that the employee engaged in fraud before seeking reimbursement for an overpayment, nor was the rule adopted by formal rulemaking under delegated authority pursuant to the Administrative Procedures Act, MCL 24.201 *et seq*. Our Constitution does not grant general lawmaking authority to state departments, agencies, or commissions. Therefore, the commission was not permitted to create its own policy limiting recovery of overpayments to cases of employee fraud. The commission exceeded its statutory authority

by requiring employers and carriers to show that overpayment had occurred as a result of an employee's fraudulent act in order to recoup the overpayment.

Reversed and remanded.

SEPARATION OF POWERS — ADMINISTRATIVE LAW — MICHIGAN COMPENSATION APPELLATE COMMISSION — WORKER'S DISABILITY COMPENSATION ACT — OVERPAYMENT OF BENEFITS.

Agencies, such as the Michigan Compensation Appellate Commission, do not have general lawmaking authority; MCL 418.833(2) provides that recoupment of overpayment of workers' disability compensation benefits by employers and carriers is limited to the one-year period preceding the recoupment action; the commission is not permitted to create its own policy further limiting recovery of overpayments to cases involving employee fraud.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Andrew J. Lemke*, Assistant Attorney General, for the state of Michigan and Kalamazoo Regional Psychiatric Hospital.

Amicus Curiae:

Conklin Benham, PC (by *Martin L. Critchell*) for the Michigan Self-Insurer's Association.

Before: SWARTZLE, P.J., and GLEICHER and M. J. KELLY, JJ.

SWARTZLE, P.J. Sometimes an employee will be overpaid worker's disability compensation benefits. This can create several types of unfairness—unfairness to the employer or insurance carrier that paid more than it should have, and unfairness to the employee who may have come to rely on the higher payment and now must adjust to a lower payment and, indeed, possibly reimburse the employer or carrier.

How best to minimize the resulting unfairness is a policy question. One way would be to require an employee to reimburse the full overpayment only if the

employee engaged in fraud. Another way would be to limit the reimbursement to the amount overpaid within the year prior to the recoupment action. The Michigan Compensation Appellate Commission adopted the former policy, while our Legislature adopted the latter policy. Under separation-of-powers principles, we conclude that the commission lacked any legal authority to adopt its policy and reverse.

I. BACKGROUND

Defendants, Kalamazoo Regional Psychiatric Hospital and the state of Michigan, appeal by leave granted the decision of the Michigan Compensation Appellate Commission affirming the magistrate's opinion and order denying defendants' petition for recoupment of benefits overpaid to plaintiff, Iesha Fisher. See *Fisher v Kalamazoo Regional Psychiatric Hosp*, unpublished per curiam order of the Court of Appeals, entered October 1, 2018 (Docket No. 343283).

The facts are few and not in dispute. Plaintiff sustained a workplace injury, and her employer voluntarily paid her worker's disability compensation benefits. Defendants later filed a petition for recoupment of benefits, seeking reimbursement of an alleged overpayment. Defendants asserted that plaintiff received weekly compensation benefits for approximately three months, but that defendants paid those benefits at an incorrect rate, resulting in an overpayment to plaintiff. The magistrate held a hearing on the petition for recoupment, and plaintiff did not appear at the hearing, despite the fact that she was provided with notice of that hearing.

The magistrate entered an order denying defendants' petition. The magistrate observed that the commission had previously held in several administrative cases that when an employer or carrier voluntarily but mistakenly

overpaid a claimant, it could not recoup the overpayment without proving that the overpayment resulted from the employee's fraudulent act. The magistrate found that defendants failed to establish that the overpayment occurred because of any fraud by plaintiff.

Defendants appealed to the commission, arguing that an employer or carrier has a right to recoup an overpayment of benefits under MCL 418.354(9) and *Ross v Modern Mirror & Glass Co*, 268 Mich App 558; 710 NW2d 59 (2005). Defendants argued that they were only limited by the one-year-back rule of MCL 418.833(2) and that the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., did not limit an employer's or carrier's right of recoupment to only those instances in which the employee fraudulently obtained the overpayment.

The commission disagreed, finding that the circumstances of this case were distinguishable from *Ross*, which involved an overpayment to an employee because of the lack of coordination of the claimant's disability pension benefits with the worker's disability compensation benefits as required under MCL 418.354. See *Ross*, 268 Mich App at 559-561. The Commission also noted that denial of defendants' petition would neither discourage voluntary payment of claims nor result in unnecessary disputes and delays of payments because defendants had a clear duty to make professional and prompt evaluation of worker's compensation claims and apply the correct rate.

Defendants appealed.

II. ANALYSIS

On appeal, defendants do not argue that plaintiff engaged in fraud or that the commission made erroneous factual findings. Rather, defendants ask us to

consider a pure question of law—Is the right to recoup the overpayment of disability compensation benefits from an employee subject to the condition that the employee engaged in fraud to obtain the overpayment?

This Court reviews de novo questions of law with respect to a final order of the commission. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000). The relevant legal framework is set forth in the WDCA. When construing a statute, this Court presumes that the Legislature "intend[ed] the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018) (citation omitted).

Under our Constitution, state departments, agencies, and commissions do not have general lawmaking authority. This authority is found, rather, in the Legislature. Const 1963, art 4, § 1. (One possible exception to this separation-of-powers principle is the recently adopted "independent citizens redistricting commission" found in Article 5, § 2, but that commission is not relevant here.) With respect to worker's disability compensation, the Legislature enacted the WDCA, within which it granted and defined the commission's limited authority to "handle, process, and decide appeals from orders of the director and hearing referees and the orders and opinions of the worker's compensation magistrates." MCL 418.274(1).

Under the WDCA, the right of an employer or carrier to seek reimbursement from an employee for an overpayment of benefits has long been recognized by courts. See, e.g., *McAvoy v HB Sherman Co*, 401 Mich 419, 449-450 n 11; 258 NW2d 414 (1977) (explaining that MCL 418.833(2) "originally was designed and

passed . . . to provide for the *recoupment* of benefits overpaid"); *Ackerman v General Motors Corp*, 201 Mich App 658, 660-661; 506 NW2d 622 (1993) (same). This is consistent with the oft-repeated principle that the WDCA does not authorize double compensation to an injured employee, *Reidenbach v Kalamazoo*, 327 Mich App 174, 183; 933 NW2d 335 (2019), because double recovery by an employee "is repugnant to the very principles of workers' compensation," *Hiltz v Phil's Quality Market*, 417 Mich 335, 350; 337 NW2d 237 (1983).

And yet, as previously recognized, seeking reimbursement for overpayment could result in some hardship to the employee. One way that the Legislature has alleviated this hardship is with a one-year statute of limitations. Under MCL 418.833(2), "When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action." Thus, while an employee who, through no fault of her own, may have to reimburse her employer for an overpayment of benefits, the financial impact to the employee is limited to a one-year period. See *Ross*, 268 Mich App at 562 (recognizing that the one-year limit was a statute of limitations that applied to overpayment of benefits).

To provide additional relief to employees, the commission has further qualified the right of reimbursement by strictly limiting it to cases where the employee engaged in fraud to obtain the overpayment. Yet, nowhere in the act is there a requirement that an employer or carrier show that the employee engaged in fraud before seeking reimbursement for an overpayment. Nor was the rule adopted by formal rulemaking under delegated authority pursuant to the Administrative Procedures Act, MCL 24.201 *et seq*.

Instead of relying on statutory authority, the commission created the fraud requirement out of whole cloth in *Whirley v JC Penney Co, Inc*, 1997 Mich ACO 247. In this decision, the commission opined, "[I]t seems to us that voluntarily made payments, in the absence of any fraudulent behavior, should remain undisturbed." *Whirley*, 1997 Mich ACO 247, p 6. The commission made this pronouncement without further explanation or citation to authority, and subsequent decisions of the Commission have simply relied on *Whirley* as support.

In crafting and applying this employee-fraud requirement, the commission exceeded its statutory authority. As explained by our Supreme Court on several occasions, " 'The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.' " *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-156; 596 NW2d 126 (1999), quoting *Mason Co Civic Research Council v Mason Co*, 343 Mich 313, 326-327; 72 NW2d 292 (1955). Neither the act nor any promulgated rule entrusted the commission with crafting an employee-fraud requirement to a recoupment action. Whether the requirement might be sound public policy is neither for the commission nor this Court to decide, but instead is left solely to the Legislature. Const 1963, art 4, § 1; see also *People v Babcock*, 343 Mich 671, 679-680; 73 NW2d 521 (1955); *D'Agostini*, 322 Mich App at 560.

Accordingly, we reverse the Commission's decision in this case and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER and M. J. KELLY, JJ., concurred with SWARTZLE, P.J.

PENNINGTON v PENNINGTON

Docket No. 348090. Submitted August 7, 2019, at Grand Rapids. Decided September 12, 2019, at 9:00 a.m.

Christina M. Pennington brought an action for divorce in the Ionia Circuit Court against Corey A. Pennington; the divorce judgment granted the parties joint legal custody of their infant child and granted plaintiff primary physical custody of the child. In January 2018, an amended parenting-time schedule granted defendant unsupervised parenting time with the child every other weekend; plaintiff did not comply with the order. A few weeks later, plaintiff had the child examined by her pediatrician because she had observed that the child's vaginal area was red and irritated and was concerned that the child had been physically or sexually abused or both. The pediatrician reported the information to Child Protective Services (CPS); the allegations of abuse were not substantiated by the child sexual abuse medical examination. Defendant moved for a change of custody, arguing that a change of circumstances had occurred because plaintiff was unwilling to support a relationship between him and the child and that, as a result, he was concerned about plaintiff's mental health. At the motion hearing before the trial court referee, a CPS investigator stated that she was concerned about plaintiff's mental health because she did not accept the determination that the abuse was unsubstantiated and because, in the investigator's opinion, plaintiff had been seeking unnecessary medical treatment for the child. The referee found that the child had an established custodial environment with plaintiff but that based on the investigator's testimony and the medical report, there had been a change of circumstances since the last custody order; the referee recommended temporary joint physical custody with defendant having custody every weekend and parenting time in the summer. In March 2018, the court, Ronald J. Schafer, J., concluded that defendant had established proper cause and a change of circumstances and that an established custodial environment existed primarily with plaintiff and, to a certain extent, with defendant; the court adopted the referee's recommendation as an interim order. In August 2018, defendant again moved for a change of custody. Following a hearing, the referee recommended that defen-

dant be awarded physical custody of the child and that plaintiff be granted parenting time on alternating weekends. In September 2019, the court adopted the referee's recommendation, finding that an established custodial environment existed with both parties and that defendant had proved by a preponderance of the evidence that a custody change was in the best interests of the child. On that basis, the court amended the custody order, granting defendant sole physical custody of the child under MCL 722.27 of the Child Custody Act, MCL 722.21 *et seq*. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 722.27, a trial court may modify or amend a previous child custody order or judgment for proper cause shown or because of a change of circumstances if the modification or amendment is in the child's best interests as defined by MCL 722.23. In order to minimize unwarranted and disruptive changes of custody orders, the party seeking the modification must first establish proper cause or a change of circumstances before the court may reopen the custody matter and hold a hearing to assess whether the proposed modification is in the child's best interests; a court may not revisit an existing custody decision and engage in a reconsideration of the statutory best-interest factors unless the party seeking to change custody establishes by a preponderance of the evidence either proper cause or a change of circumstances. Minor allegations of contempt and complaints regarding visitation do not establish proper cause or a change of circumstances sufficient to warrant the trial court revisiting the child custody best-interest factors. In this case, the trial court's conclusion in the March 2018 order that a change of circumstances and proper cause had been demonstrated by a preponderance of the evidence was against the great weight of the evidence because no medical evidence regarding plaintiff's mental health was presented; rather, only opinion testimony by lay witnesses not qualified to render a mental health diagnosis bearing on plaintiff's parental fitness was presented. With regard to the court's September order granting sole physical custody to defendant, because the March 2018 determination under MCL 722.27 was against the great weight of the evidence—regardless of whether the August motion was a new request or a continuation of the March hearing given that the order was labeled as "interim"—the trial court was required to make a threshold finding that defendant had established proper cause or a change of circumstances since the March custody order before reaching the best-interest factors; the trial court erred because it failed to make that threshold finding.

2. Under MCL 722.27(1), when modification of a custody order changes to whom the child looks for guidance, discipline, the necessities of life, and parental comfort and support, the movant must demonstrate by clear and convincing evidence that the change is in the child's best interests. In this case, the trial court should not have reached the issue of whether an established custodial environment existed with defendant because defendant failed to establish proper cause or a change of circumstances by a preponderance of the evidence. Regardless, the trial court's finding that the child had an established custodial environment with defendant was against the great weight of the evidence because there was no record evidence to support that finding. The trial court also erred as a matter of law when it concluded that a change of custody was in the best interests of the child because it applied the preponderance-of-the-evidence standard instead of the clear-and-convincing-evidence standard required under MCL 722.27(1).

September 2018 and February 2019 custody orders vacated, March 2018 custody and parenting-time order reinstated, and case remanded.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for plaintiff.

Before: GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

GADOLA, P.J. Plaintiff, Christina Marie Pennington, appeals as of right the trial court's order granting defendant, Corey Alan Pennington, sole physical custody of the parties' minor child. We vacate the trial court's orders changing the child's custody and reinstate the trial court's prior custody order.

I. FACTS

This case arises from defendant's motions to change custody of the parties' minor child. Plaintiff and defendant were married in 2014, and their daughter was born in 2015. The parties divorced in February 2016;

the judgment of divorce granted the parties joint legal custody and granted plaintiff primary physical custody of the child. Defendant was granted parenting time with the child, but because the child was an infant, was still nursing, and had recently undergone surgery for hip dysplasia, the trial court ordered that defendant's parenting time be supervised. The judgment of divorce also ordered defendant to complete parenting classes.

In April 2017, plaintiff moved to hold defendant in contempt, alleging that he had not completed parenting classes and that he was being uncooperative during the supervised visits. In July 2017, the trial court ordered defendant to complete parenting classes and further ordered that defendant's visits with the child be supervised by the Friend of the Court. The trial court also held defendant in contempt for failing to pay medical expenses related to the birth of the child.

On January 2, 2018, the trial court entered an order reflecting an amended parenting-time schedule agreed to by the parties in which defendant was granted unsupervised parenting time with the child every other weekend. After the order was entered, however, plaintiff allegedly failed to bring the child to the exchange point for defendant's parenting time. Defendant filed a motion to show cause. At the hearing on the motion, plaintiff informed the trial court that she was concerned regarding defendant's care of the child. The trial court ordered plaintiff to comply with the parenting-time order or be held in contempt; it further ordered that if plaintiff were held in contempt for failing to comply with the order she would be required to serve one day in jail for every day defendant was deprived of parenting time.

On or about January 29, 2018, plaintiff took the child to her pediatrician, fearful that the child had

been physically abused, sexually abused, or both. Plaintiff later testified that the child had vaginal redness and irritation and had stated "daddy hurt me." The pediatrician reported the information to Child Protective Services (CPS); CPS and law enforcement jointly arranged for a child sexual abuse medical examination of the child.

On March 2, 2018, defendant moved for a change of custody, requesting sole physical custody of the child. Defendant alleged that circumstances had changed because plaintiff was unwilling to support a relationship between him and the child, causing him concern regarding plaintiff's mental health. At the hearing on the motion before the trial court referee, a CPS investigator testified that the allegations of abuse had not been substantiated. She further testified that she became concerned about plaintiff's emotional stability and mental health when plaintiff refused to accept that the allegations of abuse were not substantiated by evidence. The CPS investigator further testified that in her opinion, "unnecessary medical treatment was found to have been going on." However, no medical expert was called to testify regarding either the results of the child's medical examination, plaintiff's mental health, or whether the medical treatment sought was unnecessary.[1]

In response to the testimony of the CPS investigator, plaintiff testified that her past concerns regarding the child's health related to the child's previous surgery for hip dysplasia and weight loss that the child experienced when recuperating from the surgery. She also testified that the child had certain food allergies that

[1] The trial court referee apparently was provided with a medical report regarding the child's examination. The report has not been made part of the trial court record, however.

caused her to consult her pediatrician and an allergist. Plaintiff confirmed that she had taken the child for an examination by the child's pediatrician when the child reported that defendant had hurt her, but testified that she had not contacted CPS with allegations against defendant; rather, the child's pediatrician had reported the information to CPS. Plaintiff also testified that the child had been seeing a therapist every week for the two months preceding the hearing because the child had been having some problematic behavior. Plaintiff testified that she also sees a therapist and that she takes medication for anxiety because she had experienced anxiety at work and sometimes had trouble falling asleep.

At the conclusion of the hearing, the trial court referee stated on the record that the testimony of the CPS investigator together with the medical report supported the finding that there had been a change of circumstances since the last custody order. The referee also found on the record that the established custodial environment at that time was primarily with plaintiff and that defendant's motion requested a modification of the established custodial environment, such that the "higher" burden of proof applied. The referee recommended that plaintiff undergo a psychological evaluation and that the parties temporarily have joint physical custody, with plaintiff having custody Monday through Friday and defendant having custody every weekend in addition to summer parenting time. The referee further stated that permanent custody would be evaluated after plaintiff underwent the psychological evaluation.

By order entered March 27, 2018, the trial court adopted the recommendation of the referee as an interim order. The order stated that sufficient evidence

had been introduced to prove proper cause and a change of circumstances. The order also stated that an established custodial environment for the child existed primarily with plaintiff "and to a lesser extent with father at this time." The order indicated that it was a temporary order that would last until plaintiff underwent a psychological evaluation, and pending review and recommendation by the Friend of the Court.

On July 18, 2018, defendant filed a motion to show cause, alleging that plaintiff refused to agree to schedule his summer parenting time in accordance with the March 2018 order. A hearing was held August 14, 2018, before the trial court referee on the motion to show cause, at the conclusion of which the referee found plaintiff to be in contempt of court for failing to permit defendant to exercise his parenting time with the child as ordered in the March 2018 order. The referee recommended that plaintiff be ordered to serve 30 days in jail; the trial court adopted the recommendation of the referee.

Meanwhile, also on August 14, 2018, defendant filed another motion seeking to change custody and again requesting that the trial court award him physical custody of the child. At the hearing held before the trial court referee, defendant testified that he was requesting primary physical custody of the child, with plaintiff having alternate weekends for parenting time, and asking that plaintiff be ordered to pay child support if he were awarded custody. He admitted that he was delinquent in paying the ordered child support in the approximate amount of $2,200.

At the hearing on defendant's second motion to change custody, the child's therapist testified that during several counseling sessions with the child, the child exhibited inappropriate boundaries during play; specifi-

cally, the child repeatedly took the clothes off the male doll and put it on a couch or a bed to "snuggle." The therapist testified that this expressed an inappropriate boundary between a small child and an adult male, though not necessarily defendant. The therapist recommended that both parents undergo psychological evaluation for the purpose of comparing the mental health of both parties before any change in custody occurred. Plaintiff testified that she completed the psychological evaluation, which showed that she suffered from anxiety and depression. Plaintiff opined that those issues were being adequately controlled by her medication.

After the hearing, the referee recommended that defendant be awarded physical custody of the child and that plaintiff be permitted parenting time on alternate weekends. The trial court adopted the recommendation of the referee, finding that an established custodial environment existed with both parties and that defendant had proved by a preponderance of the evidence that a custody change was in the best interests of the child. The trial court considered the best-interest factors set forth in the Child Custody Act, MCL 722.21 *et seq*., and found that all factors either favored defendant or were equal with respect to both parties.

Plaintiff filed objections to the referee's recommendations and requested de novo review by the trial court. At the conclusion of the de novo hearing, the trial court entered an order affirming the award of physical custody to defendant. Plaintiff now appeals.

II. DISCUSSION

A. STANDARD OF REVIEW

In a child custody dispute, "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. Specifically, we review under the great-weight-of-the-evidence standard the trial court's determination whether a party demonstrated proper cause or a change of circumstances. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). In addition, "[a] trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Corporan*, 282 Mich App at 605 (quotation marks and citation omitted).

B. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Plaintiff first contends that the trial court erred by making a threshold finding of proper cause or a change of circumstances when considering defendant's March 2018 motion to change custody and that the court erred again by failing to make a threshold finding of proper cause or change of circumstances when considering defendant's August 2018 motion to change custody. We agree with both contentions.

"The purposes of the Child Custody Act, MCL 722.21 *et seq*., are to promote the best interests of the child and to provide a stable environment for children

that is free of unwarranted custody changes." *Lieberman v Orr*, 319 Mich App 68, 78; 900 NW2d 130 (2017) (quotation marks and citation omitted). The Child Custody Act authorizes a trial court to award custody and parenting time in a child custody dispute and also imposes a gatekeeping function on the trial court to ensure the child's stability. *Id*. Under § 27 of the act, MCL 722.27, a trial court may modify or amend a previous child custody order or judgment " 'for proper cause shown or because of change of circumstances' " if doing so is in the child's best interests. *Bowling v McCarrick*, 318 Mich App 568, 569; 899 NW2d 808 (2017), quoting MCL 722.27.

Thus, a party seeking to modify an existing child custody order must first establish proper cause or a change of circumstances before the trial court may reopen the custody matter and hold a hearing to assess whether the proposed modification is in the child's best interests. *Id*. at 569-570, citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). The purpose of the threshold showing of either proper cause or a change of circumstances " 'is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances.' " *Lieberman*, 319 Mich App at 83, quoting *Corporan*, 282 Mich App at 603. If the party seeking to change custody does not prove by a preponderance of the evidence either proper cause or a change of circumstances, the trial court is not authorized by the Child Custody Act to revisit an existing custody decision and engage in a reconsideration of the statutory best-interest factors. *Lieberman*, 319 Mich App at 82.

Proper cause sufficient to revisit a custody order requires the party seeking the custody change to prove by a preponderance of the evidence the existence of an

appropriate ground; the ground must be relevant to at least one of the twelve statutory best-interest factors and must be of such magnitude that it has a significant effect on the well-being of the child. *Corporan*, 282 Mich App at 604. To demonstrate a change of circumstances, the party seeking to change custody must prove that after the entry of the last custody order, the conditions surrounding the child's custody, which have or could have a significant effect on the child's well-being, have materially changed and the change has had, or will almost certainly have, an effect on the child. This determination is to be made based on the facts of each case that are relevant to the statutory best-interest factors. *Id*. at 604-605.

In *Vodvarka*, this Court noted that minor allegations of contempt and complaints regarding visitation are not sufficient to establish proper cause or a change of circumstances sufficient to warrant the trial court revisiting the child custody best-interest factors. *Vodvarka*, 259 Mich App at 510. However, proper cause may be demonstrated when the parties' disagreements escalate to topics significant to the well-being of the child, such as the child's education or medical treatment. See *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011); see also *McRoberts v Ferguson*, 322 Mich App 125, 132; 910 NW2d 721 (2017) (concluding that the visitation complaints and allegations of contempt were not minor when one party was compelled to fly needlessly across the country because the other party failed to produce the child).

In addressing defendant's March 2018 motion to change custody, the trial court determined that defendant had proved by a preponderance of the evidence proper cause and a change of circumstances. Defendant alleged that there was a change of circumstances

because plaintiff's actions in not supporting a relationship between defendant and the child presented "concern for her mental status." Defendant, however, offered no evidence that plaintiff was mentally ill; the only evidence offered purportedly demonstrating plaintiff's "mental illness," apart from defendant's opinion, was the testimony of the CPS investigator that in her opinion, plaintiff was slow to accept that the physicians examining the child had not substantiated any abuse. The CPS investigator also testified that in her opinion, although plaintiff appeared sincerely concerned for the child, she was seeking too much medical care for the child. The CPS investigator, however, is not a doctor and did not testify that she had any medical expertise. Defendant, in fact, offered no medical evidence to support his theory that plaintiff was mentally ill and no medical evidence to demonstrate that too much medical care had been sought for the child.

Defendant has simply not articulated how plaintiff's conduct went beyond an appropriate level of concern for a report of potential abuse.[2] Plaintiff testified that the child told her that defendant had hurt her, and she observed that the child's vagina was red and irritated. She therefore sought the advice of her pediatrician. The child's pediatrician notified CPS, setting in motion the process by which CPS and law enforcement arranged for another medical examination of the child. According to the CPS worker, the medical examinations resulted in a conclusion that abuse had not been substantiated. While it may be the case that the entire event was a false alarm, a parent who exhibits ongoing

[2] Indeed, more concerning would be a parent who does not seriously consider a child's report of potential abuse.

concern after learning that abuse is "not substantiated" is not necessarily mentally ill or emotionally unstable.[3]

Nonetheless, on the basis of this evidence, the trial court concluded that a change in circumstances had been demonstrated because plaintiff was suffering from "some mental health issues that was [sic] subjecting the child to unnecessary, unpleasant evaluations" and was, at times, "acting in an irrational manner, which had an effect on the child." This created "a concern that the child was being traumatized overall by the mother's actions." These findings lack any valid support in the record.[4] In fact, there was virtually no evidence regarding the effect, if any, that the medical examinations had on the child, other than the CPS investigator's speculation. When asked how a particular test affected the child, the CPS investigator testified: "I am not entirely sure how it affected [the child] specifically, but I have seen the procedure done on other children as well as adults, and it's uncomfortable. I would imagine [the child] did not handle it well, as she did not handle the evaluation of the Child Protection Team either." Upon further examination, the CPS investigator admitted that she had not actually been present during the evaluation but testified that she had been on the phone with the evaluator and had heard crying in the background.

In sum, a review of the record indicates that plaintiff, rightly or wrongly, suspected abuse of the child and took the child to her pediatrician, which set in motion

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[3] We note that a finding that abuse has not been substantiated is not equivalent to a finding that no abuse occurred.

[4] As already noted, a medical report was apparently provided to the trial court referee, but because the report was not entered into the record, we cannot consider it on appeal.

the process involving CPS and law enforcement. Defendant, after learning that plaintiff had set this process in motion, moved to change custody, alleging that plaintiff had mental health problems. No medical evidence of plaintiff's mental health was presented; the trial court heard only the opinion testimony of the CPS investigator that plaintiff's level of concern was irrational. On this record, the trial court's conclusion in its March 2018 order that a change of circumstances and proper cause had been proved by a preponderance of the evidence was against the great weight of the evidence.[5]

In August 2018, defendant again moved for a change of custody. After a hearing, the trial court referee recommended a change of custody, awarding defendant primary physical custody of the child, and the trial court adopted the referee's recommendation. The trial court stated in its order that it previously had found that there was sufficient evidence to meet the threshold determination of proper cause or change of circumstances. Plaintiff sought de novo review in the trial court, arguing, in part, that defendant failed to establish proper cause or change of circumstances. The trial court affirmed the change of custody. On appeal, plaintiff contends that the trial court erred by failing to

[5] We note that, generally, an issue must be raised before and considered by the trial court to be preserved for appellate review. See *Elahham v Al-Jabban*, 319 Mich App 112, 119; 899 NW2d 768 (2017). Plaintiff objected to the September 2018 custody order, but she did not object to the March 2018 custody order. However, regardless of preservation, we may review an unpreserved issue when, as here, consideration of the issue is necessary to the proper determination of the case or when the issue presents a question of law for which the facts necessary for its resolution are sufficiently present to permit this Court's review. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

make the threshold finding when considering defendant's new motion for change of custody. We agree.

As discussed, the trial court was precluded from considering whether a custody change was in the best interests of the child without first reaching the threshold question whether proper cause or a change of circumstances had been proved by a preponderance of the evidence. The trial court entered a custody and parenting-time order in March 2018. Therefore, in addressing defendant's August 2018 second motion to change custody, the trial court was obligated to determine whether defendant had demonstrated proper cause or a change of circumstances since entry of the March 2018 order. In the alternative, because the trial court described its March 2018 order as "interim," it might be arguable that the August 2018 motion was a continuation of the proceedings from March 2018. Nevertheless, the trial court's March 2018 determination regarding proper cause or change of circumstances was erroneous. Therefore, that determination could not be relied on in September 2018. In either event, the trial court erred by reaching the issue of the best interests of the child without first determining whether proper cause or change of circumstances had been established.

The paramount purpose of the Child Custody Act is "providing a stable environment for children that is free of unwarranted custody changes . . . ." *Shade v Wright*, 291 Mich App 17, 28; 805 NW2d 1 (2010) (quotation marks and citation omitted). In keeping with that objective, the purpose of the proper-cause or change-of-circumstances requirement is "to erect a barrier against removal of a child from an established custodial environment" and "to minimize unwarranted and disruptive changes of custody orders except under

the most compelling circumstances." *Id*. (quotation marks and citation omitted). In this case, the trial court's finding that defendant had demonstrated proper cause or a change of circumstances in his March 2018 motion is against the great weight of the evidence, and the trial court failed to make a threshold finding on defendant's new motion for change of custody in August 2018. The trial court therefore erred by reaching the issue of the best interests of the child without first determining whether proper cause or change of circumstances had been established. See *Corporan*, 282 Mich App at 606.

C. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff next contends that the trial court erred when it found that an established custodial environment existed with defendant. Initially, we note that the trial court should not have reached this issue because defendant had not proved proper cause or a change of circumstances by a preponderance of the evidence. Regardless, we also conclude that the trial court erred when it found the child to have an established custodial environment with defendant as well as with plaintiff.

A child's established custodial environment is the environment in which "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); *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010). When modification of a custody order changes to whom the child looks for guidance, discipline, the necessities of life, and parental comfort and support, the movant must demonstrate by clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c); *Pierron*, 486 Mich at 85, 92. Whether an

established custodial environment exists is a question of fact. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). We will affirm a trial court's finding regarding the existence of an established custodial environment unless the evidence clearly preponderates in the opposite direction. *Pierron*, 486 Mich at 85.

It is possible for a custodial environment to be established in more than one home. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). In this case, however, the record does not support a finding of an established custodial environment with defendant. At the time of the March 2018 motion for change of custody, the custody order that was in effect was the January 2018 stipulated order. Under that order, plaintiff had primary physical custody of the child and defendant had parenting time on alternating weekends from Saturday at 9:00 a.m. to Sunday at 6:00 p.m. After defendant moved for a change of custody in March 2018, the trial court found that an established custodial environment existed primarily with plaintiff and to a lesser extent with defendant. The trial court ordered that "the parties shall share temporary joint physical custody" of the child and that defendant would have parenting time "every weekend from Saturday at 10 a.m. to Sunday at 7 p.m." and also "five non-consecutive full weeks of parenting time each summer."

In August 2018, defendant again moved for a change of custody. Ruling on the motion in its September 2018 order, the trial court stated, in relevant part:

> The court finds that there are established custodial environments with both parents now. Defendant has been consistently exercising parenting time. [The child] looks to each parent for guidance, discipline, the necessities of life, and parental comfort during respective time with them. . . . Defendant does not seek to destroy the estab-

> lished custodial environment with plaintiff so the burden of proof is a preponderance of the evidence that a change is in the child's best interests.

A review of the record, however, does not support these findings. At the time of the September 2018 hearing on defendant's motion for change of custody, the child was approximately three and a half years old and had lived almost exclusively with plaintiff for her entire life. From the time the parties divorced in February 2016 until January 2018, defendant had minimal, supervised parenting time with the child. In January 2018, defendant's parenting time increased to one overnight visit every other week. In March 2018, his parenting time increased to one overnight visit every week.[6] Defendant's August 2018 motion seeking primary physical custody of the child most certainly sought to "destroy the established custodial environment with plaintiff."

The record also does not support the finding that over an appreciable time, the child looked to defendant for guidance, discipline, the necessities of life, and parental comfort and support. At the hearing, defendant testified that parenting was going "wonderful." When asked whether the child appeared to feel comfortable in his home and whether her needs were met there, he testified "yes." He testified that he was aware that the child had food allergies but that he was not sure about which foods; defendant was aware that the child had ongoing issues related to hip dysplasia. He also testified that although he did not know the name of the child's pediatrician, he knew the name of the pediatrician's practice group. There was virtually no evidence that over an appreciable time, the child had

[6] Additional parenting time was scheduled for the summer of 2018 but did not occur allegedly because plaintiff would not cooperate.

looked to defendant in that environment for guidance, discipline, the necessities of life, and parental comfort. Although it is possible for a child to have an established custodial environment with both parents, see *Rittershaus*, 273 Mich App at 471, in this case, the trial court's finding that the child had an established custodial environment with defendant was almost entirely without support; and the finding was, therefore, against the great weight of the evidence. The trial court was accordingly precluded from changing the child's custody unless defendant presented clear and convincing evidence that the change was in the best interests of the child. *Foskett*, 247 Mich App at 6. The trial court therefore erred when it changed custody after finding only that the change was supported by a preponderance of the evidence. See MCL 722.27(1)(c); *Pierron*, 486 Mich at 86.

We vacate the custody orders of the trial court entered September 19, 2018, and February 28, 2019; we reinstate the trial court's custody and parenting-time order entered March 27, 2018; and we remand the matter to the trial court for further proceedings as it deems proper. On remand, the trial court "should consider up-to-date information," including any further evidence pertaining to the possibility of the child being abused while in defendant's care. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). We do not retain jurisdiction.

MARKEY and RONAYNE KRAUSE, JJ., concurred with GADOLA, P.J.

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY
v AMBS MESSAGE CENTER, INC

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY
v GREAT OAKS COUNTRY CLUB, INC

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY
v NBC TRUCK EQUIPMENT, INC

Docket Nos. 343521, 343846, and 343989. Submitted September 4, 2019, at Lansing. Decided September 12, 2019, at 9:05 a.m. Leave to appeal sought by NBC Truck Equipment, Inc., and Ambs Message Center, Inc. Reversed and remanded ___ Mich ___ (2021).

The claimants, Ambs Message Center, Inc., Great Oaks Country Club, Inc., and NBC Truck Equipment Inc., were employers who were required to pay unemployment insurance tax and subject to reporting requirements under the Michigan Employment Security Act, MCL 421.1 *et seq*. (MESA). However, each of the claimants avoided their liability for unemployment contributions under MESA by transferring their "entire rating account" to a professional employer organization (PEO) pursuant to a service agreement and MCL 421.24(b). Under a typical service agreement, a PEO would lease the employees back to the businesses. The leased employees were treated as the employees of the PEO, although the original employer (now referred to as the client employer) maintained day-to-day control over the employees. Before the enactment of MCL 421.13m, the PEO paid the unemployment insurance contributions required under MESA using its own account, and the Department of Talent and Economic Development/Unemployment Insurance Agency calculated the tax based on the PEO's use of unemployment benefits. During the term of the client employer's agreement with the PEO, the agency treated the client employer as though it had no employees or payroll. With the enactment of MCL 421.13m, the Legislature required PEOs to pay unemployment insurance contributions for their client employers by using the client employers' account information; i.e., the agency calculated the tax rate as if the employees were employed directly by the client employer and not

by the PEO. The statute further provided that although a PEO that was required to pay unemployment insurance contributions before January 1, 2011, was permitted to use the reporting method set forth in MCL 421.13m(2)(a) before January 1, 2014, it was not required to do so until January 1, 2014. The claimants were client employers of a PEO before January 1, 2011, and had been client employers for at least eight calendar quarters as of January 1, 2014. The agency determined that none of the claimants was entitled to the new-employer tax rate set forth in MCL 421.19 beginning with tax year 2014 because under MCL 421.13m(2)(a)(*i*)(A), they had to have reported 12 or more calendar quarters of no payroll or employees in order to qualify for the new employee tax rate. The claimants protested the tax rates, but the agency rejected their arguments. The claimants appealed to administrative law judges (ALJs) who determined in each case that the claimant was entitled to the new-employer tax rate because they each had 8 quarters of no payroll or employees before January 1, 2014. The Michigan Compensation Appellate Commission affirmed the ALJ's decision in each case, as did the Jackson Circuit Court, John G. McBain, J., in Docket No. 343521; the Oakland Circuit Court, Nanci J. Grant, J., in Docket No. 343846; and the Macomb Circuit Court, Kathryn A. Viviano, J., in Docket No. 343989. The agency applied for leave to appeal each case, and this Court granted leave and consolidated the cases.

The Court of Appeals *held*:

The claimants' proposed construction of MCL 421.13m(2)(a)(*i*)(A) is untenable because it would render portions of the statutory scheme nugatory. MCL 421.13m(2)(a)(*i*)(A) provides 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." The claimants argue that "beginning January 1, 2014" should be construed to mean "as of January 1, 2014." However, the Legislature also provided in MCL 421.19(a)(1)(*i*) that any employer that has not had employees in covered employment for 12 or more quarters is treated as a new employee for purposes of calculating its unemployment insurance tax rate. Therefore, there was no reason for the Legislature to provide in MCL 421.13m that "beginning January 1, 2014," any client employer who had not had employees or payroll for 12 quarters would be treated as a new employer, unless MCL 421.13m(2)(a)(*i*)(A) is understood as a compromise. The Legislature's compromise permits business entities that became client

employers less than three years before MCL 421.13m was enacted, or within a specified period of time after the statute was enacted, to still qualify for the new-employer tax rate even though they would not otherwise have qualified under MCL 421.19(a)(1)(*i*). The PEOs for each of the claimants waited until January 1, 2014, to change their reporting method, so the longer lookback period applied to each claimant. Therefore, the claimants were not entitled to the new-employer tax rate because they did not meet the longer lookback requirement. The agency did not err when it concluded that the claimants were not entitled to the new-employer tax rate.

Circuit court decisions reversed; circuit court orders, commission decisions, and ALJ decisions vacated; and cases remanded to the ALJs.

STATUTORY INTERPRETATION — MICHIGAN EMPLOYMENT SECURITY ACT — UNEMPLOYMENT INSURANCE TAX RATE — NEW EMPLOYERS.

Under MCL 421.19(a)(1)(*i*), any 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, MCL 421.13m(2)(a)(*i*) must be understood as a compromise that allows business entities that switched to being client employers less than three years before the enactment of MCL 421.13m to still qualify for the new-employer tax rate even though the entity would not otherwise have qualified under MCL 421.19(a)(1)(*i*); for professional employer organizations that waited until January 1, 2014, to change their method of reporting, only those client employers who had been client employers on or before the enactment of MCL 421.13m qualified for the new-employer tax rate.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Zachary A. Risk* and *Shannon W. Husband*, Assistant Attorneys General, for the Michigan Unemployment Insurance Agency.

Thav Gross PC (by *Kenneth L. Gross* and *Jeffrey B. Linden*) for NBC Truck Equipment, Inc., and Ambs Message Center, Inc.

Stark Reagan (by *Christopher E. Levasseur*) for Great Oaks Country Club, Inc.

Before: MURRAY, C.J., and METER and FORT HOOD, JJ.

PER CURIAM. In these consolidated appeals, appellant, the Department of Talent and Economic Development/Unemployment Insurance Agency (the Agency), appeals by leave granted the circuit courts' determinations that claimants, Ambs Message Center, Inc.; Great Oaks Country Club, Inc.; and NBC Truck Equipment, Inc., were entitled to claim the new-employer unemployment insurance tax rate under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. We conclude that the claimants were not entitled to the new-employer rate. Therefore, we reverse and remand in each docket.

I. BACKGROUND

A. ALTERING THE PROFESSIONAL EMPLOYER ORGANIZATION ARRANGEMENT

The claimants are employers subject to MESA's reporting and contribution requirements. See MCL 421.13; MCL 421.19. When calculating the tax rate applicable to an employer's payroll, the Agency generally uses a formula that takes into consideration the amount of benefits distributed to the employer's employees over a specified period. See MCL 421.19(a). The formula is not applicable, however, to new employers, whose base tax is a set rate of 2.7%. See MCL 421.19(a)(1)(*i*). When a contributing employer is no longer categorized as a new employer under the statute, the Agency incorporates a portion of the employer's employees' actual use of unemployment compensation benefits using the applicable formula until a certain number of years pass, after which the full formula applies (sometimes referred to as the "experienced employer" formula). See MCL 421.19(a). For that

reason, new employers usually pay a lower tax rate on their payroll than experienced employers.

An employer can cease to be an employer liable to pay the unemployment insurance tax by transferring its "entire rating account" to another employer, see MCL 421.24(b), or after the "conclusion of 12 or more consecutive calendar quarters during which the employer has not had workers in covered employment," MCL 421.19(a)(1)(*i*). If an employer again becomes liable for contributions to the unemployment insurance system after ceasing to be liable, the Agency must treat the employer as a new employer. MCL 421.19(a)(1)(*i*).

An employer can also cease to be liable to pay unemployment insurance contributions as a contributing employer by entering into a service agreement with a professional employer organization (sometimes referred to as a PEO). 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. See *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 359-360; 844 NW2d 143 (2013).

Because the professional employer organization was the employer of the employees transferred to it under the service agreement, the professional employer organization historically paid the unemployment insurance

contributions required under MESA using its own account, and the Agency calculated the tax on the basis of the professional employer organization's use of unemployment insurance benefits. The client employer, by contrast, was treated as having no employees and no payroll during the term of the agreement with the professional employer organization.

The Legislature, however, addressed this arrangement with the enactment of the Michigan Professional Employer Organization Regulatory Act, MCL 338.3721 *et seq.*, see 2010 PA 370, and the corresponding changes to MESA, see 2010 PA 383. With the enactment of MCL 421.13m, the Legislature required professional employer organizations to file reports and pay contributions for their client employers by using the account information for the client employer. See MCL 421.13m(2)(a). In other words, for the purpose of calculating the tax rate, the professional employer organization is taken out of the picture, and the rate is calculated based on the number of years the client employer has employed a staff—either directly or through the professional employer organization. Although the professional employer organization is still liable to the Agency for the tax, the rate is calculated as if the employees were employed directly by the client employer.

Acknowledging the impact of these changes on the relationship between the client employer and the professional employer organization, the amendment provided that a professional employer organization that was liable for unemployment insurance contributions before January 1, 2011, could choose to use the reporting method stated under MCL 421.13m(2)(a) before January 1, 2014, but was not *required* to use that reporting method until January 1, 2014. See MCL 421.13m(2)(b). Accordingly, by January 1, 2014, the

Agency was required to calculate the unemployment insurance tax rate by reference to the client employer's prior account and experience rather than by reference to the professional employer organization's prior account and experience. Thus, as of January 1, 2014, every client employer would be taxed at its own rate even though the professional employer organization would be paying the contribution.

The Legislature also addressed how a professional employer organization should calculate the tax rate applicable to client employers who had established a relationship with the professional employer organization before the mandatory change in the method for reporting. The Legislature indicated that if the client employer met certain eligibility criteria, it would be entitled to treatment as a new employer under the statutory scheme:

> (*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), 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.
>
> (C) If the client employer's account has been terminated for more than 1 year or if the client employer never previously registered with the agency, the client shall be

> separately registered using a method approved by the agency within 30 days after the employer becomes a client employer of the PEO. The client employer shall be assigned the new employer unemployment tax rate. [MCL 421.13m(2)(a).]

B. THE CONSOLIDATED APPEALS

In these appeals, it is undisputed that each claimant became a client employer of a professional employer organization that operated in this state before January 1, 2011, and which, for that reason, was not required to change its reporting method until January 1, 2014. It is similarly undisputed that each claimant had been a client employer of the professional employer organization for at least eight quarters as of January 1, 2014, and that each claimant had reported no employees or no payroll for those same eight quarters. Finally, it is undisputed that the claimants' professional employer organizations did not change their reporting method until January 1, 2014.

The Agency concluded in each case that the claimant was not entitled to the new-employer tax rate beginning with tax year 2014. The Agency determined that under the statute, each claimant had to have reported no employees or no payroll for 12 quarters because their professional employer organizations did not change their reporting method until January 1, 2014. See MCL 421.13m(2)(a)(*i*)(A). Further, the statute provided that "beginning January 1, 2014," the client employer had to have reported "12 or more calendar quarters" of no payroll or employees in order to qualify for the new-employer tax rate. MCL 421.13m(2)(a)(*i*)(A). Each claimant protested the Agency's decision and asserted that it was entitled to the new-employer tax rate because it had reported no employees or no payroll for the eight quarters preceding January 1, 2014. The Agency

rejected these arguments and refused to apply the new-employer tax rate to each claimant's liability for tax year 2014 and subsequent tax years.

After the Agency rejected their protests, the claimants each appealed to an administrative law judge (ALJ). In each case, the ALJs determined that because the claimant had eight quarters of no employment or payroll before January 1, 2014, the claimants were entitled to the new-employer tax rate. The ALJs each reasoned that MCL 421.13m(2)(a)(*i*)(A) established the date before which a client employer must have had the requisite eight quarters and was not a reference to the date on and after which the number of quarters increased to 12. The Michigan Compensation Appellate Commission and the circuit courts affirmed the ALJ in each case. The Agency then applied for leave to appeal in this Court, and this Court granted leave to appeal in each case and consolidated the cases.[1]

II. ANALYSIS

We review de novo the proper interpretation of a statutory scheme such as MESA. *Polania v State Employees' Retirement Sys*, 299 Mich App 322, 328; 830 NW2d 773 (2013). Our Supreme Court has provided the following rules to guide the proper construction of statutes:

> In determining the intent of the Legislature, this Court must first look to the language of the statute. The Court

[1] See *Dep't of Talent & Economic Dev v Ambs Message Ctr, Inc*, unpublished order of the Court of Appeals, entered October 29, 2018 (Docket No. 343521); *Dep't of Talent & Economic Dev v Great Oaks Country Club*, unpublished order of the Court of Appeals, entered October 29, 2018 (Docket No. 343846); *Dep't of Talent & Economic Dev v NBC Truck Equip*, unpublished order of the Court of Appeals, entered October 29, 2018 (Docket No. 343989).

> must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature. As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. Moreover, courts 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. Finally, an analysis of a statute's legislative history is an important tool in ascertaining legislative intent. [*Bush v Shabahang*, 484 Mich 156, 166-168; 772 NW2d 272 (2009) (citations and quotation marks omitted).]

The issue on appeal involves MCL 421.13m(2)(a)(*i*)(A), which states that, "[e]xcept as provided in sub-subparagraphs (B) and (C), 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." The sole question is whether the ALJs properly interpreted and applied MCL 421.13m(2)(a)(*i*)(A).

In the various lower-court proceedings and again on appeal, the claimants argue that the reference to

January 1, 2014, in MCL 421.13m(2)(a)(*i*)(A) refers only to the point by which the claimant must have had eight quarters of no reported employees or payroll. Stated another way, the claimants would have this Court construe "beginning January 1, 2014" to mean "as of January 1, 2014." However, that construction is untenable because it renders portions of the statutory scheme nugatory. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

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. Moreover, because all professional employer organizations had to switch to the new reporting method on or before January 1, 2014, see MCL 421.13m(2)(a)(*ii*), a client employer who had employees or payroll would no longer be permitted to report that it had no employees or payroll on or after January 1, 2014, simply because of its agreement with a professional employer organization. Accordingly, using the claimants' preferred construction, no client employer that had reported fewer than eight quarters of no payroll or employees by that time could ever meet the criteria, notwithstanding that the Legislature clearly understood that some client employers might meet the 12-quarter period stated under MCL 421.13m(2)(a)(*i*)(A). That construction would render the 12-quarter period meaningless. This Court may not apply a construction that renders a

portion of the statutory scheme meaningless or nugatory. See *Klapp*, 468 Mich at 468.

The inclusion of MCL 421.13m(2)(a)(*i*) must be understood as a compromise that allowed business entities that switched to being client employers less than three years before the enactment of MCL 421.13m, or within a specified period after the enactment of that statute, to still qualify for the new-employer tax rate even though the entity would not otherwise have qualified under MCL 421.19(a)(1)(*i*). For those professional employer organizations that waited to change their method of reporting on the date that the reporting requirements became mandatory, only those client employers who had been client employers on or before the enactment of the new law would qualify for the new-employer tax rate. When interpreted in this way, the shorter lookback period can be seen as a compromise that prevents client employers from being penalized if their professional employer organizations changed to the new reporting method before the mandatory date for the change. And indeed, the Legislature specifically provided that the rate rules stated under MCL 421.13m(2)(a)(*i*) applied to a "client employer" that "was a client employer of the PEO on the date that the PEO *changed to the reporting method* provided" under MCL 421.13m(2)(a). (Emphasis added.) Hence, the plain language of the statute demonstrates that the date of the change to the method required under MCL 421.13m(2)(a) is the event that triggers the lookback provisions.

In the cases before this Court, it is undisputed that each claimant's professional employer organization changed its reporting method on January 1, 2014. Accordingly, the longer lookback period applied. It was also undisputed that each claimant had reported, at

the most, eight quarters of no employees or payroll by that time. Consequently, under the plain terms of the statute, none of the claimants was entitled to the new-employer tax rate under MCL 421.13m(2)(a)(*i*).

III. CONCLUSION

The statute at issue was not ambiguous and provided that the shorter lookback periods applied only when a professional employer organization that was operating in this state before January 1, 2011, elected to change its reporting method before January 1, 2014. Because the professional employer organizations for each of the claimants waited until January 1, 2014, to 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. It is undisputed that none of the claimants met this requirement. Accordingly, the Agency did not err when it concluded that the claimants were not entitled to the new-employer tax rate.

Therefore, we reverse the circuit courts in each docket and vacate the relevant circuit court orders, the commission decisions, and the ALJ decisions. In each docket, we further remand these cases to the respective ALJs for entry of decisions upholding the Agency's tax determinations for the relevant tax years.

Reversed, vacated, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., and METER and FORT HOOD, JJ., concurred.

KING v MUNRO

Docket No. 341714. Submitted July 10, 2019, at Detroit. Decided July 23, 2019. Approved for publication September 12, 2019, at 9:10 a.m.

Tiffani King brought an action in the Oakland Circuit Court against Barbara Munro and The Michigan Group, Inc.–Livingston (doing business as Re/Max Platinum), alleging negligence and a violation of MCL 554.139 in connection with her rental of a home in which she was allegedly exposed to toxic mold. In 2012, plaintiff had leased the home, owned by Munro, for a two-year term; Re/Max listed and allegedly managed the property. Plaintiff stopped paying rent in 2014, and Munro filed a summary-proceedings action under MCL 600.5750 in the 52-2 District Court, seeking to recover payment of overdue rent and to evict plaintiff from the property; plaintiff voluntarily vacated the property after Munro filed her action and asserted as an affirmative defense that the property was uninhabitable because of the presence of mold. The parties settled the district court action by stipulated order before the pretrial hearing; under the order, plaintiff forfeited her security deposit to Munro in exchange for Munro dismissing her claims for nonpayment of rent and property damage. In 2016, plaintiff filed the instant action, asserting that defendants had violated MCL 554.139 by negligently maintaining the leased home; specifically, that their negligent maintenance resulted in black mold growing in the home, causing plaintiff to become ill. Defendants moved for summary disposition, arguing that because the district court judgment resolved all issues between the parties, plaintiff was barred by the doctrines of collateral estoppel and res judicata from bringing the action. The court, Daniel P. O'Brien, J., granted defendants' motion for summary disposition, concluding that plaintiff was collaterally estopped from bringing a negligence claim related to the presence of mold; the court reasoned that plaintiff's claim was barred because her defense in the district court action was predicated on the presence of mold and that the mold issue had, therefore, been fully resolved in the district court action. Plaintiff appealed.

The Court of Appeals *held*:

1. The doctrine of collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. Collateral estoppel is proper when (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel exists. A question of fact is essential to the judgment when the common ultimate issues were both actually and necessarily litigated. To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action; the issues must be identical and not merely similar. Even though plaintiff raised mold as an affirmative defense in the district court action, the stipulated order dismissing the action prevented any finding on the issue. Because the mold issue was not one of the essential questions actually litigated and resolved in the prior action, the trial court erred by concluding that plaintiff was collaterally estopped from raising the issue in a separate action and by dismissing plaintiff's action.

2. The doctrine of res judicata prevents multiple suits litigating the same cause of action. In that regard, res judicata bars a second, subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involved the same parties or their privies. The doctrine is applied broadly in Michigan to bar 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. MCL 600.5750 provides that with certain exceptions, a judgment for possession brought under MCL 600.5701 *et seq*. as a summary proceeding in district court does not merge or bar any other claim for relief in a subsequent action; by enacting MCL 600.5750, the Legislature took summary-proceeding actions outside the normal rules regarding merger and bar so that attorneys would not have to include all other pending claims in the swiftly moving summary proceedings. Thus, a judgment arising from summary proceedings for eviction brought in district court under MCL 500.5704 does not bar a party to the earlier action from subsequently filing a personal-injury tort claim in circuit court. In this case, because plaintiff was not required to bring her negligence claim in the summary proceedings for eviction and the district

court did not otherwise resolve the negligence claim, res judicata did not bar plaintiff from bringing this claim in the circuit court.

Reversed.

JUDGMENTS — SUMMARY PROCEEDINGS FOR EVICTION — SUBSEQUENT PROCEEDINGS — OTHER CLAIMS FOR RELIEF — RES JUDICATA.

MCL 600.5750 provides that with certain exceptions, a judgment for possession brought under MCL 600.5701 *et seq*. as a summary proceeding in district court does not merge or bar any other claim for relief in a subsequent action; a judgment arising from summary proceedings for eviction brought in district court under MCL 500.5704 does not bar a party to the earlier action from subsequently filing a personal-injury tort claim in circuit court.

Law Offices of Carson J. Tucker (by *Carson J. Tucker*) for Tiffani King.

Law Office of Vicky O. Howell (by *Vicky O. Howell*) for Barbara Munro.

William T. Russell for The Michigan Group, Inc.–Livingston.

Before: RONAYNE KRAUSE, P.J., and METER and STEPHENS, JJ.

PER CURIAM. In this negligence action, plaintiff appeals by right the circuit court's order granting summary disposition to defendants under MCR 2.116(C)(7), concluding that plaintiff was collaterally estopped from bringing a claim predicated on the presence of mold in a home she was leasing. We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On October 18, 2012, plaintiff signed a two-year lease on a home with defendant Barbara Munro, the owner and landlord of the property. The Michigan

Group Inc.–Livingston, doing business as Re/Max Platinum (Re/Max), was the property's listing agent and the alleged management agent. Plaintiff paid Munro a $3,000 security deposit, and rent was set at $2,000 per month. The lease began in December 2012 and, in due course, would have concluded in November 2014. Citing maintenance issues—including the presence of black mold in the home—plaintiff stopped paying rent on the property in October 2014, allegedly depositing the unpaid rent in an escrow account. Plaintiff vacated the home in early November 2014.

That same month, Munro filed a summary-proceedings action in the district court under MCL 600.5704,[1] seeking payment of $4,410 in overdue rent.[2] Plaintiff defended against the suit, asserting that she could not be held liable for the overdue rent because the home was uninhabitable because of the presence of mold. The district court set a pretrial hearing 45 days out so that Munro would have an opportunity to investigate the mold issue. At the pretrial hearing, the parties informed the district court that they had agreed to a settlement by which plaintiff would forfeit her $3,000 security deposit to Munro and the nonpayment-of-rent claim would be dismissed as well as any property-damage claim Munro had against plaintiff.

Almost a year later, on December 9, 2016, plaintiff filed a complaint in the circuit court against Munro

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[1] Under MCL 600.5701(a), the phrase "summary proceedings" is defined as "a civil action to recover possession of premises and to obtain certain ancillary relief . . . ." In turn, MCL 600.5704 provides that "[t]he district court . . . [has] jurisdiction over summary proceedings to recover possession of premises under this chapter."

[2] Munro also sought to evict plaintiff from the property; the request became a nonissue after plaintiff voluntarily vacated the property two days later.

and Re/Max, alleging that defendants had negligently maintained the leased home in violation of MCL 554.139(1) by allowing black mold to grow, causing plaintiff to become ill with several conditions related to toxic mold exposure. Defendants moved for summary disposition, arguing that the doctrines of collateral estoppel and res judicata barred plaintiff from bringing the negligence action because all issues between the parties had been decided in the district court case, including those pertaining to mold.

The circuit court reasoned that because plaintiff's defense to the nonpayment claim was the presence of mold, the stipulated order of dismissal brought the mold issue to a full resolution. Accordingly, the circuit court concluded that plaintiff was collaterally estopped from bringing a negligence claim related to the presence of mold[3] and granted defendants' motion for summary disposition. This appeal followed.

II. ANALYSIS

Plaintiff challenges the circuit court's summary-disposition ruling, arguing that neither the doctrine of collateral estoppel nor the doctrine of res judicata barred her claim. A trial court may grant summary disposition under MCR 2.116(C)(7) on the basis of either doctrine. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998); *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). "We review de novo a trial court's grant or denial of summary disposition." *TOMRA of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 293; 926 NW2d 259

[3] The circuit court did not address defendants' claim that plaintiff's complaint was barred by the doctrine of res judicata.

(2018). "When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015) (quotation marks and citation omitted). Collateral estoppel and res judicata present questions of law reviewed de novo by this Court. *Garrett v Washington*, 314 Mich App 436, 440-441; 886 NW2d 762 (2016); *Holton v Ward*, 303 Mich App 718, 731; 847 NW2d 1 (2014).

A. COLLATERAL ESTOPPEL

The doctrine of collateral estoppel "precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528-529; 866 NW2d 817 (2014). "Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel." *Id*. at 529.

In this case, the essential question of fact is the presence of mold in the leased home. We agree with plaintiff that this question was not one of the essential questions actually litigated in the prior case and that the issue was not resolved by the judgment. "[T]he common ultimate issues must have been both actually and necessarily litigated." *Id*. "To be actually litigated, a question must be put into issue by the pleadings,

submitted to the trier of fact, and determined by the trier." *Id*. "In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action. The issues must be identical, and not merely similar." *Id*. (citation omitted).

While plaintiff raised the presence of mold as an affirmative defense to the nonpayment action, the parties' stipulation to dismiss the case prevented any finding on that issue. The order dismissing the case provided: "[Munro] to retain security deposit of $3,000.00 as damages. This order disposes of nonpayment of rent and possession claims and [Munro's] property damage claim." Mold was not mentioned at the hearing to dismiss the case, and it was not mentioned in the order. The trial court made no determination whether mold was present in the home, and the dismissal does not hinge on the presence or absence of mold. The order dismissed only Munro's claims against plaintiff, and there is no other evidence from which this Court can conclude that the parties intended to resolve or prevent any other mold-related claim plaintiff may have harbored. Because the presence of mold in the home was not determined in the prior action, we conclude that the circuit court erred by finding that plaintiff was collaterally estopped from raising that issue in a separate claim.

B. RES JUDICATA

The purpose of the doctrine of res judicata is to prevent multiple suits litigating the same cause of action. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). "Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies,

and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998) (quotation marks and citation omitted). The doctrine bars a second, subsequent action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc (On Remand)*, 279 Mich App 741, 744; 760 NW2d 583 (2008) (quotation marks and citation omitted). Michigan courts apply the doctrine broadly to bar "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." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

Given its ruling on collateral estoppel, the circuit court did not address the parties' arguments regarding res judicata. Nonetheless, on appeal, defendants argue that even if collateral estoppel did not bar plaintiff's claim, res judicata barred plaintiff's claim because the ultimate issue in this case was litigated before the district court. Contrary to defendants' argument, we have already concluded that the ultimate issue in this case—that is, the presence of mold—was not litigated to a factual conclusion in the district court proceedings.

Moreover, as the parties appear to recognize, plaintiff was not required to bring her negligence action in the prior proceeding. Summary proceedings for eviction are governed, in pertinent part, by MCL 600.5750, which provides:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either

> legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except that a judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial and that a judgment for possession after forfeiture of such an executory contract which results in the issuance of a writ of restitution shall also bar any claim for money payments which would have become due under the contract subsequent to the time of issuance of the writ. The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be.

Interpreting this provision, our Supreme Court has concluded that "the Legislature took these cases outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 574; 621 NW2d 222 (2001) (quotation marks and citation omitted). Accordingly, because plaintiff was not required to bring her negligence claim in the summary-eviction proceedings and the district court did not otherwise resolve the claim, res judicata does not bar plaintiff from bringing a negligence claim in the circuit court.

C. CONCLUSION

Because neither collateral estoppel nor res judicata barred plaintiff's claim, we reverse the circuit court's grant of summary disposition to defendant under MCR 2.116(C)(7) and remand for further proceedings consistent with this opinion. As the prevailing party, plaintiff

may tax costs under MCR 7.219. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and METER and STEPHENS, JJ., concurred.

PEOPLE v WASHINGTON (ON REMAND)

Docket No. 336050. Submitted June 13, 2019, at Lansing. Decided September 17, 2019, at 9:00 a.m. Reversed and remanded ___ Mich ___ (2021).

Gregory C. Washington was convicted in 2004 after a jury trial in the Wayne Circuit Court of second-degree murder, MCL 750.317; assault with intent to commit murder (AWIM), MCL 750.83; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and being a felon in possession of a firearm (felon-in-possession), MCL 750.224f. The court, Patricia P. Fresard, J., sentenced Washington as a second-offense habitual offender, MCL 769.10, to 40 to 60 years' imprisonment for second-degree murder, life in prison for AWIM, 2 to 7½ years' imprisonment for felon-in-possession, and 2 years' imprisonment for felony-firearm. Washington appealed his convictions and sentences in the Court of Appeals, which affirmed his convictions but remanded the case for resentencing because the trial court had failed to articulate substantial and compelling reasons for its departure from the sentencing guidelines. Before Washington was resentenced, he filed his first application for leave to appeal in the Michigan Supreme Court. While the Supreme Court was considering Washington's application, the trial court resentenced Washington, and he applied in the Court of Appeals for leave to appeal his resentencing. The Supreme Court ultimately denied Washington's first application for leave to appeal. 477 Mich 973 (2006). After the Court of Appeals also denied Washington's application for leave to appeal, he filed his second application for leave to appeal in the Supreme Court, which was also denied. 480 Mich 891 (2007). Washington then filed a motion in the trial court for relief from judgment, which the trial court denied. Washington applied for leave to appeal this decision in the Court of Appeals, which denied his application, and the Supreme Court denied his application to appeal the Court of Appeals' denial. 486 Mich 1042 (2010). In June 2016, after exhausting all available postconviction relief, Washington filed a second motion for relief from judgment in the trial court, arguing that the trial court had lacked jurisdiction to resentence him because his application for leave to appeal in the Supreme Court was pending at the time. The trial court agreed and granted the motion, vacated Washington's sentences, and ordered resen-

tencing. The prosecution appealed. The Court of Appeals, O'BRIEN, P.J., and JANSEN and STEPHENS, JJ., upheld the trial court's ruling in a published per curiam opinion, holding that although Washington's successive motion for relief from judgment was barred by MCR 6.502(G), the trial court lacked jurisdiction to enter the second judgment of sentence, and it correctly exercised its inherent power to recognize its lack of jurisdiction when it vacated that judgment and ordered another resentencing hearing. 321 Mich App 276 (2017). The prosecution sought leave to appeal this decision in the Supreme Court, which vacated the Court of Appeals decision and remanded the case for reconsideration in light of *Luscombe v Shedd's Food Prod Corp*, 212 Mich App 537 (1995). 503 Mich 1030 (2019).

On remand, the Court of Appeals *held*:

1. Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it. Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. In *Luscombe*, the Court of Appeals summarized the rules governing how a trial court reacquires "jurisdiction" over a case after an appeal. Because *Luscombe* was describing a trial court's surrendering jurisdiction of a particular case to an appellate court and then reacquiring it after appellate proceedings, it was not discussing subject-matter or personal jurisdiction, neither of which comes or goes depending on a case's procedural posture, but rather what has been described as "procedural jurisdiction." The *Luscombe* Court expressly rejected the characterization of the trial court's having prematurely taken action in response to the Court of Appeals' remand order as an error implicating subject-matter jurisdiction, holding that such an error was merely procedural and, in the absence of any objection, harmless.

2. Under *Luscombe*, the timing error at issue in this case was not a structural error occasioned by a lack of subject-matter jurisdiction. Rather, the error was merely procedural in nature, occasioned by premature activity, and the error was rendered harmless by the lack of any objection. This unpreserved error was not grounds for granting posttrial relief, either in the form of relief from judgment under MCR 6.502(G) or an order effectuating the court's jurisdiction or judgments under MCL 600.611. Accordingly, the trial court's decision to allow resentencing on defendant's successive motion for relief from judgment was reversed and the case was remanded to the trial court for the limited purpose of reinstating the sentences imposed on October 4, 2006.

Reversed and remanded for further proceedings.

JURISDICTION — SUBJECT-MATTER JURISDICTION — PROCEDURAL JURISDICTION — HARMLESS ERROR.

The entry of a judgment by a trial court pursuant to a remand order while an application for leave to appeal that order is pending gives rise to a procedural error that is harmless in the absence of an objection; this type of error does not implicate a court's subject-matter jurisdiction or provide a ground for granting posttrial relief.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Jason W. Williams*, Chief of Research, Training, and Appeals, for the people.

John F. Royal for defendant.

ON REMAND

Before: O'BRIEN, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM. Our Supreme Court, in lieu of granting leave to appeal, vacated this Court's prior judgment in *People v Washington*, 321 Mich App 276; 908 NW2d 924 (2017), and remanded for "reconsideration in light of *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537; 539 NW2d 210 (1995)." *People v Washington*, 503 Mich 1030, 1030 (2019). On remand, we reverse and remand for further proceedings.

This Court previously articulated the relevant factual background as follows:

> On November 10, 2004, defendant was convicted after a jury trial of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder (AWIM), MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm (felon-in-possession), MCL 750.224f. On December 13, 2004, the trial court sentenced defendant, a second-offense habitual offender, MCL 769.10, to 40 to 60 years' imprisonment for the second-

degree murder conviction, life imprisonment for each AWIM conviction, 2 years' imprisonment for the felony-firearm conviction, and 2 to 7½ years' imprisonment for the felon-in-possession conviction. The trial court's sentence for second-degree murder represented a 12-month upward departure from the applicable guidelines range.

On January 7, 2005, defendant appealed as of right his convictions and sentences on a number of grounds. Relevant here, defendant challenged the propriety of the trial court's upward departure from the sentencing guidelines range for second-degree murder without stating on the record "substantial and compelling reasons" for the departure as required under MCL 769.34(3). In a June 13, 2006 unpublished opinion, this Court affirmed defendant's convictions but agreed that "the trial court did not satisfy MCL 769.34(3) when imposing a sentence outside the prescribed sentencing guidelines range." *People v Washington*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2006 (Docket No. 260155), p 8. This Court remanded for resentencing, directing the trial court to reconsider the propriety of its sentence and articulate substantial and compelling reasons for any departure as required by MCL 769.34(3). *Id*. at 8-9.

On August 8, 2006, defendant filed an application for leave to appeal in the Michigan Supreme Court. On October 4, 2006, while the application was still pending, the trial court resentenced defendant pursuant to this Court's June 13, 2006 opinion and remand, imposing identical sentences and offering a number of justifications for the departure. The Supreme Court denied defendant's application for leave to appeal on December 28, 2006. *People v Washington*, 477 Mich 973 (2006).

On December 4, 2006, about three weeks before the Supreme Court denied defendant's initial application, defendant filed in this Court a delayed application for leave to appeal the resentencing order, again arguing that the trial court failed to articulate on the record the required "substantial and compelling reasons" for the upward departure from defendant's sentencing guidelines for second-degree murder. This Court denied defendant's

application "for lack of merit." *People v Washington*, unpublished order of the Court of Appeals, entered May 4, 2007 (Docket No. 274768). Defendant filed an application for leave to appeal in the Michigan Supreme Court on June 28, 2007, which that Court denied. *People v Washington*, 480 Mich 891 (2007).

Several months later, on March 25, 2008, defendant filed a motion for relief from judgment in the trial court pursuant to MCR 6.502, raising claims of (1) insufficient evidence, (2) denial of his right to present an insanity defense, (3) ineffective assistance of trial counsel, and (4) ineffective assistance of appellate counsel. On July 9, 2008, the trial court denied defendant's motion under MCR 6.508(D)(3) for failure to demonstrate good cause for not raising the issues in a prior appeal and failure to show actual prejudice. This Court denied defendant's July 8, 2009 delayed application for leave to appeal the trial court's decision, *People v Washington*, unpublished order of the Court of Appeals, entered October 19, 2009 (Docket No. 292891), and the Michigan Supreme Court denied defendant leave to appeal this Court's denial, *People v Washington*, 486 Mich 1042 (2010).

On June 22, 2016, after exhausting all available post-conviction relief, defendant filed his second motion for relief from judgment—the motion giving rise to the instant appeal. Defendant challenged his sentences on jurisdictional grounds, arguing that the trial court's October 4, 2006 order after resentencing was invalid because the court lacked jurisdiction to resentence defendant while his application remained pending before the Michigan Supreme Court. In response, the prosecution argued that defendant's successive motion for relief from judgment was clearly barred by MCR 6.502(G), which prohibits successive motions for relief from judgment unless there has been a retroactive change in the law or new evidence has been discovered. In a November 22, 2016 written order and opinion, the trial court indicated its agreement with the prosecution's argument but noted that the prosecution had failed to address the jurisdictional issue, which "may be raised at any time." The trial court concluded that under

> MCR 7.215(F)(1)(a), MCR 7.305(C)(6)(a), and relevant caselaw, it had lacked jurisdiction to enter the October 4, 2006 judgment of sentence. The trial court granted defendant's motion, vacated defendant's sentences, and ordered resentencing. [*Washington*, 321 Mich App at 278-282.]

Defendant again appealed in this Court. This Court affirmed, concluding that

> [t]he trial court properly recognized that its October 4, 2006 judgment of sentence was a nullity, and its compliance with this Court's June 13, 2006 remand for resentencing was incomplete. Under MCL 600.611, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Therefore, the trial court did not err when it vacated the October 4, 2006 judgment of sentence and ordered a resentencing hearing. And while, as previously discussed, the trial court erred when it granted defendant's motion for relief from judgment in contravention of MCR 6.502, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). [*Washington*, 321 Mich App at 286-287.]

The prosecution again sought leave to appeal this Court's decision in our Supreme Court. In lieu of granting leave to appeal, our Supreme Court vacated this Court's decision and remanded for reconsideration.

In short, the trial court resentenced defendant in response to this Court's 2006 remand order in Docket No. 260155, but it did so while a timely application for leave was pending in our Supreme Court. The trial court therefore acted in response to a judgment from this Court that was not yet effective. MCR 7.215(F)(1)(a). Although defendant did not make issue of this irregularity in his first motion for relief from

judgment, several years later defendant persuaded the trial court to vacate his sentence for that reason. See *Washington*, 321 Mich App at 281-282.

Although MCR 6.502(G)(1) generally prohibits successive motions for relief from judgment, and Subrule (G)(2) excepts those "based on a retroactive change in law . . . or a claim of new evidence" arising after the first motion or in which the court "concludes that there is a significant possibility that the defendant is innocent of the crime," the trial court characterized the irregularity as one of subject-matter jurisdiction and tacitly treated that defect as an unstated additional exception. " 'Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement.' " *Washington*, 321 Mich App at 285, quoting *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001). " 'When a court is without jurisdiction of the subject matter, its acts and proceedings are of no force and validity; they are a mere nullity and are void.' " *Washington*, 321 Mich App at 285, quoting *People v Clement*, 254 Mich App 387, 394; 657 NW2d 172 (2002). " 'Jurisdictional defects may be raised at any time.' " *Washington*, 321 Mich App at 285, quoting *People v Martinez*, 211 Mich App 147, 149; 535 NW2d 236 (1995). See also *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994) ("It is a fundamental principle that defects in personal jurisdiction may be waived, whereas subject-matter jurisdiction may not be waived and may be raised at any time.") (quotation marks and citation omitted). Indeed, "[c]ourts are bound to take notice of the limits of their authority." *People v Jones*, 203 Mich App 74, 78; 512 NW2d 26 (1993). In light of our Supreme Court's directive to reconsider our prior conclusions in light of *Luscombe*, we again consider the distinction between whether the trial court had

subject-matter jurisdiction and whether the court properly exercised that jurisdiction.

"Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992).

> Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. . . . Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. [*In re Hatcher*, 443 Mich 426, 438-439; 505 NW2d 834 (1993) (quotation marks and citations omitted), overruled in part on other grounds in *In re Ferranti, Minor*, 504 Mich 1; 934 NW2d 610 (2019).]

In *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327; 901 NW2d 566 (2017), our Supreme Court, in the course of explaining why the ecclesiastical abstention doctrine "may affect how a civil court exercises its subject matter jurisdiction over a given claim" but "does not divest a court of such jurisdiction altogether," *id*. at 330, reiterated its caution against "[t]he loose practice [that] has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error," *id*. at 336 n 3 (quotation marks and citations omitted; alterations in original). See also *United States v George*, 676 F3d 249, 259 (CA 1, 2012) (stating that "less than meticulous practice has given the word 'jurisdiction' a chameleon-like quality") (quotation marks and citations omitted); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 707-709; 575 NW2d 68 (1997) (noting instances in which purely procedural con-

straints on courts' taking certain actions at certain times did not deprive the courts of subject-matter jurisdiction).

> "There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases." [*Buczkowski v Buczkowski*, 351 Mich 216, 222; 88 NW2d 416 (1958), quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935).]

A commentator discussing developments in Florida law in this regard stated as follows:

> "Jurisdiction of the subject matter" means that the court's authority over a particular incident, transaction, or circumstances that constitutes the "subject matter" of the case has been activated, as required by procedural law. Similarly, jurisdiction "of the parties" means more than personal jurisdiction—it means the court's existing legal authority over the parties has been activated in a procedurally proper way, usually service of process. Thus if one expects the "big two" categories of jurisdiction from law school to be the only categories, there are thousands of references to jurisdiction . . . that would not make any sense at all. But when one perceives that those references pertain to the question of whether the applicable procedural law affords the court a green light to proceed under the circumstances, it becomes evident that an entirely distinct category exists, and although some inconsistency marked its development, in recent decades, the body of procedural law of jurisdiction . . . has become increasingly coherent. All that remains is to formally recognize the existence of procedural jurisdiction as a distinct species, and to eradicate the vestiges of its confusion with subject matter jurisdiction. [Stephens, *Florida's Third Species of Jurisdiction*, 82 Fla B J 10, 22 (March 2008) (citation omitted).]

Examples of "jurisdiction" used in the sense of a court's procedural or operational prerogative to act, as opposed to its general authority, are illustrative. For example, in child custody disputes, the question of the family court's assumption of jurisdiction over a child implicates not the court's authority in connection with that class of cases, but rather whether the plaintiff has a legitimate cause of action. See *Bowie v Arder*, 441 Mich 23, 39-40; 490 NW2d 568 (1992). The same is true for child protection cases, in which objections to the court's assumption of jurisdiction over the child routinely challenge the petition's factual predicates, not the court's authority over the pertinent class of cases. Also illustrative is that when this Court remands a case to the original tribunal while retaining jurisdiction, it is the operational exercise of jurisdiction that this Court is retaining, there being no question of this Court's general subject-matter jurisdiction.

In *Luscombe*, 212 Mich App at 539-541, this Court summarized the rules governing how a trial court reacquires "jurisdiction" over a case after an appeal. Because this Court was describing a trial court's surrendering jurisdiction of a particular case to an appellate court and then reacquiring it after appellate proceedings, it was obviously not discussing subject-matter or personal jurisdiction, neither of which comes or goes depending on a case's procedural posture, but rather was discussing what the Florida commentator quoted earlier described as "procedural jurisdiction." This Court expressly rejected the characterization of the trial court's having prematurely taken action in response to this Court's remand order as an error implicating subject-matter jurisdiction and held that, in the absence of any objection, such merely procedural error is harmless. *Id*. at 541-544.

In light of the authorities endeavoring to observe the distinction between the existence of subject-matter jurisdiction and the exercise of it, and in light especially of the Supreme Court's call for deciding this case in accord with *Luscombe*, we conclude that the timing error at issue was not a structural error occasioned by a lack of subject-matter jurisdiction. Rather, the error was merely procedural in nature, occasioned by premature activity. We further conclude that this error was rendered harmless by the lack of any objection. Such an unpreserved error is not grounds for granting posttrial relief, either in the form of relief from judgment under MCR 6.502(G) or an order effectuating the court's jurisdiction or judgments under MCL 600.611. For these reasons, we reverse the trial court's decision to allow resentencing on defendant's successive motion for relief from judgment and remand to the trial court for the limited purpose of reinstating the sentences imposed on October 4, 2006.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

O'BRIEN, P.J., and JANSEN and STEPHENS, JJ., concurred.

TSP SERVICES, INC v NATIONAL-STANDARD, LLC

Docket No. 342530. Submitted September 5, 2019, at Grand Rapids. Decided September 17, 2019, at 9:05 a.m.

TSP Services, Inc., entered into a contract with National-Standard, LLC, and DW-National Standard-Niles, LLC (collectively, National-Standard), under which TSP would perform asbestos abatement, demolition and disposal of scrap steel and other waste, and site-restoration work at a National-Standard facility for $414,950, with one-third to be paid up front and the balance to be due when the abatement was completed. Although TSP expected to profit from the sale of the scrap steel it recovered, this subject was not mentioned in the contract. After various delays on the project and disputes between the parties, National-Standard requested that TSP suspend work, at which point TSP had extracted only 9% of the available steel. TSP filed a claim of lien in the amount of $141,083, which was the amount still unpaid under the contract, and also sought additional damages, including the value of the remaining steel. The parties attended arbitration, and the arbitrator concluded that National-Standard had breached the contract. The arbitrator awarded $782,469.05 in damages to TSP, which included $391,809 for lost profits on the steel, $33,793 for interest on those lost profits, and $169,226.13 for attorney fees and costs. The arbitrator further determined that TSP's construction lien was valid as filed and could be enforced on the entire award. National-Standard filed a motion in the Berrien Circuit Court to vacate the arbitration award, which the court, John M. Donahue, J., denied. The Court of Appeals granted National-Standard's application for leave to appeal.

The Court of Appeals *held*:

1. A court may not review an arbitrator's factual findings or decision on the merits; it may only review an arbitrator's decision for errors of law. Further, not every error of law by an arbitrator merits subsequent court intervention. An arbitrator's award and decision will only be set aside if it clearly appears that the arbitrator, through an error in law, was led to a wrong conclusion and that, but for such error, a substantially different award would have been made. In making this determination, a court cannot

engage in a review of an arbitrator's mental process but instead must review the face of the award itself.

2. There was no basis to disturb the arbitrator's award of consequential damages. A party asserting a breach of contract may generally recover damages that are the direct, natural, and proximate result of the breach. In this case, the arbitrator recognized that both parties were aware that TSP intended to recover the steel from the demolition site and sell that steel for a profit. The arbitrator concluded that National-Standard had breached the contract, causing TSP to be unable to recover and sell the steel. The arbitrator further concluded that TSP potentially lost profits from the sale of the steel, and the lost profits could reasonably be considered a result of National-Standard's breach. These conclusions were in conformity with Michigan's contract law.

3. The arbitrator erred by approving a construction lien on the amount of the entire award rather than just the amount remaining on the contract itself. Under the Construction Lien Act, MCL 570.1101 *et seq*., a contractor who provides an improvement to real property has a construction lien on the interest of the owner or lessee who contracted for the improvement. However, under MCL 570.1107(1), a construction lien acquired under the act may not exceed the amount of the lien claimant's contract less payments made on the contract. The parties' contract provided that TSP would perform asbestos abatement, demolition and disposal of all refuse, and restoration work in exchange for $414,950, and it contained no mention of scrap steel or any compensation for TSP for the removal or sale of the scrap steel. Accordingly, the amount of any construction lien for TSP could not exceed the remaining unpaid balance under the contract, which was $141,083. The arbitrator approved a construction lien for $782,469.05, which is $641,386.05 greater than the unpaid balance under the contract. Because the arbitration award contained an error of law that, if corrected, would substantially change the award, judicial interference with the award was justified. Therefore, the award was vacated to the extent that the construction lien exceeded the unpaid amount under the contract.

4. National-Standard's request to amend the arbitrator's award of attorney fees to reflect the correction of the construction lien was made in a cursory manner, did not show clear error on the face of the fee award, and would have required an inquiry into the arbitrator's mental process, and the request was therefore denied.

Award vacated in part; trial court affirmed in part and reversed in part.

1. ARBITRATION — ARBITRATION AWARDS — REVIEW.

A court may set aside an arbitrator's award and decision only if it clearly appears that the arbitrator, through an error in law, was led to a wrong conclusion and that, but for such error, a substantially different award would have been made; in making this determination, a court cannot engage in a review of an arbitrator's mental process but instead must review the face of the award itself.

2. LIENS — STATUTES — CONSTRUCTION LIEN ACT — SCOPE OF LIEN.

Under the Construction Lien Act, MCL 570.1101 *et seq*., a contractor who provides an improvement to real property has a construction lien on the interest of the owner or lessee who contracted for the improvement; a construction lien acquired under the act may not exceed the amount of the lien claimant's contract less payments made on the contract.

Deneweth, Dugan & Parfitt, PC (by *Mark D. Sassak*) for plaintiff.

Barnes & Thornburg LLP (by *Scott R. Murphy*) for defendants.

Before: SWARTZLE, P.J., and GLEICHER and M. J. KELLY, JJ.

SWARTZLE, P.J. With respect to a dispute over a construction contract, Michigan law limits a construction lien to the amount of the contract less any payment already made. Although a party suing for breach of contract might recover consequential damages beyond the monetary value of the contract itself, those consequential damages cannot be subject to a construction lien. The arbitrator in this case concluded otherwise, and this clear legal error had a substantial impact on the award. Accordingly, we reverse with respect to this portion of the award, but affirm in all other respects.

I. BACKGROUND

Defendants, National-Standard, LLC, and DW-National Standard-Niles, LLC (collectively, National-

Standard), appeal by leave granted the trial court's order denying their motion to vacate an arbitration award and confirming the arbitration award and money judgment in favor of plaintiff, TSP Services, Inc. See *TSP Servs, Inc v National-Standard, LLC*, unpublished order of the Court of Appeals, entered August 8, 2018 (Docket No. 342530). Although the parties raised several issues during arbitration, this appeal centers primarily on whether TSP's inability and failure to remove steel from a construction site, and the potential lost profits from the sale of that unrecovered steel, may properly be the subject of a construction lien. Because the appeal involves a discrete question, and because the nature of arbitration disfavors this Court's review of the facts and merits of the case, we will only briefly review the facts underlying this dispute.

The parties entered into a contract on August 30, 2013, under which TSP was to perform asbestos abatement, demolition and disposal of scrap steel and other waste, and site-restoration work at a National-Standard facility in Niles, Michigan. The total price listed in the contract is $414,950, to be paid in installments—one-third as a down payment and the balance due "upon completion of abatement." Critical to this appeal, the contract does not mention the sale of scrap steel or TSP's potential profits from the sale of scrap steel. Although it is clear from the arbitration proceedings that both parties recognized that the sale of scrap steel was a major part of the project, the subject is not outlined in the contract, which provides for a total payment of $414,950 and includes an integration clause.

The project encountered various delays. Asbestos removal did not begin until May 2014. Because the asbestos removal was delayed, the extraction of steel

was also delayed. TSP completed the asbestos-abatement work and was paid $273,867, but after several disputes, National-Standard requested that TSP suspend all work on the project. At that point, TSP had extracted only 9% of the available steel from the job site. In April 2015, TSP filed a claim of lien in the amount of $141,083, the amount still unpaid under the contract, plus additional damages, including the net value of the steel that TSP was unable to extract from the site.

The parties attended arbitration, and the arbitrator concluded that National-Standard had breached the contract. The arbitrator awarded $782,469.05 in damages to TSP, broken out as follows: $141,083 for the unpaid invoice under the contract, $46,557.39 for interest on that unpaid invoice, $391,809 for lost profits on steel inventory, $33,793 for interest on those lost profits, and $169,226.13 for attorney fees and costs. (There is a discrepancy of 53 cents between the total amount awarded by the arbitrator and the sum of the components awarded, though neither party takes issue with this *de minimis* discrepancy.) The arbitrator further determined that TSP's construction lien was valid as filed and could be enforced on the entire award.

National-Standard subsequently moved the trial court to vacate the arbitration award, arguing that the arbitrator committed clear legal error. The trial court denied National-Standard's motion, and this appeal followed.

II. ANALYSIS

A. LIMITED JUDICIAL REVIEW OF ARBITRATION AWARD

In general, courts have a limited role in reviewing arbitration awards. This Court reviews de novo a

circuit court's decision whether to vacate an arbitration award. *Hope-Jackson v Washington*, 311 Mich App 602, 613; 877 NW2d 736 (2015). "A court may not review an arbitrator's factual findings or decision on the merits." *Ann Arbor v American Federation of State, Co, & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). Instead, a court may only review an arbitrator's decision for errors of law. *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982) (*DAIIE*); *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554-555; 682 NW2d 542 (2004).

Not every error of law by an arbitrator, however, merits subsequent court intervention.

> "[W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside." [*DAIIE*, 416 Mich at 443, quoting *Howe v Patrons' Mut Fire Ins Co of Mich, Ltd*, 216 Mich 560, 570; 185 NW 864 (1921).]

Moreover, in determining whether there is legal error, the court cannot engage in a review of an arbitrator's mental process, *Hope-Jackson*, 311 Mich App at 614, but instead must review "the face of the award itself," *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009).

B. NO ERROR IN AWARD OF CONSEQUENTIAL DAMAGES

National-Standard challenges both the arbitrator's award of consequential damages and the construction lien securing those damages. Considering the first challenge, there is no basis to disturb the award of

consequential damages. Generally speaking, a party asserting a breach of contract may recover damages that are "the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). The arbitrator here recognized that both parties were aware that TSP intended to recover the steel from the demolition site and sell that steel for a profit. The arbitrator concluded that National-Standard had breached the contract, causing TSP to be unable to recover and sell the steel. The arbitrator further concluded that TSP potentially lost profits from the sale of the steel, and the lost profits could reasonably be considered a result of National-Standard's breach. The arbitrator's conclusions are in accord with our contract law, see *id*., and our review of the arbitrator's award confirms that there is no sound basis to disturb this part of the award, see *Saveski*, 261 Mich App at 555.

C. CONSTRUCTION LIEN CANNOT EXCEED REMAINING AMOUNT UNDER THE CONTRACT

With respect to its second challenge, National-Standard asserts that the arbitrator awarded a construction lien on the amount of the entire award, rather than just the amount remaining on the contract itself. National-Standard argues that this exceeds the statutory limit on construction liens imposed by our Legislature.

As set forth in the Construction Lien Act, MCL 570.1101 *et seq*., "Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property." MCL 570.1107(1). The act defines "improvement" to include "clearing, demolish-

ing, excavating, . . . altering, [or] repairing . . . material, pursuant to a contract." MCL 570.1104(5), as amended by 2010 PA 147.[1] There is no question that, pursuant to the parties' contract, TSP provided an improvement to the real property within the meaning of the act. Nor does National-Standard challenge the arbitrator's finding that it breached the contract and, therefore, TSP is entitled to a construction lien.

Rather, National-Standard challenges the scope of the lien. The act provides in relevant part, "A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract." MCL 570.1107(1). The statute defines the term "contract" as "a contract, of whatever nature, for the providing of improvements to real property, including any and all additions to, deletions from, and amendments to the contract." MCL 570.1103(4). Therefore, under "the plain language of the statute, the amount of the lien is determined by the terms of the contract." *Mich Pipe & Valve–Lansing, Inc v Hebeler Enterprises, Inc*, 292 Mich App 479, 487; 808 NW2d 323 (2011).

The parties' contract sets out that TSP would complete three phases of work, namely (1) asbestos abatement, (2) demolition and disposal of all refuse, and (3) restoration work. The total amount that National-Standard agreed to pay TSP for the work is $414,950, and at the time of the arbitration it had already paid $273,867, leaving an unpaid balance of $141,083. The contract contained no mention of scrap steel or any compensation for TSP for the removal or sale of the

[1] The Legislature amended MCL 570.1104 in December 2018. See 2018 PA 367. Because the underlying proceedings in this case preceded that amendment, we cite the prior version of the statute. See 2010 PA 147.

scrap steel. While the parties understood that TSP would try to make a profit on the disposal of scrap steel, this was an understanding outside of the four corners of the integrated contract. In sum, the parties contractually agreed that TSP would dispose of the refuse (including scrap steel), and how it did so and under what financial conditions were solely up to TSP and not part of the contract. Thus, pursuant to the plain meaning of the Construction Lien Act, the amount of any construction lien for TSP could not exceed the remaining unpaid balance under the contract, i.e., $141,083. See MCL 570.1103(4); *Mich Pipe*, 292 Mich App at 487; see also *CD Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 427-428; 834 NW2d 878 (2013) (concluding that attorney fees not contemplated by the parties' contract could not be included as part of the construction lien).

The arbitrator approved a construction lien well in excess of the amount authorized by statute. Specifically, the arbitrator approved a lien for $782,469.05, which is $641,386.05 greater than the unpaid balance under the contract. TSP argues that it is entitled to lost-profit damages in excess of the unpaid balance, the arbitrator agreed, and, as discussed earlier, we have no sound basis to question this part of the award. Yet it is clear from the parties' arguments and the arbitrator's award that the lost profits were awarded as damages that reasonably flowed from National-Standard's breach of the contract, but were not, strictly speaking, part of the contract itself, i.e., the lost profits were awarded as consequential damages. The Construction Lien Act is clear that a lien authorized by the act cannot exceed the unpaid amount of the contract itself, and this unpaid amount does not include consequential damages.

The arbitrator's approval of the construction lien in excess of the unpaid amount was an error of law. Correction of the error would reduce the value of the lien by over $500,000, and compared to the original contract and the arbitrator's total award, this correction would be a substantial one. Thus, because the arbitration award contains an error of law that, if corrected, would substantially change the award, judicial interference with the award is justified. See *DAIIE*, 416 Mich at 444-445. While we would ordinarily not act before the trial court entered a final order, here the final order would be one foreclosing on the lien. See MCL 570.1121. It is appropriate for this Court to correct the error now, before such an order is entered, to ensure the correct legal result before enforcement of the lien.

As a final, corollary argument, National-Standard asks this Court to amend the arbitrator's award of attorney fees to reflect the correction of the construction lien. We reject the request because National-Standard made it in a cursory manner, *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997), without showing clear error on the face of the fee award, *DAIIE*, 416 Mich at 444-445, and any review would require us to delve into the arbitrator's mental process, which we cannot do, *Hope-Jackson*, 311 Mich App at 614.

III. CONCLUSION

Michigan's Construction Lien Act authorizes a lien up to the unpaid balance of the amount contracted. A lien that includes an amount for consequential damages flowing from but otherwise outside of the four corners of the contract exceeds the authorized amount of the act. In resolving the parties' dispute, the arbi-

trator made this error of law, and given the materiality and scope of the error, we conclude that the award must be vacated to the extent that the construction lien exceeded the unpaid amount under the contract. Accordingly, we reverse the trial court in part and order relief consistent with this opinion; in all other respects, we affirm.

GLEICHER and M. J. KELLY, JJ., concurred with SWARTZLE, P.J.

PEOPLE v GRANT

Docket No. 344625. Submitted August 6, 2019, at Grand Rapids. Decided September 19, 2019, at 9:00 a.m.

Adam Grant was convicted in 1993 in the Eaton Circuit Court of bank robbery, MCL 750.531; conspiracy to commit bank robbery, MCL 750.157a and MCL 750.531; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 27 to 50 years for bank robbery and conspiracy, to be served consecutively to a two-year sentence for felony-firearm. Defendant's convictions and sentences were affirmed by the Court of Appeals in an unpublished opinion, issued February 14, 1997 (Docket No. 167327). The Supreme Court denied his application for leave to appeal. 456 Mich 954 (1998). Defendant was eligible to receive disciplinary credits at the time his sentences were imposed, and he earned disciplinary credits while incarcerated. Defendant's calendar minimum date for release was June 30, 2022, but his net minimum date, i.e., his calendar minimum date less his disciplinary credits, was December 31, 2017. In August 2017, the Parole Board sent a letter to the circuit court indicating its interest in paroling defendant early on the basis of an interview it had conducted with him. The Parole Board also requested written approval from the circuit court to parole defendant before his calendar minimum date, citing MCL 769.12(4)(a). The circuit court, Janice K. Cunningham, J., denied the Parole Board's request. In March 2018, defendant filed a motion seeking written approval of his eligibility for early parole and of the Parole Board's jurisdiction to grant him parole. The circuit court denied the motion, stating that the sentencing judge was "very experienced" and had a background in criminal law. The circuit court also expressed an intent to defer to the sentence imposed by the sentencing court, citing the amount of consideration the sentencing court had likely given to the decision to impose its minimum sentence. Defendant filed a claim of appeal, which the Court of Appeals dismissed for lack of jurisdiction because the circuit court's order was not a final order. Defendant then filed a delayed application for leave to appeal, which was denied by the Court of Appeals. Defendant applied for leave to

appeal in the Supreme Court. In lieu of granting defendant's application, the Supreme Court remanded to the Court of Appeals for consideration as on leave granted. 503 Mich 953 (2019).

The Court of Appeals *held*:

1. In deciding whether to give written approval for defendant's eligibility for early parole, the circuit court did not err by failing to review the Parole Board's decision to grant defendant parole for a clear abuse of discretion. The "written approval" requirement of MCL 769.12(4)(a) is a prerequisite for a prisoner who is a habitual offender to be eligible for early parole; it does not entail the review of any Parole Board decision. Therefore, the circuit court did not owe any deference to the decision of the Parole Board.

2. MCL 769.12(4)(a) is neither void for vagueness nor because it is overly broad. Although the statute does not provide guidance or standards for a circuit court to consider when determining a defendant's parole eligibility, the statute does not impede any constitutional guarantees. Prisoners do not enjoy a constitutional right to parole, so a circuit court's decision regarding eligibility for early parole does not implicate any concerns about deprivation of due process or other constitutional guarantees. Further, defendant in this case did not present any relevant argument that the statute prohibits or interferes with constitutionally protected conduct, so defendant's overbreadth argument also failed.

3. The court abused its discretion when it denied defendant's request for written approval to designate him eligible for early parole. MCL 769.12(4)(a) does not indicate that a successor judge must abide by the minimum sentence of the sentencing judge; in fact, such an interpretation would render this provision of the statute meaningless. The court made a clear error of law by failing to engage in its own analysis or make an independent determination on the issue. In declining to exercise its discretion to consider the request and instead abdicating its role and responsibility under MCL 769.12(4)(a) by deferring to the minimum sentence of the sentencing court, the court abused its discretion.

Reversed and remanded for reexamination of whether defendant should be declared eligible for early parole under MCL 769.12(4)(a).

STATUTORY INTERPRETATION — MCL 769.12 — ELIGIBILITY FOR EARLY PAROLE — ABUSE OF DISCRETION.

A circuit court abuses its discretion when it declines to exercise its discretionary authority under MCL 769.12(4)(a) to consider a prisoner's request for written approval for eligibility for early

> parole; the court may not simply defer to the minimum sentence imposed by the sentencing judge.

Douglas R. Lloyd, Prosecuting Attorney, and *Brent E. Morton*, Senior Assistant Prosecuting Attorney, for the people.

Adam D. Grant *in propria persona*.

Before: GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

MARKEY, J. Defendant appeals as on leave granted the circuit court's order denying his motion for written approval to make him eligible for early parole under MCL 769.12(4). The court had also previously rejected a request from the Parole Board to grant defendant early parole. We reverse and remand for further proceedings.

To give context to our discussion of the factual and procedural history of the case, we begin with a brief overview of the law implicated in this matter. MCL 769.12 addresses fourth-offense habitual offenders such as defendant, and this appeal concerns the construction of Subsection (4) of the statute, which provides:

> An offender sentenced under this section or section 10 or 11 of this chapter for an offense other than a major controlled substance offense is not eligible for parole until expiration of the following:
>
> (a) For a prisoner other than a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.
>
> (b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge.

Because defendant committed the crimes before December 15, 1998, he is not a "prisoner subject to

disciplinary time." MCL 791.233c ("As used in this act, 'prisoner subject to disciplinary time' means that term as defined in . . . [MCL] 800.34[.]"); MCL 800.34(5)(a) (A "prisoner subject to disciplinary time" encompasses prisoners sentenced to indeterminate terms of imprisonment for enumerated "crimes committed on or after December 15, 1998[.]"); *Hayes v Parole Bd*, 312 Mich App 774, 779 n 1; 886 NW2d 725 (2015). Accordingly, Subsection (4)(a) of MCL 769.12 governs, as opposed to Subsection (4)(b).[1]

We now turn to the facts of the case. In 1993, defendant was convicted by a jury of bank robbery, MCL 750.531; conspiracy to commit bank robbery, MCL 750.157a and MCL 750.531; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 27 to 50 years for the bank robbery and conspiracy convictions, preceded by a consecutive two-year sentence for the felony-firearm conviction. And those three sentences were to be served consecutively to a sentence that defendant was already serving. Defendant's convictions and sentences were affirmed by this Court on appeal. *People v Grant*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 1997 (Docket No. 167327). Our Supreme

[1] We note that similar to MCL 769.12(4)(a), MCL 791.233(1)(b) provides, in part, that "a prisoner other than a prisoner subject to disciplinary time is eligible for parole before the expiration of his or her minimum term of imprisonment whenever the sentencing judge, or the judge's successor in office, gives written approval of the parole of the prisoner before the expiration of the minimum term of imprisonment." We shall frame our discussion in terms of MCL 769.12(4)(a) because that is how the case has been presented to us, but the analysis will apply equally to MCL 791.233(1)(b). MCL 791.233 was amended pursuant to 2019 PA 14, effective August 21, 2019. Given its effective date, the amended version of the statute does not apply to this case. Moreover, the amendment has no bearing on our analysis.

Court then denied defendant's application for leave to appeal. *People v Grant*, 456 Mich 954 (1998).

The "calendar minimum date" for defendant's release from prison is June 30, 2022; however, his "net minimum date" for release—defendant's calendar minimum date less disciplinary credits—was December 31, 2017.[2] Accordingly, in December 2017, subject to the "written approval" prerequisite, defendant became eligible for parole under MCL 791.233(1)(b) and MCL 791.233b(m) and (x).[3] And the

[2] Defendant was sentenced before the enactment of Michigan's truth-in-sentencing statutes, which preclude a prisoner from earning good time and disciplinary credits, and which require a defendant to serve the minimum sentence imposed by a court prior to being eligible for parole. See Deming, *Michigan's Sentencing Guidelines*, 79 Mich B J 652, 653 n 19 (June 2000), citing MCL 791.233, MCL 791.233b, and MCL 800.34. Defendant earned disciplinary credits during his time in prison. See MCL 800.33. As a consequence, defendant was eligible for his parole date to be lowered below his actual minimum sentence, a fact known to the sentencing judge at the time of defendant's sentencing. It appears that the successor trial judge misapprehended defendant's eligibility for early parole as an "alteration" of defendant's sentence.

[3] MCL 791.233b provides in pertinent part:

> A person convicted and sentenced for the commission of any of the following crimes other than a prisoner subject to disciplinary time is not eligible for parole until the person has served the minimum term imposed by the court less an allowance for disciplinary credits as provided in section 33(5) of 1893 PA 118, MCL 800.33, and is not eligible for special parole:
>
> * * *
>
> (m) Section . . . 227 of the Michigan penal code, . . . [MCL] 750.227.
>
> * * *
>
> (x) Section . . . 531 of the Michigan penal code, . . . [MCL] 750.531. [See also MCL 791.233(1)(c) (precluding defendant from being considered for "special parole" given his offenses).]

Parole Board acquired jurisdiction pursuant to MCL 791.234(3).[4] In August 2017, the Parole Board sent a letter to the circuit court indicating that as a result of an interview with defendant, it had an interest in paroling him.[5] The Parole Board, citing MCL 769.12(4)(a), requested written approval from the circuit court to parole defendant before his calendar minimum date.

The circuit court judge, who was the successor of the sentencing judge, denied the Parole Board's request. In

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We note that MCL 791.233b was amended pursuant to 2019 PA 16, effective August 21, 2019. Considering its effective date, the amended version of the statute is inapplicable. Furthermore, the amendment is not relevant to our analysis.

[4] MCL 791.234(3) provides:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute.

MCL 791.234 was amended pursuant to 2019 PA 14, effective August 21, 2019. In light of its effective date, the amended version of the statute does not apply. Additionally, the amendment is not pertinent to the outcome of this case.

[5] "At least 90 days before the expiration of the prisoner's minimum sentence less applicable good time and disciplinary credits for a prisoner eligible for good time or disciplinary credits, . . . the appropriate institutional staff shall prepare a parole eligibility report." MCL 791.235(7). An "interview must be conducted at least 1 month before the expiration of the prisoner's minimum sentence less applicable good time and disciplinary credits for a prisoner eligible for good time and disciplinary credits . . . ." MCL 791.235(1). The Parole Board is required to take these steps even though the sentencing or successor court has not yet given and may not give written approval for early parole eligibility. *Hayes*, 312 Mich App at 781. MCL 791.235 was amended pursuant to 2019 PA 13, effective August 21, 2019. Given its effective date, the amended version of the statute is inapplicable. Moreover, the amendment does not affect our analysis.

a letter to the Parole Board, the circuit court emphasized that it was not the sentencing court and therefore, it was unfamiliar with the facts and did not know the reasoning for its predecessor's decision to impose the particular sentence. The circuit court further explained that the Parole Board's letter contained "no basis for the request to ignore the habitual status for sentencing nor what the victim['s] request was at the time of sentencing." Additionally, the court complained that it had not been provided the presentence investigation report to review for purposes of contemplating the Parole Board's request. Finally, the circuit court stated that it was "not comfortable" altering the sentence.

In March 2018, defendant filed a motion seeking written approval of the Parole Board's jurisdiction to grant him parole, and he asked the circuit court to declare him eligible for early parole. Defendant submitted numerous exhibits to the circuit court in support of his motion, including a transcript of the sentencing hearing, various internal documents of the Department of Corrections concerning defendant, parole guidelines, and letters of support. The prosecution filed a response opposing defendant's motion, arguing that defendant was not remorseful and minimized his involvement in the bank robbery. At the hearing on defendant's motion, the circuit court denied the request for written approval of early parole eligibility. The gist of the court's ruling was that it did not believe that it should exercise its discretion to alter the sentence imposed by the sentencing court. The circuit court judge expressed that her predecessor was very experienced, had a criminal law background, had been a mentor to her, and was probably "more liberal" when it came to sentencing. The court further indicated:

> I still have to come back to the fact that I was not the sentencing judge, okay. I know when I give a sentence, I have thought about it, given it all the consideration I can give it, and then I make the best decision based on the information I have when I sentence an individual.

The circuit court additionally stated that it had considered the fact that there was a victim of the robbery who had expressed concern about defendant being released. And the court appeared to agree with "the other points that were made in the prosecutor's brief." The circuit court declared that defendant would be released consistent with the calendar minimum date, June 30, 2022. An order denying defendant's motion was entered on May 15, 2018.

Defendant filed a claim of appeal, but this Court dismissed the appeal for lack of jurisdiction because the circuit court's order was not a final order appealable by right. *People v Grant*, unpublished order of the Court of Appeals, entered June 13, 2018 (Docket No. 344152). Defendant then filed a delayed application for leave to appeal in this Court; however, it was denied "for lack of merit in the grounds presented." *People v Grant*, unpublished order of the Court of Appeals, entered October 25, 2018 (Docket No. 344625). Defendant filed an application for leave to appeal in the Michigan Supreme Court, and the Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Grant*, 503 Mich 953 (2019).

We review de novo issues of statutory construction. *People v Pinkney*, 501 Mich 259, 267; 912 NW2d 535 (2018). When interpreting a statute, this Court first focuses on the plain language of the statute with the goal of giving effect to the intent of the Legislature. *Id*. at 268. We must read individual words and phrases in

the context of the entire legislative scheme, examining the statute as a whole. *Id*. When the language of the statute is unambiguous, the statute must be enforced as written, and no further judicial construction is required or permitted. *Id*. If at all possible, every word in a statute should be given meaning, and no word should be rendered nugatory or treated as surplusage. *Id*. at 288.

The Legislature did not set forth any limitations or guidelines with respect to the "written approval" language in MCL 769.12(4)(a). The statute lacks reference to standards, factors, or criteria that a court should or must consider in deciding whether to grant approval. The statutory language plainly provides a court with *discretionary* authority to approve or not approve a request to designate a habitual offender eligible for early parole. Therefore, we hold that the appropriate standard of review is abuse of discretion. "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Everett*, 318 Mich App 511, 516; 899 NW2d 94 (2017). A decision that is arbitrary and capricious would fall outside the range of reasonable and principled outcomes. See *In re ASF*, 311 Mich App 420, 429; 876 NW2d 253 (2015) ("arbitrary" means without consideration of or reference to principles and reason, and "capricious" means "freakish" and "whimsical").

This standard of review not only defines the scope of this Court's review of a circuit court's decision under MCL 769.12(4)(a), it effectively commands and guides a circuit court to render a decision and proffer an explanation for the decision such that the ruling falls

within the range of reasonable and principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This approach precludes determinations that are arbitrary and capricious or reflect an error of law—the court's discretion is not unfettered. We are not prepared to dictate, nor does the statute require, contemplation of any specific standards, factors, or criteria in the circuit court's decision-making process with respect to whether to approve a request for early parole eligibility. But a circuit court cannot whimsically decide the issue, offering no supporting grounds or reasons. A court must provide a basis or bases for its decision upon reflection of the circumstances surrounding the case and the offender, articulating any standards, factors, or criteria that the court has used in reaching its decision. It is only then that this Court can properly assess whether a decision constituted an abuse of discretion. Whether factors, standards, or criteria employed by a court can survive appellate review will have to be determined on a case-by-case basis in this Court and our Supreme Court. Accumulated precedent, starting with this opinion, will shed more light on appropriate considerations by future courts tasked with responding to requests by habitual offenders for early parole eligibility. Before we review the circuit court's decision in this case, we must address some of defendant's arguments.

We reject defendant's contention that the Parole Board's decision to grant him parole should have been reviewed by the circuit court for a clear abuse of discretion for purposes of deciding whether to approve his request for eligibility for early parole. The "written approval" requirement of MCL 769.12(4)(a) is simply a prerequisite for a prisoner who has been sentenced as a habitual offender to be eligible for early parole; *it does*

not entail review of any Parole Board decision. MCR 7.118(H)(3) provides:

> The appellant has the burden of establishing that the decision of the parole board was
>
> (a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or
>
> (b) a clear abuse of discretion.

Pursuing a request for written approval for early parole eligibility under MCL 769.12(4)(a) does not constitute an appeal of a decision by the Parole Board. Therefore, a circuit court owes no deference to the Parole Board under the "clear abuse of discretion" standard when deciding whether to approve eligibility for early parole.

Defendant also maintains that MCL 769.12(4)(a) is unconstitutional. He argues that it is vague and overly broad because the statute provides no guidance or standards for a court to consider when determining parole eligibility. In *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001), this Court observed:

> The "void for vagueness" doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property without due process of law. A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated. [Citations omitted.]

"There is a presumption that [a] statute is constitutional, and the party asserting the constitutional chal-

lenge has the burden of proof." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 539; 669 NW2d 594 (2003).

The fatal flaw in defendant's argument is that a prisoner has no right to parole. *Morales v Parole Bd*, 260 Mich App 29, 39; 676 NW2d 221 (2003). Prisoners do not enjoy a constitutional or inherent right to be conditionally released from a sentence that is validly imposed. *Id*. Accordingly, a court's decision regarding eligibility for early parole does not implicate any concerns about the deprivation of a constitutional guarantee of life, liberty, or property without due process of law. Thus, defendant's position necessarily fails. Furthermore, defendant's argument does not relate to First Amendment freedoms or to fair notice of regulated conduct. The fact that MCL 769.12(4) provides no explicit standards or structure for determining whether to approve a request for eligibility for early parole does not render the statute invalid. Furthermore, as discussed above, the abuse of discretion standard inherently constrains courts from issuing arbitrary or capricious decisions even in the absence of any other expressly enumerated standards. Therefore, defendant's vagueness argument fails.

A statute is overbroad when it intrudes on constitutionally protected conduct in addition to the behavior that it may legitimately regulate. *People v Morris*, 314 Mich App 399, 406; 886 NW2d 910 (2016). Defendant does not present any relevant argument that MCL 769.12(4)(a) prohibits or interferes with constitutionally protected conduct, such as First Amendment freedoms. Accordingly, defendant's overbreadth argument fails.

Finally, we address the issue of whether the circuit court's decision to deny approval of the request to

designate defendant eligible for early parole constituted an abuse of discretion. We hold that the court did abuse its discretion in this matter because the court effectively failed to exercise its discretion, abdicating its role and responsibility under MCL 769.12(4)(a) by refusing to consider defendant's eligibility for parole before the calendar minimum date in deference to the minimum sentence imposed by the sentencing court 25 years earlier. Pursuant to MCL 769.12(4)(a), the decision regarding whether to approve early eligibility for parole rests with the sentencing judge or the judge's "successor." Nowhere in the statutory language is it indicated that a successor judge must give deference to or abide by the sentencing judge's decision to impose a particular minimum sentence for purposes of contemplating a defendant's release before expiration of the minimum sentence. Rather, the plain text of the statute makes clear that the successor judge is to decide the matter of early parole eligibility. In this case, by deferring to the sentencing court, the circuit court failed to exercise its discretion. The circuit court made a clear error of law by not engaging in its own analysis and by not making its own independent determination on the issue; therefore, the court abused its discretion. Were we to allow the circuit court's decision to stand, MCL 769.12(4)(a) would essentially be rendered meaningless because early parole eligibility would never be authorized if the successor court feels bound to honor the expiration of the minimum sentence as the earliest point in time that a defendant should become eligible for parole. Failing to exercise discretion when called upon to do so necessarily constitutes an abuse of that discretion. *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990).

Equally problematic is that by deferring to the sentencing court's decision made in 1993, defendant's

25 years of imprisonment and his conduct during those years, whether characterized as good or bad, escaped any significant consideration by the circuit court for purposes of deciding whether to grant the request to render defendant eligible for early parole. We acknowledge that the circuit court made fleeting reference to the victim's concerns about defendant's prospective release and to the reasons the prosecution gave in its brief to reject defendant's motion. But the record is quite clear that the court ultimately made its decision on the basis of its reluctance to allow parole eligibility before defendant had served the minimum sentence imposed by the sentencing court in 1993.[6]

We reverse the circuit court's ruling and remand for reexamination of whether defendant should be declared eligible for early parole under MCL 769.12(4)(a). We do not retain jurisdiction.

GADOLA, P.J., and RONAYNE KRAUSE, J., concurred with MARKEY, J.

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[6] Notwithstanding the above, we appreciate the circuit court's reasonable trepidation regarding overturning a matter given thoughtful consideration by a predecessor. Still, we reiterate that defendant's sentence was imposed at a time when prisoners were eligible to earn good time and/or disciplinary credits. The sentencing judge presumably factored the possibility of defendant's earning such credits into its original sentence. It is appropriate for the trial court to give deference to the probable expectations of the sentencing judge. Nevertheless, the sentencing judge would not have been shocked by the possibility of defendant's being paroled early. Moreover, in any event, a court may not decline to exercise its own discretion solely based on deference to a predecessor.

SHAW v CITY OF DEARBORN

Docket No. 341701. Submitted June 4, 2019, at Detroit. Decided September 19, 2019, at 9:05 a.m. Leave to appeal denied ___ Mich ___ (2021).

Therese Shaw filed an action in the Wayne Circuit Court against the city of Dearborn alleging that the city's water and sewer rates contained hidden charges that constituted unlawful taxes, in violation of the Headlee Amendment, Const 1963, art 9, §§ 6, 25-34. Historically, Dearborn had operated a "combined" sewage system, meaning that stormwater flowed into the same pipes as raw sewage before leaving the city's system for treatment. Occasionally, heavy rainstorms would cause the sewage system to become overloaded and release combined sewage into a natural water body without treatment. Due to increasingly stringent federal and state requirements, Dearborn was required to reduce these overflow incidents. In August 2004, Dearborn voters approved a $314.12 million millage to pay for improvements to the sewer system. The city's initial plan was to build 12 retention facilities, or caissons, that could store combined sewage during times of heavy rainfall before it was treated. Construction of the caissons was funded by the millage, but the cost of operating and maintaining them was funded by revenue from sewer rates charged to the city's customers. At the time this action was filed, the city had constructed only four of the planned caissons due to difficulties that arose during the construction process. In areas of the city not served by caissons, the city implemented a plan to separate the sewer system by installing separate pipes for sewage and stormwater. To save time and money while the streets were excavated for the sewer-separation work, Dearborn also planned to repair and replace some of its existing underground infrastructure, including old or deteriorated water and sewer lines, even in locations where this work was not necessary to the performance of the sewer-separation work. Shaw alleged that the city's water and sewer rates contained hidden charges to pay for the work on the city's infrastructure, representing hidden unlawful taxes that violated the Headlee Amendment because they were imposed without the authorization of the city's voters. Specifically, Shaw objected that the water and sewer rates unlawfully included the capital infrastructure costs of separating the city's sewer system

(a so-called "CSO [combined-sewage overflow]-capital charge") and the costs of operating and maintaining the caissons (a purported "CSO-O&M charge"). Dearborn moved for summary disposition under MCR 2.116(C)(8) and (10), arguing, *inter alia*, that its water and sewer rates were not taxes, but rather the prices it charged for a commodity, and that the rates were only compulsory for customers who used the water and sewer services. Further, the city noted that water and sewer customers chose how much of those services to use and benefited directly from the city's efforts to keep the systems in good working order and in compliance with regulatory requirements. The circuit court, Brian R. Sullivan, J., granted Dearborn's motion for summary disposition, concluding that the primary purposes of the rates were not to raise revenue but to maintain the water and sewer systems and to pay the city's wholesale provider for water and sewage disposal. The circuit court further held that the city's improvements to its water lines constituted maintenance rather than an investment in infrastructure and that this was a regulatory activity rather than a revenue-raising activity. The court additionally concluded that most of the cost of the sewer-separation work was paid for by funds approved in the August 2004 millage election. The court also dismissed Shaw's unjust-enrichment claim.

The Court of Appeals *held*:

1. The trial court correctly concluded that Shaw failed to demonstrate a genuine issue of material fact in support of her Headlee Amendment claim. Shaw argued that the city imposed a CSO-capital charge on ratepayers to pay for some of the infrastructure costs of the sewer-separation project. However, she did not present any evidence that the city used funds from water and sewer rates to pay for the sewer-separation project. Although Shaw argued that the city planned to spend certain amounts from the water and sewer funds to complete the sewer-separation project, she did not cite any authority that a claim under the Headlee Amendment may be predicated on a plan to spend funds rather than on evidence that those funds were actually spent. The record indicated that the city charged its ratepayers for the ancillary water and sewer work that the city had performed at the same time as the sewer-separation work. The record also confirmed that the sewer-separation project was funded by bonds and loans to be repaid by the taxes generated from the August 2004 millage. Therefore, no evidence was presented that the city's water and sewer rates contained a hidden unlawful capital improvement tax in violation of the Headlee Amendment.

2. Dearborn did not violate the Headlee Amendment with respect to the purported CSO-O&M charges. Although the record did not support Shaw's claim that a capital charge for sewer separation was embedded in the city's rates, it was undisputed that a portion of the city's utility rates was used to fund the operation and maintenance of the caissons. Under the factors set forth in *Bolt v Lansing*, 459 Mich 152 (1998), these rates were valid user fees rather than unlawful taxes. First, the rates served the regulatory purpose of providing water and sewer service to residents. The fact that the rates generated funds to pay for operating and maintaining the water and sewer systems did not establish that the primary purpose of the rates was to generate revenue. Moreover, the cost of operating and maintaining the caissons was part of the overall cost of providing sewer service. Second, water and sewer rates were valid user fees because users paid a proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Shaw argued that the city's reliance on water usage to establish water and sewer rates constituted an improper tax because a ratepayer's use of water bore no relation to the amount of stormwater that entered the system. Shaw argued that instead the city should have charged property owners, rather than ratepayers, for the removal of stormwater from their property and should not have used water and sewer rates to pay for anything related to stormwater management. Under the Headlee Amendment, this Court's role is not to decide whether a municipality has chosen the best system for funding a municipal improvement or service, but whether a particular charge imposed by the municipality is a true user fee or a disguised tax. Reliance on water usage was a valid method for establishing water and sewer rates, and the city's use of this method did not render those rates an unconstitutional tax. Third, the rates were valid user fees under *Bolt* because users controlled how much water to use. Therefore, the purported CSO-O&M charges were voluntary.

3. The trial court properly dismissed Shaw's claim of unjust enrichment. Shaw did not present any evidence that a so-called CSO-capital charge was included in the city's water and sewer rates, that there was an improper CSO-O&M charge in the rates, or that the rates were otherwise unreasonable.

Affirmed.

Kickham Hanley PLLC (by *Gregory D. Hanley*, *Jamie K. Warrow*, and *Edward F. Kickham, Jr.*) for Therese Shaw.

Zausmer, August & Caldwell, PC (by *Gary K. August* and *Richard A. Patton*) for defendant.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Sonal Hope Mithani*) for the Michigan Municipal League, the Michigan Townships Association, and the Government Law Section of the State Bar of Michigan.

Before: GADOLA, P.J., and BOONSTRA and SWARTZLE, JJ.

SWARTZLE, J. Voters approved the Headlee Amendment to ensure that local taxpayers would have ultimate control over spending on local public works. The purpose of the amendment would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project. This is what plaintiff Therese Shaw argues happened when the city of Dearborn sought to modernize its sewer system. The record, however, belies plaintiff's argument—instead, the city performed ancillary repair and replacement utility work at the same time as its more extensive modernization work to save time and money, surely a worthwhile goal for any local authority. Finding no other basis for reversal, we affirm summary disposition in favor of the city.

I. BACKGROUND

A. THE CITY'S WATER AND SEWER PROJECTS

Like many suburban-Detroit communities, the city of Dearborn has historically purchased water on a wholesale basis from the Detroit Water and Sewerage Department and then passed on that water to its retail

customers. Following the city of Detroit's bankruptcy, a new entity called the Great Lakes Water Authority was created that, as of January 2016, provides water and sewer services to suburban-wholesale customers such as Dearborn. The parties took the deposition testimony in this case before the creation of the Great Lakes Water Authority. Therefore, we will refer to the Detroit Water and Sewerage Department in this opinion, rather than the Great Lakes Water Authority, to maintain consistency with the deposition testimony. The newer entity's assumption of the other entity's role with respect to suburban communities makes no practical difference to the legal analysis of this case.

Historically, Dearborn has operated a "combined" sewer system. Raw sewage discharged from homes and businesses entered the same pipes as stormwater, i.e., rainwater and snowmelt, that flowed into those pipes through catch basins or infiltration. Once stormwater mixed with sewage, the mixture was deemed to constitute combined sewage, and it was required to be sent to the Detroit Water and Sewerage Department for treatment before it could be released back into the environment. On some occasions, a heavy rainstorm created what is known as a combined-sewage-overflow event. During such an event, the combined-sewer system became overloaded, causing the release of combined sewage into a natural waterway without treatment.

Increasingly stringent federal and state regulations obligated Dearborn to plan and implement measures to reduce combined-sewage-overflow events. In an August 2004 election, Dearborn voters approved a property-tax millage of $314.12 million to pay for federally mandated measures to abate combined-sewage-overflow events. The millage authorized the city to incur debt, including both bonds and low-interest loans from the State Re-

volving Fund (SRF), to use for abatement measures. The funds obtained from the increased millage rate were dedicated to service the debt.

Dearborn's initial plan was to construct 12 retention facilities that could store combined sewage, called caissons. During times of heavy rainfall or snowmelt, the city could store combined sewage in the caissons and then either treat the combined sewage before releasing it into the environment, or send the combined sewage to the Detroit Water and Sewerage Department once that entity was able to handle the flow volume. Because of difficulties that arose in constructing the planned caissons, including legal battles with contractors and bonding companies, only 4 of the 12 planned caissons are currently operational. These four operational caissons serve only a portion of the city, and the sewer system remains a combined system in the portion of the city served by the caissons. Although the city funded the construction of the caissons through the millage, it currently pays the cost of operating and maintaining the caissons with revenue generated by sewer rates charged to the city's sewer customers. In other words, taxpayers built the four caissons; ratepayers operate and maintain them.

In areas of the city not served by the caissons, Dearborn is now undertaking a different abatement plan to address combined-sewage-overflow events. In these areas, the city is separating the sewer system, i.e., providing separate pipes for sewage and stormwater. In some areas, the system has already been separated, meaning that stormwater is no longer combined with sewage, and stormwater can therefore be released untreated into natural waterways, while the sewage flows to the treatment facility in a dedicated pipe. For those remaining areas where the system has not been sepa-

rated, the city is either installing a new pipe for storm-water and using the existing one for sewage or vice versa.

Also, coincident with the construction project required to separate the sewer system, Dearborn has chosen to repair and replace some existing underground infrastructure. This includes replacing old or deteriorated water and sewer lines with new lines in certain areas, even when this work is not required by the sewer-separation project itself. Dearborn has scheduled this ancillary work to save time and money, given that the city was already excavating the streets under which the water and sewer lines are located to construct the sewer-separation project. On some occasions, the city is replacing water and sewer lines because the street has already been torn up; on other occasions, the city is replacing water and sewer lines because the sewer-separation project creates a risk of damaging the infrastructure already in place.

Although the city estimated the original cost of the abatement project at $314 million when the voters approved the original property-tax millage, the cost of the entire project as designed, including both the sewer-separation work and the ancillary work, is now expected to exceed $400 million. Dearborn is paying most of this cost with the bonds and low-interest loans authorized as part of the millage, but the city is paying the costs of the ancillary work through various revenue streams, including water and sewer rates, street funds, grants, and interest earnings. To pay for the ancillary work, Dearborn is using $63 million from the sewer fund (i.e., money generated by sewer rates) and $21 million from the water fund (i.e., money generated by water rates) as a component of the anticipated $400 million overall cost of the project. The water fund is used to make repairs related to the water-supply system, and the sewer fund

is used to make repairs related to the sewer system. Dearborn has yet to spend about $57 million of the amount authorized by the original millage. The city anticipates that the overall project will be completed by 2022.

During discovery, several witnesses, including the city's finance director, James O'Connor, and the city's engineer, Mohmedyunus Patel, testified regarding the city's decision to perform the ancillary work on the water and sewer lines at the same time that it performed the sewer-separation work. O'Connor explained that the city chose to complete the ancillary work at the same time as the sewer-separation work because the impacted roads were already being excavated as part of the sewer-separation work, and performing the two projects simultaneously was a cost-effective measure because the roads did not have to be excavated twice. Meanwhile, Patel testified that the city paid for some of the ancillary work with millage funds because it was sometimes necessary to disturb the water lines to service the underlying sewer lines that required separation. Yet, because the sewer-separation work and the ancillary work occurred at the same time, witnesses sometimes referred to both the mandatory sewer-separation work and the ancillary work as part of a single construction project, known as the combined-sewage-overflow (CSO) project. Although the terminology used by the witnesses was sometimes imprecise, the testimony made clear in context that the city performed the two different types of work simultaneously for reasons of efficiency and cost savings.

B. PLAINTIFF'S LAWSUIT

Because the other plaintiffs in this case were dismissed by stipulation of the parties and are not part of

this appeal, we refer to Therese Shaw as "plaintiff." Plaintiff filed this lawsuit against Dearborn in 2013 and subsequently filed an amended complaint in 2014. In her amended complaint, plaintiff alleged that the city's water and sewer rates contained hidden charges that qualified as unlawful taxes because they were imposed without authorization by Dearborn's voters, in violation of Const 1963, art 9, §§ 6, 25-34, popularly known as the Headlee Amendment. See *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121 n 2; 537 NW2d 596 (1995). In addition, plaintiff argued that Dearborn's water and sewer rates unjustly enriched the city. Plaintiff sought to pursue this matter as a class action and requested a refund, on behalf of herself and the purported class, of all amounts to which she alleged entitlement.

Specifically, as relevant to this appeal, plaintiff argued that the water and sewer rates that Dearborn charged the users of its water and sewer systems unlawfully included the capital infrastructure costs of separating its sewer system, and plaintiff called this purported charge the "CSO-capital charge." In addition, although plaintiff conceded that Dearborn did not use funds from its water and sewer rates to construct the combined-sewage caissons, she argued that those rates unlawfully funded the operation and maintenance of the caissons, and plaintiff called this the "CSO-O&M charge." As discussed in more detail later, it is important to note at the outset that these "charges" are terms created by plaintiff rather than terms used by Dearborn in calculating or levying its water and sewer rates. We use the terms solely for the sake of simplicity in addressing plaintiff's arguments; this is not meant to express agreement with plaintiff's assertion that these purported charges actually exist as stand-alone charges or components of the actual rates charged.

Dearborn moved for summary disposition under MCR 2.116(C)(8) and (10). The city argued that: (1) plaintiff's complaint contained no factual allegations regarding how the city's actual costs of providing water and sewer services are or should be determined; (2) the city's water and sewer rates were not a tax, but instead represented the price paid for a commodity; (3) plaintiff presented no basis to overcome the presumption that the city's water and sewer rates were reasonable; (4) the city did not create a new utility fee to pay for the construction and operation of a new stormwater-utility system, but merely modified and reconfigured an existing sewer system, and the voter-approved millage funded the cost of separating the sewer system; (5) the city's replacement of aging or compromised water mains constituted merely repair and maintenance of the existing system to avoid disruption of service; and (6) the city's water and sewer rates were compulsory only for those customers who used the services and chose how much of the services to use, and those customers were directly benefited by the city's efforts to keep the water and sewer systems in good working order and in compliance with regulatory requirements.

Plaintiff filed her own motion for summary disposition, limited to her Headlee Amendment claim. Plaintiff argued that what she calls the CSO-capital charge qualified as a disguised tax because it financed an investment in public infrastructure and was not a fee designed merely to defray the costs of a regulatory activity. Plaintiff also argued that what she calls the CSO-O&M charge qualified as a disguised tax because it forced all water and sewer ratepayers to pay the costs of operating and maintaining the caissons, even though the caissons served ratepayers in only certain parts of the city, and even though the caissons benefited the general public in the form of better environ-

mental conditions, rather than serving only ratepayers. Plaintiff argued that the two purported charges were designed to raise revenue for the city rather than serve a regulatory purpose; the charges were disproportionate to the city's actual costs of providing water and sewer service; and payment of the charges was not voluntary because the charges were hidden in water and sewer rates and not approved by Dearborn voters. Based on this, plaintiff argued that the purported charges qualified as disguised taxes that violate the Headlee Amendment.

The trial court held multiple hearings between 2014 and 2017 on the parties' motions for summary disposition. It appears from the record that the delay in resolving the dispositive motions was due to various attempts to resolve the case, including facilitation, mediation, and settlement conferences, all of which proved unsuccessful.

In December 2017, the trial court issued a 37-page opinion and order granting Dearborn's motion for summary disposition and denying plaintiff's motion for partial summary disposition. The trial court concluded that the primary purposes of the purported charges described by plaintiff were not to raise revenue, but to maintain the city's water and sewer systems and to pay the Detroit Water and Sewerage Department for the provision of water and the disposal of sewage. The trial court held that the city's upgrade of water lines qualified as maintenance rather than an investment in infrastructure. Further, the trial court concluded that the city was engaged in a regulatory activity, rather than a revenue-raising activity, when it maintained and repaired the water lines. The trial court noted that the city imposed water and sewer charges only on users, and it concluded that the charges based on

metered-water usage were reasonable and proportionate. The trial court further concluded that the burden of sewer separation was borne in large part by funds approved in the August 2004 election. For these reasons, the trial court concluded that the purported charges described by plaintiff were user fees rather than taxes and granted the city summary disposition on plaintiff's Headlee Amendment claim. The trial court likewise dismissed plaintiff's unjust-enrichment claim, ruling that plaintiff failed to present evidence that an overcharge or tax existed.

After plaintiff filed a claim of appeal with this Court, the city moved to expand the record on appeal. The city sought to add to the record evidence of a millage election held in August 2018 in which Dearborn's voters approved $60 million of additional property taxes to pay for the sewer-separation project. This Court denied the city's motion to expand the record on appeal. *Shaw v Dearborn*, unpublished order of the Court of Appeals, entered February 22, 2019 (Docket No. 341701).

II. ANALYSIS

A. STANDARD OF REVIEW

Before the trial court, Dearborn moved for summary disposition under MCR 2.116(C)(8) and (10). "Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). We review de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10). *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A mere

promise or possibility that a claim might be supported by evidence produced at trial is insufficient to avoid summary disposition. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006), citing *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Whether a charge imposed by a city is a tax or a user fee is a question of law that we review de novo. *Bolt v Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998).

B. HEADLEE AMENDMENT CLAIMS

The Headlee Amendment was adopted by referendum effective December 23, 1978. *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 355; 604 NW2d 330 (2000). Under the amendment, a local governmental unit is "prohibited from levying any tax not authorized by law or charter . . . or from increasing the rate of an existing tax above that rate authorized by law or charter" when the amendment was ratified, unless a majority of voters have approved the levying of a new tax or increasing the rate of an existing one. Const 1963, art 9, § 31. In ratifying the amendment, it was clear that voters " 'were . . . concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers. The Headlee Amendment is the voters' effort to link funding, taxes, and control.' " *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 7; 564 NW2d 457 (1997), quoting *Durant v State Bd of Ed*, 424 Mich 364, 383; 381 NW2d 662 (1985). "The ultimate purpose [of the Headlee Amendment] was to place public spending under direct popular control." *Waterford Sch Dist v State Bd of Ed*, 98 Mich App 658, 663; 296 NW2d 328 (1980). The amendment "grew out of the spirit of 'tax revolt' and was designed to place specific limitations on state and local revenues." *Id*.

Application of § 31 of the Headlee Amendment "is triggered by the levying of a tax." *Jackson Co v City of Jackson*, 302 Mich App 90, 98; 836 NW2d 903 (2013), citing *Bolt*, 459 Mich at 158-159. Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not. *Jackson Co*, 302 Mich App at 98-99. In a case alleging a violation of the Headlee Amendment, the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id*. at 98.

As explained by our Supreme Court, "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id*. at 161 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Id*. at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

C. MUNICIPAL WATER AND SEWER RATES

Because the purported charges that plaintiff challenges are, according to plaintiff, embedded in the

city's water and sewer rates, it is appropriate to summarize the legal principles that govern judicial review of municipal-utility rates. Courts typically afford great deference to municipal-ratemaking authorities. See *Novi v Detroit*, 433 Mich 414, 425-426; 446 NW2d 118 (1989). "Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015). A fee charged by a municipality is "presumed reasonable unless it is facially or evidently so wholly out of proportion to the expense involved that it must be held to be a mere guise or subterfuge to obtain the increased revenue." *Kircher v Ypsilanti*, 269 Mich App 224, 232; 712 NW2d 738 (2005) (cleaned up). This is because "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi*, 433 Mich at 427. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id*. at 430. "Absent *clear evidence* of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Trahey*, 311 Mich App at 595 (emphasis added).

Plaintiff argues generally that defendant's focus on the reasonableness of its rates is a "canard" and that whether a municipal-utility rate is reasonable is a separate issue from whether the rate qualifies as an unlawful tax. Contrary to plaintiff's argument, the presumption that the amount of a municipal fee is reasonable is pertinent here and has been noted by this Court when reviewing the second *Bolt* factor regarding the proportionality of a charge imposed by a city. See *Jackson Co*, 302 Mich App at 109. Yet, this presump-

tion is just that—a presumption—and it can be overcome by the plaintiff with a showing of sufficient evidence to the contrary. *Trahey*, 311 Mich App at 594.

D. PURPORTED "HIDDEN" CHARGES

Initially, it is important to emphasize that Dearborn does not impose a distinct charge or fee called a CSO-capital charge or a CSO-O&M charge. These are merely terms created by plaintiff for the purpose of this litigation. Plaintiff claims that these purported charges are embedded in the city's water and sewer rates, but cites no pertinent authority suggesting that it is appropriate for the purpose of a Headlee Amendment claim for this Court to analyze a purported charge that is not separately or distinctly assessed by the governmental agency. Cf. *Bolt*, 459 Mich at 154 (addressing a *distinct* charge known as a "storm water service charge" imposed by city ordinance); *Jackson Co*, 302 Mich App at 93 (addressing a *distinct* charge called a "storm water management charge" imposed by city ordinance). With that said, we recognize that a municipality cannot avoid the Headlee Amendment simply with bookkeeping maneuvers, and therefore we address the merits of plaintiff's claim.

E. NO GENUINE ISSUE OF MATERIAL FACT ON PLAINTIFF'S CLAIMS

Plaintiff first argues that so-called CSO-capital charges and CSO-O&M charges purportedly embedded in the city's water and sewer rates violate the Headlee Amendment and that the trial court improperly made factual findings that prevented it from reaching the legal issues regarding her Headlee Amendment claim. Specifically, plaintiff argues that a genuine issue of material fact exists regarding whether the city paid for the separation of the sewer and storm systems with

funds obtained from water and sewer rates. Plaintiff argues that the trial court made an erroneous factual finding that the city paid the costs of the sewer-separation project with tax revenues from the 2004 millage election, rather than paying for that project with funds obtained from utility rates. Our review of the record confirms that the trial court made no erroneous factual findings. The trial court instead reviewed the evidence submitted by the parties and correctly concluded that plaintiff failed to demonstrate a genuine issue of material fact in support of her Headlee Amendment claim.

1. CSO-CAPITAL CHARGE

Plaintiff defines the CSO-capital charge as the imposition on water and sewer ratepayers of some of the infrastructure costs of the city's sewer-separation project. Significantly, the city conceded in its brief on appeal that it told the voters that it *would* increase utility rates to pay for the sewer-separation project if the voters did not approve the proposed millage in 2004. Therefore, it is not unwarranted for system users to believe that the city might decide to spend funds obtained from rates to pay for some portion of the sewer-separation project. Yet, providing evidence of what the city proposed, planned, or budgeted is not the same as providing proof of what the city actually did.

In her brief on appeal, plaintiff argues that the city "plans to spend" certain amounts from the sewer and water funds to complete the sewer-separation project. Plaintiff cites no authority that a Headlee Amendment claim may be predicated on a mere *plan* to spend certain funds in the absence of an actual expenditure. In the case of an individual plaintiff, a cause of action for a tax refund accrues when the tax is due. See

Taxpayers Allied, 450 Mich at 124. Plaintiff has not established that a mere budget plan alone is a sufficient basis for asserting a claim under the Headlee Amendment in the absence of any evidence that the city effectuated the budget plan. To the extent that plaintiff is relying on the city's alleged plan to spend money from the water and sewer funds in the future, plaintiff's claim is not ripe because it rests on speculation about possible future events. "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim that rests on contingent future events is not ripe." *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013) (cleaned up).

As explained earlier, the plaintiff bears the burden of establishing that a charge violates the Headlee Amendment. *Jackson Co*, 302 Mich App at 98. Plaintiff argues that a genuine issue of material fact exists regarding whether the city paid for the sewer-separation project with funds obtained from water and sewer rates. Yet, after ample time and significant discovery, plaintiff has presented no evidence that the city actually charged the costs of the sewer-separation work to its ratepayers after the city's voters approved the millage. Instead, the record indicates that the city charged its ratepayers for the ancillary water and sewer work that was performed at the same time as the sewer-separation work. As multiple witnesses testified, Dearborn performed ancillary projects to repair or replace old or deteriorated water mains and sewer mains even though such work was not necessitated by the sewer-separation project itself. The city scheduled this ancillary work contemporaneously with the sewer-separation project to save ratepayers the cost of having to tear up the road a second time. Although witnesses

sometimes referred to the ancillary work as part of the same construction project, that work served a different purpose than the sewer-separation work itself.

Plaintiff points to a portion of the city's 2013 financial statement that states, in relevant part, that the city "uses resources from the Major Street & Trunkline Fund, Local Street Fund, Water Fund, and Sewer Fund to partially fund the separation projects." This is a generalized statement that fails to establish the existence of any actual expenditure of funds from water or sewer rates on the sewer-separation project itself, as opposed to the ancillary projects. This is especially true given that the financial statement uses the plural term "projects" and the paragraph as a whole refers to several related projects.

Plaintiff also points to deposition testimony from various city officials. In this regard, we observe that plaintiff has selectively quoted deposition testimony out of context. As one example, plaintiff's reply brief on appeal quotes the following excerpt of O'Connor's deposition testimony, with the bracketed material below inserted by plaintiff:

> *Q*. All right. We would agree that the cost of that [the sewer-separation project] is being financed through monies that the City receives through water and sewer rates that are imposed, correct?
>
> *A*. Yes.
>
> *Q*. And so somebody who owns a house in the City of Dearborn who has access to the water and sewer system is paying some portion of the City's cost of the sewer separation project, correct? Right?
>
> *A*. Yes.

Read in its full context, however, O'Connor's deposition testimony refers not only to the sewer-separation project but to the entirety of the work being performed,

including the ancillary work that the city performed contemporaneously with the sewer-separation project. Here is a more complete excerpt of O'Connor's deposition testimony on this point, including questions and answers that plaintiff omitted from the appellate briefing:

> *Q*. All right. Well, I'll part [sic] my question out. Water lines are part of—new water lines are part of the sewer separation fund, correct?
>
> *A*. They're being done at the same time.
>
> *Q*. All right. But it's being told to the citizens that it's one of the benefits of the sewer separation project, right?
>
> *A*. Yes.
>
> *Q*. New water lines. Okay. And there's [new] sewer—and there's replacement sewer lines, and there's [new] storm sewers, correct?
>
> *A*. Yes.
>
> *Q*. All right. We would agree that the cost of that is being financed through monies that the City receives through water and sewer users via the rates that are imposed, correct?
>
> *A*. Yes.
>
> *Q*. And so somebody who owns a house in the City of Dearborn who has access to the water and sewer system is paying some portion of the City's cost of the sewer separation project, correct? Right?
>
> *A*. Yes.

Later in his deposition, O'Connor explained how he viewed the water-line-replacement project, stating that it was included by the city's choice as part of the overall sewer-separation project—in the sense that it was being performed at the same time—but that the ancillary work was not mandatory like the sewer-separation work itself:

THE WITNESS: I don't believe any of the water lines has been mandated to be replaced. That was a decision made that since the road is going to be ripped up and sewer lines are going to be replaced, that with the convenience of that, that water lines would be replaced at the same time.

Q. I don't care whether it's mandated or not. That's not part of my question.

A. Okay.

Q. My question is, is it part of the project?

A. By choice, yes.

Q. All right.

A. So these water lines are old. The City's system is very old and the roads are ripped up, and it's a great time to replace the water lines at the same time.

O'Connor testified further on this point when questioned by Dearborn's attorney:

Q. And the CSO project—and I think we've already covered this, but I just want to clarify—that includes non—even though we call it a combined sewer overflow project, there are actually other nonsewer-related improvement components to that project?

* * *

A. Yes.

Q. And part of that is replacing City water lines; is that correct?

A. Yes.

Q. And is it more cost-effective to replace the City water lines that are part of the CSO project in conjunction with the CSO project, as opposed to going back and tearing up the roads at some other date?

A. Yes.

Q. Is that why you're planning on replacing the water lines in conjunction with the CSO project?

A. Yes. And it's not me, it's the City.

Having reviewed the relevant portions of O'Connor's testimony in context, we are not convinced by plaintiff's suggestion that O'Connor admitted that funds from water and sewer rates were used to pay for the sewer-separation project. Plaintiff has pulled from context part of O'Connor's testimony and omitted testimony indicating that O'Connor was referring to the ancillary work, rather than the sewer-separation work itself, when discussing the use of funds obtained from water and sewer rates.

Plaintiff also argues that the city's brief on appeal has for the first time divided the sewer-separation project into three "aspects," i.e., sewer-separation work, water-line work, and sewer-line work. Having reviewed the relevant deposition testimony, we do not share plaintiff's view that the city's appellate brief created a new nomenclature to describe the sewer-separation project. In truth, the city's description of the work in its appellate briefing is fully consistent with how witnesses described the work in deposition testimony. The testimony supports the city's explanation that, at the same time that it was performing the federally mandated sewer-separation work, the city voluntarily chose to repair or replace infrastructure that was not part of the sewer-separation work for the sake of efficiency in avoiding the costs of having to tear up the road a second time. This is not by any means a new explanation created by the city on appeal, as plaintiff incorrectly suggests.

For its part, the city argues on appeal that the state of Michigan "policed" the city's expenditures to ensure that funds were properly spent. The city points to the

fact that the SRF reimburses the city for eligible project expenses, and argues that the SRF ensured that the tax dollars raised in the 2004 millage were spent only on sewer-separation work. It does not follow, however, that the SRF reviewed the city's expenditures on all of the various construction projects in which it was engaged for compliance with the Headlee Amendment. First, although the SRF reviewed expenditures submitted to it by the city for reimbursement, the city could have avoided the SRF's review by simply not submitting proof of an expenditure for reimbursement. Second, the SRF reviewed whether the submitted expenses related to sewer-separation work performed by the city. The fact that the city spent tax funds on the sewer-separation project, as verified by the SRF, does not necessarily mean that the city did not also spend water- and sewer-rate funds on the sewer-separation project without oversight from the SRF. Therefore, the city's reliance on the SRF's involvement in the sewer-separation project is unconvincing.

Nonetheless, the record confirms that the sewer-separation project was funded by the bonds and low-interest loans to be paid by the property taxes authorized by the August 2004 millage election. At the time of the trial court proceedings, the city had yet to spend about $57 million of the amount authorized by the 2004 millage election for the sewer-separation project. This, in itself, contradicts plaintiff's contention that the city resorted to using ratepayers' funds for the sewer-separation work because the city purportedly ran out of funds authorized by the 2004 millage election. Furthermore, although this Court denied defendant's motion to expand the record, *Shaw v City of Dearborn*, unpublished order of the Court of Appeals, entered February 22, 2019 (Docket No. 341701), we nonetheless take judicial notice of an August 2018 millage election in

which defendant's voters authorized $60 million of additional property taxes to pay for the completion of the sewer-separation project. See MRE 201(b); *Gleason v Kincaid*, 323 Mich App 308, 314 n 1; 917 NW2d 685 (2018) (taking judicial notice of an election result). While not dispositive, the fact that the city recently obtained voter approval for more tax revenues to finish the sewer-separation project tends to undermine plaintiff's claim that the city is using funds from water and sewer rates to pay for the project because, according to plaintiff, the city has run out of other funds.

We acknowledge that the record is not always clear on how the city funded each of the various components involved in its multiyear construction project. But it is not this Court's role to audit each and every aspect of the city's expenditures. It is plaintiff who is asserting a violation of the Headlee Amendment, and after extensive discovery, she simply has not presented evidence establishing that any funds obtained from water and sewer rates were used to pay for the mandatory sewer-separation project itself.

2. CSO-O&M CHARGE

Plaintiff also argues that the city's water and sewer rates include the CSO-O&M charge, which, as defined by plaintiff, is the cost of operating and maintaining the caissons constructed to hold sewage during combined-sewage-overflow events. Plaintiff concedes that the city paid for the construction of the caissons with the proceeds of the voter-approved millage. Thus, plaintiff admits that the purportedly hidden charges in her utility rates "do not technically finance" an investment in infrastructure, when it comes to the caissons.

Nonetheless, plaintiff still posits that there are embedded taxes within her utility rates, arguing that a

charge need not pay for infrastructure to qualify as a disguised tax. First, plaintiff suggests that the city uses the caissons for stormwater rather than sewage. This is incorrect given that stormwater that has not mixed with sewage need not be held or treated and can instead be discharged untreated into natural waterways. It is only when stormwater has mixed with sewage in the combined part of the sewer system that the city uses the caissons, as treatment of the combined sewage is required.

Second, plaintiff claims that not all sewer ratepayers benefit from the caissons because the caissons are used for sewage discharged by only some users of the city-wide system. Plaintiff's argument ignores the reality of a sewer system that is comprised of multiple pipes and facilities. One need not be a hydraulic engineer to understand that the sewage discharged by any particular ratepayer does not pass through every piece of infrastructure in a city-wide sewage-disposal system. From its point of entry into the sewer system, the sewage flows downhill, unless it reaches a low point and is pumped to a higher elevation through use of a lift station, and then it flows downhill again through the shortest route possible to reach the holding or treatment facility. Plaintiff has cited no authority establishing that a city must individualize each user's sewer rate based on which specific pipes and facilities transport, hold, or treat the sewage discharged by that particular ratepayer.

Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any

average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents.

An analysis of the *Bolt* factors confirms that defendant did not violate the Headlee Amendment with respect to the purported CSO-O&M charges. As discussed earlier, the record evidence does not support plaintiff's claim that a capital charge for sewer separation is embedded in defendant's rates. Given the absence of evidence that such a charge exists in defendant's water and sewer rates, it is impossible to apply the *Bolt* factors to this nonexistent charge. With respect to the CSO-O&M charges, however, it is undisputed that a portion of the city's utility rates is used to fund operation and maintenance of the caissons, and therefore we can consider those charges under the *Bolt* factors. In so doing, we follow our Supreme Court's

holding in *Bolt* that water and sewer charges are not always user fees and that such charges must be measured against the "relevant criteria for determining whether a charge is a fee or a tax." *Bolt*, 459 Mich at 162-163 n 12.

Under the first *Bolt* factor, it is beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, the alleged CSO-O&M charge, i.e., the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment. Therefore, unlike the facts in *Bolt* and *Jackson Co*, in which stormwater was released into the environment untreated, *Bolt*, 459 Mich at 167; *Jackson Co*, 302 Mich App at 106, the alleged costs at issue here are related to the treatment of combined sewage, comprised of stormwater and wastewater, in conformance with regulatory requirements. Therefore, a significant regulatory component exists here that was absent in *Bolt* and *Jackson Co*.

Under the second *Bolt* factor, the water and sewer rates constitute a valid user fee because users pay

their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. See *Trahey*, 311 Mich App at 597, citing *Jackson Co*, 302 Mich App at 109. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Bolt*, 459 Mich at 164-165 (cleaned up). It is uncontested that Dearborn determines its water and sewer rates based on metered-water usage. Plaintiff has presented no evidence (e.g., expert testimony) to establish that metered-water usage is an insufficiently precise measurement of the actual costs of using the city's water and sewer systems or otherwise to show that the water and sewer charges are disproportionate to the overall cost of those services. Furthermore, plaintiff has provided no analysis taking into account the benefits conferred by the city's services or the savings realized by the city's performance of ancillary water-main and sewer-line work simultaneously with the sewer-separation project to avoid having to tear apart the roads a second time.

Instead, plaintiff argues that the city's application of metered-water usage as a method of establishing water and sewer rates necessarily qualifies those water and sewer rates as an unconstitutional tax. Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the

construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. In so doing, we reject plaintiff's argument that application of metered-water usage as a method of establishing water and sewer rates necessarily qualifies those rates as an unconstitutional tax. Instead, plaintiff must offer evidence to support her position, and on this score, she has failed.

Also, the facts of this case, in which water and sewer rates are determined on the basis of metered-water usage, are distinct from the facts of *Bolt* and *Jackson Co*, in which the local units of government used flat rates to determine the amount of a stormwater fee for residential parcels of two acres or less. See *Bolt*, 459 Mich at 156 n 6; *Jackson Co*, 302 Mich App at 96. For these reasons, plaintiff has failed to overcome the presumption that defendant's water and sewer rates, including the costs of operating and maintaining the caissons, are reasonable. See *Jackson Co*, 302 Mich App at 109. Application of the second *Bolt* factor overall thus indicates that the city's water and sewer rates comprise a valid user fee because users pay their proportionate share of the expenses required to operate and maintain the water and sewer systems.

The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 417; 671 NW2d 572 (2003) (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use.

Applying the *Bolt* factors, we conclude that defendant's water and sewer rates—including the costs of operating and maintaining the caissons—comprise a valid user fee rather than a tax. Therefore, we conclude that the trial court properly granted summary disposition to defendant regarding plaintiff's claim under the Headlee Amendment.

3. UNJUST-ENRICHMENT CLAIM

Finally, plaintiff argues that the trial court erroneously granted summary disposition to the city on her claim that Dearborn has been unjustly enriched by collecting the purported water and sewer charges at issue. Yet, as explained, plaintiff presented no evidence that the purported CSO-capital charge is included in defendant's water and sewer rates, that there is anything improper about what she calls the CSO-O&M

charge, or that defendant's water and sewer rates are unreasonable. Plaintiff has thereby failed to establish any inequity based on the water and sewer rates. *AFT Mich v Michigan*, 303 Mich App 651, 677-678; 846 NW2d 583 (2014), aff'd 497 Mich 197 (2015). The trial court properly granted summary disposition to the city on this claim.

In light of our analysis, it is unnecessary to address the city's alternative argument that the Revenue Bond Act of 1933, MCL 141.101 *et seq*., authorized the imposition of water and sewer rates before the Headlee Amendment was ratified.

III. CONCLUSION

The city of Dearborn received voter approval to raise revenues for a major modernization of its sewer system. The city made the practical decision to repair and replace certain water and sewer infrastructure at the same time to save time and money, and this was to the benefit of ratepayers, rather than to their detriment, notwithstanding plaintiff's arguments to the contrary. Accordingly, for the reasons set forth in this opinion, we affirm the trial court's grant of summary disposition to defendant. Having prevailed in full, defendant may tax costs under MCR 7.219.

GADOLA, P.J., and BOONSTRA, J., concurred with SWARTZLE, J.

In re D, MINOR

Docket No. 345672. Submitted September 5, 2019, at Detroit. Decided September 19, 2019, at 9:10 a.m.

On July 24, 2017, the Oakland County Prosecuting Attorney filed a petition in the Oakland Circuit Court, Family Division, alleging that respondent, a minor, had committed domestic violence, MCL 750.81(2), against his adoptive mother; the prosecution filed a second domestic-violence petition against respondent on July 26, 2017, arising out of a separate incident involving his adoptive mother. Respondent, who was 12 years old when the prosecution filed the petitions, remained in custody until a pretrial was held. In August 2017, respondent pleaded no contest to the first domestic-violence charge, and at the dispositional hearing for that petition, the court, Victoria A. Valentine, J., placed respondent on probation, released him to his adoptive mother, and ordered him to attend school and continue counseling. The prosecution filed a third petition in January 2018, alleging that respondent had committed larceny in a building, MCL 750.360, by stealing money from a teacher's purse, allegedly because his friend did not have money for food. At the pretrial hearing on January 30, 2018, respondent's attorney indicated that respondent was ready to plead no contest to the second domestic-violence petition and to the larceny-in-a-building petition. The trial court initially accepted the pleas, but after a sidebar conference, the court reconsidered its decision and took the pleas under advisement; the court reasoned that even if it accepted the plea and sentenced respondent in a dispositional hearing, there were no additional services or period of probation that could be imposed given the services respondent was already receiving and the term of probation he was already serving for the original domestic-violence petition. The court also acknowledged the extreme abuse respondent had suffered before his adoption, that the domestic-violence assaults were related to issues resulting from the abuse and the subsequent abuse trial at which respondent would be testifying, and that the larceny-in-a-building offense occurred because respondent wanted to feed a hungry friend. At the next hearing, the prosecution requested that the court accept respondent's no-contest pleas to the second and third

petitions; the court denied the request. At the hearing on July 16, 2018, the prosecution again requested that the court accept respondent's pleas to the second and third petitions and proceed to disposition or to trial on the petitions. The court denied the request and continued to hold the pleas in abeyance, reasoning that accepting the pleas would not benefit respondent as required by MCL 712A.1(3) because no additional services would be provided if the no-contest pleas were accepted; moreover, the additional offenses would just increase respondent's juvenile record, which was not in his best interests. In August 2018, relying on MCL 712A.1(2), MCR 3.902(B), and MCL 780.786b(1), the trial court notified the prosecution that it would be unauthorizing the second and third petitions and removing them from the adjudicative process. At the next pretrial hearing, the prosecution objected to the removal, asserting that the trial court's decision was contrary to statutes and court rules and that it violated the separation-of-powers doctrine. The trial court disagreed, unauthorized the two petitions, and removed the petitions from the adjudicative process. The prosecution appealed.

The Court of Appeals *held*:

1. MCL 712A.1(2) provides that juvenile matters are not criminal matters; in that regard, the emphasis of juvenile-justice procedures is on rehabilitation, not retribution. In turn, MCL 712A.1(3) provides that the juvenile code must be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control—preferably in his or her own home—conductive to the juvenile's welfare and the best interests of the state. MCR 3.903(A)(21) provides that authorization of a petition refers to the written permission by a court to file a petition containing formal allegations against a juvenile with the clerk of the court. Under MCR 3.932(B), a case involving the alleged commission of an offense listed in the Crime Victim's Rights Act (CVRA), MCL 780.781 *et seq*., may only be removed from the adjudicative process by complying with the procedures set forth in MCL 780.786b(1). In that regard, MCL 780.786b(1) provides that a case involving the alleged commission of an offense listed in the CVRA by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process. For purposes of MCL 780.786b(1), the term "adjudicative process" refers to the judicial procedure that could lead to the court's fact-finding determina-

tion that the petition's allegations are true. Until a petition has been adjudicated, the trial court retains authority to act on the authorized petition in a manner that best serves both the juvenile and community; thus, a trial court has authority to unauthorize a petition before it is adjudicated by the juvenile respondent's plea or trial, particularly when the juvenile is already under the court's jurisdiction and supervision from an earlier, separate adjudication and disposition. In this case, the trial court appropriately treated respondent in a manner calculated toward rehabilitating a child who had acted in an unsuitable manner in reaction to addressing his abusive childhood. Although the second and third petitions—which involved offenses listed under the CVRA—were authorized to be filed, the trial court never accepted respondent's pleas to those offenses, and the petitions were therefore never adjudicated. Indeed, the second and third petitions were between the authorization and the adjudication stage of the juvenile-delinquency proceedings. Because there was no adjudication on the second and third petitions, the trial court had authority under MCR 3.932(B) and MCL 780.786b(1) to remove the petitions from the adjudicative process. Given the trial court's conclusion that it was not in respondent's or the public's best interests to add more adjudications to respondent's juvenile record because he was already on probation for the first petition and no additional services would be provided to him if the second and third petitions proceeded to disposition, the court did not abuse its discretion by unauthorizing those petitions and removing them from the adjudicative process. But even if the trial court erred by unauthorizing the petitions, the error was harmless and did not require reversal because if the court had accepted respondent's pleas to the second and third petitions and proceeded to disposition, no additional probationary period, services, or programs would have been recommended; given that respondent had completed his probation and case plan from the original petition, remand to proceed on the last two petitions would be inconsistent with substantial justice and the goal of rehabilitation in juvenile-delinquency proceedings.

2. Article 3, § 2 of Michigan's 1963 Constitution provides that the powers of government are divided into three branches: legislative, executive, and judicial; no person exercising the powers of one branch may exercise powers properly belonging to another branch except as expressly provided in Michigan's Constitution. The separation-of-powers doctrine does not mandate complete separation, and overlap between the functions and powers of the branches is permissible. In criminal cases, a trial court possesses the power to hear and determine controversies,

while the decision whether to bring a charge and what charges to bring lies in the prosecution's discretion. In this case, the trial court did not violate the separation-of-powers doctrine because the court had authority under statutes and court rules to remove the petitions from the adjudicative process before respondent's plea was accepted.

3. The trial court erred when it failed to assign a separate petition number to each petition, and the case had to be remanded to correct the error.

Trial court order affirmed; case remanded for the court to perform ministerial tasks.

JUVENILES — CRIME VICTIM'S RIGHTS ACT — AUTHORIZED PETITION — REMOVAL FROM ADJUDICATIVE PROCESS — NOTICE OF INTENT TO UNAUTHORIZE PETITION.

MCR 3.932(B) provides that a case involving the alleged commission of an offense listed in the Crime Victim's Rights Act (CVRA) may only be removed from the adjudicative process by complying with the procedures set forth in MCL 780.786b(1); under MCL 780.786b(1), a case involving the alleged commission of an offense listed in the CVRA by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process; until a petition has been adjudicated, a trial court retains authority to act on an authorized petition in a manner that best serves both the juvenile and the community; a trial court has authority to unauthorize a petition before it is adjudicated (MCL 780.781 *et seq*.).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Jeffrey M. Kaelin*, Assistant Prosecuting Attorney, for the people.

Hugh R. Marshall for defendant.

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

K. F. KELLY, J. The prosecution appeals as of right the trial court's order "unauthorizing" two juvenile-delinquency petitions that alleged respondent had committed domestic violence, MCL 750.81(2), and larceny in a building, MCL 750.360—both of which are offenses defined in § 31(1)(g) of the Crime Victim's Rights Act (CVRA), MCL 780.781 *et seq*.—and removing those petitions from the adjudicative process. We affirm the trial court's order but remand this case to the trial court to complete the ministerial tasks of (1) assigning separate petition numbers to each of respondent's three juvenile-delinquency petitions and (2) placing the separate petition numbers on all documents within respondent's case file that are related to each petition.

I. BASIC FACTS

This case arises out of three juvenile-delinquency petitions issued by the prosecution against respondent. The first petition, dated July 24, 2017, alleged that respondent committed domestic violence against his adoptive mother, Diehl. Specifically, respondent was then 12 years old and had resided with Diehl since he was eight years of age. On July 23, 2017, respondent's biological sister was visiting the family but abruptly decided to end her visit. This caused respondent to scream at his sister, but respondent's brother called from California and was able to calm respondent down. Hours later, respondent wanted to read the newspaper, but Diehl told him that it was time to go to sleep. This caused respondent to become enraged, and he began to throw objects. Diehl went outside and called 911. The police photographed injuries to Diehl, but she attributed her bruises to a prior fall and an unspecified medical condition. Moreover, she opined that respon-

dent did not intend to throw objects at her. The first petition was authorized after a preliminary hearing,[1] and respondent was released into Diehl's custody with the condition that Diehl arrange counseling for respondent.

Two days after respondent was released into Diehl's custody, however, a second petition dated July 26, 2017, was issued, alleging that respondent had committed another act of domestic violence against Diehl. Specifically, the police[2] were called by Diehl's neighbor who reported that respondent struck Diehl, causing her to fall to the ground and that respondent then continued to kick her. Diehl reportedly told the officers that respondent was agitated about attending court-ordered therapy and began to swing a bag. Although she denied being punched, Diehl reportedly admitted to the responding officers that respondent pushed her, causing her to fall to the ground. Following this preliminary hearing, the second petition was authorized. With regard to placement, it was noted that respondent was a good student with no disciplinary issues at school. It was determined that respondent would remain in custody until a pretrial was held. Pursuant to respondent's judge demand, the case was assigned to Oakland County Family Court Judge Victoria Valentine for its duration.

On August 8, 2017, a hearing was held before Judge Valentine. Respondent entered a plea of no contest to

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[1] Under MCR 3.935(A)(1), a "preliminary hearing" must occur with 24 hours of the juvenile being taken into custody. On the other hand, when a petition is not accompanied by a request to detain the juvenile, the court may conduct a "preliminary inquiry" to determine how to proceed with allegations in a petition. MCR 3.932(A).

[2] A detective testified to the substance of the police run because the responding officers were in training.

the domestic-violence charge in the first petition.[3] Respondent did not enter a plea to the domestic-violence charge in the second petition at that time. With regard to the second petition, it was requested that the matter be set for trial with discovery occurring in the interim. Respondent's counsel requested that "the prosecutor . . . consider dismissing the second [petition] since the Court will already have jurisdiction after you accept the plea." The prosecutor agreed that he would send respondent's counsel the necessary discovery and contemplate the dismissal of the second petition. When addressing services, Louise Strehl of Casework Services[4] requested an evaluation before respondent was returned home because of the volatile relationship with his mother. Diehl preferred to bring respondent home and get him help and therapy, "not jail." She stated that respondent "was a little boy who has spent half of his life being abused, and something set him off that weekend, . . . [b]ut before that, he had never had an incident." Diehl further stated that although respondent had been opposed to therapy, his time spent at Children's Village caused him to realize

[3] The police report served as the foundation for the no-contest plea because respondent did not have an independent recollection of the event.

[4] Casework Services is the division responsible for authorized delinquency cases in Oakland County. The entity is available before the filing of petitions to provide community-based resources and to make recommendations regarding disposition to address both the needs of the child and the protection of the community. Casework Services monitors compliance and reports to the court on a regular basis. "Unlike with adult courts, there are no fixed sentences in the Family/Juvenile Court. Recommendations from Casework Services, and the resulting court orders decided upon by a referee or judge, involve choosing from among the many programs, services and creative solutions, and consequences available." Oakland County, Juvenile Casework <https://www.oakgov.com/courts/circuit/family/court-services/Pages/juvenile-casework.aspx> (accessed September 5, 2019) [https://perma.cc/WBS3-LVV6].

the importance of it. The trial court ordered placement to continue at Children's Village with a psychological evaluation to occur within seven days.

On September 1, 2017, a dispositional hearing was conducted on the first petition. At the hearing, respondent's counsel expressed that despite his 40 years of practice, he "was appalled and beyond angry" to learn of "what took place when [respondent] lived with his biological parents." His counsel stated that although respondent had the right to be angry, respondent had learned of the need to find methods to address his anger. Respondent's counsel again asked the prosecutor to consider dropping the second petition but acknowledged "that's a prosecutorial decision." The prosecutor agreed to discuss the second petition but first addressed his reservations regarding the recommendation by Casework Services. Specifically, the prosecutor requested an adjournment of the dispositional hearing to allow the out-of-home screening committee to evaluate the case in light of the prior violence in the home; he also questioned whether Diehl would report the violence if it recurred. Strehl stated that if she felt the case needed to be presented to the committee, she would have done so. Strehl opined that supervising respondent in the community would allow her the opportunity to understand the relationship between him and Diehl, and she would report her concerns to the court and the committee if necessary. With respondent scheduled to start school, Strehl would engage in community monitoring by meeting with the school's social worker and counselor as well as monitor respondent's therapy to learn of signs of trouble in the family home. Respondent's medication had been changed while he was placed in Children's Village, yet he had not required recent physical management there. Strehl credited respondent's lack of physical involvement,

noting that Children's Village was a stressful environment and children would incite others to get into trouble.

Diehl also offered that respondent's violent reaction was triggered by his sister who had mentioned that parents could rescind an adoption, causing him to fear it would happen to him. She assured the court that resources, including therapy, were in place to prevent an incident of that magnitude from recurring and that she would comply with any court orders. In response to questioning by the court, respondent indicated that he would deal with anger in a different way, by using a stress ball or coloring, and he now wanted to attend counseling. Respondent stated that Diehl taught him math at a twelfth grade level even though he was only in seventh grade and that he would like to be an engineer. The court adopted the recommendation that respondent be placed on standard probation, attend counseling, attend school, remain on prescription medication, and be released to Diehl. The prosecutor never stated his position on the record regarding the second petition. However, the trial court addressed it by stating: "With regard to his additional charge, I'll allow you to determine how you're going to handle that, if you want that in a place for safeguarding any additional behavior. I'm going to allow the child to be released." The prosecutor offered to schedule a review on this case on the date scheduled for the trial on the second petition. Further, the prosecutor agreed to provide any video or audio recordings made by the responding police officers to the alleged act of domestic violence that was the subject of the second petition.[5]

[5] On October 17, 2017, a pretrial hearing was held. The court scheduled a review hearing on the first petition and a pretrial hearing on the second petition. All prior orders were to remain in effect.

While on probation, a third petition, dated January 19, 2018, was issued, alleging that respondent had committed larceny in a building by stealing money from a school teacher's purse in November 2017. This third petition was authorized after a preliminary-inquiry hearing under MCR 3.932(A).

On January 30, 2018, the hearing commenced with the representation that respondent was prepared to enter a plea of no contest to the domestic-violence offense raised in the second petition, as well as the larceny-in-a-building offense delineated in the third petition. Prior to the taking of the plea, the prosecutor and Strehl discussed the services that should be imposed. Strehl learned from respondent's therapist that he was starting to address the trauma that occurred when he was younger, and the therapist wrote a letter forewarning that respondent might begin to react or act out because of the work occurring in therapy. Consequently, Strehl forwarded the letter to the trial court and recommended intensive probation oversight.

The trial court advised respondent of the consequences of the plea and initially accepted it. However, respondent's counsel asked to approach the bench, and a six-minute sidebar conference occurred off the record.[6] After the sidebar, the trial court reconsidered its

[6] The prosecution faults the trial court for failing to provide a transcription of this sidebar conference, citing a transcript from an unrelated criminal case before the circuit court for the proposition that the court is responsible for eliminating sidebar discussions from the public record but may obtain separate transcriptions of sidebar discussions. Yet an affidavit from the court administrator or transcript services regarding the process and availability of transcripts of sidebar conversations occurring in family court was not presented. The prosecution, as the appellant, had the duty to file with the trial court the complete transcript of testimony and other proceedings, and appellate review is limited to what is presented on appeal. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). Curiously, although

decision, took respondent's plea "under advisement," and set the matter for review a few months later.

The trial court placed its rationale for rejecting the plea on the record as follows:

> *The Court*: So, I'm going to hold your disposition for—when is it? April 24th, 2018, at 1:30. Okay.
>
> And [respondent], let me tell you why. I've read the reasons why you took the money. And you were trying to help another child who was starving. And with regard to the alleged domestic violence here, we've gone through the issues with regard to your history and your past. And upon speaking with both the—all counsel here, it's indicated that my—I can't give more probation or more services to you than you have right now even if I sentence you in a disposition.
>
> And so, I'm going to hold everything under advisement, we're going to send it to committee to see what a recommendation would be, and I'll determine whether or not I'm going to proceed with the accepting [of] your plea or not, okay?
>
> [*Respondent*]: Yes, Your Honor.
>
> *The Court*: So, I need you to understand a couple things. We're all here to help you, okay? You had a tough past, okay? But now you have a really good future. You need to trust your mom, you need to let your mom help you, you need to talk to your therapist, and you need to work through all these issues without any violence, okay, and with doing the right thing all the time. If you would have told somebody in the office that the kid didn't have lunch money, I bet you someone would have gave him some lunch money, okay? Without you having to go take it out of someone's purse, okay?

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the prosecution contends that "the impact of this sidebar forms the basis of Petitioner's appeal," there is no indication it took steps to order its preparation if it exists. Furthermore, a summation of the prosecutor's recall of the sidebar discussion is contained within a footnote of the brief on appeal, yet an affidavit from the prosecutor was not submitted.

[*Respondent*]: Yes, Your Honor.

The Court: Okay. So, you know if your intention is to be goodhearted, that's great; you have to do it the right way.

[*Respondent*]: Yes, Your Honor.

On April 24, 2018, the hearing commenced with a summation by Strehl of Caseworker Services. She noted that the petitions for the second domestic violence and the larceny in a building[7] needed to be addressed or adjourned. Strehl stated that the larceny in a building arose from respondent's theft of money from a teacher to feed his hungry friend. Despite these new allegations, the recommendation of probation remained the same, but Strehl imposed consequences for the second domestic-violence petition, the police contact at the family home, and the third petition for larceny in a building. Despite his birthday, respondent was required to attend and complete midcourse corrections, a program in which he learned to be respectful, honorable, and accept his mistakes. Additionally, he completed an honors program in which the staff commented on his remarkable job despite his young age. Respondent continued to participate in therapy. Therefore, Strehl recommended that respondent continue with standard probation.

Although Strehl summarized the current status of the petitions, the new prosecutor asked, "If someone could help me as to—so I understand the procedure where we're at." The trial court advised that respon-

[7] The elements of larceny in a building are "(1) a trespassory taking (2) within the confines of a building and (3) the carrying away (4) of the personal property (5) of another (6) with intent to steal that property." *People v Thorne*, 322 Mich App 340, 344; 912 NW2d 560 (2017). The court's rejection of the plea also apparently took issue with whether the elements could be established through the police report in light of respondent's motive.

dent's plea was not accepted and that disposition had not occurred. The prosecutor requested that the plea be accepted, but the court denied the request. The following transpired on the record:

> *The Court*: I'm going to allow him on the path that he's on. My indication from Miss Strehl at the time was that he wouldn't be doing anything different as far as services, his services remain the same.
>
> He is among the youngest children that I have in front of me. Giving him two additional charges is just stacking a child's juvenile record. And so, I am holding everything in abeyance and having him get through all of his services, trying to get him on the right path. His history is—I'm not sure if you know about it. Do you know about his history?
>
> [*The Prosecutor*]: No.
>
> *The Court*: Okay. His history is that he's been recently adopted. He had quite a horrific childhood for six years. And I think he's got to work through some of his problems. And I want to make sure we're getting him the best treatment. And I don't think that giving him a huge criminal record at age—are you 12, you're 10?
>
> [*Respondent*]: Thirteen, Honor.
>
> *The Court*: Thirteen. You were 12 when these happened, right?
>
> [*Respondent*]: Yes, Your Honor.
>
> *The Court*: Is in the best interest of justice or this child's future.
>
> [*The Prosecutor*]: Okay. So, as far as the People's position, I need to request as these are formalized petitions alleging delinquency, I would ask the Court to accept his plea, and I would ask for a date of disposition to be set.
>
> *The Court*: Thank you; denied.

Respondent then advised the trial court that he had improved his grade in math as requested and that he

had participated in therapy and tai chi "to stay on track." A three-month review was scheduled.

On June 5, 2018, the prosecution filed a "Notice of Objection to Consent Calendar" in the court file. This pleading objected to consideration of respondent for the consent calendar, diversion, or informal status for the remaining petitions alleging domestic violence and larceny in a building. It was requested that the trial court accept respondent's plea to those offenses and proceed to disposition or schedule a jury trial for those petitions.

On July 16, 2018, a hearing was held. Again, the prosecutor requested acceptance of the plea to the second and third petitions and disposition. In response, the trial court stated:

> But the objective of the juvenile court is to ensure that we are putting procedures in place to help the children. And with regard to the two issues that we have before me now, there's no additional services that we granted, and we're really trying to work on [respondent] getting through the severe issues he's had, of no fault of his own, with regard to his past history.
>
> So, I'm not inclined just to make a record of offenses without benefit to a juvenile, especially someone as young as [respondent].

Despite the prosecutor's continued insistence on acceptance of the prior no-contest plea and disposition or scheduling of the petitions for trial, Strehl testified that her recommendation for disposition would not change even if two additional offenses were added. She submitted respondent's most recent report card to the trial court, stating that respondent did "quite well." Additionally, respondent wrote a letter to Strehl to explain his behavior, and she submitted it to the court. Respondent was preparing to testify in Macomb Cir-

cuit Court against his abuser, the boyfriend of his biological mother. Although the report of abuse was raised in 2015, the trial was adjourned on multiple occasions, which caused respondent substantial stress. Strehl noted that respondent continued to see a therapist, engaged in trauma therapy and home-based services, passed his classes, and attended basketball camp. With regard to the petition raising larceny in a building, respondent and his mother paid restitution to the teacher whose money was stolen. Thus, Strehl requested that jurisdiction continue, respondent remain on standard probation, and all orders remain in effect. The trial court inquired whether there were services that could be provided to respondent to help address the continued adjournment of the trial of his assailant. Strehl notified the court's victim advocate of the stress the adjournments placed on respondent and the impact it had on the delinquency proceeding. The trial court agreed to consider the prosecutor's continued objection to procedure, but noted that its role was to dispense justice, and the goal was not to punish a child, particularly a child so young, stating:

> But the objective of the juvenile court is to ensure that we are putting procedures in place to help the children. And with regard to the two issues that we have before me now, there's no additional services that we granted, and we're really trying to work on [respondent] getting through the severe issues he's had, of no fault of his own, with regard to his past history.
>
> So, I'm not inclined to just make a record of offenses without benefit to a juvenile, especially someone as young as [respondent].

The prosecutor continued to allege that procedure was not followed, and he would not agree to proceed on the consent calendar until there was a disposition,

despite learning of respondent's history of abuse. The court again noted that the effect of the prosecutor's request was to "just stack a juvenile record for a child who is going through some severe emotional issues with regards to a trial that's coming up and having to testify, I'm having a hard time balancing that with my job, which is to make sure that it's not a punishment." Although the prosecutor noted that a "warning and dismiss" might be appropriate because no additional services were being offered to respondent, the trial court acknowledged that the prosecutor's recommendation nonetheless placed additional offenses on respondent's juvenile record. The trial court continued to hold the plea in abeyance and scheduled the matter for a pretrial.

At the next pretrial hearing on July 16, 2018, the prosecution again requested that the trial court accept respondent's plea, framing its argument as procedural and stating that the trial court was beyond the point in which it could dispose of the second and third petitions by informal means—i.e., consent calendar, diversion, or dismissal. The trial court denied the prosecution's request, continued to take respondent's plea under advisement, and held its decision in abeyance.

In August 2018, the trial court issued a "NOTICE TO THE PROSECUTOR OF REMOVAL OF THE CASE FROM THE ADJUDICATIVE PROCESS" stating that the trial court planned on unauthorizing the second and third petitions and removing them from the adjudicative process. At the next pretrial hearing on September 10, 2018, the prosecution argued that the trial court's decision was not only adverse to the governing statutes and court rules but violated the separation-of-powers doctrine. The trial court disagreed, unauthorized respondent's second and third

petitions, and removed the petitions from the adjudicative process. The prosecution now appeals this decision. However, after the claim of appeal was filed, respondent successfully completed his probation and case-service plan for the disposition related to the first petition. The trial court terminated its jurisdiction over respondent in December 2018.

II. JUVENILE LAW AND APPELLATE REVIEW

The trial court's entry of an order of disposition in a juvenile-delinquency proceeding is reviewed for an abuse of discretion, while its factual findings are reviewed for clear error. *People v Brown*, 205 Mich App 503, 504-505; 517 NW2d 806 (1994); *In re Scruggs*, 134 Mich App 617, 622-623; 350 NW2d 916 (1984). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *In re Kerr*, 323 Mich App 407, 411; 917 NW2d 408 (2018) (quotation marks and citation omitted). This Court will reverse a trial court's finding of fact only if "this Court is left with a definite and firm conviction that a mistake has been made." *Brown*, 205 Mich App at 505. In addition, this Court reviews de novo the interpretation of statutes and court rules. *Kerr*, 323 Mich App at 411.

"The rules of statutory construction apply equally to court rules." *In re Lee*, 282 Mich App 90, 93; 761 NW2d 432 (2009). "Construction begins by considering the plain language of the statute or court rule in order to ascertain its meaning." *Patel v Patel*, 324 Mich App 631, 639-640; 922 NW2d 647 (2018). "[U]nambiguous language is given its plain meaning and is enforced as written." *Id*. at 640 (quotation marks and citation omitted). "A provision in a statute is ambiguous only if

it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning." *Lee*, 282 Mich App at 93.

"In construing a legislative enactment we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used." *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 683; 252 NW2d 747 (1977). The legislative chapter governing juveniles plainly states that it:

> shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents. [MCL 712A.1(3); see also MCR 3.902(B).]

Further, juvenile matters are not criminal proceedings. MCL 712A.1(2). "Juvenile justice procedures are governed by the applicable statutes and court rules, with an emphasis on rehabilitation rather than retribution." *Lee*, 282 Mich App at 99 (quotation marks, citation, and brackets omitted).

III. TRIAL COURT'S AUTHORITY TO UNAUTHORIZE A PETITION AND REMOVE IT FROM THE ADJUDICATIVE PROCESS

The prosecution argues that the trial court abused its discretion when it unauthorized the second and third petitions and removed them from the adjudicative process without the consent of the prosecution. We disagree.

"In general, the family court has jurisdiction over juveniles within its judicial circuit that have 'violated any municipal ordinance or law of the state or of the United States.' " *Id*. at 93, quoting MCL 712A.2(a)(1). The two petitions at issue in this case (dated July 26, 2017, and January 18, 2018) contained, respectively, allegations that respondent committed domestic violence against his adoptive mother and that respondent committed larceny in a building. Both domestic violence and larceny in a building are "offenses" under the CVRA. See MCL 780.781(1)(g)(*i*) and (*ii*). MCR 3.932(B) states that "[a] case involving the alleged commission of an offense listed in the [CVRA] may only be removed from the adjudicative process upon compliance with the procedures set forth in [MCL 780.786b]." MCL 780.786b(1) provides, in relevant part:

> [A] case involving the alleged commission of an offense, as defined in [MCL 780.781], by a juvenile shall not be diverted, placed on the consent calendar, *or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process* unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. . . . As part of any other order removing any case from the adjudicative process, the court shall order the juvenile or the juvenile's parents to provide full restitution as provided in [MCL 780.794]. [Emphasis added.]

In *Lee*, 282 Mich App at 94, this Court interpreted the phrase "adjudicative process" in MCR 3.932(B) and MCL 780.786b(1). The *Lee* Court stated that, while the phrase is not defined by statute or court rule, "it is the judicial procedure that could lead to the court's fact-finding determination that the petition's allegations

are true. This would constitute an 'adjudication,' analogous to a criminal conviction, that the court has jurisdiction over the juvenile under MCL 712A.2(a)(1)." *Id.*, citing former MCR 3.903(A)(26), now MCR 3.903(A)(27).

At the time respondent attempted to enter a plea of no contest to the charges in the second and third petitions, respondent had previously entered a plea of no contest to the domestic-violence charge in the first petition and had been ordered to complete standard probation and counseling for the first petition's disposition. The trial court would not accept respondent's plea to the offenses in the second and third petitions, explaining that no additional probation, services, or programs would aid respondent in his rehabilitation and that accepting his plea would unfairly "stack" additional adjudications onto respondent's juvenile record. Instead, the trial court took respondent's plea under advisement—which is permitted by MCR 3.941(D)—held its decision on whether to accept respondent's plea in abeyance, and ultimately decided to unauthorize those petitions and remove them from the adjudicative process. Because the trial court never accepted respondent's plea, the second and third petitions were never "adjudicated." See *Lee*, 282 Mich App at 94; MCR 3.903(A)(27). Without an adjudication, the trial court was permitted to remove the second and third petitions from the adjudicative process. *Lee*, 282 Mich App at 94; MCR 3.903(A)(27); MCL 780.786b(1).

When a new prosecutor appeared at the next hearing, he insisted that the court must accept the no-contest plea tendered at the prior hearing and proceed to disposition. Judge Valentine declined the request, instead determining that respondent should remain "on the path that he is on," because it was in the "best

interest of justice," as well as in the "child's future." Judge Valentine noted that respondent was "among the youngest children" to appear before her, and she was concerned with getting him "through all of his services, and trying to get him on the right path." Because the prosecutor was new to the case, the court explained to him that respondent was only 12 years old and had suffered horrific abuse for half of his life. Consequently, he was addressing those issues, and it was the court's intent to provide him with the best treatment, and a "huge criminal record" would not serve any proper purpose.

Accordingly, although the second and third petitions may have been authorized, the trial court did not proceed to adjudicate the offenses. Specifically, during the plea proceeding, there was a bench discussion addressing the impact of the additional petitions and the recourse available in light of the no-contest plea. Furthermore, there was a question regarding the police report serving as the factual basis for the larceny plea in light of respondent's purported benevolent purpose for allegedly taking the money. As noted, juvenile matters are not criminal proceedings, MCL 712A.1(2), and the purpose of juvenile-justice procedure is not to punish the offender, but to ensure that the juvenile receives the care, guidance, and control necessary to serve his or her welfare as well as to ensure the best interests of the state, MCL 712A.1(3). Judge Valentine repeatedly expressed that respondent's recommended disposition was probation, irrespective of whether he pleaded no contest to one or all three petitions and that the net result solely affected the number of adjudications that appeared on his juvenile record. Moreover, respondent's therapist and Strehl forewarned the judge and the parties that as respondent began to address his early childhood abuse

in therapy to expect that respondent would engage in acting-out behaviors as a result. Thus, Judge Valentine conducted this juvenile's proceeding in accordance with the manner the Legislature expected and directed, *Frost-Pack Distrib Co*, 399 Mich at 683, and it resulted in a successful outcome. When met with the prosecutor's repeated request to simply accept a plea and follow an expected procedure, Judge Valentine instead insisted on a course of action designed to ensure that respondent would receive individualized beneficial services to address the underlying cause of his inappropriate behavior. That is, respondent was not treated as a habitual criminal offender, see MCL 712a.1(2), and the services were imposed with the intent of rehabilitating a young child who was acting out in an unsuitable manner when addressing an abusive childhood, MCL 712A.1(3).

The prosecution argues that the trial court lacked the authority to unauthorize validly authorized petitions and remove them from the adjudicative process. However, authorization is not the equivalent of adjudication. See MCR 3.903(A)(21) (" 'Petition authorized to be filed' refers to written permission given by the court to file the petition containing the formal allegations against the juvenile or respondent with the clerk of the court.") and MCR 3.903(A)(27) (" 'Trial' means the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court."). Here, respondent's second and third petitions were in between the authorization and the adjudication stage of the juvenile-delinquency proceedings. While there does not appear to be any explicit statute, court rule, or published caselaw that refers to the "unauthorization" of a petition, the authorization of a petition simply means the court's written permission to file the petition containing formal allegations

against the juvenile. MCR 3.903(A)(21). When the trial court provided written notice to the prosecution of its intent to remove the case from the adjudicative process, its choice of label for that removal is irrelevant because it nonetheless retained the authority to act on the petition in the manner that best served both the juvenile and the community. Moreover, there is also no authority prohibiting the trial court from taking such action—particularly when the juvenile is already under the trial court's jurisdiction and supervision because of an earlier, separate adjudication and disposition, as respondent was here. The trial court concluded that it was not in the best interests of either respondent or the public to add more adjudications to respondent's juvenile record because he was already on probation from an earlier disposition and no additional services would be provided to him if the second and third petitions proceeded to disposition. This ruling falls within the range of reasonable, principled outcomes, and thus, it cannot be said that the trial court abused its discretion by unauthorizing respondent's second and third petitions and removing them from the adjudicative process. *Kerr*, 323 Mich App at 411.

The prosecution also contends that the trial court's reliance on MCL 780.786b(1) is erroneous because the CVRA only requires the trial court to give the prosecution notice before removing a case from the adjudicative process and does not grant a trial court "the independent authority to dismiss or remove an already authorized delinquency petition case from the adjudicative process." It is true that MCL 780.786b(1) requires the trial court to give notice to the prosecution before conducting a "prepetition or preadjudication procedure that removes the case from the adjudicative process . . . ." However, MCL 780.786b recognizes a trial court's authority to remove a case from the

adjudicative process *preadjudication*, so long as the trial court complies with certain procedural requirements. *Lee*, 282 Mich App at 95 ("The plain language of MCL 780.786b(1) contains several procedural steps that the family court must fulfill before deciding to remove from the adjudicative process a juvenile case in which it is alleged that the minor committed a CVRA offense."). Accordingly, on the basis of the plain language of MCL 780.786b(1), the trial court was permitted to remove the second and third petitions from the adjudicative process because those petitions had not yet been adjudicated. *Id*. at 93-96.

Next, the prosecution argues that respondent had already tendered his plea of no contest to the charges in the second and third petition and that, as a result, the trial court was required to accept the pleas and set the matter for a dispositional hearing. This contention is erroneous because the trial court never actually accepted respondent's plea of no contest to the charges in the second and third petitions. "[A] court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). While the trial court initially stated that it would accept respondent's plea of no contest to the charges in the second and third petitions, it later stated—both during the hearing and in its written order—that the trial court would take respondent's plea under advisement. Moreover, the police reports provided the factual basis for the plea. The trial court expressly stated that it had reservations regarding the satisfaction of the elements of larceny in a building given that respondent reportedly took money from a purse to feed a hungry classmate. Therefore, the trial court never accepted respondent's plea to the charges in the second and third petitions. *Id*.

The prosecution further contends that under MCL 722.823(1), once the second and third petitions were authorized and filed with the court clerk, respondent "was no longer eligible to participate in the diversionary services available before [the] petition [was] authorized." However, the trial court did not *divert* the charges in the second and third petitions against respondent; rather, the trial court *dismissed* the charges—before adjudication—in the petitions altogether. See MCL 722.822(c) (stating that diversion occurs before a petition is authorized). Thus, MCL 722.823(1) is inapplicable to the facts of this case.

The prosecution's reliance on MCR 3.932(C)(2) is also unpersuasive. MCR 3.932(C)(2) requires that the trial court obtain the consent of the prosecution before placing a juvenile's case on the consent calendar. The trial court placed respondent's cases on the formal calendar after authorizing the second and third petitions. Then, before adjudicating the cases (through either a plea or a trial), the trial court decided to unauthorize the petitions and remove them from the adjudicative process altogether. At no point did the trial court indicate that it would place respondent's cases on the consent calendar; therefore, MCR 3.932(C)(2) is inapplicable.

IV. HARMLESS ERROR

Even if the trial court did err by unauthorizing the second and third petitions and removing them from the adjudicative process, the error was harmless. MCR 3.902(A) incorporates the harmless-error standard of civil procedure into juvenile-delinquency proceedings, stating that "[l]imitations on corrections of error are governed by MCR 2.613." See *Lee*, 282 Mich App at 99 (acknowledging that the harmless-error analysis ap-

plies to juvenile-delinquency proceedings). MCR 2.613(A) provides, in relevant part:

> [A]n 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.

The lower court record establishes that had the trial court accepted respondent's plea to the charges in the second and third petitions and proceeded to disposition, no additional probationary period, services, or programs would have been recommended by respondent's caseworker. In fact, the prosecution did not recommend any additional probation or services either, and it even suggested that the trial court, after accepting respondent's plea, "warn" respondent and "dismiss" the second and third petitions under MCL 712A.18(1)(a)—which would do nothing more than add two additional adjudications onto respondent's juvenile record. Further, respondent's counsel indicated that respondent did not wish to proceed to a jury trial if the trial court did not accept respondent's plea. Notably, since the prosecution filed this appeal, respondent has successfully completed his case-service plan from the first petition's disposition, and the trial court has terminated its jurisdiction over respondent.

Ultimately, it would not be in the best interests of either respondent or the public to adjudicate the second and third petitions, but then not impose any additional services to rehabilitate respondent at disposition. See *Lee*, 282 Mich App at 99 (noting that courts should interpret the applicable statutes and court rules governing juvenile-delinquency proceedings procedures with an emphasis on rehabilitation, not retribution); MCL 712A.1(3); MCR 3.902(B)(1). Respondent's completion of

his probation and case-service plan from the first petition's disposition demonstrates his rehabilitation, and a remand of this case to the trial court with an instruction to proceed to adjudication of the second and third petitions would be inconsistent with substantial justice. *Lee*, 282 Mich App at 99-100. Therefore, even if the trial court erred by unauthorizing respondent's second and third petitions and removing them from the adjudicative process, the error was harmless and reversal would be inconsistent with substantial justice and the goals of juvenile-delinquency proceedings. *Id.*; MCL 712A.1(3); MCR 3.902(B)(1).

In summary, this case presented the circumstance in which respondent, an adopted 12-year-old juvenile with good grades, began to act out in a violent manner that was precipitated by his upcoming testimony in a criminal trial against his childhood abuser. Unfortunately, respondent's reactions were of a severity that prompted police involvement. Although the trial court authorized a petition for domestic violence for an incident between respondent and his adoptive mother, Caseworker Services and respondent's therapist cautioned the trial court that as respondent began to recall and confront the horrific abuse that he had suffered when he was younger, he would act out. This forecast proved to be true, and it was the prosecution's choice to reduce his acting-out behavior to offenses that became the subject of multiple petitions. However, the trial court also was charged with applying the juvenile law in accordance with its expressed purpose, to ensure that the juvenile received care, guidance, and control in the environment conducive to the child as well as the state's interest. MCL 712A.1(3). To assist the court in its decision-making, respondent's attorney as well as Caseworker Services examined the circumstances that would best equip respondent with the means to address his prior

abuse. The caseworker noted that she could not provide additional services in relationship to each offense that was the subject of a petition. To that end, Judge Valentine noted that the continued adjudication of petitions would merely serve to provide respondent with a history of offenses, and the purpose of juvenile intervention—to rehabilitate in lieu of punishment—would not be served. The Legislature provided the court with the mechanism to address a juvenile's adjudications in a manner best suited to the juvenile's circumstances and needs, MCL 780.786b, and the learned trial judge in this case applied the provisions to best suit the needs of the child and the state.

V. SEPARATION-OF-POWERS DOCTRINE

The prosecution argues that the trial court violated the separation-of-powers doctrine by unauthorizing the second and third petitions and removing them from the adjudicative process without proper authority and without the prosecution's consent. We disagree.

"[W]hether a violation of the separation of powers doctrine has occurred is a question of law that this Court reviews de novo." *Martin v Murray*, 309 Mich App 37, 45; 867 NW2d 444 (2015) (quotation marks and citation omitted).

The separation-of-powers doctrine is set forth in Const 1963, art 3, § 2, which states:

> 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.

However, the separation-of-powers doctrine does not mandate complete separation, and overlap between the

functions and powers of the branches is permissible. *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999). "Rather, the evil to be avoided is the accumulation in one branch of the powers belonging to another." *Id*. In criminal cases, a trial court possesses the "power to hear and determine controversies," while "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *Id*. at 147, 149 (quotation marks and citation omitted).

The governing statutes and court rules permit a trial court to remove a case from the adjudicative process before an adjudication is entered, which is precisely what occurred here. *Lee*, 282 Mich App at 94, citing MCL 780.786b; see also MCR 3.932(B) ("A case involving the alleged commission of an offense listed in the [CVRA] may only be removed from the adjudicative process upon compliance with the procedures set forth in [MCL 780.786b]."). Moreover, the trial court's removal of the second and third petitions from the adjudicative process was in conformity with the ultimate goal of juvenile-delinquency proceedings, which is to provide services to minor children to aid them in the rehabilitation process. *Lee*, 282 Mich App at 99. Accordingly, the trial court did not violate the separation-of-powers doctrine.

The prosecution relies on *People v Smith*, 496 Mich 133, 141-142; 852 NW2d 127 (2014), in arguing that the trial court impermissibly "stepped into the role of the prosecutor and, without a scintilla of valid legal authority, dismissed these two cases" in violation of the separation-of-powers doctrine. In *Smith*, our Supreme Court reversed a trial court's dismissal of a criminal case after the defendant pleaded to the charges, holding, in relevant part:

> Without citing a scintilla of legal authority, the trial court *dismissed* the case over the objection of the prosecutor. Aside from flagrantly ignoring contrary Court of Appeals precedent in entirely dismissing the case, the trial court usurped the prosecutor's role in violation of the separation of powers principles contained in our constitution. It is axiomatic that the power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests *exclusively* in the prosecutor. The trial court had no legal basis to trump the prosecutor's charging decision, much less dismiss the case *after* the defendant had pleaded to the charge and had never sought to withdraw his plea. [*Id*. at 140-141 (citations omitted).]

The prosecution's reliance on *Smith* is unpersuasive. Whereas the defendant in *Smith* actually pleaded guilty to the criminal charge against him, the trial court here took respondent's plea to the charges in the second and third petitions under advisement and never accepted respondent's plea of no contest. *Id*. Thus, unlike *Smith*, no adjudication occurred in this case, and the trial court was permitted to remove the second and third petitions from the adjudicative process without respondent having tendered a plea. *Lee*, 282 Mich App at 94; MCL 780.786b; MCR 3.932(B).[8]

VI. ASSIGNING SEPARATE PETITION NUMBERS TO MULTIPLE PETITIONS WITHIN A SINGLE CASE FILE

Finally, the prosecution argues that this Court should remand this case in order for the trial court to correct its error in (1) failing to assign a unique petition number to each of the three original petitions within respondent's combined case file and (2) failing to place the separate petition numbers on each document within the case file. We agree.

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[8] In light of our holding that the trial court acted in accordance with MCL 780.786b in ultimately dismissing the second and third petitions, there is no basis to remand before a different judge.

"To preserve an issue for appellate review, the issue must be raised before, addressed by, and decided by the lower court." *In re Killich*, 319 Mich App 331, 336; 900 NW2d 692 (2017). The prosecution did not argue below that the trial court failed to assign separate petition numbers to each of respondent's three separate juvenile-delinquency petitions. Accordingly, this issue is unpreserved.

Generally, this Court reviews de novo the interpretation of statutes and court rules. *Kerr*, 323 Mich App at 411. However, unpreserved issues are reviewed for plain error affecting a party's substantial rights. *In re Tiemann*, 297 Mich App 250, 257; 823 NW2d 440 (2012), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. at 763-764.

MCR 8.119(D)(1) states that in juvenile-delinquency cases, "a separate petition number shall be assigned to each petition filed under the juvenile code, MCL 712A.1 *et seq.* as required under MCR 1.109(D)(1)(d)." Both the case number and the petition number "shall be recorded in the court's automated case management system and on the case file." MCR 8.119(D)(1). "In a case filed under the juvenile code, the caption must also contain a petition number, where appropriate." MCR 1.109(D)(1)(d).

It does not appear that the trial court assigned a separate petition number to each of the three separate petitions against respondent as required by the Michi-

gan Court Rules. MCR 8.119(D)(1); MCR 1.109(D)(1)(d). The fact that the trial court unauthorized the second and third petitions is irrelevant because MCR 8.119(D)(1) specifically requires that all petitions *filed* under the juvenile code contain a separate petition number, not just those petitions that are *authorized*. The prosecution contends that the trial court's failure to assign separate petition numbers for each of the three petitions in respondent's combined case file "hinders the People's . . . ability to identify which documents in the casefile apply to which of Respondent's delinquency cases." Accordingly, a limited remand is appropriate for the trial court to complete the ministerial tasks of (1) assigning a separate petition number to each of the three petitions filed against respondent and (2) placing the separate petition numbers on each case file document that relates to the corresponding petition. MCR 8.119(D)(1); MCR 1.109(D)(1)(d).

VII. CONCLUSION

Accordingly, we affirm the trial court's order unauthorizing respondent's second and third petitions and removing them from the adjudicative process. However, we remand this case to the trial court in order to complete the ministerial tasks of (1) assigning separate petition numbers to each of respondent's three juvenile-delinquency petitions and (2) placing the separate petition numbers on all documents within respondent's case file that are related to each petition. We do not retain jurisdiction.

BORRELLO, P.J., and SERVITTO, J., concurred with K. F. KELLY, J.