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COURT OF APPEALS

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APEX LABORATORIES INTERNATIONAL INC v CITY OF DETROIT (ON REMAND)

Docket No. 338218. Submitted June 26, 2019, at Lansing. Decided January 2, 2020, at 9:00 a.m.

Apex Laboratories International Inc. challenged in the Michigan Tax Tribunal an assessment of income tax by the city of Detroit. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10), and the tribunal granted summary disposition for Apex. The tribunal ordered the city to refund the taxes Apex had paid, finding that Apex did not "do business" in Detroit because it lacked a constitutional "nexus" with Detroit to make it subject to taxation by the city. The Court of Appeals, SERVITTO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., affirmed the tribunal's decision in an unpublished opinion issued May 17, 2018. In lieu of granting leave to appeal, the Michigan Supreme Court vacated the Court of Appeals opinion and remanded the case to the Court of Appeals for reconsideration in light of *South Dakota v Wayfair, Inc*, 585 US ___ (2018). 503 Mich 1034 (2019).

On remand, the Court of Appeals *held*:

1. Before its decision in *Quill Corp v North Dakota ex rel Heitkamp*, 504 US 298 (1992), the United States Supreme Court had held that a foreign corporation without a physical presence in the taxing state and that only sold products by mail order lacked the requisite minimum contacts with the taxing state required by both the Due Process Clause and the Commerce Clause to render it subject to taxes levied by the taxing state. In *Quill*, the Supreme Court noted that the Due Process Clause was analytically distinct from the Commerce Clause and concluded that a foreign corporation was not required to have a physical presence in the taxing state in order to satisfy the "definite link" and "minimum connection" requirements of the Due Process Clause. However, the *Quill* Court retained the physical-presence rule for taxation challenges brought under the Commerce Clause. The Supreme Court concluded that foreign corporations had to have a physical presence in the taxing state in order to meet the "substantial nexus" test set forth in *Complete Auto Transit, Inc v Brady*, 430 US 274 (1977), for determining whether a tax is permissible under the Commerce

Clause. The *Complete Auto* test provides that a tax is permissible under the Commerce Clause if it (1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the state provides. In *Wayfair*, the Supreme Court overruled *Quill* and its progeny, concluding that the physical-presence rule, with respect to cases brought under the Commerce Clause, did not reflect the economic reality of twenty-first-century Internet sellers and the "substantial virtual connections" these sellers have to the states in which they conduct business. The Court in *Wayfair* determined that because *Quill* was overruled, the first prong of the *Complete Auto* test asked simply whether the tax applies to an activity with a substantial nexus with the taxing state. A substantial nexus no longer required a physical presence, but rather was established when a foreign seller availed itself of the substantial privilege of carrying out business in the taxing state.

2. The tribunal based its decision on Apex's lack of physical presence in Detroit and the physical-presence rule as set forth in *Quill*. Although the tribunal did not specifically address the application of the Due Process or Commerce Clauses to Detroit's assessment of income tax, the tribunal's conclusion that Apex lacked a "nexus" with Detroit suggests that it was based on a Commerce Clause analysis. Remand is necessary to allow the tribunal to make a ruling in the first instance and because the tribunal's decision was based on the adoption of a wrong principle in light of *Wayfair* and the Supreme Court's repudiation of *Quill* and the physical-presence rule.

Decision vacated and case remanded to the Tax Tribunal.

Honigman LLP (by *Lynn A. Gandhi*) for Apex Laboratories International Inc.

Charles N. Raimi for the city of Detroit.

ON REMAND

Before: SERVITTO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. In our previous opinion, this Court affirmed the order of the Michigan Tax Tribunal (the

Tribunal) granting petitioner Apex Laboratories International Inc.'s motion for summary disposition and denying respondent city of Detroit's motion for summary disposition.[1] Detroit applied in our Supreme Court for leave to appeal the May 17, 2018 decision of this Court. In lieu of granting leave to appeal, the Supreme Court vacated this Court's previous opinion and remanded the case to this Court for "reconsideration in light of [*South*] *Dakota v Wayfair, Inc*, 585 US ___; 138 S Ct 2080, 2099; 201 L Ed 2d 403 (2018), which overruled *Quill Corp v North Dakota ex rel Heitkamp*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992)." *Apex Laboratories Int'l Inc v Detroit*, 503 Mich 1034 (2019). We permitted the parties to file supplemental briefs on remand.[2] We now reconsider the instant case as our Supreme Court has directed, and we determine that a further remand to the Tribunal is required. We therefore vacate the decision of the Tribunal and remand for further proceedings.

I. GENERAL LEGAL PRINCIPLES

The case before us involves the ability of a taxing entity to impose a tax on the person, property, or transaction it seeks to tax. More specifically, it concerns the ability of a taxing entity to impose an income tax on a nonresident corporation. Challenges such as Apex's implicate both the Due Process and Commerce Clauses of the United States Constitution. See US Const, Am V; US Const, art I, § 8, cl 3. To survive a

[1] *Apex Laboratories Int'l Inc v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 338218). The facts of the case are provided in that opinion; for brevity's sake we will not repeat them here.

[2] See *Apex Laboratories Int'l Inc v Detroit*, unpublished order of the Court of Appeals, entered June 28, 2019 (Docket No. 338218).

due-process challenge, there must be " 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Wayfair*, 585 US at ___; 138 S Ct at 2093, quoting *Miller Bros Co v Maryland*, 347 US 340, 344-345; 74 S Ct 535; 98 L Ed 744 (1954). A "closely related" parallel to this requirement for challenges under the Commerce Clause is that there must be a "substantial nexus" between the taxing entity and the person, property, or transaction being taxed. *Wayfair*, 585 US at ___; 138 S Ct at 2093, quoting *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977).

A tax on a foreign corporation "that withstands a due process challenge will not necessarily withstand a Commerce Clause challenge." *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 313; 497 NW2d 595 (1993), citing *Quill*, 504 US at 312. The *Complete Auto* test for whether a tax is permissible under the Commerce Clause provides that the tax is constitutionally permissible as long as it (1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the state provides. *Complete Auto*, 430 US at 279; see also *Gillette*, 198 Mich App at 313.

Before its decision in *Quill*, the United States Supreme Court had held that a foreign corporation that did not have a physical presence in the taxing state but only sold products by mail order "lacked the requisite minimum contacts with the State required by both the Due Process Clause and the Commerce Clause." *Wayfair*, 585 US at ___; 138 S Ct at 2091, citing *Nat'l Bellas Hess, Inc v Dep't of Revenue of Illinois*, 386 US 753, 758; 87 S Ct 1389; 18 L Ed 2d 505 (1967),

overruled by *Wayfair*, 585 US at ___; 138 S Ct at 2099. In other words, before *Quill*, the "physical presence rule" applied to both Due Process Clause and Commerce Clause challenges to taxes levied against a foreign corporation.

A. *QUILL*

In *Quill*, the United States Supreme Court reexamined the physical-presence rule in the context of a state attempting to require an out-of-state mail-order seller to collect and remit use tax on goods purchased for use within North Dakota. *Quill*, 504 US at 301. The *Quill* Court described the Due Process Clause and the Commerce Clause as "analytically distinct" despite the "closely related" language of *Complete Auto*, noting that the two clauses "reflect different constitutional concerns" and that although a state may, "consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." *Id*. at 305. The *Quill* Court therefore elected to treat the application of the physical-presence rule differently under each clause.

With regard to the Due Process Clause, the *Quill* Court concluded that the "definite link" and "minimum connection" between a state and a foreign corporation could be satisfied without the foreign corporation's having a physical presence in the state, noting that a foreign corporation may be subject to a state's in personam jurisdiction without the requirement of a physical presence in the state if it "purposefully avails itself of the benefits of an economic market in the forum State." *Id*. at 307, citing *Burger King Corp v Rudzewicz*, 471 US 462, 476; 105 S Ct 2174; 85 L Ed 2d 528 (1985). The *Quill* Court therefore concluded that

> [t]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process. [*Quill*, 504 US at 308.]

However, with regard to challenges brought under the Commerce Clause, the *Quill* Court opted to retain the physical-presence requirement when determining whether there was a "substantial nexus," rejecting North Dakota's contention that if "a mail-order house that lacks a physical presence in the taxing State nonetheless satisfies the due process 'minimum contacts' test, then that corporation also meets the Commerce Clause 'substantial nexus' test." *Id*. at 312. The *Quill* Court reasoned that in contrast to the Due Process Clause's concern with "fairness for the individual defendant," the Commerce Clause and the substantial-nexus requirement were informed by "structural concerns about the effects of state regulation on the national economy." *Id*. The *Quill* Court found that the bright-line physical-presence rule of *Bellas Hess* furthered the goal of avoiding undue burdens on interstate commerce by creating a "discrete realm of commercial activity that is free from interstate taxation." *Id*. at 315. While the *Quill* Court noted that the *Bellas Hess* rule "appears artificial at its edges," it concluded that "[t]his artificiality . . . is more than offset by the benefits of a clear rule," such as clearly establishing "the boundaries of legitimate state authority" to impose taxes, encouraging "settled expectations," and "foster[ing] investment by businesses and individuals." *Id*. at 315-316. The *Quill* Court therefore declined to overrule the physical-presence rule of *Bellas Hess* in the context of challenges

to taxation of foreign corporations brought under the Commerce Clause. *Id*. at 317-318.

B. *WAYFAIR*

In *Wayfair*, the United States Supreme Court considered the constitutionality of a South Dakota law providing for the collection of sales taxes from certain remote sellers who lacked a physical presence in South Dakota. *Wayfair*, 585 US at ___; 138 S Ct at 2088-2089. Justice Kennedy, writing for the majority, and joined by Justices Thomas, Ginsburg, Alito, and Gorsuch,[3] reviewed the development of Commerce Clause jurisprudence through *Quill* and found that the physical-presence rule did not reflect the "economic reality" of twenty-first-century Internet sellers and resulted in "significant revenue losses to the States." *Id*. at ___; 138 S Ct at 2092. The Court in *Wayfair* concluded that

> *Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto*, 430 US at 279[;] 97 S Ct 1076. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow. [*Id*. at ___; 138 S Ct at 2092.]

Unlike in *Quill*, the Court in *Wayfair* did not believe that the different standards of the Due Process and

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[3] Although Chief Justice Roberts authored a dissenting opinion joined by Justices Breyer, Sotomayor, and Kagan, the dissent agreed that "*Bellas Hess* was wrongly decided, for many of the reasons given by the Court." *Wayfair*, 585 US at ___; 138 S Ct at 2101 (Roberts, C.J., dissenting). The dissenting justices would have adhered to the doctrine of stare decisis and left it to Congress to decide the "important question of current economic policy" implicated by the case. *Id*. at ___; 138 S Ct at 2101.

Commerce Clauses compelled a different result when analyzing the physical-presence rule: "The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus." *Id*. at ___; 138 S Ct at 2093. The Court in *Wayfair* noted that its Commerce Clause jurisprudence had generally "eschewed formalism" and moved toward a "case-by-case analysis of purposes and effects," while the physical-presence rule of *Quill* treated "economically identical actors differently, and for arbitrary reasons." *Id*. at ___; 138 S Ct at 2093 (quotation marks and citation omitted). The Court in *Wayfair* reasoned that the artificial nature of the physical-presence rule had only grown more apparent since *Quill* was decided in light of the dramatic growth of "modern e-commerce" that can utilize "targeted advertising," "instant access to most consumers via any internet-enabled device," and "[a] virtual showroom . . . with greater opportunities for consumer and seller interaction than might be possible for local stores." *Id*. at ___; 138 S Ct at 2095. In the face of these economic realities, the *Wayfair* Court concluded that it "should not maintain a rule that ignores these substantial virtual connections to the State.[4]" *Id*. at ___; 138 S Ct at 2095.

The *Wayfair* Court overruled *Quill* and *Bellas Hess*. *Id*. at ___; 138 S Ct at 2099. In the absence of the physical-presence rule, the Court in *Wayfair* stated that "the first prong of the *Complete Auto* test simply

[4] The Court in *Wayfair* further concluded that stare decisis did not bar reconsideration of *Quill* and *Bellas Hess*. See *Wayfair*, 585 US at ___; 138 S Ct at 2096-2099.

asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Id*. at ___; 138 S Ct at 2099, citing *Complete Auto*, 430 US at 279. A substantial nexus is established when a foreign seller " 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Id*., quoting *Polar Tankers, Inc v City of Valdez*, 557 US 1, 11; 129 S Ct 2277; 174 L Ed 2d 1 (2009).

II. ANALYSIS

We conclude that, under the circumstances of this case, remand is required for the Tribunal to address the impact of *Wayfair* and the overruling of *Quill* and *Bellas Hess* and, if necessary, to address Apex's alternative arguments. As we noted in our previous opinion, the parties and the Tribunal "did not specifically address the application of the Due Process or Commerce Clauses to Detroit's assessment of income tax to Apex; nonetheless, the majority of the parties' arguments, and the Tribunal's decision, centered on whether Apex had a 'nexus' with Detroit such that the assessment of income tax against it was constitutionally valid."[5] The Tribunal, in reaching its decision, repeatedly stated that it based its holding on Apex's lack of physical presence in Detroit, stating, for example: "Plainly, there must be some physical presence established in order for [Apex] to be subjected to tax"; "[Detroit] must show 'some minimum connection' or physical presence"; and "[b]oth parties agree that physical presence is a key component in establishing nexus[.]" The parties and the Tribunal relied on as persuasive the definition of "physical presence" found at MCL 206.621(2)(b) of the Income Tax Act, MCL 206.1 *et seq*.; however, the

[5] See *Apex*, unpub op at 4.

Tribunal's analysis of Apex's physical presence was based on the applicability of the physical-presence rule in *Quill* to the question before it. And the Tribunal's ultimate conclusion that Apex lacked a "nexus" with Detroit at least suggests that the conclusion was based on a Commerce Clause analysis.

We believe that the most prudent course of action is to vacate the Tribunal's decision and to remand for further proceedings to allow the parties to focus their arguments concerning *Wayfair*, *Quill*, and the Due Process and Commerce Clauses, and to allow the Tribunal to make a ruling in the first instance. We are an error-correcting Court, see *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 181; 909 NW2d 38 (2017), vacated in part on other grounds 504 Mich 985 (2019), and our review of Tribunal decisions is constitutionally and precedentially limited in many respects, see *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). Therefore, while we can determine from the existing record that the Tribunal's previous decision was based on the "adoption of a wrong principle" in light of the United States Supreme Court's repudiation of *Quill*, *Bellas Hess*, and the physical-presence rule, see *Briggs Tax Serv*, 485 Mich at 75, we conclude that we are not compelled by *Wayfair* or our Supreme Court's order to *reverse* the Tribunal so as to hold that Apex *does* owe the challenged taxes, nor do we believe that it would be appropriate for us to do so. This is especially true because the Tribunal declined to consider several alternative arguments from Apex in the event that the Tribunal were to resolve the constitutional question in Detroit's favor. Although the parties did discuss these arguments in their supplemental briefs, we do not believe we are the appropriate forum for these arguments to be initially decided. See *Autodie LLC v Grand*

Rapids, 305 Mich App 423, 430-431; 852 NW2d 650 (2014) (declining to reach issues on appeal that the Tribunal did not address below and noting that this Court had "neither the benefit of a decision by the . . . Tax Tribunal nor sufficient briefing by the parties").

We therefore vacate the Tribunal's decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO, P.J., and RONAYNE KRAUSE, J., concurred with BOONSTRA, J.

PEOPLE v ROGERS

Docket No. 346348. Submitted July 11, 2019, at Detroit. Decided January 7, 2020, at 9:00 a.m. Leave to appeal sought.

Deonton A. Rogers was charged in the 36th District Court with, among other things, intentionally discharging a firearm in a building causing physical injury, MCL 750.234b(3); intentionally discharging a firearm in a building causing serious impairment, MCL 750.234b(4); and ethnic intimidation, MCL 750.147b (the "ethnic-intimidation statute"), in connection with an altercation between defendant and the complainant, a transgender person who was assigned as a male at birth but identified and presented herself as a woman. A person is guilty of ethnic intimidation when they commit certain acts maliciously and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin. In July 2018, defendant made numerous offensive statements to the complainant while they were waiting in line at a gas station. The complainant tried to ignore the derogatory comments regarding her identification as a transgender person—which included calling her a man and asking to see her penis—before defendant pulled out a gun and threatened to kill her. According to the complainant, transgender people are often attacked and she was frightened that defendant would follow through on his threat. As defendant moved toward the exit of the station at the urging of a woman with him, he walked close to the complainant. Because the complainant was afraid that defendant would turn around and shoot her as he left the station, the complainant attempted to get the gun away from defendant as he walked by her. The complainant was shot in the left shoulder during the struggle for the gun. The district court, William McConico, J., bound defendant over to the Wayne Circuit Court on all the charged offenses. In particular, the district court reviewed the meaning of the term "gender" and concluded that transgender people are protected under the ethnic-intimidation statute. Defendant moved in the circuit court to quash the bindover on the two charges of intentionally discharging a firearm in a building and the charge of ethnic intimidation. The circuit court, Catherine L. Heise, J., granted the motion to quash the three charges. With respect to the ethnic-intimidation charge, the circuit court reasoned that because MCL 750.10 of the Michigan Penal Code,

MCL 750.1 *et seq*., defines the term "gender" as including only masculine, feminine, and neuter genders, the conduct prohibited by the ethnic-intimidation statute did not protect transgender people against the proscribed conduct. The prosecution appealed by leave granted, challenging only the circuit court's order quashing the ethnic-intimidation charge.

The Court of Appeals *held*:

1. MCL 750.147b(1) provides that a person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of the person's race, color, religion, gender, or national origin, (a) causes physical contact with another person; (b) damages, destroys, or defaces any real or personal property of another person; or (c) threatens, by word or act, to do an act in Subdivision (a) or (b), if there is reasonable cause to believe that an act described in Subdivision (a) or (b) will occur. The term "gender" is not defined in MCL 750.147b. Although MCL 750.10 of the Michigan Penal Code provides a rule of grammar that the masculine gender includes the feminine and neuter genders, that provision was enacted only to clarify that the Penal Code applies to both men and women even when only masculine pronouns are used; it does not establish a strictly limited definition of "gender" to be used throughout the Penal Code. In light of the dictionary definitions of the term "gender" when the ethnic-intimidation statute was enacted in 1988, the term is synonymous with "sex," that is, the biological roles of male and female; there is no evidence that the term would have been understood at that time to encompass a transgender person, particularly given that the term "transgender" was then newly in use in the media and might not have been understood by the general public. The definition of "gender" as synonymous with "sex" was also supported by (1) the Court of Appeals opinion in *Barbour v Dep't of Social Servs*, 198 Mich App 183 (1993), in which the Court concluded that an act prohibiting various forms of discrimination on the basis of "sex" did not include a person's sexual orientation but, instead, prohibited "gender-based" discrimination and (2) the legislative history surrounding the statute's enactment, which demonstrated that the term "gender" was specifically substituted for the term "sexual orientation" in the final version of the statute. The Legislature's intent was not to criminalize and punish all hate-based or discriminatory intimidation and harassment but, rather, to punish ethnic intimidation as proscribed by the statute. In this case, the district court erred by applying a current definition of the term "gender" to bind defendant over on the ethnic-intimidation charge. In turn, the circuit court correctly quashed the ethnic-intimidation charge but for the wrong reason. Specifically, the circuit court erred by relying on

MCL 750.10 to conclude that transgender people are not a protected class of persons under the ethnic-intimidation statute. Instead, the motion should have been granted because the term "gender" in MCL 750.147b does not protect transgender people and defendant's conduct was motivated by the complainant's identification as a transgender person, not by her sex. Defendant's actions were abhorrent, but it was up to the Legislature, not the judiciary, to criminalize intimidation motivated by a person's identity as a transgender person.

Affirmed.

SERVITTO, J., concurring in part and dissenting in part, agreed that the circuit court erred by concluding that MCL 750.10 establishes a substantive and limited definition of "gender" to be used throughout the Michigan Penal Code. She disagreed, however, with the majority's conclusion that the word "gender" in MCL 750.147b does not include transgender persons. It was not necessary to resort to dictionary definitions to determine that the Legislature enacted the statute to criminalize and punish hate-based or discriminatory intimidation and harassment. Recognizing that the complainant was targeted because of her gender, that is, because she was assigned male at birth, effectuated that legislative intent. The majority's reliance on *Barbour* to support its interpretation of the word "gender" was misplaced because that case involved harassment based on sexual orientation, which was not at issue in this case. In addition, although not binding, several federal courts have held that discrimination based on gender is discrimination based on a failure to conform to stereotypical gender norms. The plain text of the statute is unambiguous, and the majority's reliance on legislative history to interpret the term "gender" was not appropriate. Applying the majority's definition of "gender" still resulted in the statute's encompassing transgender people, specifically because there was no plausible reason for the statute to apply to a man or woman harassed because of his or her biological role, respectively, as a man or woman, but not to apply to a transgender person who identifies and presents as the opposite sex to which he or she was assigned at birth. Thus, common sense dictated that the statute applies whenever harassing or intimidating behavior is prompted by the complainant's gender, which was at the heart of defendant's actions in this case. Judge SERVITTO would have reversed the circuit court's order granting defendant's motion to quash the ethnic-intimidation charge.

CRIMINAL LAW — ETHNIC-INTIMIDATION STATUTE — WORDS AND PHRASES — "GENDER."

The ethnic-intimidation statute provides that a person is guilty of ethnic intimidation if that person maliciously, and with specific

> intent to intimidate or harass another person because of the person's race, color, religion, gender, or national origin, (a) causes physical contact with another person; (b) damages, destroys, or defaces any real or personal property of another person; or (c) threatens, by word or act, to do an act in Subdivision (a) or (b), if there is reasonable cause to believe that an act described in Subdivision (a) or (b) will occur; the undefined term "gender" is synonymous with "sex," i.e., the biological roles of male and female; the term does not include transgender persons and does not protect transgender people against the conduct proscribed by the statute (MCL 750.147b).

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.

David R. Cripps for defendant.

Amicus Curiae:

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Christopher M. Allen*, Assistant Solicitor General, for the people.

Before: GADOLA, P.J., and SERVITTO and REDFORD, JJ.

GADOLA, P.J. The prosecution appeals by leave granted[1] the trial court's November 7, 2018 order granting defendant Deonton Autez Rogers's motion to quash several counts of the information. Defendant was charged as a third-offense habitual offender, MCL 769.11, with intentionally discharging a firearm in a building causing physical injury, MCL 750.234b(3); intentionally discharging a firearm in a building causing serious impairment, MCL 750.234b(4); assault with a dangerous weapon, MCL 750.82; possession of a firearm during the commission of a felony,

[1] *People v Rogers*, unpublished order of the Court of Appeals, entered November 16, 2018 (Docket No. 346348).

MCL 750.227b; felon in possession of a firearm, MCL 750.224f; fourth-degree child abuse, MCL 750.136b(7); and ethnic intimidation, MCL 750.147b. On defendant's motion, the trial court dismissed the charges of intentionally discharging a firearm in a building causing physical injury, intentionally discharging a firearm in a building causing serious impairment, and ethnic intimidation. On appeal, the prosecution challenges only the trial court's dismissal of the ethnic-intimidation charge. We affirm the trial court's order granting defendant's motion to quash the ethnic-intimidation charge. We do so despite the fact that the trial court's reasoning constituted legal error. As detailed in our opinion, the trial court reached the correct result, albeit for the wrong reasons.

I. FACTS

This case arises out of an altercation between defendant and the complainant on the night of July 23, 2018. The complainant is a transgender person, which she explained to the court means that she was assigned as a male at birth but now identifies as a woman, living her life and presenting herself as such in society. On the night of the incident, the complainant went to a gas station in Detroit to make a purchase. When she arrived at the gas station, she saw defendant inside the gas station with a woman. The complainant got in line, and defendant began talking to her, using derogatory terms. According to the complainant, defendant made various offensive statements to her, including, "[Y]ou're a nigga." The complainant responded that "nigga is somebody that identify [sic] themselves as a man, carry themselves as a man. I don't do that. I'm a transgender." Defendant then asked the complainant about her sex organs and asked

if he could see "it." The complainant tried to ignore defendant, but he continued to make derogatory remarks, which the complainant described as "gay" in nature and included calling her a man and asking to see her penis. Defendant then pulled out a gun and threatened to kill her. The complainant was frightened that defendant would follow through on his threat to kill her. The woman with defendant told defendant to leave the complainant alone and to leave the gas station. While defendant was speaking to the complainant, a child who had arrived in the car with defendant entered the gas station. Defendant subsequently walked in close proximity to the complainant, gun in hand, moving toward the exit. The complainant testified that she feared that defendant would turn around and shoot her before leaving the gas station. The complainant further testified that transgender people are often attacked and harmed and that she feared for her life. Reacting to the threat from defendant, she grabbed at defendant's hand as he came near her in an attempt to get the gun away from him. A struggle between the two ensued, during which the complainant never had control of the gun. During this struggle, defendant kept his finger on the trigger. At some point during the struggle, the gun fired into the complainant's left shoulder. The complainant was then able to grab the gun from defendant. The woman with defendant took the gun from the complainant and moved toward the exit. Defendant then ran to the gas station exit, whereupon the woman with defendant gave him back the gun. Defendant then got into his car, and the child followed him out, climbing into defendant's car with him. The complainant was taken to the hospital, where she spent several days being treated for a shattered shoulder, including undergoing surgery.

At defendant's preliminary examination, surveillance footage was shown detailing the incident. Defendant objected to the court binding him over on the two charges of intentionally discharging a firearm, asserting that he did not intentionally fire a weapon at the complainant. With regard to the remaining charges (including the ethnic-intimidation charge), defendant conceded that there were "questions of fact for a jury[.]" Relevant to the appeal at hand, the district court ruled that "transgender" fell within the statutory definition of "gender"[2] for purposes of the ethnic-intimidation charge.

In the trial court, defendant moved to quash the district court's decision to bind him over on the two charges of intentionally discharging a firearm in a building and the charge of ethnic intimidation. With respect to the ethnic-intimidation charge, defendant argued that the prosecution failed to demonstrate that defendant committed a malicious physical act accompanied by a specific intent to harass the complainant because of her gender. In his amended motion to quash, defendant further contended that the ethnic-intimidation statute does not apply to situations in-

[2] In a written opinion following the bindover, the district court stated the following:

> Upon reviewing the ordinary, contemporary, and common meaning of "gender," the Court must conclude that a transgender person who is targeted based on their behavioral and social displays of gender, and the fact that the term gender encompasses the denotation of a range of identities, that a transgender person is protected under the Ethnic Intimidation Statute in Michigan.
>
> [The complainant] was made fearful by the defendant's bias related words and conduct. Defendant's assaultive actions were the result of his malicious intent to harass and intimidate. The defendant articulated bias against the victims' [sic] behavioral and social display of gender. Therefore, the defendant is bound over on Count 7, Ethnic Intimidation.

volving transgender people. The trial court granted defendant's motion to quash, finding that with respect to ethnic intimidation, the preliminary-examination testimony established that the complainant, not defendant, caused the physical contact between the two by grabbing defendant's wrist. The trial court further concluded that because the term "gender" is defined[3] in the Michigan Penal Code[4] as including only masculine, feminine, and neuter genders, the ethnic-intimidation statute did not apply to protect transgender people.

As previously indicated, this Court granted the prosecution's application for leave to appeal the trial court's decision.

II. STANDARD OF REVIEW

Whether a defendant's conduct falls within the scope of a criminal statute is a question of statutory interpretation, which is reviewed de novo. *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010). Additionally, "[a] district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011), see also *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016) ("A trial court's decision to quash an information is reviewed for an abuse of discretion."). "An abuse of discretion occurs when a decision falls outside the range of reasonable and principled outcomes." *People v Zitka*, 325 Mich App 38, 43; 922 NW2d 696 (2018) (quotation marks and citation omitted). To the extent that a lower court bases its decision on a motion to quash an information on an

[3] See MCL 750.10.

[4] MCL 750.1 *et seq*.

interpretation of the law, our review of that interpretation is de novo. *March*, 499 Mich at 397. When a trial court makes an error of law, it necessarily abuses its discretion. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

III. ANALYSIS

Defendant was charged with ethnic intimidation under MCL 750.147b. The statute provides, in pertinent part:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

The most important goal of statutory interpretation is to discern and give effect to the intent of the Legislature. *Dowdy*, 489 Mich at 379. If a statute's language is clear and unambiguous, it must be enforced as written and judicial construction is not required or permitted. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

Relevant to the instant matter, the word "gender" is not specifically defined within MCL 750.147b. The trial court opined that irrespective of whether the prosecution brought the ethnic-intimidation charge against defendant under Subdivision (a) or Subdivision (c) of that statute, the lower court made an error of law by

binding defendant over on the charge "based on the wording of MCL 750.147b and the definition of 'gender.' " The trial court concluded that because the word "gender" is defined in the Penal Code and that definition does not mention the term "transgender," see MCL 750.10, referring to dictionary definitions of the word "gender" to expand the statutory definition was impermissible. We thus begin our analysis by addressing whether the word "gender" in MCL 750.147b includes transgender people. We conclude that it does not, but for reasons wholly distinct from the trial court's rationale.

On its face, MCL 750.10 provides grammatical clarity and miscellaneous definitions for the entirety of the Michigan Penal Code. It states, in relevant part, that "[t]he masculine gender includes the feminine and neuter genders." It is readily apparent to this Court that the trial court was misguided in relying on that provision to conclude that "transgender" is not a part or subset of "gender" for purposes of the ethnic-intimidation statute. For decades, this Court has stated its understanding that the purpose of this statute was to place the female gender on the same footing as the male gender with regard to the application of criminal statutes. In *People v Gilliam*, 108 Mich App 695, 700; 310 NW2d 843 (1981), for example, this Court stated that the gender provision in MCL 750.10 "indicates a clear legislative intent that the Penal Code apply to females as well as males." In *People v Ghosh*, 188 Mich App 545, 546-547; 470 NW2d 497 (1991), this Court referred to *Gilliam*, stating that MCL 750.10 provides that the Michigan Penal Code "applies to both men and women." *Ghosh*, 188 Mich App at 546. Thus, we have consistently recognized that the legislative intent in enacting MCL 750.10 was simply to clarify that the Penal Code did not apply only to men, but also to women, even when only masculine pronouns are

used.[5] MCL 750.10 establishes only a rule of grammar intending to explain that persons of the male sex are not the *only* people subject to the Michigan Penal Code. We therefore conclude that the trial court erred as a matter of law by finding that the provisions of MCL 750.10 establish a substantive, strictly limited definition of "gender" to be used throughout the Penal Code.

This does not end our inquiry, however. We must still determine whether intimidation on the basis of a person's "gender" in the ethnic-intimidation statute, which was enacted in 1988, includes intimidation on the basis that a person is transgender. Normal rules of statutory construction aid us in that effort. "If a statute specifically defines a term, the statutory definition is controlling." *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). However, when " 'terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used.' " *Id*., quoting *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012). Additionally, when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined because this assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *Lewis*, 302 Mich App at 342.

Because the word "gender" is not defined within the ethnic-intimidation statute, we may consult dictionary definitions of the word to determine what is included

[5] This Court notes that MCL 750.10 also broadens the scope of other terms, stating, for example, "The singular number includes the plural and the plural includes the singular" and "The words 'person', 'accused', and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations."

within its meaning. This is not, however, a simple matter of picking up a current dictionary, as the district court appears to have done in making its bindover decision, to determine the meaning of a term enacted into law in 1988. This is because our task as judges is to determine what the statute meant at the time the people adopted it, not what it might mean under an evolved understanding of the statutory language more than 30 years following its enactment. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005) (looking to dictionary definitions from the era of the original legislation in construing the meaning of an undefined statutory term). See also *People v Wood*, 326 Mich App 561, 571; 928 NW2d 267 (2018) ("The Michigan Supreme Court has recognized the importance of defining a statutory term according to its original meaning."). That we must look to the meaning of statutory words and phrases as they would have been understood at the time of their enactment was aptly stated in *In re Certified Question*, 499 Mich 477, 484-485; 885 NW2d 628 (2016). In discussing the action of resorting to a dictionary definition of a statutory term, our Supreme Court stated: "In this regard, it is best to consult a dictionary from the era in which the legislation was enacted. . . . Because the [preservation of personal privacy act, MCL 445.1711 *et seq*.,] was enacted *in 1988*, we consult dictionaries from that era to define those words." *Id*. at 484-485, citing *Cain*, 472 Mich at 247 (emphasis added).

To do otherwise would allow a statute's meaning to change not as a result of statutory amendment but, rather, by judicial fiat on the basis of evolving societal understandings of a statutory term or terms. This approach would be particularly problematic in the area of criminal law because it would pose serious due-

process concerns. As this case well illustrates, allowing a criminal prohibition to change meaning because of nothing more than society's more "modern" or "current" understanding of a statute's terms could turn what yesterday was not criminal into something that today is criminal, without notice to the public. And likewise, that which was criminal yesterday could become legal today without any intervening change in the law. It is to avoid such anomalies that we must look to the meaning of words at the time they were enacted to determine whether certain conduct is illegal. And when we conclude that certain conduct, reprehensible as it is, is not prohibited under the law as it exists, it is up to the Legislature, not the judges of this or any other court, to specify that illegality.

In this case, we must determine whether within the ethnic-intimidation statute, intimidation on the basis of a person's "gender" encompasses intimidation motivated by the fact that a person is transgender. It is undoubtedly the case, as our dissenting colleague points out, that a current definition of the term "gender" includes gender identity, and specifically transgender identity. But the statute was not enacted in the modern era when these definitions and understandings have taken hold. Rather, the people's representatives in the Legislature enacted this statute in 1988, and it took effect on March 30, 1989. What, then, was the common understanding of the term "gender" when the Legislature criminalized ethnic intimidation?

Webster's Ninth New Collegiate Dictionary, published in 1990, gives a one-word definition of the word "gender" as follows: "SEX." This is the only definition given of the word in noun form that bears upon sexual identity; the others relate to the grammatical meaning of the term. *The Random House College Dictionary* (rev

ed), published in 1988, after likewise defining the word as a grammatical term, gives the same one-word definition: "sex." Both dictionaries then illustrate this meaning by using the word in a phrase involving "the feminine gender." The word "sex" was at that time, and remains today, associated with the biological roles of male and female. In that regard, *Webster's Ninth New Collegiate Dictionary* (1990) first defines "sex" as "either of two divisions of organisms distinguished respectively as male or female . . . ." At the time the statute was enacted, therefore, the term "gender" was synonymous with sex, being the biological roles of male and female.[6]

That this was the common understanding of the term "gender" at the time the statute was enacted is further illustrated by a 1993 opinion of this Court. In *Barbour v Dep't of Social Servs*, 198 Mich App 183, 185-186; 497 NW2d 216 (1993), this Court upheld the

[6] The partial dissent quotes an incomplete definition of the word "gender" from *The Random House Dictionary of the English Language* (1971). A review of that entire definition, however, indicates that the statement is part of a discussion of the use of the word "gender" in a grammatical context, while the next definition in the entry describes gender simply as "sex." That dictionary entry more completely states: "1. *Gram*. a. (in many languages) a set of classes that together include all nouns, membership in a particular class being shown by the form of the noun itself or by the form or choice of words that modify, replace, or otherwise refer to the noun, as, in English, the choice of *he* to replace *the man*, of *she* to replace *the woman*, of *it* to replace *the table*, of *it* or *she* to replace *the ship*. The number of genders in different languages varies from two to more than twenty; often the classification correlates in part with sex or animateness. The most familiar sets of genders are of three classes (as masculine, feminine, and neuter in Latin and German) or of two (as common and neuter in Dutch, or masculine and feminine in French and Spanish). b. one class of such a set. c. such classes or sets collectively or in general. d. membership of a word or grammatical form, or an inflectional form showing membership, in such a class. 2. sex: *She always minced her words when referring to persons of the feminine gender*. 3. *Archaic*. kind, sort, or class."

trial court's dismissal of the plaintiff's claim that he was unlawfully discriminated against in his employment on the basis of his sexual orientation. The plaintiff brought his claim under the Michigan Civil Rights Act, MCL 37.2101 *et seq*., which prohibits various forms of discrimination on the basis of "sex." The Court held that "harassment or discrimination based upon a person's sexual orientation is not an activity proscribed by the act." *Barbour*, 198 Mich App at 185. The Court went on to state, "Plaintiff has failed to meet the requirement that the harassment be *gender-based*." *Id*. at 186 (emphasis added). The Court also relied on its review of federal caselaw interpreting Title VII of the federal Civil Rights Act, 42 USC 2000e *et seq*., which similarly prohibits discrimination on the basis of "sex," concluding that Title VII's "protections are aimed at *gender* discrimination, not discrimination based on sexual orientation." *Barbour*, 198 Mich App at 185 (emphasis added). As can be seen, the court in *Barbour* used the term "gender" interchangeably with the statutory term "sex." This strongly suggests that gender, at least through the early 1990s, held the same meaning as sex, which has long been understood to denote whether a person is male or female.

There is simply no indication that when this statute was enacted in 1988, the term "gender" would have been understood to encompass one who is a transgender person. Indeed, in 1988, the general public may not have understood the meaning of the term "transgender," which was then newly in use in the media.[7] See *The Oxford English Dictionary* (2d ed) (which was

[7] This is in contrast to the terms "transsexual," which would then have been understood to mean someone who had a psychological urge to belong to the opposite sex and may have physically transitioned from one sex to the other, and "transvestite," which was then understood to

published in 1989 and contains no definition of the term "transgender"). Instead, the public would have understood the term "gender" to refer to whether a person is male or female, just as this court did in *Barbour*.[8]

A review of the legislative history of the ethnic-intimidation statute is also instructive.[9] House Bill 4113, which became Public Act 371 of 1988, was introduced on February 12, 1987. 1987 HB 4133. As introduced, the bill stated that a person is guilty of ethnic intimidation if the person engages in certain conduct that is motivated "by reason of the race, color, religion, or national origin of the victim or victims." *Id*. Notably, there was no mention of either gender or sexual orientation when the bill was first introduced. Before final passage of the bill in the House of Representatives, a substitute bill (H-4) was adopted that added the term "sexual orientation" to the list of prohibited motivations; the bill was approved and advanced to the Senate. 1988 HB 4133 (H-4). The House remarkably did not include either gender or sex

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mean a person who adopts the dress and behavior of a person of the opposite sex. *Webster's Ninth New Collegiate Dictionary* (1990) (quotation marks omitted).

[8] The term "transgender" did not work its way into an opinion of this Court until 2008. See *People v Lee*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2008 (Docket Nos. 277551 and 277552), pp 10-11. The term first appeared in a published decision of this Court in 2015. See *Shirvell v Dep't of Attorney General*, 308 Mich App 702, 745; 866 NW2d 478 (2015).

[9] We do not resort to legislative history when the meaning of a statute is clear on its face. *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). In this case, uncertainty over whether the statute prohibits intimidation on the basis that a person is transgender, derived from competing definitions of the term "gender," warrants a resort to legislative history. "This Court has recognized the benefit of using legislative history when a statute is ambiguous and construction of an ambiguous provision becomes necessary." *Id*.

in its list of prohibited motivations. The Senate then proceeded to adopt a substitute (S-2) that exchanged the term "gender" for "sexual orientation," along with other changes. 1988 HB 4113 (S-2). See also Senate Legislative Analysis, HB 4133 (December 8, 1988). This version was returned to the House, which concurred in the Senate amendments, enrolled the bill, and sent it to the Governor, who signed it into law. The statute has remained unchanged since that time.[10]

To conclude that the term "gender," adopted in 1988 in place of the term "sexual orientation," included the modern-day understanding of what it is to be a transgender person, strains credulity.[11] A Legislature that in 1988 appears to have been unwilling to criminalize behavior motivated by the sexual orientation of the victim cannot reasonably be thought to have intended, instead, to criminalize conduct based on a person being transgender, a term that was not in use at that time in

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[10] When attempting to ascertain legislative intent, not all legislative history is equally valuable. *In re Certified Question*, 468 Mich at 115 n 5; *In re Reliability Plans of Electric Utilities*, 325 Mich App 207, 229; 926 NW2d 584 (2018), rev'd on other grounds 505 Mich 97 (2020). Our Supreme Court has instructed that "the highest quality [of] legislative history [is] that [which] relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent with respect to an ambiguous statutory provision," including "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted." *In re Certified Question*, 468 Mich at 115 n 5. This is the only form of legislative history we have relied on in crafting our decision in this case.

[11] In 2009, Congress enacted comparable hate-crimes-prevention legislation, specifically prohibiting bodily injury or attempted bodily injury to any person because of actual or perceived "religion, national origin, *gender*, *sexual orientation*, *gender identity*, or disability," 18 USC 249(a)(2)(A) (emphasis added), suggesting that Congress, at the time that statutory provision was enacted, did not consider the term "gender" to include sexual orientation or gender identity.

the jurisprudence of our state and had only recently emerged in the media. Instead, it is most certainly the case that inclusion of the term "gender" was meant, as contemporaneous dictionary definitions and court rulings strongly suggest, to criminalize certain conduct motivated by whether the victim was male or female. We are constrained to reach this conclusion because we must take this term as it was understood in 1988, not through the lens of a modern-day interpretation.[12]

In this case, defendant's reprehensible actions toward the complainant were motivated by the fact she is a transgender person. When defendant asserted that the complainant is a man, she responded very specifically by saying that she does not identify as a man or carry herself as a man. Instead, she told defendant, "I'm a transgender." Defendant's conduct escalated from there, with defendant eventually pulling a weapon and threatening to shoot the complainant, which he then did during the course of a struggle over the gun. Thus, defendant's actions were not motivated by the complainant's gender, as that term was understood at the time of the statute's enactment, but instead resulted from the fact that the complainant identified herself as a transgender person. For that reason, defendant's outrageous conduct does not fall within the ambit of the ethnic-intimidation statute as

[12] Not only have the Michigan Supreme Court and this Court made clear our obligation in this regard, see *In re Certified Question*, 499 Mich at 484-485, but the United States Supreme Court has repeatedly engaged in statutory interpretation by resort to dictionary definitions at the time of a statute's enactment, see, e.g., *Taniguchi v Kan Pacific Saipan, Ltd*, 566 US 560, 566-568; 132 S Ct 1997; 182 L Ed 2d 903 (2012) (consulting dictionaries in use in 1978, the year of enactment of the Court Interpreters Act, to ascertain the meaning of "interpreter"). See also, e.g., *Smiley v Citibank (South Dakota), NA*, 517 US 735; 116 S Ct 1730; 135 L Ed 2d 25 (1996) (consulting "dictionaries of the era" of the National Bank Act to interpret the term "interest").

it is now written. The district court erred by binding defendant over for trial on the basis of what it referred to as a "contemporary" definition of the term "gender," by which it apparently meant contemporary with the current understanding of the term. The trial court therefore reached the correct result in quashing the bindover, albeit for the wrong reasons, and the court, therefore, did not abuse its discretion.

The partial dissent states that it "can be gleaned from the language of the statute itself" that the Legislature's intent in enacting the ethnic-intimidation statute was "to criminalize harassing and intimidating behavior when the behavior is based on a complainant's specific characteristics." As the partial dissent then notes, the statute itself identifies those categories to which the statute applies, being race, color, religion, gender, or national origin. The partial dissent further states that "[o]ur role is to effectuate the intent of the Legislature," that the intent of the Legislature would be effectuated by our "recogniz[ing] that the complainant here was targeted because of her gender," and that our recognition of this would have "an important role in effectuating the Legislature's intent—to criminalize and punish hate-based or discriminatory intimidation and harassment." (Emphasis omitted.) On this latter point, we must disagree.

MCL 750.147b does not seek to criminalize and punish hate-based or discriminatory intimidation and harassment generally; rather, that statute seeks to criminalize and punish a person guilty of ethnic intimidation, which the statute defines as a person who "maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin," engages in the conduct proscribed by the statute. *Id*. A person does

not violate the statute simply by behaving reprehensibly or hatefully. Even when a person's reprehensible conduct is inspired by hatred or prejudice toward a particular group of people, the statute still has not been violated unless that group of people is one of the categories included in the statute by our Legislature. Therefore, to ascertain whether a person is guilty of ethnic intimidation, we must determine whether that person was motivated by another person's race, color, religion, gender, or national origin.

We agree with the partial dissent that "[o]ur role is to effectuate the intent of the Legislature . . . ." However, the intent of the Legislature that enacted this statute cannot be effectuated by our "recogniz[ing] that the complainant here was targeted because of her gender[.]" Defendant did not assault the complainant because of her sex. Indeed, defendant did not direct his attack toward any other person present on the basis of whether they were male or female. Rather, defendant directed his attack at the complainant because she is a transgender person. The Legislature's intent was not, as the partial dissent advocates, "to criminalize and punish [all] hate-based or discriminatory intimidation and harassment." Rather, the intent of the Legislature was to punish ethnic intimidation as set forth in the statute. Indeed, much of the criminal behavior that we observe is hate-based and intended to intimidate and harass. A person only violates the ethnic-intimidation statute, however, if his or her behavior falls within the parameters of that statute.

As the partial dissent observes, "the proper role of the judiciary is simply to apply the terms of the statute to the facts of the particular case." *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013). More precisely, our Supreme Court in *Smitter* stated that

"[*w*]*hen the statutory language is unambiguous*, the proper role of the judiciary is simply to apply the terms of the statute to the facts of the particular case. In addition, words used by the Legislature must be construed and understood in accordance with their common, ordinary meaning." *Id*. (citation omitted; emphasis added). In so doing, we observe that our Legislature did not include the term "transgender" in the statute, quite possibly because at the time the statute was enacted the term was only just entering the public and jurisprudential lexicon. For the same reason, we cannot make the leap that by using the term "gender" our Legislature meant "transgender." We conclude that defendant did not target the complainant because of her sex; he targeted her because she is a transgender person, which is not within the statute's ambit.

By any measure of human decency, defendant's treatment of the complainant was abhorrent, and the complainant deserves the protection of the law. Our judicial role, however, does not permit us to extend that much-deserved protection to her in this case. If intimidation motivated by the fact that a person is transgender is to be criminalized, as many of us would readily agree it should be, this must be done by the work of the people's elected representatives in the Legislature, not by this panel of judges. Our judicial oath simply does not empower us to amend the criminal law in this fashion, however satisfying the result might be.

Affirmed.

REDFORD, J., concurred with GADOLA, P.J.

SERVITTO, J. (*concurring in part and dissenting in part*). I agree that the trial court erred as a matter of law by concluding that the provisions of MCL 750.10

establish a substantive, strictly limited definition of "gender" to be used throughout the Michigan Penal Code.[1] In all other respects, I dissent.

Although I disagree with the majority's conclusion that the word "gender" in MCL 750.147b does not include transgender persons,[2] I need not dive deeply into an analysis of past or current definitions of "gender" to conclude that defendant's conduct falls squarely within that which is unambiguously prohibited by MCL 750.147b. While I do not disagree that dictionaries may be used as an aid in interpreting statutory terms, "recourse to the dictionary is unnecessary when the legislative intent may be readily discerned from reading the statute itself." *ADVO-Sys, Inc v Dep't of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990). Moreover, "[a] statute is not ambiguous merely because a term it contains is undefined . . . ." *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015) (quotation marks and citation omitted). In this case, I do not believe that reference to a dictionary is necessary to discern the legislative intent in MCL 750.147b.[3]

MCL 750.147b provides, in pertinent part:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate

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[1] MCL 750.1 *et seq*.

[2] "Transgender" is an adjective, not a noun. See, e.g., *Merriam-Webster's Collegiate Dictionary* (11th ed).

[3] I do, however, note that the 1971 edition of *The Random House Dictionary of the English Language*, in defining "gender," states, "The number of genders in different languages varies from two to more than twenty; often the classification correlates, *in part*, with sex or animateness." (Emphasis added.) In my opinion, when the Legislature does not designate a particular dictionary that it referred to in crafting a particular statute, it cannot be said that one dictionary is the best, let alone conclusive, determiner of legislative intent.

> or harass another person because of that person's race, color, religion, gender, or national origin, does [any of certain enumerated acts.]

The primary goal of statutory construction is to determine the intent of the Legislature by reasonably considering the purpose and goal of the statute. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). While there is no binding authority stating the exact purpose of the ethnic-intimidation statute, it can be gleaned from the language of the statute itself that it is intended to criminalize harassing and intimidating behavior when the behavior is based on a complainant's specific characteristics. The Legislature sought to redress crimes motivated by a person's intolerance of another's characteristics specifically listed in MCL 750.147b (race, color, religion, gender, or national origin). In this matter, the complainant was targeted specifically *because* she was assigned biologically male at birth. Our role is to effectuate the intent of the Legislature, and I believe that to recognize that the complainant here was targeted because of her gender, whether that which was expressed outwardly or that which defendant believed she should have outwardly expressed, has an important role in *effectuating the Legislature's intent*—that is, to criminalize and punish hate-based or discriminatory intimidation and harassment.

I also do not believe that the majority's reliance on *Barbour v Dep't of Social Servs*, 198 Mich App 183; 497 NW2d 216 (1993), to support its holding that "gender" was commonly understood as synonymous with "sex" at the time the statute was drafted, is correct. In that case, the plaintiff was subjected to harassment in the form of efforts to get him to "engage in homosexual sex . . . ." *Id*. at 184. This Court stated that the "[p]lain-

tiff's sexual orientation constituted the subject matter of the harassment." *Id*. Sexual orientation is not the same as gender,[4] and there is no indication that the intimidation and harassment of the complainant in this case was based on her sexual orientation, as opposed to her gender. More importantly, while we are not bound by decisions made in other jurisdictions, I note that several United States Courts of Appeals have held that discrimination based on gender is "discrimination based on a failure to conform to stereotypical gender norms." See, e.g., *Smith v Salem*, 378 F3d 566, 573 (CA 6, 2004) (reviewing caselaw discussing same and noting that until recently, transgender people, such as people assigned male at birth "whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity," were denied protection by Title VII because discrimination on that ground fell under *gender* rather than *sex* discrimination).

In a similar vein, I do not believe it is appropriate to rely on the legislative history of MCL 750.147b to ascertain the meaning and intent of the statute. There are inherent problems in basing an interpretation on legislative history rather than relying on a plain reading of the unambiguous text. As our Supreme Court stated, "[C]onstruing an unambiguous statute by relying on legislative history at the very most . . . allows the reader, with equal plausibility, to pose a conclusion of his own that differs from that of the majority." *People v Gardner*, 482 Mich 41, 57; 753 NW2d 78 (2008) (quotation marks, citations, and brackets omitted). The legislative history cited by the majority in this case refers to the facts that the House of Representa-

[4] "Sexual orientation" generally refers to one's preference in sexual partners. See, e.g., *Random House Webster's College Dictionary* (1996).

tives added the term "sexual orientation" to the list of prohibited motivations and that the Senate thereafter adopted a substitute that eliminated the phrase "sexual orientation" and added the term "gender." While the majority views this as an "exchange" of terms, there is no indication that the Legislature intended that "gender" be a synonym of, and thus a *replacement for*, "sexual orientation." It is just as likely (more likely, in my opinion) that the Legislature viewed these as differing terms and simply determined that the inclusion of only the term "gender" better reflected the intent of the statute.

Even employing the majority's definition of "gender" as synonymous with "sex" and "the biological roles of male and female," a plain reading of the statute would dictate that whenever a complainant's sex (i.e., "biological role of male or female") was the impetus for the intimidating or harassing behavior, the conduct falls within the ethnic-intimidation statute. If, for example, the complainant was a man who was harassed or intimidated on the basis of his "biological role as male," the conduct would be criminal under the statute. The same would hold true for a woman who was harassed or intimidated because of her "biological role as female." I can see no plausible reason to determine that the ethnic-intimidation statute applies to biologically assigned males who present an outward appearance of being male and biologically assigned females who present an outward appearance as female but not to persons whose biologically assigned sex may be different from the sex that their outward appearances reflect. Defendant specifically intimidated and harassed the complainant because of her biologically assigned sex. Harassment based on gender (i.e., biological sex) is equally at the root of all the scenarios, and it is the prompt for the harassing or intimidating

behavior. The complainant's biologically assigned sex (gender) was thus the impetus for defendant's conduct toward her. "Courts should not abandon common sense when construing a statute," *Hmeidan v State Farm Mut Auto Ins Co*, 326 Mich App 467, 478; 928 NW2d 258 (2018) (quotation marks, citation, and brackets omitted), and common sense dictates that *whenever and in any circumstance* in which the complainant's sex prompts harassing or intimidating behavior, that conduct falls within that which is prohibited by MCL 750.147b.

In *People v Stevens*, 230 Mich App 502; 584 NW2d 369 (1998), this Court was called on to determine whether there was sufficient evidence to sustain a conviction of ethnic intimidation under MCL 750.147b. There, an incident occurred at a fast food restaurant in which the defendant threatened a woman and threw a punch at her after her child interrupted the defendant while he was placing his order. *Id*. at 503-504. This Court concluded:

> [T]he fact that defendant started a heated argument over a trivial matter would probably not be sufficient to allow a jury to find defendant guilty of ethnic intimidation beyond a reasonable doubt. Here, however, defendant's words provided strong evidence of a racist motive. Defendant's use of the word "nigger," his reference to the complainant as a "black bitch," and his remark that "you people shouldn't be allowed in here" explained his otherwise inexplicable actions. Taken in the light most favorable to the prosecution, this evidence was sufficient to allow the jury to conclude that defendant was guilty beyond a reasonable doubt. [*Id*. at 506.]

While the issue before this Court is not one of evidence sufficiency, it is clear that the language used by defendant during the incident provides strong evidence of a motive based on gender (or sex, again using the major-

ity's chosen definition). The complainant informed defendant that she was a transgender person. Defendant asked the complainant about her sex organs and asked if he could see "it." He continued to make derogatory remarks, called her a man, and asked to see her penis, after which he threatened to kill her. This conduct and these words cannot be seen as motivated by and centered on anything but the sex (gender) of the complainant. Just as a person's religion may not be outwardly apparent but may be sometimes gleaned from his or her words or chosen manner of dress and, thus, motivate intimidation or harassment, so too can a person's gender. And it is the harassment or intimidation that follows the recognition of and apparent disagreement with another's religion or gender (among other things) that is criminalized under MCL 750.147b.

Finally, the role of the judiciary is, indeed, to interpret the law. "[T]he proper role of the judiciary is simply to apply the terms of the statute to the facts of the particular case." *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013). In this case, applying the term "gender" in any sense, whether it is interpreted as equating with "sex" or has a broader meaning, defendant engaged in harassment and intimidation of the complainant because of her gender. It is only when one wanders beyond the specific language in the statute that the opposite result can be reached. Very simply put, would this incident have occurred had the complainant not been biologically assigned male? Undoubtedly not. I would thus conclude that the district court did not abuse its discretion by binding defendant over on the ethnic-intimidation charge. Accordingly, I would conclude that the trial court erred by determining otherwise and by granting defendant's motion to quash that charge.

BROZ v PLANTE & MORAN (ON REMAND)

Docket No. 340381. Submitted July 18, 2019, at Lansing. Decided January 9, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 950 (2020).

Robert F. Broz and Kimberly Broz filed an action against Plante & Moran for accounting malpractice in the Otsego Circuit Court in 2012. Before filing this action, the Brozes sued the Internal Revenue Service (IRS) in the United States Tax Court, disputing deficiencies in their tax payments for tax years 1996, 1998, 1999, 2000, and 2001 that the IRS found during an audit. Plante & Moran prepared the Brozes' tax returns for each of those years. The Tax Court decided the case in favor of the IRS in 2011, and the Brozes appealed in the United States Court of Appeals for the Sixth Circuit. While that appeal was pending, the Brozes filed their action for accounting malpractice. In 2014, Plante & Moran moved for summary disposition, which the trial court granted on the ground that the cause of action was not yet ripe because of the case that was pending against the IRS in the Tax Court. The trial court agreed that although the Brozes had been assessed a tax liability, they had not suffered a present injury because their liability would be offset if they prevailed in the Tax Court. The Brozes appealed in the Court of Appeals, and the Court of Appeals reversed and remanded the case to the trial court in an unpublished opinion issued May 17, 2016 (Docket No. 325884). On remand, the trial court, George J. Mertz, J., again granted summary disposition for Plante & Moran and dismissed the Brozes' claims under MCR 2.116(C)(8) and (10). The Brozes appealed in the Court of Appeals, and the Court of Appeals, BOONSTRA, P.J., and JANSEN and GADOLA, JJ., affirmed the decision of the trial court. 326 Mich App 528 (2018). The Brozes applied for leave to appeal in the Michigan Supreme Court, and in lieu of granting leave to appeal, the Supreme Court vacated Part II(A) of the Court of Appeals opinion and remanded the case to the Court of Appeals for reconsideration of the issue of professional negligence (accounting malpractice) in light of *Cox v Flint Bd of Hosp Managers*, 467 Mich 1 (2002). 504 Mich 892 (2019).

On remand, the Court of Appeals *held*:

1. When this case was previously before the Court of Appeals, the Court of Appeals held that under MCL 600.2912a, a plaintiff alleging malpractice is required to prove that the defendant failed to provide the recognized standard of acceptable professional practice or care, regardless of the type of professional malpractice alleged. However, our Supreme Court held in *Cox* that MCL 600.2912a did not apply to an action alleging malpractice against nurses because of the statute's use of the terms "general practitioner" and "specialist," which refer to persons engaged in the practice of medicine, and nurses were not engaged in the practice of medicine. Applying the analysis in *Cox*, MCL 600.2912a does not apply to accountant malpractice because accountants, like nurses, are not engaged in the practice of medicine.

2. The trial court did not erroneously conclude that the Brozes were required to establish the standard of care for accountants and that Plante & Moran breached that standard of care. The Brozes argued that they were not required to present proof of the standard of care because their professional-negligence claim was governed by MCL 600.2962, which does not require a plaintiff in an accounting malpractice case to establish the standard of care or that the defendant breached it. As members of a state-licensed profession, accountants are subject to liability for malpractice under the common law in accordance with MCL 600.2912. Because no statute or caselaw identifies the standard of care for accountants at common law, accountants are subject to the general common-law standard of care, which is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.

3. The trial court did not err by finding that expert testimony was required for the Brozes to meet their burden of establishing the standard of care and that the testimony provided by the Brozes' expert did not establish the standard of care. To establish that a professional breached the applicable standard of care, a plaintiff is usually required to introduce expert testimony unless the lack of professional care is so obvious as to be within the common knowledge and experience of an ordinary layperson. The Brozes' expert did not identify the standard of care for accountants or establish that Plante & Moran breached that standard. Rather, the expert stated generally that Plante & Moran provided bad accounting advice and inaccurate tax advice, which did not establish a standard of care or that Plante & Moran breached it.

Affirmed.

1. TORTS — NEGLIGENCE — PROFESSIONAL MALPRACTICE — STANDARD OF CARE — ACCOUNTANTS.

Accounting is a profession traditionally subject to common-law malpractice liability, and as members of a state-licensed profession, accountants are subject to malpractice liability under the common law in accordance with MCL 600.2912; because no statute or caselaw identifies the standard of care for accountants, accountants are subject to the general common-law standard of care for professionals, which is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.

2. TORTS — NEGLIGENCE — PROFESSIONAL MALPRACTICE — STANDARD OF CARE — ACCOUNTANTS — BURDEN OF PROOF — EXPERT TESTIMONY.

A plaintiff alleging accounting malpractice is required to establish the standard of care and that the defendant breached the standard in order to defeat a motion for summary disposition; to establish the applicable standard of care and that the accountant breached the standard of care, the plaintiff is required to introduce expert testimony unless the lack of professional care is so obvious as to be within the common knowledge and experience of an ordinary layperson.

Mahany Law (by *Brian H. Mahany*), *Anthony Dietz*, and *Mark Granzotto, PC* (by *Mark Granzotto*) for Robert F. Broz and Kimberly Broz.

Miller Canfield Paddock and Stone, PLC (by *Michael W. Hartmann* and *James Woolard*) for Plante & Moran, PLLC.

ON REMAND

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

GADOLA, J. This case involves alleged accounting malpractice. When this case was last before this Court, we affirmed the decision of the trial court granting summary disposition to defendant, Plante & Moran, PLLC, under MCR 2.116(C)(8) and (10). *Broz v Plante & Moran, PLLC*, 326 Mich App 528; 928 NW2d 292

(2018) (*Broz II*). Thereafter, our Supreme Court considered plaintiffs' application for leave to appeal and, in lieu of granting leave to appeal, vacated Part II(A) of our opinion and remanded the case to us for reconsideration of the issue of professional negligence (malpractice) in light of *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002). *Broz v Plante & Moran, PLLC*, 504 Mich 892 (2019). We do so now and again affirm.

I. FACTS

This case has a lengthy history and was previously before this Court in *Broz v Plante & Moran, PLLC*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2016 (Docket No. 325884) (*Broz I*). In that case, we summarized the underlying facts as follows:

> Robert Broz operated several businesses that provide cellular telephone services, including RFB Cellular and Alpine PCS. He organized the businesses as S Corporations, which provided for pass through taxation. The IRS audited the [Brozes'] tax returns and issued a notice of deficiency, or 90-day letter, to them. The IRS listed various deficiencies in the [Brozes'] tax payments for tax years 1996, 1998, 1999, 2000, and 2001. Plante Moran prepared the [Brozes'] tax returns for each of those years. The parties' professional relationship ended in February 2006.
>
> After the end of the relationship, but before the IRS issued the notice of deficiency, the Broz[es] filed amended tax returns for years 1998-2001, each one designated as a "protective filing" and showing a decrease in adjusted gross income of $35,675,453. Having claimed a large net operating loss for tax year 2002, they filed the amended returns in hopes of taking advantage of the 2002 enactment of the Job Creation and Worker Assistance Act, PL 107-147, § 102(a); 116 Stat 21, which allowed taxpayers to

carry back net operating losses incurred in tax years 2001 and 2002 for five years instead of the normal two.

The Broz[es] then sued the IRS in the United States Tax Court and disputed the deficiencies; they alleged in relevant part that all but a nominal amount of any tax deficiency assessed as a result of the audit would be eliminated by their 2002 net operating loss carryback. Despite raising the 2002 carryback as an issue in their petition to the Tax Court, the Broz[es] chose not to press that matter as part of their case before that tribunal. Their trial lawyer explained at deposition that this was done for strategic reasons and with the knowledge and approval of Robert Broz.

The Broz[es] sued Plante Moran for malpractice in 2008, but the parties entered into a series of tolling agreements pending the resolution of the case in the United States Tax Court. The Tax Court issued a decision in favor of the IRS on the deficiencies on September 1, 2011. *Broz v Comm'r of Internal Revenue*, 137 TC 46 (US Tax Ct, 2011). The Broz[es] then filed this action on January 19, 2012. They also appealed the decision of the Tax Court to the United States Court of Appeals for the Sixth Circuit. While that appeal was pending, the [Brozes'] lawyer attempted to fight collection efforts by the IRS by asserting that the judgment could be reduced either by a favorable ruling from the Sixth Circuit, or by application of the [Brozes'] 2002 net operating loss carryback, which they were still pursuing with the IRS. The federal appellate court affirmed the judgment of the Tax Court in August 2013. See *Broz v Comm'r of Internal Revenue*, 727 F3d 621 (CA 6, 2013). On September 16, 2014, the IRS sent the Broz[es] a letter disallowing the [Brozes'] carryback claims. The [Brozes'] lawyer responded with a letter stating their disagreement and requesting an appeals conference.

Plante Moran moved for summary disposition of this case on November 5, 2014. It argued that the case must be dismissed because it was not yet ripe; specifically, it stated that the IRS's review process could yet determine that no damages existed. It also argued that, by failing to assert the

> carryback argument in the United States Tax Court, the Broz[es] caused their own losses. The trial court agreed that the cause of action was not ripe. Although the Broz[es] had been assessed a tax liability, the court explained, they had not suffered any present injury because it was possible that that liability would be offset if they prevailed in their pending actions with the IRS. On that basis, the trial court granted Plante Moran's motion for summary disposition under MCR 2.116(C)(4) and dismissed the case without prejudice. [*Broz I*, unpub op at 1-2.]

Plaintiffs, Robert F. and Kimberly Broz, appealed in this Court contending that the trial court erred by granting summary disposition to defendant on ripeness grounds. This Court reversed the decision of the trial court and remanded the case for further proceedings. *Broz I*, unpub op at 4. On remand, defendant again sought summary disposition of plaintiffs' amended complaint, which alleged breach of contract, professional negligence (malpractice), negligent misrepresentation, breach of fiduciary duty, and "estoppel to mitigate and indemnity." The trial court granted defendant's motion and dismissed plaintiffs' claim for professional negligence (malpractice) under MCR 2.116(C)(10), while dismissing all other counts of plaintiffs' complaint under MCR 2.116(C)(8) and (10). Plaintiffs appealed the trial court's order in this Court, and we affirmed the decision of the trial court. *Broz II*, 326 Mich App 528. Our Supreme Court has now remanded the matter to us for reconsideration of the issue of professional negligence (malpractice).

II. DISCUSSION

A. STANDARD OF CARE

When previously before this Court, plaintiffs contended that the trial court erred by granting summary

disposition of their claim for professional negligence (malpractice) under MCR 2.116(C)(10). We review de novo a trial court's decision to grant or deny summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). In so doing, we review the entire record to determine whether the moving party was entitled to summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing an order granting summary disposition under MCR 2.116(C)(10), this Court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 520; 895 NW2d 188 (2016). Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. We also review de novo issues of statutory construction. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

In this case, the trial court ruled that with regard to their malpractice claim, plaintiffs had failed to present proof of the standard of care and proof that defendant had breached the standard of care. Specifically, the trial court found that plaintiffs' expert, Peter Oettinger, did not directly testify or report regarding the standard of care. The trial court concluded that defendant was therefore entitled to summary disposition of plaintiffs' claim of accounting malpractice. On appeal in this Court, plaintiffs contended that the trial court erroneously imposed upon them the duty to establish the standard of care. Plaintiffs argued that accounting malpractice claims are governed exclusively by MCL 600.2962 and that that statute does not require a plaintiff alleging accounting malpractice to present proof either of the standard of care or that the defen-

dant breached that standard. Plaintiffs further argued that although MCL 600.2912a applies to "many professional malpractice claims," it did not apply to accounting malpractice claims.

MCL 600.2912a provides:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *Broz II*, 326 Mich App at 540, we noted that the language of MCL 600.2912a(1) "does not specifically state that it applies to accounting malpractice," but rather "provides that 'in an action alleging malpractice, the plaintiff has the burden of proving' that the defendant 'failed to provide the plaintiff the recognized standard of acceptable professional practice or care.' "

Giving this language its plain and ordinary meaning, we observed that "the statute indicates that the Legislature meant it to apply to 'an action alleging malpractice' *without exception*." *Broz II*, 326 Mich App at 540 (emphasis added). We therefore concluded that MCL 600.2912a imposed upon plaintiffs in this case the burden of proving that defendant failed to provide plaintiffs with the recognized standard of acceptable professional practice or care.[1] *Id*. We further observed that "[m]embers of a state-licensed profession, such as accountants, are subject to liability for malpractice under the rules of the common law as articulated by MCL 600.2912 . . . ." *Id*. at 536.

In remanding this case to us, our Supreme Court has reminded us of *Cox*, in which the Court held that MCL 600.2912a does not apply to a malpractice action brought against nurses. See *Cox*, 467 Mich at 5, 18. In *Cox*, the Court explained that the statutory terms "general practitioner" and "specialist," as those terms are ordinarily defined, refer to persons engaged in the practice of medicine; therefore, for MCL 600.2912a to apply, a person must either be a medical practitioner or engaged in the practice of medicine. *Id*. at 16-19. The Court concluded that because nurses do not engage in

[1] This conclusion is in accord with earlier unpublished opinions of this Court, see, e.g., *Banker & Brisebois Co v Maddox*, unpublished per curiam opinion of the Court of Appeals, issued April 29, 2014 (Docket No. 310993), p 9 (reasoning that both MCL 600.2912a and MCL 600.2962 apply in an accounting malpractice case); *Ruby & Assoc, PC v George W. Smith & Co, PC*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2011 (Docket No. 297266), p 8 (holding that to establish accounting malpractice the plaintiff must prove in accordance with MCL 600.2912a that the defendant breached the standard of care), lv app den 493 Mich 854 (2012). Unpublished decisions of this Court are not precedentially binding, MCR 7.215(C)(1), but may be considered instructive or persuasive, *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 137; 892 NW2d 33 (2016).

the practice of medicine, a malpractice action against a nurse does not fall within MCL 600.2912a. *Id*. at 20. Applying the analysis set forth in *Cox*, we conclude in this case that because accountants, like nurses, are not engaged in the practice of medicine, MCL 600.2912a does not apply to accountant malpractice.

In *Cox*, our Supreme Court concluded that because MCL 600.2912a does not apply to nurses, the common-law standard of care applied: "[a]bsent a statutory standard, the common-law standard of care applies." *Cox*, 467 Mich at 5. The Court observed that there was no action for malpractice against nurses at common law. *Id*. at 20. The Court further observed that although the Legislature had created a malpractice cause of action against nurses by enacting MCL 600.5838a, in doing so the Legislature had not enacted an applicable standard of care. *Id*. Absent a mandated standard of care for nurses in the statute applicable to nursing malpractice, the Court concluded that the common-law standard of care applies in malpractice actions against nurses. *Id*. The Court then surveyed cases discussing the standard of care at common law and concluded that under the common law the applicable standard of care for nurses is "the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities." *Id*. at 20-22. Thus, although neither the statute nor the common law identifies a standard of care for nurses, our Supreme Court did not conclude, as urged by plaintiffs in this case with regard to accountant malpractice, that breach of the standard of care was not a requirement of demonstrating nursing malpractice. Rather, our Supreme Court concluded that the standard of care applicable in other professions at common law also applied to nurses. See *id*.

We therefore likewise turn to the common law to ascertain the standard of care applicable to accountants. Accounting is a profession traditionally subject to common-law malpractice liability. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 333; 535 NW2d 187 (1995). Accordingly, accountants are subject to the common-law principles articulated in malpractice actions generally. See *id*. In addition, as we observed in our previous opinion, as members of a state-licensed profession, accountants are subject to liability for malpractice under the common law in accordance with MCL 600.2912. *Broz II*, 326 Mich App at 536. However, we find no published Michigan case identifying the standard of care for accountants at common law. We therefore adopt the conclusion reached by our Supreme Court in *Cox* after examining the standard of care applied in other cases at common law, and we hold that at common law the standard of care is "the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities."[2] *Cox*, 467 Mich at 21-22. Compare *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995) (discussing the common-law standard of care for attorneys).

Having determined the applicable standard of care, we return to plaintiffs' contention that the trial court erroneously imposed upon them the duty to establish

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[2] Accord *Midwest Mem Group LLC v Citigroup Global Markets Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2015 (Docket No. 322338), pp 6-7 (stating that a plaintiff alleging accounting malpractice must demonstrate that the accountant failed to satisfy the common-law requisite standard of care, which is that an accountant must act with "the same degree of diligence and skill as would an accountant of ordinary learning, judgment or skill, in the same or similar community, under the same or similar circumstances"), lv app den 500 Mich 876 (2016), reconsideration den 500 Mich 948 (2017).

the standard of care in asserting their malpractice claim and to establish that defendant did not meet that standard of care. Plaintiffs contend that accounting malpractice claims are governed exclusively by MCL 600.2962, which does not articulate that proof of the standard of care is required. Plaintiffs argue on remand that therefore, under MCL 600.2962, the only proof required "against an accountant for malpractice is a negligent act." We disagree.

Professional malpractice arises from the breach of a duty owed by one rendering professional services to a person who has contracted for those services. *Saur v Probes*, 190 Mich App 636, 638; 476 NW2d 496 (1991). A professional malpractice claim is a tort claim predicated on the failure of the defendant to exercise the requisite professional skill. See *Stewart v Rudner*, 349 Mich 459, 468; 84 NW2d 816 (1957). As noted, accounting is a profession traditionally subject to common-law malpractice liability. *Local 1064*, 449 Mich at 333. In addition, MCL 600.2912 provides that members of a state-licensed profession, such as accountants, are subject to liability for malpractice under the rules of the common law as articulated by that statute. See *Sam v Balardo*, 411 Mich 405, 425-426; 308 NW2d 142 (1981) ("[L]iability for malpractice of members of state-licensed professions is to be determined by resort to the common law. Accordingly, the provisions of the [Revised Judicature Act, MCL 600.101 *et seq*.] do not purport to create or limit the cause of action of malpractice to something other than what was recognized at common law."). MCL 600.2912 provides:

> (1) A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable

> against any person who holds himself out to be a member of a state licensed profession.
>
> (2) Malpractice may be given in evidence in defense to any action for services rendered by the member of a state licensed profession, or person holding himself out to be a member of a state licensed profession.

MCL 600.2962(1) further clarifies the boundaries of liability for accounting malpractice. At the times relevant to this action,[3] that statute provided in pertinent part:

> (1) This section applies to an action for professional malpractice against a certified public accountant. A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations:
>
> (a) A negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant's client.
>
> (b) An act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation.
>
> (c) A negligent act, omission, decision, or other conduct of the certified public accountant if the certified public accountant was informed in writing by the client at the time of engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. For the purposes of this subdivision, the certified public accountant shall identify in writing to the client each person, generic group, or class description that the certified public accountant intends to have rely on the services. The certified public accountant may be held liable only to each identified person, generic group, or class description.

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[3] MCL 600.2962 has since been amended by 2012 PA 268, effective July 3, 2012. The malpractice alleged in this case occurred not later than 2006.

> The certified public accountant's written identification shall include each person, generic group, or class description identified by the client as being benefited or influenced. [MCL 600.2962(1), as enacted by 1995 PA 249.]

Neither MCL 600.2912 nor MCL 600.2962 identifies a standard of care applicable to accountants in an action alleging malpractice. As discussed, MCL 600.5838a, which created a cause of action for nursing malpractice, similarly does not identify a standard of care applicable to nurses. That being the case, we are guided by our Supreme Court's conclusion in *Cox* that "[a]bsent a statutory standard, the common-law standard of care applies." *Cox*, 467 Mich at 5. See also *Saur*, 190 Mich App at 638 (stating that the standard of care owed to a client in a professional relationship may be imposed by statute, common law, or in accordance with a professional code of responsibility). We therefore hold that plaintiffs were required to demonstrate the standard of care and that defendant breached that standard of care to survive summary disposition of their claim of professional negligence (malpractice).

B. PLAINTIFFS' EXPERT TESTIMONY

Having concluded that plaintiffs were required to identify the applicable standard of care and that defendant breached that standard of care in order to demonstrate accounting malpractice, we again conclude that plaintiffs failed to do so in this case. Generally, to state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship, (2) negligence in the performance of the duties within that relationship, (3) proximate cause, and (4) the fact and extent of the client's injury. See *Simko*, 448 Mich at 655 (stating the elements of a claim of legal malpractice). This Court has also stated that "[a] malprac-

tice claim requires proof of simple negligence based on a breach of a professional standard of care." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994). Thus, the element of negligence encompasses breach of the standard of care. See *Moning v Alfono*, 400 Mich 425, 437-438; 254 NW2d 759 (1977).

To establish the applicable standard of care and that the professional breached the standard of care, the plaintiff usually is required to introduce expert testimony unless the lack of professional care is so obvious as to be within the common knowledge and experience of an ordinary layperson. *Elher v Misra*, 499 Mich 11, 21-22; 878 NW2d 790 (2016). "Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community." *Decker v Rochowiak*, 287 Mich App 666, 686; 791 NW2d 507 (2010) (quotation marks and citation omitted). When a plaintiff fails to present expert testimony regarding the standard of care, a malpractice claim is subject to dismissal. See *Locke v Pachtman*, 446 Mich 216, 224-226; 521 NW2d 786 (1994) (discussing medical malpractice). We therefore again conclude that the trial court did not err in its finding that expert testimony was required in this case to meet that burden, given the complex accounting transactions involved. See *Elher*, 499 Mich at 21.

Having so concluded, we also again conclude that the trial court did not err by finding that plaintiffs in this case failed to do so. Plaintiffs' expert, Peter Oettinger, prepared an extensive report detailing the structure of plaintiffs' businesses, how that structure

established by defendant resulted in plaintiffs incurring tax obligations, and how the businesses could have been structured differently to avoid the tax liability. Oettinger's report, however, does not set forth the standard of care nor does it demonstrate that defendant breached that standard.

In determining whether Oettinger's report and deposition testimony adequately established the standard of care, the trial court looked for guidance to our Supreme Court's decision in *Locke*, 446 Mich 216, involving alleged medical malpractice. There, our Supreme Court upheld the trial court's determination that the plaintiff's expert witness had failed to establish a standard of care and therefore had failed to establish a prima facie case of malpractice. *Locke*, 446 Mich at 224-226. In this case, the trial court similarly determined that plaintiffs' expert failed to state an opinion regarding the standard of care and whether defendant had breached that standard. Relying on *Locke*, the trial court in this case reasoned:

> Mr. Oettinger's report does state what "typically" occurs, arguably setting *some* basis for what other accountants might have done that Defendant did not. Further, Mr. Oettinger characterizes the Defendant's actions as "highly questionable." However, like the *Locke* case, these statements do not rise to the level of clearly identifying a standard of care. It is true that Mr. Oettinger stated what typically is done in a timing sense of accounting actions, but he failed to specifically identify what is standard practice or whether the actions and advice the Defendant gave actually breached those professional standards. . . . It is clear from Mr. Oettinger's report that because of Defendant's advice the tax returns resulted in expensive deficiencies. According to Mr. Oettinger the business structure was overly complex and could have been more simple. However, pointing to damages resulting from Defendant's advice does not specifically show the Defen-

> dant committed malpractice. Advice from attorneys, doctors, and accountants can be unsatisfactory in that it does not produce the desired results, yet still be within the standard of care. Regardless of Mr. Oettinger's lack of specific language detailing negligence or malpractice, his report does not clearly identify what exactly Defendant *should* have done based on accounting standards of care or how the Defendant's advice breached the standard.

Again, we agree that Oettinger's report does not identify the standard of care or specifically state that defendant violated the standard of care. And although Oettinger stated in his deposition that he had applied the standard of care articulated by the American Institute of Certified Public Accountants (AICPA) in preparing his report, he did not state what that standard is nor whether defendant breached that standard. We also again conclude that Oettinger's affidavit does not supply the necessary information regarding the standard of care. In our prior opinion, we discussed that after defendant moved for summary disposition, plaintiffs submitted to the trial court an affidavit entitled "Declaration of Peter Oettinger, CPA," attempting to clarify Oettinger's testimony regarding the standard of care. In the affidavit, Oettinger states, in pertinent part:

> 5. This declaration is made in response to Defendant's suggestion that Defendant has not violated "a duty or standard of care." That statement is false. Defendant has clearly violated their duty to Plaintiffs and did provide bad accounting advice.
>
> 6. The tax planning and tax advice provided by Defendant to the Broz' [sic] and their companies were wrong. Their bad advice directly resulted in the IRS disallowing millions of dollars of deductions that the Broz' took on their personal returns.
>
> * * *

> 12. To be crystal clear, my report and my testimony is that Defendant committed accounting malpractice and violated its duties to the Broz'. Whether or not my report used some particular "buzzword[1]", the net effect is the same. Plante & Moran clearly and unequivocally violated its duty of care to Robert and Kimberly Broz.
>
> [1] Notwithstanding Defendant's suggestion to the contrary, my report indicates that I used the standard of care as issued by the AICPA. Subsequent research confirms that Michigan has adopted the AICPA standard. (Michigan Department of Licensing and Regulatory Affairs Accountant Rule 338.5102 which states[, "](1) The following standards are adopted by reference: (a) The standards issued by the American Institute of CPAs (AICPA), 220 Leigh Farm Road, Durham, North Carolina, 27707, set forth in the publication 'AICPA Professional Standards')[."]

The trial court declined to consider the affidavit, finding it a contradiction of Oettinger's prior testimony. On appeal in this Court, plaintiffs contended that Oettinger's affidavit was sufficient to clarify his testimony on the standard of care and that the trial court erred by declining to consider the affidavit. In our previous opinion, we observed that "a witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition." *Broz II*, 326 Mich App at 545, quoting *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006) (alteration omitted). We also observed that although a witness is bound by his or her deposition testimony, an affidavit that clarifies or expands upon previous testimony is not prohibited from consideration. See *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 312; 600 NW2d 664 (1999).

In this case, we again conclude that a review of Oettinger's report and deposition testimony demonstrates that the affidavit is consistent with his testimony, and in fact, the trial court noted in its opinion

that the affidavit *clarified* Oettinger's testimony. The trial court therefore was obligated to consider the affidavit. MCR 2.116(G)(5). We also again conclude, however, that the affidavit in this case did not establish the standard of care or the alleged breach of that standard. Stating generally that defendant provided bad accounting advice and that the tax advice was wrong, as Oettinger did in his affidavit, neither states a standard of care nor explains how defendant breached that standard. Likewise, citing generally a set of standards for accounting adopted by the state of Michigan does nothing to delineate what particular standard defendant might have breached or how defendant might have breached it. Although all documentary evidence must be considered in the light most favorable to plaintiffs as the nonmoving party, *Dawoud*, 317 Mich App at 520, here, plaintiffs failed to establish a question of material fact regarding whether defendant breached the standard of care because they failed to present expert testimony on the standard of care and whether defendant breached that standard. The trial court therefore did not err by granting defendant summary disposition of plaintiffs' claim for accounting malpractice.

Affirmed.

BOONSTRA, P.J., and JANSEN, J., concurred with GADOLA, J.

PEOPLE v GR
PEOPLE v AC
PEOPLE v DD

Docket Nos. 346418, 346596, and 347023. Submitted January 7, 2020, at Detroit. Decided January 21, 2020, at 9:00 a.m.

Defendants in these three consolidated appeals were minors charged with various offenses stemming from allegations that they were planning to commit a school shooting. Each defendant entered into a plea agreement, and the trial court, Nick O. Holowka, J., sentenced each defendant under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., to five years' probation. Defendants respectively moved to close the proceedings to the public in each case, and the trial court granted the motions. The state appealed by leave granted in Docket Nos. 346418 and 346596, and by delayed leave granted in Docket No. 347023, arguing that the trial court erred when it closed the proceedings to the public because the relevant proceedings were either not actually proceedings conducted under HYTA or the proceedings were not regarding the disposition of defendants' criminal charges. Alternatively, the state argued that if the proceedings could be closed to the public under MCL 762.14(4), then that provision is unconstitutional as applied in each case.

The Court of Appeals *held*:

1. Under MCL 762.11 of HYTA, provided that certain conditions are met, the trial court may assign youthful-trainee status to an individual who has pleaded guilty to a criminal offense without entering a judgment of conviction. MCL 762.14(4) provides that unless the court enters a judgment of conviction against the individual for the criminal offense under MCL 76.12, all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection but shall be open to the courts of this state, the Department of Corrections, the Family Independence Agency, law enforcement personnel, and, beginning January 1, 2005, prosecuting attorneys for use only in the performance of their duties. In this case, the prosecution argued that MCL 762.14(4) should be interpreted to close proceedings from public

view only after the individual has successfully completed the terms of his or her sentence and been discharged from youthful-trainee status. However, *People v Bobek*, 217 Mich App 524 (1996), held that MCL 762.14(4) means that all matters and hearings brought before the court in a case after the defendant had been assigned youthful-trainee status are to be closed to the public. In this case, the trial court granted defendants youthful-trainee status at defendants' sentencing hearings on March 1, 2018. Accordingly, the probation-review hearings at issue, which occurred in August 2018, are considered proceedings that must be closed to the public pursuant to MCL 762.14(4), and the trial court did not err by closing the matters to the public. The prosecution's argument—that "disposition" of the criminal charge refers to the end of the case when the individual is released from youthful-trainee status and the proceedings are dismissed—was unpersuasive. The probation-review hearings were proceedings regarding the individuals' assignment as youthful trainees; therefore, under the plain language of MCL 762.14(4), the trial court did not err by closing the proceedings to the public.

2. Contrary to the prosecution's argument, MCL 803.223 and MCR 6.935 did not support the proposition that the probation-review hearings must automatically remain public. Both MCL 803.223 and MCR 6.935 are silent regarding HYTA, and neither MCL 803.223 nor MCR 6.935 prohibits closing proceedings to the public. The prosecution also argued that MCR 9.925(A)(1) required the proceedings to be open to the public; however, even if this court rule were applicable, it is nonetheless silent as to the more specific class of individuals to which defendants belong: juveniles who have been assigned youthful-trainee status under HYTA. Because MCL 762.14(4) is the provision that more specifically applies to defendants who, as in this case, are juveniles who have been assigned youthful-trainee status under HYTA, MCL 762.14(4) controls with respect to closing the proceedings to the public.

3. In determining whether a qualified First Amendment right of access attaches to a criminal proceeding, the United States Supreme Court, in *Press-Enterprise Co v Superior Court*, 478 US 1 (1986), has emphasized two complementary considerations. The first is whether the place and process at issue have historically been open to the press and general public, and the second is whether public access plays a significant positive role in the functioning of the particular process in question. If both questions are answered in the affirmative, a qualified right of access applies to the proceeding and that proceeding may not be closed unless

specific findings are made that closure is essential to preserve higher values and is narrowly tailored to serve that interest. In this case, under the first prong of the analysis, the prosecution cited no legal authority for the proposition that proceedings involving juveniles have historically been open to the public; indeed, juvenile proceedings are often conducted without admitting the public. A trial is the quintessential example of criminal proceedings that are traditionally open to the public, but this case involved juveniles, and there are wide differences between the procedural rights accorded to adults and to juveniles. The proceedings at issue were not a criminal trial involving an adult defendant; the proceedings were probation-review hearings involving juvenile defendants who had been assigned youthful-trainee status under HYTA. In Michigan, HYTA is designed to give juveniles a second chance by providing them an opportunity to avoid having a criminal record and keeping the proceedings closed to public inspection. Furthermore, under the second prong of the analysis, there was no indication that the public plays a significant role in the function of the hearings at issue; rather, keeping the proceedings at issue open to the public would defeat the rehabilitative aims of HYTA. Accordingly, the prosecution failed to show that MCL 762.14(4) was unconstitutional as applied.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael J. Sharkey*, Prosecuting Attorney, and *Joseph D. Shopp* and *David L. Campbell*, Assistant Prosecuting Attorneys, for the people.

Dustyn K. Coontz for GR and DD.

Bernard A. Jocuns for AC.

Before: K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ.

BORRELLO, J. In these consolidated appeals, the state appeals by leave granted in Docket Nos. 346418 and 346596, and by delayed leave granted in Docket No. 347023, the trial court's orders granting defendants'

respective motions to close the proceedings to the public in each case. On appeal, the state argues that the trial court erred when it closed the proceedings to the public because the relevant proceedings were either not actually proceedings conducted under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., or the proceedings were not regarding the disposition of defendants' criminal charges. Alternatively, the state argues that if the proceedings could be closed to the public under MCL 762.14(4), then that provision is unconstitutional as applied in each case. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendants were charged with various offenses stemming from allegations that they were planning to commit a school shooting. Each defendant entered into a plea agreement offered by the state and accepted by the trial court. The trial court sentenced each defendant under HYTA to five years' probation.

Subsequently, pursuant to defendants' motions in the context of their respective probation-review hearings, the trial court ruled that the proceedings would be closed pursuant to HYTA and this Court's decision in *People v Bobek*, 217 Mich App 524; 553 NW2d 18 (1996). The state now challenges this ruling on appeal.

II. CLOSED PROCEEDINGS UNDER MCL 762.14(4) OF HYTA

The state first argues that the trial court erred by ordering that the proceedings would be closed to the public.[1]

[1] As an initial matter, two defendants argue that the prosecution waived review of this issue because the state declined to argue the matter further and conceded that the hearing could proceed once the

"The interpretation and application of a statute presents a question of law that the appellate court reviews de novo." *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). The Legislature's intent, as expressed in the statutory language, controls the interpretation of statutes. *Id*.

"HYTA is essentially a juvenile diversion program for criminal defendants under the age of 21." *People v Dipiazza*, 286 Mich App 137, 141; 778 NW2d 264 (2009). "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *Id*.; see also MCL 762.12; MCL 762.14. "If the defendant's status is not revoked and the defendant successfully completes his or her assignment as a youthful trainee, the court 'shall discharge the individual and dismiss the proceedings.' " *Dipiazza*, 286 Mich App at 142, quoting MCL 762.14(1). MCL 762.14(2) provides that "except as provided in subsection (3), [which is a subsection that is not implicated in this case,] the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status

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trial court made its ruling to close the proceedings. The record reveals that the state initially opposed closing the proceedings in the first defendant's hearing, and this argument was expressly incorporated into the record of the hearings. Waiver is the "intentional relinquishment or abandonment of a known right," which precludes appellate review because the "waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). Applying that standard to this record, we conclude that the state did not waive appellate review of the issue by refraining from further argument after the trial court had already ruled on the matter. The record does not reflect that the state expressed satisfaction with the trial court's ruling but instead merely recognized that the trial court had issued its ruling. That is not a waiver. See *id*. at 219 (concluding that counsel had effectuated a waiver by "clearly express[ing] satisfaction with the trial court's decision").

because of his or her assignment as a youthful trainee." "Once compliance is achieved, a youthful trainee will not be deemed convicted of a crime and proceedings regarding the disposition of the criminal charge will be closed to public inspection." *Bobek*, 217 Mich App at 529. HYTA "is a remedial statute and should be construed liberally for the advancement of the remedy." *Id*.

At issue in this appeal is MCL 762.14(4), which is the provision of HYTA concerning proceedings that are closed to public inspection. MCL 762.14(4) provides as follows:

> Unless the court enters a judgment of conviction against the individual for the criminal offense under [MCL 762.12], all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the family independence agency, law enforcement personnel and, beginning January 1, 2005, prosecuting attorneys for use only in the performance of their duties.

The state argues that this provision should be "interpreted to only close proceedings from public view *after* the individual has successfully completed the terms of their sentence and been discharged from youthful trainee status." Applying this analysis, the state argues that the trial court therefore erred by entering the order closing the proceedings during the course of defendants' probation-review hearings and while defendants were still serving their sentences of probation. However, the state's argument is at odds with this Court's holding in *Bobek*, 217 Mich App at 528-530, wherein we stated that MCL 762.14(4) means that *all matters and hearings* brought before the court in a case after the defendant had been assigned youthful-trainee status are to be closed to the public. The *Bobek* Court reasoned as follows:

> [T]he term "proceeding" apparently encompasses all matters brought before a court in a specific judicial action. When a hearing is conducted after the grant of youthful trainee status, closure of the hearing would be necessary to enforce the confidentiality provision of the act. Thus, it appears that the Legislature envisaged the term "all proceedings" as meaning *all* matters brought before a court in an action in which youthful trainee status has been granted. [*Bobek*, 217 Mich App at 530.]

In this case, the trial court granted defendants youthful-trainee status at defendants' sentencing hearings on March 1, 2018. Accordingly, the probation-review hearings at issue, which occurred in August 2018, are considered proceedings that must be closed to the public pursuant to MCL 762.14(4), and the trial court did not err by closing these matters to the public. *Bobek*, 217 Mich App at 530.

Nonetheless, the state further contends that the probation-review hearings were not required to be closed to the public under MCL 762.14(4) because they were not "proceedings regarding the *disposition* of the criminal charge . . . ." (Emphasis added.) The State argues that "disposition" of the criminal charge refers to the end of the case when the individual is released from youthful-trainee status and the proceedings are dismissed. See MCL 762.14(1) ("If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings.").

However, this argument is unpersuasive. Review of the statutory language reveals no indication that the mandate in MCL 762.14(1) to "discharge the individual and dismiss the proceedings" once the individual is

released from youthful-trainee status also serves to define the term "disposition" in MCL 762.14(4). Rather, this term is part of the phrase that this Court has determined refers broadly to all hearings in the matter after youthful-trainee status has been granted so as to effectively "enforce the confidentiality provision of the act." *Bobek*, 217 Mich App at 530. Moreover, the probation-review hearings necessarily related to defendants' "assignment as youthful trainee[s]" because defendants were sentenced to probation after the trial court granted defendants youthful-trainee status. Thus, the hearings were "proceedings regarding . . . the individual[s'] assignment as youthful trainee[s]," and under the plain language of the statute, the trial court did not err by closing the proceedings to the public. MCL 762.14(4); *Bobek*, 217 Mich App at 530.

The state additionally argues that MCL 762.14(4) does not apply in this case and that the trial court therefore did not have the authority to close the proceedings, because the probation-review hearings were actually conducted under MCL 803.223 and MCR 6.935 rather than under HYTA. MCL 803.223 provides as follows:

> If a juvenile is committed to a juvenile facility, the department or county juvenile agency, as applicable, shall prepare for the court that committed the juvenile an annual report stating the services being provided to the juvenile, where the juvenile has been placed, and the juvenile's progress in that placement.

MCR 6.935 provides as follows:

> (A) General. When a juvenile is placed on probation and committed to a state institution or agency, the court retains jurisdiction over the juvenile while the juvenile is on probation and committed to that state institution or

> agency. The court shall review the progress of a juvenile it has placed on juvenile probation and committed to state wardship.
>
> (B) Time.
>
> (1) Semiannual Progress Reviews. The court must conduct a progress review no later than 182 days after the entry of the order placing the juvenile on juvenile probation and committing the juvenile to state wardship. A review shall be made semiannually thereafter as long as the juvenile remains in state wardship.
>
> (2) Annual Review. The court shall conduct an annual review of the services being provided to the juvenile, the juvenile's placement, and the juvenile's progress in that placement.
>
> (C) Progress Review Report. In conducting these reviews, the court shall examine the progress review report prepared by the Family Independence Agency, covering placement and services being provided the juvenile and the progress of the juvenile, and the court shall also examine the juvenile's annual report prepared under MCL 803.223 (§ 3 of the Juvenile Facilities Act). The court may order changes in the juvenile's placement or treatment plan including, but not limited to, committing the juvenile to the jurisdiction of the Department of Corrections, on the basis of the review.
>
> (D) Hearings for Progress and Annual Reviews. Unless the court orders a more restrictive placement or treatment plan, there shall be no requirement that the court hold a hearing when conducting a progress review for a court-committed juvenile pursuant to MCR 6.935(B). However, the court may not order a more physically restrictive change in the level of placement of the juvenile or order more restrictive treatment absent a hearing as provided in MCR 6.937.

Contrary to the state's argument, MCL 803.223 and MCR 6.935 do not support the argument that the probation-review hearings must automatically remain public because MCR 6.935(D) specifically states that a

hearing is not required *at all* when conducting a progress review (unless the court orders a more restrictive placement or treatment plan). Furthermore, both MCL 803.223 and MCR 6.935 are silent regarding HYTA, and neither MCL 803.223 nor MCR 6.935 prohibits closing proceedings to the public. Because MCL 762.14(4) is the provision that more specifically applies to defendants who, as in this case, are juveniles who have been assigned youthful-trainee status under HYTA, MCL 762.14(4) controls over MCL 803.223 and MCR 6.935 with respect to closing the proceedings to the public. See *People v Arnold*, 502 Mich 438, 472; 918 NW2d 164 (2018) ("When a general intention is expressed, and also a particular intention, which is incompatible with the general one, the particular intention shall be considered an exception to the general one.") (quotation marks and citation omitted); see also *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009) ("When interpreting a court rule, this Court applies the same rules as when we engage in statutory interpretation.") (quotation marks and citation omitted).

The state also argues that MCR 3.925(A)(1) required the proceedings to be open to the public. MCR 3.925(A) provides as follows:

> (A) Open Proceedings.
>
> (1) General. Except as provided in subrule (A)(2), juvenile proceedings on the formal calendar and preliminary hearings shall be open to the public.
>
> (2) Closed Proceedings; Criteria. The court, on motion of a party or a victim, may close the proceedings to the public during the testimony of a child or during the testimony of the victim to protect the welfare of either. In making such a determination, the court shall consider the nature of the proceedings; the age, maturity, and preference of the witness; and, if the witness is a child, the

> preference of a parent, guardian, or legal custodian that the proceedings be open or closed. The court may not close the proceedings to the public during the testimony of the juvenile if jurisdiction is requested under MCL 712A.2(a)(1).

Even if we were to presume this court rule applicable, it is nonetheless silent as to the more specific class of individuals to which defendants belong: juveniles who have been assigned youthful-trainee status under HYTA. Accordingly, for the reasons cited earlier, MCL 762.14(4) controls. *Arnold*, 502 Mich at 472.

III. CONSTITUTIONALITY OF MCL 762.14(4)

The state argues that MCL 762.14(4) is unconstitutional as applied because it requires a closed hearing without balancing the interests of the public in having an open hearing.

"The constitutionality of a statute is a question of law, reviewed de novo on appeal." *People v Roberts*, 292 Mich App 492, 496; 808 NW2d 290 (2011) (quotation marks and citation omitted). "We presume statutes to be constitutional unless their unconstitutionality is clearly apparent and, if possible, the statute is to be construed as constitutional." *People v Deroche*, 299 Mich App 301, 305; 829 NW2d 891 (2013). The burden is on the party challenging the statute's constitutionality to prove its invalidity. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

However, although the state argued in the trial court that the public had a First Amendment right to attend the proceedings, the state did not argue in the trial court that MCL 762.14(4) violated this constitutional right. By not challenging the constitutional validity of the statute in the trial court, the state failed to preserve this argument for appeal. *People v Sands*,

261 Mich App 158, 160; 680 NW2d 500 (2004); see also *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). Therefore, our review of this unpreserved constitutional issue is for plain error. *Sands*, 261 Mich App at 160. "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." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Our Supreme Court has explained the general relationship between a defendant's Sixth Amendment right to a public trial and the concurrent First Amendment right held by the public to attend criminal trials:

> The right to a public trial "has its roots in our English common law heritage." The Sixth Amendment of the United States Constitution expressly enumerates this right and states that a criminal defendant "shall enjoy the right to a . . . public trial . . . ." The Sixth Amendment right to a public trial is incorporated to the states by the Due Process Clause of the Fourteenth Amendment. Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant "shall have the right to a . . . public trial . . . ." That the right to a public trial also encompasses the right to public voir dire proceedings is "well settled."
>
> Although the Sixth Amendment right "is the right of the accused," a member of the public can invoke the right to a public trial under the First Amendment. "The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other." The existence of this implied First Amendment right enjoyed by members of the public precludes a

> criminal defendant from enjoying a constitutional right to a *private* trial, even if he waives his Sixth Amendment right to a public trial. [*People v Vaughn*, 491 Mich 642, 650-652; 821 NW2d 288 (2012) (some citations omitted; ellipses in original).]

In this case, we are solely concerned with the right of access held by the public and protected by the First Amendment.

> In determining whether a qualified First Amendment right of access attaches to a criminal proceeding, the United States Supreme Court has emphasized two complementary considerations. *Press-Enterprise Co v Superior Court*, 478 US 1, 13; 106 S Ct 2735; 92 L Ed 2d 1 (1986) (*Press-Enterprise II*). See also *Booth Newspapers*[, *Inc v Twelfth Dist Court Judge*, 172 Mich App 688; 432 NW2d 400 (1988)]. The first is whether the place and process at issue have historically been open to the press and general public. Secondly, there is the consideration "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, [478 US] at 8; *Booth Newspapers*, [172 Mich App 688]. If both questions are answered in the affirmative, a qualified right of access applies to the proceeding, and that proceeding may not be closed unless specific findings are made that " 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Press-Enterprise II*, [478 US] at 13-14, quoting *Press-Enterprise Co v Superior Court*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984) (*Press-Enterprise I*). [*Detroit News, Inc v Recorder's Court Judge (After Remand)*, 202 Mich App 595, 600-601; 509 NW2d 894 (1993), aff'd sub nom *People v Atkins*, 444 Mich 737 (1994).]

This Court has adopted the *Press-Enterprise II* test. *Detroit News*, 202 Mich App at 599 n 2.

Under the first prong of the *Press-Enterprise II* test, we first note that the proceedings at issue were not a criminal trial (or any form of proceeding that resembled

a trial in any significant way) involving an adult defendant. A trial is the quintessential example of criminal proceedings that are traditionally open to the public. See, e.g., *Press-Enterprise I*, 464 US at 505 ("[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.") (quotation marks and citation omitted). Instead, the proceedings at issue were postplea probation-review hearings involving juvenile defendants[2] who had been assigned youthful-trainee status under HYTA. However, we stress that our analysis on this issue should not be interpreted as an all-encompassing statement that the First Amendment attaches only to "trials." We recognize that the First Amendment right to public access is not strictly limited to "trials." See, e.g., *Press-Enterprise II*, 478 US at 7 (concluding with respect to a preliminary hearing that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial"). Rather, for purposes of our analysis, we deem it necessary to distinguish the nature of the instant proceedings, which involved juveniles who had been assigned youthful-trainee status under HYTA, because these facts are decidedly significant.

The United States Supreme Court has recognized that "[f]rom the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles." *In re Application of Gault*, 387 US 1, 14; 87 S Ct 1428; 18 L Ed 2d 527 (1967). The *Gault* Court noted that the juvenile-court movement began in

[2] Defendants were each either 14 or 15 years old at the time of the underlying conduct that led to the charges in this case.

the United States near the end of the nineteenth century. *Id*. The Court further stated that the early proponents of this movement "were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone" and "believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' " *Id*. at 15 (citation omitted). There was an emphasis on treatment and rehabilitation rather than punishment. *Id*. at 15-16. The Court also recognized the underlying general policy in the juvenile system to attempt to "hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." *Id*. at 24 (quotation marks and citation omitted). The *Gault* Court held that despite these aims, juveniles were still entitled to "the essentials of due process and fair treatment" with respect to juvenile-court adjudications, *id*. at 30-31 (quotation marks and citation omitted), but the Court also clarified that such due-process protections nonetheless would not negate the beneficial aspects of the juvenile-court system and, more specifically, would not prevent a state from continuing "to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles," *id*. at 20-28.

In Michigan, HYTA is similarly designed to give juveniles a second chance by providing them an opportunity to avoid having a criminal record and keeping the proceedings closed to public inspection. *Bobek*, 217 Mich App at 528-530. Under HYTA, provided that certain conditions not at issue in this appeal are met, the trial court may assign youthful-trainee status to an individual who has pleaded guilty to a criminal offense without entering a judgment of conviction. MCL 762.11.

Successful completion results in dismissal of the proceedings. MCL 762.14(1); *Dipiazza*, 286 Mich App at 142; *Bobek*, 217 Mich App at 528-529. As the *Gault* Court also recognized, "The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process[.]" *Gault*, 387 US at 31 n 48.

We note further that the state has not cited any legal authority for the proposition that proceedings involving juveniles have historically been open to the public. We discern this lack of citation to have occurred because none exists; indeed, it appears that the opposite is true. *Id*. at 14-16, 24; see also *In re Oliver*, 333 US 257, 266 n 12; 68 S Ct 499; 92 L Ed 682 (1948) ("Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public."). Furthermore, under the second prong of the *Press-Enterprise II* test, there is no indication that the public plays a significant role in the function of the hearings at issue, and the state has not provided us any legal authority that would allow us to reach a contrary conclusion. As we have already discussed, keeping the proceedings at issue open to the public would defeat the rehabilitative aims of HYTA. See *Bobek*, 217 Mich App at 530; see also *Gault* 387 US at 14-16, 24-25.

For the reasons set forth in this opinion, we conclude that the state has failed to demonstrate that plain error occurred and has failed to meet its burden of demonstrating that MCL 762.14(4) is unconstitutional as applied. Accordingly, we affirm the judgment of the trial court.

Affirmed.

K. F. KELLY, P.J., and SERVITTO, J., concurred with BORRELLO, J.

In re PETITION OF INGHAM COUNTY TREASURER FOR FORECLOSURE

Docket No. 346626. Submitted January 14, 2020, at Lansing. Decided January 21, 2020, at 9:05 a.m.

Faiek Zeineh moved in the Ingham Circuit Court for relief from a judgment of foreclosure granted in favor of the Ingham County Treasurer. Before the foreclosure, the Treasurer sent notice of the delinquent taxes and imminent foreclosure on a parcel of real property in Lansing to the entity that held a recorded interest in the property. The Treasurer also sent a notice of foreclosure to "Occupant" at the property's address. Additionally, the Treasurer posted a foreclosure notice at the property and published notice of foreclosure in a local newspaper. Zeineh was not notified of the foreclosure and did not participate in foreclosure proceedings. Judgment of foreclosure was entered in February 2018. In June 2018, Zeineh moved for relief from the judgment, asserting that he had an interest in the property that was documented in an unrecorded land contract and arguing that the Treasurer had a statutory duty to notify him of the foreclosure proceedings because he had paid delinquent taxes on the property for tax year 2014. The trial court, Richard J. Garcia, J., granted Zeineh's motion, ruling that Zeineh was entitled to receive notice of the foreclosure proceedings because the Treasurer should have been on notice that Zeineh had an interest in the property based on his payment of delinquent taxes owed on the property for tax year 2014. The trial court subsequently denied the Treasurer's motion for reconsideration, and the Treasurer appealed.

The Court of Appeals *held*:

The Treasurer complied with the notice procedures set forth in MCL 211.78i of the General Property Tax Act, MCL 211.1 *et seq*., and was not required to provide Zeineh with notice of the foreclosure proceedings because Zeineh did not have an ownership interest in the property. MCL 211.78i(1) requires a foreclosing governmental unit to attempt to identify owners of a property interest who are entitled to notice of foreclosure by searching the records listed in MCL 211.78i(6), including recorded land title records and tax records filed with the county

treasurer, local assessor, and local treasurer. The parties agreed that Zeineh's land contract was not recorded and that Zeineh was connected to the property only by the tax record showing he had paid the delinquent taxes for the 2014 tax year. The statute did not require the Treasurer to send notice of the foreclosure to Zeineh on the basis of his one-time payment of delinquent taxes because the tax record was not sufficient to identify the ownership interest he claimed in the property based on the unrecorded land contract. The plain language of MCL 211.78i does not require the Treasurer to send notice of foreclosure proceedings to every person who has made a tax payment on a property at risk of foreclosure; rather, the statute requires that notice of foreclosure be given to a person or entity with a recorded ownership interest.

Reversed and remanded for entry of an order denying respondent's motion for relief from judgment and for reinstatement of the judgment of foreclosure.

PROPERTY — DUE PROCESS — FORECLOSURE PROCEEDINGS BY A GOVERNMENTAL UNIT — NOTICE OF FORECLOSURE — OWNERS OF A PROPERTY INTEREST.

MCL 211.78i(1) requires a foreclosing governmental unit to initiate a search of the records described in MCL 211.78i(6) to identify owners of a property interest in a property subject to foreclosure who are entitled to notice of the show-cause hearing and foreclosure hearing; the statute does not require the foreclosing governmental unit to notify any person who claims an interest in the property but whose claimed interest is not recorded, including a person or entity who has made a tax payment on a property at risk of foreclosure.

Clark Hill PLC (by *Charles A. Lawler*) for the Ingham County Treasurer.

Fraser Trebilcock Davis & Dunlap, PC (by *Brian P. Morley*) for Faiek Zeineh.

Before: BOONSTRA, P.J., and TUKEL and LETICA, JJ.

BOONSTRA, P.J. Petitioner appeals by right the trial court's orders granting respondent relief from judgment, setting aside a judgment of foreclosure, and denying reconsideration. We reverse and remand for

entry of an order denying respondent's motion for relief from judgment and for the reinstatement of the judgment of foreclosure.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In February 2018, petitioner foreclosed on the property known as 1024 Regent Street in Lansing because of unpaid property taxes. Petitioner sent notice of the delinquent taxes and imminent foreclosure to the entity that held a recorded ownership interest in the property, as well as to "Occupant" at the Regent Street address. Petitioner also posted a notice of foreclosure proceedings at the property and published a notice of foreclosure in a local newspaper. Respondent was not notified and did not participate in the foreclosure proceedings, which resulted in a judgment of foreclosure entered on February 21, 2018.

In June 2018, respondent filed a motion for relief from judgment, asserting that he had an interest in the property by virtue of an unrecorded land contract and that petitioner had erred by not notifying him of the foreclosure proceedings. Specifically, he argued that in 2016 he had paid delinquent taxes on the property for tax year 2014, that this payment was recorded in petitioner's tax records, and that petitioner therefore had a statutory duty to send him notice of the proceedings.

At a hearing held on the motion for relief from judgment, respondent conceded that petitioner had no way of knowing about respondent's land-contract interest, but petitioner acknowledged that respondent had paid the 2014 taxes. The trial court granted respondent's motion and set aside the judgment of foreclosure, stating:

> The question here is really one of notice, and I would agree that the land contract should have been filed, except . . . many are not. People don't think about it until they actually pay off the property.
>
> I do have the tax record where he was a known person because he did pay taxes . . . for the tax year 2014. This is 2015 and prior years, so he would have been known. I think that's really the argument, and then do we have notice.
>
> I'm going to set aside the default and grant [respondent's attorney] what he seeks. . . . [B]ut when there's a question of whether a person gets to keep his personal property or real property, as it may be, and there's an issue of notice, I'm going to read the statute in the favor of the person who thought they were doing right, because these are very complicated matters, and I don't think it's as clear when one section references another, and I have two very fine lawyers arguing two very different things on the same statute. The statute . . . can be read both ways . . . . [L]istening to the arguments, looking at the statute, I'm going to weigh in favor of the individual, because the county has cashed [sic] money and really was put on notice that there's something more involved here, and they had the record in their own file, so judgment is for [respondent].

The trial court subsequently denied petitioner's motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision on a motion for relief from judgment, *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008), as well as on a motion for reconsideration, *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Waterous*

Co, 279 Mich App at 380. "A court by definition abuses its discretion when it makes an error of law." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012). We review de novo constitutional issues and issues of statutory interpretation. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010).

III. ANALYSIS

Petitioner argues that it complied with the notice requirements of MCL 211.78i and that the trial court erred by setting aside the judgment of foreclosure on the ground that respondent had not been provided notice of the proceedings. We agree.

A citizen's right to due process of law is guaranteed under both the United States and Michigan Constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 17. "Due process protects vested property rights or entitlements." *Mich Ed Ass'n v State Bd of Ed*, 163 Mich App 92, 98; 414 NW2d 153 (1987). Our Supreme Court has held that Michigan's General Property Tax Act (GPTA)[1] contains an "extensive set of procedures for notice of the steps in the tax sale process" that provides "a constitutionally sound procedure for sale of property because of nonpayment of taxes." *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 428-429; 617 NW2d 536 (2000).

Under MCL 211.78g(1), "on March 1 in each tax year, . . . property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees." MCL 211.78k authorizes

[1] MCL 211.1 *et seq*.

the trial court to issue a final judgment on a petition for foreclosure after holding a hearing at which persons claiming interests in the property may contest the validity or correctness of the taxes, interest, penalties, or fees at issue for specified reasons. MCL 211.78j requires a foreclosing governmental unit to hold a hearing at least seven days before the foreclosure hearing and allow persons with interests in property forfeited to the county treasurer to show cause why the property should not be foreclosed upon.

MCL 211.78i, which is at the heart of the issue in this case, sets forth procedures for identifying and notifying property owners regarding these show-cause and foreclosure hearings. MCL 211.78i(1) requires a foreclosing governmental unit to "initiate a search of records identified in subsection (6) to identify the owners of a property interest in the property who are entitled to notice under this section of the show cause hearing . . . and the foreclosure hearing . . . ." MCL 211.78i(6) states that "[t]he owner of a property interest is entitled to notice under this section of the show cause hearing . . . and the foreclosure hearing . . . if that owner's interest was identifiable by reference to any of the following sources"; it then specifies, in Subdivision (a), "[l]and title records" on file with the register of deeds and, in Subdivisions (b), (c), and (d), "[t]ax records" on file with, respectively, the county treasurer, the local assessor, and the local treasurer.

MCL 211.78i(2) states that a foreclosing governmental unit, after searching the records identified in Subsection (1), "shall determine the address reasonably calculated to apprise those owners of a property interest of the show cause hearing . . . and the foreclosure hearing . . . and shall send notice . . . by certified mail,

return receipt requested, not less than 30 days before the show cause hearing. . . ."

Here, the parties agree that respondent's land contract was not recorded and that the only record connecting respondent's name to the foreclosed property was the tax record showing his payment of delinquent taxes for the 2014 tax year. We conclude that the plain language of MCL 211.78i(1) and (6) did not require petitioner to send notice of the foreclosure to respondent merely because he had once paid delinquent taxes on the property.

The primary purpose of statutory construction is to ascertain and give effect to the intent of the Legislature. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995). When construing a statute, a court should presume that every word has some meaning, *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439, 457; 553 NW2d 7 (1996), but we may not read requirements into a statute that do not appear in its plain language, *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017).

Again, MCL 211.78i(1) calls for a foreclosing governmental unit to "initiate a search of records identified in subsection (6) to identify the *owners* of a property interest in the property who are entitled to notice." (Emphasis added.) MCL 211.78i(6) states that an "owner" whose "interest was identifiable by reference" to certain records is entitled to notice of the foreclosure proceedings. In other words, MCL 211.78i(1) requires a

foreclosing entity to search the records identified in MCL 211.78i(6), not merely for the names of persons or entities connected in any way to the property under threat of foreclosure, but for records that reveal an ownership interest. Respondent admits that his ownership interest in the property was not recorded. The mere fact that a record existed of respondent's payment of one year's delinquent taxes on the property was insufficient to identify any ownership interest. A person or entity may pay property taxes on property that they do not own. The plain language of MCL 211.78i does not require petitioner to send notification of foreclosure to every person or entity who has ever made a tax payment on a property at risk of foreclosure, and we will not read such a requirement into the statute. *Gross*, 448 Mich at 160; *Nickola*, 500 Mich at 125; *Smith*, 463 Mich at 430 ("The courts lack the authority to create new notice requirements.").

Respondent knew that his interest in the property was unrecorded, and he could have taken steps to make sure that he was kept informed of potential risks to his interest. Indeed, MCL 211.78a(4) specifically provides a mechanism by which persons such as respondent could ensure their receipt of notice merely by paying "an annual fee not to exceed $5.00 . . . to the county treasurer" and specifying "the address to which the notice shall be sent." We conclude that petitioner diligently satisfied the statutory notice requirements of the GPTA. Respondent chose to disregard at his own risk "the costly and laborious record systems instituted to protect [his] rights in the property," and the trial court erred by granting him relief from judgment on the ground that he had not received adequate notice. *First Nat'l Bank of Chicago v Dep't of Treasury*, 280 Mich App 571, 593; 760 NW2d 775 (2008) (O'CONNELL,

J., dissenting), rev'd, for the reasons stated in the dissenting Court of Appeals opinion, 485 Mich 980 (2009).

Again, the notice procedure prescribed by the GPTA has been found to be constitutionally valid. See *Smith*, 463 Mich at 428-429; see also *First Nat'l Bank of Chicago v Dep't of Treasury*, 485 Mich 980, 981 (2009) (YOUNG, J., concurring) ("[T]he constructive notice provided by recording a certificate of forfeiture pursuant to MCL 211.78g(2) provides constitutionally adequate notice for those property interests that are unknown and not of record at the time the property is forfeited to the county treasurer."). Petitioner followed that procedure. We conclude that respondent was not deprived of a statutory or constitutional right to notice of the foreclosure proceedings. The trial court erred by concluding otherwise. See *Smith*, 463 Mich at 430.

Because we hold, for the reasons stated, that the trial court erred by granting respondent relief from judgment, we decline to consider petitioner's additional arguments in favor of reversal.

Reversed and remanded for entry of an order denying respondent's motion for relief from judgment and for the reinstatement of the judgment of foreclosure. We do not retain jurisdiction.

TUKEL and LETICA, JJ., concurred with BOONSTRA, P.J.

In re WARSHEFSKI

Docket No. 346965. Submitted January 7, 2020, at Detroit. Decided January 21, 2020, at 9:10 a.m.

A. R. Warshefski (AR) filed a petition in the St. Clair Circuit Court, Family Division, against his mother, Debra S. Warshefski, seeking to change his surname from Warshefski to Piechotte, the surname of his father, Joseph Piechotte; respondent contested the petition. AR requested the name change under MCL 711.1 because the family with whom he maintained a relationship has the Piechotte surname, he lived with his father and wanted to have the same last name as his half-siblings, and he did not speak with respondent. The appointed lawyer-guardian ad litem testified that AR was 14 years old and that his decision appeared to be logical and genuine. The court, John D. Tomlinson, J., determined that the name change could not be granted under MCL 711.1 because AR had not established a basis for the change under that statute. Specifically, the petition could not be granted because although there had been no contact between respondent and AR for three years, respondent had complied with the support order. The court granted the petition, however, reasoning that MCL 711.1 did not eliminate AR's common-law right to change his name and that the name change was in AR's best interests. Respondent appealed.

The Court of Appeals *held*:

1. Subject-matter jurisdiction is the right of the court to exercise judicial power over a class of cases, not the particular case before it. MCL 600.605 provides that circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except when exclusive jurisdiction is given in Michigan's 1963 Constitution or by statute to some other court or when the circuit courts are denied jurisdiction by the Constitution or Michigan statutes. Under MCL 600.1021(1)(d), the family division of a circuit court has sole and exclusive jurisdiction over cases involving a change of name brought under MCL 711.1 through MCL 711.3 of the Probate Code. In particular, the family division has authority under MCL 711.1(1) to enter an order changing an individual's name. MCL 711.1 does not abrogate or supersede the common

law. Instead, change-of-name statutes affirm the common-law right to change one's name and grant an additional method by which a name change may be effected as a matter of public record. The family division of a circuit court has subject-matter jurisdiction over name-change requests brought under both MCL 711.1 through MCL 711.3 of the Probate Code and under the common law because a common-law name change is within the same class of cases as a name change granted under the Probate Code. In this case, because MCL 711.1 does not abrogate or supersede the common law, the trial court had subject-matter jurisdiction to hear and grant the name change under both MCL 711.1 and the common law.

2. An individual may change his or her name as allowed by the common law of this state or by petitioning a court for a name change under MCL 711.1. Under the common law, an individual may adopt any name he or she wishes, without resort to any court or legal proceeding, provided it is not done for fraudulent purposes. Relatedly, the common law allows a minor, in the absence of fraud, to adopt any name he or she wishes provided he or she is of sufficient age and maturity to make an intelligent choice. Alternatively, MCL 711.1 provides that the family division of a circuit court may enter an order changing the name of an individual who has been a resident of the county for at least one year and petitions the court in writing; the petition must demonstrate that a sufficient reason for the proposed change exists and that the change is not sought with a fraudulent intent. If a minor is 14 years of age or older, the minor must sign a written consent in the presence of the court, and the consent must be filed with the court before an order changing the minor's name is entered. MCL 711.1(7) provides that the name of a minor may be changed under MCL 711.1(5) or (6) with the consent or signature of the custodial parent after notice to the noncustodial parent and a hearing on the matter if (1) the other parent, having the ability to support or assist in supporting the child, has failed or neglected to provide regular and substantial support for the child or failed to comply with a support order for two years or more before the petition was filed and (2) the other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for two years or more before the petition was filed. Courts must resolve parental disputes regarding a child's surname by determining whether the requested name change is in the child's best interests. In this case, the trial court correctly concluded that AR failed to establish the requirements for a name change under MCL 711.1. Although respondent had not

contacted AR for more than two years, respondent maintained her support obligation over the preceding two years. The trial court correctly concluded that MCL 711.1 did not abrogate AR's right to change his name under the common law. The trial court's finding that AR established a sufficient reason for the name change was supported by the record. In granting the petition, the trial court correctly employed the best-interest test, and it did not abuse its discretion by granting the name change.

Affirmed.

1. CIRCUIT COURTS — FAMILY DIVISION — SUBJECT-MATTER JURISDICTION — NAME CHANGES — STATUTORY RIGHT TO NAME CHANGE DOES NOT ABROGATE COMMON-LAW RIGHT.

MCL 711.1 of the Probate Code, which grants the family division of a circuit court the authority to grant a name change if certain conditions are met, does not abrogate or supersede an individual's right under the common law to change his or her name; the court has subject-matter jurisdiction over name-change requests brought under both MCL 711.1 through MCL 711.3 of the Probate Code and those brought under the common law.

2. JUVENILE LAW — NAME CHANGES — MINORS — BEST-INTEREST TEST.

An individual may change his or her name as allowed by the common law of this state or by petitioning a court for a name change under MCL 711.1; under either avenue, courts must resolve parental disputes regarding a minor's surname by determining whether the requested name change is in the child's best interests.

Brandon R. McNamee, PLC (by *Brandon R. McNamee*) for respondent.

Before: K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ.

BORRELLO, J. Respondent, Debra S. Warshefski, the mother of minor AR Warshefski, appeals as of right the trial court's order granting AR's petition to change his name. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

On September 14, 2018, AR filed a petition to change his surname from Warshefski to Piechotte. On October 31, 2018, respondent filed an answer to the petition, requesting that the trial court deny the petition. The trial court held a hearing on the petition on December 10, 2018. AR explained that he was seeking to change his surname because all the family members with whom he maintains a relationship have the surname "Piechotte"; he lives with his father, Joseph Piechotte; and he does not speak with respondent. Additionally, AR stated that he would like to have the same name as his half-siblings because he is the only one in his household with a different last name. After a review of the petition, the trial court appointed a lawyer-guardian ad litem for AR; the lawyer-guardian ad litem testified that AR is 14 years old and that his decision appears to be logical and genuine. The trial court concluded that the statutory basis in MCL 711.1 for granting a name change had not been established but ultimately granted the petition, stating:

> I agree that the statutory basis under the applicable statute, MCL 333.2872[1] has not been established. There has been no contact whatsoever between Ms. Warshefski and [AR] for apparently the last three years. But the second part of the test that the Legislature has deemed appropriate is for them to say that also there would have to be a failure for her to provide regular and substantial support, or to comply with the support order. The testimony from both these parties at the time I saw everybody the last time was that she had been supporting [AR],

[1] It appears the trial court misspoke when it referred to MCL 333.2872 and, rather, intended to refer to MCL 711.1. MCL 333.2872 concerns the procedure for changing the surname of a child on a birth certificate.

> paying her child support the way it's required. And so the statutory basis is not established.
>
> However, in Michigan there are common[-]law rights. There is case law that recognizes that this statute does not eliminate the common law with regard to name changes. So this Court also has the ability to make a name change if I believe that it would be in [AR's] best interest for me to do so.

This appeal then ensued.

II. SUBJECT-MATTER JURISDICTION

On appeal, respondent brings two challenges to the trial court's ruling. Respondent's first argument is that the trial court's subject-matter jurisdiction was limited to the specific requirements of MCL 711.1 and that the trial court, therefore, did not have subject-matter jurisdiction to rule on a common-law name change. For the reasons set forth in this opinion, we find no merit in this argument.

We first note that respondent did not cite any authority in support of this argument. "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 issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id*. at 339-340. However, in order to facilitate a final decision in this matter, we will address the issue despite respondent's failure to properly support her argument.

The issue of whether a court has subject-matter jurisdiction is a question of law, which this Court reviews de novo. *Atchison v Atchison*, 256 Mich App

531, 534; 664 NW2d 249 (2003). It is well established that " '[c]ircuit courts are courts of general jurisdiction.' " *In re Harper*, 302 Mich App 349, 352-353; 839 NW2d 44 (2013), quoting *Papas v Gaming Control Bd*, 257 Mich App 647, 657; 669 NW2d 326 (2003) (brackets omitted). "Subject-matter jurisdiction 'is the right of the court to exercise judicial power over a class of cases, not the particular case before it.' " *Teran v Rittley*, 313 Mich App 197, 205; 882 NW2d 181 (2015), quoting *Grebner v Oakland Co Clerk*, 220 Mich App 513, 516; 560 NW2d 351 (1996). Stated another way, it is the court's power to preside over the type or kind of case pending, not the power to determine the particular cause of action or particular facts before the court. *Id*.

Under MCL 600.605, the Michigan Legislature vested subject-matter jurisdiction in the circuit courts as follows:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

It is presumed that circuit courts have subject-matter jurisdiction "unless jurisdiction is expressly prohibited or given to another court by constitution or statute." *In re Wayne Co Treasurer*, 265 Mich App 285, 291; 698 NW2d 879 (2005). MCL 600.1021(1)(d) grants the family division of a circuit court sole and exclusive jurisdiction over cases involving a change of name as provided in Chapter XI of the Probate Code, MCL 711.1 to MCL 711.3. MCL 711.1(1) grants the family division of a circuit court the authority to enter an order to change an individual's name.

In *Usitalo v Landon*, 299 Mich App 222, 228; 829 NW2d 359 (2012), this Court addressed a similar challenge to the circuit court's subject-matter jurisdiction to grant an adoption outside the Probate Code. In *Usitalo*, the appellant argued that the circuit court lacked subject-matter jurisdiction to grant a same-sex adoption because the Michigan Adoption Code did not provide for same-sex adoption. *Id*. at 229. The appellant furthered argued that the circuit court only had subject-matter jurisdiction to preside over adoptions granted under the Probate Code. *Id*. This Court held that the appellant's understanding of subject-matter jurisdiction was incorrect because "subject-matter jurisdiction concerns only a court's authority to exercise judicial power over broad classes of cases and does not consider particular cases within the broad class." *Id*. at 230.

Respondent similarly argues that because MCL 600.1021(1)(d) gives the family division of the circuit court jurisdiction over cases involving name changes granted under the Probate Code, the trial court lacked subject-matter jurisdiction to grant a common-law name change. However, subject-matter jurisdiction concerns the court's authority to hear a broad class of cases. As was the case in *Usitalo*, respondent's argument conflates subject-matter jurisdiction with a court's exercise of its jurisdiction. Whether petitioner maintained the right to seek a name change under the common law after the trial court concluded he did not meet the requirements for doing so under MCL 711.1 had no effect on whether the court continued to have subject-matter jurisdiction because a common-law name change is within the same class of cases as a name change granted under the Probate Code.

This Court has held that MCL 711.1 does not abrogate or supersede the common law. In *Piotrowski v Piotrowski*, 71 Mich App 213, 216; 247 NW2d 354 (1976), this Court explained: "In Michigan, as in most states, a statute authorizes procedures by which a court can, upon petition, change the name of any person. MCLA 711.1; MSA 27.3178(561). Such change of name statutes do not abrogate or supersede the common law. To the contrary, they affirm the common law right and afford an additional method by which a name change may be effected as a matter of public record."

It is uncontested that subject-matter jurisdiction over common-law name changes has not been expressly conferred on any other court by the Michigan Legislature. It is further uncontested that circuit courts have never been expressly prohibited from granting common-law name changes. Because MCL 711.1 does not abrogate or supersede the common law, the trial court has subject-matter jurisdiction to hear and grant petitions for a name change under both MCL 711.1 and the common law. Accordingly, respondent is not entitled to relief on this issue.

III. NAME CHANGE UNDER THE COMMON LAW

Next, respondent argues that the trial court lacked the authority to "sua sponte" grant the petition under the common law after concluding that respondent did not meet the requirements for a name change under MCL 711.1.

This Court reviews for an abuse of discretion a trial court's grant of a legal name change under MCL 711.1. *Rappleye v Rappleye*, 183 Mich App 396, 399; 454 NW2d 231 (1990). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the

range of principled outcomes." *Rettig v Rettig*, 322 Mich App 750, 754; 912 NW2d 877 (2018) (quotation marks and citation omitted). However, the specific question of whether the trial court could properly grant a minor's name change under the common law, despite the fact that the petition was filed under MCL 711.1, is a question of law. This Court reviews de novo questions of law. *Eickelberg v Eickelberg*, 309 Mich App 694, 698; 871 NW2d 561 (2015).

As previously stated, this Court has long recognized two methods for effectuating a name change under Michigan law. *Piotrowski*, 71 Mich App at 216. Under the common law, an individual may adopt any name he or she wishes, without resort to any court or legal proceeding, provided it is not done for fraudulent purposes. *Id*. Relatedly, under the common law, and in the absence of fraud, a minor may adopt any name he or she wishes provided he or she is of sufficient age and maturity to make an intelligent choice. *Rappleye*, 183 Mich App at 398 (quotation marks omitted).

Alternatively, an individual may petition the court for a name change under MCL 711.1. *Piotrowski*, 71 Mich App at 216. MCL 711.1(1) provides that the family division of the circuit court may enter an order to change the name of an individual who has been a resident of the county for at least one year and petitions the court in writing. The petition must demonstrate a "sufficient reason for the proposed change and that the change is not sought with a fraudulent intent." *Id*. If the petitioner is a minor, the petition must be signed by the minor's mother and father jointly or by one of the minor's parents if there is only one legal parent available to give consent. MCL 711.1(5).

If a minor is 14 years of age or older, a written consent to change his or her name must be signed by

the minor in the presence of the court and must be filed with the court before an order changing the name of the minor is entered. MCL 711.1(5); MCR 3.613(B). MCL 711.1(7) provides, in relevant part:

> The name of a minor may be changed pursuant to subsection (5) or (6) with the consent or signature of the custodial parent upon notice to the noncustodial parent as provided in supreme court rule and after a hearing in either of the following circumstances:
>
> (a) If both of the following occur:
>
> (*i*) The other parent, having the ability to support or assist in supporting the child, has failed or neglected to provide regular and substantial support for the child or, if a support order has been entered, has failed to substantially comply with the order, for 2 years or more before the filing of the petition.
>
> (*ii*) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for 2 years or more before the filing of the petition.

At the time of filing the petition, AR was 14 years old. AR signed the petition as the petitioner and Piechotte signed as the parent/guardian of AR. After a hearing on the petition, the trial court had AR sign a written consent form in the presence of the trial court in accordance with MCL 711.1(5) and MCR 3.613(B). As previously indicated, the trial court then concluded that "the statutory basis under the applicable statute, [MCL 711.1,] has not been established."

Understandably, respondent does not take issue with the trial court's holding that the statutory requirements of MCL 711.1(7) were not met because while respondent failed to visit, contact, or communicate with AR, she had maintained her support obligations. What respondent does take issue with is the trial

court's conclusion that petitioner maintained a common-law right to a name change irrespective of the filing of a petition citing MCL 711.1. However, contrary to respondent's assertions, this Court previously recognized that MCL 711.1 does not abrogate or supersede the common law, a holding we deem important to reaffirm:

> In Michigan, as in most states, a statute authorizes procedures by which a court can, upon petition, change the name of any person. MCLA 711.1 . . . . Such change of name statutes do not abrogate or supersede the common law. To the contrary, they affirm the common law right and afford an additional method by which a name change may be effected as a matter of public record. [*Piotrowski*, 71 Mich App at 216.]

Having established that petitioner maintained a common-law right to a name change, the next issue we consider is whether the trial court provided a proper basis for granting the petition. In deciding whether to grant the petition, the trial court employed a best-interest test. While we note the dearth of caselaw on this point, this Court previously approved a trial court's application of the best-interest test in deciding whether to grant a minor's request for a legal name change. In *Rappleye*, 183 Mich App at 399, this Court stated: "[W]e cannot conclude on this record that the trial court abused its discretion by determining that it is in the minor child's best interest to allow her to continue using the name Gregory, if she so desires. . . . In the present case, the trial court's decision was clearly based on the facts and on what was right and equitable under the circumstances." Recognizing that the *Rappleye* Court did not explicitly adopt the best-interest test, this Court did so in *Garling v Spiering*, 203 Mich App 1, 4; 512 NW2d 12 (1993), stating: "Although admittedly this Court in *Rappleye* did not

formally adopt the 'best interest' test for the purpose of resolving these types of disputes, we clearly approved of its use by our trial courts. In light of the specific issue raised in this case, we now hold that parental disputes regarding a child's surname should be resolved in accordance with the best interests of the child."

In accordance with our holding in *Garling*, here, the trial court employed the best-interest test as its basis for granting the petition. The trial court began its analysis by noting that neither parent was able to agree on how to resolve the issue of AR's proper last name and that given the level of animosity between the parents, absent court intervention, the issue would never be resolved. The trial court appointed a lawyer-guardian ad litem to interview the minor and inform the court of those discussions. The guardian ad litem testified that after interviewing AR, it was clear that AR wanted the name change because he identified with and lived with members of his father's family, all of whom had the last name of Piechotte. The trial court also found, after interviewing AR, that given the length of time since he last had any contact with his mother—approximately three years—and the dearth of contact with his mother's family, AR identified as a member of the Piechotte family rather than as a member of the Warshefski family. The trial court also found that AR lived in a household in which everyone but him had the last name of Piechotte.

The record also reveals that the trial court gave all parties to these proceedings ample opportunities to state their particular reasons for granting or denying the petition. To ensure no undue influence was exerted over the minor child, the trial court appointed a lawyer-guardian ad litem who testified before the trial

court that there was no evidence AR was being manipulated or coerced into bringing a petition for a name change. From this record, we cannot assign any error to the trial court's factual findings, and we note that respondent has failed to establish a legally sufficient basis for a finding by this Court that the trial court committed any factual error.

Similarly, in its legal rulings, the trial court correctly held that MCL 711.1 did not provide a basis for granting the name change because at the time of the filing of the petition, respondent was providing support for AR. Relying on this Court's prior decisions, the trial court next concluded that statutory enactments like MCL 711.1 did not abrogate an individual's right to change his or her name under the common law. *Piotrowski*, 71 Mich App at 216. Next, by employing the best-interest test in reaching its decision to grant the petition, the trial court followed prior rulings of this Court. *Garling*, 203 Mich App at 4. On this record, we find no legal error, and the trial court did not abuse its discretion by granting AR's petition. Accordingly, respondent is not entitled to relief.

Affirmed. Petitioner, having prevailed in full, may tax costs. MCR 7.219(A).

K. F. KELLY, P.J., and SERVITTO, J., concurred with BORRELLO, J.

TOWNSHIP OF FRASER v HANEY (ON REMAND)

Docket No. 337842. Submitted October 23, 2019, at Lansing. Decided January 21, 2020, at 9:15 a.m. Reversed and remanded 509 Mich ___ (2022).

Fraser Township filed a complaint in the Bay Circuit Court against Harvey and Ruth Ann Haney in 2016, seeking injunctive relief to abate a public nuisance. The complaint alleged that defendants were raising hogs on their property, which violated the township zoning ordinance. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that because they began raising hogs on the property in 2006, the township's 2016 complaint was barred by the general six-year period of limitations in MCL 600.5813. The trial court, Harry P. Gill, J., denied the motion, concluding that because the case was an action in rem, the statute of limitations did not apply. Defendants sought leave to appeal in the Court of Appeals, and the Court of Appeals, SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ., concluded that the trial court erred by denying defendants' motion for summary disposition. 327 Mich App 1 (2019). Plaintiff sought leave to appeal in the Supreme Court, and the Supreme Court vacated the Court of Appeals judgment and remanded the case to the Court of Appeals to address whether the published opinion in this case was consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590 (2018). 504 Mich 968 (2019).

On remand, the Court of Appeals *held*:

The original opinion in this case was consistent with the opinion in *Baker*. There was a crucial distinction between *Baker* and this case: in *Baker*, when the issue of the plaintiff's fraud was raised in the motion for summary disposition, the plaintiff argued that the fraud defense was waived because it had not been pleaded as an affirmative defense as required by MCR 2.111(F); however, in the present case, when defendants moved for summary disposition on the basis of the statute of limitations, plaintiff did not argue that defendants had waived the statute-of-limitations defense. It was only after defendants filed their appeal that plaintiff claimed that defendants had waived the statute-of-limitations defense because the defense was not raised in defendants' responsive pleading. MCR 2.111(F)(3) provides, in pertinent part, that affir-

mative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. MCR 2.118(C)(1) provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In *Baker*, because the plaintiff argued when she responded to the motion for summary disposition that the fraud defense had been waived, the plaintiff did not expressly or impliedly consent to try the fraud issue. In contrast, in the present case, because plaintiff responded to the merits of defendants' claim that its request for injunctive relief was barred by the six-year limitations period of MCL 600.5813 without claiming that defendants had waived the statute-of-limitations defense, plaintiff impliedly tried the statute-of-limitations defense.

Reversed and remanded for further proceedings.

Birchler, Fitzhugh, Purtell & Brissette, PLC (by *Mark J. Brissette*) for plaintiff.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for defendants.

ON REMAND

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM. This matter is again before us, now on remand from the Supreme Court. We again reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

In our original opinion, we concluded that the trial court erred by denying defendants' motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations). *Fraser Twp v Haney*, 327 Mich App 1, 3; 932 NW2d 239 (2019). The trial court had concluded that because this case was an action in rem, the statute of limitations did not apply. We disagreed and remanded the matter to allow defendants to raise

the defense. *Id*. Thereafter, the Supreme Court vacated this Court's judgment and remanded the case to this Court "to address whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590[; 919 NW2d 407] (2018)." *Fraser Twp v Haney*, 504 Mich 968, 968 (2019). We then permitted the parties to file supplemental briefs on remand. After due consideration, we conclude that our original opinion is consistent with this Court's opinion in *Baker*.

In *Baker*, the defendant asserted numerous affirmative defenses, but not one of fraud. *Baker*, 323 Mich App at 593-594. Rather, fraud was raised for the first time in a motion for summary disposition, which the trial court granted. *Id*. at 594. On appeal, the plaintiff argued that the trial court erred by granting summary disposition on the basis of fraud because the defense was waived by the failure to raise it as an affirmative defense. *Id*. at 594-595. The *Baker* Court ultimately concluded that "[b]ecause the fraud defense is an affirmative defense, the failure to raise it constitutes a waiver of that defense." *Id*. at 598.

There is a crucial distinction between *Baker* and the present case. In *Baker*, when the issue of the plaintiff's fraud was raised in the motion for summary disposition, the plaintiff argued that the fraud defense was waived because it had not been pleaded as an affirmative defense as required by MCR 2.111(F). In the present case, when defendants moved for summary disposition on the basis of the statute of limitations, plaintiff did not argue that defendants had waived the statute-of-limitations defense. It was only after defendants filed their appeal that plaintiff claimed that defendants had waived the statute-of-limitations defense because the defense was not

raised in defendants' responsive pleading. *Fraser Twp*, 327 Mich App at 6-7. Because of this distinction, we conclude that our published opinion in this case is consistent with *Baker*.

MCR 2.111(F)(3) provides, in pertinent part: "Affirmative defenses must be stated in a party's responsive pleading, *either as originally filed or as amended in accordance with MCR 2.118*." (Emphasis added.) "When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings." MCR 2.118(C)(1). In *Baker*, because the plaintiff argued when she responded to the motion for summary disposition that the fraud defense had been waived, the plaintiff did not expressly or impliedly consent to try the fraud issue. In contrast, in our case, because plaintiff responded to the merits of defendants' claim that its request for injunctive relief was barred by the six-year limitations period of MCL 600.5813 without claiming that defendants had waived the statute-of-limitations defense, plaintiff impliedly tried the statute-of-limitations defense. *Fraser Twp*, 327 Mich App at 6-7. Although defendants did not raise the statute-of-limitations defense in their responsive pleading, because that defense was tried by the express or implied consent of the parties, it is treated as if it had been raised by the pleadings. MCR 2.118(C)(1). Additionally, we note that because MCR 2.111(F)(3) permits an affirmative defense to be raised by way of amendment, it cannot be concluded that failure to initially raise it in the affirmative defenses forever bars it from being raised.

Finally, we briefly address a point raised in plaintiff's supplemental brief on remand. Plaintiff suggests that it is excused from raising the issue precisely

because the trial court chose to address it. In its brief, plaintiff argues as follows:

> Since the Court decided to hear the Motion, Plaintiff's Counsel did not have much choice other than to participate. Telling the Circuit Judge "Gee Judge you should not be hearing this Motion so I am leaving—" [w]ould be disrespectful, stupid, and likely to encourage the Circuit Judge to hold Counsel in contempt. That seems to be what Appellant is saying should have been done. Easy for them to say.

We would agree that walking out of the courtroom in the middle of the motion hearing would indeed be disrespectful and stupid and would possibly lead to a finding of contempt. But the same could not be said of raising the argument that the issue of the statute of limitations was not properly before the trial court. Plaintiff could, respectfully, raise the argument that defendants had not properly pleaded the defense. Indeed, it is an argument that plaintiff could well have put in its response to the motion for summary disposition and led with at the motion hearing.[1] If the trial court chose to address the issue anyway, then plaintiff could have continued with the hearing and raised the issue again on appeal if necessary, this time having properly preserved the argument rather than waiving it.[2]

For these reasons, we conclude that our original opinion was consistent with *Baker*, and we reaffirm our original opinion.

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[1] Not only did plaintiff first raise this issue on appeal in this Court, plaintiff did not raise it in its application to the Supreme Court, nor did it raise any issue regarding a conflict with the decision in *Baker*. Rather, the Supreme Court sua sponte raised the issue.

[2] Conversely, a party is generally not obligated to specifically preserve an objection to an issue raised sua sponte by a court. See MCR 2.517(A)(7); *In re Gach*, 315 Mich App 83, 97; 889 NW2d 707 (2016).

The matter is again reversed and remanded to the trial court for further proceedings consistent with this opinion and our original opinion. We do not retain jurisdiction. Defendants may tax costs.

SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ., concurred.

ROTT v ROTT

Docket No. 347609. Submitted January 8, 2020, at Detroit. Decided January 21, 2020, at 9:20 a.m. Reversed and remanded 508 Mich 274 (2021).

Doreen Rott brought a negligence and premises-liability action in the Oakland Circuit Court against Arthur Rott, seeking to recover damages for injuries she received after riding defendant's self-installed zip line at his house. Plaintiff attended a dinner party at defendant's house on the day she was injured. She watched several people successfully use the zip line before riding it herself at defendant's urging. Plaintiff injured her knee when she put her legs down to make contact with the ground before the ride was over. Defendant moved for summary disposition, arguing that plaintiff's complaint should be dismissed under the recreational land use act (RUA), MCL 324.73301, because plaintiff was on his property for the purpose of zip lining, plaintiff did not pay him for use of the zip line, and plaintiff's injuries were not caused by the gross negligence or willful or wanton conduct of defendant. The court, Cheryl A. Matthews, J., granted in part and denied in part defendant's motion. The court agreed with defendant that the RUA applied to the facts of the case but denied the request for dismissal, concluding that a genuine issue of material fact existed regarding whether plaintiff's injuries were caused by defendant's gross negligence or willful and wanton misconduct, thereby precluding application of the RUA. Defendant appealed by leave granted. In an unpublished per curiam opinion issued December 18, 2018 (Docket No. 336240), the Court of Appeals, CAVANAGH, P.J., and SERVITTO and CAMERON, JJ., reversed the trial court's order and remanded for entry of an order granting summary disposition in favor of defendant under MCR 2.116(C)(10), concluding that there was no genuine issue of material fact that defendant's conduct did not amount to gross negligence or willful or wanton misconduct. On remand, the trial court entered an order granting summary disposition in favor of defendant. Plaintiff appealed.

The Court of Appeals *held*:

The RUA provides that a cause of action shall not arise for injuries to a person who is on the land of another without paying

to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. The RUA was enacted to restrict suits by persons coming onto the property of another for recreational purposes and to declare the limited liability of owners of property within this state. The law-of-the-case doctrine provides that if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions determined by the appellate court will not be differently determined on a subsequent appeal in the same case when the facts remain materially the same. The doctrine only applies to issues actually decided, either implicitly or explicitly, in the prior appeal. In Docket No. 336240, the Court implicitly decided that the RUA applied to the facts of the case. Accordingly, plaintiff's arguments in this case—that the RUA did not apply because she was not on defendant's property for the purpose of zip lining and that zip lining is not of the same kind, class, character, or nature as the activities enumerated in the act—were barred by the law-of-the-case doctrine. Regardless, plaintiff's arguments were also without merit. While plaintiff's initial purpose for entering defendant's property may have been for a family gathering, the trial court correctly determined that at the time of the accident, plaintiff's purpose for being on the land was to use the zip line. In addition, the activity was of the same kind, class, character, or nature of the recreational activities enumerated in the statute. The RUA applied because zip lining fits within the plain meaning of "any other outdoor recreational use" and is not excluded by any interpretation of the general provision of the RUA under the doctrine of *ejusdem generis*.

Affirmed.

Stewart Law PLLC (by *Melissa P. Stewart*) for plaintiff.

The Hanover Law Group (by *Ronald C. Paul*) for defendant.

Before: K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court order, entered on remand from this Court,[1] granting defendant summary disposition in this action sounding in negligence and premises liability. We affirm.

This case has already been before this Court, and the facts were provided in the previous opinion as follows:

> Plaintiff sustained an injury to her knee after riding defendant's self-installed zip line in his backyard. Plaintiff is defendant's sister, and before the incident, she would visit defendant's home several times a month. Defendant and his neighbor, Gary Kukulka, installed the zip line on defendant's property about a year before the incident; subsequently, defendant repeatedly asked plaintiff to ride the zip line, but she declined because she was "not comfortable" doing so.
>
> On the day of the incident, plaintiff attended a dinner party at defendant's residence. While plaintiff was there, she watched several people ride the zip line and, after some "prodding," plaintiff decided to ride it. Defendant helped plaintiff put on the zip line harness and attach to the zip line, and Kukulka was at the bottom of the hill to detach her from the zip line. As plaintiff traversed down the zip line, she thought that her feet were too close to the ground as she approached the end. While still in motion, plaintiff believed "the ride was over" so she put her legs down to make contact with the ground, which caused the injury at issue. Plaintiff suffered two meniscal tears in her left knee, which required restorative surgery. [*Rott v Rott*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 336240), pp 1-2.]

The trial court originally determined that the recreational land use act (RUA), MCL 324.73301, applied to

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[1] *Rott v Rott*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 336240).

this matter, stating, "[Zip lining] in this instance is an outdoor recreational activity as defined in the [RUA] and . . . Plaintiff's specific purpose for being on the land at the time of the accident, was for the purpose of using the [zip line]." However, the trial court determined that a genuine issue of material fact existed regarding whether plaintiff's injuries were caused by defendant's gross negligence or willful and wanton misconduct, thereby precluding application of the RUA. Defendant appealed by leave granted the trial court's denial of his motion for summary disposition, and this Court upheld the denial under MCR 2.116(C)(8) but remanded to the trial court for entry of summary disposition in defendant's favor under MCR 2.116(C)(10) because there was no genuine issue of material fact that defendant's conduct did not amount to gross negligence or willful or wanton misconduct. *Rott*, unpub op at 4-6.

Plaintiff now appeals the order entered on remand granting defendant summary disposition, arguing that the RUA does not apply because she was not on defendant's property for the purpose of zip lining and that zip lining is not the same kind, class, character, or nature of the activities enumerated in the act. We disagree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018).

> A trial court deciding a motion for summary disposition under MCR 2.116(C)(10) considers "the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . ." "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. 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." [*Id.* (citations omitted).]

Matters of statutory interpretation are also reviewed de novo. *Barclae v Zarb*, 300 Mich App 455, 466; 834 NW2d 100 (2013). Whether the RUA applies to a given set of facts is a question of law that this Court reviews de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004).

The RUA provided, in relevant part:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. [MCL 324.73301(1).][2]

The RUA "was designed to restrict suits by persons coming upon the property of another for [recreational] purposes, and to declare the limited liability of owners of property within this state." *Ballard v Ypsilanti Twp*, 457 Mich 564, 577; 577 NW2d 890 (1998) (quotation marks, citation, and brackets omitted; alteration in original). The Michigan Supreme Court characterized the RUA as "a liability-limiting" enactment. *Id*. It reduces the exposure to litigation with the goal of "encourag[ing] landowners to open their property to others for recreation." *Id*.

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[2] MCL 324.73301 was amended by 2017 PA 39. The amendment changed the phrase "*shall* not arise" to "*does* not arise" in MCL 324.73301(1). The statutory language quoted in this opinion is from the version of the statute in effect when plaintiff originally filed this action in 2015. See 2007 PA 174.

As an initial matter, defendant argues that this Court already "tacitly approved" the application of the RUA to these facts in its previous opinion in Docket No. 336240. Indeed, in its previous opinion in this matter, this Court stated:

> Plaintiff accepted the inherent risk associated with riding a self-installed zip line on her brother's property. Absent gross negligence or willful and wanton misconduct on the part of defendant, plaintiff cannot recover for damages resulting from the zip line. [*Rott*, unpub op at 4.]

We determined that defendant's conduct was not grossly negligent or willful or wanton misconduct and that defendant was, therefore, entitled to summary disposition. *Id*. at 4-5.

The law-of-the-case doctrine provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (quotation marks and citation omitted). The doctrine only applies "to issues actually decided, either implicitly or explicitly, in the prior appeal." *Brownlow v McCall Enterprises, Inc*, 315 Mich App 103, 118; 888 NW2d 295 (2016) (quotation marks and citations omitted). This Court implicitly decided in the previous opinion that the RUA applied to the facts of the case, and plaintiff's arguments on appeal stemming from whether the RUA applies are therefore subject to the law-of-the-case doctrine. Although this determination resolves plaintiff's arguments on appeal, we will nonetheless briefly address the issues raised.

Plaintiff first argues that the RUA does not apply because she was not on defendant's property "for the purpose" of zip lining, but rather for a family gathering. We disagree.

"The goal of statutory interpretation is to discern and give effect to the intent of the Legislature." *Barclae*, 300 Mich App at 466. The first step in this process is to review the statutory language. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Id*. (quotation marks and citations omitted). "If the statutory language is unambiguous, then the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Barclae*, 300 Mich App at 466-467. Under the last-antecedent rule of statutory construction, "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Hardaway v Wayne Co*, 494 Mich 423, 427; 835 NW2d 336 (2013) (quotation marks and citation omitted).

Plaintiff argues that the statute should be read so that a cause of action only arises for injuries to a person who has entered another's land "*for the purpose* of" the statutorily enumerated activities or any other outdoor recreational use. (Underlining omitted.) However, the statute actually reads that a cause of action does not arise for injuries to a person "on the land of another *without paying . . . a valuable consideration for the purpose of*" the enumerated activities or any other outdoor recreational use. MCL 324.73301(1) (em-

phasis added). Under the plain and unambiguous language of the statute and the last-antecedent rule the word "for" in the statute modifies "a valuable consideration." *Hardaway*, 494 Mich at 427. Therefore, the statute applies if a person does not pay the owner of the land a valuable consideration for the purpose of the recreational activity. MCL 324.73301(1). Defendant testified that neither he nor his wife collected money from anyone to ride the zip line. A plain reading of the statute does not lend itself to plaintiff's interpretation that the statute requires a person to be on the property for the purpose of the recreational activity for the statute to apply. Plaintiff's assertions that she was harassed by defendant into riding the zip line are irrelevant.

Moreover, the Michigan Supreme Court has expressly rejected plaintiff's argument in this regard:

> Plaintiff argues in the alternative that the RUA does not apply because plaintiff was not on defendant's property for the "purpose" of an outdoor recreational use, but, rather, was on defendant's property for the "purpose" of a social visit. In other words, plaintiff argues that the RUA only applies to individuals who enter upon land with the specific intent of using the land for a specified purpose; it does not apply to individuals who enter the land for some other purpose, such as a social visit, and who, incidentally to this purpose, subsequently use the land for a specified purpose. We disagree. Plaintiff, like the Court in *Wymer*,[3] is adding words to the act that simply are not there. The RUA states that an owner of land is not liable for injuries to a person who is "on the [owner's] land" "for the purpose of" a specified activity. Nothing in the act's language limits its application to individuals who *enter* the land for the purpose of a specified activity. Rather, the act clearly

[3] *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987), overruled by *Neal*, 470 Mich at 667.

> applies to individuals who, at the time of the injury, are on the land of another for a specified purpose. One's initial purpose for entering the land is not relevant. [*Neal*, 470 Mich at 670 n 13.]

Thus, although plaintiff's initial purpose for entering defendant's property may have been for a family gathering, the trial court did not err in its determination that plaintiff's "specific purpose for being on the land at the time of the accident, was for the purpose of using the [zip line]."

Plaintiff also argues that the RUA did not apply to bar her claims because zip lining is not the same kind, class, character, or nature of the enumerated activities within the statute. We disagree.

The *Neal* Court explained what activities are covered under the RUA:

> Contrary to the dissent's suggestion, the RUA does not apply to *any* outdoor recreational activity. Rather, it only applies to "fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use . . . ." MCL 324.73301(1). Under the statutory construction doctrine known as [*ejusdem generis*], where a general term follows a series of specific terms, the general term is interpreted "to include only things of the same kind, class, character or nature as those specifically enumerated." Therefore, the language "other outdoor recreational use" must be interpreted to include only those outdoor recreational uses "of the same kind, class, character, or nature," as "fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, [and] snowmobiling . . . ." MCL 324.73301(1). [*Neal*, 470 Mich at 669 (citations omitted; second alteration in original).]

Plaintiff is correct in her assertion that there is no published caselaw applying the RUA to zip lining. Nonetheless, we conclude that zip lining is of the same

kind, class, character, or nature of the recreational activities enumerated in the statute. *Id*. The Michigan Supreme Court has determined that the RUA applies to "beach play," including " 'building sand castles, throwing stones in the water, and splashing around,' " because such activities "occurred outdoors and were done for refreshment or diversion, and consequently were recreational." *Otto v Inn at Watervale, Inc*, 501 Mich 1044, 1044-1045 (2018). The Supreme Court rejected this Court's characterization of the enumerated activities involving "any particular heightened degree of physical intensity or inherent risk." *Id*. at 1045. Riding an all-terrain vehicle has also been considered a recreational activity under the act. *Neal*, 470 Mich at 671-672. Therefore, because zip lining fits the plain meaning of "any other outdoor recreational use" and is not excluded by any interpretation of the general provision in the RUA under *ejusdem generis*, the RUA applies. Accordingly, the trial court properly granted defendant summary disposition under MCR 2.116(C)(10).

Affirmed.

K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ., concurred.

MDOT v NATIONAL INTERSTATE INSURANCE COMPANY

Docket No. 343009. Submitted November 5, 2019, at Lansing. Decided November 26, 2019. Approved for publication January 23, 2020, at 9:00 a.m.

The Department of Transportation (MDOT) sued National Interstate Insurance Company and Frankenmuth Mutual Insurance Company in the Ingham Circuit Court for property protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*. MDOT alleged that National and Frankenmuth were liable for damage to the Milwaukee Bridge spanning US-23 in Monroe County caused by a collision with a semitruck owned by a trucking company insured by National. The collision occurred when the semitruck was transporting an oversize load from Toledo, Ohio, to Sanilac, Michigan. The permit issued to the trucking company by MDOT required the truck to be accompanied by two escort vehicles, one in the front and one in the rear. Frankenmuth insured the front escort vehicle, referred to as the lead pilot vehicle. The lead pilot vehicle was equipped with a fiberglass pole the height of the load to assist the lead pilot vehicle's driver in determining whether the load could clear the overpasses along the route. The driver of the semitruck drove under two low overpasses along the route without incident after the driver of the lead pilot vehicle communicated to him that the pole had "hit" the overpass, which informed the semitruck's driver that precautions needed to be taken in order to avoid a collision with the overpass. When the three vehicles reached the Milwaukee Bridge, the pole on the lead pilot vehicle broke while passing under the bridge. However, the lead pilot vehicle did not inform the semitruck's driver that the load would not clear the overpass in time for him to stop the truck, and it collided with the bridge, causing significant damage. National moved for summary disposition under MCR 2.116(C)(10) and asked the trial court to rule that Frankenmuth had partial liability for the damage to the bridge. Frankenmuth moved for summary disposition under MCR 2.116(I)(2), arguing that the accident did not arise out of the operation of the lead pilot vehicle as required by MCL 500.3121 but was a result of the drivers' communication, which was not covered by the no-fault act. The trial court, James S. Jamo, J., denied National's motion and granted summary disposition for Frankenmuth, reasoning that the lead pilot vehicle was not

"involved in the accident" within the meaning of MCL 500.3125 because there was no connection between the actual damage to the bridge and the use of the lead pilot vehicle. National appealed.

The Court of Appeals *held*:

In *Turner v Auto Club Ins Ass'n*, 448 Mich 22 (1995), the Supreme Court determined that in a multivehicle accident, an insured's vehicle may be considered to have been "involved in the accident" for payment of property protection benefits under MCL 500.3125 even though the damage resulting from the accident cannot be said to have arisen out of the ownership, maintenance, or use of that vehicle. Rather, under MCL 500.3121(1), a claimant must show only that the damage arose out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. The Supreme Court also stated that in order to be "involved in the accident" within the meaning of the statute, the vehicle must have made an active contribution to the happening of the accident, and liability will not be imposed simply because of a remote association between the insured's vehicles and the accident. Further, a causal nexus must exist that establishes more than a random, incidental, or fortuitous connection between a vehicle and an accident that results in property damage. Frankenmuth's argument that its insured, the lead pilot vehicle, was not "involved in the accident" because the lead pilot vehicle did not perpetuate or prompt the movement of the semitruck into the Milwaukee Bridge was not persuasive because the lead pilot vehicle actively contributed to the accident. The MDOT permit required the lead pilot vehicle to guide the semitruck along the route to avoid collisions with bridges and other obstacles. The lead pilot vehicle was equipped with the height-measuring pole, and the driver prompted the forward movement of the semitruck by communicating with the semitruck's driver and providing assurance that it was safe to proceed along the route. As explained in *Turner*, the lead pilot vehicle was not required to have physical contact with any other vehicle or the bridge to be "involved in the accident." Rather, it was sufficient that the active use of the vehicle as a motor vehicle perpetuated the motion of another vehicle that caused the property damage in order to meet the standard in MCL 500.3125.

Reversed and remanded for further proceedings.

INSURANCE — NO-FAULT ACT — MULTIVEHICLE ACCIDENTS — PROPERTY PROTECTION INSURANCE — LIABILITY OF INSUREDS.

In a multivehicle accident resulting in property damage, the liability of an insured with some physical connection to the

> accident to pay property protection insurance does not turn on whether the damage arose out of the ownership, operation, maintenance, or use of the insured's motor vehicle as a motor vehicle; therefore, the insured's vehicle may be determined to be "involved in the accident" under MCL 500.3125 even though the damage did not arise out of the ownership, operation, maintenance or use of that particular motor vehicle; a vehicle that perpetuates or prompts the motion of the vehicle that causes the damage, even through verbal guidance or other communication, actively contributed to the accident and may be said to be "involved in the accident."

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Philip L. Bladen*, Assistant Attorney General, for the Department of Transportation.

Cardelli Lanfear, PC (by *Anthony F. Caffrey III* and *James T. Newman*) for National Interstate Insurance Company.

Vandeveer Garzia, PC (by *Christian E. Hildebrandt* and *Roger A. Smith*) for Frankenmuth Mutual Insurance Company.

Before: O'BRIEN, P.J., and GADOLA and REDFORD, JJ.

REDFORD, J. Defendant National Interstate Insurance Company appeals by leave granted the trial court's order denying it summary disposition and granting summary disposition in favor of defendant Frankenmuth Mutual Insurance Company and dismissing Frankenmuth from the case. We reverse.

I. FACTS

National insured Pahoa Express, a trucking company that contracted to transport an oversize load from

Toledo, Ohio, to Sanilac, Michigan. Plaintiff, the Michigan Department of Transportation (MDOT), issued Pahoa a single-trip permit for the movement of the oversize load and specified the route in Michigan. The permit required, among other things, that the route be checked for vertical clearance and overhead obstructions before movement of the load; that the Pahoa semitruck be accompanied by two escort vehicles, one in the front[1] and one to follow in the rear; and if the load's height exceeded 14'6", the lead escort vehicle had to have a fixed measuring device set at a height to assure clearance of the load. The MDOT permit required the escort vehicles and the Pahoa semi to maintain a distance from each other of not less than 2,000 feet. The permit specified that the permittee "shall be responsible for damages to the highway, to persons, and to property caused by or arising from operations covered by this permit" and "shall indemnify" MDOT.

Frankenmuth insured the lead pilot vehicle.[2] The lead pilot vehicle had affixed to it a fiberglass pole the height of the Pahoa semi's load to alert the lead pilot vehicle's driver to any potential clearance difficulties so that if the pole hit anything overhead, the driver could alert the driver of the Pahoa semi.

The MDOT permit specified the route the permittee could use for the transport of the oversize load and did not allow the Pahoa vehicle to use US-23. The permit from the Ohio Department of Transportation, however, routed the vehicles to the Michigan border via US-23. According to Pahoa's semi driver, the drivers of the escort vehicles suggested that they use US-23 in Michi-

[1] The parties called the front escort vehicle either the "lead pilot vehicle" or "lead pole vehicle."

[2] The insurer of the rear escort vehicle is not a party to this action.

gan to make their way back to the route permitted by MDOT. He agreed, and the three vehicles traveled under two low overpasses while proceeding on US-23 before the subject accident. At those overpasses, the driver of the lead pilot vehicle alerted Pahoa's semi driver via CB radio that his "stick hit," meaning that the fiberglass pole struck the overpass. Pahoa's semi driver understood that this message indicated that the load could pass under the overpass if he moved to the center lane for the highest clearance under an arched bridge and lowered the air suspension of the vehicle to reduce the load's vertical height. By doing this, the Pahoa semi's load cleared the two low overpasses.

When the group reached the Milwaukee Bridge spanning northbound US-23 in Monroe County, the driver of the lead pilot vehicle initially alerted Pahoa's semi driver via CB radio that his "stick hit," so the Pahoa driver moved into the center lane. A few moments later, however, the lead pilot driver communicated that his "stick broke," indicating that the overpass lacked sufficient height for the load to clear. The Pahoa semi driver did not have enough time to stop and the vehicle collided with the bridge, causing significant damage.

MDOT sued National and Frankenmuth for property protection insurance benefits pursuant to Michigan's no-fault act, MCL 500.3101 *et seq*., alleging that they both bore liability for the damage to the bridge in excess of $528,617.10. MDOT alleged that the lead pilot car driver and Pahoa's semi driver knew or should have known that they were not permitted to travel on northbound US-23 and that by doing so, they violated the MDOT permit.

National moved for summary disposition under MCR 2.116(C)(10) and asked the trial court to rule that

Frankenmuth had partial liability for the damage to the bridge under the rule in *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 35; 528 NW2d 681 (1995). In *Turner*, a case involving a multivehicle accident, our Supreme Court explained that insurers of owners of vehicles having some physical connection to an accident that is more than a random association are potentially primarily liable for property protection benefits under MCL 500.3125.[3] *Id*. National sought a determination by the trial court that Frankenmuth's insured was "involved in the accident" pursuant to MCL 500.3125. Frankenmuth sought summary disposition under MCR 2.116(I)(2)[4] and argued that the accident did not arise out of the operation of the lead pilot vehicle, as required under MCL 500.3121, but resulted from the communications between the drivers, which the no-fault act did not cover.

The trial court denied National's motion and granted Frankenmuth summary disposition. The trial court considered the facts in relation to our Supreme Court's explanation in *Turner* regarding what it means to be "involved in the accident" and concluded that the lead pilot driver's involvement was "too attenuated to be considered to be involved in the accident." The trial court reasoned that in *Turner*, the vehicles in the multivehicle accident had acted "almost as a unit" to cause the property damage. By contrast, the trial court

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[3] MCL 500.3125 provides: "A person suffering accidental property damage shall claim property protection insurance benefits from insurers in the following order of priority: insurers of owners or registrants of vehicles *involved in the accident*; and insurers of operators of vehicles *involved in the accident*." (Emphasis added.)

[4] MCR 2.116(I)(2) provides: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

found "no real connection between the actual damage to the bridge and the use of the pilot vehicle."

Preliminarily, Frankenmuth asserts that this Court lacks jurisdiction over the instant case because National is not an aggrieved party as against Frankenmuth respecting the underlying litigation. We disagree.

In *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006), our Supreme Court explained that an "aggrieved" party "must have some interest of a pecuniary nature in the outcome of the case" and "must have suffered a concrete and particularized injury." (Quotation marks and citation omitted.) Frankenmuth's jurisdiction argument lacks merit because National's liability could be reduced by half if Frankenmuth is found liable for personal property insurance benefits. Moreover, the trial court's decision to dismiss Frankenmuth adversely affected National because liability for the damage to the bridge following the decision rests solely on National. We conclude that National is an "aggrieved party" that has suffered a pecuniary injury by the court's decision, and therefore, this Court has jurisdiction over this appeal.

II. STANDARD OF REVIEW

We review de novo a trial court's summary disposition decision. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). 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. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper if there is "no genuine issue regarding any material

fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Summary disposition is properly granted to the opposing party if it appears to the trial court that that party, rather than the moving party, is entitled to judgment. MCR 2.116(I)(2); *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

III. ANALYSIS

National argues that the trial court erred by denying its motion for summary disposition and granting Frankenmuth's motion because, under *Turner*, the pilot vehicle that Frankenmuth insured constituted a vehicle "involved in the accident." We agree.

In *Turner*, our Supreme Court considered which vehicles in a multivehicle accident were "involved in the accident" under MCL 500.3125 in order to permit recovery from the insurers of the owners, registrants, or operators of the vehicles for property damage that resulted from the accident. *Turner*, 448 Mich at 25. In that case, a police officer driving a patrol car chased a stolen vehicle until it ran a red light at an intersection and collided first with a pickup truck in the intersection, then with a second truck that split in half because of the impact. The rear portion of the second truck crashed into a nearby building, causing extensive damage. *Id*. at 25-26. The police car did not collide with any vehicle or hit the building. *Id*. at 26.

The building owners sought personal property insurance benefits from League General Insurance Company, which insured the owner of the pickup truck;

Auto Club Insurance Association (ACIA), which insured the owner of the truck that split and collided with the building; and Royal Insurance Company, which insured the owner of the stolen vehicle. *Id*. ACIA filed a third-party complaint against the city of Ferndale, the self-insurer of the police car, claiming that Ferndale shared liability for a portion of property protection benefits. ACIA moved for summary disposition against Royal and Ferndale regarding the liability issue. *Id*. at 26-27. The trial court granted summary disposition against Royal but denied ACIA's motion against Ferndale. *Id*. at 27. This Court affirmed. Our Supreme Court granted leave and explained:

> Generally, a no-fault insurer will be liable to pay property protection benefits if the three following requirements are met:
>
> 1. There has been "accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle . . . ." Section 3121(1).
>
> 2. The facts do not implicate any of the statutorily enumerated exceptions for property protection liability. Section 3123.
>
> 3. The insurer insures the owner of a vehicle "involved in the accident," in which case the insurer will be primarily liable; or, the insurer insures the operator of a vehicle "involved in the accident," in which case the insurer will be secondarily liable. Section 3125. [*Id*. at 28-29.]

Additionally, "in a multivehicle accident, the liability of each insurer of an owner of a vehicle having some physical connection with the accident *will not* turn on whether the claimant can establish that the damage arose out of the ownership, operation, maintenance, or use of *each insured's* vehicle as a motor vehicle." *Id*. at 34-35. Under MCL 500.3121(1), a claimant must show

only "that the damage arose out of 'the ownership, operation, maintenance, or use of *a* motor vehicle as a motor vehicle.' " *Turner*, 448 Mich at 35, quoting MCL 500.3121(1). Therefore, "[a] vehicle may be 'involved in the accident' even though the damage cannot be said to have arisen out of the ownership, operation, maintenance, or use of *that* vehicle." *Turner*, 448 Mich at 35.

For "a vehicle to be considered 'involved in the accident' under § 3125, the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident." *Id*. at 39. Further, "a mere 'but for' connection between the operation or use of the motor vehicle and the damage" is insufficient to establish that the vehicle was "involved in the accident" under the statute. *Id*. Additionally, "physical contact is not required to establish that the vehicle was 'involved in the accident,' nor is fault a relevant consideration in the determination . . . ." *Id*. Rather, "the concept of being 'involved in the accident' under § 3125 encompasses a broader causal nexus between the use of the vehicle and the damage than what is required under § 3121(1) to show that the damage arose out of the ownership, operation, maintenance, or use of the motor vehicle as a motor vehicle." *Id*. The "involved in the accident" standard requires the determination that the vehicle made "an active contribution to the happening of the accident" and liability will not be imposed "simply because of a remote association between [the] insureds' vehicles and the accident." *Id*. at 41-42.

In *Turner*, our Supreme Court determined that the police officer's use of the police car while pursuing the stolen vehicle constituted active use that "perpetuated the stolen vehicle's flight, which, in turn, resulted in the collision with the other cars and the damage to the

nearby property" despite the fact that the police car had backed off its chase to deter the stolen vehicle from running the red light. *Id*. at 42. The Court concluded that "the use of the police vehicle as a motor vehicle had an active link with the damage, making it 'involved in the accident' for purposes of § 3125, and notwithstanding the fact that the same use could not be said to have given rise to the damage for purposes of § 3121(1)." *Id*. at 43. Thus, Ferndale, the insurer of the police car, had primary liability to pay a share of the property protection benefits. *Id*.

The case at bar presents the issue whether the lead pilot vehicle was "involved in the accident" under MCL 500.3125 for purposes of determining insurer liability for the property damage caused by the accident. Frankenmuth contends that its insured was not "involved in the accident" because, unlike the police car in *Turner*, the lead pilot vehicle did not "perpetuate" or "prompt" the movement of the Pahoa semi into the bridge. National argues that the lead pilot vehicle, as part of a "caravan" having the role of guiding the Pahoa semi along the route, led the Pahoa semi and therefore constituted a vehicle "involved in the accident" under MCL 500.3125. We find National's argument persuasive.

The record indicates that the lead pilot vehicle actively, as opposed to passively, contributed to the accident in this case. The MDOT permit required the lead pilot vehicle to guide the Pahoa semi on a safe course in Michigan to avoid collisions with bridges and other obstacles under which the oversize load could not pass. The lead pilot vehicle was equipped with the height-measuring device, and the driver needed to communicate with the Pahoa semi's driver regarding whether adequate clearance existed for all overpasses

to ensure that the Pahoa semi could safely pass under them or stop with sufficient time to avoid colliding with them.

The driver of the Pahoa semi testified that the lead pilot vehicle alerted him twice before the collision when the measuring device "hit" other overpasses. The record reflects that, up to and including the time of the accident, the lead pilot vehicle prompted and perpetuated the forward movement of the Pahoa vehicle by providing guidance and assurance regarding the chosen route. As explained in *Turner*, the lead pilot vehicle did not need to have physical contact with any vehicle or the bridge to be "involved in the accident." Rather, the active use of the lead pilot vehicle as a motor vehicle that perpetuated the motion of another vehicle that caused property damage suffices to meet the "involved in the accident" requirement of MCL 500.3125.

Frankenmuth's argument that the lead pilot vehicle was not "involved in the accident" because the accident arose out of a failure of communication between the drivers, rather than as the result of the lead pilot vehicle's use of his vehicle as a motor vehicle, lacks merit. The lead pilot driver's ability to communicate information about the clearance of the overpasses, including its accuracy and usefulness, depended upon his operation of the vehicle in his role as the driver of the lead pilot vehicle escorting the Pahoa semi. The lead pilot vehicle cannot be said to have a mere remote or random connection to the accident. The record establishes that the use of the lead pilot vehicle had a causal nexus with the Pahoa semi that collided with the overpass. The accident and ensuing damage arose because the lead pilot vehicle led the Pahoa semi under the low overpass. The lead pilot vehicle driver's failure

to adequately warn the Pahoa semi driver of the low clearance does not mean that the lead pilot vehicle was not "involved in the accident" under MCL 500.3125. On the contrary, the vehicles and their drivers had inextricably intertwined roles in the caravan. The lead pilot vehicle led the Pahoa vehicle and its cargo into the bridge.

In *Turner*, our Supreme Court clarified that a causal nexus exists when "the relationship between the use of the vehicle as a motor vehicle and the injury . . . [is] more than incidental, fortuitous, or 'but for,' and [where] the vehicle's connection with the injury . . . [is] directly related to its character as a motor vehicle." *Turner*, 448 Mich at 32 (quotation marks and citation omitted). In this case, the lead pilot vehicle's presence on the roadway cannot be said to have been incidental or fortuitous. It traversed the highway in advance of the Pahoa semi with the purpose of identifying clearance problems and assuring the safe passage of the Pahoa semi. The operation of the two vehicles was linked.

Frankenmuth's argument that its insured was not "involved in the accident" because it was too far away from the scene of the accident when it occurred also lacks merit. Although the MDOT permit required the lead pilot vehicle to be 2,000 feet away from the oversize load, and thus it passed under the bridge well before the collision occurred, we do not agree that the lead pilot vehicle therefore had no association with the accident. The determination of whether a vehicle was "involved in the accident" does not turn on measuring the temporal or physical proximity of the vehicle to the accident. *Turner* makes clear that a causal nexus must exist that establishes more than a random, incidental, fortuitous connection between a vehicle and an acci-

dent that results in property damage. Regardless of the fact that the lead pilot vehicle may have been 2,000 feet or more ahead of the Pahoa semi, a sufficient causal nexus existed to establish that the lead pilot vehicle was "involved in the accident" under MCL 500.3125. The evidence establishes that the lead pilot vehicle's action and inaction contributed to the happening of the accident. Accordingly, the trial court erred by ruling that the lead pilot vehicle was "essentially too attenuated to be considered to be involved in the accident." Therefore, the trial court erred by denying National's motion for summary disposition seeking a determination that Frankenmuth's insured was "involved in the accident" and by concomitantly granting Frankenmuth summary disposition and dismissal from this case.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

O'BRIEN, P.J., and GADOLA, J., concurred with REDFORD, J.

PEOPLE v RYDZEWSKI

Docket No. 347005. Submitted January 7, 2020, at Detroit. Decided January 23, 2020, at 9:05 a.m.

Eric J. Rydzewski was charged in the 71-A District Court as a second-offense habitual offender, MCL 769.10, with felon in possession of a firearm (felon-in-possession), MCL 750.224f; felonious assault, MCL 750.82; assaulting, resisting, or obstructing a police officer, MCL 750.81d(1); and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant pleaded no contest to the felon-in-possession, felonious assault, and assaulting, resisting, or obstructing a police officer charges in exchange for the prosecution dismissing the two felony-firearm charges. The written plea agreement included the phrase "[n]o mental health [court]." Before accepting the plea, the court, Laura Cheger Barnard, J., discussed the terms of the plea, noting that the prosecution had not "up-front" consented to defendant's placement in mental health court, that the court would wait to see whether the presentence investigation report (PSIR) recommended admission to the mental health court, and that the court would rely on that recommendation. The prosecution and defendant agreed on the record with the court's interpretation of the plea, and the court accepted defendant's no-contest plea. After the district court accepted the plea, the case was transferred to the Lapeer Circuit Court, Nick O. Holowka, J., presiding. Judge Holowka then reassigned the case back to Judge Barnard for defendant's participation in the mental health court. The PSIR was then completed. It recommended that defendant be admitted to mental health court. The prosecution objected and moved to withdraw from the plea agreement, asserting that admission to the mental health court violated the terms of the plea bargain because the prosecution had not consented to that placement. Judge Barnard denied the motion, reasoning that she had the authority to accept defendant's plea without being bound by any recommended sentence because the parties had entered into a plea agreement, not a sentencing agreement. She further concluded that the plea agreement did not contain a specific agreement that defendant would not be considered for mental health court but, rather, left that decision to the trial court's discretion. Judge

Barnard later sentenced defendant to two years' probation and a suspended jail sentence of 365 days in jail, both of which were conditioned on defendant successfully completing mental health court. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

1. MCL 600.1093 sets forth the procedure for admission into a mental health court. No individual has a right to be admitted into the court, and admission into a mental health court program is at the discretion of the court based on the individual's legal or clinical eligibility. The Lapeer County Mental Health Court is also governed by certain county documents, including a policy and procedure manual. Although the manual states that the prosecuting attorney must agree to a defendant's admission to the county's mental health court, the document also provides that the manual's policies and procedures are not rigid rules but guidelines on best practices for the efficient and effective function of the mental health court. The consent provision in the manual was a standard best practice concerning admission to the mental health court; it was not a rigid rule from which a court could not stray, and it was, therefore, within a trial court's discretion whether to sentence defendant to mental health court, despite the prosecution's objection or lack of consent. In this case, the trial court followed the MCL 600.1093 requirements for admission to mental health court, and it did not abuse its discretion by following the PSIR recommendation and admitting defendant to the mental health court. The Court's holding in *People v Baldes*, 309 Mich App 651 (2015)—that a court may not admit a defendant into a drug treatment program when doing so departs from the sentencing guidelines and the prosecutor has not approved such admission—did not extend to admissions into mental health courts because MCL 600.1068(2) specifically requires prosecutorial consent for admission into a drug treatment program and MCL 600.1093 does not contain that consent requirement for mental health courts.

2. MCR 6.310(E) provides that on a prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement. Thus, to determine whether a trial court abused its discretion by denying a motion under MCR 6.310(E), a reviewing court must determine whether the defendant's conduct violated the terms of the plea agreement. Plea agreements are an essential component of the efficient administration of justice. The scope of a plea bargain is determined by its terms under the principles of contract interpretation, but those terms must serve the interests of justice. A contractual term is

ambiguous when it is equally susceptible to more than a single meaning. A patent ambiguity arises from the face of the document while a latent ambiguity arises from a collateral matter when the document's terms are applied or executed. When a contractual term in a plea agreement is prone to multiple meanings, a court may look to extrinsic evidence to help determine the parties' intent. In this case, a latent ambiguity arose when the court attempted to give effect to the phrase "[n]o mental health [court]" within the broader context of effecting the plea agreement. A review of the plea colloquy established that the prosecution accepted the trial court's interpretation of the "[n]o mental health [court]" term of the agreement, specifically, that admission to mental health court was in the trial court's discretion because the agreement did not definitively state whether defendant would or would not be considered for admission to that court. Therefore, defendant did not violate the terms of the plea agreement when he requested that the court follow the PSIR recommendation of admission to the mental health court.

3. A trial court is not required to impose a sentence that is only recommended as part of a plea agreement, and not as a condition upon which the agreement is predicated. If a trial court accepts a plea bargain that contains an agreed-upon sentence and chooses to impose a lesser sentence, then the prosecution is entitled to learn that the judge does not intend to impose that sentence, to be advised what the sentence would be, and to be given an opportunity to withdraw from the plea agreement. In *People v Smith*, 502 Mich 624, 647 (2018) (opinion by VIVIANO, J.); *id*. at 648-649, 658 (opinion by CLEMENT, J.), the Supreme Court extended the prosecution's right to withdraw a plea to encompass when the trial court rejects either the agreed-upon sentence or a plea term while keeping the rest of the agreement; in that situation, the trial court essentially imposes a different plea agreement on the prosecutor than he or she agreed to, and the trial court abuses its discretion if it does not allow the prosecution to withdraw from the plea agreement in that situation. In this case, the agreement contained a sentence recommendation, not a sentence agreement, and under MCR 6.310(E), it was within the trial court's discretion to deny the prosecution's motion to withdraw from the plea agreement. *Smith* was factually distinguishable because the plea agreement regarding mental health court was ambiguous at best. In addition, it was unclear whether the trial court's interpretation of that term imposed a new agreement on the prosecution, particularly in light of the prosecution's assent to that interpretation during the plea hearing. The trial court was therefore not required under *Smith* to give the prosecution notice and an opportunity to withdraw the

plea agreement, and it did not abuse its discretion by denying the prosecution's motion to withdraw the plea.

Affirmed.

RIORDAN, P.J., concurring in part and dissenting in part, disagreed with the majority's conclusion regarding the prosecution's request to withdraw from the plea agreement. Judge RIORDAN would have remanded the case for the trial court to determine whether the prosecution's nonresponse to the court's interpretation of the plea agreement constituted its assent to the agreement being modified. If not, Judge RIORDAN would have allowed the prosecution to withdraw from the plea in accordance with *Smith*. Judge RIORDAN otherwise agreed with the majority opinion.

SENTENCING — MENTAL HEALTH COURTS — PROSECUTOR APPROVAL NOT REQUIRED.

MCL 600.1093 sets forth the procedures under which a criminal defendant may be admitted into a mental health court; the statute does not require the prosecution to agree to a defendant's admission to a mental health court before the trial court includes that placement in a sentencing order.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael J. Sharkey*, Prosecuting Attorney, and *Joseph D. Shopp* and *David L. Campbell*, Assistant Prosecuting Attorneys, for the people.

Morgan Starr Sackin PLLC (by *Marc Sackin*) for defendant.

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

JANSEN, J. The prosecution appeals by delayed leave granted[1] the order holding defendant's jail term in abeyance pending defendant's successful completion of mental health court. We affirm.

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[1] *People v Rydzewski*, unpublished order of the Court of Appeals, entered February 25, 2019 (Docket No. 347005).

I. RELEVANT FACTUAL BACKGROUND

Defendant was charged, as a second-offense habitual offender, MCL 769.10, with felon in possession of a firearm (felon-in-possession), MCL 750.224f; felonious assault, MCL 750.82; assaulting, resisting, or obstructing a police officer, MCL 750.81d(1); and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant pleaded no contest to the felon-in-possession, felonious assault, and assaulting, resisting, or obstructing a police officer charges in exchange for the prosecution dismissing the two felony-firearm charges. The terms of defendant's plea were memorialized in a written plea agreement, which also ambiguously stated, "No mental health [court.]"

At defendant's preliminary examination, the trial court stated the terms of the plea agreement on the record before accepting defendant's plea. When discussing the "[n]o mental health [court]" stipulation with the parties, the trial court stated:

> *The Court*: And the record should indicate very specifically that the prosecutor's office is not up-front consenting to the placement in Mental Health Court. However, [defendant] already has done one stint in Mental Health Court, and the specialty courts have no prohibition from anybody re-entering if the Adult Probation Department makes a determination that that might be his best treatment or as part of his probation.
>
> [*Defense Counsel*]: Yes, Judge.
>
> *The Court*: Yes. It's very clear that the prosecutor's office is not, as part of this plea, consenting to a placement in Mental Health Court. However, without—without seeing the presentence report, I have—I can't say which way

> the team is going to want to go, and it's going to be reliant upon that.
>
> [*Prosecutor*]: That's correct, your Honor.

After this discussion, the trial court asked whether the terms of the plea agreement, as stated on the record, reflected their "understanding of the total agreement," to which both parties replied in the affirmative. The trial court then accepted defendant's no-contest plea and arranged for sentencing.

At defendant's initial sentencing hearing, the trial court reviewed defendant's presentence investigation report (PSIR) and noted that the report recommended defendant as a candidate for mental health court. The prosecution objected, stating that it had not consented to defendant's admission to mental health court and that such a sentence would violate the terms of defendant's plea agreement. The prosecution also stated its intention to withdraw from the plea agreement if the trial court decided to refer defendant to mental health court.

The prosecution did, in fact, file a motion to withdraw from its plea agreement with defendant. The trial court accepted supplemental briefing from both parties and held a hearing on the prosecution's request to withdraw from the plea agreement. In denying the prosecution's motion to withdraw from the plea agreement, the trial court stated that because defendant and the prosecution had entered into a plea agreement, not a sentencing agreement, it could accept defendant's no-contest plea while not being bound by any recommended sentence. The trial court also concluded that the plea agreement's terms did not contain a specific agreement that defendant "would or would not be considered for placement" in mental health court and

that the agreement left that determination to the trial court's discretion. Ultimately, defendant was sentenced to two years' probation and a suspended jail term of 365 days, both of which were conditioned on defendant's successful completion of mental health court. This appeal followed.

II. THE PROSECUTION'S LACK OF CONSENT

On appeal, the prosecution argues that under the terms of the Lapeer County Mental Health Court's governing documents, the prosecution has unilateral authority to decide whether a defendant can be admitted to the mental health court. Furthermore, the governing documents do not allow a trial court to sentence a defendant to mental health court without the prosecution's consent. Because the prosecution did not consent in this case, the prosecution argues, the trial court abused its discretion by sentencing defendant to participate in the Lapeer County Mental Health Court. We disagree.

We review "questions of law . . . de novo, and the trial court's decision about the sentence imposed is reviewed for an abuse of discretion." *People v Wiley*, 324 Mich App 130, 165; 919 NW2d 802 (2018), citing *People v Malinowski*, 301 Mich App 182, 185; 835 NW2d 468 (2013). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. A trial court necessarily abuses its discretion when it makes an error of law." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citations omitted). "The interpretation of a statute or court rule . . . involves a question of law that [this Court reviews] de novo." *People v Parker*, 319 Mich App 664, 669; 903 NW2d 405 (2017). Additionally, if the plain and ordi-

nary meaning of a statute or court rule is clear, judicial construction is not necessary. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *People v Howell*, 300 Mich App 638, 645; 834 NW2d 923 (2013).

The relevant provisions of the Revised Judicature Act, MCL 600.1090 *et seq*., outline the legal requirements governing mental health courts in the state of Michigan. MCL 600.1091(1), in relevant part, provides the statutory requirements for the establishment of a mental health court:

> The circuit court or the district court in any judicial circuit or a district court in any judicial district may adopt or institute a mental health court pursuant to statute or court rules. However, if the mental health court will include in its program individuals who may be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines, the circuit or district court shall not adopt or institute the mental health court unless the circuit or district court enters into a memorandum of understanding with each participating prosecuting attorney in the circuit or district court district, a representative or representatives of the community mental health services programs, a representative of the criminal defense bar, and a representative or representatives of community treatment providers. . . . The memorandum of understanding must describe the role of each party.

MCL 600.1093 outlines the procedure for admission into a mental health court:

> (1) Each mental health court shall determine whether an individual may be admitted to the mental health court. No individual has a right to be admitted into a mental health court. Admission into a mental health court program is at the discretion of the court based on the individual's legal or clinical eligibility. An individual may be admitted to mental health court regardless of prior

participation or prior completion status. However, in no case shall a violent offender be admitted into mental health court.

* * *

(3) To be admitted to a mental health court, an individual shall cooperate with and complete a preadmission screening and evaluation assessment and shall submit to any future evaluation assessment as directed by the mental health court. A preadmission screening and evaluation assessment must include all of the following:

(a) A review of the individual's criminal history. A review of the law enforcement information network may be considered sufficient for purposes of this subdivision unless a further review is warranted. The court may accept other verifiable and reliable information from the prosecution or defense to complete its review and may require the individual to submit a statement as to whether or not he or she has previously been admitted to a mental health court and the results of his or her participation in the prior program or programs.

(b) An assessment of the risk of danger or harm to the individual, others, or the community.

(c) A mental health assessment, clinical in nature, and using standardized instruments that have acceptable reliability and validity, meeting diagnostic criteria for a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.

(d) A review of any special needs or circumstances of the individual that may potentially affect the individual's ability to receive mental health or substance abuse treatment and follow the court's orders.

In this case, a Memorandum of Understanding and a Policy and Procedure Manual also govern the Lapeer County Mental Health Court. The manual states that "[i]n all cases and regardless of the charge, the [p]rosecuting [a]ttorney must agree to the defendant's ad-

mission to the" Lapeer County Mental Health Court. The prosecution interprets this provision as granting it unilateral authority to bar defendant's admission to mental health court and that any such determination is binding on the trial court.

However, when reading this requirement in the manual's broader context, it becomes apparent that the consent requirement does not carry the level of authority asserted by the prosecution. The manual itself provides guidance on how its provisions are to be understood, stating that its policies and procedures "shall not be construed as rigid rules and policies but as guidelines on 'best practices' for the efficient and effective function of the [Mental Health Court] . . . ." The manual further states, "Unless mandated by State or Federal law or funding requirements, the policies and procedures must be flexible in nature." Thus, the manual itself makes clear that its provisions are more akin to guidance than regulations. Given the acknowledgment of the flexibility of its provisions, the manual foresees and allows for a certain level of discretion on the part of those effecting its provisions. As a result, we understand the manual's consent provision to be a standard "best practice" concerning admission to the Lapeer County Mental Health Court, not a "rigid" rule from which a trial court cannot stray.

Understanding the manual's consent provision in this light, we conclude that it was within the trial court's discretion to sentence defendant to participation in mental health court, despite the prosecution's objection and lack of consent. Nothing on the record indicates that the trial court failed to follow the statutory requirements concerning defendant's admission to mental health court. Although the trial court did deviate from the manual's guidance by admitting de-

fendant without the prosecution's consent, the record shows the trial court did so based on the recommendation contained within defendant's PSIR. In doing so, the trial court adhered to the manual's stated goal that admission to the Lapeer County Mental Health Court "will not be based on pleas or delayed sentence[s] but on the appropriateness of the defendant . . . ."

The prosecution also argues that this Court should extend its holding in *People v Baldes*, 309 Mich App 651, 657; 873 NW2d 338 (2015), to mental health courts. In *Baldes*, this Court held that "courts may not admit a defendant into a drug treatment program when doing so departs from the sentencing guidelines and the prosecutor has not approved." *Id*. The prosecution asserts that, given the similarity between drug courts and mental health courts, it makes sense to apply *Baldes*'s holding to this case. We disagree.

In urging this Court to apply the *Baldes* holding regarding drug courts to mental health courts, the prosecution overlooks one crucial distinction. Under MCL 600.1068(2), which governs the admission of individuals into a drug court, the prosecution must consent to a defendant's placement into a drug court in accordance with the procedures set out in the memorandum of understanding that created the court. There is no such requirement found in MCL 600.1093 for the admission of a defendant into a mental health court. In *Baldes*, this Court was concerned with whether the prosecutor's participation in the defendant's screening process for drug court constituted consent to the defendant's admission to that court as required under the statute. It does not, as the prosecution contends, support an extension of the consent requirement of MCL 600.1068(2) to other treatment courts. We decline to do so here.

Because of the discretion and flexibility accorded to the trial court by the manual, we conclude that the trial court's decision to sentence defendant to participation in mental health court without the consent of the prosecution fell within the range of reasonable and principled outcomes available to the trial court. We find no abuse of discretion.

III. WITHDRAWAL OF DEFENDANT'S PLEA

The prosecution next argues that the trial court erred by denying its motion to withdraw from its plea agreement with defendant. Again, we disagree.

"We review a trial court's decision on a motion to withdraw a plea for an abuse of discretion. . . . Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *People v Martinez*, 307 Mich App 641, 646-647; 861 NW2d 905 (2014) (quotation marks and citations omitted).

MCR 6.310(E) provides, "On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." The prosecution argues that the trial court should have allowed it to withdraw from the plea agreement, in effect vacating defendant's plea, because it believes defendant's consent to participate in mental health court violated the plea agreement's terms. Interpreting MCR 6.310(E), this Court has stated that the rule's plain language "clearly limits the discretion of the trial court to vacate an accepted plea. The trial court may exercise its discretion to vacate an accepted plea only under the parameters of the court rule." *Martinez*, 307 Mich App at 649, quoting *People v Strong*, 213 Mich App 107, 111-112; 539 NW2d 736 (1995) (quotation marks omitted). Accordingly, the question of whether

the trial court abused its discretion by denying the prosecution's motion first requires a determination of whether defendant's conduct violated the terms of the plea agreement.

Plea agreements are an "essential component of the efficient administration of justice." *Martinez*, 307 Mich App at 651, quoting *People v Jackson*, 192 Mich App 10, 14-15; 480 NW2d 283 (1991) (quotation marks omitted). While plea agreements are similar to contracts, because they are concerned with the criminal law, they are governed by the "interests of justice" rather than by commercial principles. *Martinez*, 307 Mich App at 651 (citation omitted). "Thus, the scope of a plea bargain is determined by its terms under the principles of contract interpretation but those terms must serve the interests of justice." *Id*.

When interpreting contractual terms, a court's primary purpose is to "determine the parties' intent from the language of the contract. In general, contract language is interpreted according to its plain meaning. An unambiguous contract must be enforced according to its terms." *Martinez*, 307 Mich App at 651-652 (quotation marks and citations omitted). Moreover, in cases involving plea bargains with ambiguous terms, this Court has also applied "general contract principles for construing ambiguous agreements . . . ." *People v Swirles (After Remand)*, 218 Mich App 133, 138; 553 NW2d 357 (1996). A recent opinion by our Supreme Court provides a helpful summary of these principles. When the contract's terms are ambiguous, a court may look to extrinsic evidence to determine the parties' intent. *Kendzierski v Macomb Co*, 503 Mich 296, 311; 931 NW2d 604 (2019). A contractual term can be ambiguous either when it is "equally susceptible to more than a single meaning" or "if two provisions of the

same contract irreconcilably conflict with each other[.]" *Id*. at 311 (quotation marks and citations omitted). Our Supreme Court has also recognized two ways in which a contractual ambiguity can be discovered. A patent ambiguity arises "from the face of the document." *Id*. at 317 (quotation marks and citation omitted). By contrast, a latent ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Id*., quoting *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010) (quotation marks omitted).

Applying these principles, the terms and, thus, the scope of the plea agreement in this case are clear up until a point. Both in the written agreement and as expressed by the trial court on the record, the plea agreement clearly and unambiguously states that defendant would plead no contest to the felon-in-possession, felonious assault, and resisting a police officer charges with a habitual second-offender enhancement. In exchange, the prosecution agreed to dismiss the two felony-firearm charges. These terms are not in dispute, and defendant complied with them. However, an issue arises in trying to interpret the phrase "No mental health [court.]" While acknowledging that a finding of ambiguity is a "last resort" in contract interpretation, *Kendzierski*, 503 Mich at 311, the language and context of this provision of the plea agreement do not provide us with enough guidance to construe and give effect to the parties' intention from the plain language alone. As is apparent from our review of the record, while the phrase on its own appears to be straightforward, a latent ambiguity arises when trying to give effect to the provision in the broader context of effecting the plea agreement.

When a contractual term is prone to multiple meanings, a court may look to extrinsic evidence to help determine the parties' intent. *Id*. In this case, the most helpful evidence comes from the plea colloquy at defendant's preliminary examination. During the colloquy, the trial court noted that the written plea agreement stated, "No mental health court," and interpreted the phrase to mean that the prosecution was not "up-front" consenting to defendant's admission to mental health court as part of the plea agreement. However, the trial court immediately qualified this interpretation by stating that the question of whether defendant would be admitted to mental health court depended on the recommendation contained within the PSIR. The prosecution did not correct the trial court's interpretation: the prosecution did not state that the plea agreement prohibited defendant from being sentenced to participation in mental health court or that the prosecution had to agree with or consent to mental health court admission before the trial court could impose such a sentence. Instead, the prosecution stated the trial court had accurately recited the plea agreement's terms on the record. In light of the interpretation stated by the trial court and accepted by the parties, we agree with the trial court's ultimate determination that the plea agreement did not definitively state whether defendant "would or would not be considered" for admission to mental health court. Therefore, when defendant requested that the trial court follow the PSIR's recommendation that he be sentenced to mental health court, he did not violate the terms of the plea agreement.

Further, the trial court concluded that, in light of the terms of the agreement as stated on the record, the agreement contained a sentence recommendation rather than a sentence agreement, the latter of which

the trial court would have been bound to follow. Under *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982), a trial court is not required to impose a sentence that is only recommended as part of a plea agreement, and not a condition upon which the agreement is predicated. The trial court reviewed the terms of the plea agreement, as they had been placed on the record, and concluded that "there was no specific agreement that [defendant] would or would not be considered for placement, and the matter was left to this Court's discretion . . . . The parties agreed with this formulation of the plea agreement on the record." (Paragraph structure omitted.) Nothing in our review of the record leads us to believe that the trial court's conclusion was in error. As a result, it was within the trial court's discretion to deny the prosecution's motion to withdraw from the plea agreement under MCR 6.310(E).

The prosecution also argues that it should have been permitted to withdraw from the plea agreement as allowed by our Supreme Court in *People v Siebert*, 450 Mich 500, 504; 537 NW2d 891 (1995). In *Siebert*, our Supreme Court held that if a trial court accepts a plea bargain that contains an agreed-upon sentence and chooses to impose a lesser sentence, then "a prosecutor . . . is entitled to learn that the judge does not intend to impose the agreed-upon sentence, to be advised what the sentence would be, and given an opportunity to withdraw from the plea agreement." *Id*. at 510. As the prosecution rightly points out, *Siebert*'s holding was recently extended by our Supreme Court: "When it rejects either the sentence or a plea term . . . while keeping the rest of the agreement, the trial court essentially imposes a different plea bargain on the prosecutor than he or she agreed to." *People v Smith*, 502 Mich 624, 647; 918 NW2d 718 (2018)

(opinion by VIVIANO, J.). A trial court's failure to provide the prosecution with an opportunity to withdraw from the plea agreement in such a situation amounts to an abuse of discretion. *Id*. at 648-649, 658 (opinion by CLEMENT, J.).

However, a significant distinction exists between *Smith* and the case at hand, which leads us to conclude that the holding in *Smith* is not dispositive here. In *Smith*, the plea terms that the trial court disregarded were clear and imposed definite obligations on the defendant. By invalidating them at sentencing, the trial court undoubtedly imposed a new plea agreement on the prosecutor. That is not the case here because the provision of defendant's plea agreement concerning mental health court is ambiguous at best. Because it is unclear what obligation the provision imposed, we cannot conclude that the trial court's ultimate interpretation changed these obligations or imposed a new plea agreement on the prosecution. Further, considering the prosecution's assent to the trial court's interpretation of the plea agreement's terms, there is nothing on the record to suggest that the trial court invalidated one provision of the plea agreement while imposing the remainder. In either situation, the trial court was not required under *Smith* to give the prosecution notice and an opportunity to withdraw from the plea agreement. As a result, the trial court did not abuse its discretion by denying the prosecution's motion to withdraw from the plea agreement.

Affirmed.

SAWYER, J., concurred with JANSEN, J.

RIORDAN, P.J. (*concurring in part and dissenting in part*). I respectfully dissent on the issue of the prosecu-

tion's request to withdraw from the plea agreement.

Because it is not clear from the record, I would remand this case to the trial court to clarify whether the prosecution's nonresponse to the trial court's interpretation of its role relating to mental health court during the plea colloquy amounted to the prosecution's acquiescence to a modification of the plea agreement. If not, the trial court must apply *People v Smith*, 502 Mich 624, 647; 918 NW2d 718 (2018) (opinion by VIVIANO, J.); *id*. at 648-649, 658 (opinion by CLEMENT, J.), and allow the prosecutor to withdraw from the plea agreement.

In all other respects, I concur with the majority.

PEOPLE v WHITE

Docket No. 346901. Submitted January 7, 2020, at Grand Rapids. Decided January 23, 2020, at 9:10 a.m. Leave to appeal denied 505 Mich 1132 (2020).

Valden Devone White was convicted by a jury in the Kent Circuit Court of storing a stolen firearm, MCL 750.535b; felon in possession of a firearm, MCL 750.224f; felon in possession of ammunition, MCL 750.224f(6); violent felon in possession of body armor, MCL 750.227g(9)(a); maintaining a drug house, MCL 333.7405(d); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and possession of marijuana, MCL 333.7403(2)(d). The police arrested defendant while defendant was driving and searched defendant's home pursuant to a warrant; the police found several hundred dollars and marijuana on defendant's person and found a bottle of codeine; two handguns; marijuana; a bulletproof vest; drug paraphernalia; and a safe that contained ammunition, about $13,000, and traces of cocaine during the search of defendant's home. According to a detective, defendant said that the guns, money, and bulletproof vest belonged to him. He also stated that he used cocaine and crack cocaine and that he sold drugs to friends. However, defendant argued that he was not given his *Miranda*[1] rights, did not commit any of the charged offenses other than possession of marijuana, and did not confess to the detective. Before preliminary examination, the prosecution offered defendant the opportunity to plead guilty to storing a stolen firearm, felon in possession of a firearm, and possession of codeine less than 25 grams in exchange for dismissal of three other charged counts. The prosecution also warned defendant that if he proceeded to the preliminary examination, the prosecution would add charges of felony-firearm and felon in possession of ammunition to defendant's charges. Defendant rejected the plea offer and decided to proceed to preliminary examination, and the additional charges were added. Defendant was convicted as previously stated, and the court, Dennis B. Leiber, J., sentenced defendant. Defendant

[1] *Miranda v Arizona*, 384 US 436 (1966).

obtained a *Ginther*[2] hearing, following which the trial court determined that trial counsel had not been ineffective. Defendant appealed, arguing that if he had received competent advice from his trial attorney, he would not have rejected the plea offer.

The Court of Appeals *held*:

Defendants are entitled to the effective assistance of counsel when considering or negotiating a plea agreement. When a defendant claims to be prejudiced by rejecting a plea offer on the basis of ineffective assistance of counsel, the defendant must show (1) that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), (2) that the court would have accepted its terms, and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that, in fact, were imposed. In the context of pleas, a defendant must show that the outcome of the plea process would have been different with competent advice. In this case, defendant asserted that trial counsel failed to explain, before rejecting the plea offer, that defendant was "legally" guilty because of his confession. Defendant failed to comprehend two significant and fundamental legal incompatibilities with his argument: first, a trial court may not accept a guilty plea without placing the defendant under oath and establishing a factual basis for the defendant's guilt, and second, the jury was not required to believe defendant's alleged confession, even in the absence of any contradictory evidence. If defendant truly had not committed (or truly believed he had not committed) any of the crimes to which he allegedly confessed, then entering a guilty plea would have entailed committing perjury under MCL 750.423(1); therefore, it was not ineffective for counsel to refrain from seeking to admit perjured testimony. And defendant's alleged confession was a highly prejudicial piece of evidence, but nevertheless it was nothing more than a piece of evidence; the confession made an acquittal improbable, but it did not make defendant "legally guilty." Trial counsel warned defendant of the risk of proceeding to preliminary examination, but when defendant realized that he was facing a felony and potential prison time even under the plea offer, defendant was not willing to accept that plea offer. The record showed that trial counsel reasonably and accurately advised defendant of the nature of the

[2] *People v Ginther*, 390 Mich 436 (1973).

dilemma he faced, had a sound reason for proceeding with the preliminary examination, and properly refrained from suborning perjury. Finally, even if trial counsel's advice had been objectively substandard, which it was not, defendant could not establish that trial counsel's performance prejudiced him.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Frank Stanley, PC (by *Frank Stanley*) for defendant.

Before: O'BRIEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

RONAYNE KRAUSE, J. Defendant, Valden Devone White, appeals as of right his convictions by a jury of storing a stolen firearm, MCL 750.535b; felon in possession of a firearm, MCL 750.224f; felon in possession of ammunition, MCL 750.224f(6); violent felon in possession of body armor, MCL 750.227g(9)(a); maintaining a drug house, MCL 333.7405(d); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to 28 to 180 months' imprisonment for the storing-a-stolen-firearm conviction, 28 to 90 months' imprisonment for the felon-in-possession-of-a-firearm conviction, 28 to 90 months' imprisonment for the felon-in-possession-of-ammunition conviction, 28 to 72 months' imprisonment for the violent-felon-in-possession-of-body-armor conviction, 24 to 36 months' imprisonment for the maintaining-a-drug-house conviction, 2 years' imprisonment for the felony-firearm conviction, and 12 to 24 months' imprisonment for the possession-of-marijuana conviction. Defendant argues

that he was denied effective assistance of counsel pertaining to defendant's rejection of a plea offer prior to his preliminary examination. We disagree and affirm the jury's verdict.

I. BACKGROUND FACTS

On the basis of information obtained from a confidential informant, Detective Lindsey Jo Moorehead obtained a search warrant to install a GPS tracker on defendant's vehicle. After following defendant for six days, the police obtained a warrant to search defendant's home. The police arrested defendant while defendant was driving, and they found several hundred dollars and marijuana on his person. The police then searched defendant's home. During the search, the police found a bottle of codeine; two handguns; marijuana; a bulletproof vest; drug paraphernalia; and a safe that contained ammunition, about $13,000, and traces of cocaine.

Moorehead interviewed defendant while the other officers conducted the search of his home. According to Moorehead, defendant told her that the guns, the money, and the bulletproof vest belonged to him. He also stated that he used cocaine and crack cocaine and that he sold drugs to his friends. As will be discussed more fully, defendant maintains that he was not given his *Miranda*[1] rights, did not commit any of the charged offenses other than possession of marijuana, and did not confess to Moorehead. Defendant rejected a plea offer under which certain charges would not be brought if defendant waived the preliminary examination. Defendant proceeded with the preliminary exami-

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

nation.[2] Defendant was convicted and sentenced as stated earlier. Defendant obtained a *Ginther*[3] hearing, following which the trial court determined that trial counsel had not been ineffective. Defendant now appeals, arguing that if he had received competent advice from his trial attorney, he would not have rejected the first plea offer.

II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Defendants are entitled to the effective assistance of counsel when considering or negotiating a plea agreement. *People v Douglas*, 496 Mich 557, 591-592; 852 NW2d 587 (2014). Defense counsel's obligation was to properly advise defendant regarding "the nature of the charges or the consequences of the guilty plea" and the "possible defenses to the charges to which the defendant is pleading guilty," so defendant has "the ability to make an intelligent and informed choice from among his alternative courses of action." *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995). The proper remedy for ineffective assistance of counsel during plea negotiations will depend on the circumstances of the case, but it could potentially entail resentencing or requiring a rejected plea to be reoffered. *Lafler v Cooper*, 566 US 156, 171; 132 S Ct 1376; 182 L Ed 2d 398 (2012).

As with any other claim of ineffective assistance, "[t]he defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *Douglas*, 496 Mich at 592. "In the context of pleas a

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[2] Defendant also later rejected a substantially less generous plea offer before trial, but defendant emphasizes on appeal that his ineffective-assistance claim pertains only to the first plea offer.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 US at 163. Thus,

> [a] defendant seeking relief for ineffective assistance in this context must meet *Strickland* [*v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984)]'s familiar two-pronged standard by showing (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [*Douglas*, 496 Mich at 592, quoting *Lafler*, 566 US at 163.]

Lafler did not create a new rule of law but rather only established how the familiar *Strickland* test applied to plea negotiations. *People v Walker*, 328 Mich App 429, 448; 938 NW2d 31 (2019).[4] Counsel's performance is strongly presumed to have been "born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). This Court should not "substitute our judgment for that of counsel" or "use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). A trial strategy is not ineffective simply because it ultimately does not succeed. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). A strategy is also not ineffective because it entails taking calculated risks, especially if the range of available options for the defense is meager. *People v Pickens*, 446 Mich 298, 324-325; 521 NW2d 797 (1994).

When a defendant claims to be prejudiced by rejecting a plea offer on the basis of ineffective assistance of

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[4] Contrary to defendant's argument, the facts in *Walker* were meaningfully distinguishable from the facts in the instant matter. In *Walker*, the defendant's trial counsel did not even inform the defendant of a plea offer. *Walker*, 328 Mich App at 432.

counsel, the defendant must show (1) "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)"; (2) "that the court would have accepted its terms"; and (3) "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 US at 163-164. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court's findings of fact and reviews de novo questions of constitutional law. *Id*. This Court defers to the trial court's superior position to evaluate the credibility of witnesses who testified before it. *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018).

III. ANALYSIS

Defendant argues that he was denied his right to effective assistance of counsel because defense counsel misadvised him as to whether to reject the prosecution's plea offer and proceed to preliminary examination. We disagree.

Defendant was originally charged with storing a stolen firearm, felon in possession of a firearm, possession of codeine less than 25 grams, violent felon in possession of body armor, maintaining a drug house, and possession of marijuana. Before preliminary examination, the prosecution offered defendant the opportunity to plead guilty to storing a stolen firearm, felon in possession of a firearm, and possession of

codeine less than 25 grams in exchange for dismissal of the other three counts. The prosecution also warned defendant that if he proceeded to the preliminary examination, the prosecution would add charges of felony-firearm and felon in possession of ammunition to defendant's charges. Defendant decided to proceed to preliminary examination, and the additional charges were added.

It is not disputed that the rejected plea offer[5] would have resulted in a less serious array of convictions and sentences, and we presume, although we do not decide, that the prosecution would not have withdrawn the offer. *Lafler*, 566 US at 163-164. At issue is whether defendant would have accepted the offer if trial counsel had provided him with allegedly more competent advice and whether the trial court might have accepted the offer.

Initially, defendant asserts that trial counsel made a variety of alleged mistakes throughout the proceedings *after* the plea was rejected. Defendant's argument is difficult to follow, but it apparently turns on the theory that counsel's alleged subsequent errors, which defendant does not even assert constituted ineffective assistance of counsel, prove that he must have been ineffective in providing advice regarding the plea offer. What happened after defendant rejected the plea is irrelevant,[6] and in any event, a trial strategy is not ineffec-

[5] We reiterate that in his brief on appeal, defendant explains that his ineffective-assistance claim is based only on the first plea offer.

[6] We do, however, note that because defendant denied making a confession at all, rather than claiming that his confession occurred but was involuntary, his confession was properly a question of fact for the jury rather than a proper subject for a *Walker* hearing. See *People v Neal*, 182 Mich App 368, 371-372; 451 NW2d 639 (1990). Counsel is not ineffective for failing to pursue a meritless position. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

tive for being risky or unsuccessful. *Kevorkian*, 248 Mich App at 414-415; *Pickens*, 446 Mich at 324-325. Furthermore, trial counsel indicated his awareness that the confession was the most important piece of evidence, and his general goal was to try to find a way to suppress or undermine the confession despite having very little other evidence with which to work. Defendant having already made the decision to reject the plea offer by that time, we find nothing unsound about trial counsel's strategy or his implicit determination that the only available options were essentially a "long shot."

The heart of defendant's claim is that trial counsel erred by failing to "explain to [defendant] why there was no legal support for his claim of innocence" or "the legal implications of the facts to which [defendant] had admitted." Particularly, defendant argues that trial counsel failed to explain, before rejecting the plea offer, that defendant was "legally" guilty because of his confession; defendant argues that he was therefore incorrect to believe that he was innocent. Defendant apparently fails to comprehend two significant and fundamental legal incompatibilities with his argument.

First, a trial court may not accept a guilty plea without placing the defendant under oath and establishing a factual basis for the defendant's guilt. MCR 6.302; *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003). Courts in Michigan are required to evaluate a defendant's *actual* guilt before accepting a plea, not just "the mere expression of willingness by the prosecutor and defendant to strike a bargain." See *People v Butler*, 43 Mich App 270, 279-280; 204 NW2d 325 (1972). It is not disputed that defendant maintained his actual innocence of all charges other than

possession of marijuana, and he continued to maintain his actual innocence throughout the *Ginther* hearing. If defendant truly had not committed (or truly believed he had not committed) any of the crimes to which he allegedly confessed, then entering a guilty plea would have entailed committing perjury. MCL 750.423(1). It is per se not ineffective for counsel to refrain from seeking to admit perjured testimony; indeed, counsel is obligated to prevent a client from committing perjury of which counsel is aware. See *People v Collier*, 105 Mich App 46, 56; 306 NW2d 387 (1981); see also MCL 750.424; MCL 750.425.

Secondly, the jury was not required to believe the confession, even in the absence of any contradictory evidence. See *People v Jackson*, 390 Mich 621, 624-625; 212 NW2d 918 (1973); *People v Fuller*, 395 Mich 451, 453-454; 236 NW2d 58 (1975). Indeed, the jury is not even required to accept facts to which the parties have stipulated. M Crim JI 4.7. Trial counsel was emphatic that he explained to defendant that the confession, whether or not it was true, made acquittal an extremely unlikely outcome. Defendant is certainly correct that the confession made his defense difficult. However, defendant is incorrect to assert that the confession was somehow legally binding. Defendant's confession was a highly prejudicial piece of evidence, but nevertheless it was nothing more than a piece of evidence. The confession made an acquittal improbable, but it did not make defendant "legally guilty."

Furthermore, trial counsel explained that he wanted to proceed with the preliminary examination because he lacked information he believed might help him undermine or suppress the confession, he had been assured by the prosecution that there was no further discovery to be handed over, and therefore the prelimi-

nary examination might be defendant's only way to obtain that information. Trial counsel warned defendant of the risk of proceeding to preliminary examination. However, trial counsel also warned defendant that if he accepted the prosecution's plea offer, he would serve time in prison. According to trial counsel, when defendant realized he was facing a felony and potential prison time even under the plea offer, he was not willing to accept that plea offer. Additionally, as noted, defendant maintained that he was innocent and denied making a confession to Moorehead. Defendant contends that defense counsel never told him what it meant to add felony-firearm to his list of charges, but defense counsel testified that he did. To the extent defendant's testimony conflicts with trial counsel's testimony at the *Ginther* hearing, we defer to the trial court's finding that trial counsel was more credible. *Johnson*, 502 Mich at 565. The record shows that trial counsel reasonably and accurately advised defendant of the nature of the dilemma he faced, had a sound reason for proceeding with the preliminary examination, and properly refrained from suborning perjury.

As stated earlier, to prove ineffective assistance of counsel, a defendant must also show that defense counsel's objectively deficient performance prejudiced him. *Douglas*, 496 Mich at 592. The trial court did not clearly err by accepting trial counsel's testimony that defendant was disinclined to plead guilty to a felony he maintained he did not commit when such a plea would result in serving a prison sentence. Therefore, defendant did not meet his burden of establishing that he would have accepted the prosecution's plea offer and that there was "a reasonable probability that the plea offer would have been presented to the court . . . ." See *Lafler*, 566 US at 164. Furthermore, because defendant maintained his innocence, it is not clear that the trial

court could have established, to its satisfaction, a factual basis for a guilty plea. See MCR 6.302(D)(1). We are therefore also unpersuaded that the trial court would have accepted the plea. See *Douglas*, 496 Mich at 592. Even if trial counsel's advice had been objectively substandard, which it was not, defendant cannot establish that trial counsel's performance prejudiced him.

Affirmed.

O'BRIEN, P.J., and GADOLA, J., concurred with RONAYNE KRAUSE, J.

LEAGUE OF WOMEN VOTERS OF MICHIGAN v
SECRETARY OF STATE
SENATE v SECRETARY OF STATE

Docket Nos. 350938 and 351073. Submitted December 3, 2019, at Lansing. Decided January 27, 2020, at 9:00 a.m. Vacated in part, affirmed on alternative grounds in part, and cases remanded for dismissal 506 Mich 561 (2020).

The League of Women Voters of Michigan, Michiganders for Fair and Transparent Elections, and others (collectively, the League of Women Voters), filed a complaint in the Court of Claims for declaratory and injunctive relief against the Secretary of State (the Secretary) regarding 2018 PA 608, which amended the Michigan Election Law, MCL 168.1 *et seq*., in several respects. Specifically, the League of Women Voters objected to provisions in the public act limiting the total number of signatures used to determine the validity of initiative and referendum petitions to no more than 15% from any one congressional district, MCL 168.471, and provisions requiring paid petition circulators to file precirculation affidavits and to identify themselves as paid circulators on the face of the petition, MCL 168.482 and MCL 168.482a. The League of Women Voters sought a declaration that the challenged provisions of 2018 PA 608 were unconstitutional and a permanent injunction barring the Secretary from enforcing or giving any effect to the challenged provisions. The Michigan Senate and House of Representatives (the Legislature) also filed a complaint in the Court of Claims for declaratory and injunctive relief against the Secretary. The Legislature challenged an opinion solicited by the Secretary from the Attorney General, who concluded that certain provisions of 2018 PA 608 were unconstitutional, and sought declarations that the public act is constitutional and a valid exercise of the Legislature's authority and that it must be implemented and enforced by the Secretary. The League of Women Voters and the Legislature moved for summary disposition in their respective cases, and the Court of Claims consolidated the cases and permitted the parties to participate in either of the consolidated cases. The Court of Claims, CYNTHIA DIANE STEPHENS, J., determined that the Legislature lacked standing to sue because it had not demonstrated a particularized injury such that it would be detrimentally affected by the outcome of the case in a manner different from the citizenry at large.

However, the court accepted the papers filed by the Legislature as amicus briefs. The court determined that the 15% geographic limit on petition signatures violated the Michigan Constitution and that the provision requiring paid petition circulators to disclose their paid status to potential signatories via a checkbox on the petition sheets was also unconstitutional. The court ruled that the precirculation-affidavit requirement for paid petition circulators was not facially unconstitutional, was content-neutral, nondiscriminatory, and a valid check by the state on the integrity of the petition process. The League of Women Voters and the Legislature appealed, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The Legislature claims that it has standing to pursue a declaratory judgment in these cases because it has an interest in whether the legislation is upheld and asserts that it would be detrimentally affected by an adverse ruling in a manner different from the citizenry at large. The Court of Claims fully considered the Legislature's claims despite the court's determination that the Legislature lacked standing. Therefore, the Legislature is not an aggrieved party entitled to appeal as of right because it had the opportunity to assert its arguments before the lower court. Further, the Legislature has not demonstrated the existence of an actual controversy pursuant to MCR 2.605. A declaratory judgment is not necessary to guide the Legislature's future conduct in order to preserve its legal rights, because the Legislature's authority to enact laws is separate and distinct from the Court of Appeals' role in determining whether a particular law is unconstitutional. Further, any injury resulting from 2018 PA 608 not being enforced in its entirety is not unique to the Legislature. Once a statute is enacted, the legislators' special interest as lawmakers has ceased.

2. Const 1963, art 2, § 9 is a self-executing provision reserving to the people the power to propose, enact, and reject laws, called the initiative, and the power to approve or reject laws enacted by the Legislature, called the referendum. This provision further provides requirements for the number of registered electors that must sign a petition in order to invoke the powers of initiative or referendum. 2018 PA 608 adds an additional requirement to the petition process in the form of an obligation to limit signatures of registered electors to not more than 15% from one congressional district. The Legislature may not impose additional obligations on a self-executing constitutional provision, and legislation supplementary to self-executing constitutional provisions must further the exercise of the constitutional right and make it more available,

rather than limit it as does the 15% geographic cap. The 15% cap in MCL 168.471 and related provisions of 2018 PA 608 are unconstitutional.

3. The Court of Claims concluded that the checkbox requirement of MCL 168.482a requiring paid petition circulators to disclose their paid status was unconstitutional but that the portion of the act requiring paid petition circulators to file an affidavit attesting to their paid status did not violate the Constitution. Neither provision meets the exacting-scrutiny standard required for this issue involving core political speech protected by the First Amendment. The Legislature has not articulated a specific state interest that directly aligns with the checkbox requirement. According to the Legislature, the act was designed, in general, to increase transparency in elections and accountability for voters. However, the state's interest in the integrity of the petition does not outweigh the restriction on the ability of petition sponsors to communicate with voters. Because the checkbox requirement is not narrowly tailored to serve an overriding state interest, it does not pass exacting scrutiny and is unconstitutional.

4. The requirement in 2018 PA 608 that paid petition circulators must file an affidavit attesting to their paid status is unconstitutional. MCL 168.482a stipulates that the affidavit must be filed before circulating a petition, and if an affidavit is not filed by a paid circulator, any signature collected by that circulator will not be counted. This requirement imposes significant burdens on paid circulators that do not apply to volunteers, and it could result in violations of voters' rights to political speech if their signatures were not counted based on a circulator's failure to comply with the act's affidavit requirement. Additionally, the affidavit requirement may discriminate against smaller or unpopular charities that rely on paid circulators. The Legislature has not shown that the affidavit requirement serves the state's interest.

5. Although 2018 PA 608 does not address severability, courts have authority under MCL 8.5 to sever unconstitutional portions of statutes from the portions that pass constitutional muster. 2018 PA 608 can be given effect without the 15% geographic limit on petition signatures, the checkbox requirement, and the precirculation-affidavit requirement. Therefore, those provisions are stricken from the act.

Affirmed in part and reversed in part.

BOONSTRA, J., concurring in part and dissenting in part, agreed that the 15% geographic limit in MCL 168.471 and the affidavit requirement in MCL 168.482a are unconstitutional, but he disagreed that the Legislature lacked standing to pursue the case and that the checkbox requirement of MCL 168.482 is unconstitutional.

> He would have exercised the discretion of the Court of Appeals to find that the Legislature has standing, especially because the Legislature was the only party advocating for the constitutionality of 2018 PA 608. The Constitution does not contain a geographic limitation on the congressional districts of petition signatories, so adding such a requirement without amending the Constitution is unconstitutional. The affidavit requirement also does not survive constitutional scrutiny because it targets only paid petition circulators and could have the effect of disenfranchising voters who signed a petition without the precirculation affidavit having been filed. Judge BOONSTRA would have held that the checkbox requirement is constitutional because it applies equally to both volunteer and paid petition circulators. The checkbox requirement also does not prohibit any speech or restrict the content of speech and may have the effect of promoting transparency and full information.

Goodman Acker, PC (by *Mark Brewer*), *Nickelhoff & Widick, PLLC* (by *Andrew Nickelhoff*), and *Cummings & Cummings Law Group, PLLC* (by *Mary Ellen Gurewitz*) for the League of Women Voters of Michigan, Michiganders for Fair and Transparent Elections, Henry Mayers, Valeriya Epshteyn, and Barry Rubin.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Heather S. Meingast* and *Erik A. Grill*, Assistant Attorneys General, for the Secretary of State.

Bursch Law PLLC (by *John J. Bursch*) and *Dickinson Wright PLLC* (by *Charles R. Spies* and *Ariana D. Pellegrino*) for the Michigan Senate and House of Representatives.

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

SERVITTO, P.J. In these consolidated appeals, plaintiffs in both cases appeal as of right a September 27, 2019 opinion and order of the Court of Claims which addressed two central issues: the constitutionality of

certain provisions of 2018 PA 608 and whether or not the Senate and House of Representatives had standing to seek to uphold the constitutionality of a validly enacted statute. We affirm in part and reverse in part.

I. FACTS AND PROCEDURAL HISTORY

On December 28, 2018, 2018 PA 608 was signed into law. This public act amended the Michigan Election Law, MCL 168.1 *et seq*., in several respects. First, the act amended MCL 168.471, which governs petitions that propose an amendment to the Michigan Constitution, initiative petitions, and referendum petitions. Prior to amendment, this statute generally set forth the number of signatures that had to be obtained on the petitions and set forth timing requirements for filing the petitions. One of the features of 2018 PA 608 was to add a geographic requirement that limits the total number of signatures to be used to determine the validity of a petition to no more than 15% from one congressional district.[1] Signatures in excess of the 15% per-district limit would not be counted. Additionally, when filing petitions as provided for in that statute, submitters would be required to sort the signed petitions by congressional district and include a good-faith estimate regarding the number of signatures from each district.

Second, the act amended MCL 168.477, which governs the sufficiency of a petition. 2018 PA 608 added a requirement that when the Board of State Canvassers

[1] Michigan is divided into 14 congressional districts. The United States House of Representatives, *Directory of Representatives* <https://www.house.gov/representatives#state-michigan> (accessed August 27, 2020) [https://perma.cc/9WBV-NEDC]. All congressional districts span multiple counties except one: only District 13 involves a single county, Wayne County. See 2011 PA 128.

is making an official declaration of the sufficiency or insufficiency of an initiative petition, it may not count toward the sufficiency of the petition any valid signature of a registered elector from a congressional district submitted on that petition that is above the 15% limit described in MCL 168.471.

Third, the act amended MCL 168.482.[2] This statute previously addressed only the format and content of acceptable petitions. The amendment requires sponsors of ballot petitions to gather signatures on forms designated by congressional district rather than by county, the designation previously used. The amendment further adds several parts which (1) require paid petition circulators,[3] before gathering signatures, to file an affidavit with the Secretary of State (the Secretary) disclosing their nonvolunteer status;[4] (2) mandate that new petition forms contain a checkbox for a circulator to indicate whether they are a paid circulator;[5] and (3) require petition forms to contain a statement that, if a petition circulator fails to comply with the requirements, all signatures obtained by that circulator are invalid and will not be counted.[6] In addition, circulators who provide false information relating to their status as a paid circulator would be subject to criminal prosecution for a misdemeanor.[7]

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[2] 2018 PA 608 made other substantive changes to the Michigan Election Law, but those changes have not been challenged in this appeal, so they are not detailed here.

[3] The statute defines a "paid signature gatherer" as "an individual who is compensated, directly or indirectly, through payments of money or other valuable consideration to obtain signatures on a petition as described in section 471." MCL 168.482d.

[4] MCL 168.482a(1).

[5] MCL 168.482(7).

[6] MCL 168.482(8).

[7] MCL 168.482c.

On January 22, 2019, the Secretary, who is the chief election officer of the state and has supervisory authority over local election officials,[8] asked Michigan Attorney General Dana Nessel for a formal opinion regarding the constitutionality of 2018 PA 608 because it added new provisions regarding the invalidation of petition signatures that would have been considered lawful under the prior version of the law. By statute, the Attorney General gives opinions on questions of law posed by state officers. See MCL 14.32.

Relevant to the instant appeals, the Secretary inquired about the constitutionality of the act's 15% cap on the number of signatures allowable per congressional district, the requirement for submitters to sort petitions by congressional district, and the obligation for submitters to include a good-faith estimate of the number of signatures. The Secretary also asked whether the requirements for paid signature gatherers to file an affidavit before circulating petitions and a disclosure on the face of the petition that a circulator is paid were constitutional and whether she retained the authority to set forth the petition form for statewide ballot proposals in light of the mandate in 2018 PA 608 that sponsors use a congressional district form rather than a countywide form.

On May 22, 2019, the Michigan Attorney General issued Attorney General Opinion No. 7310. In the opinion, the Attorney General stated that the 15% geographic requirement based on congressional districts violates the petition and amendment provisions of the state Constitution, neither of which limit the number of signatures collected from one geographic region. She also opined that the requirement for circulators to

[8] MCL 168.21. See also Const 1963, art 5, § 3.

indicate on petitions whether they were paid did not further any asserted governmental interest and exposed the circulators to the risk of "heat of the moment" harassment, such that it was unconstitutional. The Attorney General additionally stated that no state interest was apparent regarding why the Secretary would need to receive an affidavit from the circulator regarding their paid status, particularly where the petitions will contain circulators' addresses, and thus concluded that the affidavit requirement was not substantially related to Michigan governmental interests and was unconstitutional. The Attorney General concluded that the following sections that were unconstitutional could be severed from the remainder of the act:

- the portions of MCL 168.471, MCL 168.477, and MCL 168.482(4) involving the 15% geographic requirement;
- MCL 168.482(7) and MCL 168.482c, regarding the checkbox requirement; and
- MCL 168.482a(1) and (2), involving the precirculation affidavit.

On May 23, 2019, plaintiffs League of Women Voters of Michigan, Michiganders for Fair and Transparent Elections, Henry Mayers, Valeriya Epshteyn, and Barry Rubin (collectively, the League of Women Voters) filed a complaint in the Court of Claims against the Secretary for declaratory and injunctive relief. In their complaint, the League of Women Voters asserted that the 15% cap on petition signatures from any one congressional district is an unconstitutional effort to amend the Constitution by legislation, violates the constitutional rights of free speech and association, and violates the right to petition. They further asserted that invalidation of signatures for technical circulator errors or omissions violates the same constitutional rights with respect to petition proponents and signers and also violates due

process. These plaintiffs thus sought a declaration that the challenged provisions of 2018 PA 608 are unconstitutional and additionally sought a permanent injunction barring defendant and her agents, officers, and employees from enforcing or giving any effect to the challenged provisions.

On June 5, 2019, the Michigan Senate and Michigan House of Representatives (the Legislature) also filed a complaint in the Court of Claims for declaratory and injunctive relief against the Secretary. These plaintiffs challenged the May 22, 2019 opinion of the Attorney General finding certain provisions of 2018 PA 608 unconstitutional, and they sought declarations that 2018 PA 608 is constitutional and a valid exercise of the Legislature's authority and that the law must be implemented and enforced by the Secretary.

The plaintiffs in both cases filed motions for summary disposition in July 2019. The League of Women Voters moved for summary disposition in its action against the Secretary pursuant to MCR 2.116(C)(10), asserting that there is no genuine issue of material fact that 2018 PA 608 is unconstitutional in several respects. The Legislature likewise moved for summary disposition pursuant to MCR 2.116(C)(10), contending that there is no genuine issue of material fact that 2018 PA 608 is presumptively constitutional and further withstands any challenges to its constitutionality.

The Court of Claims consolidated the cases. In a July 29, 2019 order, the Court of Claims also ordered that any parties in either of the two cases before it, for purposes of judicial economy and the avoidance of unnecessary costs and duplication of effort, "shall be permitted to file motions and papers, argue in hearings, and otherwise participate in either of the consolidated cases, subject to any further orders of the Court."

The League of Women Voters thereafter filed a second motion for summary disposition, this one against the Legislature pursuant to MCR 2.116(C)(6) and (10). The League of Women Voters asserted that the Legislature lacked standing to sue in the matter and that there was no genuine issue of material fact that 2018 PA 608 is unconstitutional.

After a hearing on all summary disposition motions, the Court of Claims issued a single opinion and order addressing all of the issues raised in both matters. At the outset, the Court of Claims determined that the Legislature had no standing to sue because it had not demonstrated a particularized injury such that it would be detrimentally affected by the outcome of the case in a manner different from the citizenry at large as is required to pursue its complaint and that its complaint in Docket No. 19-000092-MZ therefore had to be dismissed. The Court of Claims, however, treated the papers submitted by the Legislature as amicus briefs in the matter initiated by the League of Women Voters.

The Court of Claims next determined that the 15% geographic limit set forth in 2018 PA 608 is unconstitutional on its face. The court reasoned that the Michigan Constitution contains a self-executing provision that reserves the power of the initiative and referendum process to the people and the state Constitution establishes requirements in terms of the number of signatures needed to invoke the respective processes—without any limits on where those signatures can be gathered. The court opined that the Legislature was not permitted to impose additional obligations or undue burdens, such as the 15% geographic limit, on the self-executing constitutional provision governing the initiative and referendum pro-

cess. The court reached a similar conclusion with respect to the right of the citizenry to petition for constitutional amendment. The court further found that the 15% requirement in MCL 168.471 and other provisions in 2018 PA 608 relying on the 15% geographic requirement (MCL 168.477(1) and MCL 168.482(4)) could be and would be stricken from 2018 PA 608 and that the remainder of the act remained enforceable.

Next, the Court of Claims concluded that the requirement imposed on paid petition circulators in MCL 168.482(7) (requiring paid petition circulators to disclose their paid status on the face of petition sheets circulated to potential petition signers) does not substantially relate to a sufficiently important governmental interest and is therefore unconstitutional on its face. The court also found that this provision was severable from the remainder of 2018 PA 608.

The Court of Claims also found that MCL 168.482a, which requires paid petition circulators—but not volunteers—to file signed affidavits with the Secretary indicating that they will be paid to circulate a petition and to gather signatures, is not unconstitutional on its face. It found that the signature-invalidating provisions found in MCL 168.482a do not violate petition signers' rights of free speech and free association, nor do they violate due process because they are content-neutral, nondiscriminatory, and represent merely a check imposed by the state on the integrity of the petition process.

In sum, the Court of Claims ordered that the League of Women Voters was entitled to summary disposition in the case they initiated with respect to their requests for declaratory relief: (1) the 15% geographic requirement in MCL 168.471 is unconstitutional—as are the

sections of 2018 PA 608 related to the 15% requirement and/or congressional districts, see MCL 168.477(1) and MCL 168.482(4); and (2) the checkbox requirement in MCL 168.482(7) is unconstitutional. It ordered, however, that declaratory relief would not be entered in favor of the League of Women Voters concerning whether the affidavit requirement in MCL 168.482a(1) is unconstitutional on its face. The court further granted summary disposition in favor of the Secretary in that matter with respect to whether the signature-invalidation requirements contained in MCL 168.482a are unconstitutional. Finally, the court dismissed the Legislature's complaint due to its lack of standing.

Appeals ensued in both cases and this Court consolidated the matters for review. *League of Women Voters of Mich v Secretary of State*, unpublished order of the Court of Appeals, entered November 8, 2019 (Docket Nos. 350938 and 351073). This Court further allowed appellants in both cases to file briefs, motions, and other filings as if they were appellees in the others' appeals (*League of Women Voters of Mich v Secretary of State*, unpublished order of the Court of Appeals, entered December 19, 2019 (Docket Nos. 350938 and 351073)), and ordered that the appeals would be decided on the briefs filed, without oral argument, unless otherwise ordered. *League of Women Voters of Mich v Secretary of State*, unpublished order of the Court of Appeals, entered December 20, 2019 (Docket Nos. 350938 and 351073).

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for a summary decision in a declaratory-relief action. See *Mich Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725

(2000). The constitutionality of a statute presents a question of law, which also carries a de novo standard of review. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). And whether a party has standing is also a question of law subject to review de novo. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011).

III. STANDING

On appeal, the Legislature contends that it has standing to pursue a declaratory judgment in these matters because it has an interest in having this Court uphold the legislation it has passed, has a real interest in the cause of action, and will be a vigorous advocate. Moreover, the Legislature asserts that it has a special right and substantial interest that will be detrimentally affected in a manner different than the citizenry at large. We disagree.

As an initial matter, this Court has jurisdiction over appeals by right "filed by an aggrieved party." MCR 7.203(A). *Black's Law Dictionary* (11th ed) defines "aggrieved party" as "[a] party entitled to a remedy; [especially], a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006) (quotation marks and citation omitted).

Here the Legislature's arguments were fully considered and addressed by the Court of Claims, despite its holding that the Legislature had no standing. Indeed, the Legislature was permitted to file briefs in the

League of Women Voters' case in the Court of Claims and with this Court. The Legislature did not file a brief specific to the League of Women Voters' case here, but its appellant's brief, which contained both captions and docket numbers, was docketed in the League of Women Voters' appeal. The Legislature would therefore appear to derive no identifiable benefit in having this Court reverse the Court of Claims decision on the issue of standing. Accordingly, under the unique circumstances of these cases, the Legislature has had the opportunity to assert its arguments and is not an "aggrieved party" entitled to appeal the court's decision as of right under MCR 7.203. In the interest of thoroughness, this Court will nevertheless address the standing arguments proffered by the Legislature on appeal.

" 'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.' " *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (citations omitted). When standing is at issue in a case, "the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Id*. (quotation marks and citations omitted). "[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988). Where a cause of

action has not been provided by law,[9] a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . ." *Lansing Sch Ed Ass'n*, 487 Mich at 372. Thus, a litigant may have standing if (1) the litigant has a special right that will be detrimentally affected in a manner distinct from the citizenry at large, (2) has met the requirements of MCR 2.605, or (3) when the Legislature has intended to confer standing on the litigant under a particular statutory scheme. *Id*.

In this matter, the Legislature filed a complaint for declaratory action pursuant to MCR 2.605. That rule provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve [that plaintiff's] legal rights." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Where no actual controversy exists, a plaintiff does not have standing to bring a declaratory action. *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 534; 734 NW2d 533 (2007). The plaintiff therefore has the obligation to show that an actual controversy exists.

Given the definition of "actual controversy" for purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgment is

[9] 2018 PA 608 does not create a specific cause of action or expressly confer standing on the Legislature to enforce the act's provisions.

necessary to guide the Legislature's future conduct in order to preserve its legal rights. *UAW*, 295 Mich App at 495. The Legislature's authority to enact laws is separate and distinct from this Court's role in determining whether any law passes constitutional muster. These "rights" and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature's legal rights is not at issue.

While the Legislature asserts that it is the *only* real party in interest in ensuring that Michigan laws are enforced and upheld when the Attorney General will not do so, and may therefore file a declaratory action pursuant to MCR 2.605, it has provided no authority or support for this position. This Court need not search for authority to sustain a party's position. *Schellenberg v Rochester Elks*, 228 Mich App 20, 49; 577 NW2d 163 (1998). Moreover, we find the Legislature's position unconvincing.

Michigan appellate courts have not examined whether the Legislature as a whole has standing to challenge an Attorney General's opinion regarding the constitutionality of a statute. However, our Supreme Court has analyzed the standing issue in relation to individual legislators. In *House Speaker v State Admin Bd*, 441 Mich 547, 550; 495 NW2d 539 (1993), four legislators challenged the authority of the State Administrative Board to transfer funds between state departments. After the Governor asked the House and Senate Appropriations Committees to transfer funds, but the committees failed to act, the State Administrative Board transferred the funds. *Id*. at 552-553. Four individual members of the Legislature, two of whom were members of the House and Senate Appropriations

Committees, and the Speaker of the House and Minority Leader of the Senate, who selected at least some members of the appropriations committees, brought a declaratory action, arguing that the statutory authority for the transfer was unconstitutional. *Id*. at 553.

In their complaint, the plaintiffs alleged that the transfer actions of the board reduced their effectiveness as legislators, nullified the effect of their votes, interfered with the authority of the plaintiffs as members of the House and Senate Appropriations Committees to approve or disapprove intradepartmental transfers, and diminished the effectiveness of two of the plaintiffs who, as leaders, appointed members of their party to positions on the respective appropriations committees. *Id*. at 554-555. Our Supreme Court noted that to establish standing, a legislator must overcome a heavy burden because "[c]ourts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *Id*. at 555. Therefore, plaintiffs who sue as legislators must establish that they have been deprived of a personal and legally cognizable interest peculiar to them individually, rather than assert a generalized grievance that the law is not being followed. *Id*. at 556.

Our Supreme Court ultimately concluded that only one of the four plaintiffs had shown a personal and legally cognizable interest peculiar to him because he, as a member of the House Appropriations Committee, had been deprived of his right to approve or disapprove transfers made by the State Budget Director. In contrast, the plaintiff on the Senate Appropriations Committee was without standing, as that committee actually had voted to approve the transfer, and that plaintiff was not suing regarding the effectiveness of his vote, but rather was suing "to reverse the outcome

of a political battle that he lost." *Id*. at 561. The Court rejected as without basis the arguments of the remaining two plaintiffs that the board's action infringed upon their authority to appoint committee members and that it affected the Legislature's power to override a line-item veto. *Id*.

Applying the above legal framework to this case, the Legislature has a heavy burden to show that it has standing. There is no dispute that the Legislature would be a vigorous advocate, as it asserts. The question, however, is whether it has an interest that is distinct from that of the general public. Nothing in the text of 2018 PA 608 supports that the Legislature has a substantial and distinct interest in its enforcement.

Attempting to distinguish *House Speaker*, the Legislature argues that it did not lose a political battle and that it is not suing to reverse a legislative outcome. However, in light of the Attorney General's opinion, the Legislature is suing to reverse actions by the Secretary, a member of the Executive Branch. The Legislature is thus plainly challenging the actions of members of the Executive Branch. *House Speaker* stands for the proposition that courts should not confer standing in matters that have the real possibility of infringing upon the separation of powers.

To accept the Legislature's argument that it has standing here would open the door for the Legislature to seek a declaratory judgment whenever the constitutionality of a statute is challenged. Further, 2018 PA 608 was designed not to benefit the Legislature, but to amend the Michigan Election Law to set forth new requirements for voter-initiated petitions for ballot proposals and to invalidate signatures on noncomplying petitions. The Legislature simply has not shown

that it has a special interest in voter-initiated petitions that differs from the citizenry at large.

The Legislature argues that it has an interest in upholding the legislation that it has passed. But here it is the role of the courts, not the Legislature, to determine whether 2018 PA 608 is constitutional. A legal ruling regarding the constitutionality of certain provisions of the act will not deprive the Legislature of personal and legally cognizable authority that is peculiar to those chambers alone. Though the Legislature is essentially asserting that 2018 PA 608 was not enforced in its entirety, that injury is not personal or unique to the Legislature. This is particularly so, given that once the votes of the legislators have been counted and the statute enacted, "their special interest as lawmakers has ceased." See *Killeen v Wayne Co Rd Comm*, 137 Mich App 178, 189; 357 NW2d 851 (1984). Moreover, the validity of any particular legislative member's vote is not at issue; the public act was duly enacted into law. Rather, here the issue is the constitutionality of new conditions for filing voter-initiated petitions, and it impacts Michigan voters who sign petitions.

Relying on our Constitution, the Legislature also argues that it has standing because it has the "exclusive constitutional authority to regulate elections in the State of Michigan." See Const 1963, art 2, § 4 and art 4, § 1. While the Legislature is correct that it has certain authority to regulate elections in Michigan, it fails to acknowledge the people's authority to bring petitions, which is also constitutionally based. Const 1963, art 2, § 9 and art 12, § 2.[10] These specific constitutional pro-

[10] While the Legislature also argues that "[l]eaving the Court of Claims Opinion in place will result in a single member of the executive branch being able to exercise unchecked veto power over a bill that has already been passed and enacted into law," the Court of Claims analyzed

visions are explored more thoroughly in the next section. Suffice it to say that we are satisfied that the Legislature did not and does not have standing to bring a declaratory action in the matters at hand.

IV. CONSTITUTIONALITY OF 2018 PA 608

A. 15% GEOGRAPHIC REQUIREMENT

2018 PA 608 amended the Michigan Election Law to add the following 15% geographic limit:

> Not more than 15% of the signatures to be used to determine the validity of a petition described in this section shall be of registered electors from any 1 congressional district. Any signature submitted on a petition above the limit described in this section must not be counted. When filing a petition described in this section with the secretary of state, a person must sort the petition so that the petition signatures are categorized by congressional district. In addition, when filing a petition described in this section with the secretary of state, the person who files the petition must state in writing a good-faith estimate of the number of petition signatures from each congressional district. [MCL 168.471, as amended by 2018 PA 608.]

2018 PA 608 also amended the Michigan Election Law by indicating that signatures above the 15% geographic limit will not be counted by the Board of Canvassers:

> The board of state canvassers may not count toward the sufficiency of a petition described in this section any valid signature of a registered elector from a congressional

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the Attorney General's legal conclusions, this Court scrutinized those conclusions, and presumably, our Supreme Court will also consider the legal conclusions in the Attorney General's opinion. In light of that review process, it cannot be concluded that the Attorney General has "unchecked veto power" over 2018 PA 608.

> district submitted on that petition that is above the 15% limit described in section 471. . . . [MCL 168.477(1), as amended by 2018 PA 608.]

In addition, 2018 PA 608 requires petitions to indicate in which congressional district the people who sign the petition reside.

The Legislature argues that the requirements set forth above pass constitutional scrutiny and are valid means to ensure participation from voters within the entire state. The League of Women Voters, on the other hand, contends that the 15% cap violates the self-executing provisions of the state Constitution regarding ballot proposals and violates the rights to free speech, association, and petition. The Secretary agrees with the League of Women Voters.

In the context of a constitutional analysis, courts generally construe a statute as not violating the Constitution unless it clearly appears that the statute is unconstitutional. *In re Int'l Transmission Co*, 304 Mich App 561, 569; 847 NW2d 684 (2014). "Further, when considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003).

There are two general types of constitutional challenges. Whereas an "as applied" constitutional challenge considers the specific application of a facially valid law to individual facts, a "facial" constitutional challenge considers the plain language of the challenged provision (i.e., on its face). *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 n 20; 740 NW2d 444 (2007). Because 2018 PA 608 has yet to be enforced, the League of Women Voters' arguments regarding the act constitute a facial challenge. See *id*. A facial challenge

is a claim that the law is "invalid in toto—and therefore incapable of any valid application . . . ." *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974). In such a challenge, " '[t]he party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the [a]ct would be valid." ' " *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999) (citation omitted; second alteration in original).

To determine whether the 15% geographic limit survives a facial challenge, we first look to the constitutional provision at issue. Const 1963, art 2, § 9 governs initiative and referendum, providing, in pertinent part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

Constitutional initiative and referendum provisions, by which the people reserve to themselves a direct legislative voice, should be liberally construed to effectuate their purposes. *Bingo Coalition for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405, 410; 546 NW2d 637 (1996).

Significantly, Const 1963, art 2, § 9 is a self-executing constitutional provision. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971) (*Wolverine Golf Club II*). A constitutional provision is deemed self-executing "if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced . . . ." *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 725-726; 180 NW2d 820 (1970) (*Wolverine Golf Club I*) (quotation marks and citations omitted). "Whether a constitutional provision is self-executing is largely determined by whether legislation is a necessary prerequisite to the operation of the provision." *Id*. at 725.

Const 1963, art 2, § 9 specifically reserves the initiative and referendum power to the people and further provides a specific numerical mechanism through which to invoke the initiative or referendum—by obtaining "petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected." 2018 PA 608, however, clearly and unequivocally provides an *additional* requirement in the form of an obligation to limit signatures from specific geographic locations: "Not more than 15% of the signatures to be used to determine the validity of a petition described in this section shall be of registered electors from any 1 congressional district." MCL 168.471, as amended by 2018 PA 608. It is settled law that the Legislature may not act to impose additional obligations on a self-executing constitutional provision. *Soutar v St Clair Co Election Comm*, 334 Mich 258, 265; 54 NW2d 425 (1952).

Moreover, legislation supplementary to self-executing constitutional provisions " 'must be in harmony with the spirit of the Constitution and its object to further the exercise of constitutional right and make it more available, and such laws must not curtail the rights reserved, or exceed the limitations specified.' " *Wolverine Golf Club I*, 24 Mich App at 730, quoting *State ex rel Caldwell v Hooker*, 22 Okla 712, 718; 98 P 964 (1908). "Any statute which is both unnecessary for the effective administration of the initiative process and restrictive of the initiative right is unreasonable and thus unconstitutional." *Id*. at 735. Here, the 15% limitation is not in harmony with the spirit of Const 1963, art 2, § 9, which requires only a specified number of *electors*' signatures on relevant petitions. Further, the 15% cap limits, rather than furthers, the exercise of the constitutional right, making it less available. It thus curtails the rights reserved.

We recognize that Const 1963, art 2, § 9 also provides that "[t]he legislature shall implement the provisions of this section." The stricture of that section is, however, simply "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Wolverine Golf Club II*, 384 Mich at 466. The clear intent in this provision is "to limit the power of the legislature to that which is 'necessary' to the effective implementation of the initiative right." *Wolverine Golf Club I*, 24 Mich App at 735. Accordingly, while the Constitution places the duty of implementation of initiative and referendum provisions on the Legislature, it does so as an incident to the granting of a right to the people. Although administrative implementation is needed if the initiative process is to function smoothly, the administrative statutes may not create unnecessary burdens which tend to restrict the consti-

tutional right. "The spirit of the Constitution is not met if the rights it grants are unnecessarily impaired under the guise of implementation." *Id*.

Despite the clear limiting intent of the implementation language in Const 1963, art 2, § 9, the Legislature contends that this provision must be read in conjunction with Const 1963, art 2, § 4, and its broad delegation of power to the Legislature. Specifically, the Legislature directs us to Const 1963, art 2, § 4(2), which states, in part:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. . . .

The question here, however, is not whether the Legislature has the power to legislate; the question is whether the restrictions implemented by the legislation constitute an impermissible burden on the petition processes, the power over which the people reserved for themselves more than a century ago.

The opening language of Const 1963, art 2, § 4(2), "[e]xcept as otherwise provided in this constitution," signals that the legislative power is not unfettered, but instead is subject to other constitutional provisions. A reading of the constitutional provisions that pertain to petitions does not suggest that the Legislature may impose a requirement to cap the number of voter signatures to be counted from a particular geographic region. To the extent that the Legislature cites its authority to enact certain specifications for petitions, such as font size, clerical matters such as

that simply cannot be compared to the 15% cap on voters' signatures promoted here.

Although the Legislature indicates that its goal in enacting the 15% limit was to ensure participation from voters in the entire state, participating in the voting process is a *right* held by the *people*—not an obligation to be forced upon them by some means. And the 15% cap violates the rights of Michigan electors to participate in the electoral process by potentially excluding some from the petition process. Though the Legislature also generally asserts that 2018 PA 608 was intended "[t]o preserve the purity of elections and guard against abuses of the elective franchise related to ballot initiatives," the Legislature does not explain any specific impurities or abuses to be remedied by the 15% cap.

In *Todd v Boards of Election Comm'rs of Kalamazoo, Calhoun, Branch, Eaton & Hillsdale Cos*, 104 Mich 474, 483; 64 NW 496 (1895), our Supreme Court, quoting Justice Cooley's treatise on constitutional law, articulated the applicable standard courts are governed by in determining the constitutionality of acts passed by the Legislature to preserve the purity of elections. " 'All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot-box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them are absolutely essential.' " *Id.*, quoting Cooley, Constitutional Limitations, p 602. While "the 'purity of elections' concept has been applied in different factual settings, it unmistakably requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party v Secretary of State*, 412 Mich 571, 598; 317 NW2d 1 (1982).

Given its absolute cap on voters' signatures among geographic districts, 2018 PA 608 cannot be characterized as setting forth an "evenhanded" restriction akin to the types of restrictions that have been upheld in the past. For example, in *Consumers Power Co v Attorney General*, 426 Mich 1, 2-3; 392 NW2d 513 (1986), our Supreme Court addressed the constitutionality of 1973 PA 112, which instituted a rebuttable presumption that any signatures on petitions for constitutional amendments or initiative legislation that were made more than 180 days before the petition's filing date with the Secretary are stale and should be void. The statute's objective was to assure that only registered voters of Michigan could propose a constitutional amendment. *Id*. at 2-8. The restriction in that case can be considered closely aligned with its purpose to ensure that only Michigan registered voters signed petitions. In contrast, the objective of 2018 PA 608 has not been demonstrated to be closely related to the purity of the petition process. Further, here the 15% requirement is a ceiling, not a floor. Its effect would be to unconditionally deny untold numbers of registered voters the right to have their signatures counted, a fact that distinguishes it from the rebuttable presumption of staleness offered in *Consumers Power*.

Nothing in the plain language of Const 1963, art 2, § 4 provides a basis for the Legislature to control the number of voters' signatures to be counted toward a ballot petition and to categorically restrict voters who sign above the 15% limit of 2018 PA 608. Fairness and evenhandedness would be served by allowing all electors in the state who wish to sign a petition to have their signatures count. In the absence of any reasonable, supported argument suggesting otherwise, we do

not interpret the 15% cap as serving to preserve the purity of elections or guard against abuses of the elective franchise.

An important rule of constitutional construction "requires consideration of the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished . . . ." *House Speaker v Governor*, 443 Mich 560, 580; 506 NW2d 190 (1993) (quotation marks and citation omitted). And "the most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional Convention record." *Id*. at 580-581. Significantly, the delegates to the 1961 Constitutional Convention considered adding a 25% geographic requirement to the Constitution. Proponents gave reasons similar to those offered here: to gain an informed electorate and to prevent placement on the state ballot matters of only very local interest. 2 Official Record, Constitutional Convention 1961-1962, p 3200. Opponents stated that all signatures of voters should be equally counted, and the rule of "one person, one vote" should hold true for petition signers as well. The delegates voted down the geographic requirement. *Id*. at 3200-3201. The record makes manifest that the people specifically and deliberately chose not to add a geographic requirement to the Constitution. Had the people wanted to tie a geographic condition to the process, they would have done so. The constitutional provisions relating to petitions simply do not reference a geographic requirement that is tied to the power of initiative, referendum, or constitutional amendment, and a geographic component is clearly outside not only the language of the relevant constitutional sections but also the intent of the drafters of these sections.

Differences of opinion on initiatives are commonplace and addressed, as they should be, through the voting process. Setting a 15% geographic limitation serves to take power out of the hands of the people and requires, in essence, a pre-vote of agreement in a certain number of congressional districts as to whether or not a matter should be put to a general vote. This places the cart before the horse and unduly burdens the initiative and petition process. That the process would be more difficult was unrebutted below, where the League of Women Voters filed affidavits with the Court of Claims detailing the myriad increased time and cost burdens imposed by the 15% geographic requirement.[11]

In reaching our decision, we ultimately need only reach back to the most basic principles set forth in *Marbury v Madison*, 5 US 137, 177-178; 2 L Ed 60 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the

[11] We also note that the boundaries of congressional districts change every ten years and some districts have disappeared entirely throughout the years, providing yet more potential for confusion and added burdens associated with the 15% cap.

> legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbid[d]en, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

We hold that 2018 PA 608, specifically the provision in MCL 168.471 imposing a 15% geographic limit, constitutes an unnecessary and unreasonable restraint on the constitutional right of the people to initiate laws. It is therefore unconstitutional. The same holds true for MCL 168.477 and MCL 168.482(4), involving the 15% geographic requirement. As a result of this holding, we need not consider the League of Women Voters' alternative arguments on this issue.

B. CIRCULATORS

We next turn to the requirements set forth in 2018 PA 608 concerning petition circulators. Several parts of the act are at issue. First, MCL 168.482 provides, in relevant part:

> (7) Each petition under this section must provide at the top of the page check boxes and statements printed in

> 12-point type to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer.
>
> (8) Each petition under this section must clearly indicate below the statement required under subsection (7) and be printed in 12-point type that if the petition circulator does not comply with all of the requirements of this act for petition circulators, any signature obtained by that petition circulator on that petition is invalid and will not be counted.

2018 PA 608 also provides a criminal penalty for a false indicator of a circulator's status. Specifically, MCL 168.482c provides: "The circulator of a petition under section 482 who knowingly makes a false statement concerning his or her status as a paid signature gatherer or volunteer signature gatherer is guilty of a misdemeanor." Finally, MCL 168.482a(1) requires that "[i]f an individual who circulates a petition under section 482 is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer." If a paid circulator has not filed the affidavit, any signature obtained by the circulator is invalid, and if a circulator's petition does not meet the necessary requirements under § 482, any signature on that petition is invalid. MCL 168.482a(2) and (4).

The Court of Claims concluded that the checkbox requirement does not substantially relate to a sufficiently important governmental interest and is therefore unconstitutional. It upheld, however, the affidavit requirement. On appeal, the Legislature asserts that both requirements are constitutional, whereas the League of Women Voters asserts that neither is. We agree with the League of Women Voters.

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Const, Am I. The Fourteenth Amendment makes that prohibition applicable to the states. See US Const, Am XIV. Where, as here, First Amendment rights are implicated, the Supreme Court has held that exacting scrutiny is applied.

In *Meyer v Grant*, 486 US 414, 415-417; 108 S Ct 1886, 100 L Ed 2d 425 (1988), proponents of an initiative to amend the state of Colorado's constitution brought an action to challenge the constitutionality of Colorado's statutory prohibition against paying circulators of initiative petitions. The proponents sought a declaration that the statutory payment prohibition violated their First Amendment rights. *Id*. at 417. On review, the Supreme Court noted that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id*. at 421 (quotation marks and citation omitted). It then stated:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication

> concerning political change that is appropriately described as "core political speech." [*Id*. at 421-422.]

The Supreme Court opined that the prohibition on paid petition circulators restricted political expression by restricting the number of people who would carry the sponsors' message, thereby limiting the size of the audience, and would make it less likely that sponsors would obtain the necessary signatures, thereby limiting the odds that they could garner a statewide ballot proposal. *Id*. at 422-423. It therefore determined that the statute involves a limitation on political expression subject to exacting scrutiny. *Id*. at 420.

Ultimately, the Supreme Court found that the statute violates the First and Fourteenth Amendments. "[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. That principle applies equally to the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id*. at 428 (quotation marks and citation omitted; bracket in original). "The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify." *Id*. In reaching its conclusion, the Court rejected the state's claimed interest in protecting the integrity of the petition process, reasoning that the state had not shown that it needed to burden the sponsors' ability to communicate to preserve that process. *Id*. at 425-426. The Court also noted that the state had not offered evidence that a paid circulator would be more likely to pad signatures, and declined to make that presumption. *Id*. at 426.

Similarly, in *Buckley v American Constitutional Law Foundation, Inc*, 525 US 182, 186; 119 S Ct 636; 142 L Ed 2d 599 (1999), the Supreme Court reviewed condi-

tions that Colorado statutes placed on the ballot-initiative process. Relevant to the instant matter, one of the conditions was the requirement that circulators wear identification badges bearing the circulator's name and whether the circulator was paid or was a volunteer. *Id*. Recognizing that "the First Amendment requires us to be vigilant in . . . guard[ing] against undue hindrances to political conversations and the exchange of ideas," the *Buckley* Court held that the restrictions at issue "significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Id*. at 192. The timing of the disclosure, at the same time the circulator's political message was revealed, was of significant importance to the *Buckley* Court because it "forces circulators to reveal their identities at the same time they deliver their political message; it operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned." *Id*. at 198-199 (quotation marks and citation omitted).[12]

Meyer and *Buckley* instruct that exacting scrutiny is applied to the core political speech at issue in this case. The exacting-scrutiny standard "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v Reed*, 561 US 186, 196; 130 S Ct 2811; 177 L Ed 2d 493 (2010) (quotation marks and citation omitted). For a

[12] Although the *Buckley* Court expressly declined to address the constitutionality of the paid/volunteer indicator on the badge (*Buckley*, 525 US at 200), the concerns about the timing of disclosures a circulator may otherwise choose to keep private are no less compelling in circumstances where the status of the circulator is at issue.

statute or regulation to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. (quotation marks and citation omitted). When a law burdens core political speech, exacting scrutiny applies and the restriction is upheld "only if it is narrowly tailored to serve an overriding state interest." *McIntyre v Ohio Elections Comm*, 514 US 334, 347; 115 S Ct 1511; 131 L Ed 2d 426 (1995). Moreover, when the government burdens speech, "the Government bears the burden of proving the constitutionality of its actions"; i.e., the government bears the burden of identifying a substantial interest and justifying its restriction. *United States v Playboy Entertainment Group, Inc*, 529 US 803, 816-817; 120 S Ct 1878; 146 L Ed 2d 865 (2000).

Here, the Legislature has not articulated a specific state interest directly aligned with the mandate in 2018 PA 608 that petition circulators check a box regarding their paid or volunteer status. The Legislature instead has indicated that 2018 PA 608 in general was designed to increase transparency in elections and accountability for voters. *Meyer*, however, weighed the state's interest in the integrity of the petition but found it did not outweigh the restriction on the sponsors' ability to communicate with voters.

The Legislature relies upon *Citizens in Charge v Gale*, 810 F Supp 2d 916 (D Neb, 2011), to support its position otherwise. Not only is this case not binding on this Court,[13] we are not persuaded by the decision reached in that matter. Significantly, the *Gale* court made its determination concerning a law that bur-

[13] "Although lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

dened core political speech by placing the burden on the parties alleging a violation of their First Amendment rights: "Neither the plaintiffs nor the intervenors offered any significant or substantially credible evidence that the required language, color and type impaired their ability to obtain signatures." *Id*. at 928. This shifting of the burden was inappropriate given the clear mandate by the United States Supreme Court that, when First Amendment rights are implicated, "the Government bears the burden of proving the constitutionality of its actions." *Playboy Entertainment Group*, 529 US at 816.

The checkbox requirement forces petition circulators to make disclosures to potential petition signers at the same time the circulators are delivering their political message and at a time "when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned." *Buckley*, 525 US at 199 (quotation marks and citation omitted). This type of compelled disclosure discourages participation in the petition circulation process and inhibits core political speech. See *id*. at 192, 200. Again, for a statute or regulation to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 US at 196 (quotation marks and citation omitted). Where, as here, no real governmental interest has been asserted, let alone been proven, the circulators' right to be free from potential "heat of the moment" harassment and to protect their privacy regarding their status as either a paid circulator or a volunteer, as well as the sponsors' right to have circulators engage in discourse with voters, outweigh the state's generally stated interests in transparency and accountability.

The Legislature has simply not demonstrated that the checkbox requirement in 2018 PA 608 is necessary to serve its vaguely asserted interests. To the extent that the Legislature contends that the checkbox is intended to inform the electorate of a circulator's paid or volunteer status, if any potential signer seeks such information, they could simply ask the circulator. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 US at 348. We hold that the checkbox requirement is not narrowly tailored to serve an overriding state interest. The checkbox requirement does not pass exacting scrutiny in this matter and is therefore unconstitutional.[14]

We find that the same holds true for the affidavit requirement. Notably, 2018 PA 608 requires only paid petition circulators, but not volunteer circulators, to file an affidavit before circulating a petition and mandates that, if an affidavit is not filed, signatures collected by those circulators will not be counted:

> (1) If an individual who circulates a petition under section 482 is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer.

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[14] We recognize that the checkbox appears to be a minor burden on circulators. However, even if this Court were to apply a lesser scrutiny, such as the sliding scale addressed in *Citizens for Tax Reform v Deters*, 518 F3d 375, 380 (CA 6, 2008), we would still find the checkbox requirement unconstitutional. Although the burden applies in equal force to both paid and unpaid circulators, the fact remains that the Legislature has offered no realistic justification for the burden, as is its obligation when burdening core political speech protected by the First Amendment.

> (2) Any signature obtained on a petition under section 482 by an individual who has not filed the required affidavit under subsection (1) is invalid and must not be counted. [MCL 168.482a.]

As noted, 2018 PA 608 also provides a penalty for a false indicator of that status.[15]

The United States Supreme Court has clearly recognized First Amendment protections for paid petition circulators. In *Meyer*, the Supreme Court struck down Colorado's prohibition on the use of paid petition circulators. *Meyer*, 486 US at 416, 428. In *Buckley*, the Supreme Court rejected, on First Amendment grounds, portions of a Colorado statute requiring reports disclosing information regarding only paid petition circulators, including their names, their addresses, and the amounts paid to those circulators. *Buckley*, 525 US at 201-204. The Supreme Court held that "[l]isting paid circulators and their income from circulation forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts." *Id*. at 204 (second alteration in original). The Supreme Court further held that the reporting requirements were "no more than tenuously related" to the substantial state interests that disclosure serves, and it ruled that to the extent that reports targeted paid circulators, they failed the exacting-scrutiny test. *Id*. Although *Buckley* is distinguishable because the legislation at issue in that case required the disclosure of the circulators' names and other identifying information, the affidavit requirement here still makes circulators fulfill a requirement that their volunteer counterparts need not.

The affidavit requirements do not simply target paid circulators, similar to the provisions struck down in

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[15] See MCL 168.482c.

Buckley, they also impose substantial burdens on paid circulators that are not shared by volunteer circulators. First, although 2018 PA 608 contains a definition of a "paid signature gatherer,"[16] there may be issues concerning the clarity of that definition. If circulators have any doubts regarding their status, they may not be aware of the need to file a precirculation affidavit. This could impinge on the voters' right to political speech because the voters' signatures on those circulators' petitions would not be counted.

Second, as demonstrated from the affidavits in the lower-court record, time is of the essence in any petition campaign. The affidavit requirement will make sponsors' political speech more difficult by increasing the time required in petition drives when paid circulators must file affidavits before circulating any petitions. Volunteer circulators would not, of course, be subject to the more limited time frame constraining paid circulators.

Third, the affidavit requirement for some circulators but not others based on whether work is paid will result in harsher treatment for organizations that must rely on paid circulators. See *Riley v Nat'l Federation of the Blind of North Carolina, Inc*, 487 US 781, 799; 108 S Ct 2667; 101 L Ed 2d 669 (1988) (explaining that a requirement applying to only paid personnel making charitable solicitations "necessarily discriminates against small or unpopular charities" that typically rely on professional fundraisers).

Given the fact that the affidavit must be submitted before signatures may be collected, and that it applies only to paid signature gatherers, it can be seen as

[16] The statute indicates that a paid signature gatherer is "an individual who is compensated, directly or indirectly, through payments of money or other valuable consideration to obtain signatures on a petition as described in section 471." MCL 168.482d.

imposing a significant burden on the right of political speech protected by the First Amendment. This Court must balance this burden against the state's interests in transparency and providing voters with useful information about the electoral process.

The Legislature has not shown why an affidavit relating to an individual circulator's status, rather than information from sponsors of a petition, would aid in serving the state's interests. It is beyond dispute that Michigan has an important interest in an orderly petition process. The Legislature, however, has presented very little basis for a conclusion that the requirement in 2018 PA 608 for a precirculation affidavit to be filed only by people who receive remuneration for their petition circulation is either necessary or substantially related to that interest. Indeed, the Secretary indicates in her appeal brief that under existing law, petitions must already contain the circulator's address and that "[i]t is not apparent . . . why she would need, or be helped by, receiving the additional detail that a circulator is paid."

The Legislature has not shown that the state's interests are furthered by the disclosure requirement, which singles out only paid circulators and burdens the sponsors' political speech by imposing a requirement that circulators must file an affidavit before obtaining signatures. The affidavit requirement is therefore unconstitutional.

V. SEVERABILITY

Having found certain portions of 2018 PA 608 unconstitutional, we must necessarily address whether such portions can be severed from the remainder of the act.

2018 PA 608 does not address severability. However, it is indisputable that courts have statutory authority

to sever unconstitutional portions of statutes from the whole:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable. [MCL 8.5.]

Moreover, it has long been held that courts will not invalidate an entire act if the offending provisions can be severed from the act. *Avis Rent-A-Car Sys, Inc v City of Romulus*, 400 Mich 337, 348-349; 254 NW2d 555 (1977).

2018 PA 608 can be given effect without the 15% geographic requirement, the checkbox requirement, and the precirculation-affidavit requirement. There is and has been no argument otherwise. Therefore, sections relating to those requirements are stricken from the act. This Court affirms the Court of Claims ruling which struck the 15% geographic requirement in MCL 168.471, MCL 168.477(1), and MCL 168.482(4), as well as the checkbox requirement in MCL 168.482(7). We reverse the Court of Claims ruling that the affidavit requirement passes constitutional muster and strike the precirculation-affidavit requirement of MCL 168.482a(1).

Affirmed in part and reversed in part.

GADOLA, J., concurred with SERVITTO, P.J.

BOONSTRA, J. (*concurring in part and dissenting in part*). For the reasons that follow, I concur with the majority opinion in concluding that the 15% geographic limit set forth in MCL 168.471 and the affidavit requirement of MCL 168.482a(1) and (2) are unconstitutional. I respectfully dissent, however, from the majority's decision to affirm the denial of standing to the Legislature in this case, and I would instead, at a minimum, exercise our discretion to fully entertain the Legislature's arguments in this matter. I also dissent from the majority's determination that the checkbox requirement of MCL 168.482 is unconstitutional. I further concur with the majority that the unconstitutional provisions are severable from the remainder of 2018 PA 608.

I. STANDING

Although the majority acknowledges that the Senate and House of Representatives (the Legislature) were permitted to file briefs both in the Court of Claims and in this Court, it nonetheless proceeds to hold that the Legislature lacks standing. I disagree with its decision to affirm the denial of standing to the Legislature in this case and would instead, at a minimum, exercise our discretion to fully entertain the Legislature's arguments in this matter.

To properly address the standing issue, we must first consider the evolution of Michigan law on the subject. In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), our Supreme Court overruled its earlier decisions in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and its progeny, and held that "Michigan standing jurisprudence should be restored to a limited,

prudential doctrine that is consistent with Michigan's longstanding historical approach to standing." *Lansing Sch Ed Ass'n*, 487 Mich at 352-353, 372. It rejected the determination of those earlier cases that standing was a "constitutional requirement" and that "a lack of standing equated to the lack of a controversy necessary for the invocation of the judicial power under the Michigan Constitution." *Id*. at 365. It noted that "before *Lee*, from the [standing] doctrine's inception this Court has at times addressed a case's merits despite concluding that the parties lacked standing." *Id*.

The Court in *Lansing Sch Ed Ass'n* thus jettisoned the *Lee* Court's approach and held that "Michigan's standing doctrine should be restored to an approach that is consistent with the limited, prudential approach used historically." *Id*. at 355. In describing that historical approach, the Court noted that "[s]tanding was a prudential limit, which is to say that the court's decision to invoke it was 'one of discretion and not of law.' " *Id*. (citations omitted). The Court thus concluded that under the restored, limited, prudential approach, "a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Id*. at 372. Moreover,

> [w]here a cause of action is not provided at law, then a court should, *in its discretion*, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id*. (emphasis added).]

In sum, the restoration of the limited, prudential approach to standing in *Lansing Sch Ed Ass'n* made it *easier* to establish standing, or at least transformed the previously existing *requirement* of standing into a *discretionary* consideration for the courts. I would exercise our discretion in this case so as to allow the Legislature's claim and to fully consider its arguments.

The Supreme Court in *Lansing Sch Ed Ass'n* also noted that "[t]he purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.' " *Id*. at 355 (citation omitted). There can be little doubt that the Legislature satisfies that test in this case. The real question (apart from the discretionary consideration of whether to invoke the standing doctrine at all) is whether the Legislature also has "a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large." *Id*. at 359.

The circumstances of this case are unique. The duly elected Legislature enacted 2018 PA 608, and it was signed into law. The Secretary of State (the Secretary) subsequently declined to enforce aspects of that law, premised on the Attorney General's opinion that they were unconstitutional. The Legislature posits that it possesses a " 'substantial interest' in regulating elections in Michigan that is distinct from the general public," because it has a constitutional duty to "regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, § 4(2) and art 4, § 1. Whether the Legislature is

correct on the merits, i.e., whether its constitutional duty in that regard has been impaired, is not the question. That is because "the standing inquiry [is] distinct from the merits of the case." *Lansing Sch Ed Ass'n*, 487 Mich at 356. Rather, the question is whether the Legislature has a "substantial interest that would be detrimentally affected in a manner different from the citizenry at large." *Id*. at 359.

The majority acknowledges that our state appellate courts have not addressed whether the Legislature as a whole has standing in circumstances such as this. It relies instead on *House Speaker v State Admin Bd*, 441 Mich 547, 550; 495 NW2d 539 (1993), in which four individual legislators challenged the authority of the State Administrative Board, under MCL 17.3, to transfer funds between state departments. The issue in that case was one of statutory interpretation, not of constitutional dimension. In concluding that only one of the four individual legislator-plaintiffs had standing, the Court distinguished the legislator's interest from that of the others by noting that he was "suing to maintain the effectiveness of his vote under the Management and Budget Act." *Id*. at 560-561. Similarly, in my judgment, the Legislature here is suing to maintain the effectiveness of its collective votes in enacting 2018 PA 608, which the Secretary is now declining (at least in part) to enforce.

I note that the Secretary argues that this is insufficient to confer standing, stating:

> Just as "a generalized grievance that the law is not being followed" is not a sufficient injury to confer standing on an individual legislator, [*House Speaker*], 441 Mich at 556, neither is it a sufficient "institutional injury" to support standing of the Senate and House as an institutional body. See, e.g, *Virginia House of Delegates v Bethune-Hill*, [587]

> US ___, [___;] 139 S Ct 1945, 1953[; 204 L Ed 2d 305] (2019) (discussing legislative standing to defend constitutionality of statutes).

However, in "discussing legislative standing to defend [the] constitutionality of statutes" (as the Secretary describes the case) the United States Supreme Court in *Virginia House of Delegates* held only that "a *single House of a bicameral legislature* lacks capacity to assert interests belonging to the legislature as a whole." *Virginia House of Delegates*, 587 US at ___; 139 S Ct at 1953-1954 (emphasis added). Indeed, the Court distinguished the situation in *Virginia House of Delegates* (in which only a single House of a bicameral legislature brought suit) from the situation in *Arizona State Legislature v Arizona Independent Redistricting Comm*, 576 US 787; 135 S Ct 2652; 192 L Ed 2d 704 (2015), "in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority under the Federal Constitution over congressional redistricting." *Virginia House of Delegates*, 587 US at ___; 139 S Ct at 1953. In this case, of course, both houses of the bicameral Michigan Legislature, acting together, have brought suit. Notwithstanding the Secretary's reliance upon it, *Virginia House of Delegates* therefore actually *supports* the Legislature's claim of standing in this case.

Moreover, I find little solace in the majority's observation that "the Court of Claims analyzed the Attorney General's legal conclusions, this Court scrutinized those conclusions, and presumably, our Supreme Court will also consider the legal conclusions in the Attorney General's opinion." "Under our adversarial system, each party bears the responsibility for ensuring that its

positions are vigorously and properly advocated," and " 'parties frame the issues and arguments' for the trial court." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 382-383; 775 NW2d 618 (2009) (citations omitted). Courts do not function both as advocate and adjudicator. Yet, apart from the Legislature, there would appear to be no one to argue in opposition to the position taken jointly by plaintiffs (in Docket No. 350938), the Secretary (defendant in both dockets) and the Attorney General (who is representing the Secretary in both dockets, premised on the Attorney General's own legal opinion),[1] particularly within the attenuated time frame within which these issues must be decided in advance of the procedural run-up to the 2020 elections. This, to me, is troubling, and it counsels toward affording standing to the Legislature in this circumstance or, at a minimum, toward exercising our discretion under the restored, limited, prudential approach to standing of *Lansing Sch Ed Ass'n*, so as to fully entertain the Legislature's arguments in this matter.

For these reasons, I dissent from the majority's decision to affirm the denial of standing to the Legis-

[1] According to the Legislature, this case represents an "incredibly rare" circumstance in which "the Attorney General . . . refuse[s] to defend a statute and instead . . . affirmatively attack[s] it. Historically, even when the Attorney General disagreed with a policy embodied in the statute, the Office of the Attorney General would set up a conflict wall and appoint assistant attorneys general to argue both sides of the dispute. In that way, there were always attorneys defending the Legislature's enactment." See also MCL 14.28 ("[T]he attorney general shall also, when requested by . . . either branch of the legislature, . . . intervene in and appear for the people of this state in any . . . court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested."). Had the Attorney General followed that procedure in this case, the standing issue would be moot and much angst and gnashing of teeth could have been avoided.

lature in this case and would instead, at a minimum, exercise our discretion to fully entertain the Legislature's arguments in this matter.

II. CONSTITUTIONALITY OF 2018 PA 608

A. 15% GEOGRAPHIC REQUIREMENT

I concur in the majority's determination that the provision in MCL 168.471 imposing a 15% geographic limit is unconstitutional. Put simply, in order to interpret our Constitution as a cohesive whole, the Legislature's constitutional authority must be read in a manner that is consistent with other constitutional provisions and limitations. *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 9; 818 NW2d 337 (2011). Specifically, Const 1963, art 2, § 9 states in part:

> To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than *eight percent for initiative* and *five percent for referendum* of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required. [Emphasis added.]

Although Const 1963, art 2, § 9 expressly imposes numerical requirements for petition signatures required for initiative or referendum, it says nothing about limiting the percentages of those petition signatures per congressional district, or otherwise. Indeed, a geographic-limitation proposal was presented to the 1961 constitutional convention and, wisely or not, it was rejected. Although the Legislature has constitutional authority to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to

provide for a system of voter registration and absentee voting," Const 1963, art 2, § 4(2), that authority is limited by its own terms. See *id*. (stating that the Legislature has this authority "[e]xcept as otherwise provided in this constitution or in the constitution or laws of the United States . . . ."). It therefore remains subject to the limitations that are inherent in Const 1963, art 2, § 9.

I conclude that where, as here, the Constitution speaks to the initiative and referendum process and provides specific numerical percentages for the petition signatures required for initiative or referendum, and where the convention that adopted that Constitution specifically rejected a proposal for additional requirements akin to the 15% limitation of MCL 168.471, such a proposal may only be accomplished by way of constitutional amendment, not by legislation. Consequently, I concur with the majority that the 15% geographic limit of MCL 168.471 is unconstitutional.

B. CHECKBOX REQUIREMENT

I disagree with the majority's treatment of the checkbox requirement of MCL 168.482, and therefore dissent from that portion of the majority's opinion. I would instead hold that requirement to be constitutional.

MCL 168.482 sets forth various requirements for the size, form, and content of a petition for constitutional amendment, initiative, or referendum, and pertinent to this appeal, provides, in part:

> (7) Each petition under this section must provide at the top of the page check boxes and statements printed in 12-point type to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer.

> (8) Each petition under this section must clearly indicate below the statement required under subsection (7) and be printed in 12-point type that if the petition circulator does not comply with all of the requirements of this act for petition circulators, any signature obtained by that petition circulator on that petition is invalid and will not be counted. [MCL 168.482.]

I am unpersuaded that the checkbox requirement is unconstitutional. This is so particularly because the requirement applies, evenhandedly, to both paid and volunteer circulators. And I do not find the cases relied upon by the majority compelling in the current context.

In *Meyer v Grant*, 486 US 414, 415-416, 428; 108 S Ct 1886, 100 L Ed 2d 425 (1988), the United States Supreme Court considered a Colorado statute that prohibited the payment of circulators of initiative petitions, and the Court concluded that the blanket prohibition unconstitutionally limited political expression. Nothing akin to that exists in this case.

In *McIntyre v Ohio Elections Comm*, 514 US 334, 338 n 3, 357; 115 S Ct 1511; 131 L Ed 2d 426 (1995), the Supreme Court held unconstitutional an Ohio statute that prohibited the distribution of anonymous campaign literature; in other words, the statute required that campaign literature contain the name and address of the person or campaign official issuing the literature. This case presents no such requirement.

Similarly inapt is the majority's citation of *Buckley v American Constitutional Law Foundation, Inc*, 525 US 182; 119 S Ct 636; 142 L Ed 2d 599 (1999). In *Buckley*, the Supreme Court struck down a Colorado statute that required circulators to wear identification badges bearing the circulator's name, concluding that the requirement "discourages participation in the petition circulation process by forcing name identification with-

out sufficient cause." *Id*. at 200. As the majority acknowledges, however, the Court expressly declined to address "whether the additional requirements—that the badge disclose the circulator's paid or volunteer status, and if paid, by whom—'would pass constitutional muster standing alone.' " *Id*. (citation omitted).

In this case, by contrast, 2018 PA 608 contains no requirement that a petition circulator disclose his or her identity. Indeed, it contains only one portion of the "additional requirements" whose constitutionality the Court in *Buckley* declined to address. *Buckley* does not support a finding of unconstitutionality here.

Finally, the majority cites *United States v Playboy Entertainment Group, Inc*, 529 US 803, 811-812; 120 S Ct 1878; 146 L Ed 2d 865 (2000), in which the Supreme Court held unconstitutional a statutory content-based restriction on cable television transmissions. No content-based speech restriction is at issue in this case.

In sum, the checkbox requirement of MCL 168.482 applies equally to paid and volunteer circulators. It does not compel circulators to provide their name (or address), prohibit any component of speech, or restrict the content of speech. Indeed, the requirement would seem to promote full information and transparency with prospective voters and petition signers. The Legislature additionally cites the "small burden on First Amendment activity" imposed by the checkbox requirement, "coupled with an important and well-established governmental interest to which the disclosure requirement is substantially related," i.e., deterring election fraud. *Libertarian Party of Ohio v Husted*, 751 F3d 403, 418 (CA 6, 2014) (affirming the denial of a preliminary injunction of an Ohio statute that required circulators to provide the names and addresses of their employers). I note, however, that unlike the statute at issue in

Husted, the checkbox requirement in this case does not require circulators to disclose information identifying their employers.[2] I perceive no basis for assuming that the checkbox requirement would induce "heat of the moment" harassment. I would hold it to be constitutional. See *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11; 743 NW2d 902 (2008) ("Statutes are presumed constitutional unless the unconstitutionality is clearly apparent.").

C. AFFIDAVIT REQUIREMENT

I join the majority, however, in concluding that the affidavit requirement of MCL 168.482a(1) and (2) does not survive constitutional scrutiny. Unlike the checkbox requirement, the affidavit requirement is targeted only toward paid circulators and therefore is not evenly applied. It mandates that the required affidavits be filed before petition signatures are gathered. And it disenfranchises voters who signed a petition without the required precirculation affidavit being filed—but, again, only for petitions circulated by paid circulators. While a more evenhanded affidavit requirement imposing different timing requirements for the filing of the affidavits might survive constitutional muster, I conclude that this one does not.

III. CONCLUSION

For all of these reasons, I concur with the majority opinion in concluding that the 15% geographic limit set

[2] The Sixth Circuit in *Husted* distinguished its earlier precedent in *Citizens for Tax Reform v Deters*, 518 F3d 375 (CA 6, 2008) (which had struck down a statutory prohibition on paying circulators on a per-signature or per-volume basis), finding "no convincing evidence that the employer disclosure requirement at issue in this case would significantly diminish petition circulation, if at all." *Husted*, 751 F3d at 420.

forth in MCL 168.471 and the affidavit requirement of MCL 168.482a(1) and (2) are unconstitutional. I respectfully dissent, however, from the majority's decision to affirm the denial of standing to the Legislature in this case and from its determination that the checkbox requirement of MCL 168.482 is unconstitutional. I further concur with the majority that the unconstitutional provisions are severable from the remainder of 2018 PA 608.

SMITH v STRAUGHN

Docket No. 345391. Submitted January 7, 2020, at Grand Rapids. Decided January 28, 2020, at 9:00 a.m.

Ralph S. Smith and Sue Smith filed a declaratory action in the Cass Circuit Court against Joseph W. Straughn, individually and as trustee of the Joseph W. Straughn Revocable Trust, seeking full and unimpeded access to and use of an easement across defendant's property. In 1978, plaintiffs and their family members had formed a partnership and purchased property off of US-12 East, subsequently dividing the property into five parcels, Parcels A, B, C, D, and E. Parcel E, on which plaintiffs lived, fronted on US-12 East. To allow access to the remaining parcels, the partnership created an easement across the easternmost 66 feet of Parcels C, D, and E and the southernmost 87.91 feet of Parcel B. Plaintiffs and their family created a 14-foot gravel roadbed running north and south along the easement; plaintiffs shared use of the easement, as well as Parcels A and B, with their family. In 2005, defendant purchased Parcel C, and in 2008, defendant's home was broken into and robbed. As a result of the break-in, defendant constructed a wooden fence across the southern border of his property, including across the easement. The fence contained a 19½-foot gate with two doors that rolled open sideways in opposite directions and extended beyond the 14-foot wide roadbed. Plaintiffs asserted that defendant left the gate closed and that it was difficult for plaintiffs to open the gate; however, plaintiffs declined defendant's offer to install an electric motor on the fence. Plaintiffs sought a declaration that they were entitled to unimpeded access and use of the easement and that defendant could not obstruct or interfere with that right. Defendant counterclaimed, seeking a declaration that his use of the easement, including the construction of the fence and gate, was consistent with the easement and did not unreasonably burden plaintiffs' use of it. Following a bench trial which included an on-site visit to the property, the court, Susan L. Dobrich, J., concluded that the purpose of the easement was for ingress and egress and to access US-12, that the easement did not contain language restricting use of the easement, that the gate was easy to move and did not unreasonably interfere with plaintiffs' use of the easement, that

it was not unreasonable for the gate to be kept closed as long as it did not prevent plaintiffs from using the easement, and that the parties should jointly maintain the easement. Plaintiffs appealed.

The Court of Appeals *held*:

An easement is a limited property interest in that it is the right to use the land burdened by the easement for a specific purpose. The land burdened by an easement is the servient estate, and the land benefited by the easement is the dominant estate. An easement holder's use of an easement is limited to the purpose for which the easement was granted and must impose as little burden as possible to the fee owner of the land. Regardless, the easement holder nevertheless enjoys all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. A fee owner may use his or her land on a servient estate for any purpose not unreasonably inconsistent with the rights of the easement holder. Extrinsic evidence may only be used to determine the scope of an easement when the language of the easement is ambiguous. In the absence of an express reservation of a right to maintain gates, whether the servient owner may erect and maintain gates or fences across or along the easement depends on the intention of the parties to the original easement as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the easement has been used and occupied. Thus, servient estate holders are not per se precluded from erecting a gate across an easement. Rather, an unlocked gate may be permissible when it is not erected to interfere with the easement holder's use of the easement. Moreover, equity will not allow gates across an easement if they are motivated by ill will without any real benefit to the owner of the gate; that is, a gate will be allowed only if it is reasonable under the circumstances. In this case, the trial court did not clearly err by finding that defendant's construction of a fence was a reasonable response to the break-in and by concluding that the gate did not, as a practical matter, interfere with plaintiffs' use of the easement for ingress and egress even when it was left closed and plaintiffs had to get out of their vehicles to open the gate. In addition, the gate did not obstruct or effectively reduce the size of the easement because the gate only restricted the easement in that particular spot and the roadbed was narrower than the gate opening. The trial court's order was warranted by the circumstances. In addition, the written easement was unambiguous and did not forbid a nonobstructive gate across the easement, and plaintiffs provided insufficient evidence that the grantors of the easement intended to

prohibit a gate or fence. Therefore, the trial court properly considered the plain language of the easement, concluded that defendant's gate and fence were not prohibited by the easement, were not contrary to the parties' intent when the easement was created, and were not inconsistent with plaintiffs' use of the easement.

Affirmed.

EASEMENTS — GATES ACROSS EASEMENTS — REASONABLENESS-OF-THE-CIRCUMSTANCES TEST.

The owner of a servient estate is not per se precluded from erecting a gate across an easement; in the absence of an express reservation of a right to maintain a gate, whether the owner of a servient estate may erect and maintain a gate across an easement depends on the intention of the parties to the original easement as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the easement has been used and occupied.

Foster Swift Collins & Smith, PC (by *Stephen W. Smith*) for plaintiffs.

HassCaywood PC (by *Michael J. Caywood*) for defendant.

Before: O'BRIEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

RONAYNE KRAUSE, J. Plaintiffs, Ralph Steven Smith and Sue Smith, appeal as of right the trial court's order and declaratory ruling regarding an easement that burdens the property of defendant, Joseph Straughn, individually and as Trustee of the Joseph W. Straughn Revocable Trust. In relevant part, the trial court permitted defendant to maintain a fence and gate across the easement at defendant's property line, forbade either party from placing anything on the easement, and required both parties to maintain the portion of the easement, including trimming trees, on their re-

spective properties. Only the matter of the gate is being appealed. We affirm.

I. BACKGROUND

In 1978, plaintiffs and their family members formed a partnership to purchase property located off US-12 East in Niles, Michigan. In 1986, the partnership divided the property into five parcels, Parcels A, B, C, D, and E. Parcel E was the southernmost property located directly on US-12, and the other parcels were landlocked and located farther north of each subsequent parcel, with Parcel A being the northernmost property. The partnership created an easement across the easternmost 66 feet of Parcels E, D, and C and the southern 87.91 feet of Parcel B.[1] Plaintiffs lived on Parcel E and shared the use of the easement and Parcels A and B with their family. Plaintiffs and their family created a 14-foot gravel roadbed extending north and south along the easement.

In November 2005, defendant purchased Parcel C, the parcel in the center of the properties, subject to the easement across the eastern 66 feet of Parcel C. In late July 2008, defendant experienced a break-in and theft at his house, and he requested plaintiffs' consent to install a gate along the southern property line of Parcel C across the easement for security purposes. According to plaintiffs, they did not consent to defendant's proposed gate, but according to defendant, plaintiffs did not object to his proposal. Over the next year, defendant constructed a 7-foot tall and 400-foot wide wooden fence across the southern border of his property, including across the easement. The gate had two doors

[1] Parcel A, the northernmost parcel, wrapped partially around Parcel B. Consequently, Parcel A could be accessed without needing to extend the easement across the entirety of Parcel B.

that rolled open sideways in opposite directions. The gate opening was 19½ feet wide when fully open and opened beyond the 14-foot-wide roadbed.

Beginning in 2016, plaintiffs raised concerns regarding defendant's use of the easement. Defendant parked vehicles and equipment on the easement, placed cement blocks and stones on the roadbed, damaged and scraped the roadbed, placed snow piles across the easement, placed caution tape and fiberglass rods along the western portion of the easement extending north along defendant's property, and installed cameras facing his gate. Plaintiffs and defendant testified that these interferences with the easement did not totally prevent plaintiffs from using the easement, except for one instance when snow piles covered the easement. According to plaintiffs, defendant left the gate closed, which required them to exit their vehicles to use the easement, and the gate was physically challenging for plaintiffs to open. However, defendant stated that he often observed plaintiffs and their son opening the gate without any difficulties. Additionally, the gate was always unlocked, and defendant told plaintiffs that if he ever did lock it, he would arrange for plaintiffs to have a key. According to plaintiffs' son, defendant also offered to install an electric motor on the fence, but plaintiffs declined.[2]

Plaintiffs alleged that defendant's fence, gate, vehicles, and other items on the easement impeded the easement and prevented them from accessing Parcels A and B without obstruction or interference. Plaintiffs requested declaratory and injunctive relief declaring

[2] At trial, plaintiffs testified that they would consider it unacceptable to mechanize the gate, to add counterweights to make the gate easier to open, or even to remove the gate entirely and leave intact any portion of the fence on the easement.

their right to full and unimpeded access and use of the easement and preventing defendant from obstructing or interfering with that right. Defendant filed a counterclaim and requested declaratory relief to determine the parties' rights and obligations regarding the easement and to declare that his use of the easement, including his fence and gate, was consistent with the easement and did not unreasonably burden plaintiffs' use of the easement. The trial court conducted a site visit, with the attorneys present, and personally determined that the gate was easy to move.

The trial court interpreted the language of the easement and concluded that its purpose was for ingress and egress and to access US-12. The trial court determined that the easement did not provide any restrictions or specify plaintiffs' intent or plan to use the easement and to develop Parcels A and B. The trial court determined that defendant's gate permitted plaintiffs to use the gate for ingress and egress and did not unreasonably interfere with their use of the easement. The trial court also determined that it was not unreasonable to have the gate closed, if it did not deprive plaintiffs of the ability to use the easement, and that it was reasonable for the parties to jointly maintain the easement. The trial court prohibited both parties from placing vehicles or items on the easement.

II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

This Court reviews de novo a trial court's ruling in a declaratory action. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). This Court also reviews de novo the proper interpretation of legal instruments, such as deeds or contracts. See *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009). This Court reviews de novo equitable

matters but gives deference to the trial court's determinations. *Cantieny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954). Thus, this Court reviews for clear error the trial court's factual determination of a party's rights under an easement. *Blackhawk Dev Corp v Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). This Court is especially deferential to the trial court's superior ability "to judge of the relative credibility of witnesses[.]" *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881).

An easement is a limited property interest; it is the right to use the land burdened by the easement for a specific purpose. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378-379; 699 NW2d 272 (2005). The land burdened by the easement is the servient estate, and the land benefited by the easement is the dominant estate. See *D'Andrea v AT&T Mich*, 289 Mich App 70, 73 n 2; 795 NW2d 620 (2010). An easement holder's use of the easement is limited to the purposes for which the easement was granted and must impose "as little burden as possible to the fee owner of the land," but the easement holder nevertheless enjoys "all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." *Blackhawk*, 473 Mich at 41-42 (quotation marks and citations omitted); see also *Cantieny*, 341 Mich at 147; *Harvey v Crane*, 85 Mich 316, 325; 48 NW 582 (1891); *Kirby v Meyering Land Co*, 260 Mich 156, 169; 244 NW 433 (1932). The necessity of an easement holder's conduct can be informed by the purpose and scope of the easement in addition to the

easement holder's accustomed use of the easement. See *Harvey*, 85 Mich at 318-319, 325.

A fee owner may use his or her land on a servient estate for any purpose not unreasonably inconsistent with the rights of the easement holder. *Cantieny*, 341 Mich at 146-147; *Harvey*, 85 Mich at 322; *Kirby*, 260 Mich at 168-170. "What may be considered a proper and reasonable use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to [the easement holder's] use and enjoyment, are questions of fact to be determined by the trial court or jury." *Harvey*, 85 Mich at 322-323. "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); see also *Blackhawk*, 473 Mich at 42. The scope of an easement may only be determined by reference to extrinsic evidence if the text of the instrument is ambiguous. *Id*.

III. ANALYSIS

Plaintiffs first argue that the trial court erroneously concluded that defendant had a right to install a fence and gate across the parties' shared easement because the easement did not reserve such a right. Plaintiffs also argue that the trial court erroneously failed to consider plaintiffs' intent and understanding of the easement at the time they created the easement. We disagree with both arguments.

A. FACIAL PROHIBITION OF A FENCE

As discussed, the fee owner's use of land on a servient estate is reviewed for reasonableness and whether that use is unreasonably inconsistent with the

easement holder's rights. We cannot find clear error in the conclusion that security and deterrence against break-ins, trespassers, and theft are reasonable concerns that are reasonably addressed by the fence and gate. Even more significantly, we take particular note that the trial court personally verified how easy the gate was to open. We defer strongly to trial courts' superior ability to evaluate the credibility of witnesses. See *McGonegal*, 46 Mich at 67. We conclude that the same deference must apply here given that the trial court was uniquely able to directly test a critical piece of evidence, as well as view that evidence in its proper context. We must also defer to the trial court's implicit credibility assessment, especially in light of its site visit, that plaintiffs were able to move the gate, contrary to their claims that they could not. We are unable to find any clear error in the trial court's factual finding that the gate did not practically interfere with plaintiffs' use of the easement, even when left closed and even though plaintiffs had to exit their vehicles to open the gate. Therefore, we conclude that defendant's fence and gate were not inconsistent with plaintiffs' use of the easement.[3] See *Harvey*, 85 Mich at 325; see also *Kirby*, 260 Mich at 168-170.

Additionally, defendant's gate does not obstruct or effectively reduce the size of the easement from 66 feet to the 19½-foot gate opening. The gate imposes a 19½-foot bottleneck at one point on the easement. Defendant's actions on his property did not narrow or restrict the 66-foot easement at any other point along the easement. Significantly, the actual *roadbed* is only

[3] Any other obstructions placed on the easement by defendant do not pertain to the gate or fence. Furthermore, the trial court ordered that defendant was prohibited from placing any such obstructions on the easement, and defendant has not appealed that portion of the trial court's order.

approximately 14 feet wide, narrower than the gate opening. There was no evidence in the lower-court record to suggest that the 19½-foot gate opening was insufficient for any of plaintiffs' uses of the easement or for plaintiffs to access Parcels A and B.[4] Therefore, we conclude that defendant's gate and fence did not obstruct and was not inconsistent with plaintiffs' use of the easement. Cf. *Berkey & Gay Furniture Co v Valley City Milling Co*, 194 Mich 234, 243-244; 160 NW 648 (1916) (concluding that under the circumstances, the full width of the easement was actually necessary for its use). Further, the trial court's order was supported by the evidence and was warranted by the circumstances. See MCR 2.601(A); *Three Lakes Ass'n v Kessler*, 91 Mich App 371, 377-378; 285 NW2d 300 (1979) (explaining that a trial court may fashion an equitable remedy that is warranted by the circumstances).

Plaintiffs argue that gates are per se impermissible under *Cantieny*, but in fact, *Cantieny* involved gates that were *locked*. *Cantieny*, 341 Mich at 145. We find it critically distinguishable that the gate here was unlocked and easily opened; furthermore, defendant offered to mechanize the gate. Quoting approvingly from the trial court's opinion in the case, our Supreme Court held, in relevant part:

> "[I]t is settled law that gates will not be permitted except where the right has been reserved, and where the owner of the servient estate, acting in good faith, is able to show that the gates are reasonably necessary to provide some substantial and legitimate benefit to himself; *or, to put it another way*, that equity will not authorize such structures when they are inspired by ill will, for the purpose of

[4] Apparently, the inconvenience of the gate was seriously exacerbated by the presence of untrimmed tree branches, which we presume will be resolved by the unappealed portion of the trial court's order.

> injuring or annoying others, without being of any real benefit to the owner." [*Id*. at 147-148 (approvingly quoting the trial court) (emphasis added).]

Our Supreme Court emphasized that it was sitting in chancery. *Id*. at 146. In that context, we think the above quotation sets forth a reasonableness-under-the-circumstances test, not a mechanical prohibition no matter the surrounding facts.

Plaintiffs also rely heavily on this Court's opinion in *Bryant v Albertie*, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2005 (Docket No. 253207).[5] The gate at issue in *Bryant* was, again, *locked* and erected after a history of the defendants intentionally blocking the plaintiffs from using the easement at all.[6] *Bryant*, unpub op at 1-2. In any event, *Bryant* quoted with approval:

> In the absence of an express reservation of a right to maintain gates, it is the general rule that whether the servient owner may erect and maintain gates, bars, or fences across or along the easement of way depends on the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case, the nature and situation of the property subject to the easement, *and* the manner in which the way has been used and occupied. [*Bryant*, unpub op at 3, quoting 25 Am Jur 2d, Easements & Licenses, § 88, p 587 (emphasis added).]

The word "and" must generally be read as conjunctive. See *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 14;

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[5] Unpublished opinions have no precedential effect under the doctrine of stare decisis, MCR 7.215(C)(1), nor are they binding under the "first-out rule," MCR 7.215(J)(1).

[6] Plaintiffs also cite *Todd v Nobach*, 368 Mich 544, 550; 118 NW2d 402 (1962), which, again, involved a history of completely blocking use of the easement. *Id*. at 549.

894 NW2d 758 (2016); *People v Comella*, 296 Mich App 643, 649; 823 NW2d 138 (2012). *Bryant* also noted that all of the circumstances should be considered when sitting in equity. *Bryant*, unpub op at 5. Thus, *Bryant* again supports our conclusion that servient estate holders are not necessarily per se precluded from erecting a gate across an easement. Rather, the caselaw indicates that a gate may be permissible where, as here, it was not erected for the purpose of interfering with the easement holder's use of the easement, it was not locked, and the trial court did not clearly err by finding that the gate did not actually interfere with the use of the easement. Defendant's offer to mechanize the gate also weighs equitably in his favor.

In sum, defendant's fence and gate were not inconsistent with plaintiffs' limited right to use the easement for ingress and egress. The fence and gate did not prevent plaintiffs from using the easement, and the temporary interferences with the easement, including the snow piles and stones, did not prevent plaintiffs from using the easement and were cleared from the easement at the time of the bench trial. Additionally, the 19½-foot gate opening did not prevent plaintiffs from using the easement. Therefore, defendant's use of his property and his gate and fence were not inconsistent with plaintiffs' use of the easement, and the trial court's order and equitable remedies were warranted by the circumstances. See *Cantieny*, 341 Mich at 147; *Harvey*, 85 Mich at 322, 325; *Three Lakes*, 91 Mich App at 377-378.

On its face, the easement here provided that Parcels C, D, and E were "[s]ubject to an easement to be used in common with others over the East 66.00 feet thereof." Parcel B was "[s]ubject to an easement to be used in common with others over the South 87.91 feet of the

East 66.00 feet thereof." The easement provided that the owners of Parcels B, C, D, and E could use the easement in common. The easement provided a means of ingress and egress from Parcels A, B, C, and D to a public roadway, US-12, because those parcels were landlocked. Therefore, plaintiffs unambiguously had a limited right to use the easement for ingress and egress to Parcels A and B and to US-12. See *Cantieny*, 341 Mich at 147; *Harvey*, 85 Mich at 322, 325.

The easement is silent as to the installation of fences, neither prohibiting them nor reserving the right to install them. As discussed, a locked gate or a gate motivated by the goal of excluding the easement holder would therefore be prohibited. However, the fact that the easement did not reserve a right to install a gate is not dispositive under the circumstances given that the trial court found the gate properly motivated and not an impediment to the use of the easement. "The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement." *Harvey*, 85 Mich at 322. Caselaw establishes that installation of a locked gate, or any other erection of an impediment to accessing an easement, requires a reservation of a right to do so in the easement itself. However, the caselaw also establishes that the fee owner of the land may do essentially whatever the owner wishes, so long as the easement is not unreasonably impeded in the process. See *Kirby*, 260 Mich at 168-170. Therefore, because the plain language of the easement unambiguously does not forbid a nonobstructive gate, the trial court properly enforced the easement as it was written and fashioned equitable relief as warranted by the circumstances of this case. See *Little*, 468 Mich at 700; *Three Lakes*, 91 Mich App at 377-378.

B. INTENT AND UNDERSTANDING OF DRAFTERS

Plaintiffs argue that the trial court gave inadequate consideration to the understanding of the original parties to the easement at the time the easement was granted. As noted, courts generally are not permitted to consider such extrinsic evidence if the plain language of the instrument granting the easement is unambiguous. Nevertheless, even if we were to presume that silence regarding gates constitutes an ambiguity, plaintiffs' testimony that they intended to develop Parcels A and B and to construct a two-lane, and possibly public, roadway on the easement did not support the conclusion that defendant's gate and fence were impermissible.

Plaintiffs neither developed Parcels A and B nor initiated the process to establish a private or public roadway after acquiring the properties in 1986. Allegedly, a document from the original partnership existed and indicated that the easement was meant to be used as a roadway, but this document was not provided to the court at the bench trial. For decades, users of the easement and owners of the servient parcels have been accustomed to using the easement in a manner perfectly consistent with a 14-foot wide roadbed. See *Harvey*, 85 Mich at 325. Thus, it is conceivable that developing the roadbed into a two-lane public highway might be deemed to overburden the easement.[7] See *Morse v Colitti*, 317 Mich App 526, 544-547; 896 NW2d 15 (2016). There was no other evidence of the grantors' intent to prohibit or permit a gate or fence at the time the easement was created. Furthermore, it is not clear

[7] We expressly make no determination of this issue, and we do not hold any opinion regarding this issue and none should be implied. We note only that such an outcome is not strictly impossible.

from the record that a 14-foot, or possibly a 19½-foot, roadway would necessarily be incompatible with further developing Parcels A and B.[8] Unlike the situation in *Berkey & Gay Furniture Co*, 194 Mich at 243-244, any interference with the use of the easement posed by the gate and fence is, at most, hypothetical; there is no evidence here that plaintiffs actually do or actually will need a wider roadway.

There was insufficient evidence in the lower-court record to demonstrate that the grantors of the easement intended to prohibit a gate or fence across the easement or otherwise limit defendant's use of his property as the fee owner. The trial court did not clearly err by finding that the gate and fence were properly motivated and did not unreasonably impede plaintiffs' actual use of the easement. Therefore, the trial court properly considered the plain language of the easement and concluded that defendant's gate and fence were not prohibited by the easement, were not contrary to the parties' intent when plaintiffs and their family created the easement, and were not inconsistent with plaintiffs' use of the easement.

Affirmed. Defendant, being the prevailing party, may tax costs. MCR 7.219(A).

O'BRIEN, P.J., and GADOLA, J., concurred with RONAYNE KRAUSE, J.

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[8] Plaintiffs cite trial testimony from parties to the original easement indicating that they had a general belief at the time that 66 feet was the legally mandated width for a road. However, the cited testimony does not state that the roadbed as actually installed was inadequate for the uses to which it was actually put. Rather, the testimony, like the easement itself, is silent as to gates or fences. Plaintiffs' testimony did, however, reflect that plaintiffs were able to drive a motor home and other vehicles through the gate opening and were impeded mostly by the alleged difficulty opening the gate and by untrimmed tree branches.

MARTIN v MARTIN

Docket No. 349261. Submitted January 14, 2020, at Grand Rapids. Decided January 28, 2020, at 9:05 a.m. Leave to appeal denied 506 Mich 947 (2020).

In 2010, Tammy L. Martin filed an action in the Ottawa Circuit Court, seeking a divorce from her husband, Jeffrey A. Martin; the divorce was final in 2012. The parties had three children during their marriage—AM1, MM, and AM2. Evidence established that Jeffrey had emotionally abused the family and used inappropriate physical punishment against his sons, AM1 and MM, and that Tammy had consistently worked to alienate the children from Jeffrey, interfering with their relationship. The court, Jon A. VanAllsburg, J., found that both parties had engaged in some form of abuse but awarded Tammy sole legal and physical custody of the children with Jeffrey having therapeutic parenting-time sessions. Jeffrey was denied those sessions because the children's counselor resigned, and the trial court did not rectify the situation, indicating that it had no alternate parenting-time plan available. From 2012 through 2016, although Jeffrey did not have parenting time with the children, he voluntarily attended counseling and parenting classes to improve his anger-management issues and parenting skills. In 2016, Jeffrey moved to enforce the earlier parenting-time orders. The court implemented a parenting-time plan, but Tammy undermined the reunification efforts. Ultimately, the court held Tammy in contempt based on her alienating behavior and for failing to schedule and attend counseling appointments for her and the children. The court also adopted a new parenting plan that included extended periods of uninterrupted parenting time for Jeffrey. In 2018, the parties entered into two separate stipulated orders, the second of which allowed AM2 to live primarily with Jeffrey with Tammy having parenting time on alternating weekends. Jeffrey abandoned his right to parenting time with MM to limit the effect on AM2 of MM's hostility toward reunification. Thereafter, Jeffrey moved for sole physical custody of AM2, arguing that the change was necessary because of Tammy's alienating behavior and her noncompliance with court orders. Tammy argued that AM2 suffered emotionally and physically from Jeffrey's parenting style and that the forced therapy sessions were inadequate.

Given the testimony of the reunification therapist and AM2's therapist, Tammy's use of back-channel communications with AM2 and AM2's gathering of information to assist Tammy in the custody case, and the apparent failure of extensive counseling, the court found that a change of circumstances or proper cause existed to revisit the custody issue. The court reluctantly determined that AM2 had an established custodial environment with Tammy alone. In considering the MCL 722.23 best-interest factors, the court concluded that each factor overwhelmingly weighed in Jeffrey's favor and that Jeffrey had established by clear and convincing evidence that it was in AM2's best interests to grant sole legal and physical custody to Jeffrey. The court reasoned that Tammy and the children might have exaggerated or fabricated some of their original descriptions of Jeffrey's behavior, Jeffrey had significantly improved with counseling, and Tammy's behavior had significantly deteriorated and had no chance of improvement given her active opposition to and interference with the therapeutic process. Tammy was allowed only supervised parenting time during therapy sessions and was ordered not to communicate with AM2 unless authorized by a therapist. Tammy appealed.

The Court of Appeals *held*:

1. MCL 722.27(1)(c) provides that in a child custody dispute, for the best interests of a child, the court may modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age; however, the court may not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless clear and convincing evidence is presented that it is in the best interests of the child. Trial courts must fully comply with the MCL 722.27(1)(c) requirements before entering an order that alters a child's established custodial environment because any error could have lasting consequences that are irreversible. To establish proper cause necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. An appropriate ground is one that is relevant to one of the twelve best-interest factors set forth in MCL 722.23. It is presumed to be in the best interests of a child to have a strong relationship with both of the child's parents. In that regard, MCL 722.23(j) provides that a court must consider the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents; however, a court may not consider negatively for the purposes of

that factor any reasonable action taken by a parent to protect the child from sexual assault or domestic violence by the child's other parent. In light of Tammy's continued efforts to alienate the children since the trial court's 2012 finding that her conduct rose to the level of abuse and her continued obstruction of the court-ordered parental-reunification plan in 2016 that culminated in the court holding her in contempt, Jeffrey established proper cause and a change in circumstances necessary to revisit the custody order. The trial court thoroughly supported its factual findings, and the court was entitled to deference regarding its credibility determinations and its conclusion that Tammy's actions could have a significant effect on AM2's life, including her long-term mental and emotional health. The trial court properly admitted the e-mail messages between Tammy and AM2 because they established that Tammy encouraged AM2 to spy for her and they were not admitted to prove the truth of the matters asserted.

2. Tammy waived review of her argument that the trial court erred by purportedly refusing to admit all of AM2's medical record because she failed to fully discuss the issue or cite supporting caselaw.

3. The Fourth Amendment safeguards the privacy and security of individuals against arbitrary invasions by government agents, and it does so by prohibiting unreasonable searches and seizures. To the extent that a discovery order entered by a trial court in a civil lawsuit constitutes a search by a government agent within the meaning of the Fourth Amendment, the search would be reasonable if entered by a neutral judge in accordance with closely circumscribed rules that provide safeguards equivalent to probable cause. Michigan's court rules—in particular, MCR 2.302(B), (C), and (G), and MCR 7.203(B)(1)—provide adequate protections to ensure that properly made discovery orders are reasonably consistent with the Fourth Amendment. In this case, the trial court ordered Tammy to turn over her cell phone for forensic examination after evidence established that Tammy had used her phone to communicate with AM2 in violation of prior court orders. The order restricted the examination to 24 hours, limited the search terms allowed, and permitted the report to be reviewed by the attorneys but not the parties. The evidence was within the scope of discovery, and under the totality of the circumstances, the protections afforded Tammy exceeded those applicable when police officers request a warrant. Accordingly, the discovery order did not violate Tammy's Fourth Amendment right to be free from unreasonable searches and seizures.

Affirmed.

Tammy Martin *in propria persona*.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for defendant.

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

PER CURIAM. Since at least 2010, plaintiff Tammy Lee Martin has denigrated her now ex-husband, defendant Jeffrey Allan Martin, to their three children. Jeffrey was not blameless, and the trial court found in 2012 that he was controlling and misused corporal punishment in times of anger. During a four-year period during which Tammy effectively prevented any parenting time, Jeffrey engaged in extensive counseling and showed marked improvement. Even so, Tammy continued to obstruct her children's counseling and parent-child reunification efforts, adding to the strain on Jeffrey's relationship with his children. In 2019, after several less drastic attempted measures failed, the court awarded Jeffrey sole physical and legal custody of the couple's only remaining minor child and prohibited Tammy any unsupervised contact. The circuit court thoroughly explained its findings and actions on the record, did not reach its final order lightly, and anticipated that Tammy may regain unsupervised parenting time. We discern no error in the circuit court's conclusion that awarding Jeffrey sole custody and preserving that parent-child relationship was in the child's best interests. We affirm.

I. BACKGROUND

Tammy and Jeffrey Martin married in 1995. The couple had two sons (AM1 and MM), who are now both adults, and a daughter (AM2), who will soon be 17. The

marriage was rife with conflict, and Tammy filed for divorce in 2010. Custody of the children, who were then all minors, was hotly contested. Evidence supported that Jeffrey had emotionally abused the family and had used improper physical punishment against his sons; also supported was that Tammy worked to alienate her children from their father. From 2010 until the 2012 divorce trial, parenting time was strained at best. Tammy often violated the court's parenting-time orders. Parenting time was eventually moved to sessions supervised by a therapist or social worker, further revealing a pattern of interference by Tammy.

Following extensive discovery and counseling, the court held a seven-day trial in 2012, after which it awarded sole legal and physical custody to Tammy. The court ordered therapeutic supervised parenting time to ease the reunification of the children with Jeffrey. Of import to this appeal, in rendering its custody and parenting-time orders, the court found that *both parents* had engaged in some type of "abuse." Here is a sample of the court's findings:

> Since their separation, [Jeffrey] has experienced significantly increased estrangement from his children. [Tammy] has used offensive and inappropriate language when talking to or about [Jeffrey] in the children's presence, and the children have all witnessed some degree of domestic violence in the home. As a result, it is clear that they have avoided exercising parenting time with their father. . . . The Court concludes that [Tammy] has engaged in conduct intended to alienate the children from their father, but the estrangement that [Jeffrey] has experienced can also be explained by his own language and conduct. . . .
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> The relationship between the parties is one of chronic and constant conflict. This has affected both of their

> capacities to give the children love, affection, and guidance. [Jeffrey's] guidance has been strict, too often angry, and sometimes vindictive. [Tammy's] guidance has been more permissive, and often asserted in reaction and opposition to her husband. . . .
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> As the marital conflict increased, [Tammy's] opposition to [Jeffrey's] aggressive and rigid attempts to provide guidance has become more overt and destructive. She has told [Jeffrey] in the children's presence that they can call him names and treat him disrespectfully because "he deserves it." [Jeffrey's] capacity to provide guidance has been badly damaged, partially by his own anger and control issues, and just as significantly by [Tammy's] actions and statements. . . .
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> . . . [Jeffrey] has engaged in verbal abuse and some physical abuse directed toward his wife and the children, and [Tammy] has exposed the children to her ongoing verbal abuse about or directed toward her husband. . . .
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> . . . [Tammy] and the children have been subject to [Jeffrey's] verbal and emotional abuse, and the testimony and evidence support a finding that he used his anger and emotional abuse as tools of control against both [Tammy] and the children. . . . Although the court agrees that the evidence of physical violence is sparse, [Jeffrey's] use of anger and intimidation has been frequent, and disciplining children by the use of corporal punishment, in anger, as [Jeffrey] has often done, makes it very difficult to distinguish from abuse. It is the first and primary cause of his estrangement from the children.

Despite the family difficulties, the therapists involved all believed that the father-child relationship could and should be restored through therapeutic parenting-time sessions. The court agreed. The court

therefore ordered parenting-time sessions supervised by social worker Todd Monroe, who had been selected by Tammy to counsel the children. Unbeknownst to the court, however, Monroe had recently resigned as the children's counselor. Monroe later advised the court that the "process [was] no longer therapeutically effective" because of Tammy's lack of cooperation and the children's defiant and unwilling attitudes. As a result, Jeffrey was denied his court-ordered parenting time. Jeffrey sought court intervention, but on August 23, 2012, the court inexplicably entered an order denying Jeffrey's request for relief because the court had "no alternate parenting time plan" available.

For the next four years, Jeffrey had no parenting time with the children. He voluntarily engaged in counseling and parenting classes to improve his anger-management issues and parenting skills. Jeffrey sometimes attended the children's sports and school events in order to see them, but Tammy and the children responded by withdrawing from extracurricular activities and accusing Jeffrey of "stalking" them. In February 2016, Jeffrey again approached the court to enforce its parenting-time orders.

Following a Friend of the Court (FOC) investigation, the trial court implemented a parenting-time plan that required the two remaining minor children, MM and AM2, to work with a reunification therapist, Amy Van Gunst. The court ordered Tammy to work with a therapist, Merrill Graham, "regarding her alienating behaviors, as identified in the [FOC] report." The court required Jeffrey to continue counseling with Al Heysteck and provided that MM and AM2 would see a therapist, Lesley Menhart. Jeffrey's parenting time was then to be supervised by a therapist. Menhart's early reports focused on the impacts of abuse and

described that MM and AM2 suffered from anxiety and depression, that MM's psychological conditions had caused digestive and abdominal issues, and that a therapist would require extensive time to build a relationship with AM2 given her shyness and unwillingness to speak. Over a span of several months, however, the evidence increasingly showed that Tammy was undermining the reunification efforts. Graham reported, "In attempting to understand the rationale behind [Tammy's] concerns, it was not sufficiently clear that there is [a] basis for an ongoing refusal to support the child-father attachment."

Tammy delayed arranging appointments with Van Gunst, which led to additional delay in Jeffrey seeing the children. Then, in a July 2017 report, Van Gunst stated that Tammy was "rewrit[ing] history" for her children and had convinced them that Jeffrey was "a monster." Tammy's alienation was "psychologically very dangerous" for the children and would have "[l]ong-term effects" on their future relationships. Around the same time, Menhart reported:

> [O]n 3-2-17 and 3-27-17[,] [Tammy] was clear in front of the children, as well as privately with this therapist, that she continues to believe the children are in extreme danger if they were to be around [Jeffrey], that [Jeffrey] is trying to see the children only to control her and the children (not because he loves or cares about them), that [Jeffrey] is the cause of the children's physical and emotional issues, that [Jeffrey] has made no positive changes in his life and that this therapist has deceived and failed the children by supporting the process of reunification. During these discussions, [Tammy] was extremely upset, anxious and angry, with loud, pressured speech. When this therapist attempted to provide more recent facts (for example, that [Jeffrey] has not seen the children in 4+ years, therefore maybe the children's anxiety and depression has another source)[,] [Tammy's] anger escalated.

Based on the evidence gathered during counseling and Tammy's failure to comply with scheduling and attending appointments for her and the children, the court held Tammy in contempt on October 5, 2017, and imposed a jail sentence. After considering the best-interest factors of MCL 722.23 at length, the court adopted a new parenting-time plan that included extended periods of uninterrupted make-up parenting time for Jeffrey.

Despite the ongoing problems, the parties reached a stipulated order on April 3, 2018, for shared legal and physical custody of MM and AM2. The parties agreed to several provisions governing parenting time and other matters and agreed to a step schedule of increasing parenting time for Jeffrey. But this agreement was short-lived. During Jeffrey's parenting time, MM surreptitiously disseminated information gleaned from Jeffrey's and his then-girlfriend's, now wife's, iPads to the child's maternal aunt and both children made parenting time with their father difficult and stressful. On May 4, 2018, the court eliminated Tammy's midweek visits with the children during Jeffrey's parenting time as well as Tammy's right to an extended period of parenting time that summer. The court also ordered "specific behavioral modification therapy" for Tammy.

On June 13, 2018, the parties reached a new stipulated order under which AM2 would live primarily with Jeffrey while Tammy would have parenting time only on alternating weekends. To limit the effect on AM2 of MM's more overt defiance to reunification, Jeffrey abandoned his right to parenting time with his son. The parties agreed that MM required permission to visit Jeffrey's home and to have contact with his sister during Jeffrey's parenting time. Therapeutic reunifica-

tion efforts with MM also ceased. MM apparently did not react well when Jeffrey informed him of the stipulated order that evening. After MM called his mother's attorney and 911, the police convinced MM to leave Jeffrey's home. AM2 threatened to commit suicide if MM left, and she was transported to the hospital.

On December 10, 2018, Jeffrey moved for sole physical custody of AM2 based on Tammy's continued efforts to alienate the children and her noncompliance with court orders. Tammy, on the other hand, contended that AM2 suffered emotionally and physically from Jeffrey's parenting style and the inadequacy of the forced therapy sessions.

At the close of a December 18, 2018 hearing, the court found that a change of circumstances or proper cause existed to revisit the custody issue. After considering the testimony of the reunification therapist and AM2's therapist, the court found that AM2 "refused to engage with counselors, although she had done so in the past" and "engaged in essentially back-channel communications, participating in information gathering to assist her mother in her court battle." The court further cited "the apparent failure of extensive counseling" as grounds to reconsider the standing custody order. The court subsequently took evidence over several days from January to March 2019, and resolved the custody issue in a written opinion and order on May 28, 2019. Although reluctant to do so given Tammy's conditioning of AM2 to fear and despise her father, the court found that AM2 had an established custodial environment with her mother alone and that Jeffrey therefore had an uphill battle to prove that a change of custody was in AM2's best interests.

The court then considered in depth the best-interest factors of MCL 722.23 and determined that they over-

whelmingly weighed in Jeffrey's favor. The court acknowledged Jeffrey's past conduct, but opined with the benefit of hindsight that some of the children's and Tammy's descriptions of Jeffrey's behavior may have been exaggerated or fabricated. The court further noted that Jeffrey had significantly improved with counseling. Tammy's conduct, on the other hand, had significantly deteriorated and given her active opposition to and interference with the therapeutic process, had no chance of improving. Based on the record evidence, the court found that Jeffrey established by clear and convincing evidence that it was in AM2's best interests to grant sole legal and physical custody to him. In addition, the court felt that strong measures were necessary to prevent the completion of Tammy's campaign to alienate AM2 from her father: "Continuation along the current path will only leave this child with a warped and unhealthy relationship with her mother, resting on a shared base of fear, loathing and anxiety, and no relationship with her father." Accordingly, the court determined that Tammy should have only supervised parenting time during therapy sessions and no communication with AM2 unless expressly authorized by a therapist.

Tammy then appealed in this Court.

II. STANDARDS OF REVIEW

Three different standards govern appellate review of a trial court's decision in a child custody dispute. "We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). A factual finding is against the great weight of the evidence if

the evidence "clearly preponderate[s] in the opposite direction" such that the judgment is a miscarriage of justice. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (cleaned up).[1] A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or applies the law . . . ." *Id*. at 881. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review for an abuse of discretion the trial court's underlying evidentiary decisions. See *Varran v Granneman*, 312 Mich App 591, 621; 880 NW2d 242 (2015).

III. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Tammy has appealed in pro per and has made an admirable effort to brief her chief complaints in this Court. She first challenges the trial court's determination that Jeffrey established proper cause or a change of circumstances warranting a reconsideration of the prior custody order. MCL 722.27(1)(c) provides that in a custody dispute, the trial court, for the best interests of the child at the center of the dispute, may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." However, the court is not permitted to "modify or amend its previous judg-

[1] This opinion uses the parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Prac & Process 143 (2017).

ments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*. "These initial steps to changing custody—finding a change of circumstance or proper cause and not changing an established custodial environment without clear and convincing evidence—are intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (cleaned up). As described in *Vodvarka*, 259 Mich App at 512-514:

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. . . .
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> . . . [T]o establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of

> each case, with the relevance of the facts presented being gauged by the statutory best interest factors.

As recently stated by the Supreme Court, "it is critical that trial courts, in the *first* instance, carefully and fully comply with the requirements of MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment" as "[a]ny error in this regard may have lasting consequences yet effectively be irreversible." *Daly v Ward*, 501 Mich 897, 898 (2017).

Jeffrey established proper cause and a change in circumstances by a preponderance of the evidence as required in *Vodvarka*, 259 Mich App at 512. The court had already determined in 2012 that Tammy actively sought to undermine Jeffrey's relationship with the children and that Tammy's conduct rose to the level of abuse. Tammy took no action to rectify her extreme positions in the four years that Jeffrey was completely denied any parenting time. In 2016, the court initiated a parental-reunification process that included counseling for all individuals involved and supervised therapeutic parenting-time sessions. Tammy continued to interfere with Jeffrey's relationship with the children and actively obstructed the therapeutic process. Evidence supported that Tammy had swayed her children to distrust any therapist who did not adopt their viewpoints wholesale. Tammy's own counselor reported that Tammy distrusted therapists "and anyone who might (even gently) challenge her thinking" such that she was unlikely to continue therapy on her own. The court then ordered extended parenting-time periods for Jeffrey without interruption by Tammy. In response, Tammy escalated her interference and alienating behaviors and even encouraged her chil-

dren to spy for her, leading the court to hold her in contempt and impose a jail sentence.

Tammy contends that several mischaracterizations of fact, erroneous factual findings, and overall misconceptions invalidate the trial court's finding of proper cause or a change in circumstances. First, Tammy contends that MCL 722.23(j) permits a parent to isolate a child from the other parent to protect the child from abuse. The statute provides that one best-interest factor to consider when undertaking a custody analysis is:

> The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent. [MCL 722.23(j).]

Her actions, Tammy insists, were reasonable as she was protecting her children from Jeffrey's abuse. Thus, Tammy contends that if her acts amounted to parental alienation, they would not justify a finding of proper cause or a change in circumstances.[2]

" 'It is presumed to be in the best interests of the child to have a strong relationship with both of his or her parents.' " *Luna v Regnier*, 326 Mich App 173, 180;

[2] Tammy also essentially contends that "parental alienation" is junk science. While there may be a dispute in the scientific community about whether there is a diagnosable, pathological condition called parental-alienation syndrome, see, e.g., Nichols, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*, 112 Mich L Rev 663 (2014), there is no reasonable dispute that high-conflict custody disputes frequently involve acts by one parent designed to obstruct or sabotage the opposing parent's relationship with the child.

930 NW2d 410 (2018), quoting MCL 722.27a(1). To this end, Factor (j) of the best-interest factors favors parents who facilitate the relationship of their children with the other parent. But if the parent overcomes the presumption with evidence that separation from the other parent is necessary for the child's safety, the parent's acts cannot be counted against him or her. See *Luna*, 326 Mich App at 180; MCL 722.27a(3).

Related to Factor (j), Tammy asserts that the court should have treated this as a hybrid case of abuse and parental alienation, that the court erroneously minimized Jeffrey's abuse, and that the court wrongfully faulted her for the failure of the therapeutic process. However, the court thoughtfully and thoroughly supported its factual findings. And to the extent the court's findings were based on its assessment of the witnesses' credibility, we must defer to the court's determinations "given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

At the December 18, 2018 hearing, Van Gunst testified that during the reunification therapy process, Jeffrey had "been patient and expressed love and concern, offered opportunities, solutions." In contrast, Tammy still had not given AM2 "permission to enter into a relationship with her dad." Tammy continued to "encourage[]" AM2's negative attitude toward and treatment of Jeffrey. At the last family meeting at the end of July 2018, AM2 still showed signs of being swayed by Tammy's alienating behaviors as her description of a family vacation with Jeffrey, his fiancée, and her daughter vastly differed from the descriptions of the others involved and AM2 insisted in therapy that she "was just faking" having fun with her father. Van Gunst opined that AM2 had "a vested interest in keeping me believ-

ing, keeping everyone around her believing that it's horrible with her dad." At that final meeting, Van Gunst recommended that reunification therapy cease because it "simply exacerbated and fueled [AM2's] fire." Ultimately, in comparison to other "high-conflict parental alienation cases," Van Gunst ranked this case "at a nine or a ten." Van Gunst recommended that the court "disconnect [AM2] from mom, extended family, and . . . the community that she has lived in" in order to complete the reunification process.

Menhart testified that the children were very angry at Jeffrey but that many of their concerns were proved false over time. He further opined that AM2 was difficult for Jeffrey to deal with and that Jeffrey was "frustrated" but had handled everything appropriately. Menhart's last session with AM2 was on November 12, 2018, and he noted that the entire process had not gone well: "It feels like when a therapist is involved at this point, she has to show how much she hates her father and I feel like the level of disrespect increases and any attempt at engaging her in any part of that process is met with complete silence. She might simply stare straight at the person." Overall, Menhart had "never seen such a lack of engagement in 25 years of counseling with a child." Menhart believed that MM and AM2 suffered from post-traumatic stress disorder but not "because of what necessarily dad has done." Rather, Menhart believed that Tammy had caused this condition: "I feel like they've been provided inaccurate information by mom that has resulted in them having a very intense level of fear, anxiety, and anger at their dad that is not warranted." Menhart had observed Tammy acting "openly hostile towards [Jeffrey] in front of the children and said things that simply weren't accurate," as recently as a year earlier. Jeffrey, on the other hand, had been appropriate, tried to

engage the children in activities, and had reacted appropriately even when the children were "angry and in his face and yelling and screaming." Ultimately, Menhart rated this case of parental alienation as a nine and asserted that AM2 should have no contact with her mother, the maternal side of her family, or her community, which included dance, church, and school.

The trial court credited this evidence over Tammy's claims that the therapy methods were inadequate and that Jeffrey's historic conduct was fully to blame for the children's attitudes. In the subsequent May 28, 2019 custody order, the court expounded on its analysis that proper cause or a change in circumstances warranted further review, truly clarifying that the court's focus was on AM2's best interests based on the evidence:

> [I]t has been shown that [Tammy's] stubborn hatred of [Jeffrey] and her undermining of the agreed custodial relationship has been significant and ongoing, and that it has grown to involve surreptitious communications with [AM2] to enlist the child as a co-conspirator in that effort. These are not minor disputes over contempt and parenting time. These are matters that could have a significant effect on the child's life, including on her long-term mental and emotional health: having to maintain the perception of hatred and contempt toward her father—which she may or may not share with her mother—will undoubtedly affect her mental and emotional health as well as her long-term relationship with her father.

Tammy challenges certain additional factual findings underlying the court's decision. Tammy contends that the trial court improperly admitted her e-mails as evidence of back-channel or surreptitious information-gathering communications. Contrary to Tammy's assertion, these e-mails were not admitted for an improper hearsay purpose. " 'Hearsay' is a statement,

other than one by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The court did not admit the e-mails to prove the truth of the matters asserted; it allowed Jeffrey to admit them as evidence that there was constant contact between AM2 and Tammy during Jeffrey's parenting time and to show Tammy's purpose for the communications. The value of the e-mails was to prove the effect on AM2, not to prove the truth of their content. Tammy also could not claim unfair surprise by the admission of the e-mails. Tammy conceded at the hearing that she did, in fact, send the e-mails and remembered the e-mail conversations with her daughter. See, e.g., *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987) (stating that a party cannot complain of nondisclosure when he or she authored the document and, therefore, had knowledge independent of discovery).

And the e-mails tended to establish that Tammy encouraged AM2 to spy for her. Although Tammy claims that AM2 used these e-mails as a type of journal, that was not the message conveyed. The e-mails appeared to be log entries that cataloged what Jeffrey said and did during his parenting time. Tammy responded to one e-mail with the following exhortation: "[G]ood girl, keep them coming." In another message, Tammy asked AM2 whether she had recorded Jeffrey's statement. When AM2 replied that she had not done so because she was not prepared for it, Tammy responded that she should always be prepared. AM2 suggested that Tammy should forward the e-mail to her attorney, but black out her e-mail address.

Tammy also takes issue with the court's mischaracterization of the event during which MM left Jeffrey's home for good. We agree that certain descriptive errors

were made. However, any error was harmless and does not warrant relief. Although the trial court misstated the order of events and got certain facts wrong, it did so in a recitation of the procedural history. The trial court did not identify this incident as being particularly important to its resolution of any material factual dispute. And in the end, this case is about custody of AM2 alone, not MM. Accordingly, the information was no longer relevant when the court made its final decision.

IV. MEDICAL RECORDS

Tammy challenges the trial court's purported refusal to admit all of AM2's medical records into evidence. AM2 suffered a prenatal stroke that led to cerebral palsy. As a result, AM2 has required significant medical attention throughout her life. As AM2 aged, she often complained of muscle and joint pains and required physical therapy. At issue in the custody battle was whether any of AM2's symptoms were psychosomatic or exaggerated to gain leverage in the custody battle. Also at issue was whether Tammy purposely avoided including Jeffrey in AM2's medical appointments. Tammy also complains that Jeffrey ignored AM2's medical needs and that this factor should have weighed in her favor.

On appeal, however, Tammy does not identify any particular record that the court excluded from evidence. In fact, the court actually admitted every medical record that Tammy's counsel proffered, although conditionally. Tammy does not contend on appeal that the conditional admittance of the records was improper. Absent any meaningful discussion of this issue, there simply is nothing for this Court to review. This

claim of error is therefore abandoned. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

V. SEARCH AND SEIZURE

Finally, Tammy contends that the trial court violated her right to be free from unreasonable searches and seizures when it ordered her to turn over her cell phone for forensic examination. We review de novo questions of constitutional law. See *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). This Court reviews for an abuse of discretion a trial court's decision to order discovery. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

As part of its order resolving the custody dispute and competing motions for contempt, the trial court granted Jeffrey's request for an order compelling Tammy to turn over her cell phone for forensic examination. The court's order responded to evidence that Tammy had used her phone to communicate with AM2 and encourage her to gather information for use against Jeffrey in the litigation and that she would likely continue to do so in the future. The trial court provided Tammy with several procedural safeguards to ensure that the information gathered from the phone would not be disseminated beyond the persons involved in the litigation and that it would be destroyed once it was no longer needed. More specifically, the court ordered Tammy, through her attorney, to turn her cell phone over to a forensic professional for a 24-hour period. The professional would search the phone based on limited search terms and produce a report that could be reviewed by the attorneys but not the parties. Tammy's attorney could challenge privileged information that would be redacted before the court's *in camera* review. We note that Tammy has yet

to produce her phone for examination, but in the meantime, she and AM2 have been ordered to "preserve all electronic files on" their phones.

The Fourth Amendment safeguards the privacy and security of individuals against arbitrary invasions by government agents. See *Carpenter v United States*, 585 US ___, ___; 138 S Ct 2206, 2213; 201 L Ed 2d 507 (2018). It accomplishes that goal by prohibiting unreasonable searches and seizures. *Id*. at ___; 138 S Ct at 2214. However, the amendment does not apply to the actions of private parties. *United States v Jacobsen* 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). To the extent that a discovery order entered by a trial court in a civil lawsuit constitutes a search by a government agent within the meaning of the Fourth Amendment, the search would be reasonable if entered by a neutral judge in accordance with "closely circumscribed" rules that provide safeguards equivalent to probable cause. See *Bowerman v MacDonald*, 431 Mich 1, 19-20; 427 NW2d 477 (1988) (rejecting the contention that the Fourth Amendment barred a trial court from ordering a blood test in a paternity action because the statute provided for safeguards greater than probable cause).

Michigan's court rules regulate the use of discovery in a civil proceeding. Although the scope of discovery is broad, the discovery must be relevant to the subject matter and must not be privileged. See MCR 2.302(B)(1). Moreover, to the extent that a party or person from whom discovery is sought objects to a discovery request, that party or person may seek a protective order to prevent annoyance, embarrassment, oppression, or undue burden or expense. See MCR 2.302(C). The rules further authorize trial courts to provide significant protections against unreasonable

discovery requests. See *id*. And improper discovery requests may be subject to sanction. See MCR 2.302(G). Finally, a party aggrieved by a trial court's decision to order discovery may appeal the trial court's decision in this Court. See MCR 7.203(B)(1). Accordingly, the court rules provide adequate protections to ensure that properly made discovery orders are reasonably consistent with the Fourth Amendment. See *Bowerman*, 431 Mich at 19-20.

In this case, Jeffrey moved to compel discovery of Tammy's phone after he discovered evidence that Tammy was using her phone to communicate with AM2 in violation of the court's orders. The evidence presented thus far amounted to probable cause to believe that Tammy's phone had evidence relevant to the trial court's orders governing custody and was consistent with the requirements of MCR 2.302(B)(1). While the trial court entered the order after resolving the custody dispute, the court's orders governing custody remained in force and Tammy's history of repeatedly violating orders and interfering in Jeffrey's relationship with the children constituted cause to believe that she would continue to engage in such behavior. Therefore, the order was not beyond the scope of discovery. See MCR 2.302(A)(4). Tammy opposed the motion, and the parties had the opportunity to argue their respective positions before the trial court. Additionally, the court entered a protective order to limit the risks associated with the discovery as permitted under MCR 2.302(C). Under the totality of the circumstances, the protections afforded to Tammy exceeded those applicable when police officers make a warrant request. See *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006) (noting that a magistrate's decision to issue a warrant will not be disturbed if a reasonably cautious person could have concluded that

there was a substantial basis for the finding of probable cause). Consequently, the order was reasonable within the meaning of the Fourth Amendment.

Tammy also argues that the order violated her attorney-client privilege. The trial court's authority to order discovery does not generally apply to privileged material. See MCR 2.302(B)(1); see also *Augustine*, 292 Mich App at 420-421. However, the court already formulated a protection plan in case any privileged communications find their way into the forensic report.

VI. TAMMY'S FUTURE PARENTING TIME

Although we affirm the trial court's custody order, we are concerned that Tammy has been completely unable to visit or communicate with AM2 since the order issued. The court ordered parenting time to be supervised by Van Gunst and precluded any outside communication unless Van Gunst determines that it would be in AM2's best interests. However, according to Tammy, Van Gunst has refused to participate in any supervised parenting-time sessions until Tammy makes payments, which Tammy claims she cannot afford. If this is true, it is quite troubling as the trial court has already determined that it is in AM2's best interests to have a relationship with both parents and that a complete deprivation of contact with either parent is against the child's best interests. Within the last month, the trial court issued orders attempting to alleviate this issue. In the event the problem has not resolved, Tammy is free to file a new motion in the trial court. If she does, the court must consider the financial impact of its orders and craft any remedy necessary to promote AM2's best interests. We highlight that which the trial court so adroitly communicated throughout

these challenging proceedings: it is in a child's best interests to have a healthy relationship with *both* parents.

We affirm.

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

In re JR KELLOGG, Minor

Docket No. 349930. Submitted January 15, 2020, at Grand Rapids. Decided January 28, 2020, at 9:10 a.m.

The Department of Health and Human Services petitioned the Ionia Circuit Court, Family Division, seeking removal of respondent's children, DF and JK, from respondent's care and asking the court to take jurisdiction over them. The petition predominantly alleged that respondent did not provide DF with proper care and custody. As it related to JK, the petition only asserted that respondent had been verbally aggressive with him and unable to regulate her emotional state when responding to him. Following the preliminary hearing, the court authorized the petition, and the matter was set for an adjudication trial. Subsequently, the trial court, Robert S. Sykes, Jr., J., found that there were statutory grounds under MCL 712A.2(b)(1) and (2) to assume jurisdiction over both children because of respondent's failure to provide, when able to do so, necessary care for the health or morals of the children and because respondent's home was an unfit environment by reason of neglect or depravity on her part. Accordingly, the court entered an order of adjudication assuming jurisdiction over both children. Respondent appealed, arguing that the trial court clearly erred by finding statutory grounds to take jurisdiction over JK.

The Court of Appeals *held*:

1. To acquire jurisdiction over a child, the fact-finder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2. MCL 712A.2(b)(1) provides, in relevant part, that the court has jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals; who is subject to a substantial risk of harm to his or her mental well-being; who is abandoned by his or her parents, guardian, or other custodian; or who is without proper custody or guardianship. MCL 712A.2(b)(2) provides, in

relevant part, that the court has jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. The fact that there are statutory grounds to assume jurisdiction over one minor child does not automatically mean that there are statutory grounds to assume jurisdiction over a second minor child. In this case, under MCL 712A.2(b)(1), the court found that respondent, when able to do so, neglected to provide care necessary for the children's health or morals. The court also found that under MCL 712A.2(b)(2), respondent's neglect and depravity rendered the children's home an unfit place for them to live. However, there was no independent basis on the record to support the court's findings as they related to JK. In light of all the evidence relating to respondent's mental health, respondent had difficulty with stress, had a negative diagnosis on a psychological assessment over 10 years ago, and at the time of the trial had anxiety and depression. This evidence did not rise to the level of establishing that respondent was unfit to parent JK. Furthermore, the fact that respondent yelled at JK did not, standing alone, prove her unfitness under MCL 712A.2(b)(1) because it was insufficient to show that there was a substantial risk of harm to the child's mental well-being. Nor did respondent's yelling establish that the child's home environment was an unfit place under MCL 712A.2(b)(2). Moreover, DF had a special need for structure and routine because of his history of trauma, behavioral issues, and mental-health diagnosis; wholly missing from the record was any testimony indicating that the lack of structure and routine and the inconsistent application of rules was actually having a negative effect on JK's health or mental well-being or that it was creating an unfit home environment for him. Although the court found that respondent neglected to provide necessary care for JK's health and morals, there was no independent factual basis for that finding; accordingly, the trial court clearly erred by finding grounds for jurisdiction over JK under MCL 712A.2(b)(1). Further, there was no evidentiary support for the court's finding that respondent's "neglect" or "depravity" deprived JK of a fit home environment under MCL 712A.2(b)(2).

2. In cases with multiple children, the doctrine of anticipatory neglect may apply to confer jurisdiction. The doctrine of anticipatory neglect allows an inference that a parent's treatment of one child is probative of how that parent may treat other children. However, the probative value of such an inference is decreased by

differences between the children, such as age and medical conditions. Abuse or neglect of the second child is not a prerequisite for jurisdiction of that child and application of the doctrine of anticipatory neglect. In this case, respondent did not challenge that the court properly assumed jurisdiction over DF, and there were marked and significant differences between DF and JK that severely decreased the probative value of the anticipatory-neglect doctrine. At the time of the adjudication trial, DF was 12 years old and had not been in respondent's care between 2009 and 2017; JK was three years old and had always been in respondent's care. DF had a long history of trauma; JK had no history of trauma or behavioral issues. DF was diagnosed with attention deficient disorder, oppositional defiance disorder, and post-traumatic stress disorder; JK was not diagnosed with any mental-health disorders. DF required counseling; JK did not. Finally, the caseworker testified expressly and repeatedly that respondent did not treat the children the same. Given the substantial differences between the two children, the doctrine of anticipatory neglect was not sufficient to establish statutory grounds for jurisdiction in this case.

Order of adjudication and order of disposition as they pertained to JK vacated; case remanded for further proceedings.

Kyle B. Butler, Prosecuting Attorney, and *Barbara Tsaturova*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Evonne Ulmer for respondent.

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

M. J. KELLY, J. Following a bench trial, the trial court found that there were statutory grounds under MCL 712A.2(b)(1) and (2) to assume jurisdiction over respondent's minor children, DF and JK. In this appeal by right,[1] respondent argues that the trial court clearly

[1] The order appealed refers to both DF and JK. However, no claim of appeal was filed in DF's case; therefore, we have no jurisdiction over his case and refer to him only as necessary.

erred by finding that there were statutory grounds to exercise jurisdiction over JK. For the reasons stated in this opinion, we vacate the order of adjudication and the subsequent dispositional order and remand for further proceedings.

I. BASIC FACTS

In March 2019, the Department of Health and Human Services (the DHHS) filed a petition seeking the removal of the children from respondent's care and asking the court to take jurisdiction over them. The majority of the petition contained allegations that respondent did not provide DF with proper care and custody. Specifically, the petition alleged that DF was removed from respondent's care in 2008 because respondent caused him a "mental injury." DF was returned to respondent's care in 2017. In its petition, the DHHS alleged that respondent "aggressive[ly]" yelled at DF for breaking her rules and that DF lived in a state of fear and anxiety as a result of her yelling, harsh punishment, and unpredictable and inconsistent punishment based on different behaviors. The petition also included allegations that respondent failed to comply or benefit from services from previous Child Protective Services (CPS) cases, failed to participate in mental-health treatment, and had difficulty implementing her parenting-skills training. As it related to JK, the petition only asserted that respondent had "been observed by professionals to become verbally aggressive with [JK] and unable to regulate her emotional state when responding to him." Following the preliminary hearing, the court authorized the petition, and the matter was set for an adjudication trial. Subsequently, the court found that there were statutory grounds to take jurisdiction because of respon-

dent's "failure to provide, when able to do so, necessary care for the health or morals of the children" and because respondent's home was "an unfit environment by reason of neglect or depravity on her part." Accordingly, the court entered an order of adjudication assuming jurisdiction over both children.

This appeal follows.

II. JURISDICTION

A. STANDARD OF REVIEW

Respondent argues that the trial court clearly erred by finding statutory grounds to take jurisdiction over JK. "To acquire jurisdiction, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2." *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). Challenges to the court's decision to exercise jurisdiction are reviewed "for clear error in light of the court's finding of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "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." *Id*. at 296-297.

B. ANALYSIS

In this case, the trial court assumed jurisdiction over the minor children under MCL 712A.2(b)(1) and (2), which provide that the court has jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary

> support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> * * *
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

The fact that there are statutory grounds to assume jurisdiction over one minor child does not automatically mean that there are statutory grounds to assume jurisdiction over a second minor child. See *In re Churchill/Belinski*, 503 Mich 895, 895 (2018) (vacating the trial court's order of adjudication and dispositional order over two of the respondent-mother's children because "[t]here is no independent basis to conclude that SLB or JWC come within the statutory requirements of MCL 712A.2(b)").[2]

In this case, as it relates to MCL 712A.2(b)(1), the court found that respondent, when able to do so, neglected to provide care necessary for the children's health or morals. And as it pertains to MCL 712A.2(b)(2), the court found that respondent's neglect and depravity rendered the children's home an unfit place for them to live. However, on the record before this Court, there is no independent basis to support the court's findings as they relate to JK.

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[2] Orders from our Supreme Court are binding if they are a final disposition of an application containing a concise statement of the applicable facts and the reason for the decision. See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012).

Petitioner argued and presented evidence that the court should assume jurisdiction over JK because of concerns with respondent's overall mental health and because respondent was yelling and swearing at JK, was neglecting JK's educational needs, had failed to provide JK with consistent rules and with a routine and structure, and had some difficulty managing JK's wants and controlling him. We address the evidentiary support for each allegation in turn.

With regard to respondent's overall mental health, the caseworker referenced a 2008 psychological evaluation where respondent was apparently diagnosed with borderline personality disorder.[3] Yet, it is undisputed that respondent submitted to a psychological evaluation in 2017. That evaluation, which was admitted into evidence, was conducted by Dr. Thomas Spahn, a licensed psychologist. In the summary and conclusion section of his report, Dr. Spahn opined:

> The psychological is essentially normative. There are no serious cautions such as deficient problem-solving skills, serious psychopathology, highly problematic personality pattern, or an authoritarian personality style that would raise cautions.

Further, although there was testimony that respondent was being treated for anxiety and had some depression, there was no testimony explaining how those conditions affected her fitness as a parent to JK, nor was there any testimony regarding the severity of the conditions. Regarding respondent's mental health, there was also evidence that respondent admitted to Dr. Spahn that she had difficulty managing stress, and the testimony from the caseworker and other service providers corroborated her statement. The caseworker

[3] The 2008 psychological evaluation was not admitted into evidence.

testified that an example of this was when JK had a meltdown and respondent took her phone away from him. The caseworker stated that in response to the stress of the situation, respondent returned the phone to him, which the caseworker appeared to believe showed that respondent was unable to handle the stress of parenting JK. In light of all the evidence relating to respondent's mental health, we conclude that respondent has difficulty with stress, that over 10 years ago she had a negative diagnosis on a psychological assessment, and that she currently has some anxiety and depression. The testimony does not, however, rise to the level of establishing that respondent is unfit to parent JK, especially in light of the caseworker's testimony that it was "unknown" how removal of DF—a significant source of stress in the home—would affect respondent's parenting of JK.

The caseworker also suggested it was proper for the court to assume jurisdiction over JK because respondent was verbally aggressive with him. At trial, several witnesses testified that respondent was verbally aggressive with JK, and they recounted that she was loud and would yell and swear at him. On one occasion, JK flinched when she was yelling at him. There was also testimony that while yelling, respondent would have an intimidating presence because she would stand over JK or invade his personal space. There were no allegations of physical violence, and beyond the testimony that he flinched on one occasion, there was no indication that JK was negatively affected by respondent's yelling and swearing. A parent that yells and swears at his or her child, stands over them, and invades their personal space can fairly be characterized as a less than ideal parent. But that fact standing alone does not prove a parent's unfitness under MCL 712A.2(b)(1) because it is insufficient to show that there is "a

substantial risk of harm to [the child's] mental well-being." Nor does it establish that the child's home environment is an unfit place because of the parent's neglect, cruelty, drunkenness, criminality, or depravity so as to allow the court to assume jurisdiction under MCL 712A.2(b)(2). Something more than yelling and swearing is necessary to prove parental unfitness.

The caseworker also suggests that the court could take jurisdiction over JK because respondent was neglecting his educational needs. Notwithstanding the fact that JK was only three years old at the time, the record reflects that he had an individualized educational plan (IEP) to address a speech delay. Respondent did not consistently take him to his "school." But nothing on the record supports an inference that respondent was required by law or court order to take him to school. Furthermore, the trial court found that this failure did not rise to the level of educational neglect under MCL 712A.2(b). Accordingly, on this record, there is no indication that JK's "truancy" was a basis to find respondent an unfit parent.

There was also testimony from one of the service providers that respondent's pattern of inconsistent rules and lack of routine or structure was detrimental to both children. The testimony, however, focused primarily on DF, who had a special need for structure and routine because of his history of trauma, behavioral issues, and mental-health diagnosis. As it relates to JK, the testimony was only that, generally, it is better for a child to have a consistent set of rules and to have a routine and structure to his or her life. Wholly missing from the record is any testimony indicating that the lack of structure and routine and the inconsistent application of rules was actually having a

negative impact on JK's health or mental well-being or that it was creating an unfit home environment for him under MCL 712A.2(b)(2).

Finally, another witness testified that she observed respondent having some difficulties managing JK's wants and controlling him. The witness recounted that on occasions respondent would be loud and verbally aggressive and that on one occasion she "plopped" JK onto her lap somewhat aggressively. Parents, however, are allowed to have some difficulties managing the wants of and control of their children. MCL 712A.2(b)(1) and (2) require more than "some difficulty," and in this case nothing more has been offered.

In conclusion, although the court found that respondent neglected to provide necessary care for JK's health and morals, we can discern no independent factual basis for that finding. Accordingly, we conclude that the trial court clearly erred by finding grounds for jurisdiction under MCL 712A.2(b)(1). Further, we cannot find evidentiary support for the court's finding that respondent's "neglect" or "depravity" deprived JK of a fit home environment. Although there is certainly evidence enough to support that respondent has not been a model parent, "[t]he 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 . . . ." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); see also *In re Newman*, 189 Mich App 61, 70; 472 NW2d 38 (1991) (determining that although the respondent-parents were "less than ideal," there was insufficient evidence to terminate their parental rights).

Our inquiry, however, cannot end with a determination that there is not an individual factual basis for the

court to assume jurisdiction over JK under MCL 712A.2(b). In cases with multiple children, the doctrine of anticipatory neglect may apply to confer jurisdiction. *In re BZ*, 264 Mich App at 296. "The doctrine of anticipatory neglect recognizes that [h]ow a parent treats one child is certainly *probative* of how that parent may treat other children." *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001) (quotation marks and citation omitted; emphasis added). "Abuse or neglect of the second child is not a prerequisite for jurisdiction of that child and application of the doctrine of anticipatory neglect." *In re Gazella*, 264 Mich App 668, 680-681; 692 NW2d 708 (2005), superseded in part on other grounds *In re Hansen*, 285 Mich App 158, 163 (2009).

Here, respondent does not challenge that the court properly assumed jurisdiction over DF. Moreover, although the trial court did not directly reference the doctrine of anticipatory neglect in its findings, the petitioner argued to the trial court that jurisdiction over JK was proper on this basis. Yet, even though jurisdiction may be properly assumed on the basis of the anticipatory-neglect doctrine, that does not also mean that it will always be sufficient. See *In re LaFrance*, 306 Mich App 713; 858 NW2d 143 (2014).

In *LaFrance*, this Court held that the doctrine of anticipatory neglect allows an inference that a parent's treatment of one child is probative of how that parent may treat other children. *Id*. at 730. However, the probative value of such an inference is decreased by differences between the children, such as age and medical conditions. *Id*. at 730-731. In *LaFrance*, the respondent-parents had neglected their youngest child, but there was no evidence that they had ever abused or neglected their three older children. *Id*. at 726-730. The trial court nevertheless found grounds to

terminate the respondents' parental rights to all the children, relying heavily on the parents' failure to address their substance-abuse issues. *Id*. at 730. This Court reversed, finding that the court's reliance on the parents' failure to control their substance-abuse issues and on the doctrine of anticipatory neglect was insufficient to warrant termination when considered alongside the fact (1) that the older children, whose ages ranged from five to twelve, had different needs than the infant that was neglected and (2) that, unlike their infant sibling, the older children did not require special care for cerebral palsy. *Id*. at 730-731.

Similarly, in this case, there are marked and significant differences between DF and JK that severely decrease the probative value of the anticipatory-neglect doctrine. At the time of the adjudication trial, DF was 12 years old and had not been in respondent's care between 2008 and 2017. JK was 3 years old and had always been in respondent's care. JK had no history of trauma or behavioral issues. In contrast, DF had a long history of trauma. He was removed from respondent's care because of a "mental injury," and he was placed with his father from 2008 until 2017. While with his father, he was subjected to additional trauma. The exact nature of the additional trauma was undefined, but the caseworker indicated that there were allegations of physical and sexual abuse. Further, it was uncontroverted that DF had behavioral issues while in his father's care and that those issues continued in his mother's care. Because of his history of trauma and behavioral issues, DF had needs markedly different from JK's needs. In addition, DF was diagnosed with attention deficient disorder, oppositional defiance disorder, and post-traumatic stress disorder. JK was not diagnosed with any mental-health disorders. Thus, DF required counseling; JK did not. Fi-

nally, and somewhat significantly, the caseworker testified expressly and repeatedly that respondent did not treat the children the same. Instead, she showed "clear favoritism" toward JK. There was also testimony that she would provide validation to JK, was physically close to him, and generally had a significantly better bond with him than she had with DF. Given the substantial differences between the two children, we conclude that the doctrine of anticipatory neglect is not sufficient to establish statutory grounds for jurisdiction in this case.[4]

We vacate the order of adjudication and the order of disposition as they relate to JK, and we remand for further proceedings. We do not retain jurisdiction.

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

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[4] Given our resolution, we decline to address whether the trial court erred by permitting the caseworker to testify to statements made in the 2008 CPS report and 2008 psychological evaluation.

MICHIGAN HEAD & SPINE INSTITUTE, PC v MICHIGAN ASSIGNED CLAIMS PLAN

Docket Nos. 344955, 345010, and 345012. Submitted December 3, 2019, at Detroit. Decided December 17, 2019. Approved for publication January 30, 2020, at 9:00 a.m.

Michigan Head & Spine Institute, PC (MHSI) and VHS of Michigan, Inc., doing business as Detroit Medical Center (DMC), jointly filed a one-count complaint in the Wayne Circuit Court against the Michigan Assigned Claims Plan, which is maintained by the Michigan Automobile Insurance Placement Facility (MAIPF), and an unnamed insurer, alleging that plaintiffs were entitled under the no-fault act, MCL 500.3101 *et seq*., to recover for medical services and accommodations provided to Jesse Garrett to treat injuries Garrett suffered in a motor vehicle collision. Plaintiffs further alleged that under MCL 500.3174, MAIPF had a statutory duty to assign an insurance carrier to provide no-fault benefits and that MAIPF breached that duty. Garrett successfully moved to intervene, also alleging that MAIPF had failed to assign an insurer and that MAIPF was liable for the no-fault benefits should it continue to fail to assign an insurer. Garrett also named the yet-to-be-assigned insurer as a defendant. MHSI and DMC then moved to compel the assignment of an insurer. The trial court, David J. Allen, J., denied the motion without prejudice. MHSI and DMC moved for leave to amend their complaint, seeking to allege that they possessed standing by assignment in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017). The court denied the motion without prejudice. MAIPF moved for summary disposition under MCR 2.116(C)(8) and filed additional motions for summary disposition not relevant to this appeal. The trial court granted summary disposition to MAIPF under MCR 2.116(C)(8) and denied the request of MHSI and DMC to amend their complaint to account for the assignments. The trial court held that MAIPF could not be held liable for directly paying benefits and, relatedly, that the only form of action that could be brought against MAIPF was one for declaratory relief requiring it to assign the claim to an insurer. The trial court accordingly dismissed the claims of MHSI, DMC, and Garrett because they did not have a specific count in their

respective complaints for declaratory relief and the court viewed the complaints as seeking only monetary damages. Garrett appealed in Docket No. 344955, MHSI appealed in Docket No. 345010, and DMC appealed in Docket No. 345012. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Under MCL 500.3174, as amended by 2012 PA 204, which was the version of the statute in effect when this action was commenced, MAIPF shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned once MAIPF is timely notified by a person claiming through the assigned claims plan. Under MCL 500.3173a(1), as amended by 2012 PA 204, MAIPF is first required to make an initial determination of a claimant's eligibility for benefits under the assigned claims plan before assigning the claim to an insurer, and it shall deny an obviously ineligible claim. If MAIPF denies the claim, the claimant shall be notified promptly in writing of the denial and the reasons for the denial. However, the claim itself is nonetheless processed through MAIPF, and the servicing insurers act on behalf of MAIPF; therefore, a claim for no-fault benefits is a claim to MAIPF. Accordingly, plaintiffs could seek no-fault benefits from MAIPF directly because MAIPF had not assigned the claim to a servicing insurer. The trial court erred by granting summary disposition in MAIPF's favor on the ground that the only type of action that could ever be brought against MAIPF was one for declaratory relief seeking to require MAIPF to assign an insurer.

2. MCR 2.111(B)(1) requires a complaint to include 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. In this case, the trial court erred by determining that the complaints filed by MHSI, DMC, and Garrett did not sufficiently request that MAIPF be ordered to assign the claim to an insurer. The trial court erred in its focus on whether such relief had been sought in its own distinct count. It was clear from the face of each complaint that MHSI and DMC, as well as Garrett, alleged that MAIPF breached its statutory duty to assign an insurer or otherwise pay Garrett's claims. The complaints adequately put MAIPF on notice that the claims relied on the allegation that MAIPF had breached its statutory duty to assign an insurer in this case and that MHSI, DMC, and Garrett alleged that MAIPF was required to assign the claim for benefits to an insurer. Accordingly, the trial

court erred by granting summary disposition under MCR 2.116(C)(8) on such an overly technical basis that was contrary to the principles of notice pleading applicable in Michigan.

3. A motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. In this case, permitting an amendment to the complaints for purposes of clarifying that the parties sought an order compelling MAIPF to fulfill its statutory obligations regarding assignment of the claim would not have been futile, and this amendment would have changed the complaint in form only and not substance. It was clear from the outset of this litigation—and the face of the complaint itself—that MHSI and DMC were claiming an entitlement to recover no-fault benefits based on their respective provision of medical services and accommodations to Garrett. Allowing MHSI and DMC to amend their complaint to clarify that their standing was based on an assignment from Garrett would not have changed anything about the merits of the lawsuit or the basis on which MHSI and DMC claimed that they were entitled to relief in this case. Additionally, there was no record evidence that the proposed amendment to allege the existence of the assignment from Garrett would have caused any actual prejudice to MAIPF, nor is there evidence of bad faith or dilatory motive by MHSI or DMC. Therefore, the trial court abused its discretion by denying leave to amend to reflect the assignments on the sole basis of the delay in seeking the amendment.

Trial court's order granting summary disposition under MCR 2.116(C)(8) and trial court's denial of leave to amend the complaints reversed; case remanded for further proceedings.

Miller & Tischler, PC (by *Andrew J. Horne*) for the Michigan Head & Spine Institute, PC, and VHS of Michigan, Inc., doing business as Detroit Medical Center.

Bagley & Langan, PLLC (by *Steven M. Hanft*) for Jesse Garrett.

Hewson & Van Hellemont, PC (by *Grant O. Jaskulski*, *Jordan A. Wiener*, *Lynn B. Sholander*, and *Kathryn R. Church*) for the Michigan Assigned Claims Plan.

Before: BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM. In this no-fault case, plaintiffs Michigan Head & Spine Institute, PC (MHSI) and VHS of Michigan, Inc., doing business as Detroit Medical Center (DMC), as well as intervening plaintiff Jesse Garrett appeal as of right and challenge the trial court's dismissal of their claims against defendants the Michigan Assigned Claims Plan (the MACP), which is maintained by the Michigan Automobile Insurance Placement Facility (MAIPF), and an unnamed insurer to whom it was anticipated MAIPF would assign Garrett's claim.[1] MHSI, DMC, and Garrett also challenge the trial court's refusal to allow them an opportunity to amend their complaints. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. BACKGROUND

MHSI and DMC initiated this action in a jointly filed one-count complaint alleging that they were entitled under the no-fault act, MCL 500.3101 *et seq*., to recover for medical services and accommodations provided to Garrett to treat injuries he suffered in a motor vehicle collision and that MAIPF was required to "assign a carrier to provide No-Fault benefits to a claimant if no personal protection insurance applicable to the injury

[1] MAIPF maintains the MACP. See MCL 500.3171(2) ("The Michigan automobile insurance placement facility shall adopt and maintain an assigned claims plan."). Although all plaintiffs named the MACP as the defendant in this matter, MAIPF asserts that it, not the MACP, is the "entity with the capacity to be sued and, for all intents and purposes, should be considered the actual Defendant in this case." Accordingly, we will refer to MAIPF as the relevant defendant and to the MACP to the extent it is necessary to address the plan itself.

is available" but "breached its statutory obligation to assign an insurance carrier to process claims arising out of the September 6, 2016 motor vehicle accident, as provided by MCL 500.3174." MHSI and DMC also named the yet-to-be-assigned insurer as a defendant. Garrett successfully moved to intervene and, in his intervening complaint, alleged, in relevant part, that MAIPF "has failed to assign Intervening Plaintiff's claim for no-fault benefits to an insurer, violating its duties under MCL 500.3171, MCL 500.3172, MCL 500.3173, MCL 500.3174, and MCL 500.3175." Garrett likewise alleged that MAIPF was "liable to Intervening Plaintiff for the claimed benefits should [it] continue to violate its statutory duty to assign Intervening Plaintiff's claim to an insurer." Like MHSI and DMC, Garrett also named the yet-to-be-assigned insurer as a defendant. MAIPF answered plaintiffs' complaint but did *not* timely answer Garrett's intervening complaint.

As the case progressed, MHSI and DMC moved to compel the assignment of an insurer, but the trial court denied the motion without prejudice.

MHSI and DMC subsequently filed an "emergency" motion for leave to amend their complaint, seeking to allege that they possessed standing by assignment in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). In *Covenant*, our Supreme Court held that the no-fault act did not provide healthcare providers with a statutory direct cause of action against no-fault insurers to recover personal protection insurance (PIP) benefits. *Id*. at 196. The *Covenant* Court also stated, however, that its holding was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Id*. at 217 n 40. MAIPF opposed the motion for leave to amend, con-

tending that the "emergency" motion was prejudicial because of "undue delay" and that the amendment would be "futile." With respect to delay, MAIPF argued that the parties had been litigating the case for approximately one year by the time the motion to amend was filed on December 1, 2017, and that the assignments at issue were executed in September 2016, February 2017, and June 2017—15 months, 10 months, and 6 months, respectively, before the "emergency" motion was filed. With respect to futility, MAIPF argued that amending the complaint would be futile because it was entitled to have its pending motion for summary disposition, which was premised on the ground that Garrett and his mother had made material misrepresentations of fact related to the case, granted in its favor. The trial court denied the emergency motion for leave to amend without prejudice, finding that the motion was "too late, prejudicial and futile."[2] The court offered no further explanation of this ruling. At the same hearing, the trial court stated that it would take the pending motion for summary disposition under advisement.[3]

MAIPF subsequently filed additional motions for summary disposition, including one under MCR 2.116(C)(8) that is relevant to the issues raised in this appeal. In this (C)(8) motion, MAIPF first argued that MHSI's and DMC's claims failed to state a claim because the holding in *Covenant* prohibited healthcare providers from proceeding with a direct action against

[2] MHSI and DMC filed an application for leave to appeal that decision in this Court, which was denied. See *Mich Head & Spine Institute PC v Mich Assigned Claims Plan*, unpublished order of the Court of Appeals, entered April 6, 2018 (Docket No. 342537).

[3] This summary disposition motion is not at issue in this appeal and will not be further discussed.

a no-fault insurer. MAIPF next argued that MHSI and DMC had also failed to state a claim for PIP benefits against it because (1) MAIPF was only created by statute to adopt and maintain an assigned claims plan, (2) MAIPF was not an insurer and its function was limited to reviewing and assigning eligible claims to an insurer that would be responsible for providing benefits required under the no-fault act, and (3) MAIPF therefore could not be liable as a matter of law for paying insurance benefits. Finally, MAIPF argued that its second argument (that it could not be liable for paying PIP benefits) applied with equal force to Garrett, justifying dismissal of his claim as well.

While the motion for summary disposition under MCR 2.116(C)(8) was pending, Garrett requested, and the court clerk entered, a default against MAIPF on Garrett's intervening complaint based on MAIPF's failure to file an answer. The default was entered on March 26, 2018. MAIPF then filed a responsive pleading the next day. Three days later, the parties stipulated to set aside the default, and the court entered an order to that effect. Once the default was set aside, MAIPF refiled its answer and affirmative defenses on April 9, 2018.

Meanwhile, MHSI and DMC opposed MAIPF's (C)(8) motion, arguing first that their claims could proceed based on a valid assignment of benefits received from Garrett and that leave to amend their complaint should be granted to reflect that their standing was based on an assignment. MHSI and DMC, citing MCR 2.116(I)(5), argued that granting leave to amend was warranted. MHSI and DMC argued that MAIPF would not be prejudiced because the amendment would only clarify their standing and would not otherwise change the nature of the underlying claims

at issue in the lawsuit. Next, with respect to MAIPF's claim that it could not be liable for paying insurance benefits as a matter of law, MHSI and DMC argued that MCL 500.3172 specifically provides for claimants to obtain PIP benefits through the assigned claims plan if no personal protection insurance is applicable to the injury. MHSI and DMC further argued that the MACP Plan of Operations provided that MAIPF was ultimately responsible for indemnifying all losses and liabilities related to benefits paid under the MACP and that the MAIPF could, as it did in this case, elect to defend, pay, or otherwise dispose of any claim at its own cost instead of assigning the claim. MHSI and DMC also argued that because MAIPF had refused to assign an insurer, there was no other defendant against which to timely file an action.

Garrett's arguments were largely the same with respect to opposing MAIPF's argument that it could not be held liable for PIP benefits as a matter of law. Garrett further argued that his complaint alleged that MAIPF had breached its statutory duty to assign his claim. Finally, Garrett argued that, in the alternative, he should be granted leave to amend his complaint to add a claim requiring MAIPF to assign an insurer.

In reply, MAIPF asserted that MHSI and DMC's arguments with respect to an assignment-based claim were nothing more than an attempt to undermine the trial court's earlier decision to deny them an opportunity to amend their pleading. MAIPF argued that granting leave to amend would be prejudicial to it solely because MHSI and DMC could have moved earlier than they did for leave to amend based on the assignments that they had long possessed. MAIPF also argued that it could not be held liable for monetary damages because it only had an obligation to reimburse servicing insurance

carriers, not claimants, and had nonetheless already determined that Garrett was "obviously ineligible" for PIP benefits. Additionally, MAIPF admitted in its reply brief that even if summary disposition were granted on the ground that it could not be monetarily liable for paying benefits, Garrett would still be permitted to proceed in the action with attempting to require MAIPF to assign his claim because Garrett had sought this relief in his complaint. Specifically, MAIPF stated, "If the Court grants this Motion as previously done in prior cases, Plaintiff would still have a cause of action for assignment as pled in the Complaint and permitted by the statute."

The trial court granted summary disposition to MAIPF under MCR 2.116(C)(8). With respect to the *Covenant* issue, counsel for MHSI and DMC argued at the hearing that they had waited to move to amend because they "wanted an insurance company in the case so that we could do one amendment as to both . . . an insurance company and allege the assignment." Counsel further argued that the previous denial of the motion for leave to amend had been without prejudice. Additionally, counsel argued that MAIPF inexcusably delayed filing a (C)(8) motion based on *Covenant*, that there was no actual prejudice to MAIPF if the court permitted the amendment, and that delay alone was insufficient to justify denying leave to amend in the absence of such prejudice. The trial court granted MAIPF's motion for summary disposition under (C)(8) with respect to MHSI and DMC pursuant to *Covenant*. The trial court confirmed that it had already denied leave for MHSI and DMC to amend their complaint to reflect an assignment-based theory of standing because it was "late." The trial court also explained that its summary disposition ruling was based on the court being "consistent with what it did."

Additionally, the trial court again denied the request of MHSI and DMC to amend their complaint to account for the assignments.

With respect to MAIPF's argument that it could not be liable for paying PIP benefits because it was not an insurer, the trial court concluded that MAIPF was entitled to summary disposition under (C)(8) as to MHSI, DMC, and Garrett on this basis. The trial court ruled that "all claims for monetary damages" would be dismissed. The trial court appeared to impliedly rule that the only type of action that could legitimately be brought against MAIPF was one for declaratory relief requiring MAIPF to assign the claim to an insurer. The trial court accordingly dismissed the claims of MHSI, DMC, and Garrett because they did not have a specific count in their respective complaints for declaratory relief and the court viewed the complaints as seeking only monetary damages. The trial court further ruled that it "isn't going to permit an amendment at this late in the game."

II. ANALYSIS

On appeal, MHSI, DMC, and Garrett challenge the trial court's order granting summary disposition under MCR 2.116(C)(8). As described earlier, the trial court's ruling was based on two grounds, one of which applied to all three plaintiff-appellants and one of which only applied to MHSI and DMC. Plaintiff-appellants also challenge the trial court's related rulings prohibiting them from amending their complaints.

A. STANDARD OF REVIEW

"This Court reviews de novo a circuit court's summary disposition ruling." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010).

> A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019) (citations omitted).]

This Court also reviews the interpretation of the no-fault act's statutory provisions de novo. *Agnone v Home-Owners Ins Co*, 310 Mich App 522, 526; 871 NW2d 732 (2015). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543, 551; 909 NW2d 495 (2017) (quotation marks and citation omitted). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Id*. (quotation marks and citation omitted).

Finally, we review a trial court's decision denying leave to amend pleadings for an abuse of discretion. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 207; 920 NW2d 148 (2018).

B. DISCUSSION

The first ground on which the trial court granted summary disposition involved the trial court's conclusions that MAIPF could not be held liable for directly paying PIP benefits and, relatedly, that the only form of action that could be brought against MAIPF was one for declaratory relief requiring it to assign the claim to an insurer.

The no-fault act's intended purpose "is to ensure the compensation of persons injured in automobile accidents." *Allstate Ins Co*, 321 Mich App at 552 (quotation marks and citation omitted). As part of this statutory scheme, a "person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may claim personal protection insurance benefits *through* the assigned claims plan" even when there does not appear to be any PIP coverage applicable to the injury. MCL 500.3172(1), as amended by 2012 PA 204 (emphasis added);[4] see also *Spectrum Health Hosps v Mich Assigned Claims Plan*, 330 Mich App 21, 33; 944 NW2d 412 (2019). MCL 500.3174, as amended by 2012 PA 204, which was the version of the statute in effect when this action was commenced, instructs that "[t]he Michigan automobile insurance placement facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned" once MAIPF is timely notified by a person "claiming through the assigned claims plan." However, MAIPF is first required to "make an initial determination of a claimant's eligibility for benefits under the assigned claims plan" before assigning the claim to an insurer, and it "shall deny an obviously ineligible claim." MCL 500.3173a(1), as amended by 2012 PA 204; see also *Spectrum Health*, 330 Mich App at 34-35. If MAIPF denies the claim, the "claimant shall be notified promptly in writing of the denial and the reasons for the denial." MCL 500.3173a(1), as amended by 2012 PA 204; see also *Spectrum Health*, 330 Mich App at 35.

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[4] The recent amendment of this statute by 2019 PA 21, which took effect on June 11, 2019, has not substantively changed this particular rule.

However, this Court has previously recognized that although MAIPF assigns claims to insurers, "the claim itself [is] nonetheless being processed through the MAIPF" and the servicing insurers "act on behalf of the MAIPF." *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 781; 910 NW2d 666 (2017) (quotation marks and citation omitted). Thus, we concluded, such a "claim for no-fault benefits is a claim to the MAIPF[.]" *Id*.

This conclusion is further supported by the version of MCL 500.3175(1) that was in effect during the course of the proceedings below, which provided, in relevant part, as follows:

> The assignment of claims under the assigned claims plan shall be made according to procedures established in the assigned claims plan that assure fair allocation of the burden of assigned claims among insurers doing business in this state on a basis reasonably related to the volume of automobile liability and personal protection insurance they write on motor vehicles or the number of self-insured motor vehicles. An insurer to whom claims have been assigned shall make prompt payment of loss in accordance with this act. *An insurer is entitled to reimbursement by the Michigan automobile insurance placement facility for the payments*, the established loss adjustment cost, and an amount determined by use of the average annual 90–day United States treasury bill yield rate . . . . [MCL 500.3175(1), as amended by 2012 PA 204 (emphasis added).]

Accordingly, we conclude that plaintiffs may seek PIP benefits from MAIPF directly because MAIPF has not assigned the claim to a servicing insurer. The trial court erred by granting summary disposition in MAIPF's favor on the ground that the only type of action that could ever be brought against MAIPF was one for declaratory relief seeking to require MAIPF to assign an insurer.

Furthermore, the trial court also erred by determining that the complaints filed by MHSI, DMC, and Garrett did not sufficiently request that MAIPF be ordered to assign the claim to an insurer. The trial court erred in its focus on whether such relief had been sought in its own distinct count. See *Wiggins v City of Burton*, 291 Mich App 532, 561; 805 NW2d 517 (2011) ("Although it has become commonplace in this state for a plaintiff to assert a request for declaratory relief as a separately labeled cause of action within his or her complaint, this is technically improper because 'declaratory relief is a remedy, not a claim.' ") (citation omitted).

MCR 2.111(B)(1) simply requires a complaint to include 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[.]" This Court has previously explained that this subrule is "consistent with a notice pleading environment" and that "[t]he 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." *Dalley*, 287 Mich App at 305 (quotation marks and citations omitted).

In this case, although the operative complaints did not include a specific paragraph asking MAIPF to assign an insurer in the "WHEREFORE" clause, "a complaint must be read as a whole, and it is well settled that this Court will look beyond the mere procedural labels used in the pleadings." *Wiggins*, 291 Mich App at 561. "Courts are not bound by a party's choice of labels because this would effectively elevate form over substance." *Shah*, 324 Mich App at 204

(quotation marks and citation omitted). It is clear from the face of each complaint that MHSI and DMC, as well as Garrett, alleged that MAIPF breached its statutory duty to assign an insurer or otherwise pay Garrett's PIP claims. MHSI and DMC alleged that MAIPF was required by MCL 500.3172(1) to "assign a carrier to provide No-Fault benefits to a claimant if no personal protection insurance applicable to the injury is available" and "breached its statutory obligation to assign an insurance carrier to process claims arising out of the September 6, 2016 motor vehicle accident, as provided by MCL 500.3174." Likewise, Garrett alleged that MAIPF "has failed to assign Intervening Plaintiff's claim for no-fault benefits to an insurer, violating its duties under MCL 500.3171, MCL 500.3172, MCL 500.3173, MCL 500.3174, and MCL 500.3175." Garrett also alleged that he was entitled to recover benefits from the insurer to which his claim was assigned and that MAIPF was liable for these benefits if it "continue[d] to violate its statutory duty to assign Intervening Plaintiff's claim to an insurer." We conclude that the complaints adequately put MAIPF on notice that the claims relied on the allegation that MAIPF had breached its statutory duty to assign an insurer in this case and that MHSI, DMC, and Garrett alleged that MAIPF was required to assign the claim for benefits to an insurer.

Accordingly, the trial court erred by granting summary disposition under MCR 2.116(C)(8) on such an overly technical basis that was contrary to the principles of notice pleading applicable in Michigan. *Dalley*, 287 Mich App at 305. To the extent that the trial court or MAIPF believed that the form of this request for an order compelling MAIPF to assign the claim should have been different, the trial court should have permitted amendment of the complaints. When sum-

mary disposition is granted under MCR 2.116(C)(8), the trial court "must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Shah*, 324 Mich App at 209 (quotation marks and citation omitted); see also MCR 2.116(I)(5). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Shah*, 324 Mich App at 209 (quotation marks and citation omitted). Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2). In this case, permitting an amendment to the complaints for purposes of clarifying that the parties sought an order compelling MAIPF to fulfill its statutory obligations regarding assignment of the claim would not have been futile under these standards, and this amendment would have changed the complaint in form only and not substance. The trial court abused its discretion by denying leave to amend the complaints in this respect.

Finally, the trial court also erred by denying MHSI and DMC leave to amend their complaint to allege an assignment-based theory of standing. It was clear from the outset of this litigation—and the face of the complaint itself—that MHSI and DMC were claiming an entitlement to recover PIP benefits based on their respective provision of medical services and accommodations to Garrett. There is no question that their claims were derivative of any right to recover PIP benefits that Garrett might have. Allowing MHSI and DMC to amend their complaint to clarify that their standing was based on an assignment from Garrett would not have changed anything about the merits of the lawsuit or the basis on which MHSI and DMC claimed that they were entitled to relief in this case. However, it is clear from the record that the trial court

denied leave to amend solely because it would have preferred that MHSI and DMC had moved to amend their complaint earlier.

"[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *Shah*, 324 Mich App at 208 (quotation marks and citation omitted; alteration in original). Our Supreme Court has stated, "While (a)s a general rule, the risk of substantial prejudice increases with the passage of time, in the absence of a showing of either bad faith or actual prejudice, mere delay does not warrant denial of a motion to amend." *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 663-664; 213 NW2d 134 (1973) (quotation marks and citation omitted).

In this case, there was no record evidence that the proposed amendment to allege the existence of the assignment from Garrett would have caused any actual prejudice to MAIPF, nor is there evidence of bad faith or dilatory motive by MHSI or DMC. Counsel for MHSI and DMC provided a reasonable explanation for the delay by indicating their desire to name an insurance-company defendant in the same motion for leave to amend. MHSI and DMC had previously moved to compel MAIPF to assign an insurer, but the trial court denied that motion. Therefore, the trial court abused its discretion by denying leave to amend to reflect the assignment on the sole basis of the delay in seeking the amendment. The trial court's assertions that the amendment was prejudicial and futile were not based on any further explanations or findings of fact, and such conclusions are unsupported by the record.

We reverse the trial court's order granting summary disposition under MCR 2.116(C)(8) and the trial court's denial of leave to amend the complaints.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Plaintiffs, having prevailed, are entitled to costs. MCR 7.219(A).

BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ., concurred.

LIFE SKILLS VILLAGE, PLLC v NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

Docket No. 345237. Submitted December 4, 2019, at Detroit. Decided December 17, 2019. Approved for publication January 30, 2020, at 9:05 a.m.

Life Skills Village, PLLC (LSV) and Life Skills Residential, LLC (LSR) filed an action in the Oakland Circuit Court against Nationwide Mutual Fire Insurance Company, seeking to recover payment under the no-fault act, MCL 500.3101 *et seq*., for medical services they provided to Donald Oliver after he suffered a traumatic brain injury in a pedestrian-vehicle accident. Beginning in June 2016, LSV provided daytime services—that is, cognitive therapy, occupational therapy, etc.—to Oliver. Later that year, LSR, a semi-independent residential program whose focus was to assist people with transitioning to independent living, placed Oliver in a rented house. Oliver lived in the house by himself but was monitored 24 hours a day by staff through cameras placed in his home. Although Oliver was able to perform daily activities by himself—such as taking medications, eating, bathing, and seeing doctors—he frequently did not. As part of its services, LSR staff monitored Oliver daily and prompted him to perform those activities. Nationwide initially made payments to LSR for those services but then stopped. Oliver assigned to LSV and LSR his right to personal protection insurance benefits for the services rendered, and the providers filed this action. With regard to LSR, Nationwide moved for summary disposition, arguing that the claims included charges for adult foster care and room and board provided to Oliver during his stay at the residential home and that those charges were not compensable because LSR was not licensed as an adult foster care facility as defined in MCL 400.703(4) of the Adult Foster Care Facility Licensing Act (the act), MCL 400.701 *et seq*. In its answer, LSR asserted that it provided residential services to persons who did not require adult foster care; LSR also requested summary disposition in its favor. The court, Hala Y. Jarbou, J., granted Nationwide's motion for summary disposition and denied LSR's request for summary disposition. The court reasoned that because LSR provided personal care and

room and board to Oliver, the services constituted "foster care" as defined by MCL 400.704(7), as amended by 2016 PA 525, and that LSR could not be compensated for those services because it was not a licensed adult foster care facility. In particular, the court found that LSR satisfied the "second part" of the MCL 400.706(1) definition of "personal care." By stipulation of the parties, the court later dismissed LSV's claims against Nationwide. LSR appealed.

The Court of Appeals *held*:

1. MCL 500.3157(1), as enacted by 1972 PA 294, provided that a physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services, and accommodations rendered. A healthcare provider must be in compliance with licensing requirements for services to be "lawfully rendered" and, thus, recoverable under the no-fault act. An adult foster care facility cannot be established or maintained unless licensed by the Department of Licensing and Regulatory Affairs. Under MCL 400.703(3), an "adult foster care facility" means an establishment that provides foster care to adults and includes facilities and foster care homes for adults who are aged, mentally ill, developmentally disabled, or physically disabled who do not require continuous nursing care. In turn, MCL 400.704(7), as amended by 2016 PA 525, defines the term "foster care" as the provision of supervision, personal care, and protection, in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation; all three services—that is, supervision, personal care, and room and board—must be provided to qualify as foster care. Within the act, "personal care" and "supervision" have distinct meanings. Specifically, under MCL 400.706(1), "personal care" means personal assistance provided by a licensee or an agent or employee of a licensee to a resident who requires assistance with dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident's physician, or the development of those personal and social skills required to live in the least restrictive environment; the final clause in the definition—"the development of those personal and social skills required to live in the least restrictive environment"—is not an alternative definition of "personal care" but, rather, the last item in a list of activities that define the

term. The personal assistance must pertain to one of the listed activities to satisfy the definition of "personal care." In contrast, MCL 400.707(7), as amended by 1986 PA 257, provides that "supervision" means guidance of a resident in the activities of daily living, including reminding a resident to maintain his or her medication schedule as directed by the resident's physician, reminding a resident of important activities to be carried out, assisting a resident in keeping appointments, and being aware of a resident's general whereabouts even though the resident may travel independently about the community. The term "personal care," therefore, requires something more, or at least different, than "supervision, which involves only guidance of and reminders to residents.

2. In this case, LSR reminded Oliver to perform daily activities and conducted daily checks on his health and safety. Because LSR staff only guided Oliver in his daily activities, the services constituted "supervision" as defined by the statute and did not constitute "personal care." Because LSR did not provide one of the three services required under the definition of "foster care,"—here, personal-care services—it did not provide foster care to Oliver. It was unnecessary to determine whether LSR provided room and board to Oliver because all three elements had to exist to qualify as "foster care" and it was clear that LSR did not provide one of the elements (i.e., personal care). Because LSR did not provide foster care to Oliver, it was not required to be licensed as an adult foster care facility and the services were not unlawfully rendered on that basis. Accordingly, the trial court erred by determining that LSR had to be licensed as an adult foster care facility and by granting summary disposition in favor of Nationwide. However, the trial court correctly denied LSR's request for summary disposition because LSR still had to establish that the charges for its services were reasonable and that the expenses were reasonably necessary.

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

1. NO-FAULT INSURANCE — ADULT FOSTER CARE FACILITY LICENSING ACT — WORDS AND PHRASES — "PERSONAL CARE" and "SUPERVISION."

The terms "personal care" and "supervision" have distinct meanings within the Adult Foster Care Facility Licensing Act, MCL 400.701 *et seq*.; "personal care" requires something more than, or at least different than, supervision, which involves only guidance in the activities of daily living, including providing reminders to residents about important activities to be carried out.

2. NO-FAULT INSURANCE — ADULT FOSTER CARE FACILITY LICENSING ACT — WORDS AND PHRASES — "FOSTER CARE."

The term "foster care" within the Adult Foster Care Facility Licensing Act, MCL 400.701 *et seq*., means the provision of supervision, personal care, and protection, in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation; if a provider provides all three services—that is, supervision, personal care, and room and board—the provider must be licensed as an adult foster care facility to recover payment for those services under the no-fault act, MCL 500.3101 *et seq*.

Green & Green, PLLC (by *Jonathon A. Green*) and *Steven A. Hicks* for Life Skills Residential, LLC.

Anselmi Mierzejewski Ruth & Sowle PC (by *Christopher P. Endres*) for Nationwide Mutual Fire Insurance Company.

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM. In this action for recovery of no-fault benefits, the trial court granted defendant, Nationwide Mutual Fire Insurance Company (Nationwide), summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) based on its finding that plaintiff Life Skills Residential, LLC (LSR) was operating as an unlicensed adult foster care facility. On appeal, LSR challenges that ruling. For the reasons stated in this opinion, we reverse the grant of summary disposition to Nationwide but affirm the trial court's decision to deny LSR summary disposition under MCR 2.116(I)(2) (nonmoving party entitled to judgment).

I. BACKGROUND

The underlying claimant, Donald Oliver, was severely injured in December 2014 when a car struck

him as he was walking across a street. He sustained a closed head injury, a spinal cord injury, and multiple broken bones. In June 2016, he began receiving services from plaintiff Life Skills Village, PLLC (LSV), which is "a day treatment program for patients with brain injury." At LSV, Oliver received cognitive therapy, behavioral therapy, psychological counseling, occupational therapy, speech therapy, and vocational training.

In October 2016, Oliver entered a residential program with LSR,[1] where he lived through October 2017. Nate Gardin, LSR's managing member, described LSR as "a semi-independent residential program that's built on helping assist people transition back to independent living." He explained that Oliver was placed in the residential program because of safety concerns and because his providers felt that his health was failing.

Oliver was placed in a three-bedroom ranch house that was rented by LSR. He was monitored 24 hours a day by LSR through the use of two cameras inside the house. The LSR staff would prompt residents such as Oliver in important activities of daily living, such as eating, bathing, taking medication if needed, and seeing doctors when needed. Gardin testified that Oliver "needed help in prompting with almost everything. He was able to do things on his own, but frequently didn't. So we had staff that had to go in and prompt him to get up and engage in those tasks." Gardin explained that Oliver did not require assistance with tasks, only prompting: "Mr. Oliver can get himself dressed. He may need a prompt to wash clothing or to eat or take

[1] LSV and LSR are separate legal entities. Some of the LSR residents received services from LSV but others did not. Similarly, some LSV patients were treated on an outpatient basis or lived in facilities that were not managed by LSR.

medication, but he does not have a direct assist in actually performing that exercise." An LSR employee would perform a daily health and safety check on Oliver. Sometimes the employee would provide Oliver with food or cook for him.

Nationwide is the insurance carrier assigned to provide no-fault benefits to Oliver. In March 2017, Nationwide made payments to LSR for two months of services provided to Oliver, but no further payments were made. After Oliver assigned his right to personal protection insurance (PIP) benefits for services rendered by LSV and LSR, plaintiffs filed this action against Nationwide in September 2017, seeking recovery of the outstanding balances for medical services rendered to Oliver.

In April 2018, Nationwide moved for summary disposition, arguing, in part, that LSR's claims included charges for adult foster care and room and board provided to Oliver during his stay at the residential home. Nationwide maintained that those charges were not compensable because LSR was not licensed as an adult foster care facility. In response, plaintiffs requested summary disposition under MCR 2.116(I)(2). LSR argued that it provided residential services to persons who did not require adult foster care and were able to take care of their own daily activities and handle their own personal-care needs. According to LSR, it would not take patients in the early rehabilitation stages who would require assistance with daily activities.

At the motion hearing, the parties agreed that the only issues in dispute were whether, under the statutory definitions of adult "foster care," LSR provided "personal care" and "room and board" to Oliver. In a written opinion and order, the trial court determined

that there was no genuine issue of material fact that LSR provided those services to Oliver. Accordingly, the trial court granted Nationwide's motion for summary disposition with regard to LSR's claims and denied plaintiffs' countermotion for summary disposition.

The trial court denied Nationwide's motion for summary disposition as to LSV. Upon stipulation of the parties, the court later dismissed LSV's claims against Nationwide.[2] This appeal followed.

II. ANALYSIS

LSR argues that it was not required to be licensed as an adult foster care facility and that the trial court therefore erred by granting summary disposition to Nationwide. We agree.[3]

Under the no-fault act, MCL 500.3101 *et seq*., "[a] physician, hospital, clinic or other person or institution

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[2] Accordingly, LSV is not involved in this appeal.

[3] We review de novo a trial court's decision on a motion for summary disposition. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 304 n 3. When reviewing a motion under this subrule, we must consider "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." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

We also review de novo issues of statutory interpretation. See *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A court's primary purpose in interpreting a statute 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). 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).

lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered." MCL 500.3157, as enacted by 1972 PA 294 (emphasis added).[4] In order for treatment to be lawfully rendered and, thus, recoverable under the no-fault act, a health-care provider must be in compliance with licensing requirements. *Cherry v State Farm Mut Auto Ins Co*, 195 Mich App 316, 320; 489 NW2d 788 (1992).

Nationwide maintains that LSR was providing foster care to Oliver in an unlicensed adult foster care facility. Licensing requirements for institutions providing adult foster care are covered by the Adult Foster Care Facility Licensing Act (AFCFLA), MCL 400.701 *et seq*. An adult foster care facility cannot be established or maintained unless licensed by the Department of Licensing and Regulatory Affairs. See MCL 400.713(1). An "adult foster care facility" is defined as an "establishment that provides foster care to adults" and "includes facilities and foster care family homes for adults who are aged, mentally ill, developmentally disabled, or physically disabled who require supervision on an ongoing basis but who do not require continuous nursing care." MCL 400.703(4). In turn, "foster care" was defined at all times relevant to this appeal as "the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation." MCL 400.704(7), as amended by

[4] MCL 500.3157 was amended by 2019 PA 21, effective June 11, 2019. We apply the former version, which was in effect at all times relevant to this appeal.

2016 PA 525.[5] LSR acknowledges that it provided supervision and protection to Oliver within the meaning of the statutory definition of "foster care" but denies that it provided personal care and room and board. "Personal care" is defined as

> personal assistance provided by a licensee or an agent or employee of a licensee to a resident who requires assistance with dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident's physician, or the development of those personal and social skills required to live in the least restrictive environment. [MCL 400.706(1).]

The undisputed evidence is that LSR did not personally assist its residents with the listed activities; it merely reminded or prompted the residents to complete those tasks. However, the trial court found that LSR's services satisfied the "second part" of the "personal care" definition, i.e., "the development of those personal and social skills required to live in the least restrictive environment." MCL 400.706(1).

As an initial matter, the trial court erred by interpreting MCL 400.706(1) as containing a "second part." "[C]ommas generally demark items in a list, and an 'or' before the final item indicates that the entire list is disjunctive." *People v Walker*, 330 Mich App 378, 390; 948 NW2d 122 (2019). Accordingly, the clause referring to the development of personal and social skills is not an alternative definition of "personal care" but, rather, the last item in a list of activities. In other words, "personal

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[5] This definition, now found at MCL 400.704(8), was amended by 2018 PA 557, effective March 28, 2019, to define "foster care" as "the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation provided at a single address. Providing room under a landlord and tenant arrangement does not, by itself, exclude a person from the licensure requirement under this act."

care" is defined as personal assistance provided to a resident requiring assistance with *any* of the following: "dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident's physician, or the development of those personal and social skills required to live in the least restrictive environment." MCL 400.706(1).[6] It is also clear that the personal assistance must pertain to one of the listed activities in order to satisfy the definition of "personal care." See *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543, 559; 909 NW2d 495 (2017) ("[A] word or phrase in a statute must not be read in a vacuum; it must be harmonized with the whole statute.").

In this case, the trial court found that Gardin's testimony established that the services LSR provided to Oliver were to develop his personal and social skills so that he could become independent. In support of that finding, Nationwide relies on the following question and answer from Gardin's deposition:

> *Q*. Would it be fair to say that [LSR's] goal is to provide the least restrictive environment to develop the personal and social skills of Donald Oliver?
>
> *A*. To support the development of those skills, that is correct. The least amount of disablement while still accounting for health and safety of the patient making sure they are doing what they are supposed to be doing.

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[6] We reject LSR's argument that the doctrine of *ejusdem generis* is applicable to the interpretation of MCL 400.706(1). That canon of construction provides that if a statute contains a list of particular subjects followed by general words or phrases, the general words or phrases must be construed as being "of the same kind, class, character or nature" as the particular items enumerated. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000) (quotation marks and citation omitted). MCL 400.706(1) does not end with a general word or phrase. Instead, "the development of those personal and social skills required to live in the least restrictive environment" is merely the last item in a list.

Nationwide's heavy reliance on that testimony is misplaced. First, Nationwide's counsel did not precisely state the statutory language. Given the statutory language, the question is whether LSR *assisted* in the development of personal and social skills, not whether it provided the least restrictive environment for the development of those skills. Second, Gardin also testified that LSR did not provide personal-care services to Oliver or the other residents. Specifically, he stated that "outside of personal-care services, which we do no[t] provide or include at all, we provide almost all other services." He also testified that LSR does not provide "direct personal care." Third, and most important, "[t]he duty to interpret and apply the law is allocated to the courts, and the statement of a witness is not dispositive." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 698 n 4; 818 NW2d 410 (2012). So Gardin's statements characterizing the nature of the services are not dispositive. Instead, we must look to the services themselves to determine whether they constitute the development of personal and social skills for purposes of MCL 400.706(1).

The services provided to Oliver consisted of reminding him to perform daily activities and conducting daily checks on his health and safety.[7] LSR argues, and we agree, that these services cannot constitute personal care because they are covered by the AFCFLA's definition of "supervision," which provides as follows:

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[7] In addition to Gardin's testimony, Nationwide relies on testimony from Dr. David Cowan, a psychologist who is one of LSV's clinical directors. Dr. Cowan did *not* work for LSR. He stated, "I am not an [LSR] employee and I don't have much information about them that I would be able to tell you." Nationwide nonetheless highlights Dr. Cowan's general testimony regarding the purpose of semi-independent living situations. However, this is not evidence of services that LSR provided to its residents.

> (7) "Supervision" means guidance of a resident in the activities of daily living, including all of the following:[8]
>
> (a) Reminding a resident to maintain his or her medication schedule, as directed by the resident's physician.
>
> (b) Reminding a resident of important activities to be carried out.
>
> (c) Assisting a resident in keeping appointments.
>
> (d) Being aware of a resident's general whereabouts even though the resident may travel independently about the community. [MCL 400.707(7), as amended by 1986 PA 257.]

The services performed by LSR plainly fall under the definition of "supervision" because the services constitute guidance of the resident in the activities of daily living, either as a general matter or under one of the specific examples provided by the statute. And "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). Thus, personal care is clearly something distinct from supervision. We can discern from the definition of "supervision" that personal care requires something more, or at least different, than guidance and reminders to the residents. We need not decide the precise contours of "personal care," however, because the services at issue here amount to no more than "supervision" as defined by MCL 400.707(7).

Because we conclude that LSR did not provide personal care to Oliver or the other residents, we need not decide whether LSR provided room and board

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[8] Although at all times relevant to this appeal the definition of "supervision" included the phrase "including *all* of the following," it was amended by 2018 PA 557, effective March 28, 2019, to now state "including *one or more* of the following."

under the AFCFLA.[9] The statute provides that even if room and board is provided, it does not constitute adult foster care unless the facility also provides supervision, personal care, and protection. MCL 400.704(7). Therefore, all of those components must be established for the services to be considered the provision of foster care. So the lack of personal care means that LSR was not providing adult foster care and did not need to be licensed as an adult foster care facility. Accordingly, the services were not unlawfully rendered.

The caselaw cited by Nationwide does not change our view of this case. Nationwide relies primarily on *Keys of Life v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2016 (Docket No. 328227), which is not precedentially binding on this Court, MCR 7.215(C)(1). In any event, the case is inapposite. In that case, after the accident, the injured person functioned at the level of a young child and was unable to work or care for himself on his own or even be alone in a room. The injured person resided in the plaintiff's apartment-care program, where he was provided with 24-hour one-on-one attendant care and two-on-one care while being transported and when he was getting dressed and showering. The injured person was unable to cook for himself, do his laundry, or clean, and an attendant provided these functions. *Id*. at 1, 4. Given those circumstances, this Court held that the defendant-insurer had established that the plaintiff provided adult foster care services and was, therefore, required to be licensed under MCL 400.713(1). *Id*. at 4.

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[9] MCL 400.703 was amended by 2018 PA 557, effective March 28, 2019, to define "board" as "food service provided at the adult foster care facility." MCL 400.703(10).

In contrast to the extensive personal assistance required by the injured person in *Keys of Life*, Oliver was capable of performing all tasks by himself and merely required prompting to do so. Another unpublished opinion relied on by Nationwide, *Riverview Macomb Home & Attendant Care, LLC v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2016 (Docket No. 327030), is distinguishable on the same basis. There, the injured person required 24-hour attendant care and assistance "with daily activities such as showering, personal hygiene, dressing, medication and transportation." *Id*. at 4.

Nationwide relies primarily on *Keys of Life*, even though it is unpublished, because the one relevant published case provides little detail about the care provided to the residents. In *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 57-58; 744 NW2d 174 (2007), this Court held that the services provided by the plaintiffs were not lawfully rendered for the purpose of recovering personal protection insurance benefits under MCL 500.3157, in part, because plaintiff providers were not licensed as an adult care facility, but the majority opinion did not discuss the specific services the injured party received or whether those services met the statutory definition of adult foster care.

The same is true for the final case cited by Nationwide, *Healing Place, Ltd v Farm Bureau Mut Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued August 5, 2010 (Docket No. 286050), rev'd 488 Mich 1026 (2011). In reversing the Court of Appeals opinion, the Supreme Court adopted the dissenting judge's opinion that the plaintiff was an adult foster care facility because the injured person

" 'require[d] supervision on an ongoing basis but [did] not require continuous nursing care,' MCL 400.703(4)[.]" *Id*. at 2 (WILDER, J., concurring in part and dissenting in part) (alterations in original). In this case, the parties correctly acknowledge that the pertinent inquiry in determining whether LSR must be licensed as an adult foster care facility is whether it provides foster care as defined by the AFCFLA.

In sum, Nationwide has not identified any case analogous to the circumstances presented here, i.e., the residents live alone in private homes and are able to perform the activities of daily living but require prompting and reminders from the staff to do so. If anything, the caselaw cited by Nationwide demonstrates that a determination of whether a facility provides adult foster care is dependent on the facts of each case. And, for the reasons discussed, we conclude that the evidence establishes that LSR did not provide personal care to its residents as that term is defined by the AFCFLA. Accordingly, the trial court erred by determining that LSR was required to be licensed as an adult foster care facility and by granting summary disposition. However, we disagree with LSR that it is entitled to summary disposition under MCR 2.116(I)(2). Although LSR's claim is not defeated on the ground that it failed to comply with licensing requirements, LSR still bears the burden of proving that the charge for the services was reasonable and that the expenses were reasonably necessary. MCL 500.3107(1)(a); *Williams v AAA Mich*, 250 Mich App 249, 258; 646 NW2d 476 (2002).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ., concurred.

COLEN v COLEN

Docket No. 345318. Submitted January 7, 2020, at Detroit. Decided February 4, 2020, at 9:00 a.m.

Plaintiff, Roxanne Colen, filed a motion in the Wayne Circuit Court seeking payment of her attorney fees by defendant, Chaim Colen, related to parenting-time proceedings following the parties' 2013 divorce. Between March 2014 and April 2016, the parties disputed various matters before the trial court, including issues related to child support, spousal support, property division, custody, and parenting time. Following an evidentiary hearing, the trial court entered an opinion and order on April 18, 2016, resolving the parties' parenting-time dispute. Plaintiff did not request attorney fees in her brief filed with the court before the hearing, and the court's order did not address the issue of attorney fees. In April 2018, plaintiff filed a motion regarding child support matters and for attorney fees and asked the court to order defendant to pay her attorney fees related to that motion as well as the fees related to the parenting-time dispute that the court resolved with the April 2016 opinion and order. Following a hearing on the attorney-fee issue, the trial court, Kathleen M. McCarthy, J., denied the motion, determining that it was untimely. Although the court recognized that under MCR 3.206(D) a request for attorney fees may be made "at any time," the court concluded that plaintiff's request was nevertheless untimely because she had waited for more than two years before pursuing the attorney fees incurred during the parenting-time dispute. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCR 3.206(D)(1), a party in a divorce action may seek attorney fees from the other party "at any time." Although this language is broad, decisions of the Court of Appeals involving statutes that do not include express time limits indicate that a trial court has inherent authority to manage its own affairs to achieve the orderly and expeditious disposition of cases and to control its own docket. These cases also demonstrate that a court may deny a motion as untimely, even if the statute on which it is based does not include a time limitation, if the court

determines that the motion was not brought within a reasonable time after the prevailing party was determined. Accordingly, a motion brought under MCR 3.206(D) must be brought within a reasonable time after the fees were incurred, and what constitutes a reasonable time depends on the particular facts and circumstances of each case. The trial court did not abuse its discretion when it denied plaintiff's motion for attorney fees on the ground that she had failed to timely request them by waiting for two years before pursuing them. Under the factual circumstances, the motion was not made within a reasonable time after the attorney fees were incurred, and denying the motion was within the court's inherent authority to manage its affairs and sanction litigants.

2. Appellate attorney fees may be awarded under MCR 3.206(D)(2) based on a party's inability to pay and the other party's ability to pay the fees, or a party's behavior. Plaintiff argues that she is entitled to appellate fees under MCR 3.206(D)(2)(a) because defendant has the ability to pay them and she does not. However, whether a party has an inability to pay their own attorney fees is a question that is dependent on the facts and circumstances of each case. The record in the lower court does not include sufficient facts to enable the Court of Appeals to determine whether plaintiff is unable to pay her attorney fees and defendant is able to pay them. Plaintiff's request for appellate attorney fees was made within a reasonable time of incurring the fees in the process of pursuing the instant appeal and should first be addressed by the trial court.

Affirmed, but case remanded to allow the trial court to address plaintiff's motion for appellate attorney fees.

DIVORCE — ATTORNEY FEES — MCR 3.206 — TIMELINESS.

MCR 3.206(D)(1) permits a party in a divorce action to seek attorney fees from the other party "at any time"; however, a trial court has inherent authority to manage its own affairs in order to achieve the expeditious disposition of cases, and the court does not abuse its discretion by denying a request for attorney fees under the court rule as untimely if the request is not made within a reasonable time, depending on the particular facts and circumstances of the case.

Haas Prokopec (by *Trish Oleksa Haas* and *Dawn M. Prokopec*) for Roxanne Colen.

Before: K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM. This appeal concerns plaintiff's post-judgment motion for attorney fees in a divorce action. Plaintiff appeals as of right the trial court's order denying her motion for attorney fees related to earlier proceedings in the divorce action that had culminated in an April 2016 opinion and order. For the reasons set forth in this opinion, we affirm the trial court's order and remand to allow the trial court an opportunity to address plaintiff's new request for attorney fees related to this appeal under MCR 3.206(D).

I. BACKGROUND

Plaintiff and defendant were divorced on April 10, 2013, pursuant to a consent judgment of divorce. Under the consent judgment, plaintiff was granted "sole care, custody and control" of the parties' three minor children. Defendant was ordered to pay child support and spousal support. The consent judgment also provided that "Defendant will be responsible for Plaintiff's attorney fees for an amount not to exceed $5,000.00."

From March 2014 until April 2016, the court addressed various disputes between the parties involving child support, spousal support, property division, custody, and parenting-time matters. On February 9, 2015, the trial court entered an order requiring defendant to pay plaintiff $20,000 "for the resolution of all currently outstanding attorney fees as of today's date, February 9, 2015."

On April 18, 2016, the trial court entered an opinion and order following an evidentiary hearing that resolved the parties' parenting-time dispute. In this written opinion, the trial court did not address, or make any

reference to, attorney fees. Plaintiff's trial brief, filed before the evidentiary hearing, did not include any request for attorney fees.

Almost two years later, on April 5, 2018, plaintiff filed a motion in the trial court involving child support matters and a request for attorney fees, and it is this motion that forms the underlying basis for the instant appeal. Plaintiff was represented by different counsel at this point. The register of actions reflects that no filings were made in the case during the period between the trial court's April 18, 2016 opinion and order and plaintiff's April 5, 2018 motion. Because the instant appeal involves only plaintiff's motion for attorney fees and the child support matters are not at issue, we will not discuss the child support issues in detail. Suffice it to say that plaintiff essentially alleged that defendant was in arrears on his child support despite having a high income. Plaintiff also alleged that her sole source of income was child and spousal support.

As specifically relevant to the issues on appeal, plaintiff's motion requested that defendant be ordered to pay plaintiff's attorney fees "for this litigation, as well as the litigation incident to the parties' competing parenting time motions which were resolved via an Opinion entered on April 18, 2016." Plaintiff specified that she was seeking to be reimbursed for attorney fees related to that parenting-time dispute that were incurred from February 10, 2015 through November 2, 2017. Plaintiff maintained that MCR 3.206(C)(1) permitted her to, "at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or specific proceeding, including a post-judgment proceeding."[1] Plaintiff's motion alleged that

[1] MCR 3.206(C) was relettered as MCR 3.206(D), without any change in language, pursuant to the May 30, 2018 amendment of the court rule

she incurred $37,887.60 in attorney fees that were owed to her former counsel's law firm and that she had also paid a retainer to her new counsel. Plaintiff subsequently filed an amended motion specifically limited to her request for attorney fees and with essentially the same relevant underlying factual allegations.

The trial court held a hearing on July 23, 2018, dedicated entirely to the attorney fee issue. After hearing oral arguments from the parties, the trial court denied plaintiff's motion for attorney fees with respect to prior fees "up and through the current request." The trial court recognized that the court rule permitted a request for attorney fees to be made at "any time," but nonetheless reasoned that plaintiff's request was untimely because she had waited more than two years before pursuing the attorney fees related to the parenting-time motions that had already been resolved.[2] The trial court clarified that it was also

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that took effect on September 1, 2018. See 501 Mich cclxxviii, ccxcviii (2018). As will be discussed, the court rule was amended again after the proceedings at issue below. However, the quoted language remained in effect through the May 30, 2018 amendment of the court rule and was in effect at all times during the proceedings below that are relevant to the instant appeal. For the sake of simplicity, we will refer to the provision at issue using the current lettering; that is, we will refer to it as Subrule (D). The newest version of MCR 3.206 took effect on January 1, 2020, and includes some additional language in Subrule (D)(2). See 505 Mich clxxiv, clxxviii (2019). We refer to this newly amended version of the rule as necessary, but we note that our analysis of the particular issues raised on appeal does not implicate the most recent changes to MCR 3.206(D)(2) and that our conclusion would be the same under either the version of the rule in effect following the May 30, 2018 amendment or under the current version of this rule.

[2] Although the trial court ruled that plaintiff could not be awarded attorney fees related to the prior parenting-time proceedings or for the current motion seeking those fees, the trial court reserved the issue of attorney fees with respect to plaintiff's concurrent child support motion, and plaintiff does not challenge that ruling on appeal.

denying attorney fees related to the instant motion. Plaintiff now appeals and challenges this ruling.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision regarding whether to award attorney fees in a divorce action for an abuse of discretion. *Richards v Richards*, 310 Mich App 683, 699; 874 NW2d 704 (2015). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). The trial court's factual findings underlying an award of attorney fees are reviewed for clear error. *Richards*, 310 Mich App at 700. "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). To the extent that questions of law are presented, our review is de novo. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

III. ANALYSIS

On appeal, plaintiff argues that the trial court abused its discretion and erred as a matter of law by denying her motion for attorney fees for the period of February 9, 2015 through July 23, 2018 (the date of the motion hearing) for being untimely. Plaintiff maintains that MCR 3.206(D)(1) expressly allows a party to seek attorney fees from the other party in a divorce action "at any time."

"Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed*, 265 Mich App at 164

(citations omitted). "In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, [currently MCR 3.206(D)]." *Reed*, 265 Mich App at 164. However, "attorney fees are not recoverable as of right in divorce actions." *Id*.

MCL 552.13(1) provides in relevant part that "[i]n every action brought, either for a divorce or for a separation, the court may require either party . . . to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." Under MCR 3.206(D)(1), "[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding."[3]

The issue presented by plaintiff's appellate argument is whether a trial court may determine that a motion for attorney fees by a party in a divorce action was untimely and deny the motion on that basis, despite the language in MCR 3.206(D)(1) permitting a party in a divorce action to request attorney fees "at any time." We acknowledge that this language appears broad and that there is no explicit time limitation in the rule. See *Smith*, 278 Mich App at 207 n 3. However, this case is distinguishable from *Smith* in a crucial respect. Plaintiff in this case allowed almost two years to elapse without taking any action in the trial court related to the divorce action, much less any action to recover attorney fees related to the parenting-time proceedings under MCR 3.206. *Smith*, in contrast, involved an attorney fee request that was made in the context of ongoing litigation that was actively proceeding in the trial court. See *Smith*, 278 Mich App at 207 n 3. Accord-

[3] We note that MCR 3.206(D)(1) has not been affected by the amendment of the court rule that took effect on January 1, 2020.

ingly, we conclude that we are not bound by *Smith* on this issue under the circumstances of this case.[4] Instead, to guide our analysis, we turn to other decisions of this Court involving statutes that do not include express time limits for a party to seek the relief provided for by the statute.

In *Baynesan v Wayne State Univ*, 316 Mich App 643, 647-649, 655-656; 894 NW2d 102 (2016), this Court held that the Court of Claims did not abuse its discretion by determining that the defendant's attempt to transfer a case from the circuit court to the Court of Claims was ineffective for being untimely even though the statute allowing such a transfer did not contain an explicit time limitation. The Court of Claims, in transferring the matter back to the circuit court (which had concurrent jurisdiction over the matter), recognized that the statute authorizing the transfer from the circuit court to the Court of Claims did not have a time limit. *Id*. at 649. However, the Court of Claims reasoned that the defendant had continued to actively litigate the matter in the circuit court for almost one year after the option to transfer the case to the Court of Claims had become available through the enactment of the relevant statute[5] and that such conduct demonstrated " 'an unequivocal act of approval to the matter being joined for trial in [the circuit] court.' " *Id*. at 648-649, 652-653. The Court of Claims further expressed its concerns about unrestricted forum-shopping and found that the defendant's notice of transfer was untimely and impermissible. *Id*. at 649-650.

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[4] For the same reason, the unpublished case relied on by plaintiff on appeal, *Pierron v Pierron*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2011 (Docket No. 292817), is distinguishable and unpersuasive in resolving this appeal.

[5] The statute at issue in *Baynesan* allowing for transfer to the Court of Claims was MCL 600.6404(3). *Baynesan*, 316 Mich App at 646-647.

On appeal, this Court affirmed, reasoning that the Court of Claims' ruling "was within the inherent authority of a court to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice." *Id*. at 655 (quotation marks and citation omitted). The *Baynesan* Court stated, " 'This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' " *Id*., quoting *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). The *Baynesan* Court further noted that a "trial court has the inherent authority to control its own docket." *Baynesan*, 316 Mich App at 651.

Another approach is illustrated in *Avery v Demetropoulos*, 209 Mich App 500, 501; 531 NW2d 720 (1995), in which this Court addressed the plaintiff's appeal from an order awarding costs and attorney fees to the defendant "because plaintiff filed a frivolous claim within the meaning of MCL 600.2591(3)." MCL 600.2591(1) provides that "[u]pon motion of any party," a court in a civil action "shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action" if the court finds that a civil action or defense was "frivolous." The term "frivolous" is defined for purposes of this statute in MCL 600.2591(3). MCL 600.2591(2) states, "The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." There is no timing requirement in MCL 600.2591 specifying when a motion for costs must be made under this statute. This Court held that with respect to the procedure for recovering costs under MCL 600.2591, the "appropriate standard to apply to

the statute is whether the motion for costs was filed within a reasonable time after the prevailing party was determined." *Avery*, 209 Mich App at 503. Subsequently, this Court has concluded that whether a motion for costs under MCL 600.2591 was brought within a reasonable time after the prevailing party was determined "depends on the circumstances" of the individual case. *In re Costs & Attorney Fees*, 250 Mich App 89, 107-108; 645 NW2d 697 (2002).

Accordingly, we conclude that a motion for attorney fees under MCR 3.206(D) must be brought within a reasonable time after the fees sought were incurred and that what constitutes a reasonable time depends on the particular facts and circumstances of each case. *Avery*, 209 Mich App at 503; *In re Costs & Attorney Fees*, 250 Mich App at 108. A trial court's decision to deny a request for attorney fees on the ground that the motion was untimely because it was not made within a reasonable time is within the court's inherent authority to "impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice," as well as its inherent authority to "manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *Baynesan*, 316 Mich App at 655 (quotation marks and citations omitted). "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Id*. at 651 (quotation marks and citation omitted). "An abuse of discretion occurs when a court chooses an outcome outside the range of principled outcomes." *Id*. Underlying factual findings are reviewed for clear error. *Id*.

In this case, the trial court did not abuse its discretion by denying plaintiff's motion for attorney fees with respect to the matters preceding and including the

2018 motion for attorney fees on the ground that by neglecting the matter for almost two years, plaintiff had failed to timely pursue attorney fees under MCR 3.206. Although plaintiff apparently attempted to recover certain additional attorney fees in 2016 after the court's February 9, 2015 order awarding fees and before the April 18, 2016 order resolving the parties' parenting-time dispute, it appears from the record that plaintiff abandoned this attempt and did not take any further action in the trial court between April 2016 and April 2018 to obtain attorney fees for the period at issue after the attorney fee issue was not addressed in the trial court's April 18, 2016 order. Under these factual circumstances, plaintiff's April 2018 motion was not brought within a reasonable time after the attorney fees at issue were incurred, and the trial court did not abuse its discretion by determining that the motion was untimely. Dismissal of the motion on the basis of untimeliness was within the trial court's inherent authority to manage its affairs and sanction litigants. The trial court's ruling is affirmed.

Additionally, plaintiff argues that this Court should award her appellate attorney fees related to this appeal under MCR 3.206(D) and based on the existing record. This Court has indicated that appellate attorney fees may be awarded under MCR 3.206(D). See *Myland v Myland*, 290 Mich App 691, 703; 804 NW2d 124 (2010).

As an initial matter, this Court has explained that MCR 3.206(D)(2) "provides two independent bases for awarding attorney fees and expenses." *Richards*, 310 Mich App at 700. Subrule (D)(2)(a) "allows payment of attorney fees based on one party's inability to pay and the other party's ability to do so," while Subrule

(D)(2)(b) "considers only a party's behavior, without reference to the ability to pay." *Id*. at 701.

In this case, plaintiff specifically argues that she is entitled to appellate attorney fees based on Subrule (D)(2)(a), arguing that she is unable to bear the expense of the action while defendant has the ability to pay. "Attorney fees in a divorce action may be awarded when a party needs financial assistance to prosecute or defend the suit," and "a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Smith*, 278 Mich App at 207 (quotation marks and citations omitted). "Pursuant to [MCR 3.206(D)(2)(a)], the party requesting the fees must allege facts sufficient to show that he or she is 'unable to bear the expense of the action, and that the other party is able to pay.' " *Smith*, 278 Mich App at 207.[6]

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[6] As noted, this provision of the court rule was amended after *Smith* was decided. The version of MCR 3.206(D)(2)(a) that took effect on January 1, 2020, provides as follows:

> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay . . . . [MCR 3.206(D)(2)(a), as amended November 13, 2019, 505 Mich clxxiv, clxxviii (2019).]

The former version of this subrule provided as follows:

> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that:
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay . . . . [MCR 3.206(D)(2)(a), as amended May 30, 2018, 501 Mich cclxxviii, ccxcviii (2018).]

We do not perceive that the addition of language to the court rule clarifying that the expense of the action includes the expense of engaging in appropriate discovery would have any effect on the stan-

Accordingly, in this context, the analytical focus is on the financial status of each party in relation to the attorney fees because this is all that MCR 3.206(D)(2)(a) discusses and there is no language in the subrule requiring consideration of whether the party requesting attorney fees prevailed on other substantive matters. MCR 3.206(D)(2)(a); see also *Smith*, 278 Mich App at 207 (explaining what the party requesting fees must allege); *Myland*, 290 Mich App at 701-703 (concluding that the trial court made an error of law by denying the plaintiff's need-based request for attorney fees under what is now MCR 3.206(D)(2)(a) because the trial court's decision was based on its belief that attorney fees should only be awarded if a party engaged in egregious conduct or wasteful litigation; this Court stated that "[i]t was incumbent upon the trial court to consider whether attorney fees were necessary for plaintiff to defend her suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to pay her attorney fees and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees"); *Edge v Edge*, 299 Mich App 121, 136; 829 NW2d 276 (2012) (explaining that a circuit court had not actually granted attorney fees under MCR 3.206(D), even though the circuit court had cited that subrule as a basis for its decision, because the court had expressly stated that it was granting attorney fees and costs as

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dard described in this Court's decisions cited in the body of this opinion, i.e., that a court must determine the financial ability of the parties to pay the attorney fees and expenses. Regardless, as will be more fully explained, our disposition of the appellate attorney fee issue is based on the absence of factual findings by the trial court in the current record regarding the parties' respective financial ability to pay the attorney fees. Accordingly, further discussion of the amended language is unnecessary.

sanctions for making frivolous claims on appeal and did not make any factual findings about the parties' relative abilities to pay the expense of the defendant's prior appeal or whether the defendant had refused to comply with a previous order despite having the ability to comply). Thus, plaintiff's failure to prevail on her appellate argument in this Court regarding the trial court's denial of her motion for attorney fees as being untimely is not dispositive of the issue regarding her request for attorney fees in pursuing the instant appeal.

However, the record before this Court does not include factual findings by the trial court sufficient for us to review whether plaintiff is currently unable to bear these expenses.[7] "[W]hether a party has an inability to pay is dependent on the particular facts and circumstances of each case." *Loutts v Loutts (After Remand)*, 309 Mich App 203, 217; 871 NW2d 298 (2015).

> It [i]s incumbent upon the trial court to consider whether attorney fees [a]re necessary for plaintiff to defend her suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to pay her attorney fees and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees.
>
> This requires a trial court to give "special consideration to the specific financial situations of the parties and the equities involved." [*Id*. at 217-218 (citations omitted; alterations in original).]

[7] Although the trial court did order defendant to pay $2,900 in attorney fees to plaintiff's counsel in an order on January 15, 2019, involving the ongoing child support dispute, the record before this Court does not contain the trial court's factual findings with respect to that ruling.

In this case, the level of defendant's financial resources, which the parties disputed, is unclear from the record. Moreover, this Court has no record of the amount of fees to which plaintiff claims she is entitled as a result of this appeal or whether she would actually need to invade the same spousal-support assets that she relies on for living expenses in order to pay her attorney fees. The essence of plaintiff's argument is that she has fewer financial resources than defendant, but the standard for awarding attorney fees under MCR 3.206(D)(2)(a) is more complex than that. See *Loutts*, 309 Mich App at 217-218. The determination whether plaintiff satisfies the requirements of the court rule regarding her financial inability to bear these costs is a factual one that should first be addressed by the trial court. See *id*.; see also *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994) ("Appellate review is limited to issues actually decided by the trial court.").[8]

Because the record is insufficiently developed to allow adequate appellate review of this issue, the trial court should first address plaintiff's request for appellate attorney fees. Notably, this request was made within a reasonable time of incurring those fees since they were incurred in the process of pursuing the instant appeal and are not fees incurred for the prior proceedings that culminated in the April 2016 order.

We recognize that in *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003), this Court determined that the defendant was entitled to appellate attorney fees under what is now MCR 3.206(D)(2)(a) and re-

[8] Although plaintiff logically could not have requested these appellate fees in the trial court before deciding to pursue an appeal, remanding this matter to the trial court will still allow her to attempt to recover these fees.

manded only for the trial court to decide the appropriate amount of those fees. The *Gates* Court concluded that the defendant was "unable to bear the expense of this action on appeal for the same reasons we have determined that the award of spousal support and attorney fees by the trial court is inadequate" and that on remand the trial court was also to "determine an appropriate award of attorney fees for this appeal." *Id*.

However, in *Gates*, this Court had relevant factual findings by the trial court to review that are not available in the instant case. See *id*. at 423-424, 433-434, 436-439. The trial court in this case denied attorney fees to plaintiff on the ground that her motion was untimely without making any factual findings regarding the parties' respective abilities to pay attorney fees, and there are no pertinent findings in the current record from which this Court could make a determination whether plaintiff may be entitled to appellate attorney fees under MCR 3.206(D)(2)(a). Thus, *Gates* does not require this Court to decide first whether plaintiff in this case is entitled to some amount of attorney fees before remanding this matter, nor does *Gates* prohibit this Court from remanding this matter to the trial court to address this question in the first instance.

In conclusion, we affirm the trial court's decision denying plaintiff's motion for attorney fees related to the prior 2016 hearing and the 2018 motion pursuing those fees, and we remand this matter to the trial court to allow plaintiff to pursue her request for appellate attorney fees related to the instant appeal under MCR 2.306(D)(2)(a) in the trial court so as to develop an appropriate factual record.

Affirmed but remanded for purposes of allowing the trial court to address plaintiff's motion for appellate

attorney fees under MCR 2.306(D)(2)(a). We do not retain jurisdiction.

K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ., concurred.

CAMPBELL v MICHIGAN DEPARTMENT OF TREASURY

Docket No. 350248. Submitted January 15, 2020, at Lansing. Decided February 4, 2020, at 9:05 a.m. Leave to appeal granted 506 Mich 964 (2020).

Andrew P. Campbell filed a petition in the Michigan Tax Tribunal, challenging the Department of Treasury's issuance of a notice denying his real property's principal residence exemption (PRE) for the 2017 tax year. Petitioner resided in Michigan his entire life but purchased property in Arizona in 2016. Without petitioner's knowledge, Arizona automatically gave him a credit of $600 when he purchased the property. Petitioner claimed a PRE for his Michigan property when he filed his 2017 taxes. Respondent denied the exemption because petitioner had received a similar exemption for that tax year from Arizona. When he discovered that Arizona considered his Arizona property his primary residence, petitioner had Arizona change his residency status. Nevertheless, respondent refused to grant petitioner a PRE for his Michigan property for the 2017 tax year. Petitioner appealed the denial, and respondent affirmed the denial following an informal conference. Petitioner thereafter filed his petition in the tribunal. The tribunal concluded that petitioner's property did not qualify under MCL 211.7cc for a PRE because even though petitioner did not apply for the Arizona exemption, under MCL 211.7cc(3), he had still "claimed" an exemption similar to the PRE in another state for the 2017 tax year. However, the tribunal determined that under MCL 211.7cc(4), the PRE for the property continued until December 31, 2017, and that the property, therefore, had a 100% PRE for the 2017 tax year. Respondent moved for reconsideration, and the tribunal denied the motion. Respondent appealed.

The Court of Appeals *held*:

PREs are governed by MCL 211.7cc. Subsection (1) provides that a principal residence is exempt from taxes levied by a local school district for school operating purposes if an owner of that principal residence claims an exemption as provided in MCL 211.7cc. To claim a PRE, Subsection (2) requires a property owner to file an affidavit stating that the property is owned and occupied as a principal residence by that owner of the property on the date

that the affidavit is signed and that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state. The subsection sets a uniform effective date of the PRE depending on the date when the affidavit was filed. Once granted, the exemption continues until an event makes the property ineligible for the exemption. Subsection (3) sets forth specific limitations barring an exemption. In particular, Subsection (3) provides that a person is not entitled to an exemption in any calendar year in which (a) that person has claimed a substantially similar exemption, deduction, or credit, regardless of the amount, on property in another state or (b) that person or his or her spouse owns property in a state other than this state for which that person or his or her spouse claims an exemption, deduction, or credit substantially similar to the exemption provided under MCL 211.7cc, unless that person and his or her spouse file separate income tax returns. In turn, Subsection (4) addresses exemptions that are subsequently lost because they no longer qualify as exemptions and defines the date on which the effectiveness of the exemption ceases; that is, the subsection provides a uniform formula for determining the date on which a PRE that has become invalid ceases to apply to the property. Specifically, Subsection (4) provides that when an assessor receives a valid affidavit filed under Subsection (2), the assessor must exempt the property from the collection of the tax levied by a local school district for school operating purposes until December 31 of the year in which the property is transferred, or except as otherwise provided in Subsections (5), (32), and (33), is no longer a principal residence as defined in MCL 211.7dd, or the owner is no longer entitled to an exemption as provided in Subsection (3). Given that Subsection (2) creates a uniform date regarding the commencement of a PRE and that Subsection (4) contains similar language, the Legislature intended the cessation of a PRE to have a termination date that is uniform like the commencement date in Subsection (2) is uniform. Thus, Subsection (4) works in harmony with Subsections (1) through (3) to create a taxation scheme that maintains uniformity and promotes ease of administration by providing a date for the termination of a PRE. Accordingly, when a PRE is lost by the occurrence of one of the three triggering events listed in Subsection (4)—the property is transferred, the property is no longer a principal residence, or the owner is no longer entitled to an exemption as provided in Subsection (3)—the exclusion continues through December 31 of the year in which the exemption is lost. The last-antecedent rule does not limit the phrase "until December 31 of the year" to the first triggering event listed in Subsection (4) (i.e., the transfer of

property) because (1) the dominant purpose and structure of the statute supports reading Subsection (4) in conjunction with the other sections of the statute to provide uniform rules for the commencement and termination of exemptions and (2) the various clauses of the subsection are set off by commas. In accordance with Subsection (3), petitioner lost his PRE in 2017 because Arizona granted him a similar exemption. Because Subsection (4) provides that a PRE lost under Subsection (3) remains in effect through December 31 of the year the exemption is lost, the tribunal correctly reversed respondent's denial of the property's PRE for the 2017 tax year.

Affirmed.

TAXATION — PROPERTY TAX — PERSONAL RESIDENCE EXEMPTION — LOSS OF PERSONAL RESIDENCE EXEMPTION — EFFECTIVE DATE OF LOSS OF EXEMPTION.

Under MCL 211.7cc(4), when an assessor receives a valid personal-residence-exemption (PRE) affidavit filed under Subsection (2) of that statute, the assessor must exempt the property from the collection of the tax levied by a local school district for school operating purposes until December 31 of the year in which the property is transferred, or except as otherwise provided in Subsections (5), (32), and (33), is no longer a principal residence as defined in MCL 211.7dd, or the owner is no longer entitled to an exemption as provided in Subsection (3) of MCL 211.7cc; when a PRE is lost by the occurrence of one of the three triggering events listed in Subsection (4)—the property is transferred, the property is no longer a principal residence, or the owner is no longer entitled to an exemption as provided in Subsection (3)—the exclusion continues through December 31 of the year in which the exemption is lost.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Suzanne Sonneborn*, Chief Legal Counsel, and *James A. Ziehmer* and *Michael Hill*, Assistant Attorneys General, for the Michigan Department of Treasury.

Before: BOONSTRA, P.J., and TUKEL and LETICA, JJ.

TUKEL, J. Respondent appeals by right the order of the Michigan Tax Tribunal (MTT) entitling petitioner

to claim a 100% principal residence exemption (PRE) for tax year 2017 on certain real property. We affirm.

I. UNDERLYING FACTS

Petitioner is a lifelong Michigan resident who purchased property in Arizona in 2016. When petitioner purchased the Arizona property, the state of Arizona automatically gave him a $600 credit on his tax bill without petitioner's knowledge, apparently because it assumed the Arizona property was petitioner's primary residence. Petitioner claimed a PRE for his Michigan property when he filed his 2017 taxes, but respondent denied the exemption because petitioner had received a similar exemption from Arizona for that same tax year. After learning that Arizona considered his Arizona residence to be his primary residence, petitioner informed the treasurer of Maricopa County, Arizona, that he was not an Arizona resident. Petitioner's Arizona residency status was changed "within 24 hours." Despite Arizona changing petitioner's residency status, however, respondent still refused to grant petitioner a PRE for the Michigan property for tax year 2017.

Petitioner appealed this denial, and an "informal conference" was conducted in August 2018 with the parties participating by telephone. The referee recommended that the PRE for the Michigan property remain denied, and respondent's director of the Bureau of Tax Policy adopted the referee's recommendation. Petitioner then filed a petition for relief in the MTT in November 2018. The MTT held a telephonic hearing in May 2019 and issued a written order in July 2019. The MTT found that petitioner did not apply for the Arizona property tax exemption but that Arizona had automatically given it to him at closing. Nevertheless,

the MTT found that even though petitioner had not applied for the exemption, under MCL 211.7cc(3), he still "claimed" an exemption similar to the PRE in another state for tax year 2017. See note 1 of this opinion. Accordingly, the property did not qualify for the PRE, and petitioner's rescission of the Arizona exemption had no effect on the Michigan PRE. Nonetheless, the MTT concluded that under MCL 211.7cc(4), petitioner's previous PRE for the Michigan property remained in effect through December 31, 2017. Thus, the tribunal ruled that the Michigan property was entitled to a 100% PRE for the 2017 tax year.

Respondent moved for reconsideration, and the MTT denied the motion. This appeal followed.

II. STANDARD OF REVIEW

Unless there is fraud, this Court's "review of MTT decisions is limited to determining whether the MTT erred in applying the law or adopted a wrong legal principle." *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 627; 752 NW2d 479 (2008). 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 662 (2013). However, "[t]his Court will generally defer to the [MTT'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). Additionally, " 'statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority.' " *Power*, 301 Mich App at 230, quoting *Liberty Hill Housing Corp v Livonia*, 480

Mich 44, 49; 746 NW2d 282 (2008). Finally, "[w]e deem the tribunal's factual findings conclusive if they are supported by 'competent, material, and substantial evidence on the whole record.' " *Liberty Hill*, 480 Mich at 49 (quotation marks and citations omitted).

III. ANALYSIS

As an initial matter, whether petitioner was properly denied the PRE is not at issue in this appeal. Respondent takes no issue with the portion of the MTT's decision that ruled the PRE was properly denied. The issue is whether the PRE, after being denied, should have continued through December of that tax year, 2017, or whether it should have ceased immediately upon the granting of the Arizona exemption.

PREs are created by and addressed under MCL 211.7cc of the General Property Tax Act, MCL 211.1 *et seq*., which provides:

> (1) A principal residence is exempt from the tax levied by a local school district for school operating purposes to the extent provided under . . . MCL 380.1211, if an owner of that principal residence claims an exemption as provided in this section. Notwithstanding the tax day provided in [MCL 211.2], the status of property as a principal residence shall be determined on the date an affidavit claiming an exemption is filed under subsection (2). [MCL 211.7cc(1).]

The property owner is required to file an affidavit which, among other provisions, requires the owner to "state that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed and shall state that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state." MCL 211.7cc(2). There are a number of exclu-

sions to a claimed PRE. See MCL 211.7cc(3). In relevant part, MCL 211.7cc(3) states:

> For taxes levied after December 31, 2002, *a person is not entitled to an exemption under this section in any calendar year* in which any of the following conditions occur:
>
> (a) *That person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state*. Upon request . . . a person who claims an exemption under this section shall, within 30 days, file an affidavit on a form . . . stating that the person has not claimed a substantially similar exemption, deduction, or credit on property in another state. A claim for a substantially similar exemption, deduction, or credit in another state occurs at the time of the filing or granting of a substantially similar exemption, deduction, or credit in another state. If the assessor of the local tax collecting unit, the department of treasury, or the county denies an existing claim for exemption under this section, an owner of the property subject to that denial cannot rescind a substantially similar exemption, deduction, or credit claimed in another state in order to qualify for the exemption under this section for any of the years denied. . . .
>
> (b) Subject to subdivision (a), *that person or his or her spouse owns property in a state other than this state for which that person or his or her spouse claims an exemption, deduction, or credit substantially similar to the exemption provided under this section*, unless that person and his or her spouse file separate income tax returns. [Emphasis added.]

MCL 211.7cc(4), which is at the heart of this appeal, provides:

> Upon receipt of an affidavit filed under subsection (2) and unless the claim is denied under this section, the assessor shall exempt the property from the collection of the tax levied by a local school district for school operating purposes to the extent provided under . . . MCL 380.1211, as provided in subsection (1) *until December 31 of the year*

> *in which the property is transferred or*, except as otherwise provided in subsections (5), (32), and (33), *is no longer a principal residence as defined in* [MCL 211.7dd], *or the owner is no longer entitled to an exemption* as provided in subsection (3). [Emphasis added.]

The critical issues in this case are the meaning of the phrase "until December 31 of the year in which" certain events occur and whether that language applies only to the immediately connected phrase "the property is transferred" or whether it also applies to the following phrases, "is no longer a principal residence" and "the owner is no longer entitled to an exemption." Respondent asserts that the December 31 language modifies *only* the immediately connecting phrase and not the two following phrases. Accordingly, respondent argues, petitioner should not have received a PRE for 2017 because once he was no longer entitled to the exemption, the PRE immediately ceased.

This Court and our Supreme Court have not previously addressed whether the December 31 language in MCL 211.7cc(4) applies to one, two, or all three of the circumstances set forth in the statute. Accordingly, this is an issue of first impression.

"When interpreting a statute, [this Court] must ascertain the Legislature's intent," which is accomplished "by giving the words selected by the Legislature 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). If a statute is unambiguous, it must be applied as plainly written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018). 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." *Id*.

(quotation marks and citation omitted). Additionally, this Court should "consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in the statute." *In re AGD, Minor*, 327 Mich App 332, 343; 933 NW2d 751 (2019) (quotation marks and citation omitted).

The last-antecedent rule "provides that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation." *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004) (quotation marks and citations omitted; alteration in original). However, this rule does not apply when the modifying clause is set off by punctuation, "such as a comma . . . ." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 71; 718 NW2d 784 (2006), overruled on other grounds by *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), overruled on other grounds by *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; 815 NW2d 412 (2012). A dependent clause set off by commas from the rest of the sentence is not to be viewed as an independent clause operating separately but, rather, as "part of the complex sentence overall." See *In re AGD*, 327 Mich App at 346-347. Finally, the word "or" is a disjunctive word that is "used to indicate a disunion, a separation, an alternative." *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 35; 878 NW2d 799 (2016) (quotation marks and citations omitted).

The principal statutory provision at issue, MCL 211.7cc, thoroughly and comprehensively addresses the availability of and mechanism for seeking and granting a PRE. The statute first states the general rule that "[a] principal residence is exempt from the

tax levied . . . if an owner of that principal residence claims an exemption as provided in this section." MCL 211.7cc(1). Subsection (2) provides that an exemption, once granted, continues until an event makes the property ineligible for the exemption, without any requirement that the owner do anything further to maintain the exemption. See MCL 211.7cc(2) ("Except as otherwise provided in subsection (5), an owner of property may claim 1 exemption under this section . . . for the immediately succeeding summer tax levy *and all subsequent tax levie*s . . . [and] for the immediately succeeding winter tax levy *and all subsequent tax levies* . . . .") (emphasis added).

Subsection 3 then sets forth specific limitations barring an exemption. Those exceptions include the situation involved here, in which the person "has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state." MCL 211.7cc(3)(a).[1] An exemption also is not available if the person files a nonresident Michigan income tax return, MCL 211.7cc(3)(c), or the person

[1] In the trial court, petitioner asserted and respondent did not contest that the exemption in Arizona was granted without petitioner's knowledge or request, and the tribunal accepted that fact. Whether or not petitioner sought the exemption is not relevant to whether or not he "claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state." MCL 211.7cc(3)(a). As a matter of law, the granting of the exemption in Arizona constituted a "claim" because "[a] claim for a substantially similar exemption, deduction, or credit in another state occurs at the time of the filing or granting of a substantially similar exemption, deduction, or credit in another state." *Id*. Regardless of whether petitioner sought or even knew of the granting of the exemption in Arizona, the exemption undisputedly was granted. And once the Arizona exemption was granted and the Michigan exemption denied, "an owner of the property subject to that denial cannot rescind a substantially similar exemption, deduction, or credit claimed in another state in order to qualify for the exemption under this section for any of the years denied." *Id*.

has filed an income tax return in another state as a resident, MCL 211.7cc(3)(d).

Subsection (4) is the critical provision for this appeal.[2] That subsection involves exemptions that are subsequently lost because they no longer qualify as exemptions and defines the date on which the effectiveness of the exemption ceases. Under Subsection (4), once an exemption is validly begun through the filing of an affidavit and provided that the claim is not denied under any provision of MCL 211.7cc, "the assessor shall exempt the property from the collection of the tax . . . until December 31 of the year in which the property is transferred or, except as otherwise provided in subsections (5), (32), and (33), is no longer a principal residence as defined in [MCL 211.7dd], or the owner is no longer entitled to an exemption as provided in subsection (3)." Respondent argues that the language "until December 31 of the year in which" applies only to the first of the situations set forth in that section, i.e., when the property is transferred, and the other phrases involving the filing of tax returns and the catchall disallowance of certain exemptions are not modified by the December 31 language. Under this view, Subsection (4) essentially states as follows:

> If the exemption is proper, it continues until:

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[2] That section provides:

> Upon receipt of an affidavit filed under subsection (2) and unless the claim is denied under this section, the assessor shall exempt the property from the collection of the tax levied by a local school district for school operating purposes to the extent provided under [MCL 380.1211] as provided in subsection (1) until December 31 of the year in which the property is transferred or, except as otherwise provided in subsections (5), (32), and (33), is no longer a principal residence as defined in [MCL 211.7dd], or the owner is no longer entitled to an exemption as provided in subsection (3).

> (I) the property is transferred, in which case the exemption is valid through December 31 of the year in which the property is transferred; or
>
> (II) the property is no longer a principal residence, in which case the exemption is valid until the time at which the property ceases being a principal residence; or
>
> (III) if the owner is no longer entitled to an exemption under Subsection (3) other than because the property is transferred, the exemption is valid until the time at which the property is transferred.

Petitioner's claimed exemption comes within Subsection (4). Subsection (4) incorporates by reference any exemption under Subsection (3) to which the person is no longer entitled; Subsection (3) specifically delineates that an exemption is lost if a substantially similar exemption is granted in another state. Reading the incorporated portion of Subsection (3) in conjunction with Subsection (4), petitioner lost his exemption because of the granting of the Arizona exemption. The only question is when the loss of that exemption became effective. Under respondent's reading of the statute, petitioner's exemption would become ineffective upon the granting of the Arizona exemption, rather than on December 31, because in respondent's view, the December 31 language applies only to the first situation set forth in Subsection (4) (transfer of the property), and not the later provision of Subsection (4) applicable here (the owner is no longer entitled to an exemption as provided in Subsection (3)). Respondent's position fails for a number of reasons.

To begin with, and consistently with basic rules of statutory interpretation, Subsection (4) should be read in a way that harmonizes with the rest of the statute. See, e.g., *Radina v Wieland Sales, Inc*, 297 Mich App 369, 373; 824 NW2d 587 (2012) ("[I]n determining the Legislature's intent, statutory provisions must be read

in the context of the whole statute and harmonized with the statute's other provisions."). When examined in light of the preceding subsections, Subsection (4) clearly works in harmony with them to create a uniform taxation scheme that promotes ease of administration. As noted, Subsection (1) states the general rule that an exemption is available under certain circumstances; Subsection (2) provides that a properly granted exemption generally continues without requiring any further action by the owner; Subsection (3) creates carve-outs or exceptions under which an exemption is not permitted; and Subsection (4) provides a uniform formula for determining the date on which an exemption that has become invalid ceases to apply.

Respondent's interpretation would destroy the uniformity that Subsection (4) seemingly created for the implementation of the phasing out of exemptions that are no longer valid. Under respondent's view, for example, if 50 homeowners bought property in another state and received an exemption in each of those other states, all of the Michigan properties would lose their exemptions, but such exemptions would be lost on each of the various dates on which the out-of-state exemptions were issued. The Legislature was evidently concerned with the difficulty that taxing authorities would have in trying to keep track of such varying dates. Therefore, in Subsection (2), the Legislature took great pains to establish a clear and easily administered comprehensive formula for a uniform effective date of an exemption. That formula provides that an owner may claim an exemption if the affidavit is filed "on or before June 1 for the immediately succeeding summer tax levy"; and the formula provides that an owner may claim an exemption if the affidavit is filed "on or before November 1 for the immediately succeeding winter tax levy . . . ." There is no ambiguity in that scheme, and it

makes the outcome uniform regardless of filing date, so long as the filing takes place prior to the deadline. As we read Subsection (4), it provides the mirror image to Subsection (2), providing a uniform date not for the commencement of an exemption but for its termination. Respondent's reading of the statute would destroy that uniformity and ease of administration for taxing authorities. See *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 19-20; 714 NW2d 664 (2006) (holding that ease of administration is a legitimate government purpose for a tax statute).

Given the clarity with which the Legislature spoke in creating a uniform date regarding the commencement of exemptions, and given the statutory language at issue, we do not believe that the Legislature intended for the cessation of exemptions to have no such uniform application. Indeed, if respondent's position were correct, the statute would be lacking in significant direction to taxing authorities as to how to proceed. Would authorities prorate taxes depending on the percentage of the year that had already passed when an exemption ceased to be effective? Or would they use some other formula? And would there be any statutory basis for requiring all tax officials from across the state to use the same formula? The statute is silent as to those questions. Given the overall structure and comprehensiveness of MCL 211.7cc, particularly in Subsection (2), we interpret that lack of direction in the statute to bespeak a legislative intent that any and all exemptions that are lost and that fall under Subsection (4) continue through December 31 of the year in which such an exemption is lost to maintain uniformity and to ease administration.

In addition, the last-antecedent rule supports reading December 31 as modifying all of the events in

Subsection (4) that terminate an exemption. As already stated, the last-antecedent rule "provides that a modifying clause is confined to the last antecedent, unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation." *Dessart*, 470 Mich at 41 (quotation marks and citations omitted; alteration in original). In this case, the last antecedent regarding the December 31 language relates to transfer of the property. However, as noted, the dominant purpose and structure of the statute supports reading Subsection (4) in conjunction with the other sections of the statute to provide uniform rules for the commencement and termination of exemptions, thus making the last-antecedent rule inapplicable.

In addition, the last-antecedent rule does not apply when the modifying clause is set off by punctuation, "such as a comma . . . ." *Cameron*, 476 Mich at 71. A dependent clause set off by commas from the rest of the sentence is not to be viewed as an independent clause operating separately but, rather, as "part of the complex sentence overall." See *In re AGD*, 327 Mich App at 346-347. The various clauses of Subsection (4), providing for various reasons an exemption shall be rescinded, are set off by commas. See MCL 211.7cc(4) (providing that property is exempt "until December 31 of the year in which the property *is transferred or*, except as otherwise provided in subsections (5), (32), and (33), *is no longer a principal residence as defined in section 7dd*, or the owner is no longer entitled to an exemption as provided in subsection (3)") (emphasis added).

Finally, although this Court reviews de novo the interpretation of a statute, it will "generally defer to the [MTT's] interpretation of a statute that it is

charged with administering and enforcing." *Twentieth Century Fox*, 270 Mich App at 541 (quotation marks and citation omitted). The MTT interpreted the December 31 language as applying to all of the exceptions set forth in Subsection (4); therefore, in this case, deference to the MTT's interpretation would bolster rather than be in derogation of our construction of the statute. Because deference to the MTT's interpretation of the statute would not assist respondent's position, we need not decide whether to give such deference in the case. Whether or not we give such deference, the interpretation would be the same—the no-longer-valid exemption remained in effect through December 31 of the 2017 tax year. Accordingly, petitioner is entitled to 100% of the PRE for that year.[3]

Affirmed.

BOONSTRA, P.J., and LETICA, J., concurred with TUKEL, J.

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[3] Our decision here, of course, is based on our understanding of the public-policy choices made by the Legislature in the statutes at issue. See *Robinson v Detroit*, 462 Mich 439, 474; 613 NW2d 307 (2000) (CORRIGAN, J., concurring) ("[A] Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature.").

PEOPLE v SPEED

Docket No. 343184. Submitted November 7, 2019, at Lansing. Decided February 4, 2020, at 9:10 a.m. Leave to appeal denied 506 Mich 1025 (2020).

Amber Speed was convicted following a jury trial in the Ingham Circuit Court of conducting a criminal enterprise (racketeering), MCL 750.159i(1). Speed was acquitted of recruiting a minor for sexually abusive activity, MCL 750.462e, and inducing a person to engage in prostitution, MCL 750.455, with respect to one victim, and the jury could not reach a verdict on the same charges with respect to another victim. Speed appealed, arguing that the evidence was insufficient to support the conviction because she was not convicted of any predicate offenses of racketeering under MCL 750.159g.

The Court of Appeals *held*:

MCL 750.159i prohibits a person from knowingly conducting or participating in the affairs of an enterprise directly or indirectly through a pattern of racketeering activity. In order to establish a "pattern of racketeering activity," a jury must find beyond a reasonable doubt that a defendant committed at least two racketeering offenses. Additionally, MCL 750.159i and two other statutes that define racketeering, MCL 750.159f(c) and MCL 750.159g, indicate that a jury must find that a defendant committed or attempted to commit the racketeering offenses at least twice in order to be convicted of conducting a criminal enterprise. However, the racketeering statute does not state whether a defendant must have been *convicted* of at least two predicate offenses in order to have violated MCL 750.159i. Prior decisions of the Court of Appeals suggest that conviction of conducting a criminal enterprise under the statute does not require a defendant to have been convicted of at least two predicate offenses but merely that evidence be presented to prove that a defendant engaged in at least two predicate offenses. In this case, there was evidence that Speed had engaged in the predicate acts of recruiting a minor for child sexually abusive activity and for procuring or inducing a person to engage in prostitution. Additionally, the statutory definition

of "racketeering" in MCL 750.159g provides that if Speed had conspired to commit any of the charged offenses, the jury could find her guilty of racketeering. The prosecution presented sufficient evidence to establish the elements of at least two predicate offenses, and so the evidence was sufficient for the jury to find Speed guilty of conducting a criminal enterprise.

Affirmed.

CRIMINAL LAW — CONDUCTING A CRIMINAL ENTERPRISE (RACKETEERING) — PATTERN OF RACKETEERING ACTIVITY — PREDICATE OFFENSES — SUFFICIENCY OF THE EVIDENCE.

One of the elements that a prosecutor must establish in order to prove that a defendant is guilty of conducting a criminal enterprise (racketeering) is that the defendant participated in a pattern of racketeering activity consisting of the commission of at least two racketeering offenses; the statute that prohibits racketeering, MCL 750.159i, does not require the prosecution to prove that the defendant had been convicted of at least two predicate offenses to obtain a conviction; therefore, the evidence is sufficient to support a defendant's conviction for racketeering when evidence has been presented to prove that a defendant engaged in at least two predicate offenses.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Daniel Ping*, Assistant Attorney General, for the people.

John Zevalking for defendant.

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM. Defendant appeals as of right her jury-trial conviction of conducting a criminal enterprise, MCL 750.159i(1). The jury found her not guilty of one count of recruiting a minor for sexually abusive activity, MCL 750.462e,[1] and one count of inducing a

[1] Formerly found at MCL 750.462g, prior to the amendment of 1931 PA 328 by 2014 PA 329, effective January 14, 2015.

person to engage in prostitution, MCL 750.455,[2] with respect to one victim, and could not reach a verdict on the same charges with respect to another victim. The trial court sentenced her to 5 to 20 years' imprisonment. We affirm.

Defendant was accused of recruiting minors into prostitution and forcing these minors to engage in sexual activities in exchange for money and drugs for defendant. She was initially charged with nine counts of various related offenses, including human trafficking, that allegedly occurred on or about August 2009 through February 2013. The prosecution dismissed four counts prior to trial, and the jury found defendant not guilty of two counts but was unable to reach a verdict on two other counts. The jury ultimately found defendant guilty of one count of conducting a criminal enterprise.

On appeal, defendant asserts that there was insufficient evidence to convict her of the crime of conducting a criminal enterprise. However, defendant's specific claim of error is that she could not be found guilty of this crime because the jury did not find that she committed the predicate alleged acts of racketeering. Thus, defendant's claim is not that the evidence presented was factually lacking, but instead it is a legal claim that she could not be convicted under MCL 750.159i when she was not convicted of any predicate offenses under MCL 750.159g.[3]

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[2] MCL 750.455 was amended by 2014 PA 331, effective October 16, 2014. In this opinion, we refer to the previous version of the statute, enacted by 1931 PA 328.

[3] Defendant has not argued that the facts did not support her conviction under MCL 750.159i; rather, defendant has argued that there were no predicate acts found, which made it impossible to be convicted under MCL 750.159i. And defendant contests not the *facts* of the predicate

To the extent that defendant sets forth a claim challenging the sufficiency of the evidence, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence to support his or her conviction. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). "In examining the sufficiency of the evidence, 'this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.' " *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (citation omitted).

Defendant did not raise before the trial court the issue of whether she could be convicted under MCL 750.159i without being convicted of predicate offenses. This issue is thus unpreserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An issue of statutory interpretation is reviewed de novo. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). "In interpreting statutes, we start by examining the plain language of the statute . . . [and] if the statutory language is plain and unambiguous, then no judicial interpretation is necessary or permitted . . . ." *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). Further, we give effect to every word, phrase, and clause to the extent possible. *Id*.

MCL 750.159i provides in relevant part:

> (1) A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.

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offenses but the *validity* of her conviction because the jury found her not guilty of two predicate offenses and could not render a verdict on the other two predicate offenses.

A "pattern of racketeering activity" means not less than two incidents of racketeering to which all of the following characteristics apply:

> (*i*) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.
>
> (*ii*) The incidents amount to or pose a threat of continued criminal activity.
>
> (*iii*) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity. [MCL 750.159f(c).]

The term "racketeering," in turn, is defined as

> committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain, involving any of the following:
>
> * * *
>
> (ii) A violation of . . . [MCL 750.452, MCL 750.455, MCL 750.457, MCL 750.458, or MCL 750.459], concerning prostitution.
>
> (jj) A violation of [MCL 750.462a *et seq*.] concerning human trafficking. [MCL 750.159g, as amended by 2014 PA 300, effective January 1, 2015.]

In order to find defendant guilty of racketeering, then, the jury needed to find beyond a reasonable doubt that

> (1) an enterprise existed, (2) defendant was employed by or associated with the enterprise, (3) defendant knowingly conducted or participated, directly or indirectly, in the affairs of the enterprise, (4) through a pattern of racketeering activity that consisted of the commission of at

> least two racketeering offenses that (a) had the same or substantially similar purpose, result, participant, victim, or method of commission, or were otherwise interrelated by distinguishing characteristics and are not isolated acts, (b) amounted to or posed a threat of continued criminal activity, and (c) were committed for financial gain. [*People v Martin*, 271 Mich App 280, 321; 721 NW2d 815 (2006).]

One of the elements of conducting a criminal enterprise is "through a pattern of racketeering activity that consisted *of the commission of at least two racketeering offenses*." *Id*. (emphasis added). Additionally, a plain reading of MCL 750.159i, MCL 750.159f(c), and MCL 750.159g indicates that a jury must find that the defendant at least twice committed, attempted to commit, conspired to commit, or aided or abetted, solicited, coerced, or intimidated a person to commit one of the offenses listed in order to find the defendant guilty. However, the statute is silent on whether a defendant must have been *convicted* of at least two racketeering offenses.

Although there is no caselaw directly on point, *Martin* provides guidance on this issue. In *Martin*, several appeals were consolidated to address multiple defendants' convictions and sentences arising out of their participation in the operation of an adult entertainment establishment. *Martin*, 271 Mich App at 285. Two of the defendants were charged with and convicted of a single count of racketeering in violation of MCL 750.159i(1). *Id*. at 286. At the time of their joint trial, two predicate offenses were listed on the informations. *Id*. at 287, 290. The Court stated that in order to prove the racketeering charge, the prosecution had to prove that the defendants had committed "both predicate offenses." *Id*. at 290. "[D]efendants could not have committed racketeering without committing the predicate offenses and the jury could not

convict defendants of racketeering without making findings regarding factual elements that were not part of the predicate offenses." *Id*. Defendant Billy Martin argued that "the prosecution failed to present sufficient evidence to prove the elements of the racketeering offense *and the underlying predicate acts*" and, accordingly, the trial court should have issued a directed verdict in his favor. *Id*. at 313-314 (emphasis added). This Court disagreed, holding that "the essential elements of racketeering and the predicate offenses were proven beyond a reasonable doubt," *id*. at 327, *despite* the fact that Martin was never convicted of any predicate offenses. This Court concluded that there was sufficient evidence to show "that defendant knowingly conducted or participated in the affairs of [the adult entertainment establishment] directly or indirectly through a pattern of racketeering activity, which included committing, attempting to commit, conspiring to commit or aiding or abetting the violation of MCL 750.452 and MCL 750.457." *Id*. at 323-324. In other words, despite Martin's having been *convicted* only of conducting a criminal enterprise and not any predicate offenses, this Court, when presented with a sufficiency-of-the-evidence argument, looked at the two predicate offenses alleged at trial and held that the evidence supported a determination that Martin had committed, attempted to commit, conspired to commit, or aided or abetted the commission of these two predicate offenses.

Though the defendants in *Martin* admittedly did not present the same argument that defendant makes on appeal here, it is noteworthy that this Court took no issue with the fact that Martin had not been convicted of any predicate offenses and that we analyzed whether there was sufficient evidence to show that defendant had *engaged* in the predicate offenses, notwithstanding

the lack of charges or convictions for those predicate offenses. Therefore, *Martin* suggests that conducting a criminal enterprise does not require convictions of, but rather merely evidence to *prove*, at least two predicate offenses.

In *People v Schrauben*, 314 Mich App 181; 886 NW2d 173 (2016), on the other hand, we affirmed the trial court's dismissal of the defendant's conviction of conducting a criminal enterprise after it determined that his convictions of embezzlement, which supported the conviction for conducting a criminal enterprise, could not be proven beyond a reasonable doubt. In that case, the defendant was charged, among other things, with converting money that belonged to a funeral home to his own use (embezzlement) and conducting a criminal enterprise based upon that embezzlement. *Id*. at 198-199. We, like the trial court, determined that the money at issue never belonged to the funeral home and that the money never came into the defendant's possession because of a relationship of trust—two essential elements of an embezzlement conviction. *Id*. Accordingly, this Court concluded that the trial court did not err by granting a directed verdict on both the embezzlement *and* conducting-a-criminal-enterprise charges. *Id*. at 199-200. This Court engaged in no lengthy analysis concerning the viability of the charge for conducting a criminal enterprise but, rather, apparently assumed that without the embezzlement convictions, the conviction for conducting a criminal enterprise could not stand. See *id*. at 198-200. While this case would appear to suggest that a conducting-a-criminal-enterprise conviction requires convictions of predicate offenses, we conclude that it actually does not.

In *Schrauben*, there was no possible way for embezzlement to be *proven* because the money was clearly

not the funeral home's money and was not obtained by trust with the principal. *Id*. at 199. In other words, as a matter of law, there was no way for the commission of the predicate offenses to be established because it was clear that the elements of embezzlement could not be met. Accordingly, it was not necessarily the dismissal of the convictions of the predicate offenses that defeated the charge of conducting a criminal enterprise, but the fact that the predicate offenses could not be established at all.

In the present case, there is no such issue. Although the jury found defendant not guilty of two counts and could not reach a unanimous verdict on two counts, there was nothing that conclusively prevented an element of those predicate offenses from being proven. And, in fact, there was evidence to support a finding that defendant had engaged in the charged predicate acts of recruiting a minor for child sexually abusive activity, former MCL 750.462g, and procuring or inducing a person to engage in prostitution, MCL 750.455.

Under former MCL 750.462g, a person could "not knowingly recruit, entice, harbor, transport, provide, or obtain by any means, or attempt to recruit, entice, harbor, provide, or obtain by any means, a minor knowing that the minor will be used for child sexually abusive activity." See 2006 PA 162. Former MCL 750.455 stated in pertinent part:

> Any person who shall procure a female inmate for a house of prostitution; or who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute; or who by promises, threats, violence or by any device or scheme, shall cause, induce, persuade, encourage, take, place, harbor, inveigle or entice a female person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed; or any person who shall, by promises,

> threats, violence or by any device or scheme, cause, induce, persuade, encourage, inveigle or entice an inmate of a house of prostitution or place of assignation to remain therein as such inmate; or any person who by promises, threats, violence, by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, shall take, place, harbor, inveigle, entice, persuade, encourage or procure any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution; or who shall inveigle, entice, persuade, encourage, or procure any female person to come into this state or to leave this state for the purpose of prostitution; or who upon the pretense of marriage takes or detains a female person for the purpose of sexual intercourse; or who shall receive or give or agree to receive or give any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years. [MCL 750.455, as enacted by 1931 PA 328.]

Here, Haylee Young testified that she felt pressured by defendant into engaging in sexual activity with men in order to obtain money and drugs for defendant. Young testified that she engaged in sexual acts with a man who gave defendant drugs after the encounter the first time defendant told her to, and that this occurred frequently after the first time. Young further testified that she observed defendant's daughter Ashleigh go on "dates" with men, and that these "dates" constituted sexual activity in exchange for something of value. Young testified that she and Ashleigh eventually set up their own "dates" with men, but still shared the money and drugs they obtained with defendant. None of Young's actions occurred until after meeting defendant and spending time at her house. Dejuan Horne testified that men visited defendant's house in order to

exchange money and drugs for sexual acts, and that he even drove some of the girls to meet men at hotel rooms and houses on occasion. Jeffrey Howenstine testified that he gave money for the receipt of sexual acts from Ashleigh, and that defendant was aware of this and blackmailed him with this information.

Accordingly, there was evidence for a jury to find that defendant had "recruit[ed], entice[d], harbor[ed], transport[ed], provide[d], or obtain[ed] . . . a minor [i.e., Ashleigh] knowing that . . . [Ashleigh would] be used for child sexually abusive activity," i.e., would be engaged in a listed sexual act. See former MCL 750.462g; former MCL 750.455; MCL 750.145c(i), (o), and (n). Likewise, there was also sufficient evidence for the jury to find that defendant had "aid[ed] or abet-t[ed], solicit[ed], coerc[ed], or intimidat[ed] a person [i.e., Young and/or Ashleigh] to commit an offense [i.e., prostitution] for financial gain." MCL 750.159g. Moreover, the statutory definition of "racketeering" is "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain, involving" prostitution or human trafficking. MCL 750.159g. The jury could thus have found that while defendant did not aid, abet, solicit, coerce, or intimidate the individuals specifically named in the felony information for financial gain, she had perhaps *conspired* to do so—which is all that is required under the racketeering statute. And there were a multitude of charges concerning young girls that could have been brought against defendant, but were not. Having presented sufficient evidence to establish each of the elements of at least two predicate offenses, the prosecution presented sufficient evidence for the jury to find defendant guilty of conducting a criminal enterprise.

That the jury did not convict defendant of the predicate offenses does not render the conviction for conducting a criminal enterprise invalid, not only considering this Court's prior analysis in *Martin*, but also because a jury verdict need not be consistent. *People v Vaughn*, 409 Mich 463, 465; 295 NW2d 354 (1980). "Juries are not held to any rules of logic nor are they required to explain their decisions." *Id*. at 466. Our Supreme Court explained:

> The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Id*. (citations omitted).]

Similarly, in *People v Lewis*, 415 Mich 443, 446, 448; 330 NW2d 16 (1982), our Supreme Court held that the jury's verdict convicting the defendants of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b, but acquitting them of the underlying felonies did not invalidate the convictions. The defendants argued on appeal that their felony-firearm convictions could not stand because the jury had acquitted them of the requisite felony, which was an element of felony-firearm. *Id*. at 446. Our Supreme Court rejected this argument, reasoning that

> [w]hen a jury responds to a multi-count indictment, lawyers and judges are often tempted to reconcile the ver-

> dicts, to strive for some rational compatibility. But to do so imposes an artificial gloss on jury verdicts. Narrowly viewed, a jury's acquittal on one charge in a multi-count indictment signals no more than the jurors' agreement not to convict on that charge for whatever reason satisfactory to them. [*Id*. at 450.]

The Court stated that the inconsistent verdict suggested that the jury had "either compromised or [was] lenient." *Id*. If leniency was the motivation, the defendant had no complaint. The Court acknowledged that if the jury had compromised, the defendant may have been prejudiced. However, when a jury is unable to agree on a unanimous verdict on certain charges, the remedy is a mistrial, not dismissal of the charges or convictions, and the defendant could be required to stand trial again on the charges. *Id*. at 451-452. In any event, the *Lewis* Court determined that "[t]he conviction of felony-firearm may be read as an implicit finding that the defendant did commit the felony," and it noted that the Legislature made the commission or the attempt to commit a felony and not *conviction* of a felony an element of felony-firearm. *Id*. at 452-453. The Court concluded:

> Having in mind the legislative purpose to provide separate punishment for carrying a firearm in the commission of or attempt to commit a felony, we are satisfied that it is both within the letter of the statute and the spirit of the legislative purpose to construe the statute as providing for the imposition of sentence in a case where the jury convicts of felony-firearm but acquits of the underlying felony. It would not be consistent with the legislative purpose in enacting the felony-firearm statute to conclude that it intended that a felony-firearm conviction be set aside and no punishment at all be imposed in a case where the jury, extending leniency or compromising, failed to convict of the underlying felony, but did convict of felony-firearm. [*Id*. at 453-454 (citation omitted).]

We find the same to be applicable here. Just as no felony conviction was necessary for the jury to find the defendants guilty of felony-firearm in *Lewis*, so also in the present case the jury was not required to find defendant guilty of the predicate offenses in order to find her guilty of conducting a criminal enterprise. The jury could have been exercising leniency in the present case, just as it could have done in *Lewis*.[4] Similarly, there is no requirement that a defendant be "convicted" of a felony in order to violate the felony-firearm statute (MCL 750.227b), and this word is absent from MCL 750.159g. Instead, MCL 750.159g uses the words "committing" and "commit" rather than "conviction" or some variation. Because the statute that prohibits conducting a criminal enterprise does not require the prosecution to prove that a defendant was convicted of the predicate offenses but merely that a defendant engaged in them, and the evidence was sufficient for a jury to find that defendant committed the predicate offenses of recruiting a minor for sexually abusive activity (former MCL 750.462g) and of procuring or inducing a person to engage in prostitution (former MCL 750.455),[5] defendant is not entitled to relief.

Affirmed.

BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ., concurred.

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[4] The only potential issue with the integrity of the verdict is if the jury compromised in order to render its verdict, see *Lewis*, 415 Mich at 451-452, but defendant has advanced no argument in this regard on appeal, nor has she offered evidence that the jury did compromise.

[5] These two counts represent the two upon which the jury was unable to reach a verdict.

BYRNES v MARTINEZ

Docket No. 345061. Submitted December 11, 2019, at Detroit. Decided December 19, 2019. Approved for publication February 4, 2020, at 9:15 a.m. Vacated in part 506 Mich 948 (2020).

Theresa Byrnes and Paul Byrnes, M.D., filed a medical malpractice action in the Lenawee Circuit Court against Jacob Martinez, M.D., CRG Lynwood, LLC, and others, asserting that defendants' negligence while she was a patient at Lynwood Manor Healthcare Center resulted in Theresa suffering from left-sided hemiplegia and being dependent on skilled nursing care for her daily needs. After filing the instant action, plaintiffs notified the Department of Health and Human Services of the lawsuit because Theresa had received Medicaid benefits while she was a patient at the healthcare center. The department moved to intervene, arguing that under MCL 400.106, defendants were liable to reimburse the department, as subrogee of Theresa, for the cost of all Medicaid benefits paid for medical services. The court, Anna Marie Anzalone, J., granted the motion to intervene but ordered that the intervention be silent; specifically, the department was allowed to participate in settlement negotiations but was not allowed to participate at trial or make a jury presentation. At the mediation proceeding before trial, plaintiffs settled their claims with defendants for $2.95 million, approximately one-third of what they had demanded. The department participated in the mediation, but its intervening claim was not part of the settlement agreement. Plaintiffs and the department separately moved the court to apportion the settlement proceeds and determine the amount the department would receive in Medicaid reimbursement. Plaintiff argued that under 42 USC 1396p(a)(1), the Medicaid claim had to be reduced pro rata to 32.45% to reflect the reduced amount accepted in the settlement and further reduced by 39.73% to reflect the amount paid for attorney fees. In contrast, the department argued that under *Neal v Detroit Receiving Hosp*, 319 Mich App 557 (2017), the court had to allocate the settlement proceeds into medical and nonmedical expenses or hold an evidentiary hearing to allocate the proceeds before determining the amount of the Medicaid claim. Purportedly relying on *Neal*, the court reduced the department's claimed Medicaid expenditures in an

amount proportionate to the entire settlement and then reduced that sum by a proportionate amount for attorney fees. The department appealed, and Theresa cross-appealed.

The Court of Appeals *held*:

1. 42 USC 1396a provides that Medicaid recipients must assign to the state any right to payment for medical care from any third party. In conjunction with this mandate, the federal statute requires states to make reasonable efforts to determine whether any third parties are liable to pay for a Medicaid recipient's medical care and to seek reimbursement from those third parties. 42 USC 1396k(b) provides that any amount collected by the state by assignment must be retained by the state to reimburse it for Medicaid payments and that the remainder from the amount collected must be paid to the recipient. In collecting reimbursement payments, 42 USC 1396a(a)(18) specifically requires states to comply with the provisions of 42 USC 1396p, the federal antilien statute, with respect to liens. In particular, 42 USC 1396p(a)(1)(A) prohibits placing a lien against a recipient's property before the individual's death for the purpose of recovering medical assistance paid or to be paid on the recipient's behalf by a state health plan except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of the recipient.

2. On the state level, MCL 400.106 provides that Michigan's Medicaid plan is subrogated under MCL 400.106(1)(b)(*ii*) to a recipient's right to recover funds for payment of medical expenses and that the state has first priority against proceeds from third-party settlements or judgments. With regard to a Medicaid recipient's settlement, 42 USC 1396p(a)(1) limits a Medicaid plan's recovery to the medical expenses allowed for in the settlement, meaning that a state may only recover the portion of the proceeds designated as payment for medical expenses. Therefore, any fund awarded as compensation for other damages (that is, nonmedical damages) are the recipient's property, and 42 USC 1396p prohibits a lien against a recipient's property for the recovery of medical expenses paid by the party claiming the lien. Thus, money allocated to compensate a recipient for other types of damages, including economic and noneconomic damages, may not be used to pay a state Medicaid plan for medical expenses it paid. A state Medicaid plan is not necessarily bound by the allocation of damages agreed on by the parties to a tort settlement when the plan was not included in the settlement negotiations and did not approve the allocation. When a tort settlement does not specify an allocation, the parties have not agreed to an allocation, or all parties were not part of the settlement negotiations, a court must

conduct an evidentiary hearing to review the case and determine the real value of the Medicaid recipient's claim and order a fair and reasonable allocation of the settlement in light of the various damages the recipient suffered; the evidentiary hearing obviates the possibility that the settling parties allocated away the lienholder's significant interest in recovering its rightful portion of a plaintiff's settlement proceeds. Neither *Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268 (2006), nor *Wos v EMA*, 568 US 627 (2013), limit the medical expenses for which a Medicaid plan can seek reimbursement to past medical costs as a per se rule. Further, the federal statutory provisions regarding Medicaid reimbursement also do not indicate a congressional intent to exempt states from recovering future medical expenses. Therefore, when calculating medical expenses, a court should also consider what amount, if any, of the settlement can be attributed to future medical costs. As held by *Neal v Detroit Receiving Hosp*, 319 Mich App 557 (2017), the portion of MCL 400.106(5) that allows the state to recover the full cost of expenses paid directly conflicts with and is preempted by 42 USC 1396p(a)(1), the federal antilien provision. However that decision applied only to the types of damages the state can collect and did not nullify the portion of MCL 400.106(5) that states that attorney fees and costs must be deducted from the settlement amount before the state receives its allocated share. In this case, the department did not agree to the allocation of damages in the settlement, and the trial court did not hold an evidentiary hearing to apportion the settlement proceeds into medical and nonmedical categories. Instead, the court incorrectly applied a formula not allowed by MCL 400.106 or controlling caselaw. The court also erred by reducing the department's share by a pro rata reduction of attorney fees; instead, the trial court should have deducted the parties' fees and costs from the settlement first and then calculated the department's share. Accordingly, the trial court's allocation order was reversed and the case remanded for an evidentiary hearing to determine the correct allocation of settlement proceeds.

3. The forced-assignment provisions in 42 USC 1396a(a)(25) and 42 USC 1396k(a) are exceptions to the 42 USC 1396p(a)(1)(A) antilien provision. 42 USC 1396p(a)(1)(A), which provides that no lien may be imposed against the property of an individual before his or her death for Medicaid benefits paid except when a court determines the benefits were incorrectly paid, is therefore inapplicable to the medical-expenses portion of a settlement. Similarly, settlement proceeds in Michigan are subject to the lien set forth in MCL 400.106(5), and the portion of the proceeds that represent medical expenses are an exception to the federal antilien

provision. The relevant federal statutory provisions—42 USC 1396a(a)(18) and (25)(A) through (B), 42 USC 1396k, and 42 USC 1396p(a)(1)(A)—do not require the state to first prove the elements of the recipient's underlying tort claim or that the benefits were otherwise "incorrectly paid" before seeking reimbursement. Accordingly, the state does not have to prove the underlying liability of a third-party tortfeasor or insurer or that benefits were otherwise incorrectly paid before being reimbursed under MCL 400.106 for medical expenses paid on behalf of a Medicaid recipient. In this case, the trial court did not err by permitting the department to recover a portion of its lien without first proving the elements of the underlying medical malpractice claim.

4. MCL 400.106(1)(b)(*ii*) authorizes the department to intervene in an action brought by an injured Medicaid recipient. Even though that authorization is unconditional, it is not an absolute right, and the trial court can place restrictions on it so long as those restrictions do not impose conditions precedent that run afoul of a statute or court rule. The trial court did not abuse its discretion by limiting the department's intervention by not allowing it to participate at trial; the department failed to explain how the restriction harmed its ability to participate and negotiate in settlement proceedings.

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

1. TORTS — MEDICAID LIEN AGAINST SETTLEMENT PROCEEDS — ALLOCATION OF PROCEEDS — PROOF OF UNDERLYING LIABILITY OR BENEFITS OTHERWISE INCORRECTLY PAID.

42 USC 1396(a)(25)(B) and 42 USC 1396p(a)(1)(A) do not require the state to prove the underlying liability of a third-party tortfeasor or insurer or that benefits were otherwise incorrectly paid before it may be reimbursed under MCL 400.106 for medical expenses paid on behalf of a Medicaid recipient.

2. TORTS — MEDICAID LIEN AGAINST SETTLEMENT PROCEEDS — ALLOCATION OF PROCEEDS — MEDICAL AND NONMEDICAL CATEGORIES — FUTURE MEDICAL EXPENSES ALLOWED.

When a tort settlement does not specify an allocation, the parties have not agreed to an allocation, or all parties were not part of the settlement negotiations, a court must conduct an evidentiary hearing to review the case and determine the real value of the Medicaid recipient's claim and order a fair and reasonable allocation of the settlement in light of the various damages the recipient suffered; the court must allocate the settlement proceeds into medical and nonmedical categories; future medical expenses re-

quested by a plaintiff can be included in the allocation of settlement proceeds to medical expenses.

The Law Offices of Courtney Morgan, PLLC (by *Courtney E. Morgan, Jr.*, and *Brian T. Keck*) for Theresa A. Byrnes.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kelley T. McLean*, Assistant Attorney General, for the Department of Health and Human Services.

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

RIORDAN, P.J. Intervening plaintiff, the Department of Health and Human Services (DHHS), appeals as of right the trial court's order approving final distribution of settlement proceeds. Plaintiff Theresa Byrnes cross-appeals that judgment.[1] This Court is asked to decide whether the trial court committed error requiring reversal when it (1) calculated the amount the DHHS could recover from the settlement proceeds under a Medicaid lien; (2) did not require the DHHS to prove the elements of plaintiff's medical malpractice claim before finding that it was entitled to reimbursement; and (3) limited the DHHS's ability to fully participate in the lawsuit. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

On August 16, 2014, Byrnes went to the hospital with a severe headache. Scans revealed that she had suffered

[1] Plaintiff Paul Byrnes, M.D., was originally a party to the appeal and cross-appeal, but the parties stipulated to his dismissal from the action because he is now deceased and the claims on appeal do not apply to him individually.

a subarachnoid hemorrhage (brain bleed) that required surgical intervention. She received rehabilitative care at Lynwood Manor Health Care Center (Lynwood), which is where Lynwood's alleged malpractice occurred. In short, her headaches persisted and she was unable to participate in therapy. Eventually, it was discovered that she had suffered another brain bleed, which required additional surgery. As a result of her brain bleeds, Byrnes suffers from left-sided hemiplegia and is dependent on skilled nursing care for her daily needs.

Byrnes received Medicaid benefits while she was treated at Lynwood. On May 6, 2016, Byrnes and her husband filed a medical malpractice lawsuit against Lynwood. On June 2, 2017, the DHHS moved to intervene in the lawsuit; the trial court granted the motion but ordered that the DHHS's intervention be "silent." Specifically, the order provided:

> IT IS ORDERED that the [DHHS] is allowed to intervene as Plaintiff to protect its subrogation right under MCL 400.106(1). Although the intervention will be silent, the [DHHS] can participate in settlement negotiations; exercise any interest it may have with respect to the verdict form; and participate post-verdict. The interests or identity of the [DHHS] shall not be disclosed to the jury. The [DHHS] will not participate at trial, and will make no jury presentation.

The DHHS filed its intervening complaint, and the parties submitted the matter to facilitation in March 2018. At the facilitation, plaintiffs settled their claims with defendants for approximately one-third of what they had demanded. The DHHS participated in the facilitation, but it was not a party to the settlement agreement.

Plaintiffs and the DHHS each filed a motion requesting that the trial court apportion the settlement

proceeds and address how much the DHHS would receive in Medicaid reimbursement. At the hearing on the motions, plaintiffs argued that pursuant to the federal antilien statute, 42 USC 1396p(a)(1), the Medicaid claim must be reduced pro rata to 32.45% to reflect the reduced amount that plaintiffs had accepted under the settlement agreement and that it should be further reduced by 39.73% to reflect the amount paid for plaintiffs' attorney fees and costs. The DHHS argued that under *Neal v Detroit Receiving Hosp*, 319 Mich App 557; 903 NW2d 832 (2017), the trial court must allocate the settlement proceeds into medical and nonmedical expenses or hold an evidentiary hearing to allocate the proceeds before determining the amount of the Medicaid claim.

The trial court ordered that the DHHS be reimbursed for a portion of the Medicaid claim. The trial court explained that it applied the formula from *Neal* to reduce the DHHS's claimed Medicaid expenditures proportionate to the amount of the entire settlement and then reduced that sum by a proportionate amount for attorney fees.

The DHHS appeals by right, arguing that the trial court committed error requiring reversal when it calculated this amount and when it limited the DHHS's intervention. Plaintiffs cross-appealed, arguing that the DHHS was not entitled to any reimbursement because it did not first prove the elements of a medical malpractice claim against defendants and, in the alternative, that the trial court erred in its calculations. We consider each of the arguments in turn.

II. STANDARD OF REVIEW

This case involves issues of statutory interpretation, which are reviewed de novo as questions of law. *Id*. at

564. "All matters of statutory interpretation begin with an examination of the language of the statute." *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018). When the statutory language is clear and unambiguous, the statute must be applied as written. *Id*. A court may not read anything "into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*. "A statutory term or phrase cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme." *Id*. (quotation marks and citation omitted). We review for an abuse of discretion a trial court's decision on a motion to intervene. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes . . . ." *In re Brosamer Guardianship*, 328 Mich App 267, 271; 936 NW2d 870 (2019) (quotation marks and citation omitted).

III. CALCULATING MEDICAL EXPENSES

The DHHS argues that the trial court erred when it failed to allocate the settlement proceeds attributable to medical expenses before apportioning them. We agree.

42 USC 1396a(a)(25)(A) requires states to take "all reasonable measures to ascertain the legal liability of third parties (including . . . parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service) to pay for care and services . . . ." 42 USC 1396a(a)(25)(B) requires "that in any case where such a legal liability is found to exist . . . , the State . . . will seek reimbursement for such assistance

to the extent of such legal liability[.]" 42 USC 1396a(a)(25)(H) requires "that . . . in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which . . . [it] is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." Under 42 USC 1396k(a)(1), "as a condition of [Medicaid] eligibility . . . , the individual is required . . . (A) to assign [to] the State any rights . . . to payment for medical care from any third party; (B) to cooperate with the State . . . in obtaining . . . [such] payments . . . and . . . (C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan[.]" (Paragraph structure omitted.)

42 USC 1396k(b) provides, "[A]ny amount collected by the State under [such] an assignment . . . shall be retained by the State . . . to reimburse it for [Medicaid] payments made on behalf of" the recipient, and "the remainder of such amount collected shall be paid" to the recipient. 42 USC 1396a(a)(18) requires that states "comply with the provisions of section 1396p [the federal antilien statute] . . . with respect to liens[.]" In turn, 42 USC 1396p(a)(1)(A) prevents states from seeking reimbursement of medical expenses from a Medicaid recipient during his or her lifetime "except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual . . . ."

In an effort to comply with these requirements, Michigan enacted MCL 400.106,[2] which includes the

[2] MCL 400.106 was amended by 2018 PA 511, effective December 28, 2018. The former version of MCL 400.106, as amended by 2014 PA 452,

state's rights of subrogation and assignment and gives the state first priority against proceeds from settlements or judgments against third parties. In relevant part, MCL 400.106(1)(b)(*ii*) defines the term "medically indigent individual" as a person who has

> subrogated [to the DHHS] any right of recovery that a patient may have for the cost of hospitalization, pharmaceutical services, physician services, nursing services, and other medical services not to exceed the amount of funds expended by [the DHHS] for the care and treatment of the patient. The patient or other person acting in the patient's behalf shall execute and deliver an assignment of claim or other authorizations as necessary to secure the right of recovery to [the DHHS]. . . . If a payment is made, [the DHHS], to enforce its subrogation right, may do either of the following: (a) intervene or join in an action or proceeding brought by the injured, diseased, or disabled individual, the individual's guardian, personal representative, estate, dependents, or survivors, against a third person who may be liable for the injury, disease, or disability, or against contractors, public or private, who may be liable to pay or provide medical care and services rendered to an injured, diseased, or disabled individual; (b) institute and prosecute a legal proceeding against a third person who may be liable for the injury, disease, or disability, or against contractors, public or private, who may be liable to pay or provide medical care and services rendered to an injured, diseased, or disabled individual, in state or federal court, either alone or in conjunction with the injured, diseased, or disabled individual, the individual's guardian, personal representative, estate, dependents, or survivors. [The DHHS] may institute the proceedings in its own name or in the name of the injured, diseased, or disabled individual, the individual's guardian, personal representative, estate, dependents, or survivors. . . . The injured, diseased, or disabled individual may proceed in his or her

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effective January 2, 2015, was in effect at the time the trial court analyzed this statute. That version is referred to herein.

> own name, collecting the costs without the necessity of joining [the DHHS] as a named party. The injured, diseased, or disabled individual shall notify [the DHHS] of the action or proceeding entered into upon commencement of the action or proceeding. An action taken by [the DHHS] in connection with the right of recovery afforded by this section does not deny the injured, diseased, or disabled individual any part of the recovery beyond the costs expended on the individual's behalf by [the DHHS]. The costs of legal action initiated by [the DHHS] shall be paid by [the DHHS].

MCL 400.106 goes on to state:

> (3) An individual receiving medical assistance under this act or his or her legal counsel shall notify [the DHHS] when filing an action in which [the DHHS] may have a right to recover expenses paid under this act. . . .
>
> (4) If a legal action in which [the DHHS has] a right to recover expenses paid under this act is filed and settled after November 29, 2004 without notice to [the DHHS], [the DHHS] may file a legal action against the individual or his or her legal counsel, or both, to recover expenses paid under this act. The attorney general shall recover any cost or attorney fees associated with a recovery under this subsection.
>
> (5) [The DHHS] has first priority against the proceeds of the net recovery from the settlement or judgment in an action settled in which notice has been provided under subsection (3). . . . [The DHHS] shall recover the full cost of expenses paid under this act unless [the DHHS] agrees to accept an amount less than the full amount. If the individual would recover less against the proceeds of the net recovery than the expenses paid under this act, [the DHHS] and the individual shall share equally in the proceeds of the net recovery. As used in this subsection, "net recovery" means the total settlement or judgment less the costs and fees incurred by or on behalf of the individual who obtains the settlement or judgment.

There are three relevant cases that have considered these types of Medicaid reimbursement provisions.[3] In *Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268, 274; 126 S Ct 1752; 164 L Ed 2d 459 (2006), a Medicaid recipient settled her lawsuit, but the parties did not allocate separate amounts for medical expenses and other categories. The state of Arkansas was not a party to the settlement and sought to recover the full amount of Medicaid benefits paid. *Id*. The plaintiff brought a declaratory action and argued that Arkansas could only recover the portion of settlement proceeds that accounted for past medical expenses. The parties stipulated that the settlement was for approximately one-sixth of the plaintiff's overall damages and that only a specific dollar amount of the settlement represented compensation for medical expenses. *Id*. at 274, 280. The Court held that Arkansas could only recover the portion of proceeds designated as payment for medical expenses and that the rest constituted "property" subject to the federal antilien statute. *Id*. at 280-282, 284-285. Insofar as the state statute permitted Arkansas to recover for medical expenses out of the other portions of the settlement proceeds, it was preempted by the federal antilien statute. *Id*. at 282-286.

In *Wos v EMA*, 568 US 627, 630, 638; 133 S Ct 1391; 185 L Ed 2d 471 (2013), the Court held that a North

[3] Although the federal cases we consider—*Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268; 126 S Ct 1752; 164 L Ed 2d 459 (2006), and *Wos v EMA*, 568 US 627; 133 S Ct 1391; 185 L Ed 2d 471 (2013)—are not binding on this Court, we find them persuasive, and we note that this Court previously turned to those cases for guidance in *Neal*, 319 Mich App 557, which is controlling here. MCR 7.215(C)(2); *Hackett v Kress*, 1 Mich App 6, 11; 133 NW2d 221 (1965); *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993) (stating that this Court is not bound by federal precedent interpreting Michigan law but that it may turn to federal precedent for guidance).

Carolina statute that required "up to one-third of any damages recovered by a beneficiary for a tortious injury be paid to the State to reimburse it for payments it made for medical treatment on account of the injury" violated the federal antilien statute. When the parties settled the underlying tort action for $2.8 million, the trial court placed 1/3 of that amount into an escrow account until the state's Medicaid lien could be conclusively determined. *Id*. at 631-632. Medicaid had paid for medical expenses totaling $1.9 million, and the settlement agreement did not allocate the settlement amount to different categories of damages. *Id*. at 631. In discussing the *Wos* decision, our Court stated in *Neal* that

> "[w]hen there has been a judicial finding or approval of an allocation between medical and nonmedical damages—in the form of either a jury verdict, court decree, or stipulation binding on all parties—that is the end of the matter." The *Wos* Court noted that in *Ahlborn* "[a]ll parties (including the State of Arkansas) stipulated that approximately 6 percent of the plaintiff's settlement represented payment for medical costs." However, when such a stipulation or judgment does not exist, and "[w]hen the State and the beneficiary are unable to agree on an allocation," . . . a judicial proceeding is necessary. [*Neal*, 319 Mich App at 575 (citations omitted; alterations in *Neal*).]

In *Neal*, 319 Mich App at 561, the plaintiff appealed an order requiring her to pay the full amount of a Medicaid lien after she settled her medical malpractice claim and allocated for medical expenses a much lower amount than the lien amount. Meridian Health Plan of Michigan, the Medicaid plan that paid for the plaintiff's medical care, argued that it was entitled to recovery of the full lien amount pursuant to MCL 400.106(5), notwithstanding the parties' settlement allocations. The plaintiff argued that MCL 400.106(5)

was preempted by the federal antilien provision, § 1396p(a)(1), and that Meridian was, therefore, only entitled to the amount allocated by the settlement agreement for medical expenses. *Neal*, 319 Mich App at 562-563.

The trial court held that Meridian was entitled to the full amount of the Medicaid lien. *Id*. at 563-564. On appeal, this Court reversed the trial court's decision and held that MCL 400.106(5) was preempted by 42 USC 1396p(a)(1) and that Meridian was precluded from "recovering on its Medicaid lien an amount greater than the portion of the settlement proceeds designated as payment for medical expenses[.]" *Id*. at 564, 572-573. We also noted that Meridian was not a party to the settlement and that it was not, therefore, "bound by the allocation of damages made by the settling parties." *Id*. at 576. The case was "remanded to the trial court for a proper hearing and resolution because (1) there [was] no indication in the record that the trial court reviewed the confidential settlement and found it reasonable, fair, and proper regarding the different categories of plaintiff's claimed damages, (2) [Meridian] was an affected party but did not participate in the settlement negotiations or consent to a reduced recovery on its lien, and (3) [Meridian] and plaintiff were unable to agree on a resolution of the outstanding Medicaid lien." *Id*. at 577. We went on to explain:

> [T]o obviate the possibility that the settling parties allocated away [Meridian's] significant interest in recovering its rightful portion of plaintiff's settlement proceeds, an evidentiary hearing must be conducted. At the hearing, the court must determine the amount of the Medicaid lien that may be recovered from plaintiff's settlement proceeds taking into consideration the true value of the case and plaintiff's claimed losses. [Meridian] would only be en-

> titled to recover its entire Medicaid lien . . . if that amount comports with a fair and proper allocation of the settlement proceeds among all of plaintiff's losses—which is possible. But again, [Meridian] may only recover its lien amount from the portion of the tort settlement that represents payment for medical expenses. Therefore, until either the parties reach an agreement or the trial court determines the proper and fair allocation of the settlement, the amount [Meridian] is entitled to recover on its lien remains unresolved. [*Id*.]

Meridian also was required to pay a pro rata share of costs and attorney fees incurred in pursuing the tort action. *Id*. at 578.

The takeaway from *Neal* is twofold:

(1) A Medicaid lien can *only* encumber the portion of settlement proceeds designated as payment for medical care, and anything beyond that is preempted by the federal antilien statute.

(2) There are effectively two ways of determining that amount: stipulation (including agreement by the lienholder) or judicial determination (made after an evidentiary hearing on the matter).

Neal laid out several ways for the trial court to ensure that a lienholder's interests are protected when a plaintiff settles an underlying tort claim. First, "the most efficient way is for the plaintiff to ascertain the precise amount the Medicaid lienholder expects to recover and to negotiate that amount if necessary before settling the underlying tort action." *Id*. at 576-577. Second, the parties, including the lienholder, can reach an agreement on the amount of the Medicaid lien. *Id*. at 577. Third, the trial court can determine the "proper and fair allocation of the settlement[.]" *Id*. When a settlement agreement allocates damages, the trial court should review the agreement and make sure that it is reasonable, fair, and proper regarding the

different categories of a plaintiff's claimed damages. *Id*. As stated, to obviate the possibility that the settling parties allocated away the lienholder's significant interest in recovering its rightful portion of a plaintiff's settlement proceeds, the trial court should conduct an evidentiary hearing. *Id*. There, the trial court must make a determination of the amount of the Medicaid lien and apportion that from the plaintiff's settlement proceeds taking into consideration the true value of the case and the plaintiff's claimed losses. *Id*.

Here, rather than hold such a hearing, the trial court heard arguments regarding the application of *Neal*, focusing on the law rather than on any evidence. The record contains no indication that the trial court apportioned the settlement proceeds into medical and nonmedical categories or considered what portion of the settlement was attributable to lost wages, attendant care, replacement services, lost earning capacity, pain and suffering, etc. Instead, the trial court took the full settlement amount and reduced it inversely by determining the ratio the settlement amount was relative to the amount plaintiffs demand in their lawsuit. The trial court apparently attempted to apply a formula not found in MCL 400.106, and that was a departure from *Neal*, in which we rejected such a formulaic approach.[4]

Accordingly, on remand, the trial court must hold an evidentiary hearing to determine the portion of the settlement amount that is attributable to medical expenses, "taking into consideration the true value of

[4] *Neal* relied on the United States Supreme Court's holdings in *Ahlborn* and *Wos*, which likewise rejected a "one-size-fits-all" approach to determining what portion of a plaintiff's settlement proceeds are attributable to medical expenses. *Neal*, 319 Mich App at 572-573; *Ahlborn*, 547 US at 281; *Wos*, 586 US at 637-638.

the case and plaintiff's claimed losses." *Neal*, 319 Mich App at 577. The DHHS argues that its portion is not subject to a pro rata reduction to reflect the reduced settlement amount compared to claimed damages. However, our instructions in *Neal* made clear that this was one factor for the trial court to consider. *Id*. The DHHS has not offered a persuasive argument for us to depart from our directive in *Neal*.

When calculating "medical expenses" the trial court also should consider what amount, if any, of the settlement can be attributed to future medical costs. Neither *Ahlborn* nor *Wos* limit "medical expenses" to past medical costs as a per se rule, and nothing in the relevant statutory language indicates a congressional intent to exempt plaintiff's future medical expenses from recovery by the DHHS. See 42 USC 1396a(a)(25) and 42 USC 1396k. Rather, the mandatory assignment of rights under 42 USC 1396a(a)(25)(H) requires that the state "must be assigned 'the rights of [the recipient] to payment by any other party *for such health care items or services*.' " *Ahlborn*, 547 US at 281, quoting 42 USC 1396a(a)(25)(H) (alteration in *Ahlborn*). This does not include lost wages, pain and suffering, or inheritance because those damages are distinct from medical costs. *Ahlborn*, 547 US at 281. Following this reasoning to its natural conclusion, the "medical care" described in these provisions is not limited to past medical care but, instead, includes future medical expenses, which are likewise distinct from a plaintiff's other claimed damages. However, we decline to find that future medical costs are always included in "medical expenses" because, as was the case in *Ahlborn*, the plaintiff did not specifically plead those damages in her complaint. Thus, it may be that in some cases, future medical costs are not considered in settlement negotia-

tions. However, it is one factor the trial court may consider when calculating medical expenses.

Additionally, the trial court may not reduce the DHHS's share by a pro rata reduction of attorney fees. MCL 400.106(5) provides the statutory framework for plaintiff's attorney to receive compensation. MCL 400.106(5) states:

> The [DHHS] has first priority against the proceeds of the net recovery from the settlement or judgment in an action settled . . . . The [DHHS] shall recover the full cost of expenses paid under this act unless [the DHHS] agrees to accept an amount less than the full amount. If the individual would recover less against the proceeds of the net recovery than the expenses paid under this act, [the DHHS] and the individual shall share equally in the proceeds of the net recovery. As used in this subsection, "net recovery" means the total settlement or judgment less the costs and fees incurred by or on behalf of the individual who obtains the settlement or judgment.

Therefore, attorney fees and costs should be deducted from the settlement amount first—before the DHHS receives its share. Although *Neal* declared that this provision was preempted, it only did so with respect to the types of damages the DHHS could collect. *Neal* did not nullify the portion of MCL 400.106(5) that provides for the payment of attorney fees. *Neal* stated that "to the extent that MCL 400.106(5) operates to permit recovery of the full amount of a Medicaid lien from a tort judgment or settlement regardless of the allocation of damages, it is in direct conflict with, and is preempted by, the federal anti-lien provision, 42 USC 1396p(a)(1)." *Neal*, 319 Mich App at 572. "Conflict preemption acts to preempt state law to the extent that it is in direct conflict with federal law or with the purposes and objectives of Congress." *Konynenbelt v Flagstar Bank, FSB*, 242

Mich App 21, 26; 617 NW2d 706 (2000) (quotation marks and citation omitted). Because *Neal* does not hold that MCL 400.106(5) is preempted entirely, and because nothing in the relevant federal provisions says anything about attorney fees, the portion of MCL 400.106(5) that intends for attorney fees to be taken out of the settlement amount first is still in effect. The trial court should therefore follow this provision when calculating what portion of the settlement proceeds the DHHS may recover.

IV. PROVING AN UNDERLYING CLAIM AS A PREREQUISITE FOR REIMBURSEMENT

Plaintiffs argue that the DHHS was required to prove the elements of the underlying medical malpractice claim before it could recover any of its Medicaid reimbursement claim. Plaintiffs assert that 42 USC 1396a(a)(25)(B) permits the DHHS to step into a plaintiff's shoes via subrogation in order to collect reimbursement for medical assistance if legal liability is found to exist; plaintiff argues that this necessarily means that plaintiff's burden becomes the DHHS's burden and that the DHHS must prove legal liability. Additionally, 42 USC 1396p(a)(1)(A) states that a lien may only be imposed when benefits were "incorrectly paid on behalf of" the Medicaid recipient, and plaintiffs argue that the DHHS must therefore show that benefits were incorrectly paid by proving the underlying medical malpractice claim before it can recover. We disagree.

Federal law requires the DHHS to (1) pay for certain people's medical care, (2) make reasonable efforts to recoup the medical expense it paid from liable third parties (i.e., tortfeasors and insurers), and (3) not recoup any such payments by imposing a lien

on the recipient's property. 42 USC 1396a(a)(25)(A) and (B); 42 USC 1396k; 42 USC 1396a(a)(18); 42 USC 1396p(a)(1)(A). Nothing in the plain language of any of these provisions requires the DHHS to first prove the elements of an underlying tort claim. Moreover, in *Ahlborn*, 547 US at 284, the United States Supreme Court opined that the forced-assignment provisions of 42 USC 1396a(a)(25) and 42 USC 1396k(a) were exceptions to the antilien provision in 42 USC 1396p(a)(1)(A) because they were expressly authorized by Congress. Just like in *Ahlborn*, the settlement proceeds here are subject to a statutory lien, MCL 400.106(5), and just like in *Ahlborn*, the portion of the proceeds that represents medical expenses is subject to an exception to the antilien provision. Thus, insofar as that portion of proceeds is concerned, 42 USC 1396p(a)(1)(A) is inapplicable, and the DHHS is not obligated to first prove liability or that the benefits were otherwise "incorrectly paid." Accordingly, the trial court did not err by permitting the DHHS to recover a portion of its lien without first proving the elements of the underlying medical malpractice claim.

V. RIGHT TO INTERVENTION

The DHHS argues that the trial court erred when it limited its right to intervene at trial. We disagree.

MCR 2.209(A)(1) provides that "[o]n timely application a person has a right to intervene in an action" in those cases in which "a Michigan statute or court rule confers an unconditional right to intervene[.]" MCL 400.106(1)(b)(*ii*), which permits the DHHS to intervene in an action brought by an injured Medicaid recipient, provides, in relevant part:

> If a payment is made, [the DHHS], to enforce its subrogation right, may . . . intervene or join in an action or proceeding brought by the injured, diseased, or disabled individual, the individual's guardian, personal representative, estate, dependents, or survivors, against the third person who may be liable for the injury, disease, or disability, or against contractors, public or private, who may be liable to pay or provide medical care and services rendered to an injured, diseased, or disabled individual[.]

However, even if the right to intervene is unconditional for purposes of the court rules, it is not an absolute right, and the trial court can place restrictions on it so long as those restrictions stop short of imposing conditions precedent that run afoul of a statute or court rule. See *Mason v Scarpuzza*, 147 Mich App 180; 383 NW2d 158 (1985)[5] (reversing the trial court's order granting the insurance company's motion to intervene contingent on the parties reaching an agreement on payment of the plaintiff's litigation costs where the intervening party had a statutory right to intervene); *In re Credit Acceptance Corp*, 273 Mich App 594, 601; 733 NW2d 65 (2007) ("[A] court has inherent powers to manage its own affairs so as to achieve the orderly and expeditious disposition of cases.").

Plaintiffs argue that the trial court properly limited the DHHS's intervention in this case because to permit the DHHS to participate at trial would run afoul of M Civ JI 3.06, which prohibits introduction of evidence that a party is insured, and the collateral-source rule, MCL 600.6303(1), which permits postverdict reduction of the judgment attributable to medical expenses paid by a collateral source. However, M Civ JI 3.06 pertains

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[5] Although published decisions of this Court issued before November 1, 1990, are not precedentially binding, MCR 7.215(J)(1), they may be considered as persuasive authority. *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

only to insurance, not Medicaid coverage, and Medicaid payments do not fit with the definition of "collateral source" under MCL 600.6303. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 358-359; 660 NW2d 361 (2003), aff'd in part and rev'd in part on other grounds, 471 Mich 540 (2004). Even though plaintiffs' arguments are unpersuasive, the trial court limited the DHHS's right to intervene only to the extent that it could not participate at trial, and the DHHS does not explain how this restriction harmed its ability to participate and negotiate in settlement proceedings, or its ability to participate in any award eventually gained by plaintiffs. Absent this explanation, we cannot conclude that the trial court's decision fell outside the range of reasonable and principled outcomes.

VI. CONCLUSION

The trial court committed error requiring reversal when it apportioned the settlement proceeds without first holding an evidentiary hearing and making a determination as to what portion of the settlement amount was attributable to medical expenses. Further, the DHHS was not required to prove the elements of the underlying claim before it was entitled to recovery of its Medicaid lien, and the trial court did not abuse its discretion by limiting the DHHS's right to intervene. Accordingly, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

JANSEN and STEPHENS, JJ., concurred with RIORDAN, P.J.

LEGION-LONDON v THE SURGICAL INSTITUTE OF MICHIGAN AMBULATORY SURGERY CENTER, LLC

Docket No. 344838. Submitted November 14, 2019, at Detroit. Decided February 6, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 1006 (2021).

Plaintiff Charlette Legion-London sued defendants, The Surgical Institute of Michigan Ambulatory Surgery Center, LLC; Michigan Brain and Spine Physicians Group, PLLC; and others, in the Oakland Circuit Court for medical malpractice. Defendant Aria Sabit, M.D., a neurosurgeon, defaulted, and the case proceeded against defendant Kevin Crawford, D.O., an orthopedist, and his practice. The affidavit of merit (AOM) filed by plaintiff with her complaint was signed by a neurosurgeon who attested that the relevant standard of care was that of a neurosurgeon and that both Sabit and Crawford had violated it. Crawford moved for summary disposition, asserting that the AOM was deficient because the relevant standard of care applicable to him was that of an orthopedist, not a neurosurgeon. Plaintiff moved to file an amended AOM that was signed by an orthopedist and that referred to the standard of care for an orthopedist, but the trial court, Michael Warren, J., denied the motion to amend and granted Crawford's motion for summary disposition. According to the court, the revised AOM did not constitute an amendment because the affiant was not the same doctor who had signed the original AOM. The trial court dismissed the case, and because the statute of limitations had run, plaintiff could not refile the case. Plaintiff appealed.

The Court of Appeals *held*:

The trial court abused its discretion when it ruled that the revised AOM was not an amendment because its ruling depended on an erroneous interpretation of the court rules. The court also erred by relying on caselaw that predated the 2010 amendment of MCR 2.112(L) and MCR 2.118(D). In 2010, MCR 2.112(L)(2)(b) was amended to provide that a defendant in a medical malpractice case may challenge an AOM that the defendant believes is defective, including challenges concerning "the qualifications of the signer," within 63 days of its filing. And the 2010 amendment of MCR 2.118(D) provides that an amendment of an AOM in a

medical malpractice case relates back to the date of the original filing of the affidavit. MCR 2.112(L)(2)(b) applies not only to errors in the body of the AOM but specifically applies to the qualifications of the signer. Because the correction of such an error will typically require a different health professional to sign the affidavit, the text of the rule allows a plaintiff to amend an AOM by submitting one signed by a properly qualified physician, other than the one who signed the original affidavit. MCR 2.118(D) does not place limits on the nature of the amendment but provides that all types of amendments are covered by the rule so long as the substance of the amendment relates to the same conduct as the original pleading. Further, MCL 600.2301, which governs amendments under MCR 2.112(L)(2)(b), clearly provides that amendments must be permitted to correct any defect so long as the substantial rights of the other party are not affected, and it requires a showing of actual prejudice to deny a motion to amend. The revised AOM should be permitted on remand because defendants have not shown that they would suffer any prejudice on this basis.

Reversed and remanded for the trial court to accept the amended AOM for filing.

CAMERON, P.J., dissenting, disagreed that plaintiff was entitled to amend her AOM pursuant to MCR 2.112(L)(2)(b). He noted that "amendment" is commonly defined as a minor revision or addition to a pleading or other instrument. However, plaintiff asked the trial court to accept an entirely new AOM signed by an expert in a different medical specialty than the expert who had signed the first AOM. Judge CAMERON would have held that the second affidavit should not have been considered an amendment of the original AOM within the meaning of MCR 2.112(L)(2)(b) or MCR 2.118. Additionally, he believed that the majority should have considered the case in light of MCL 600.2912d(1), which stipulates that a plaintiff's attorney need only reasonably believe that an expert who signs the AOM meets the requirements for an expert witness. In this case, plaintiff's attorney could not have reasonably believed that the expert who signed the original AOM met the requirements of an expert witness, so amendment was not permissible.

TORTS — MEDICAL MALPRACTICE ACTIONS — AFFIDAVITS OF MERIT — AMENDMENTS — SUBMITTING AN AFFIDAVIT SIGNED BY A DIFFERENT EXPERT.

MCR 2.112(L)(2)(b) allows a plaintiff to correct by amendment errors in an affidavit of merit (AOM) regarding the "qualifications of the signer"; amendments to AOMs are also permissible under MCL 600.2301, which provides that amendments must be per-

mitted to correct any defect so long as the substantial rights of the parties are not affected; an AOM may be amended by submitting an affidavit signed by a different expert when there has been a challenge to the qualifications of the original signer; such an amendment relates back to the original filing under MCR 2.118(D).

Bendure & Thomas, PLC (by *Mark R. Bendure*) and *McKeen & Associates, PC* (by *Brian J. McKeen* and *Andrew F. Kay*) for Charlette Legion-London.

Corbet, Shaw, Essad & Bonasso, PLLC (by *Erika Jost*, *Daniel R. Corbet*, and *Kenneth A. Willis*) and *Plunkett Cooney* (by *Robert G. Kamenec*) for Kevin T. Crawford, D.O., and Kevin T. Crawford, D.O., PC.

Before: CAMERON, P.J., and CAVANAGH and SHAPIRO, JJ.

SHAPIRO, J. The trial court granted summary disposition to defendants, Kevin T. Crawford, D.O., and Kevin T. Crawford, D.O., PC (collectively, defendants), on the ground that the author of the affidavit of merit (AOM) filed with the complaint was not an expert in Dr. Crawford's medical specialty. The trial court also denied plaintiff's motion to amend her AOM pursuant to MCR 2.112(L)(2)(b). The proposed amendment revised the affidavit to correctly identify Dr. Crawford's specialty as orthopedics and contained the notarized signature of an expert in orthopedics. The trial court denied the motion and dismissed the case, reasoning that because a different expert had signed the affidavit it could not be considered an amendment. Because the statute of limitations had already run, the case could not be refiled, and plaintiff appealed the dismissal. For the reasons stated in this opinion, we reverse the order granting summary disposition and remand for the trial court to accept

the amendment for filing and for further proceedings consistent with this opinion.[1]

I. FACTS AND PROCEDURE

Plaintiff filed this medical malpractice suit against two surgeons: Dr. Aria Sabit, a neurosurgeon who was listed on the operative report as the "Surgeon," and Dr. Crawford, identified on the report as "Assistant." Plaintiff's complaint was filed with an AOM signed by a neurosurgeon, stating that the relevant standard of care was that of a neurosurgeon and that both doctors had violated it.

Dr. Sabit defaulted[2] and the case proceeded against only Dr. Crawford and his practice. Dr. Crawford moved for summary disposition, asserting that the AOM was deficient because the standard of care applicable to him was that of an orthopedist, not a neurosurgeon. Plaintiff raised several arguments concerning the suitability of the AOM and subsequently moved to file an amended AOM that referred to the standard of care for an orthopedist and was signed by an orthope-

[1] We review a trial court's denial of a motion to amend a pleading, including an AOM, for an abuse of discretion. *Jackson v Detroit Med Ctr*, 278 Mich App 532, 539; 753 NW2d 635 (2008). An abuse of discretion occurs when a trial court's decision falls "outside the range of reasonable and principled outcomes." *Souden v Souden*, 303 Mich App 406, 414; 844 NW2d 151 (2013). We review de novo the interpretation of court rules. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). "We employ statutory construction principles when interpreting court rules, applying the rule's plain and unambiguous language as written." *Spine Specialists of Mich, PC v State Farm Mut Auto Ins Co*, 317 Mich App 497, 501; 894 NW2d 749 (2016). "When interpreting a court rule, we must read the rule's provisions reasonably and in context." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 446; 861 NW2d 303 (2014) (quotation marks and citations omitted).

[2] Dr. Sabit is currently serving a 19½ year term in federal prison, having been convicted of crimes including healthcare fraud and conspiracy.

dist. The trial court granted defendants' motion for summary disposition and later denied the motion to amend, concluding that the proffered revised affidavit did not constitute an amendment because the affiant was not the same doctor as the one who had signed the initial AOM.[3]

II. ANALYSIS

This case is controlled by the 2010 amendment of two court rules. First, MCR 2.112(L) was amended by the addition of Subrule (2). 485 Mich cclxxv, cclxxv-cclxxvi (2010). Subrule (2)(b) provides a step-by-step procedure to be followed if a defendant believes that the AOM is defective. It provides that the defendant must challenge the AOM within 63 days of service and that a defective affidavit may be amended. It reads in pertinent part:

> (2) In a medical malpractice action, unless the court allows a later challenge for good cause:
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> * * *
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> (b) all challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301. [MCR 2.112(L)(2)(b).]

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[3] Plaintiff also argues that the trial court erred by granting defendants summary disposition because her counsel had a reasonable belief that Dr. Crawford's actions were governed by the standard of care applicable to neurosurgeons since he was merely assisting in the surgery performed by a neurosurgeon. Given our decision allowing the amendment, we need not decide that issue.

Second, additional language was added to MCR 2.118(D). 485 Mich cclxxv, cclxxvi (2010). This amendment provided that a party could request to amend an AOM and that the amended affidavit would relate back to the original filing. The text of the rule, with the added language emphasized, reads:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. *In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit*. [MCR 2.118(D) (emphasis added).]

MCR 2.118(D) does not place limits on the nature of the amendment. It provides for all types of amendments provided that the substance relates to the same conduct as the original pleading. Indeed, "[i]t does not matter whether the proposed amendment introduces new facts, a different cause of action, or a new theory, so long as the amendment springs from the same transactional setting as that pleaded originally." *Kostadinovski v Harrington*, 321 Mich App 736, 744; 909 NW2d 907 (2017). See also *Doyle v Hutzel Hosp*, 241 Mich App 206, 212-213; 615 NW2d 759 (2000). In this case, it is undisputed that plaintiff's proposed amendment arose out of the same conduct as the conduct described in the original AOM. The substantive allegations pertain to the same event, and the allegations regarding the breach of the standard of care are materially the same. Therefore, plaintiff's proposed amendment is within the purview of MCR 2.118(D).

Defendants do not refer us to any language in MCR 2.118 indicating that an AOM signed by a different expert should not be considered an amendment. And

it is well settled that under MCR 2.118(A)(2), "[l]eave [to amend] shall be freely given when justice so requires." *Kostadinovski*, 321 Mich App at 743 (first alteration in original). Motions to amend should only be denied for "the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). There may be instances where seeking to substitute an affiant in an AOM implicates one of these reasons for denial. But none is present here, or at least defendants have not identified one.

Moreover, an amendment to change an expert affiant is clearly contemplated by the text of MCR 2.112(L)(2)(b) as amended. Again, the rule states:

> [A]ll challenges to an affidavit of merit or affidavit of meritorious defense, *including challenges to the qualifications of the signer*, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301. [MCR 2.112(L)(2)(b) (emphasis added).]

Significantly, MCR 2.112(L)(2)(b) does not limit itself to errors in the body of the AOM, but applies also to the "qualifications of the signer." Because such a correction will, for all intents and purposes, require that a different health professional sign the affidavit, the text of the rule allows a plaintiff to amend an AOM by submitting one signed by a properly qualified physician. Holding otherwise would render nugatory

the rule's reference to the "qualifications of the signer." See *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 510; 890 NW2d 875 (2016) ("Court rules, like statutes, must be read to give every word effect and to avoid an interpretation that would render any part of the [court rule] surplusage or nugatory.") (quotation marks and citation omitted; alteration in original). Moreover, requiring the defendant to promptly notify a plaintiff that the affiant is not properly qualified would serve no purpose if plaintiff was not also permitted to amend the affidavit so as to have a properly qualified expert.[4]

In its ruling from the bench, the trial court did not address either of the amended court rules. It instead relied on two cases decided pursuant to the rules as they existed *prior* to the 2010 amendments. In *Ligons v Crittenton Hosp*, 490 Mich 61, 81-85; 803 NW2d 271 (2011), the Supreme Court held that an AOM may not be amended because it was not a "pleading" under the preamendment version of MCR 2.118. However, the *Ligons* Court made explicitly clear that it was ruling solely on the law as it existed prior to the 2010 court rule amendments and explicitly "decline[d] to apply

[4] Our dissenting colleague suggests that the language regarding the qualifications of the signer was intended only to allow correction of a clerical error in fully identifying the specialty of the affiant. However, the dissent fails to cite a single case in which such an error occurred, let alone one in which it was corrected by use of this provision. Nor has our research revealed any case in which an expert's qualifications complied with MCL 600.2169 but were misstated in the AOM. By contrast, there have been numerous cases involving the striking of AOMs on the ground that the expert lacked the relevant matching specialty. See, e.g., *Kirkaldy v Rim (On Remand)*, 266 Mich App 626, 629; 702 NW2d 686 (2005), rev'd 478 Mich 581 (2007); *Geralds v Munson Healthcare*, 259 Mich App 225, 227-229; 673 NW2d 792 (2003), overruled by *Kirkaldy*, 478 Mich 581. We decline to conclude that the change in the court rule was adopted in order to address a problem that had never occurred and to ignore the problem that had repeatedly arisen.

the amended versions" of the rules. *Id*. at 87-89.[5] And, as noted, the amendment of MCR 2.118(D) specifically refers to "an amendment of an affidavit of merit." Thus, whether one considers an AOM to be a pleading is irrelevant under the amended rule because it specifically provides for AOM amendments in addition to amendments to pleadings.[6]

The other case relied on by the trial court was *Lucas v Awaad*, 299 Mich App 345; 830 NW2d 141 (2013), which like *Ligons* was decided based on the law prior to the 2010 court rule revisions. In that case, the trial court ruled that the affidavits of meritorious defense (AOMDs) did not address the standard of care and so were defective. *Id*. at 356. The defendant-physician

[5] Indeed, the Court captioned the relevant section of the opinion, "THE NEW VERSIONS OF MCR 2.112 AND MCR 2.118 ARE NOT APPLICABLE." *Ligons*, 490 Mich at 87.

[6] The dissent concludes that the means to cure a defective affidavit provided in the court rules cannot apply to an error regarding expert qualifications because MCL 600.2912d provides that an incorrect expert match could still be deemed adequate if the attorney had a good-faith belief in its accuracy. Contrary to the dissent, we find no conflict, textual or otherwise, between the statute and the court rule. The statute provides a means to avoid dismissal due to an expert-qualification defect in the AOM, and the court rule provides another mechanism to do so that applies to all defects including those concerning expert qualifications. Further, the statute does not contain any language suggesting that a corrective mechanism adopted later by court rule regarding AOM defects should not apply to expert-qualification defects or that the statute's mechanism must be exclusive. And, as noted, MCR 2.112(L)(2)(b) employs the broadest possible language, providing for curative amendments as to "*all* challenges to an affidavit of merit" and specifically refers to amendments in order to address challenges to the "qualifications of the signer." (Emphasis added.) Lastly, under the statute, an expert-qualification error is the only defect that *need not result in dismissal*. The dissent's view that the court rule amendments apply to all defects except those involving expert qualifications would make such defects the only ones that *do result in dismissal*—exactly the opposite result intended by the statute.

then sought to file an AOMD signed by himself as an amendment. *Id*. at 356-357. This Court rejected that effort on two grounds. First, it held that even if the defendant's own AOMD was considered an amendment it would not be permitted under MCR 2.118 prior to its 2010 revision. *Id*. at 375-377. The Court was careful to limit the scope of its decision, pointing out that a deficient AOM or AOMD may not be amended "*under the version of MCR 2.118 in effect*" at the time the case was filed. *Id*. at 377 (quotation marks and citation omitted; emphasis added). As previously discussed, MCR 2.118(D) now permits amendments to AOMs whether or not they are regarded as pleadings.

Second, this Court in *Lucas* stated that the affidavit signed by the defendant himself was "not an amendment of a previously submitted affidavit" and was instead "an entirely new affidavit."[7] *Id*. at 375-376. This conclusion also has no bearing on the issue as governed by the 2010 court rule changes. As discussed, precluding amendments related to the author of an affidavit would essentially nullify the reference in MCR 2.112(L)(2)(b) to "qualifications of the signer." Defendants do not contest that MCR 2.112(L)(2) provides for amendments to the text of the affidavit, including the particular medical specialty at issue. However, if the amendment to the AOM references a different specialty than the one identified in the origi-

[7] Unfortunately, the Court in *Lucas* did not explain the basis for its conclusion that an affidavit signed by a different expert is not an amendment of a previously filed affidavit. This single conclusory sentence was the entirety of the analysis provided. While the court rule amendments render this question moot, it is difficult to see why a change of affiant constitutes a "new" affidavit any more than does a change in theory, facts, and claims. Certainly, an amendment that adds a wholly new theory, a different claim, or additional facts could readily be termed "new" as it is not the same as the original.

nal AOM, it must be signed by an expert in that different specialty, not the one referenced in the original AOM. Since a doctor can only spend more than 50% of his or her professional time in a single specialty, see MCL 600.2169(1), an error in defining the relevant specialty means that the original affiant cannot sign the amended affidavit. Therefore, an amended affidavit in which the relevant specialty is corrected will be ineffective unless it is signed by a different physician than the one who signed the original.[8]

Our holding is buttressed by MCL 600.2301, which along with MCR 2.118 governs amendments under MCR 2.112(L)(2)(b). That statute makes clear that amendments must be permitted to correct any defect so long as the substantial rights of the other party are not violated:

> The court in which any action or proceeding is pending, has power to *amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just*, at any time before judgment rendered therein. *The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties*. [MCL 600.2301 (emphasis added).]

The Legislature's language makes clear that amendments are to be permitted as to "*any* process, pleading or proceeding" and offers no hint that AOMs fall outside its scope. *Id*. (emphasis added). Moreover, it requires a showing of actual prejudice to deny a motion

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[8] The purpose of requiring an AOM "is to deter frivolous medical malpractice claims." *Young v Sellers*, 254 Mich App 447, 452; 657 NW2d 555 (2002). See also *King v Reed*, 278 Mich App 504, 519; 751 NW2d 525 (2008). In this case, that purpose has been met because an expert in defendants' specialty has attested to the merit of plaintiff's claim against Dr. Crawford. The identity of the expert is irrelevant to this purpose.

to amend. *Furr v McLeod*, 304 Mich App 677, 704; 848 NW2d 465 (2014), rev'd in part on other grounds sub nom *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 74; 869 NW2d 213 (2015) ("Generally speaking, an error or defect affects substantial rights when a party incurs prejudice."). Defendants do not explain how they are prejudiced by the substitution of a different affiant, nor do they explain why such an amendment is so inherently prejudicial to the opposing party that it should be precluded as a matter of law.

Finally, we note that the 2010 court rule amendments were adopted, at least in part, to address concerns about medical malpractice cases being dismissed on the basis of AOM defects without providing an opportunity to cure.[9] Under preamendment caselaw, any defect in an AOM was likely to subject a plaintiff to dismissal with prejudice regardless of the merits or considerations of substantive justice.[10] As reflected in their plain language, the 2010 court rule changes were intended to-

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[9] In her concurrence to the adoption of the 2010 amendments of MCR 2.112 and MCR 2.118, then Chief Justice KELLY explained that the goal was to apply the amendment policy governing all other civil actions to medical malpractice cases:

> [T]he court rule amendments merely bring medical malpractice procedural requirements in line with those applicable to other civil actions. As long as the amendment added a claim or a defense that arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading, our court rules *already* permitted the relation back of amendments of pleadings. The court rule amendments adopted today merely clarify that relation back includes medical malpractice claims. Indeed, there is no legal justification for preventing a party in a medical malpractice action from amending an affidavit of merit or an affidavit of meritorious defense when parties in other actions are freely and routinely permitted to do so. [485 Mich cclxxv, cclxxviii (KELLY, C.J., concurring).]

[10] The controlling caselaw prior to the court rule amendments held that if an AOM was found defective, the complaint filed with it was

ensure plaintiffs in medical malpractice cases have an opportunity to cure any defect in an AOM. We see no basis to apply the rule so as to frustrate its purpose.[11]

In sum, we hold that under MCR 2.112(L)(2)(b), an AOM may be amended by submitting an affidavit signed by a different expert when there has been a challenge to the "qualifications of the signer." Such an amendment relates back to the original filing. MCR 2.118(D). The trial court abused its discretion by denying plaintiff's motion to amend because that decision was based on an erroneous interpretation of

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considered a nullity, meaning that it did not toll the limitations period, which would continue to run and often expired before the time the defendant raised his or her challenge. See *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003), overruled by *Kirkaldy*, 478 Mich 581; *Geralds*, 259 Mich App 225. Indeed, a defendant could simply sandbag the plaintiff, i.e., wait for the limitations period to expire before raising the challenge and thereby deny the plaintiff any attempt to refile the case. Following the Supreme Court decision in *Kirkaldy*, 478 Mich 581, the harshness of this rule was moderated but still required that the case be refiled, which often required a plaintiff to locate and retain a new expert, provide the expert with the relevant materials, have the expert review them, draft an AOM based on the expert's findings, have the expert sign the AOM in the presence of a notary and return it to counsel before the case could be refiled. As a practical matter, those cases that had little time remaining in the limitations period when filed were at risk of being extinguished regardless of their merits. Moreover, requiring refiling as opposed to permitting amendments was judicially inefficient as it involved starting the entire process over again.

[11] Rather than attempting to determine the meaning of "amendment" in the context of the controlling court rule, the dissent would decide the case based on a definition from a law dictionary that considers the word in a vacuum and not in the context of the relevant text. Moreover, the dissent argues that an amendment can only consist of "minor revision[s]." However, even the dictionary definition on which the dissent relies allows for more substantive changes, as it provides that it is only "usu[ally]" that the revision or addition is "minor." *Black's Law Dictionary* (11th ed). Restricting amendments to "minor revisions" would have a very broad and disruptive effect: it would bar the filing of amended complaints that add new theories, factual allegations, or parties.

the court rules. See *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016) ("An error of law necessarily constitutes an abuse of discretion.").

We reverse the grant of summary disposition and direct the trial court on remand to accept the amended AOM for filing. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs. MCR 7.219(A).

CAVANAGH, J., concurred with SHAPIRO, J.

CAMERON, P.J. (*dissenting*). Plaintiff filed a defective affidavit of merit (AOM) with her complaint in support of her medical malpractice claim. The defect in the AOM was significant: the doctor who signed the affidavit lacked the statutorily required qualifications necessary to support plaintiff's claims. More than six months after the complaint was filed, plaintiff moved the trial court to "amend" her AOM with a new AOM signed by a different doctor who was qualified in an entirely different medical specialty. Not surprisingly, the trial court denied plaintiff's motion to amend, concluding that the substitution of a different healthcare professional with different qualifications in a different medical specialty is not an amendment of the AOM previously filed; rather, it is the filing of a new AOM. Consequently, the trial court held that the second AOM could not relate back to the filing date of the original AOM and dismissed the claim. In reversing the trial court, the majority broadly interprets MCR 2.112(L)(2)(b) as permitting plaintiff to cure a defective AOM so long as the "proposed amendment arose out of the same conduct as the conduct described in the original AOM." I disagree with the majority's expansive interpretation of MCR 2.112(L)(2)(b) and its conclusion that the substitute AOM constitutes an amendment. Therefore, I respectfully dissent.

MCL 600.2912d(1) requires a complaint alleging medical malpractice to be filed with an AOM "signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004) (emphasis omitted). MCL 600.2169 requires, among other things, that the AOM be signed by a healthcare professional "in the same specialty as the [defendant]." The purpose of this requirement is to prevent frivolous medical malpractice claims. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). In enacting MCL 600.2912d(1), which requires a reasonable belief that the requirements of MCL 600.2169 are satisfied, the Legislature "placed 'enhanced responsibilities' on medical malpractice plaintiffs." *Ligons v Crittenton Hosp*, 490 Mich 61, 70-71; 803 NW2d 271 (2011), quoting *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 228; 561 NW2d 843 (1997).

In this case, it is undisputed that plaintiff's affiant, Dr. James Vascik, was board-certified in a different specialty than defendant Dr. Kevin Crawford and that defendant Crawford used this defect to successfully challenge the AOM. The issue in this case is whether plaintiff's substitute AOM constitutes, as a matter of law, an amendment. I agree with the trial court that it was not an amendment.

As a preliminary matter, there is no dispute that AOMs may be amended and a properly amended AOM relates back to its original filing date.[1] However, the

[1] MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or by written consent of the adverse party." Although an AOM is not a pleading, it is an attachment that must be filed along with a plaintiff's complaint, MCL 600.2912d(1), and the AOM is therefore subject to amendment under MCR 2.118(A)(2). Amendments of an AOM

majority does not cite any authority that distinguishes a properly amended AOM from a wholesale substitute AOM that is not an amendment. Instead, the majority reasons that MCR 2.112(L)(2)(b) does not place limits on the nature of amendments to AOMs and then turns to authority outside the AOM context to support its conclusion that plaintiffs are permitted to cure a defective AOM so long as the "proposed amendment arose out of the same conduct as the conduct described in the original AOM." In so concluding, the majority relies on MCR 2.118(D), which provides, in relevant part, that a claim will relate back to the date of the original pleading if the claim in the amended pleading "arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." However, the majority disregards the fact that AOMs do not set forth claims. Rather, AOMs provide factual support for the allegations in the complaint and serve to prevent frivolous medical malpractice claims. See *Dorris*, 460 Mich at 47. Further, by treating all requests to amend the same, the majority blurs the legislative distinction between amendments of AOMs and the amendments of pleadings.

Consequently, the majority's reliance on MCR 2.118(D) is misplaced, and the majority's holding disregards the plain language of MCR 2.112(L)(2).[2]

"relate[] back to the date of the original filing of the affidavit." MCR 2.118(D). See also *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 222; 871 NW2d 15 (2015) (DONOFRIO, P.J., concurring in part and dissenting in part) ("While an affidavit of merit is not a 'pleading' under MCR 2.110(A), MCR 2.112(L)(2)(b), taken together with MCR 2.118(D), allows an affidavit of merit to be amended, and that amendment relates back to the date of the original filing of the affidavit."). Thus, in order to relate back to the date of the original filing of the AOM, the change to the AOM must constitute an amendment.

[2] This Court reviews de novo whether a trial court properly interpreted and applied the relevant court rule. *Henry v Dow Chem Co*, 484

MCR 2.112(L)(2)(b) provides, in relevant part:

> [A]ll challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be *amended* in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301. [Emphasis added.]

Therefore, under MCR 2.112(L)(2)(b), the trial court has discretion to permit an amendment of an AOM only if the requirements of both MCR 2.118 and MCL 600.2301 are met.

In reaching its conclusion, the majority does not define the term "amendment" and does not apply any definition to the facts at issue in this case. Instead, the majority focuses on the factors that a trial court must consider *after* the court determines that the proposed change to a pleading constitutes an amendment.[3] In doing so, the majority fails to apply well-established rules relating to the interpretation of court rules, which include consulting dictionary definitions when a

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Mich 483, 495; 772 NW2d 301 (2009). Court rules are interpreted according to their plain language. *Id*. The term "may" generally designates discretion, *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), and the word "and" is "a conjunction" that means "with," "as well as," and "in addition to," *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009). "Court rules . . . must be read to give every word effect and to avoid an interpretation that would render any part of the [court rule] surplusage or nugatory." See *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 510; 890 NW2d 875 (2016) (quotation marks and citation omitted; alteration in original).

[3] The majority notes that under MCR 2.118(A)(2), a party may amend a pleading by leave of the court and that such "[l]eave shall be freely given when justice so requires" so long as certain particularized reasons do not exist. In relying on MCR 2.118(A)(2) and caselaw relating to the amendment of pleadings, the majority fails to first analyze whether the substitute AOM constituted an amendment.

court rule does not define a term. See *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). I believe that the majority's failure to do so contributes to its flawed interpretation and application of MCR 2.112(L)(2)(b).

Black's Law Dictionary (11th ed) defines "amendment" as "a formal and usu[ally] minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif[ically], a change made by addition, deletion, or correction; esp[ecially], an alteration in wording." Similarly, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "amendment" as "an alteration proposed or effected by" the process of amendment; "amend" is also a verb, meaning "to alter formally by modification, deletion, or addition."

Plaintiff's second AOM was not an amendment under any commonly understood sense of the word. Plaintiff did not seek to make an addition, deletion, or correction to the AOM that was filed with the complaint. Rather, plaintiff sought to replace the original AOM with a different AOM signed by Dr. John Joseph Regan, an orthopedic surgeon whose medical specialty matched that of defendant Crawford. The wholesale substitution of affiants in different medical specialties cannot be considered a "minor revision or addition" of wording to the original AOM. Because the definition of amendment does not contemplate the substitution of one AOM with a new AOM that is signed by a different affiant in a different specialty, Dr. Regan's AOM cannot be considered an amendment within the meaning of MCR 2.112(L)(2)(b) and MCR 2.118.

Nonetheless, the majority reasons that "for all intents and purposes," a successful challenge to the qualifications of the signer requires a plaintiff to submit a new AOM authored by a different affiant. There-

fore, the majority argues, because MCR 2.112(L)(2)(b) permits amendment of AOMs when the qualifications of the signer are successfully challenged and because MCR 2.118(D) does not place limitations on the nature of the amendment, the plain text of the rules requires the trial court to accept the replacement AOM as an amendment. In so concluding, the majority fails to take into consideration that the Legislature placed special restrictions on when a claim can proceed despite the fact that the expert witness who signed the AOM did not meet the requirements of MCL 600.2169.

Under MCL 600.2912d(1), a plaintiff's attorney in a medical malpractice action is required to file "an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably* believes meets the requirements for an expert witness under [MCL 600.]2169." (Emphasis added.) Thus, pursuant to MCL 600.2912d(1), a plaintiff's attorney must only reasonably believe that the proposed expert meets the requirements for an expert witness. See *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 200; 871 NW2d 15 (2015). "[T]he issue is not whether the attorney's judgment proves to be incorrect, but rather whether the attorney's belief, though erroneous in hindsight, was reasonable at the time." *Id*. at 201. If a plaintiff's attorney did not possess a reasonable belief that the expert met the requirements under MCL 600.2169, the medical malpractice action must be dismissed. See *Bates v Gilbert*, 479 Mich 451, 462; 736 NW2d 566 (2007).

The majority entirely fails to consider MCL 600.2912d(1) despite the fact that it sets forth the circumstances under which the court may nevertheless accept an AOM when a party has successfully challenged the qualifications of a signer of an AOM. Be-

cause the rules of statutory construction require courts to "construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature," *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001), I believe that it is necessary to consider whether the trial court properly interpreted and applied MCL 600.2912d(1) to the facts of this case.

I conclude that the trial court properly determined that plaintiff's attorney did not have a reasonable belief that Dr. Vascik met the requirements of an expert witness. It is undisputed that before the alleged malpractice, defendant Crawford had previously treated plaintiff for knee issues. The trial court found that "a simple Google search would have uncovered" that defendant Crawford is board certified in orthopedic surgery and specializes solely in orthopedic surgery, including hip and knee orthopedic surgery.[4] Given the widespread availability of information on the Internet, even a cursory search would have revealed to plaintiff's attorney that defendant Crawford was an orthopedic surgeon who specialized in orthopedic surgery. Plaintiff correctly notes that defendant Crawford assisted Dr. Aria Sabit in performing plaintiff's spinal surgery and that Dr. Sabit is a neurosurgeon. However, plaintiff presents no evidence in support of the notion that defendant Crawford engaged in the practice of neurosurgery, particularly in light of the fact that defendant Crawford operated alongside Dr. Sabit, a neurosurgeon. Plaintiff also fails to present logical argument in favor of a finding that defendant Crawford practiced outside of his specialty in orthopedics. Moreover, defendant Crawford's response to plaintiff's

[4] Beaumont Hospital, *Kevin Crawford* <https://doctors.beaumont.org/provider/Kevin+Crawford/225913> (accessed January 8, 2020) [https://perma.cc/4Q2P-LZ4J].

presuit notice of intent contained information that defendant Crawford was an orthopedic surgeon. According to defendant Crawford's response to the notice of intent, "[t]he applicable standard of care for a board certified orthopedic surgeon assisting a neurosurgeon in the performance of spinal surgery [is] of a physician board certified in orthopedic surgery." Accordingly, given the information available to plaintiff's counsel before the suit was filed, plaintiff's counsel could not have reasonably believed that Dr. Vascik (a neurosurgeon) met the requirements for an expert witness with respect to defendant Crawford under MCL 600.2169.

Had plaintiff's counsel possessed a reasonable belief that Dr. Vascik was qualified to sign the AOM, the action would have been able to proceed despite the failure to comply with MCL 600.2169. The majority's conclusion that the trial court possessed an unbounded ability to permit the wholesale substitution of AOMs ignores the fact that, in enacting MCL 600.2912d(1), the Legislature "placed 'enhanced responsibilities' on medical malpractice plaintiffs." See *Ligons*, 490 Mich at 70-71 (citation omitted). As already discussed, this enhanced responsibility requires a plaintiff's attorney to possess a reasonable belief that an expert meets the requirements of MCL 600.2169. The majority's expansive reading of MCR 2.112(L)(2)(b) subverts the requirements of MCL 600.2912d(1) and holds that even if a plaintiff's attorney did not reasonably believe that the proposed expert met the requirements of an expert witness, the trial court should nonetheless permit the action to proceed. In so holding, the majority essentially concludes that a plaintiff's attorney need not investigate whether a potential expert meets the requirements of MCL 600.2169 before filing a medical malpractice action and that, in the event the expert's qualifications are successfully challenged, amendment

must be permitted regardless of whether the plaintiff's attorney possessed a reasonable belief that the signer of the AOM was qualified under MCL 600.2169. The majority's interpretation of MCR 2.112(L)(2)(b) essentially renders MCL 600.2169 and MCL 600.2912d(1) nugatory in that it permits plaintiffs to file complaints without conforming AOMs.

Although the majority notes that locating the appropriate expert can be challenging, the Legislature took this into consideration when enacting MCL 600.2912d(2). MCL 600.2912d(2) "allows, upon a showing of good cause, an additional twenty-eight days to obtain the required affidavit of merit. During this period, the statute will be tolled and summary disposition motions on the ground of failure to state a claim should not be granted." *Solowy*, 454 Mich at 229. Consequently, the majority fails to acknowledge that its concerns have already been addressed by the Legislature in its enactment of MCL 600.2912d(2).

Further, I disagree with the majority that my reading of MCR 2.112(L)(2)(b) would render the phrase "qualifications of the signer" nugatory. I agree that in some cases, a plaintiff could be required to procure an entirely different expert witness after a defendant has successfully challenged the qualifications of the medical professional who signed the original affidavit of merit. However, in certain cases, an expert's qualifications can be corrected or supplemented within the original affidavit of merit. In such cases, a new affidavit from a new affiant would not need to be filed in order for a plaintiff to continue to pursue his or her medical malpractice action. For example, in the event that an expert's qualifications are not described accurately or completely in the AOM, it would certainly be appropriate for a trial court to permit amendment of

the AOM. In such circumstances, the plaintiff would not be seeking to replace the original expert's AOM. Rather, the plaintiff would be seeking to correct an error or provide additional facts within the original AOM. Thus, reading MCR 2.112(L)(2)(b) to not permit entirely new AOMs does not render the phrase "qualifications of the signer" nugatory.

Finally, the majority also relies on MCL 600.2301, which provides as follows:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. *The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties*. [Emphasis added.]

"The language in MCL 600.2301 requiring a court to disregard 'any' errors or defects if no substantial rights are affected plainly and unambiguously reaches both content and noncontent errors or defects, as the term 'any' is all-inclusive." *Furr v McLeod*, 304 Mich App 677, 702-703; 848 NW2d 465 (2014), rev'd in part by *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68; 869 NW2d 213 (2015). The Court in *Furr* noted that Supreme Court precedent emphasizes that MCL 600.2301 "aims to abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties." *Furr*, 304 Mich App at 702 (quotation marks and citation omitted).

Even if I were to accept the majority's conclusion that MCL 600.2301 applies to the facts at issue in this case, it would not be dispositive given that plaintiff must comply with both MCR 2.118 *and* MCL 600.2301

in order to be entitled to relief under MCR 2.112(L)(2)(b).[5] Because I conclude that the substitution of affiants based on these facts cannot be considered a "minor revision or addition" of wording so as to constitute an amendment, I would conclude that MCL 600.2301 cannot be applied to save plaintiff's claim.

For these reasons, I would affirm the trial court's decision to deny plaintiff's motion for leave to amend the affidavit of merit.

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[5] The word "and" is "a conjunction" that means "with," "as well as," and "in addition to." *Amerisure Ins Co*, 282 Mich App at 428.

QUALITY MARKET v DETROIT BOARD OF ZONING APPEALS

Docket No. 346014. Submitted December 6, 2019, at Detroit. Decided December 17, 2019. Approved for publication February 11, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 890 (2020).

Quality Market filed a petition in the Wayne Circuit Court against the Detroit Board of Zoning Appeals, challenging the board's denial of its request for a zoning variance. Quality Market operated a convenience store and sought a zoning variance that would enable it to sell liquor. The board denied the petition at a meeting on February 20, 2018; the board approved the meeting minutes on February 27, 2018; and the board issued a written decision and order reflecting the denial on March 15, 2018. The written decision and order notified Quality Market that the decision could be appealed in the circuit court as specified in MCL 125.3605 and MCL 125.3606 of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., and that an appeal from the board had to be filed within 30 days after the board issued its decision in writing signed by the chairperson. Quality Market filed this action in the circuit court on April 6, 2018. The board moved to dismiss, arguing that the appeal was untimely under MCL 125.3606(3). The court, John H. Gillis, Jr., denied the motion, reasoning that even if it granted the board's motion to dismiss, Quality Market would simply file a delayed application for leave to appeal and that denying the motion was the most efficient way to address the substantive issue raised in the petition. Following a hearing, the court reversed the board's denial of Quality Market's request for a zoning variance. The board appealed.

The Court of Appeals *held*:

MCR 7.122(B), which governs appeals to the circuit court from a determination under a zoning ordinance, provides that an appeal under the rule must be filed within the time prescribed by statute; if no time is specified within an applicable statute, an appeal must be filed within 30 days after the certification of the minutes of the board or commission from which the appeal is taken or within 30 days after the board or commission issued its decision in writing, whichever deadline comes first. MCL 125.3606(3), which governs appeals to the circuit court from a decision by a zoning board of appeals, provides that an appeal from a decision of a zoning board

of appeals must be filed within whichever of the following deadlines occurs first: (a) 30 days after the board issues its decision in writing signed by the chairperson if there is a chairperson, or signed by the members of the board if there is no chairperson or (b) 21 days after the board approves the minutes of its decision. Quality Market incorrectly argued that when a board issues a written decision, the 30-day statutory deadline applies regardless of the date of the approval of the minutes. Instead, the statute clearly provides that the time for filing an appeal is triggered by whichever event occurs first, the passing of 30 days after the issuance of the written decision or the passing of 21 days after the approval of the minutes. While MCR 7.103(B)(4) provides that a circuit court may grant leave to appeal from a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a later appeal, MCL 125.3606(3) does not authorize a later appeal. Under MCR 7.104(A)(1), the time limit for filing an appeal in the circuit court is a jurisdictional issue, and the circuit court lacks jurisdiction over a claim of appeal that is untimely filed. In this case, although the appeal language in the board's written decision was not clear, it sufficiently informed Quality Market of the relevant statutes governing an appeal. Regardless, the time limit for an appeal of right is jurisdictional. The zoning board approved the minutes of its decision denying the variance on February 27, 2018. Therefore, under MCL 125.3606(3), Quality Market had to file its appeal in the circuit court within 21 days of that date. Quality Market's appeal was untimely because it did not file the appeal until April 6, 2018, outside the statutory 21-day deadline. Accordingly, the circuit court lacked jurisdiction to hear the appeal. In addition, the trial court erred by concluding that it could review Quality Market's untimely appeal as on leave or by delayed leave granted because MCL 125.3606(3) does not authorize such an appeal.

Vacated in part, reversed in part, and remanded to the circuit court for entry of an order granting the zoning board's motion to dismiss.

ZONING — CIRCUIT COURT APPEALS — JURISDICTION — CONSIDERATION OF UNTIMELY APPEALS.

A circuit court may not consider an untimely claim of appeal from a zoning board decision as a late application for leave to appeal under MCR 7.103(B)(4).

Derek A. Hurt, PLC (by *Derek A. Hurt*) for petitioner.

Lawrence T. Garcia and *Sheri L. Whyte* for respondent.

Before: FORT HOOD, P.J., and SERVITTO and BOONSTRA, JJ.

BOONSTRA, J. Respondent, the Detroit Board of Zoning Appeals (the BZA), appeals by delayed leave granted[1] the circuit court's orders denying the BZA's motion to dismiss petitioner Quality Market's appeal and reversing the BZA's denial of a variance. We vacate the circuit court's order reversing the BZA's denial, reverse the circuit court's order denying the BZA's motion to dismiss, and remand for entry of an order granting the BZA's motion to dismiss.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The relevant facts in this case are undisputed. Quality Market has operated as a retail convenience store on Michigan Avenue in Detroit for 30 years. It has a Specially Designated Merchant license, which enables it to sell carryout beer and wine. At some point, Quality Market purchased a Specially Designated Distributor (SDD) license, which permits the sale of carryout liquor, from a former liquor retailer in the neighborhood. However, because Quality Market's building is located within 500 feet of a school and a residentially zoned area, Quality Market was required to seek a zoning variance from the BZA in order to add the license to its existing retail store.

In August 2017, the Detroit Buildings, Safety, Engineering and Environmental Department (BSEED) concluded that Quality Market's proposed use of the property to sell carryout liquor under the SDD license met

[1] See *Quality Market v Detroit Bd of Zoning Appeals*, unpublished order of the Michigan Court of Appeals, entered December 21, 2018 (Docket No. 346014).

the requirements of Detroit's zoning ordinance. BSEED conditionally approved the use if a spacing waiver could be obtained from the BZA.

Quality Market submitted a petition to the BZA, requesting to add the SDD license to its existing retail space and requesting a spacing waiver, stating that petitioner planned an expansion to include liquor and fresh produce and that because the license was a transfer from a former liquor retailer, the addition of the SDD license would not increase the total number of liquor distributors in the area. The BZA held a public meeting on February 20, 2018. Opponents of the proposal included people from the nearby school and a nearby neighbor who did not believe that adding liquor to the store was in the best interests of the neighborhood.

The BZA denied Quality Market's petition at the meeting as reflected in its meeting minutes. The BZA approved the meeting minutes on February 27, 2018.

The BZA issued a written decision and order reflecting this denial on March 15, 2018. The decision stated that a spacing waiver would not be in keeping with the spirit and intent of Detroit's zoning ordinance and master plan, would be injurious to the enjoyment of other property owners in the vicinity, and might substantially impair property values. The BZA also noted that Quality Market had not met all of the relevant criteria for approval of a variance under Detroit's zoning ordinance. The BZA therefore denied the spacing waiver. The written decision contained the following statements:

> Any decision of the Board of Zoning Appeals may be appealed to Circuit Court as specified in 125.585 (MSA 5.2935) of the Zoning Enabling Act of Michigan, Act 207

> of the Public Acts of 1921, as amended, within twenty one (21) days from the entry of such decision.
>
> * * *
>
> . . . A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under section 606.125.3606 Circuit court; review; duties, Sec. 606(3)(a).
>
> * * *
>
> Any decision of the Board may be appealed to Circuit Court as specified in Sections 605 and 606 of the Michigan Zoning Enabling Act, being MCL 125.3605 and 125.3606.
>
> *An appeal from a decision of the Board shall be filed within 30 days after the Board issues its decision in writing signed by the chairperson*. [Underlining omitted.]

Quality Market filed its claim of appeal in the circuit court on April 6, 2018. The BZA moved to dismiss on the basis that the appeal was untimely under MCL 125.3606(3). The circuit court denied the motion following a hearing, stating that even if it granted the BZA's motion to dismiss, counsel for Quality Market would just file a delayed application for leave to appeal and opining that denying the motion to dismiss was the most efficient way to get the merits of the issues before the court. The circuit court subsequently considered the merits of Quality Market's appeal and concluded that the BZA's decision was not supported by competent, material, and substantial evidence. The circuit court therefore reversed the BZA's decision.

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo questions of law in zoning cases. See *Bell River Assoc v China Charter Twp*, 223

Mich App 124, 129; 565 NW2d 695 (1997). We also review de novo issues of statutory interpretation, *McQueer v Perfect Fence Co*, 502 Mich 276, 285-286; 917 NW2d 584 (2018), and whether the circuit court has subject-matter jurisdiction over a case, *Summer v Southfield Bd of Ed*, 310 Mich App 660, 667; 874 NW2d 150 (2015).

III. ANALYSIS

An appeal to the circuit court of a zoning board decision must be taken within the time allotted by statute. See MCR 7.104(A)(1); MCR 7.122(B). MCR 7.122(B) specifically provides:

> Time requirements. An appeal under this rule must be filed within the time prescribed by the statute applicable to the appeal. If no time is specified in the applicable statute, the appeal must be filed within 30 days after the certification of the minutes of the board or commission from which the appeal is taken or within 30 days after the board or commission issued its decision in writing, whichever deadline comes first.

And the applicable statute, MCL 125.3606(3), provides:

> An appeal from a decision of a zoning board of appeals shall be filed within whichever of the following deadlines comes first:
>
> (a) Thirty days after the zoning board of appeals issues its decision in writing signed by the chairperson, if there is a chairperson, or signed by the members of the zoning board of appeals, if there is no chairperson.
>
> (b) Twenty-one days after the zoning board of appeals approves the minutes of its decision.

The time limit for filing an appeal in the circuit court is jurisdictional; a circuit court lacks jurisdiction over an untimely filed claim of appeal. MCR 7.104(A)(1);

Schlega v Detroit Bd of Zoning Appeals, 147 Mich App 79, 82; 382 NW2d 737 (1985).

In this case, the BZA approved the minutes reflecting its denial of the spacing waiver on February 27, 2018, and later issued a written decision and order reflecting its denial on March 15, 2018. Quality Market did not file its appeal until April 6, 2018. Therefore, Quality Market's appeal was untimely under MCL 125.3606(3) or MCR 7.122(B) because the applicable time period is measured from the approval of the BZA's minutes, which occurred before the issuance of the BZA's written decision.

Unambiguous statutory language must be enforced as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). The plain language of MCL 125.3606 and MCR 7.122(B) states that the time period for the filing of a claim of appeal is calculated from whichever deadline comes first. Quality Market urges this Court to interpret MCL 125.3606(3) as mandating that when a zoning board issues a written decision, the 30-day deadline in MCL 125.3606(3)(a) applies, regardless of the date of the approval of the minutes. We are not permitted to make such a construction of clear statutory language, which amounts to speculation about the intent of the Legislature beyond the language it chose to use, and we decline to do so. See *In re MCI Telecom Complaint*, 460 Mich 396, 414-415; 596 NW2d 164 (1999); *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016); *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

Quality Market also argues that the BZA's wording of the written decision was misleading about the time for an appeal and, therefore, that the BZA should be estopped from arguing that Quality Market's appeal was untimely. We disagree. Again, the time limit for an

appeal to the circuit court is jurisdictional. MCR 7.104(A)(1); *Schlega*, 147 Mich App at 82. Subject-matter jurisdiction may not be conferred on a court by the actions of the parties. See *Smith v Smith*, 218 Mich App 727, 733; 555 NW2d 271 (1996). Additionally, while the BZA's language concerning appeals may not have been a model of clarity, it did refer to the statute in which the relevant deadlines for appeal could be found.

Finally, to the extent that the circuit court concluded that it had the ability to consider Quality Market's untimely appeal as a late application for leave to appeal, it erred. MCR 7.105(G) does permit the filing of late applications for leave to appeal. However, MCR 7.103(B)(4) provides that the circuit court may grant leave to appeal from "a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal[.]" The latter requirement was lacking in that MCL 125.3606(3) does not authorize an appeal by leave granted or a late appeal. The circuit court therefore erred by concluding that it could review Quality Market's untimely filed appeal as on leave or by delayed leave granted. Because Quality Market failed to timely file its claim of appeal in the circuit court, the court lacked jurisdiction over the appeal. See MCL 125.3606(3)(a); MCR 7.104(A). And because we conclude that the circuit court lacked jurisdiction over Quality Market's appeal, we need not consider the BZA's remaining arguments on appeal.

For these reasons, we vacate the circuit court's order reversing the BZA's denial of a spacing waiver, reverse the circuit court's order denying the BZA's motion to dismiss, and remand this matter to the circuit court for the entry of an order granting that motion. We do not retain jurisdiction.

FORT HOOD, P.J., and SERVITTO, J., concurred with BOONSTRA, J.

PIONEER STATE MUTUAL INSURANCE COMPANY v WRIGHT

Docket No. 347072. Submitted January 8, 2020, at Detroit. Decided February 11, 2020, at 9:05 a.m. Leave to appeal denied 506 Mich 1022 (2020).

In 2014, Dana R. Harris filed an action in the Macomb Circuit Court against Pioneer State Mutual Insurance Company and others, seeking to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries he sustained during an automobile accident. In April 2013, Vanetta Wright, Harris's mother, had purchased an automobile insurance policy with Pioneer. Wright did not identify Harris, who was an adult, as a driver or resident in her household when she submitted the insurance application. In September 2013, Harris was injured in a motor vehicle accident while a passenger in a car driven by Laurie Francen, whose car was covered by an insurance policy issued by State Farm. Because Harris did not own a car or have no-fault insurance at the time of the accident, Harris submitted a claim for PIP benefits to Pioneer, which rejected the claim. In 2014, Harris filed the action to recover PIP benefits (LC No. 2014-002049-NI); Harris amended his claim in March 2015 to include State Farm as a defendant. State Farm filed a cross-claim, asserting that Pioneer was the first-in-priority insurer responsible for Harris's PIP benefits under the no-fault act because Harris was a resident relative in Wright's home at the time of the accident. In August 2015, Pioneer filed a separate action in the Macomb Circuit Court against Harris, Wright, and State Farm (collectively, defendants), seeking to rescind the insurance policy issued to Wright on the basis that Wright's failure to identify Harris as a household resident on the application constituted a material misrepresentation; Harris's medical providers intervened in that action (LC No. 2015-002978-CZ). In the original action, State Farm and Harris separately moved for summary disposition. The court, James M. Maceroni, J., granted the motions, concluding that under MCL 500.3114(1), Pioneer was the highest-in-priority insurer because Harris was a resident of his mother's household at the time of the accident. The court rejected Pioneer's assertion that it should be able to rescind the policy because of Wright's misrepresentation on the insurance application. The court reasoned that there was no evidence that

Harris was aware of the misrepresentation and that under the innocent-third-party rule, Harris was entitled to benefits under the policy. Subsequently, the Court of Appeals issued *Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016) (*Bazzi I*), aff'd in part and rev'd in part 502 Mich 390 (2018) (*Bazzi II*), in which it held that an insurance company may deny an innocent third party coverage for PIP benefits when the insurance company establishes that the policy was obtained through fraud. Thereafter, in Pioneer's separate action seeking declaratory relief, the court granted summary disposition in favor of defendants and third-party defendants. The court recognized that the innocent-third-party rule had been abolished under *Bazzi I* but dismissed the claim under the doctrine of laches, reasoning that Pioneer's delay in seeking to rescind the policy had harmed Harris because the one-year-back rule set forth in MCL 500.3145(1) might preclude Harris from recovering PIP benefits from other insurers. In Docket No. 332764, Pioneer appealed by delayed leave granted the trial court's decision in the original action. In Docket No. 335025, Pioneer appealed the trial court's decision in the declaratory action. The Court of Appeals consolidated the appeals. In *Harris v Booker*, an unpublished per curiam opinion issued December 14, 2017, the Court of Appeals, TALBOT, C.J., and BORRELLO and RIORDAN, JJ., affirmed in part, reversed in part, and remanded for further proceedings. In Docket No. 332764, the Court, in relevant part, affirmed the trial court's determination that Harris was a resident relative domiciled with Wright. However, in light of *Bazzi I*, the Court reversed the portion of the trial court's order applying the innocent-third-party rule to Harris and remanded for further proceedings. In Docket No. 335025, the Court reversed the trial court's order granting summary disposition in favor of Harris, Wright, and State Farm under the doctrine of laches. The Court reasoned that while Pioneer waited two years after the accident to file an action to rescind the policy, the delay was neither unreasonable nor unjustified because *Bazzi I* was decided during the pendency of the lower-court proceedings and gave Pioneer cause to seek rescission of the policy. Subsequently, the Supreme Court issued *Bazzi II*, holding that an insurer may seek rescission of an automobile insurance policy on the basis of the common-law defense of fraud—even with regard to an innocent third party seeking to recover PIP benefits—and that trial courts must balance the equities when determining whether an insurer may rescind an insurance policy. On remand, the parties each moved for summary disposition. The trial court balanced the equities of the case, concluding that it would be inequitable to allow Pioneer to rescind the policy because al-

though Pioneer's delay was reasonable, the two-year delay in filing the declaratory action to rescind the policy precluded Harris from recovering most of his no-fault claims from any insurer because of the one-year-back rule. Pioneer appealed.

The Court of Appeals *held*:

1. In general, the law-of-the-case doctrine provides that the ruling of a higher court on an issue in a case will bind the lower court on remand and the appellate court in any subsequent appeals. An appellate court's decision binds lower tribunals because the tribunal must not take action on remand that is inconsistent with the judgment of the appellate court. Trial courts are bound by the law-of-the-case doctrine unless there has been a material change in the facts or an intervening change in the law. On remand, the trial court balanced the equities to determine whether Pioneer was entitled to rescind the insurance policy; the court explicitly stated that laches was inapplicable as directed by the Court of Appeals in the original appeal and that it was obligated to balance the equities instead. While the trial court considered nearly all the same facts to balance the equities as it did when applying the doctrine of laches, its analysis was consistent with the earlier appellate decision because it did not find Pioneer's delay to be unreasonable or unjustified and, instead, just considered the delay in resolving the case. Accordingly, the trial court did not violate the law-of-the-case doctrine.

2. Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made. Under *Bazzi II*, while the innocent-third-party rule no longer bars insurers from seeking rescission, insurers are not categorically entitled to rescission; instead, whether an insurance company should be able to rescind a policy is contingent on the circumstances of each case. When two equally innocent parties are affected, the court must balance the equities to determine which blameless party should assume the loss. In balancing the equities, as stated in *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903 (2018) (MARKMAN, J., concurring), a court should consider: (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) whether policy enforcement only

serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. The list of factors to be considered is nonexclusive. The trial court's analysis on remand was consistent with the *Farm Bureau* factors, and those factors weighed against rescission. Moreover, the court's analysis was specific to the facts and circumstances of the case and was equitable. Accordingly, the trial court did not abuse its discretion by refusing Pioneer's request to rescind the contract, and the court properly granted defendants' motions for summary disposition and denied Pioneer's motion for summary disposition.

Affirmed.

INSURANCE — NO-FAULT — THIRD-PARTY CLAIM — MISREPRESENTATION BY APPLICANT — RESCISSION OF THE POLICY — BALANCING OF EQUITIES — FACTORS TO BE CONSIDERED.

An insurance company may seek rescission of an automobile insurance policy on the basis of fraud even when an innocent third party seeks to recover personal protection insurance benefits; whether an insurance company may rescind a policy is contingent on the circumstances of each case; when two equally innocent parties are affected, the court must balance the equities to determine which blameless party should assume the loss; in balancing the equities, a court should consider: (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party; the list of factors to be considered is nonexclusive (MCL 500.3101 *et seq*.).

Gault Davison, PC (by *Edward B. Davison*) for Pioneer State Mutual Insurance Company.

Goodman Acker, PC (by *Barry J. Goodman* and *Bradley M. Peri*) for Vanetta Wright and Dana Reynard Harris.

Miller, Canfield, Paddock and Stone, PLC (by *Paul D. Hudson* and *Michael C. Simoni*) and *Julie A. Taylor & Associates* (by *Brian D. Wright*) for State Farm Mutual Automobile Insurance Company.

Bruce Pazner, PC (by *Bruce K. Pazner*) for Mendelson Orthopedics, PC, and Synergy Spine and Orthopedic Surgery Center, LLC.

Before: K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ.

K. F. KELLY, P.J. Plaintiff Pioneer State Mutual Insurance Company (Pioneer) appeals as of right the trial court's order denying its motion for summary disposition and granting the motions for summary disposition of Vanetta Wright (Wright), Dana Reynard Harris (Harris), State Farm Mutual Automobile Insurance Company (State Farm), Mendelson Orthopedics, PC (Mendelson), and Synergy Spine and Orthopedic Surgery Center, LLC (Synergy) (collectively, defendants). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY[1]

In April 2013, Wright lived in an apartment in Warren and submitted an automotive insurance application to Pioneer. At the time of her submission, Wright did not identify Harris, her adult son, as a driver or resident in her household. On September 13, 2013, Harris was injured in a motor vehicle accident while traveling as a passenger in a vehicle owned by Laurie Francen. Francen's car was covered by a policy of insurance issued by

[1] This no-fault case returns to this Court following a remand to the trial court. *Harris v Booker*, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2017 (Docket Nos. 332764 and 335025).

State Farm. Harris did not own a vehicle or carry no-fault insurance at the time of the accident. Therefore, he pursued a claim for personal protection insurance (PIP) benefits from Pioneer through the policy issued to Wright. *Harris v Booker*, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2017 (Docket Nos. 332764 and 335025), pp 2, 5.

Unable to obtain PIP benefits from Pioneer, on May 20, 2014, Harris filed suit against Pioneer and the driver of the other vehicle involved in the accident. In March 2015, Harris amended his complaint to include State Farm as a defendant. State Farm pursued a cross-claim against Pioneer, claiming that Pioneer was the first-in-priority insurer required to pay Harris's PIP benefits pursuant to the no-fault act, MCL 500.3101 *et seq*., because Harris was a resident relative in the home of Wright at the time of the accident. However, in August 2015, Pioneer filed a separate action for declaratory relief, requesting rescission of the insurance policy issued to Wright. It claimed that Wright's failure to name Harris as a household resident in the application for insurance constituted a material misrepresentation that warranted rescission of the policy. *Id*. at 3.

In the original first-party action, both State Farm and Harris filed motions for summary disposition. State Farm moved for summary disposition of Harris's complaint as well as its cross-claim against Pioneer, contending that Harris resided with Wright, his mother, and as a resident relative, Pioneer was responsible for paying PIP benefits. Harris concurred in the dispositive motion filed by State Farm, agreeing that Pioneer was the highest-priority payer, and filed his own motion, submitting that judgment should enter in his favor against Pioneer under the circumstances.

Pioneer opposed the dispositive motions, asserting that there was a factual issue regarding Harris's residence at the time of the accident. Further, it contended that even if Harris were deemed a domiciled relative, the policy was voidable in light of Wright's failure to disclose that he shared her home on her application for insurance. The trial court held that the underlying facts were not in dispute and that Harris resided in his mother's guest room where he kept his personal belongings and that he did not have another place of lodging at the time. Because Pioneer was the highest-priority payer, the trial court granted State Farm's motion. The trial court also concluded that plaintiff was an innocent third party entitled to benefits because there was no evidence that he knew of misrepresentations by Wright on the application for insurance. Therefore, Pioneer did not have the right to rescind the insurance policy. With regard to Pioneer's declaratory action for rescission, the trial court summarily dismissed the complaint on the basis of laches.

When the trial court ruled on the summary disposition motions, the innocent-third-party rule prohibited "an insurer from rescinding an insurance policy because of a material misrepresentation made in an application for no-fault insurance where there is a claim involving an innocent third party." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 430; 760 NW2d 878 (2008). However, in *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 770; 891 NW2d 13 (2016) (*Bazzi I*), aff'd in part and rev'd in part 502 Mich 390; 919 NW2d 20 (2018) (*Bazzi II*), we subsequently held that the innocent-third-party rule did not apply to a claim for PIP benefits and that, therefore, insurers were entitled to rescind an insurance policy on the basis of fraud and were not obligated to pay PIP benefits to an innocent third party.

Accordingly, the state of the law changed after the trial court's summary disposition rulings but prior to appellate disposition. After review of the lower-court decisions, this Court affirmed the "determination that Harris was a resident relative domiciled with Wright" but reversed the trial court's order applying the innocent-third-party rule to Harris and remanded for further proceedings. *Harris*, unpub op at 2, 7.[2] This Court reasoned that the trial court's rationale for applying the innocent third-party rule was expressly rejected by *Bazzi I*. *Id*. at 7.

Further, we reversed the trial court's decision to apply the doctrine of laches to Pioneer's action for declaratory relief and remanded to the trial court to determine whether Pioneer could rescind Wright's insurance policy. *Id*. at 2-3, 9.[3] This Court held that the trial court improperly applied the doctrine of laches to grant defendants summary disposition. *Id*. at 8. Although there was little doubt that Pioneer waited two years to file a declaratory-judgment action seeking rescission, this Court concluded that Pioneer's delay was neither unreasonable nor unjustified because *Bazzi I* was decided during the pendency of the lower-court proceedings and gave Pioneer cause to seek rescission of the policy. *Id*.

After our decision and remand to the trial court, the Michigan Supreme Court decided *Bazzi II*, 502 Mich at 407-411, which held that while an individual's claim as an innocent third party does not preclude an insurer from seeking rescission for fraud, the existence of fraud does not give the insurer an absolute right to rescission. *Bazzi II* instructs trial courts to " 'balance the

[2] This ruling was the subject of the appeal in Docket No. 332764.

[3] This ruling was the subject of the appeal in Docket No. 335025.

equities' " when determining whether an insurer may rescind an insurance policy. *Id*. at 410 (quotation marks and citation omitted).

On remand from this Court and in light of *Bazzi II*, the trial court ordered the parties to file motions for summary disposition. Following the receipt of briefs and oral argument, the trial court granted defendants' motions for summary disposition and denied Pioneer's motion for summary disposition. The trial court first concluded "that the requirements of laches are different than balancing the equities of the case," and that laches only applies when another party suffers prejudice because of an unreasonable delay. The trial court determined that all of the parties, except for Wright, were innocent. Harris was an innocent party because there was no evidence that he participated in Wright's misrepresentation. Pioneer constituted an innocent party because it had no obligation to investigate Wright's representations in her insurance application. Because all of the parties, except for Wright, were innocent, the trial court concluded that the resolution of the case required a balancing of the equities. Next, the trial court held that it would be inequitable to permit Pioneer to rescind Wright's insurance policy because, although Pioneer's delay was "reasonable," it waited two years to file its declaratory action and to permit rescission would preclude Harris from recovering most of his claim for no-fault benefits from any other insurer because of the application of the one-year-back rule. From this ruling, Pioneer appeals.

II. STANDARD OF REVIEW

The appellate court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785

(2018). The trial court did not specify whether its decision was premised on MCR 2.116(C)(8) or (10). This Court must treat plaintiff's motion as having been decided under MCR 2.116(C)(10) to the extent the trial court considered evidence beyond the pleadings. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 544; 904 NW2d 192 (2017). "A motion under MCR 2.116(C)(10) . . . tests the *factual sufficiency* of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). When considering a motion brought pursuant to MCR 2.116(C)(10), the trial court must review the evidence in the light most favorable to the nonmoving party. *Id*. Summary disposition is only appropriate when there is no genuine issue of material fact. *Id*. A genuine issue of material fact exists when the record presents an issue upon which reasonable minds might differ. *Id*.

The remedy of rescission is "granted only in the sound discretion of the court." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982); see also *Bazzi II*, 502 Mich at 409. An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. *Berryman v Mackey*, 327 Mich App 711, 717; 935 NW2d 94 (2019). An abuse of discretion necessarily occurs when the trial court makes an error of law. *Id*. The trial court's factual findings are reviewed for clear error, and a finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 717-718.

III. LAW OF THE CASE

Pioneer argues that the trial court erred by denying its motion for summary disposition and granting defendants' motion for summary disposition because it

violated the law-of-the-case doctrine. Pioneer asserts that the trial court's conclusion, that rescission was inequitable, essentially constitutes an application of the doctrine of laches to balance the equities, a decision that directly contradicts this Court's prior ruling that laches was inapplicable. *Harris*, unpub op at 2-3, 6-7. We disagree.

The issue of whether the law-of-the-case doctrine applies is a question of law that this Court reviews de novo. *Duncan v Michigan*, 300 Mich App 176, 188; 832 NW2d 761 (2013). Whether the lower court properly "followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

Generally, the ruling of a higher court on an issue in a case will bind the lower court on remand and the appellate court in any subsequent appeals. *Id*. This principle, known as the law-of-the-case doctrine, provides:

> [I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. [*Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (citations and quotation marks omitted).]

The doctrine is based on "the need for finality of judgments and the lack of jurisdiction of an appellate

court to modify its judgments except on rehearing." *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 654-655; 625 NW2d 40 (2000). Trial courts are bound by the doctrine unless there has been a material change in the facts or an intervening change in the law. *Duncan*, 300 Mich App at 189. A trial court violates the law-of-the-case doctrine when it revisits a legal issue already ruled on by this Court. *Schumacher*, 275 Mich App at 128.

In *Harris*, this Court held that the trial court erred when it applied the doctrine of laches to Pioneer's declaratory-judgment action seeking rescission of Wright's insurance policy. *Harris*, unpub op at 7-8. When this Court decided *Harris* and remanded the case to the trial court, *Bazzi I* was the applicable law. *Bazzi I* held that "if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of PIP benefits to innocent third parties." *Id*. at 781-782. Shortly after this Court remanded to the trial court, *Bazzi II* was decided.[4] *Bazzi II* declared that an individual's claim for no-fault benefits as an innocent third party does not preclude an insurer from seeking rescission for fraud but that fraud did not give an insurer an absolute right to rescission. *Bazzi II*, 502 Mich at 407-408. *Bazzi II* clarified that "when two equally innocent parties are affected," the trial court "must balance the equities to determine whether" the insurer is entitled to rescind an insurance policy. *Id*. at 410 (quotation marks and citation omitted).

Here, the trial court adhered to our Supreme Court's instruction in *Bazzi II* to balance the equities. Con-

[4] *Bazzi II* was decided on July 18, 2018, approximately seven months after this Court decided Docket No. 335025.

trary to Pioneer's assertions, the trial court did not apply laches; rather, it balanced the equities as required by *Bazzi II*. Although laches and rescission are both equitable remedies, they are not one and the same. As the trial court properly noted, laches requires prejudice to the defendant that results from the plaintiff's unreasonable delay. See *Yankee Springs Twp v Fox*, 264 Mich App 604, 611-612; 692 NW2d 728 (2004) (noting that "[t]he doctrine of laches is concerned with unreasonable delay that" would make it inequitable to allow a plaintiff to enforce a claim against a defendant). The trial court explicitly recognized that laches was inapplicable and that it was obligated to determine whether rescission was equitable by balancing the parties' equities.

Pioneer argues that the trial court violated the law-of-the-case doctrine because, on remand, it used the same analysis as it did when it applied laches. Indeed, the trial court considered nearly all of the same facts to balance the equities on remand that it did when it applied the doctrine of laches. Specifically, it considered the fact that Pioneer waited over two years to file a declaratory-judgment action for rescission even though it knew that Harris resided with Wright and that it could potentially rescind Wright's insurance policy. The trial court also considered that Harris was prejudiced by Pioneer's delay because the one-year-back rule, MCL 500.3145, now precludes Harris from recovering a majority of his claim for PIP benefits from any other insurer since Harris's losses occurred more than one year after he added State Farm as a defendant. However, the factual analysis conducted by the trial court did not contradict this Court's ruling in *Harris*. This Court did not absolve Pioneer of any delay; it only concluded that Pioneer's delay was not unreasonable. *Harris*, unpub op at 8. This Court also

acknowledged that Harris was "likely prejudiced" by Pioneer's delay. *Id*. The fact that the trial court considered the same factors to balance the equities does not indicate that the trial court applied the doctrine of laches. The trial court simply concluded that both Pioneer and Harris are innocent parties, but a balancing of the equities demonstrated that rescission would be inequitable and that Pioneer should bear the loss.

In summary, the trial court's analysis was consistent with this Court's ruling in *Harris* because it did not find Pioneer's delay to be unreasonable or unjustified; the court merely considered the delay in resolving the case. In fact, the court stated that, "despite the reasonableness" of Pioneer's delay, the equities favored Harris. Accordingly, the trial court did not violate the law-of-the-case doctrine.

IV. BALANCING THE EQUITIES

Pioneer next argues that the trial court erred when it denied its motion for summary disposition because, when the trial court balanced the equities as required by *Bazzi II*, it essentially applied the doctrine of laches and failed to consider other relevant factors. We disagree.

There is no dispute that Harris and Pioneer are innocent parties to Wright's representations and omissions on the insurance application. Because both Pioneer and Harris are innocent parties, *Bazzi II*, 502 Mich at 410-411, required the trial court to balance the equities to determine whether the equitable remedy of rescission was appropriate. "Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Id*. at 409. *Bazzi II* clarified that, while the innocent-third-party rule no longer bars

insurers from seeking rescission, insurers are not "categorically entitled to rescission." *Id*. at 408. Rescission is equitable in nature, and therefore, the remedy is granted only within the trial court's discretion. *Id*. at 409. Our Supreme Court explained:

> [W]hen two equally innocent parties are affected, the court is required, in the exercise of its equitable powers, to determine which blameless party should assume the loss . . . . Where one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong. The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked. [*Id*. at 410-411 (citations, brackets, and quotation marks omitted).]

Bazzi II did not provide trial courts with a clear-cut framework for balancing the equities because "an absolute approach would unduly hamper and constrain the proper functioning of" an equitable remedy. *Id*. at 411. "Equitable remedies are adaptive to the circumstances of each case[.]" *Id*.

Here, the trial court considered Pioneer's delay in filing its action for declaratory relief seeking rescission. While the trial court expressly recognized the reasonableness of Pioneer's delay, it did note that as early as October 13, 2013, Pioneer knew that Harris resided with Wright and that it could potentially rescind Wright's policy. The trial court also recognized that if rescission were permitted, the one-year-back rule would bar Harris from recovering a majority of his claim for PIP benefits. In light of these facts, the trial court concluded that it would be inequitable for Pioneer to rescind Wright's insurance policy.

Although the *Bazzi II* Court concluded that the application of equitable remedies in the context of

rescission was contingent on the circumstances of each case, Justice MARKMAN recently articulated factors applicable to balancing the equities. *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903, 906-907 (2018) (MARKMAN, J., concurring).[5] Justice MARKMAN described a "nonexclusive list of factors" the trial court should consider when resolving the issue of rescission. Reduced to their essence, five factors were identified and they address: (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. *Id*. We conclude that the factors outlined in Justice MARKMAN's concurrence to render a determination regarding the balance of the equities presents a workable framework as well as necessary guidance to the lower courts and the litigants, and therefore we adopt it as our own.

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[5] We recognize that Justice MARKMAN's concurrence is not binding on this Court because it is a concurrence to a Michigan Supreme Court order, but it is instructive. See *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001) ("An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent."); see also *People v Armstrong*, 207 Mich App 211, 214-215; 523 NW2d 878 (1994) ("To create binding precedent, a majority must agree on a ground for decision.").

The trial court's analysis appears to be consistent with Justice MARKMAN's framework. The first factor, the extent to which Pioneer could have discovered Wright's representations before the accident,[6] does not truly weigh in either party's favor. There is no evidence to suggest that there could or could not have been a more diligent effort on Pioneer's part to discover contradictions or omissions in Wright's application any earlier. The second factor, the innocent third party's potential knowledge of the fraud, weighs against rescission because there is no evidence that Harris was ever aware of Wright's representations. Pioneer concedes that Harris was unaware of Wright's representations. The third factor—the innocent third party's conduct in the event that caused the injury—also weighs against rescission because Harris was simply a passenger in Francen's car and was not involved in the operation of the vehicle. The fourth factor—whether the innocent third party has an alternate avenue for recovery—also weighs against rescission. As noted by the trial court, if rescission were permitted, the one-year-back rule would bar Harris from recovering a majority of his claim for PIP benefits. Pioneer argues that the trial court incorrectly balanced the equities because it did not consider the fact that Harris failed to file a timely claim against State Farm. According to Pioneer, Harris had an alternate means of recovery, but failed to timely

[6] In *Titan Ins Co v Hyten*, 491 Mich 547, 572-573; 817 NW2d 562 (2012), our Supreme Court held that "an insurer may seek to avoid liability under an insurance policy using traditional legal and equitable remedies including cancellation, rescission, or reformation, on the ground of fraud made in an application for insurance, notwithstanding that the fraud may have been easily ascertainable and the claimant is a third-party." The first factor does not impose a duty to investigate upon insurers, contrary to *Titan Ins Co*, but merely addresses the process of procurement of insurance and any information disclosed.

add State Farm and the Michigan Assigned Claims Plan.

The accident at issue in this case occurred on September 13, 2013. When Harris filed his complaint against Pioneer on May 20, 2014, he sought PIP benefits only from Pioneer. One year later, Harris filed an amended complaint to add State Farm as a named defendant. As a result of Harris's delay in adding State Farm as a defendant, the one-year-back rule barred most of the PIP benefits that Harris could recover from State Farm because Harris had received medical care more than one year before he amended his complaint to add State Farm as a defendant.

Pioneer's argument fails to recognize that, because Harris was a resident relative domiciled with Wright at the time of the accident, Pioneer is the insurer of highest priority under MCL 500.3114(1).[7] While it may have been prudent of Harris to name Pioneer, State Farm, and the Michigan Assigned Claims Plan as defendants when he initially filed his complaint, it is apparent why Harris failed to do so. Pioneer's primary reason for denying Harris's claim for PIP benefits was based on Harris's residency. Presumably, Harris believed that he had a viable claim against Pioneer and would successfully recover PIP benefits. Regardless, the fourth factor considers the present situation, not whether an injured party could have done something different to have more options in the future. *Farm Bureau Gen Ins Co of Mich*, 503 Mich at 906-907 (MARKMAN, J., concurring), citing *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 251; 293 NW2d 594 (1980) ("[B]efore recovery of benefits may be obtained through

[7] In Docket No. 332764, we held that the trial court properly determined that Harris was a resident relative of Wright, and therefore, plaintiff was the insurer of highest priority. *Harris*, unpub op at 4, 6.

an assigned claims plan, it must be determined that no personal protection insurance is 'applicable to the injury'."). As discussed, the one-year-back rule precludes Harris from recovering most of his PIP benefits from any other insurer because his losses occurred more than one year before he added State Farm as a defendant and Harris did not name any other insurer as a defendant, and therefore, Harris does not have an alternative avenue for recovery.

Finally, the fifth factor—whether enforcing "the insurance policy would subject the insurer to coverage for tort liability for an at-fault insured"—does not appear to be applicable because the only apparent wrongdoer in this case was Wright. *Farm Bureau Gen Ins Co of Mich*, 503 Mich at 907 (MARKMAN, J., concurring). This factor is inapplicable because Wright was not involved in the accident at issue and Harris was not the "fraudulent insured" or driver.

Balancing the equities is not concerned with assigning blame but, rather, with determining which of the innocent parties should bear a loss. *Bazzi II*, 502 Mich at 410-411. The resolution of the issue does not require this Court to litigate the propriety of Pioneer's delayed conduct, particularly where this Court previously addressed it. The trial court properly determined that rescission would be inequitable because Pioneer filed a declaratory-judgment action seeking rescission nearly two years after it learned of Wright's insurance representations and rescission would preclude Harris from recovering most of his PIP claim from any other insurer. See *Farm Bureau Gen Ins Co of Mich*, 503 Mich at 906-907 (MARKMAN, J., concurring). The trial court's analysis was specific to the facts and circumstances of the case and went no further than what was equitable. Therefore, we cannot conclude that the trial

court abused its discretion by refusing to grant rescission. *Lenawee Co Bd of Health*, 417 Mich at 26. Moreover, the factors applied weigh against rescission. Accordingly, the trial court properly denied Pioneer's motion for summary disposition and properly granted defendants' motions for summary disposition.

Affirmed.

BORRELLO and SERVITTO, JJ., concurred with K. F. KELLY, P.J.

CADILLAC RUBBER & PLASTICS, INC v TUBULAR METAL SYSTEMS, LLC

Docket No. 345512. Submitted October 3, 2019, at Detroit. Decided February 11, 2020, at 9:10 a.m.

Cadillac Rubber & Plastics, Inc., doing business as Avon Automotive, and Avon Automotive Holdings, Inc. (collectively, Avon) filed an action against Tubular Metal Systems, LLC, in the Oakland Circuit Court, seeking declaratory judgment and damages for breach of contract. Avon supplies hoses for automotive parts to Tubular, which uses them to manufacture parts for General Motors. Tubular issued blanket purchase orders to Avon in 2012 and 2016. Both purchase orders provided that Tubular would release material requirements each week and incorporated by reference Tubular's terms and conditions of purchase, which were posted online. Paragraph 4(b) of Tubular's terms and conditions provided that for blanket orders, in consideration of $10, the seller (Avon) granted to the buyer (Tubular) an irrevocable option during the term of the order to purchase supplies in quantities determined by Tubular and identified as "firm orders" in the material authorization releases. The material authorization releases, under ¶ 4(b), were to be transmitted to Avon during the term of the order and provided that Tubular would purchase "no less than one piece or unit" of supplies from Avon and no more than 100% of Tubular's requirements for supplies. A separate provision of Tubular's terms and conditions provided that the contract was for the life of the program initiated by Tubular's customer, General Motors. Beginning in 2012, Avon provided supplies to Tubular pursuant to the material authorization releases, which Tubular issued on a weekly basis to Avon. In 2018, Avon filed this action, arguing that Tubular's obligation under the contract to only purchase the quantity of parts specified in its material authorization releases created a series of "spot-buy" or "fixed-quantity" contracts, rather than a requirements contract. Therefore, Avon asked the trial court to issue a judgment declaring that it had the right to accept or reject each material authorization release issued by Tubular and that the "irrevocable option" referenced in ¶ 4(b) was not binding on Avon because it was set forth on Tubular's form and Avon did not separately sign

the part of the form that contains the alleged firm offer, contrary to MCL 440.2205. Avon also moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). In response, Tubular requested summary disposition under MCR 2.116(I)(2) and argued that the parties had an enforceable requirements contract in light of the blanket purchase orders, its own terms and conditions, the material authorization releases, and the parties' ongoing relationship since 2012. Tubular further argued that an enforceable option contract existed between the parties. The trial court, Wendy Potts, J., granted summary disposition in favor of Tubular. Avon appealed.

The Court of Appeals *held*:

1. The firm offer in Tubular's terms and conditions was enforceable under the statute of frauds, MCL 440.2205. The statute provides that a written offer to buy or sell goods that by its terms gives assurance that it will be held open for a period of time is not revocable for lack of consideration during the stated time period that the offer is open, or if no time is stated in the offer, for a reasonable time not to exceed three months. The statute further provides that any such term of assurance on a form supplied by the offeree must be signed separately by the offeror. Contrary to Avon's argument, the requirement of a separate signature only applies when no consideration is given for the firm offer. In this case, the firm offer was supported by $10 consideration, so MCL 440.2205 was not applicable.

2. Avon argued that even if there was an enforceable firm offer, the parties' agreement created a series of "spot buy" contracts, not a requirements contract. Under MCL 440.2306, a requirements contract is a contract that includes a term that measures the quantity by the output of the seller or the requirements of the buyer, in which output and requirements mean the actual output or requirements as may occur in good faith and that are not unreasonably disproportionate to any stated estimate or normal or otherwise comparable requirements. Under MCL 440.2306, requirements contracts need not be exclusive. The evidence in this case establishes that the parties have a requirements contract. Both the 2012 and 2016 purchase orders noted that the material requirements would be issued weekly and incorporated Tubular's terms and conditions, which also provided for the issuance of material authorization releases under which Tubular was obligated to purchase between "one piece" and 100% of its requirements from Avon. The fact that Tubular was not obligated by its terms and conditions to purchase 100% of its requirements from

Avon was not dispositive, because the statute does not require that requirements contracts be exclusive in order to be enforceable.

Affirmed.

SHAPIRO, J., concurring in part and dissenting in part, agreed that a separate, signed document was not necessary in order to create a valid irrevocable option because there was consideration for the option. However, he did not believe that the parties' agreement was a requirements contract based on the language of the contract and would have remanded the case to the trial court for further proceedings to determine the status of the contract following discovery and with the consideration of parol evidence. Judge SHAPIRO noted that although a requirements contract need not be exclusive, it must define a practicable estimate or range of future requirements. Because the requirements term in the parties' agreement was for between 1 unit and 100% of Tubular's requirements, it was necessary to examine the parties' past practices and dealings to discern whether there was a good-faith estimate on which Avon could generally rely.

1. CONTRACTS — UNIFORM COMMERCIAL CODE — REQUIREMENTS CONTRACTS — FIRM OFFERS — STATUTE OF FRAUDS.

MCL 440.2205, the statute of frauds, provides that a written offer to buy or sell goods that by its terms gives assurance that it will be held open for a period of time is not revocable for lack of consideration during the stated time period that the offer is open, or if no time is stated in the offer, for a reasonable time not to exceed three months; the statute of frauds further provides that any such term of assurance on a form supplied by the offeree must be signed separately by the offeror; the statute of frauds does not apply to agreements in which the firm offer was supported by consideration.

2. CONTRACTS — UNIFORM COMMERCIAL CODE — REQUIREMENTS CONTRACTS — EXCLUSIVITY.

A requirements contract need not be exclusive; that is, a buyer need not agree to purchase 100% of its requirements from the seller under the contract, as MCL 440.2306 specifically contemplates requirements contracts as including contracts with indefinite quantity terms; rather, the statute requires the term of a requirements contract that measures quantity by the seller's output or the buyer's requirements to mean such actual output or requirements as may occur in good faith and that are reasonably proportionate to any stated estimate or normal or otherwise comparable output or requirements.

Miller Johnson (by *Patrick M. Jaicomo* and *Christopher J. Schneider*) for Cadillac Rubber & Plastics, Inc., doing business as Avon Automotive, and Avon Automotive Holdings, Inc.

McDonald Hopkins PLC (by *Timothy J. Lowe* and *Mark W. Steiner*) for Tubular Metal Systems, LLC.

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

SAWYER, J. Plaintiffs (collectively referred to as "Avon") appeal from an order of the circuit court granting summary disposition in favor of defendant under MCR 2.116(I)(2) (opposing party, rather than moving party, entitled to immediate judgment). We affirm.

Avon is a supplier of automotive parts, supplying hoses to defendant (Tubular), which in turn uses the hoses in producing parts for General Motors. Tubular issued two blanket purchase orders to Avon, one in 2012 and the other in 2016. Both purchase orders provided that Tubular would release material requirements each week. The orders further incorporated by reference Tubular's terms and conditions of purchase, which were posted online. Paragraph 4(b) of those terms and conditions is particularly relevant to this case, stating:

> If the face of the Order . . . specifies the quantities as . . . "blanket order", . . . then, in consideration for ten US dollars (US$10.00), the payment of which shall be made by Buyer upon the termination or non-renewal of this Order, Seller grants to Buyer an irrevocable option during the term of this Order to purchase Supplies in such quantities as determined by Buyer and identified as firm orders in material authorization releases, manifests, broadcasts or similar releases ("Material Authorization Releases") that are transmitted to Seller during the term

> of this Order . . . provided that Buyer shall purchase no less than one piece or unit of each of the Supplies and no more than one hundred percent (100%) of Buyer's requirements for the Supplies. All references herein to "this Order" shall include any Material Authorization Releases. . . .

Additionally, ¶ 2 of the terms and conditions stated that the contract was "for the life of the program initiated by Buyer's Customer," identifying General Motors' Epsilon program as the relevant program.

Beginning with the 2012 purchase order, Tubular issued weekly material authorization releases to Avon, listing the quantity of parts needed and a reasonable forecast of future requirements. Avon fulfilled those releases with the required parts. In 2018, Avon filed this action seeking declaratory judgment and damages for breach of contract. Under the purchase orders and Tubular's terms and conditions, Tubular is only obligated to purchase the quantity of parts set forth in its material authorization releases. According to Avon, "[t]his 'per releases' quantity term creates a series of spot-buy (also called fixed-quantity) contracts, not a requirements contract." Therefore, Avon asserted that it had the right to accept or reject each material authorization release issued by Tubular. Avon further claimed that the "irrevocable option" allegedly created by ¶ 4(b) of Tubular's terms and conditions "is invalid and/or not binding on Avon because it is on Tubular's form and Avon did not separately sign the portion of the form that contains the alleged firm offer. MCL 440.2205." Avon requested a judgment declaring that the blanket purchase orders are not requirements contracts, the alleged "irrevocable option" in Tubular's terms is invalid or unenforceable, and Avon has the right to reject any material authorization release that Avon has not yet accepted. Avon also asserted that

Tubular had breached the parties' contracts by requiring Avon to supply Tubular's requirements of the parts.

Simultaneously with filing this action, Avon moved for summary disposition under MCR 2.116(C)(9) and (10). Avon argued that it was entitled to a declaratory judgment as a matter of law, that Tubular's terms and conditions do not create a requirements contract, and that the alleged irrevocable option in Tubular's terms and conditions is invalid. Tubular filed a response to Avon's motion and requested summary disposition in favor of Tubular under MCR 2.116(I)(2). Tubular argued that an enforceable requirements contract existed between the parties in light of the blanket purchase orders, Tubular's terms and conditions, the material authorization releases, and the parties' ongoing relationship since 2012. Tubular further argued that an enforceable option contract existed.

Following a hearing, the trial court issued a written opinion and granted summary disposition in favor of Tubular. Avon now appeals, and we affirm.

This Court provided the applicable standard of review for summary disposition under MCR 2.116(I)(2) in *Lockwood v Ellington Twp*, 323 Mich App 392, 400-401; 917 NW2d 413 (2018):

> We review a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768; 887 NW2d 635 (2016), and should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law," *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

> "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006) (quotation marks and citation omitted). "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." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423; 864 NW2d 609 (2014) (quotation marks and citation omitted).
>
> If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly granted under MCR 2.116(I)(2). *Holland v Consumers Energy Co*, 308 Mich App 675, 681-682; 866 NW2d 871 (2015), aff'd *Coldwater v Consumers Energy Co*, 500 Mich 158 (2017).

Additionally, the proper interpretation of a contract is a question of law which we also review de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

Avon first argues that the trial court erred by rejecting Avon's argument that the firm offer contained in Tubular's terms and conditions is not enforceable

because Avon had not separately signed that document as required by MCL 440.2205. We disagree.

MCL 440.2205 provides:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed 3 months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

We agree with the trial court that the separate-signature requirement only applies when no consideration is given for the firm offer. The language clearly and unambiguously establishes a limitation on the length of time that an offer may be considered irrevocable if the firm offer is not supported by consideration—for the stated time, or a reasonable time if there is no stated time, but not for more than three months. In this case, the firm offer was supported by consideration, specifically $10. Therefore, this provision does not apply.

This interpretation of the statutory text is supported by the official comments to UCC § 2-205, upon which MCL 440.2205 is modeled.[1] Comment 1 states, "This

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[1] We recognize that the comments are not binding. This Court has explained:

> Although the official comments do not have the force of law, they are useful aids to interpretation and construction of the UCC. Further, the comments were intended to promote uniformity in the interpretation of the UCC. Therefore, it is appropriate for this Court to consider the official comments when interpreting Michigan's UCC. [*Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 260 n 6; 761 NW2d 694 (2008).]

Our Supreme Court has emphasized that because the official comments to the UCC do not have the force of law, "a reviewing court should focus first on the plain language of the statute in question, and when the

section is intended to modify the former rule which required that 'firm offers' be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings." MCL 440.2205, comment 1. Comment 3 provides:

> This section is intended to apply to current "firm" offers and not to long term options, and an outside time limit of three months during which such offers remain irrevocable has been set. The three month period during which firm offers remain irrevocable under this section need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event. A promise made for a longer period will operate under this section to bind the offeror only for the first three months of the period but may of course be renewed. If supported by consideration it may continue for as long as the parties specify. *This section deals only with the offer which is not supported by consideration*. [MCL 440.2205, comment 3 (emphasis added).]

In addition to the nonbinding comments, our conclusion is further supported by persuasive precedent from other jurisdictions. See, e.g., *In re Modern Dairy of Champaign, Inc*, 171 F3d 1106, 1110 (CA 7, 1999); in *E A Coronis Assoc v M Gordon Constr Co*, 90 NJ Super 69, 73; 216 A2d 246 (App Div, 1966) (UCC § 2-205 was designed to reverse the common-law rule that "an offer not supported by consideration could be revoked at any time prior to acceptance"); *Realty Dev, Inc v Kosydar*,

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language of the statute is unambiguous, it must be enforced as written." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013). In *Fisher Sand & Gravel Co*, our Supreme Court concluded that this Court had erroneously relied on an official comment to the UCC. *Id*. With this in mind, we refer to the official comments to this UCC provision only to reinforce and buttress our conclusion, which is based upon an analysis of the statutory language.

322 NE2d 328, 332 (Ohio App, 1974) ("In order to constitute a firm offer to sell, irrevocable and *unnecessary to be founded on consideration*, the quotation must be a 'signed writing' giving assurance that it will be held open for acceptance by the purchaser.") (emphasis added).

The meaning of UCC § 2-205 has similarly been explained in a treatise[2] as follows:

> Under the common law of contracts, it was frequently said that an offeror can always withdraw an offer if no consideration was received for it. But under the Code, 2-205 limits the offeror's right to withdraw[.]
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> * * *
>
> Section 2-205 . . . enables the offeror to make a "gift" of a firm offer in the sense that the offeree need not give any consideration, such as paying for the option. Section 2-205 is intended mainly to limit the power of an offeror to withdraw a firm offer if the offeree reasonably relies on the offer's firmness. . . . [1 White, Summers & Hillman, Uniform Commercial Code (6th ed), § 2:25, pp 134-135 (quotation marks and citation omitted).]

In sum, the clear and unambiguous language of MCL 440.2205 supports the conclusion that that statute is simply inapplicable when a firm offer is supported by consideration. This interpretation is further supported by various persuasive authorities. And Avon makes no argument challenging the adequacy or existence of consideration in this case. Specifically, consideration of $10 was provided for in the agreement.[3]

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[2] Treatises are not binding authority but may be considered persuasive. *Fowler v Doan*, 261 Mich App 595, 601; 683 NW2d 682 (2004).

[3] And, as the trial court noted, courts do not typically inquire into the sufficiency of consideration. See *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002) ("Courts do not generally

Avon next argues that, even if there were an enforceable firm offer, this agreement did not create a requirements contract, but rather a "spot buy" contract. Like the trial court, we reject this argument.

MCL 440.2306(1) provides for requirements contracts as follows:

> A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Comment 2 for this provision explains, in relevant part:

> Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. . . . [MCL 440.2306, comment 2.]

Requirements contracts need not be exclusive. In *Gen Motors Corp v Paramount Metal Prods Co*, 90 F Supp 2d 861, 873 (ED Mich, 2000), the court convincingly concluded that "MCL 440.2306 expresses a legislative intent to enforce both exclusive and non-exclusive requirements contracts." The court noted that "MCL 440.2306(2)[4] applies a standard to 'exclusive dealing'

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inquire into the sufficiency of consideration. It has been said a cent or a pepper corn, in legal estimation, would constitute a valuable consideration.") (quotation marks, citations, and brackets omitted).

[4] MCL 440.2306(2) provides:

that is not applicable to the class of output requirements referred to in MCL 440.2306(1)." *Gen Motors Corp*, 90 F Supp 2d at 873. The court stated that "[t]he statute and official comments simply do not support [the defendant's] assertion that all requirements contracts are exclusive requirements contracts; a requirements contract may exist where all or some of the purchaser's requirements are purchased from the seller." *Id*. at 874.

A requirements-contract arrangement very similar to what exists here was addressed in *Johnson Controls, Inc v TRW Vehicle Safety Sys, Inc*, 491 F Supp 2d 707 (ED Mich, 2007). In *Johnson Controls*, the plaintiffs (referred to collectively as "JCI") issued purchase orders to the defendant (referred to as "TRW") for various parts for a one-year period. *Id*. at 709.

> The purchase orders stated the specific price of each part but did not state the quantity. This was because JCI's need for parts depended on General Motor's [sic] production schedule. Accordingly, when JCI had a need for parts it would issue a material release to TRW, requesting that TRW ship a specified number of parts. JCI followed this practice, which is standard in the automotive industry and known as a just-in-time supply system, in order to maintain a minimum inventory. [*Id*.]

The court in *Johnson Controls* explained that such automotive supply

> contracts are typically entered into with little or no negotiation and are primarily made up of carefully drafted boilerplate language. As in this case, the pur-

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> A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

> chaser will issue a purchase order for a period of time at a fixed price that incorporates Global Terms. General Motors, for example, enters into roughly one million procurement contracts every year, at a total amount in excess of $80 billion — all governed by a single contract form containing thirty-one paragraphs[.] [*Id*. at 709 n 2 (quotation marks and citation omitted).]

In *Johnson Controls*, JCI's purchase orders incorporated JCI's Global Terms of Purchase, which contained language substantively identical in all relevant respects to the pertinent language in Tubular's terms and conditions in the instant case. See *id*. at 710. In particular, JCI's Global Terms provided that, in consideration for $10,

> Seller grants to Buyer an irrevocable option during the term of the Order to purchase Supplies in such quantities as determined by Buyer and identified as firm orders in material authorization releases, manifests, broadcasts, or similar releases ("Material Releases") that are transmitted to Seller during the term of the Order, and Seller will supply all such Supplies at the price and other terms specified in the Order; provided that the Buyer may purchase no less than a minimum quantity of at least one piece or unit of each of the Supplies and no more than 100% of Buyer's requirements for the Supplies. . . . [*Id*.]

In addressing an argument that JCI's purchase orders did not satisfy the statute of frauds, MCL 440.2201(1),[5] the court in *Johnson Controls* noted that the UCC "specifically contemplates contracts with in-

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[5] MCL 440.2201(1) states:

> Except as otherwise provided in this section, a contract for the sale of goods for the price of $1,000.00 or more is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed

definite quantity terms. See [MCL] 440.2306 (defining quantity in output or requirements contracts as actual good faith output or requirements)." *Johnson Controls*, 491 F Supp 2d at 717. The court observed that the purchase orders in that case referred to JCI's material releases, which were issued periodically to specify the exact quantities of parts needed. *Id*. Such references in the purchase orders have "some nexus to the notion of amount or quantity in light of the customary practice in the automotive industry of using just-in-time supply chains and material releases." *Id*. The court explained that

> the quantity could be construed as simply referencing the amount of supplies indicated in the material releases. The releases are incorporated into the purchase orders via the Global Terms and JCI is not obligated to purchase anything that exceeds the amounts stated in the material releases. On the other hand, the fact that the Global Terms referenced an option to purchase goods at a fixed price so long as JCI's orders were within a specific range of amounts could indicate that JCI was to purchase its requirements. That this may have been a requirements contract seems reasonable in light of the practice among automotive suppliers to enter into long-term, just-in-time production arrangements that rely on a fixed price and a variable quantity, and provide flexibility to adjust to changing commercial conditions. [*Id*. at 718 (citation omitted).]

The court thus concluded that the statute of frauds was satisfied. *Id*.

In the present case, the evidence indisputably establishes that the parties have a requirements contract. Tubular issued two purchase orders, one in 2012 and another one in 2016, that incorporated its terms and

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upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the writing.

conditions. The purchase orders both noted, "MATERIAL REQUIREMENT WILL BE RELEASED WEEKLY." Tubular's terms and conditions likewise provided for the issuance of material authorization releases under which Tubular was obligated to purchase from Avon a quantity between one part and 100% of Tubular's requirements. The fact that Tubular was not required by the terms and conditions to purchase 100% of its requirements from Avon is not dispositive. As noted, a requirements contract need not be exclusive to be enforceable. *Johnson Controls*, 491 F Supp 2d at 720; *Gen Motors Corp*, 90 F Supp 2d at 873. We find these federal precedents persuasive, and we choose to follow them.[6]

It is undisputed that the parties have performed consistently with the contractual documents since 2012. Tubular has regularly issued material authorization releases setting forth the quantity of parts needed as well as a reasonable forecast of future

[6] Avon cites an unpublished lower federal court opinion concluding that "Michigan law is not well settled as to whether a requirements contract must be exclusive, i.e., whether all requirements must be purchased from the supplier and all needs of a given type directed to that supplier by the purchaser." *GRM Corp v Miniature Precision Components, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 8, 2008 (Case No. 06-15231-BC), p 9. The court in *GRM Corp* stated that, apart from two arguably conflicting unpublished opinions of this Court, "little attention has yet been provided by the Michigan courts as to whether a requirements contract must be exclusive." *Id*. This Court is not bound by unpublished opinions of lower federal courts. *Bartlett Investments, Inc v Certain Underwriters at Lloyd's London*, 319 Mich App 54, 60 n 2; 899 NW2d 761 (2017). Nor is this Court bound by unpublished opinions of this Court. MCR 7.215(C)(1). As stated above, we find persuasive the analyses in *Johnson Controls*, 491 F Supp 2d at 720, and *Gen Motors Corp*, 90 F Supp 2d at 873, concluding that under Michigan law, a requirements contract need not be exclusive to be enforceable. And to the extent that the *GRM* court was correct that Michigan law is not well settled on this point, with the publication of this opinion it now is.

requirements, and Avon has fulfilled those releases by providing the required parts. Avon does not claim or present evidence that Tubular has failed to comply with its obligation under MCL 440.2306(1) to act in good faith in determining its requirements.

In sum, the trial court correctly determined that the pertinent documents, including the purchase orders, Tubular's terms and conditions, and the material authorization releases, when considered together, established the existence of a requirements contract as a matter of law. The trial court properly granted summary disposition to Tubular.

Affirmed. Tubular may tax costs.

FORT HOOD, P.J., concurred with SAWYER, J.

SHAPIRO, J. (*concurring in part and dissenting in part*). I concur in the majority's conclusion that a separate, signed document was not required to create a valid irrevocable option because there was consideration for that option. However, I respectfully dissent from the majority's affirmance of the conclusion that, as a matter of law, the written agreement created a "requirements contract." I conclude that the contract language itself does not unambiguously create a requirements contract and that its status should be determined after discovery and with consideration of parol evidence.

The majority relies largely on *Johnson Controls, Inc v TRW Vehicle Safety Sys, Inc*, 491 F Supp 2d 707 (ED Mich, 2007), and *Gen Motors Corp v Paramount Metal Prods Co*, 90 F Supp 2d 861 (ED Mich, 2000). In my view, neither of those cases supports the trial court's decision that the contract can only be read as a requirements contract. Neither case concluded that

the agreement in question was a requirements contract as a matter of law. To the contrary, they each found that there was an ambiguity regarding the nature of the contract and concluded that it was a question of fact to be determined after consideration of parol evidence and the parties' past practices and dealings. See *Johnson Controls*, 491 F Supp 2d at 719-720; *Gen Motors Corp*, 90 F Supp 2d at 873.

The majority contends that *Johnson Controls* held that a term of "a minimum quantity of at least one piece or unit of each of the Supplies and no more than 100% of Buyer's requirements for the Supplies" meets the requirements of the UCC. I disagree with this reading of the case. *Johnson Controls* held that the terms were sufficient to establish a contract that did not violate the statute of frauds. *Johnson Controls*, 491 F Supp 2d at 718. However, as noted, the court remanded the case for a factual finding to determine whether "the parties' past dealings and current course of performance . . . indicate that a requirements contract was intended." *Id*. at 720. See also *Metal One America, Inc v Ctr Mfg Inc*, unpublished opinion of the United States District Court for the Western District of Michigan, issued July 14, 2005 (Case No. 1:04-CV-431) (relying on the parties' course of performance and past dealings to find that a requirements contract existed). Similarly, in *General Motors*, the court held that a supply contract need not be exclusive in order to constitute a requirements contract, but it did not rule on whether the agreement at issue was a requirements contract, stating:

> Construing the pleadings and evidence in a light most favorable to the plaintiffs [the non-moving buyer], it remains possible for the plaintiffs to develop a record at

> trial demonstrating that the various purchase orders are in fact enforceable requirements contracts. [*Gen Motors Corp*, 90 F Supp 2d at 873.]

For an agreement to unambiguously create a requirements contract it is not necessary that the agreement be exclusive, but it must define a practicable estimate or range of future requirements. "A requirements or output term of a contract, although general in language, nonetheless is, if stated in the writing, specific as to quantity . . . ." *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 615; 358 NW2d 845 (1984) (emphasis omitted). In *Plastech Engineered Prod v Grand Haven Plastics, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 31, 2005 (Docket No. 252532), pp 7-9, our Court held that a requirements contract need not contain an estimate of needed goods when the contract provides that the buyer will use the seller's products for "100% [of the buyer's] requirements." When the buyer's requirements will all be ordered from the seller, i.e., an exclusive arrangement, such a description is sufficiently specific even though the actual amount may vary. However, when the contract is not exclusive, it should not be read as a requirements contract absent an estimate or range of anticipated future orders. See e.g., *Cyril Bath Co v Winters Indus*, 892 F2d 465, 467 (CA 6, 1989) ("[A] contract to furnish only part of the buyer's requirements along with an approximate number of the identified goods is sufficient to be a requirements contract under [the] UCC."); 1 White, Summers & Hillman, Uniform Commercial Code (6th ed), § 4:20, p 335 ("Where an agreement does not establish exclusivity and is otherwise silent as to quantity, the agreement is treated as an open offer to sell [or buy]."). "Because section 2-306 depends on exclusivity to determine the quantity, there can be no valid requirements

contract without it . . . . Despite the presence of another supplier, the contract may be sufficiently 'exclusive.' This may occur where a purchaser agrees to purchase exclusively from a seller up to a certain quantity." *Id*. at 333.

The majority does not cite any case holding that a promise to buy between 1 unit and 100% of requirements is sufficient to create a requirements contract. Such a conclusion would severely undercut the UCC's requirements that the parties act in good faith regarding an estimate of production requirements. If a contract that is nonexclusive and that also provides no estimate of future requirements is sufficient to create a requirements contract, it is difficult to see how a party's good faith could ever be challenged. In this case, the range of requirements is nothing more than "whatever we order." If that is adequate, then a buyer could sign another nonexclusive contract with another supplier who can sell more cheaply and order 99.9% of their requirements from this alternative supplier without ever breaching the contract with the first supplier. In sum, without a baseline estimate, a nonexclusive contract does not provide sufficient information to meet the requirement that the "output or requirements will approximate a reasonably foreseeable figure." MCL 440.2306, comment 2.

It is certainly possible that the past practices and dealings between the parties establish a reasonable basis from which defendant could determine what its production requirements are likely to be, taking into account good-faith variations. See White, § 4:20, p 334 ("Exclusivity can also be established through implication, course of dealing, or extrinsic evidence."). If so, it would constitute a requirements contract. But that conclusion cannot be made on the text of the contract

alone. To determine whether the agreement is a requirements contract, factual findings must be made. See *Aleris Aluminum Canada LP v Valeo, Inc*, 718 F Supp 2d 825, 832 (ED Mich, 2010) (holding that where the quantity term is not clearly stated, "parol evidence is admissible to show what the parties intended as to the exact quantity") (quotation marks and citation omitted).

If parol evidence of past practice or dealings demonstrates beyond a question of fact that there was a good-faith estimate on which the seller could generally rely, I would agree that the trial court could rule on the question in a motion under MCR 2.116(C)(10). If, however, a question of fact remains, the determination is for the fact-finder.

In my view, a promise to purchase anywhere from 1 unit to 100% of needs in a nonexclusive contract does not, in and of itself, create a requirements contract consistent with the UCC. Accordingly, I would reverse the grant of summary disposition to plaintiff and remand for further proceedings.

ICKES v KORTE

Docket No. 346490. Submitted January 8, 2020, at Grand Rapids. Decided February 11, 2020, at 9:15 a.m.

In January 2018, Michael Ickes filed an action in the Muskegon Circuit Court against Alexander S. Korte and Trans Front, Inc., seeking to recover for damages he allegedly sustained during an automobile accident involving Korte. Before the summons expired on April 6, 2018, Ickes filed ex parte motions under MCR 2.102, seeking substituted service and the issuance of a second summons, claiming that he had exercised due diligence in attempting to serve defendant but that he had been unsuccessful; the address on the accident report was out of date, and he had not been able to obtain a new address for Ickes from the United States Postal Service because the postal service did not have a current address for Ickes on file as of March 20, 2018. The court, Annette Rose Smedley, J., granted the motions, allowing substituted service and a second summons to Korte's attorney who was representing him in a related case to which both Ickes and Korte were parties. After receiving the second summons, Korte moved to vacate the orders for substituted service and issuance of a second summons, to quash service of process, and to grant summary disposition to Korte. In a supporting affidavit, Korte detailed the address of each home he had lived in since the accident, stating that he filed a change-of-address card with the postal service for each move and notified the Secretary of State of the new address. Korte argued that defendant failed to show due diligence in attempting to serve him given that Ickes had his current telephone number and the name of his attorney and that Ickes could have obtained his current address from a number of sources. The trial court granted Korte's motions and dismissed Ickes's complaint without prejudice, reasoning that Ickes had failed to demonstrate due diligence in attempting to serve Korte before the first summons expired. Ickes appealed.

The Court of Appeals *held*:

Under MCR 2.105(A), a plaintiff may serve an individual defendant either by delivering the summons and a copy of the complaint to the defendant in person or by sending the summons

and a copy of the complaint to the defendant by registered or certified mail, return receipt requested, with delivery restricted to the defendant. MCR 2.102(D) provides that, in general, a plaintiff has 91 days to serve a defendant before a summons expires and that within that time, a trial court may extend the time for the plaintiff to serve the defendant by ordering the issuance of a second summons if the plaintiff demonstrates due diligence in attempting to serve the original summons. MCR 2.105(I) authorizes a trial court to allow service of process in another manner reasonably calculated to provide the defendant actual notice if the plaintiff demonstrates that service cannot reasonably be made upon the defendant in the manner provided in MCR 2.105(A). The search for an absentee defendant must be truly diligent and more than a mere gesture to warrant the ordering of substituted service. For purposes of service of process, the term "due diligence" means undertaking reasonable, good-faith measures under the circumstances; it does not necessarily require undertaking every measure possible. In this case, Ickes's failure to call or otherwise directly contact Korte did not show a lack of due diligence. On the other hand, Ickes made no effort to serve Korte until three weeks before the original summons expired and did not make use of the multiple methods reasonably available to locate Korte, including contacting Korte's attorney, checking with the Secretary of State, contacting defendant by phone to arrange service, or contacting Korte's landlord at his last-registered address for his new address. Accordingly, the trial court did not abuse its discretion by concluding that Ickes failed to demonstrate due diligence in attempting to serve Korte and did not abuse its discretion by granting Korte's motions and dismissing the complaint as to Korte.

Affirmed.

ACTIONS — SERVICE OF PROCESS — ABSENTEE DEFENDANT — ALTERNATE SERVICE OF PROCESS — DUE DILIGENCE.

MCR 2.105(I) authorizes a trial court to allow service of process in another manner reasonably calculated to provide the defendant actual notice if the plaintiff demonstrates that service cannot reasonably be made upon the defendant in the manner provided in MCR 2.105(A); the search for an absentee defendant must be truly diligent and more than a mere gesture to warrant the ordering of substituted service; for purposes of service of process, the term "due diligence" means undertaking reasonable, good-faith measures under the circumstances; it does not necessarily require undertaking every measure possible.

Bosch Killman VanderWal, PC (by *Peter D. Bosch*) for Michael Ickes.

Bremer & Nelson LLP (by *Philip J. Nelson*) for Alexander Korte.

Before: O'BRIEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

PER CURIAM. Plaintiff, Michael Ickes, appeals as of right the trial court's order dismissing his complaint against defendant Alexander S. Korte. The primary issue on appeal is whether plaintiff exercised "due diligence" within the meaning of MCR 2.102(D) in attempting to serve his first summons upon defendant.[1] We affirm.

I. BACKGROUND

This case arose from plaintiff's claim that he sustained injuries in an automobile accident involving defendant on January 7, 2015. On January 5, 2018, plaintiff filed a complaint initiating this action and naming Korte as a defendant. The expiration date for the summons was April 6, 2018. On March 27, 2018, shortly before the summons was due to expire, plaintiff filed ex parte motions for substituted service and for the issuance of a second summons, asserting that he had exercised due diligence in attempting to serve defendant but without success. Plaintiff asserted that he was unable to serve defendant because the address in the accident report was outdated, and he had been unsuccessful in obtaining a new address for defendant from the United States Postal Service (USPS). Plaintiff

[1] Defendant Trans Front, Inc., is not involved in this appeal. All references to "defendant" in this opinion are to Korte only.

included a form from the USPS indicating that he had asked the USPS for defendant's current address, specifying the address on the accident report as defendant's last known address. The USPS did not have a current address on file as of March 20, 2018. Plaintiff requested a second summons and substituted service in the form of first-class mail to the attorney representing defendant in a related case to which both plaintiff and defendant were parties. The trial court granted plaintiff's ex parte motions for substituted service and the issuance of a second summons.

Upon receiving the second summons by mail on April 12, 2018, defendant moved to vacate the orders for substituted service and the issuance of a second summons, to quash service of process, and to grant summary disposition to defendant. According to defendant's supporting affidavit, he lived at the address listed in the accident report until late 2015 or early 2016 when he moved to a North Green Creek Road address in Muskegon, where he lived until September 2017, when he moved to a West Grand Avenue address. Defendant asserted that after each move, he filed a change-of-address card with the USPS and notified the Secretary of State of the new address.[2] On February 28, 2018, defendant moved to a Michigan Avenue address, and he submitted a change-of-address card to the USPS in mid-March 2018. Defendant also informed the West Grand Avenue landlord of his new Michigan Avenue address, and defendant claimed that he received his mail from the time he moved to the Michigan Avenue address until submitting the change-of-address card.

[2] Defendant asserts that because the USPS only forwards mail to a new address for 12 months, it is not surprising that by March 2018, the USPS would no longer retain forwarding information for the address listed in the accident report.

Lastly, defendant stated that he had maintained the same phone number since January 2015. Defendant argued that plaintiff failed to show due diligence in attempting to serve him given that plaintiff had defendant's current phone number and the name of defendant's attorney and could have obtained defendant's current address at any point with minimal effort by checking with the USPS, the Secretary of State's office, his attorney, or his former landlord.

The trial court granted defendant's motions and dismissed the complaint against defendant without prejudice, holding that plaintiff failed to demonstrate due diligence in attempting to serve defendant before the original summons expired. The trial court also denied plaintiff's motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

On appeal, plaintiff contends that the trial court abused its discretion by vacating the orders for substituted service and for the issuance of a second summons, quashing service of process, and dismissing the complaint against defendant without prejudice. We disagree.

We review for an abuse of discretion a trial court's decision to permit or deny the issuance of a second summons. See *Bush v Beemer*, 224 Mich App 457, 465-466; 569 NW2d 636 (1997). Similarly, we review for an abuse of discretion a trial court's decision to permit or deny substituted service. See *Bullington v Corbell*, 293 Mich App 549, 560; 809 NW2d 657 (2011). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

Upon the filing of a complaint, the court clerk issues a summons to be served upon the defendant. MCR 2.102(A). A plaintiff then may obtain service upon an individual defendant either by delivery of the summons and a copy of the complaint to the defendant in person or by sending the summons and a copy of the complaint to the defendant by registered or certified mail, return receipt requested, with delivery restricted to the defendant. MCR 2.105(A). Generally, a plaintiff has 91 days to serve a defendant before a summons expires. MCR 2.102(D). Within that time, a trial court may extend the time for the plaintiff to serve the defendant by ordering the issuance of a second summons if the plaintiff demonstrates due diligence in attempting to serve the original summons. *Id.*; see also *Richards v McNamee*, 240 Mich App 444, 449; 613 NW2d 366 (2000). "The due diligence requirement applies even when dismissal results in the plaintiff's case being time-barred due to the fact that the statute of limitations on the plaintiff's cause of action has run." *Bush*, 224 Mich App at 463 (quotation marks and citation omitted).

Similarly, if a plaintiff demonstrates that service cannot reasonably be made upon the defendant in the manner provided in MCR 2.105(A), the trial court may permit service of process in another manner reasonably calculated to provide the defendant actual notice. MCR 2.105(I). However, "[a] truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service." *Bullington*, 293 Mich App at 559 (quotation marks and citation omitted).

III. ANALYSIS

In this case, the trial court determined that plaintiff did not provide evidence of due diligence in attempting

to serve defendant. The trial court observed that plaintiff could have located the defendant and effectuated service before the original summons expired by checking with the Secretary of State, contacting defendant by phone to arrange service, checking with defendant's previous landlord, or contacting defendant's attorney but that plaintiff had failed to take these simple steps. The trial court stated, in pertinent part:

> If the plaintiff would have exercised due diligence by checking with the secretary of state he would have had [defendant's] new address and would have been able to serve the defendant.
>
> After February 28th the defendant again changed his residence. . . . The defendant notified his landlord of his new address. A check with the landlord at this address would have given the plaintiff the information needed for service.
>
> The defendant has maintained the same phone number since the accident and it is listed in the police report. Plaintiff never tried to call to see if defendant would accept service.
>
> The defendant has the same attorney for both cases, the instant case and 2017-2952-NI as stated previously. The attorney for the plaintiff in this case has had contact with the defendant's attorney in the 2017 case and has never asked the attorney about serving his client. At the hearing on June 15th the plaintiff's attorney stated that he did not say anything because he did not want to tip his hand at that time.
>
> The plaintiff had many opportunities that he did not use to serve the defendant before the summons expired.

We are baffled and disturbed by the suggestion that plaintiff's counsel should have contacted defendant directly given that plaintiff's counsel was aware that defendant was represented in the other litigation by an attorney. See MRPC 4.2. We also do not believe plain-

tiff should have been personally obligated to act on behalf of his attorney. Therefore, we absolutely reject the proposition that plaintiff's failure to call, or otherwise directly contact, defendant shows any lack of due diligence whatsoever. Nevertheless, in all other respects, we agree.

We recognize that plaintiff took *some* steps to serve defendant, in contrast to the total absence of effort in *Bush*. See *Bush*, 224 Mich App at 466. Nevertheless, due diligence requires efforts that are more than a "mere gesture." *Bullington*, 293 Mich App at 559 (quotation marks and citations omitted). We adopt the definition of "due diligence" set forth in other contexts: due diligence means undertaking reasonable, good-faith measures under the circumstances, not necessarily undertaking everything possible.[3] See *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998); *People v Sullivan*, 97 Mich App 488, 493; 296 NW2d 81 (1980); *People v Williams*, 57 Mich App 199, 201-202; 225 NW2d 691 (1974). In this case, the record shows that plaintiff made no effort to serve defendant until about three weeks before the original summons was set to expire and did not avail himself of the multiple methods reasonably available to him to locate defendant. For example, plaintiff could simply and easily have contacted defendant's attorney, who was known to plaintiff because of the parties' simultaneous involvement in other litigation. Furthermore, an interrogatory answer in the other litigation contained defendant's current address. We agree with plaintiff's

[3] Thus, the bare fact that a party could have expended greater efforts is irrelevant. Of necessity, due diligence also, therefore, does not require the commission of acts that are illegal, professionally unethical, or otherwise impermissible under any applicable rules or regulations. We are unaware of any standard of care that might impose such a requirement.

argument that those efforts might have been unsuccessful; however, that does not excuse plaintiff's failure to make reasonable attempts.

Because the trial court's determination that plaintiff failed to demonstrate due diligence in attempting to serve defendant did not fall outside the range of reasonable and principled outcomes, we conclude that the trial court did not abuse its discretion by granting defendant's motions and dismissing the complaint as to defendant.

Affirmed.

O'BRIEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ., concurred.

In re PEDERSON, MINORS

Docket No. 349881. Submitted January 7, 2020, at Lansing. Decided February 13, 2020, at 9:00 a.m.

The Department of Health and Human Services petitioned the Presque Isle Circuit Court in March 2017 to remove two minor children from their parents. Petitioner alleged that caseworkers had visited respondents' home numerous times over the course of several years and found it in appalling condition. Caseworkers had observed pest infestations in the home and in the refrigerator, and they had discovered animal feces and urine in the basement. Petitioner also alleged that the children had poor hygiene and were frequently absent from school. Although respondents had been provided with services and assistance, they had failed to rectify the problems in the home. Following a hearing, the trial court ordered the children removed from respondents, and the children were placed in a foster home. At a pretrial hearing in April 2017, respondents' attorney informed the court that they wished to plead to the court's jurisdiction rather than proceed to trial. After giving respondents an abbreviated advice of rights and asking them whether they understood, the trial court accepted the pleas. Petitioner subsequently filed a supplemental petition seeking termination of respondents' parental rights. At the termination hearing, a psychologist who had evaluated respondents and the children testified that respondents had a number of difficult-to-treat psychological issues and that any children in their care would be at a "very high, long-term chronic risk for neglect." Additionally, one of the children testified that she was doing well in foster care, wanted to remain there, and did not believe that respondents had changed. The trial court, Erik J. Stone, J., concluded after considering the record that statutory grounds for terminating respondents' parental rights had been established under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j) and that termination of parental rights was in the children's best interests. Respondents appealed.

The Court of Appeals *held*:

1. Respondents argued that the trial court erred by failing to inform them, pursuant to MCR 3.971(B)(4), that their pleas could

be used as evidence against them during subsequent termination proceedings. Child-protective proceedings are comprised of two phases: the adjudicative phase and the dispositional phase. The fact-finding adjudication of an authorized petition to determine whether a minor comes within the jurisdiction of the court is called a trial. During the trial, the court determines whether the parent is subject to its dispositional authority. Pleas generally waive certain rights; respondents' pleas effectively waived their rights to a jury trial, to cross-examine witnesses, and to force petitioner to prove grounds for jurisdiction at trial. The record showed that, although the trial court advised respondents of most of the rights listed in MCR 3.971, it failed to advise them that their pleas could later be used against them in a termination-of-parental-rights proceeding, contrary to MCR 3.971(B)(4). However, respondents were not prejudiced by this error because it was not outcome-determinative. The trial court informed respondents of most of the rights that they were waiving, and the record showed that respondents reviewed the allegations in the petition with their attorney and that the allegations were read aloud at the hearing. Further, the record showed that respondents entered the pleas of their own free will and understood that if they failed to abide by the terms of the case service plan that was a consequence of the plea, their parental rights could be terminated. Additionally, MCR 3.971(B)(4) relates to the dispositional phase of the proceeding and does not address rights associated with the adjudicative phase. Therefore, the adjudicative phase was not tainted by the court's failure to advise respondents in accordance with MCR 3.971(B)(4). Additionally, the trial court's error did not affect the outcome of the dispositional phase of the proceeding given that the court relied on MCL 712A.19b(3)(c)(*ii*) as one of the statutory grounds for termination. That subsection provides that termination may be appropriate on the basis of *conditions other than the ones that led to adjudication*. It followed that the *adjudicatory error* under MCR 3.971(B)(4) did not affect the court's decision to terminate respondents' parental rights under MCL 712A.19b(3)(c)(*ii*).

2. Respondents also argued that the trial court clearly erred by finding that clear and convincing evidence supported termination of parental rights on four statutory grounds. The trial court found that grounds for terminating respondents' parental rights were established under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). The trial court did not clearly err by determining under Subsection (3)(j) that there was clear and convincing evidence that there was a reasonable likelihood, based on the conduct or capacity of respondents, that the children would suffer emotional harm if

they were returned to respondents. Termination was also appropriate under Subsection (3)(c)(*ii*) because respondents' mental health conditions, their prognoses, and their recurring legal issues were all conditions other than those that led to the adjudication; the conditions were not rectified; and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's age. Because termination was properly granted under Subsections (3)(j) and (3)(c)(*ii*), it was unnecessary to determine whether the trial court properly found that termination was supported by the other cited provisions of the statute because only one statutory ground needed to be established to terminate respondents' parental rights.

3. The trial court did not err by concluding that termination of parental rights was in the children's best interests. Respondents contended that termination of the parent-child bond was not in the children's best interests and would be traumatic for them, but a parent-child bond is not universally positive and may either benefit or harm a child, depending on the actions of their parent. In this case, respondents' neglect caused the parent-child bond to become emotionally harmful to the children. Additionally, the parent-child bond should not supersede all other considerations, and when all of the other pertinent factors and relevant evidence were considered, the record did not support that the trial court made a mistake with regard to its best-interest determinations.

Affirmed.

SHAPIRO, J., concurring, agreed with the majority opinion and noted that the evidence supporting termination of respondents' parental rights was overwhelming, so their pleas were of little significance to the outcome. Therefore, the error of the trial court in failing to advise respondents that their pleas could be used as evidence at a later termination proceeding was harmless.

SWARTZLE, J., concurring, agreed with the majority opinion but wrote separately to emphasize that respondents had not challenged the trial court's advice pursuant to MCR 3.971(B)(3). Judge SWARTZLE noted that the trial court had not advised respondents of a number of their rights under that subrule and that the rights listed in the subrule represent crucial aspects of the due-process protections afforded to respondents during the adjudication phase. If the trial court had relied solely on MCL 712A.19b(3)(c)(*i*) as grounds for termination of respondents' parental rights, the Court of Appeals' consideration of the appeal would have been very different because the trial court failed to properly advise respondents of the consequences of their pleas.

> Therefore, it was questionable whether respondents' plea admissions or independent evidence developed at the plea hearing that supported the admissions could have been subsequently used to terminate respondents' parental rights. Judge SWARTZLE also contrasted this case with *In re Ferranti*, 504 Mich 1 (2019), in which the trial court had failed to advise the respondents of any of their rights or of the consequences of their pleas and the Supreme Court held that the respondents were entitled to reversal. This case illustrates that *Ferranti* did not create a bright-line rule that any omission of the advice of rights in MCR 3.971(B), including a partial omission, is grounds for automatic reversal.

Anthony M. Damiano for the Department of Health and Human Services.

Donald J. Dowling, Jr., for respondents.

Michael Vogler for the minor children.

Before: CAMERON, P.J., and SHAPIRO and SWARTZLE, JJ.

CAMERON, P.J. Respondents appeal as of right the trial court's order terminating their parental rights to their two minor children[1] under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (c)(*ii*) (failure to rectify other conditions), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that the children will be harmed if returned to the parents). We affirm.

I. FACTUAL BACKGROUND

Respondents' parental rights were terminated due to their neglect of their minor children over the course of several years. In March 2017, the Department of Health and Human Services filed a petition seeking

[1] We refer to the minor children as "the daughter" and "the son" in this opinion.

the children's removal. The petition alleged that respondents had been the subjects of Child Protective Services complaints on 18 prior occasions, with those prior complaints regarding both of respondent-mother's other children, who had since become adults, and the minor children at issue in this case. Petitioner also alleged that over the course of several years, numerous caseworkers had visited respondents' home and found it in appalling condition. During this time, infestations of spiders and cockroaches had been observed, as had mold and flooding. Cockroaches had been observed crawling over food in respondents' refrigerator. The daughter was significantly overweight, her bedroom had an "unbearable" odor of urine, and her mattress was so saturated with urine that it had soaked through and inundated the floorboards. The electricity had been shut off at times for nonpayment of outstanding bills, and the plumbing was nonfunctional at times. Caseworkers discovered animal feces and urine in the basement. The minor children had also been habitually absent from school, often without excuse, and had been sent to school with poor hygiene, noticeable body odor, "greasy" hair, and ill-fitting, unwashed clothing that sometimes smelled strongly of urine or feces. As a result, the children had been bullied by their peers. Petitioner alleged that services and assistance had been provided to respondents but that they had failed to rectify the problems. After a preliminary hearing, the trial court authorized the petition and ordered the children removed from respondents. The children were eventually placed in a foster home in Traverse City. After their removal, respondents' son was assessed and diagnosed with autism spectrum disorder.

At a pretrial hearing on April 21, 2017, respondents' attorney informed the trial court that he had spoken

with respondents "at length" the previous day and that respondents wished to enter a plea to jurisdiction rather than proceed to a trial. Respondents' attorney stated:

> We went over the petition, and picked out portions we believe . . . will allow the Court to take jurisdiction. I explained to [respondents] if the Court takes jurisdiction then they're going to have to abide by the conditions and terms of the parent agency treatment plan, as well as recommendations . . . after the psychological [evaluations are] done. They are both in agreement with that.
>
> I explained to them that they would have a right to a trial on the issue of jurisdiction before the Court or jury. They've agreed to waive those—or that right. I've also went over [sic] the rights to have witnesses called and subpoena witnesses and things of that sort.
>
> They are going to tender a plea this morning, understanding that if they don't comply with the case service plan, eventually the Court will entertain termination of parental rights. . . .

The trial court subsequently gave respondents an abbreviated advice of rights, stating as follows:

> I just want to ensure that you do understand that if you do enter a plea, that is if you admit allegations that enables the Court to take jurisdiction, that you then are submitting to the jurisdiction of the Court. You must participate in and benefit from a case service plan, an initial admonition from the Court is going to be we want you to be reunified with your children, however, if you do not cooperate with and benefit from the provisions of the case service plan, you're risking termination of your parental rights. . . .

When asked whether they understood, both respondents answered "Yes." Respondents also indicated that they were entering their pleas of their "own free will." The trial court accepted respondents' pleas. As sum-

marized by respondents' attorney, the factual basis for the pleas was respondents' joint admission that services had been "provided to them over the course of the last couple of years," "those services did not result in an improvement of their home situation," they had "neglected their children because the home was not fit for them because it was unsanitary," and they were facing eviction.

Respondents were subsequently convicted of fourth-degree child abuse, MCL 750.136b(7), arising out of the same circumstances alleged in the initial petition in this case and were sentenced to 90 days in jail. Respondents indicated that they did not want to arrange any face-to-face visitation with the minor children while incarcerated. When respondents were released from jail in November 2017, they were homeless, unemployed, and actively seeking public assistance. They moved into a motel and made arrangements to move into an apartment a few weeks later.

According to the caseworker, Amanda Fisher, as of a review hearing on May 14, 2018, the children were doing well in foster care, and respondents had been making steady progress. Respondents had completed parenting classes, they had obtained suitable housing, they were engaging in therapy, and they were acting appropriately during supervised weekly visits with the children, which they had attended consistently. On the basis of respondents' progress, Fisher recommended that petitioner be given discretion to permit unsupervised visitation. However, the daughter had asked for an opportunity to meet with respondents before any unsupervised visitation was permitted, and the daughter's therapist offered to perform family counseling sessions. The trial court agreed and entered an order to that effect. In an attempt to qualify for a housing

subsidy, however, respondents intentionally became homeless. Consequently, no unsupervised visits ever occurred.

In July and August 2018, the daughter's therapist, Paula Kilcherman, held several family therapy sessions with the daughter and respondents. During those sessions, respondents tended to blame the daughter for the children's removal. Near the end of August 2018, the family therapy sessions were terminated at the daughter's request. The daughter believed that respondents had not changed, and she was upset with what she perceived as their failure to take "responsibility for their behaviors." Thereafter, the daughter consistently maintained that she wanted to "move on" and have no further contact with respondents.

Petitioner subsequently filed a supplemental petition seeking termination of respondents' parental rights. In October 2018, the children's lawyer-guardian ad litem (LGAL) moved to suspend further visits between respondents and the minor children pending a dispositional hearing concerning termination. Two caseworkers—Fisher and Danielle Mankin—testified in support of the LGAL's motion, stating that suspension of further visits would best serve the children's interests and noting that the daughter had refused to participate in any further visits with respondents. Fisher noted that the son was excited for visits but that the visits also seemed to cause him anxiety. The trial court granted the LGAL's motion to suspend visitation pending a hearing concerning termination.

By the December 2018 review hearing, respondents had obtained a new home, which petitioner deemed to be appropriate. At the parties' agreement, the proceedings were adjourned to give the children an opportunity to visit the home. The visit took place either on or

around Christmas 2018. Although respondent-mother believed that the visit went well, the daughter informed Kilcherman that she was "very upset" because respondents had made "promises" to her that were "contingent on her . . . coming home."

In January 2019, the daughter gave Kilcherman a letter in which the daughter made allegations of inappropriate sexual behaviors in the past involving herself, respondents, and several of her older brothers. Kilcherman believed that the daughter's allegations were genuine and not a contrived means of seeking termination of respondents' parental rights.

At the May 2019 review hearing, Kilcherman testified that the daughter had made significant progress since entering foster care. Before her removal, she had been suicidal. Since removal, her general hygiene had improved "tenfold." She had also lost significant weight, stopped wetting the bed, "become successful in school," gained confidence, increased her social interaction with peers, garnered "a few friends," developed better "coping skills," and joined the school marching band. Kilcherman agreed that the daughter was capable of making "informed and responsible decisions about where she wants to live," and she noted that the daughter had made seemingly credible threats on more than one occasion that she would run away from home if she was returned to respondents. The daughter was angry with respondents, and Kilcherman believed that she would suffer behavioral, physical, and emotional regression if she was forced to return to respondents against her will. According to Kilcherman, the daughter required permanency and her uncertainty in that respect was holding her back from achieving further progress.

The son's Board-Certified Assistant Behavior Analyst, Megan Keyes, testified that she was tasked with developing programming to assist the son with his autism-related skill deficits and that she had been working with the son for about a year and a half. Such programming included family training involving the foster parents, and Keyes indicated that the son "was really lucky with the foster parents that he got" because the foster mother had been proactive about autism treatment even before the son was referred for services. The foster parents had also successfully potty-trained the son. According to Keyes, the son was in the fifth grade and functioning at a kindergarten or first-grade level academically, but he had made significant progress while working with Keyes.

Family support specialist Celia Anderson supervised several of respondents' visits with the children from October 2017 through August 2018, when the daughter asked to stop the family therapy sessions. Anderson opined that the visits went well and respondents acted appropriately. In particular, over time respondents had begun to bring healthier meals and snacks for the children, and they were better at monitoring the children's portion sizes. The children generally seemed reluctant to leave the visits that Anderson observed, and there seemed to be a solid parent-child bond.

The foster mother testified that the children had been placed in her home since April 2017. The daughter had bonded with one of the foster family's daughters, who was around the same age as her. The foster mother confirmed that Anderson and Fisher had supervised different visits, and she stated that the children showed some regression and behavioral issues following visits with respondents. The daughter would

overeat following the visits, and the son often seemed withdrawn or angry afterward. During one visit in particular, which followed an upsetting family therapy session, the daughter had become emotional and asked to leave early. The foster mother confirmed that the daughter had threatened to run away from home if she was returned to respondents' home. The foster mother opined that reunification "would hurt the kids."

On June 1, 2019, a police officer was dispatched to an adult foster care home where respondent-mother's adult son, who had autism, had previously resided. Respondents were attempting to remove "an old truck, . . . a snowmobile, and trailer" that belonged to respondent-mother's adult son. The officer informed respondents that they could not use the truck to tow away the other equipment because the truck was unregistered and uninsured. The officer arrested respondents after learning that they had outstanding arrest warrants for failure to pay fines. A few days later, the same officer received a report that respondent-mother's adult son had been seen removing the truck from the adult foster care home. The officer located the truck as it was being driven by respondent-father, who was towing the trailer and snowmobile. Respondent-mother was following him in respondents' car, with her adult son as her passenger. The officer attempted to initiate a traffic stop, but respondents refused to pull over and instead led the officer on a high-speed chase through a nearby town. Respondents were eventually apprehended and charged with fleeing or eluding a police officer, MCL 750.479a.

The termination hearing was held on two dates in July 2019. Dr. Timothy Strauss, a clinical psychologist, testified that he had performed clinical evaluations on

respondents and both children in 2017. Respondent-father "reported that he had been in special education his whole life," had dropped out of high school, was unemployed, and was "on disability . . . , initially for learning problems but also physical problems." Respondent-father also reported "significant symptoms of depression"; he was unsure as to whether he may have been on any medication for depression and advised Dr. Strauss to ask respondent-mother about his medications. In general, respondent-father presented as "kind of a depressed, withdrawn, somewhat isolated person" with poor interpersonal skills and a "lower I.Q." Later testing revealed that respondent-father had an "extremely low" IQ score, falling in the bottom two percentile. Dr. Strauss opined that because of respondent-father's cognitive deficits, respondent-father would have difficulty parenting, particularly a child with special needs. Dr. Strauss diagnosed respondent-father with "major depression with anxious features" and "dependent personality disorder with schizoid traits." As a result of the borderline personality disorder, Dr. Strauss opined that respondent-father would "be passive in relationships . . . and have difficulty with attachment, and closeness, and empathy." Although Dr. Strauss recommended services for respondent-father, including further assessments, a medication review, and budgeting assistance, he believed that his prognosis was "very poor" because he would likely neglect his treatment. Dr. Strauss testified that personality disorders are "difficult to treat and typically take a year or two of therapy" and that respondent-father's low IQ was effectively untreatable.

Dr. Strauss's evaluation of respondent-mother revealed that she suffered from degenerative physical disabilities, including pain in her back and knees. She

reported that she was on a "variety of medications," including antianxiety and antidepressant drugs, plus medications for pain, chronic headaches, and asthma. Respondent-mother also reported that she had previously been diagnosed with post-traumatic stress disorder. Dr. Strauss diagnosed respondent-mother with "a mixed personality disorder with dependent, avoidant and schizoid traits," "major depression with anxiety," and "an average I.Q." Respondent-mother also had difficulty budgeting. Like respondent-father, her personality tended to be "dependent, . . . withdrawn, [and] rather passive." Although Dr. Strauss recommended various therapies, budgeting assistance, and a medication review, he viewed respondent-mother's general prognosis as "poor." He agreed that the prognosis for her "not to be a neglectful parent" as "very poor." Dr. Strauss explained that personality disorders "just take a long time to treat," and "if you have special needs children it makes it very complicated to pull off and be fully functional as a parent." Indeed, respondent-mother had received similar diagnoses from a different doctor in 2014 and there had been no "significant . . . positive change[.]"

With regard to the minor children, Dr. Strauss noted that the son suffers from "severe autism." Dr. Strauss diagnosed the daughter with "generalized anxiety disorder," which is common in children who have "separation anxiety." In Dr. Strauss's estimation, when he examined respondents in 2017, they lacked the capabilities to provide the son with the highly structured environment and the treatment plan that he required. They also lacked the initiative and motivation necessary to assist the daughter with achieving a regular routine, eating well, exercising, and maintaining proper hygiene. In sum, Dr. Strauss believed that

children in respondents' care would suffer "a very high, long-term chronic risk for neglect[.]"

Fisher testified that she performed two home visits at the children's foster placement in the two months before the termination hearing. The children were "continu[ing] to do well" in that placement with "no change in their behaviors." Fisher believed that respondents had failed to "benefit from certain services, particularly mental health services." She opined that—although the minor children loved respondents and were bonded to them—it would be in their best interests to terminate respondents' parental rights. Fisher noted the great progress the children had made in foster care, her belief that such progress would be jeopardized if reunification occurred, respondents' seeming inability to maintain stability and provide for the children's special needs, and the fact that the parent-child bond had seemingly weakened since the children entered foster care.

Mankin testified that respondents had demonstrated some benefit from the services they received and had maintained suitable housing for the approximately six-month period preceding the termination hearing. However, Mankin had doubts that respondents would be able to maintain housing over time. Respondents had been experiencing budgetary problems and had outstanding arrest warrants. Moreover, they had not adequately addressed their psychological problems, and the prognosis of full recovery was not encouraging. Although respondents had engaged in some counseling, they had been inconsistent in attending the sessions. In Mankin's view, although respondents seemingly loved the children, they had demonstrated that they were not capable of caring for their special needs.

Respondent-mother testified at the termination hearing and admitted that, at the time of adjudication, their home had been unsuitable for the children and that respondents had neglected them. Respondent-mother testified that respondents loved their children, and respondent-mother maintained that they had made great strides during the pendency of the case. Respondents were residing in a clean, appropriate home in a trailer park that was located in a safe neighborhood in Traverse City and had a play area for the children. Respondents had secured a housing voucher that paid 75% of their rent. They were paying their bills consistently and had developed a payment plan to pay off court fines that they owed. Also, the fleeing or eluding charges against them had been "discharged or dismissed," with respondent-father evidently entering a plea to serve three days in jail and pay a $300 fine for driving the truck without registration or proof of insurance. Respondents had also changed to healthier eating habits and planned to ensure proper nutrition and dietary restrictions for the minor children in the future. Respondent-mother was attending individual counseling sessions and joint counseling sessions with respondent-father, and she believed they were benefiting from counseling.[2] Also, they were taking prescribed psychoactive medications that helped with their psychological problems. Respondent-mother also believed that she had benefited from parenting classes and budgeting services she had received during the case.

On cross-examination, respondent-mother admitted that, despite the psychological issues she had from being raised in an "extremely abusive" home, she did

[2] Respondent-mother denied that she had any type of personality disorder.

not attend any individual counseling sessions from June 2018 to February 2019. Respondent-mother also admitted to having ongoing financial difficulties, failing to pay court fines and costs, further criminality on the part of respondent-father, and to the fact that her driver's license was either suspended or "expired and suspended." On the topic of the daughter's past bedwetting, respondent-mother suggested that it might have been done "on purpose," with the daughter intentionally urinating in her bed because she had been "[t]oo lazy to get out, . . . more busy watching her [TV], or cutting up paper, or playing on her computer, or playing on her phone."

At the outset of the termination hearing, there was a discussion about whether the then 15-year-old daughter would testify. Petitioner's attorney and the LGAL were opposed to her testifying because the daughter's therapist indicated it would be traumatic for her to testify in open court. However, respondents called the daughter as a witness. She testified that she and the son "get along just fine" with the foster family and she thought that the son had made quite a bit of progress in that placement. The daughter identified respondents by their full names, rather than referring to them as "mom and dad" or "mother and father." She indicated that respondents had neglected her and that she had been abused sexually, physically, and emotionally in their household. Conversely, her foster parents were supportive and provided a safe, clean home. The daughter also testified that she was no longer being bullied in school and had lost "a total of 72.5 pounds." The daughter felt strongly bonded with her foster family, and while she still "kind of" loved respondents, she wanted no further contact with them even if they were able to maintain a stable home environment. The daughter did not believe that respondents had mean-

ingfully changed or that they were capable of providing proper care for her, and she would refuse to return to them regardless of the outcome of these proceedings. Instead, she wanted to remain in foster care. The son, however, continued to inform the daughter that he wanted to "go home" to respondents. She attributed this to his lack of understanding of the situation.

The trial court permitted the daughter to read two prepared statements, which summarized her feelings as follows:

> I grew up in a house of dog and chicken feces all over the house and never knew how to bathe, never had friends, hopping house to house. Now, I have a lot of friends that support me. I smell like laundry detergent and soap. I love school to death and I'm on the Honor Roll for the second year in a row. And this is also my cleanest house I've ever lived in.
>
> * * *
>
> So, when I was raised with my parents I felt like, just thinking about it right now, that I am very livid and disgusted about the question, why am here [sic] or why was I treated like this by my own parents? But, here's the thing, children should not be treated like pets out of a dumpster, basically. Especially by their siblings. Even parents know how to treat their kids, and no one has dog feces or chicken feces, especially under a truck topper, in the living room. And I was always the one who cleaned it up. So, my basement was smelling like bleach all the time because it was the last minute before the cop came in the house to inspect the basement to see if it was still a safe place. And I didn't know how to bathe. And my life was horrible because I was always bullied by popular kids every day of my life. And it wouldn't stop. And I had an older brother . . . who forced me to watch porn. And he also called me a lesbian. So, I didn't know what that meant. . . . And we kept getting evicted. They never paid bills or taxes. We always went to amusement parks for only fun.

> And I—every time I was bullied, and I told them about it, they were not supportive at all. And I never knew what foster care was until now and I absolutely love it. I think its [sic] heaven for me, basically, because I'm in a family that supports me. They welcomed me into their home. They take care of all the bullies that I have in my way. And they're just very protective.

During closing arguments, the LGAL indicated that he believed it was vital for the trial court to terminate respondents' parental rights in order to afford the children permanency. He also argued that the trial court should disregard the son's stated desire to return to respondents given the son's limited capacity to reach a rational decision in that respect. After considering the evidence on the record at substantial length, the trial court found that statutory grounds for terminating respondents' parental rights had been established under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j), and that termination of their parental rights was in the children's best interests. This appeal followed.

II. ADJUDICATION

Respondents first argue that when the trial court accepted their pleas to establish its jurisdiction over the children, the court erred by failing to properly advise respondents of all of the consequences of their decision as required by MCR 3.971(B). More specifically, respondents contend that the trial court failed to comply with MCR 3.971(B)(4) by failing to advise them that their pleas could be used against them during subsequent termination proceedings. Respondents did not move to withdraw their pleas in the trial court or otherwise object to the advice of rights that they were provided. Therefore, this issue is unpreserved. See *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989) (when the respondent did not argue in the trial

court that he should be allowed to withdraw his plea, and therefore, the trial court never addressed the issue, "the issue was not preserved for appeal").

Both this Court and our Supreme Court have applied the plain-error standard set forth in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), to unpreserved claims of error arising out of child-protective proceedings. See *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019); *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). The *Carines* test "has four elements":

> 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) . . . the plain error affected substantial rights . . . [, and 4)] once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted . . . when the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings . . . . [*People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018), quoting *Carines*, 460 Mich at 763-764 (alteration and some ellipses in original).]

"A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.' " *Randolph*, 502 Mich at 10. An error has affected a party's "substantial rights when there is 'a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.' " *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019), quoting *Carines*, 460 Mich at 763. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852

NW2d 524 (2014). The family court determines whether to take jurisdiction of the child during the adjudicative phase. *Id*. The "fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court" is called a "trial." MCR 3.903(A)(27). The term "trial" includes a "specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court." MCR 3.903(A)(27). A parent may also waive his or her right to a trial and admit the allegations in a petition or plead no contest to them. MCR 3.971(A); *In re Sanders*, 495 Mich at 405.

Pleas generally waive certain rights, and respondents' jurisdictional pleas in this case effectively waived, among other things, their rights to a jury trial, to cross-examine the witnesses against them, and to force petitioner to prove grounds for jurisdiction at a trial. See MCR 3.971(B)(3) (enumerating the rights that a respondent must be advised that he or she will waive by entering a jurisdictional plea). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970). Hence, for a plea to constitute a valid waiver of constitutional rights, the person entering it must be made "fully aware of the direct consequences of the plea." *People v Cole*, 491 Mich 325, 333; 817 NW2d 497 (2012) (quotation marks and citation omitted). "A consequence is 'direct' where it presents 'a definite, immediate and largely automatic effect' on the defendant's range of punishment." *United States v Kikuyama*, 109 F3d 536, 537 (CA 9, 1997), quoting *United States v Wills*, 881 F2d 823, 825 (CA 9, 1989).

In the context of jurisdictional pleas in child-protective proceedings, "[o]ur court rules reflect this due-process guarantee." *In re Ferranti*, 504 Mich at 21.[3] MCR 3.971(B) provides, in relevant part, as follows:

> Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:
>
> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,
>
> (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
>
> (c) have witnesses against the respondent appear and testify under oath at the trial,
>
> (d) cross-examine witnesses, and
>
> (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

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[3] On the date that *In re Ferranti* was released, our Supreme Court amended MCR 3.971 to require trial courts to inform a respondent that appellate review is available to challenge the "court's initial order of disposition" and that the respondent "may be barred from challenging the assumption of jurisdiction in an appeal from the order terminating parental rights if [the respondent] do[es] not timely file an appeal of the initial dispositional order . . . ." MCR 3.971(B)(6) and (8), as amended June 12, 2019, 504 Mich xcvi, xcvii. Additionally, in the event that a respondent is not informed that he or she is entitled to challenge a trial court's assumption of jurisdiction on appeal from the initial dispositional order, "the respondent may challenge the assumption of jurisdiction in an appeal from the order terminating [the] respondent's parental rights." MCR 3.971(C), as amended June 12, 2019, 504 Mich xcvi, xcviii. The child-protective proceeding at issue in this appeal was initiated in 2017, and respondents entered their pleas in April 2017.

> (4) *of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent*. [Emphasis added.]

The record supports that the trial court advised respondents of *most* of the rights listed in MCR 3.971. However, contrary to MCR 3.971(B)(4), the trial court failed to advise them that their pleas could "later be used as evidence in a proceeding to terminate parental rights." A written advice of rights form containing such information does not appear in the record. Thus, by failing to properly advise respondents as required by MCR 3.971(B)(4) that their pleas could "later be used as evidence in a proceeding to terminate parental rights," the trial court erred.

However, with regard to the prejudice prong of the plain-error test, we conclude that respondents have failed to carry their burden of demonstrating that the adjudicatory error at issue in this case was outcome-determinative. In *In re Ferranti*, 504 Mich at 30-31, our Supreme Court held that, because the trial court had failed to advise respondents of the rights they were waiving and of the potential consequences of their pleas, the trial court violated their due-process rights because the pleas were unknowing and involuntary. It was undisputed in that case that the trial court's advice of rights was deficient because the court failed to advise the respondents of "any" of the waived rights enumerated by MCR 3.971(B)(3) or (B)(4). *Id*. at 31.

MCR 3.971(B)(3) lists the rights that a parent waives by virtue of entering a plea, as opposed to requiring petitioner to proceed to trial and prove the allegations contained in the petition by a preponderance of the evidence. MCR 3.972(C)(1). The rights outlined in MCR 3.971(B)(3) are particularly impor-

tant because they directly relate to the adjudicative stage of the child-protective proceeding. The adjudicative stage is a critical stage in the proceeding because if the trial court exercises jurisdiction, then the parent will be unable to control the care and custody of his or her child, *In re Deng*, 314 Mich App 615, 626; 887 NW2d 445 (2016), and will be subjected to "the dispositional authority of the court," MCR 3.903(A)(27). See *In re Sanders*, 495 Mich at 405-406 ("While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights.") (quotation marks and citation omitted). In contrast, if the trial court determines that it lacks authority to exercise jurisdiction, the minor child must be returned to the care of his or her parent(s). See MCL 712A.18(1) (providing that the trial court must dismiss the petition if it is found that the petition concerning the child at issue does not fall within the chapter). The importance of the adjudicative stage is reflected by the fact that it is the only stage of the proceeding when a parent is entitled to a trial. See MCR 3.903(A)(27); see also MCR 3.977(A)(3); *In re Sanders*, 492 Mich at 405-406. Thus, by failing to advise the respondents of the rights outlined in MCR 3.971(B)(3), the trial court in *In re Ferranti* effectively tainted the adjudicative stage of the proceeding.

This case does not feature the numerous errors that occurred in *In re Ferranti*. Respondents in this case only take issue with the fact that the trial court failed to advise them that their pleas could "later be used as evidence in a proceeding to terminate parental rights" as required by MCR 3.971(B)(4). Thus, unlike the parents in *In re Ferranti*, respondents in this case were informed of most of the rights that they were waiving,

including their rights to a trial by judge or jury, to have witnesses against them appear, and to subpoena witnesses. Moreover, the transcript of the plea proceeding supports that respondents reviewed the allegations in the petition with their attorney, who represented them at the plea hearing. See MCR 3.971(B)(1) and (2). The record also supports that respondents discussed the allegations contained in the petition with their attorney and considered their decision. Respondents' attorney indicated the following at the hearing:

> I did speak at length with the Pedersons yesterday. We went over the petition, and picked out portions we believe that will allow the Court to take jurisdiction. . . . They are both in agreement with that.
>
> I explained to them that they would have a right to a trial on the issue of jurisdiction before the Court or jury. They've agreed to waive those—or that right. I've also went over [sic] the rights to have witnesses called and subpoena witnesses *and things of that sort*. [Emphasis added.][4]

Each of the allegations that respondents were pleading to were read aloud at the hearing. Thus, respondents were clearly advised of the allegations to which they were pleading. Additionally, and importantly, respondents confirmed that they were entering pleas of their own free will. Specifically, before the trial court accepted respondents' jurisdictional pleas, the following line of questioning occurred:

> *Trial Court*: Is anyone, Ms. Pederson, twisting your arm to enter into this plea or are you doing it of your own free will?

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[4] During oral argument in this Court, respondents' appellate attorney, who was also respondents' trial attorney, indicated that he could not recall whether he had advised respondents that their pleas could be used against them during termination proceedings.

Ms. Pederson: My own free will.

Trial Court: And Mr. Pederson?

Mr. Pederson: My own free will.

Although respondents were not informed that their pleas could "later be used as evidence in a proceeding to terminate parental rights," respondents were informed on several occasions that if the pleas were accepted, a consequence of their pleas would be that they would be required to comply with the case service plans. The record of the plea proceeding supports that respondents had reviewed the case service plans before the plea hearing. Furthermore, respondents were informed several times that another possible consequence of their pleas was that their parental rights could be terminated if they did not comply with the case service plans. Respondents indicated under oath that they understood this, thereby supporting that they understood the nature and the consequences of their pleas.

Therefore, this is not a case involving a complete failure to address the requirements listed in MCR 3.971(B)(4). Furthermore, MCR 3.971(B)(4) relates to the dispositional phase of the proceedings—as opposed to the adjudicative phase—in that Subrule (B)(4) does not address the rights associated with an adjudication trial. Rather, MCR 3.971(B)(4) concerns how entering a plea at the adjudication stage could later be used against respondents during the dispositional phase. Thus, unlike in *In re Ferranti*, the adjudicative stage was not tainted by the trial court's failure to advise respondents of their rights under MCR 3.971(B)(4). Rather, respondents were aware that they were giving up the right to an adjudication trial before entering pleas.

Additionally, we conclude that the trial court's error did not affect the outcome of the dispositional phase of the proceedings. In *In re Ferranti*, 504 Mich at 12, the trial court relied on two statutory grounds for termination: MCL 712A.19b(3)(c)(*i*) (conditions that led to the adjudication continue to exist) and MCL 712A.19b(3)(g) (parent is unable to provide proper care and custody). In addition to citing both of those grounds, the trial court in this case also relied on MCL 712A.19b(3)(c)(*ii*), under which termination may be appropriate on the basis of grounds "other" than those that led to the adjudication. See *In re JK*, 468 Mich 202, 210-212; 661 NW2d 216 (2003). As explained below, the trial court did not clearly err by finding that termination of respondents' parental rights was warranted under MCL 712A.19b(3)(c)(*ii*). Although respondents' pleas served to establish a statutory basis for jurisdiction, because only one statutory ground for termination need be established, *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), and because termination under MCL 712A.19b(3)(c)(*ii*) is, by definition, unrelated to the grounds that led to the adjudication, it follows that the adjudicatory error at issue here did not affect the decision to terminate respondents' parental rights.

Because we cannot conclude from the record that respondents' pleas were not knowingly and voluntarily made or that respondents' decision to plead affected the adjudicative or dispositional stages of the proceeding, we conclude that respondents have failed to carry their burden of demonstrating prejudice. See *Carines*, 460 Mich at 763.

Furthermore, even if we were to conclude that respondents' substantial rights were affected, respondents would not automatically be entitled to reversal.

Rather, "[r]eversal is warranted . . . when the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings." See *Randolph*, 502 Mich at 10. In this case, respondents have not argued that they would not have pleaded to some of the allegations in the petition had the trial court informed them that their pleas could be used as evidence against them if termination proceedings commenced.[5] Respondents were informed that their parental rights could be terminated if they did not comply with the case service plans. Before respondents entered their pleas, they had reviewed the case service plans and therefore knew what would be required of them. After respondents failed to comply with and benefit from the case service plans, termination proceedings were initiated. As discussed later, overwhelming evidence supported termination of respondents' parental rights pursuant to MCL 712A.19b(3)(c)(*ii*) and that termination was in the minor children's best interests. Given this record, we conclude that respondents are not entitled to relief under plain-error review.

III. STATUTORY GROUNDS FOR TERMINATION

Respondents argue that the trial court clearly erred by finding clear and convincing evidence supporting the four statutory grounds cited in support of termination. We find no clear error warranting reversal.

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[5] Although the Court in *In re Ferranti*, 504 Mich at 30, made it clear that "constitutional deficiencies . . . are not forgiven by what might have transpired at [an adjudication] trial," we note that respondents faced overwhelming evidence against them. Had an adjudication trial been conducted, the trial court likely would have found that one or more of the statutory grounds alleged in the petition were proven by a preponderance of the evidence. See *id*. at 61-62 (MARKMAN, J., dissenting).

We review for clear error the trial court's decision whether grounds for termination have been proven by clear and convincing evidence. *In re Medina*, 317 Mich App 219, 226; 894 NW2d 653 (2016). "A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made" with the reviewing court "defer[ring] to the special ability of the trial court to judge the credibility of witnesses." *In re LaFrance Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014).

"To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App at 32. The clear and convincing evidence standard is "the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Evidence is clear and convincing if it

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (quotation marks, citation, and brackets omitted).]

"Evidence may be uncontroverted, and yet not be 'clear and convincing.' " *Id*. (quotation marks and citation omitted). "Conversely, evidence may be 'clear and convincing' despite the fact that it has been contradicted." *Id*. (quotation marks and citation omitted).

The trial court found that grounds for terminating respondents' parental rights were established under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j), which authorize termination under the following circumstances:

> (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.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, 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.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

In our estimation, Subsection (3)(j) provides the best support for termination in this case. For purposes of that subsection, the harm in question need not be physical; a "risk of *emotional* harm" can suffice. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). On this record, the trial court did not clearly err by determining that there was clear and convincing evidence that there was a reasonable likelihood, based

on the conduct or capacity of respondents, that the minor children would suffer emotional harm if they were returned to respondents. The daughter was steadfastly opposed to reunification, and both of the children had thrived in foster care. Dr. Strauss's expert opinion, which was not controverted by any other expert testimony, was that it would take respondents years to address their psychological issues under optimal circumstances. Dr. Strauss further opined that respondents' prognoses were rather poor even with treatment, that respondent-father's low IQ was irreversible, and that any child placed in respondents' care would suffer "a very high, long-term chronic risk for neglect." Moreover, respondents were admittedly unable to work, which restricted their income, and they owed tens of thousands of dollars in outstanding debts. In an attempt to meet some of those obligations, they had financially exploited one of respondent-mother's disabled adult children, thereby demonstrating their willingness to sacrifice the best interests of their children for their own self-interest. Respondents also frequently found themselves incarcerated and fined for a variety of petty crimes. Time and again, respondents were unable to accept responsibility for their own actions. This was poignantly demonstrated when, at the termination hearing, respondent-mother suggested that the daughter might have intentionally wet her own bed—to the point that it had become so saturated with urine that the floorboards beneath were soaked—because she was simply too "lazy" to get up and go to the bathroom. In sum, there was ample evidence for the trial court to conclude that there was a reasonable likelihood, based on the conduct or capacity of respondents, that the minor children would suffer emotional harm if they were returned to respondents.

For the same reasons that termination was appropriate under Subsection (3)(j), it was also appropriate under Subsection (3)(c)(*ii*). Respondents acknowledge that they were respondents in a child-protective proceeding and, before termination occurred, 182 or more days had elapsed since issuance of the initial dispositional order. Moreover, the conditions discussed above with regard to Subsection (3)(j)—respondents' mental health conditions, respondent-father's cognitive issues, respondents' prognoses, and respondents' recurring legal problems—are all conditions "other" than those that led to the adjudication because respondents made no admissions concerning those conditions in their jurisdictional pleas. Although the evidence establishes that respondents were afforded a reasonable opportunity to rectify these conditions through services, respondents failed to do so. Moreover, in light of Dr. Strauss's testimony, the trial court did not clearly err by finding that there was no reasonable likelihood that respondents would be able to rectify these conditions within a reasonable time given the ages of the children. Accordingly, we find no clear error with regard to Subsection (3)(c)(*ii*).

Having decided that termination was properly granted under Subsection (3)(j) and Subsection (3)(c)(*ii*), it is unnecessary to consider or decide respondents' claims of error concerning the other disputed grounds. See *In re Ellis*, 294 Mich App at 32 ("Only one statutory ground need be established . . . to terminate a respondent's parental rights, even if the [trial] court erroneously found sufficient evidence under other statutory grounds.").

IV. BEST INTERESTS

Respondents also argue that the trial court erred by finding that termination of their parental rights was in

the children's best interests. We disagree. The trial court's best-interest determination is also reviewed for clear error. *In re Medina*, 317 Mich App at 226.

MCL 712A.19b(5) provides, "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." As explained in *In re Medina*, 317 Mich App at 237:

> Although a reviewing court must remain cognizant that the fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State, at the best-interest stage, the child's interest in a normal family home is superior to any interest the parent has. Therefore, once a statutory ground for termination has been established by clear and convincing evidence, a preponderance of the evidence can establish that termination is in the best interests of the child. [Quotation marks, citations, and brackets omitted.]

"In making its best-interest determination, the trial court may consider the whole record, including evidence introduced by any party." *Id*. (quotation marks and citation omitted).

> [T]he court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014) (quotation marks and citation omitted).]

In support of their argument that the trial court erred by concluding that termination of their parental rights was in the children's best interests, respondents cite the parent-child bonds that existed in this case and contend that "[i]n the long run termination of these bonds will be traumatic and not in the children's best interest." This argument ignores that because of respondents' neglect, the parent-child bond had already been transformed into something that has traumatized the children. In *In re Medina*, 317 Mich App at 240, this Court addressed a similar argument as follows:

> Respondent argues that "[k]nowing who one's biological father is and having a relationship with him have intrinsic value." In a utopian world, that might be true. But ours is an imperfect world, and the "value" a child derives from the parent-child relationship is not, as respondent suggests, universally positive; if it were, there would be little need for child protective proceedings.

In other words, the parent-child bond is a blade that is capable of cutting both ways; whether it benefits or harms a child depends on how the parent wields it. In this case, respondents' neglect turned the parent-child bond into something emotionally harmful, and further contact with respondents will likely only prevent the children's psychological wounds from healing. Indeed, the 15-year-old daughter has consistently indicated that she would run away from home if forced to return to respondents. Consequently, respondents do not have an appropriate parent-child bond with the minor children.

Respondents' argument is also myopic, focusing on the parent-child bond to the exclusion of all else. Considering all of the other pertinent factors and the evidence on the whole, we are not definitely and firmly convinced that the trial court made a mistake with

regard to its best-interest determinations. Both children have flourished in foster care, and the foster mother indicated that the foster family was interested in adopting the children if respondents' parental rights were terminated. Given the length of these proceedings, the children's ages, and the children's special needs, the children are in desperate need of stability and permanency, which the foster family has been able to provide. Although respondents were able to secure appropriate housing during the proceeding, they have a long track record of evictions, unpaid debts, mental illness, criminality, and neglect. Moreover, Dr. Strauss indicated that their psychological problems made them far-from-effective parents, particularly for children with special needs. Therefore, the children would not have been safe in respondents' care. See *In re VanDalen*, 293 Mich App at 141. For those reasons, we are convinced that the trial court's best-interest determination was not clearly erroneous.

Affirmed.

SHAPIRO and SWARTZLE, JJ., concurred with CAMERON, P.J.

SHAPIRO, J. (*concurring*). I concur in the majority opinion. The issue before us is whether, before pleading to several allegations in the petition, respondents were advised that their pleas could be used as evidence at a later termination proceeding. The evidence supporting termination was overwhelming, and the fact of their pleas was of little, if any, significance to the outcome. In such a circumstance, I believe that the error was harmless.

SWARTZLE, J. (*concurring*). I join in full the well-reasoned majority opinion by Judge CAMERON. I write

separately to emphasize the point that respondents did not challenge the trial court's advice of rights set out in MCR 3.971(B)(3). Had they done so, this would have been a much different appeal. The trial court did not, for instance, explain to respondents that witnesses would have to testify "under oath," that respondents could cross-examine witnesses, or that petitioner would be required to prove allegations in the petition "by a preponderance of the evidence." These are crucial aspects of the "due-process protections" of a jury trial at the adjudication stage, as identified by our Supreme Court in *In re Ferranti*, 504 Mich 1, 30; 934 NW2d 610 (2019). We need not consider, however, whether omission of these rights from the advice of rights resulted in reversible error, unlike the situation in *Ferranti*. *Id*. at 30-31.

Similarly, had the trial court relied solely on MCL 712A.19b(3)(c)(*i*) as a ground for terminating respondents' parental rights, this would have been a much different appeal. Respondents were not adequately advised of the consequences of their pleas, specifically that their admissions could "later be used as evidence in a proceeding to terminate parental rights." MCR 3.971(B)(4). Given this omission, it is questionable whether any of respondents' plea admissions, or even any independent evidence developed at the time of the pleas that supported the admissions, could have been subsequently used as evidence to terminate their parental rights. While the trial court concluded that Subsection (3)(c)(*i*) did support termination, the trial court also found that there were sufficient other grounds, distinct from those to which respondents admitted at the adjudication stage, that supported termination. This further distinguishes the present case from *Ferranti*, 504 Mich at 9-13 (noting that termination in that case occurred

under MCL 712A.19b(3)(c)(*i*) and (g), and the allegations to which respondents pleaded were those that supported termination).

Finally, this case serves as a useful illustration that *Ferranti* should not be read as drawing a bright-line rule that any omission of the advice of rights identified in MCR 3.971(B) is a ground for automatic reversal. The omission in *Ferranti* was total; the omission here was partial. When the omission is partial, a careful, facts-and-circumstances approach is needed. If courts were instead to read *Ferranti* as establishing a bright-line rule of automatic reversal whenever any right in MCR 3.971(B)(3) or (4) is omitted, then the very real, practical concerns with respect to kids, foster parents, and adoptive parents identified by Justice MARKMAN in his dissent would be fully realized. *Ferranti*, 504 Mich at 48-50 (MARKMAN, J., dissenting). I do not read *Ferranti* as drawing a bright-line rule, and accordingly, I concur in full with the majority opinion.

PEOPLE v MOORMAN

Docket No. 349282. Submitted February 5, 2020, at Grand Rapids. Decided February 13, 2020, at 9:05 a.m.

Thomas Moorman was charged in the Alger Circuit Court with possession of alprazolam, MCL 333.7403(2)(b)(*ii*); possession of Ultram, MCL 333.7403(2)(b)(*ii*); obtaining a pistol without a license, MCL 750.232a(1); and carrying a concealed weapon (CCW), MCL 750.227. A police officer stopped defendant's vehicle for speeding; the police officer testified that he smelled a strong odor of fresh marijuana emanating from the vehicle, indicating to him that there was a "good quantity" of marijuana in the vehicle. Defendant initially denied having marijuana in the car. However, upon further questioning, defendant stated that he had harvested marijuana earlier that day. The officer testified that defendant claimed to have a medical marijuana card. The officer searched the vehicle to verify that defendant was within the regulated amount of marijuana under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The officer found pills in the vehicle for which defendant did not have a prescription. Defendant moved to suppress the evidence, arguing that under *People v Anthony*, 327 Mich App 24 (2019), the smell of marijuana alone did not provide probable cause to search a vehicle without other circumstances indicating that an individual possesses marijuana outside the allowable limits under the MMMA. Defendant further argued that the possession of a valid medical marijuana card eliminated any suspicion of criminal activity. The court, William W. Carmody, J., denied the motion, relying on *Anthony*. Defendant appealed.

The Court of Appeals *held*:

A traffic stop does not violate the Fourth Amendment when a police officer has an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law. 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. *People v Kazmierczak*, 461 Mich 411 (2000), held that the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor

vehicle under the motor vehicle exception to the warrant requirement. *Anthony*, 327 Mich App 24, held that a police officer had probable cause to search a publicly parked vehicle when the strong odor of burned marijuana emanating from the vehicle suggested that the defendant had been using marijuana. *Anthony* specifically involved the defendant's unprotected conduct of *using* marijuana in a public place, whereas in this case, defendant was in *possession* of marijuana in accordance with his caregiver card. Therefore, this case was distinguishable from *Anthony*, and the trial court erred by relying on *Anthony*. Nonetheless, the trial court's decision was proper under *Kazmierczak*. Defendant qualified for protection under the MMMA as a verified marijuana caregiver and was in possession of marijuana in a permitted area; however, the analysis had to move to a second question: whether the officer had probable cause to believe that the possession was unlawful because of the quantity involved. Under MCL 333.26424(b)(1) of the MMMA, defendant was allowed to possess a maximum amount of 2.5 ounces of marijuana per patient, and defendant testified that he had five patients. An important fact in this case gave rise to probable cause to believe that defendant's possession was not in conformity with the MMMA: defendant initially denied the presence of any marijuana in the vehicle, which was inconsistent with the officer's testimony that he smelled the odor of fresh marijuana. Accordingly, under *Kazmierczak*, the officer had probable cause to believe that defendant did possess marijuana and that defendant lied about it. Furthermore, defendant's deception about the presence of marijuana in the vehicle would give rise to probable cause to believe that the amount defendant possessed was greater than that permitted under the MMMA. Accordingly, the search of the vehicle was lawful.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Robert T. Steinhoff*, Prosecuting Attorney, for the people.

Superior Law, PLLC (by *Antonio Ruiz*) for defendant.

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM. Defendant, Thomas Moorman, appeals by leave granted an order denying his motion to

suppress the evidence and dismiss the charges against him, including possession of alprazolam, MCL 333.7403(2)(b)(*ii*); possession of Ultram, MCL 333.7403(2)(b)(*ii*); obtaining a pistol without a license, MCL 750.232a(1); and carrying a concealed weapon (CCW), MCL 750.227. Defendant argues that the trial court erred by denying his motion to suppress pursuant to our recent decision, *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019), because the odor of marijuana alone was insufficient to establish probable cause when defendant possessed a medical marijuana card in accordance with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. We affirm.

I. FACTUAL BACKGROUND

In November 2018, Trooper Alan Park of the Michigan State Police stopped defendant's vehicle for speeding. Park testified that when he approached defendant's vehicle, he smelled a strong odor of fresh marijuana emanating from the vehicle, which indicated to him that there was a "good quantity" of marijuana in the vehicle.

Defendant initially denied having any marijuana in the car. However, upon Park's further questioning, defendant stated that he had harvested marijuana earlier that day. Park testified that defendant claimed to have a medical marijuana card, but Park could not recall whether defendant presented the card to him during the traffic stop. Defendant testified that he had produced a valid medical marijuana caregiver card to Park during the traffic stop and that he had five patients at the time. Park affirmed that the card's registration number was listed in the police report. The police report did not indicate when the card was presented.

Park testified that a search of the vehicle was performed to verify that defendant was within the

regulated amount of 2.5 ounces of medical marijuana. When asked what justification Park had for the search, he responded, "Just the odor of marijuana." After Park stated to defendant that he was going to search the vehicle because of the odor of marijuana, he asked whether defendant had any weapons in the vehicle. Defendant replied that he had a handgun and "slap[ped] it on the dash of his truck." Park determined that defendant did not have a Michigan permit for the gun; however, defendant claimed that he had a concealed pistol license (CPL) in Indiana. Defendant presented a Michigan driver's license and stated that he had lived in Michigan for at least a year. Park informed defendant that he was required to have a Michigan permit for the handgun and that Park would be seizing it. Defendant consented to a search of his person, which did not reveal any illegal contraband. Park then searched defendant's vehicle and found pills for which defendant did not have a prescription.

Defendant moved to suppress the evidence against him, arguing that the smell of marijuana alone does not provide probable cause to search a vehicle without other circumstances indicating that an individual possesses marijuana outside the allowable limits under the MMMA. Defendant further argued that the possession of a valid medical marijuana card eliminated any suspicion of criminal activity. Following a hearing and supplemental briefing concerning this Court's recent decision in *Anthony*, 327 Mich App 24, the trial court denied the motion, concluding that *Anthony* was dispositive.

II. ANALYSIS

This Court reviews de novo a trial court's ruling on a motion to suppress. *People v Hyde*, 285 Mich App 428,

436; 775 NW2d 833 (2009). "The trial court's factual findings are reviewed for clear error, and the underlying constitutional issues, including whether a Fourth Amendment violation occurred, are reviewed de novo." *People v Henry (After Remand)*, 305 Mich App 127, 137; 854 NW2d 114 (2014) (citation omitted). "A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake." *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011).

Both the United States Constitution and the Michigan Constitution guarantee the right of the people to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "The lawfulness of a search or seizure depends on its reasonableness." *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). Searches or seizures conducted without a warrant are per se unreasonable, subject to several well-delineated exceptions. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Therefore, "[i]n order to show that a search was in compliance with the Fourth Amendment, the police must show either that they had a warrant or that their conduct fell within one of the narrow, specific exceptions to the warrant requirement." *Kazmierczak*, 461 Mich at 418. Generally, "evidence that is obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

A traffic stop does not violate the Fourth Amendment when a police 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 Williams*, 236 Mich App 610, 612; 601 NW2d 138

(1999). "[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." *People v Williams*, 472 Mich 308, 315; 696 NW2d 636 (2005). "[U]nder the automobile exception, the police may search a motor vehicle without the necessity of first obtaining a warrant if probable cause to support the search exists." *Kazmierczak*, 461 Mich at 418-419. In *Kazmierczak*, our Supreme Court held that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement." *Id*. at 413.

Defendant contends that the smell of marijuana alone was insufficient to establish probable cause for the warrantless search of defendant's vehicle when defendant presented a medical marijuana caregiver card to the officer and that the trial court erred by relying solely on *Anthony* to support its denial of defendant's motion to suppress. Under the circumstances, we agree that the trial court erred by relying on *Anthony*, but we conclude that the trial court's decision was nonetheless proper under *Kazmierczak*.

In *Anthony*, we held that a police officer had probable cause to search a publicly parked vehicle when the strong odor of burned marijuana emanating from the vehicle suggested that the defendant had been using marijuana. *Anthony*, 327 Mich App at 45. We concluded that

> if the MMMA does not apply to a parked vehicle in a parking lot open to the public, then it likewise could not apply to a parked vehicle on a public street. Thus, because defendant used marijuana in his truck on a public street, the protections of the MMMA did not apply to defendant and *Kazmierczak* applied with full force to supply probable cause for the officers to search his vehicle. [*Id*.]

Defendant argues that this case is distinguishable from *Anthony*, and we agree. *Anthony* specifically involved the defendant's unprotected conduct of *using* marijuana in a public place, whereas defendant in this case was in *possession* of marijuana in accordance with his caregiver card. Thus, further analysis is required.

In this case, defendant was a verified marijuana caregiver, which qualified defendant for protection under the MMMA. Defendant was in possession of marijuana in a permitted area. Park conducted a traffic stop after observing defendant speeding on a public highway. The MMMA appears to allow an individual to *possess* marijuana so long as the individual is not in a school bus, on the grounds of a preschool or primary or secondary school, or in any correction facility. See MCL 333.26427(b)(2)(A) through (C). Defendant was pulled over at a "pump station area," and the record does not indicate that defendant was present at any of these prohibited locations.

Thus, unlike in *Anthony*, the activity (possession versus use) was not inherently unprotected under the MMMA. But the analysis must then move to a second question: Did the trooper have probable cause to believe that the possession was unlawful because of the quantity involved? As a caregiver, defendant was allowed to possess a maximum amount of 2.5 ounces of marijuana per patient. MCL 333.26424(b)(1). Defendant made no statements indicating that he possessed marijuana over his limit.[1] But we think that there

[1] We do note that defendant was protected from arrest only if he presented his registry identification card and a driver's license or other government-issued identification. MCL 333.26424(a). There appears to be some dispute over exactly when defendant presented his registry card during the encounter. For purposes of this appeal, we will assume that he did so before the search took place.

exists an important fact that does give rise to probable cause to believe that defendant's possession was not in conformity with the MMMA.

As noted earlier, defendant initially denied the presence of any marijuana in the vehicle. This claim was inconsistent with Park's testimony that he smelled the odor of fresh marijuana. Accordingly, under *Kazmierczak*, Park had probable cause to believe that defendant did possess marijuana *and* that defendant lied about it. Furthermore, we believe that defendant's deception about the presence of marijuana in the vehicle would give rise to probable cause to believe that the amount possessed was greater than that permitted under the MMMA. That is, if defendant's possession was lawful, it is reasonable to believe that he would simply admit to marijuana being in the vehicle and produce his registry card to establish its lawfulness. But if a person, even with a registry card, misrepresents that he has no marijuana in his possession, then it is reasonable to believe that he is doing so because the amount he possesses is in excess of that permitted by the MMMA.

In reaching this conclusion, we find support in our Supreme Court's decision in *Champion*, 452 Mich 92. In *Champion*, the police made an investigatory stop and subsequent frisk of the defendant. *Id*. at 95. During the pat down, the officer felt a pill bottle stuffed down the front of the defendant's sweatpants; the officer seized the bottle and discovered that it contained cocaine. *Id*. This Court concluded that the seizure of the pill bottle was unlawful because it was not readily apparent that the pill bottle contained contraband; therefore, the pill bottle could not be seized under the plain-view doctrine. *Id*. at 96-97.

In reversing, the Supreme Court found that probable cause was supported by a number of facts. Among these facts were that the defendant got out of his car and walked away upon seeing the officers, that the defendant had his hands tucked inside his sweatpants and refused to remove them, and that the pill bottle was found stuffed down the front of the defendant's sweatpants rather than being in a pocket. *Id*. at 111-113. In sum, the Court concluded that "the officer formed probable cause to arrest on the basis of the defendant's furtive behavior . . . ." *Id*. at 117.

In applying that principle to this case, we conclude that defendant's behavior (denying the presence of marijuana) was inconsistent with being in lawful possession of marijuana under the MMMA. This behavior, in conjunction with the odor of marijuana, gave rise to probable cause to believe that defendant was in possession of marijuana in a manner not consistent with the protections of the MMMA. Accordingly, the search of the vehicle was lawful.[2]

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[2] We would be remiss if we did not acknowledge that this is not the basis Park articulated for conducting the search. But the Fourth Amendment creates an objective, not subjective, standard. *Devenpeck v Alford*, 543 US 146, 153; 125 S Ct 588; 160 L Ed 2d 537 (2004). In *Devenpeck*, the officer arrested the suspect for violation of the Washington Privacy Act upon discovering that the suspect was recording the conversation with the officer. *Id*. at 149. The charges were dropped because it was determined that it was not, in fact, a violation of Washington law. *Id*. at 151. A civil lawsuit followed, ultimately reaching the United States Supreme Court. The Court concluded that the arrest did not violate the Fourth Amendment because, while the officer's subjective reason for making the arrest was incorrect, the arrest was lawful given that the facts known to the officer at the time of arrest gave rise to probable cause to believe that the suspect had committed the crime of impersonating a police officer. *Id*. at 154-155. Accordingly, applying the principle that the Fourth Amendment establishes an objective standard to our case, because the facts known to Park established probable cause to believe that there was marijuana in

For these reasons, we conclude that while the trial court erred by simply relying on *Anthony* without further analysis, the trial court's ultimate decision to deny defendant's motion to suppress was nonetheless proper. This Court will not reverse when the trial court reaches the right result for the wrong reason. See *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

To summarize, under *Kazmierczak*, "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement." *Kazmierczak*, 461 Mich at 413. Therefore, Park, who was experienced in marijuana arrests, had probable cause solely on the basis of the strong odor of fresh marijuana. *Kazmierczak* has not been overruled. See *Anthony*, 327 Mich App at 44-45. But, as recognized in *Anthony*, the MMMA introduces the additional requirement that there must be a basis to believe that a suspect's actions, i.e., the use or possession of the marijuana, fall outside the protections of the MMMA. For the reasons discussed in this opinion, we conclude that Park did have probable cause to believe (1) that defendant possessed marijuana and (2) that that possession fell outside the protections of the MMMA.[3]

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the vehicle and that defendant was not covered by the protections of the MMMA, the search was reasonable. See also *Scott v United States*, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.").

[3] Plaintiff also argues that the handgun found prior to the search is not subject to suppression under the fruit-of-the-poisonous-tree doctrine. Because we affirm the trial court's decision to deny defendant's

Affirmed.

SAWYER, P.J., and MARKEY and STEPHENS, JJ., concurred.

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motion to suppress and dismiss the evidence, we conclude that it is unnecessary to address this argument.

SMITH v CHRYSLER GROUP, LLC

Docket No. 339705. Submitted February 5, 2020, at Lansing. Decided February 25, 2020, at 9:00 a.m.

Raymond R. Smith filed an application for mediation with the Workers' Disability Compensation Agency, seeking to recover workers' compensation benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., from his employer, Chrysler Group, LLC. Plaintiff was injured in an automobile accident when he was driving in the morning from his home to one of defendant's plants to conduct an audit. Plaintiff drove his own car to the audit but was paid mileage by defendant for the distance between his main base of operation, the Chrysler Technology Center, and the plant; he transported his company-owned computer and cellular telephone to the plant in his car; and he was a salaried employee who did not have specific hours of employment. Plaintiff asserted that he was entitled to compensation benefits because he was injured while on a business trip; defendant argued that he was not entitled to benefits because he was injured while merely commuting to work, a noncompensable event. The magistrate concluded that plaintiff's injuries arose out of and in the course of his employment with defendant and that he was therefore entitled to compensation benefits. Defendant appealed, and the Michigan Compensation Appellate Commission reversed, concluding that plaintiff had failed to establish three of the four exceptions identified as necessary to support a conclusion that the plaintiff's injuries arose out of or in the course of his or her employment in *Starks v L E Myers Co*, 58 Mich App 439 (1975). Plaintiff sought leave to appeal. The Court Appeals initially denied the application, but it ultimately considered the appeal as on leave granted following a remand order from the Michigan Supreme Court. 503 Mich 855 (2018).

The Court of Appeals *held*:

The Worker's Disability Compensation Act provides that employers must provide compensation to employees for injuries suffered in the course of employment regardless of fault. An employee is entitled to compensation when the nexus between the employment and the injury is sufficient to conclude that the

injury was a circumstance of employment. In general, an employee cannot recover workers' compensation benefits for injuries the employee suffers while going to or coming from work. While *Stark* recognized four exceptions to the general rule, *Bowman v R L Coolsaet Constr Co (On Remand)*, 275 Mich App 188 (2007), expanded that list to include six exceptions. Under *Bowman*, recovery is permitted when (1) the employee was on a special mission for the employer, (2) the employer derived a special benefit from the employee's activity at the time of the injury, (3) the employer paid for or furnished employee transportation as part of the employment contract, (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to traffic risks, or (6) the travel took place as a result of a split-shift working schedule or employment requiring a similar irregular, nonfixed working schedule. Injuries that occur under the six exceptions are compensable because there is a sufficient nexus between the employment and the injury such that the injury was a circumstance of the employment. *Forgach v George Koch & Sons Co*, 167 Mich App 50 (1988), should not be read as requiring the exceptions to be balanced; each exception is independent of the others and examined on its own merit when determining whether a plaintiff's injuries arose out of or in the course of employment. In this case, the commission incorrectly applied *Stark*'s four-exception test instead of *Bowman*'s six-exception test. In addition, it erred by balancing the four exceptions instead of examining them independently and by reversing the magistrate's decision even though the commission explicitly concluded that plaintiff had established one of the exceptions. With regard to the first exception, plaintiff was on a special mission for defendant at the time of his accident because defendant directed plaintiff away from his main base of operations to the other plant to perform his duties and the particular circumstances of his trip to the plant were an integral part of his employment. The circumstances supporting application of the third exception were also shown because defendant paid for plaintiff's travel mileage when he traveled to the plant to perform his job duties. Thus, there was a sufficient nexus between the employment and the injury such that the injury was a circumstance of the employment rather than a mere commute to work. For those reasons, the commission erred when it determined that plaintiff was not entitled to compensation.

Reversed and remanded.

WORKERS' COMPENSATION — NEXUS BETWEEN EMPLOYMENT AND INJURY — INJURIES SUSTAINED GOING TO OR COMING FROM WORK NOT COMPENSABLE — EXCEPTIONS.

Generally, an employee cannot recover workers' compensation benefits for injuries the employee suffers while going to or coming from work, but there are exceptions to the general rule; that is, recovery is permitted when (1) the employee was on a special mission for the employer, (2) the employer derived a special benefit from the employee's activity at the time of the injury, (3) the employer paid for or furnished employee transportation as part of the employment contract, (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to traffic risks, or (6) the travel took place as a result of a split-shift working schedule or employment requiring a similar irregular, nonfixed working schedule; each exception is independent of the others and must be examined on its own merit when determining whether a plaintiff's injuries arose out of or in the course of employment; the exceptions are not factors to be balanced (MCL 418.10 *et seq*.).

Charters Tyler Zac & Shearer, PC (by *Matthew A. Tyler*) for plaintiff.

Lacey & Jones LLP (by *Ronald A. Weglarz*) for defendant.

Before: FORT HOOD, P.J., and BECKERING and BOONSTRA, JJ.

BOONSTRA, J. Plaintiff appeals by leave granted[1] the opinion of the Michigan Compensation Appellate Commission (MCAC) denying plaintiff's claim for wage benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. The proceeding in

[1] This Court initially denied plaintiff's application for leave to appeal. *Smith v Chrysler Group LLC*, unpublished order of the Court of Appeals, entered January 31, 2018 (Docket No. 339705). Plaintiff appealed this Court's denial of leave in our Supreme Court, which remanded the case to this Court for consideration as on leave granted. *Smith v Chrysler Group, LLC*, 503 Mich 855 (2018).

the MCAC was an appeal from an earlier decision of a magistrate of the Workers' Compensation Board of Magistrates; the MCAC reversed the magistrate's holding that plaintiff's injury had arisen out of or in the course of his employment with defendant. We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as an auditor for defendant. He sustained injuries in a motor vehicle accident while driving from his home in Clarkston to defendant's Jefferson Avenue North Assembly Plant (JANAP) in Detroit to conduct an audit, which was scheduled to begin at 7:30 a.m. After the accident, plaintiff filed an application for mediation with the Workers' Disability Compensation Agency, arguing that he had been injured on a business trip and was entitled to workers' compensation benefits. In response, defendant argued, in relevant part, that plaintiff had merely been injured while traveling to work, which is not compensable under the WDCA. Following a hearing, the magistrate issued an opinion, finding that plaintiff's injuries arose out of and in the course of his employment with defendant and noting the following undisputed facts:

> Plaintiff was driving his own personal vehicle but was paid mileage by the Defendant based upon the distance between the CTC[2] and JANAP. Plaintiff was transporting his company owned computer and cell[ular] [tele]phone as well as necessary papers which he had taken home the previous day so that he would not have to go to the CTC before travelling to JANAP. Plaintiff was paid a salary. In fact, as set forth above, the stipulated average weekly wage was $2,298.63. There was no testimony or evidence that Plaintiff's salary was dependent in any way upon his

[2] "CTC" refers to the Chrysler Technology Center in Auburn Hills.

> commencing work at JANAP at 7:30 am [sic]. He was not an hourly paid employee whose compensation depended upon specific hours of employment with a specific starting and ending time.

Defendant appealed the magistrate's decision to the MCAC, arguing that the magistrate erred by determining that plaintiff's injuries arose out of and in the course of his employment. The MCAC reversed the magistrate's determination, concluding that plaintiff had failed to establish three of the four exceptions identified as necessary to support a conclusion that the plaintiff's injuries arose out of or in the course of his or her employment in *Stark v L E Myers Co*, 58 Mich App 439, 443; 228 NW2d 411 (1975).

This appeal followed.

II. STANDARD OF REVIEW

As this Court stated in *Moore v Prestige Painting*, 277 Mich App 437, 447; 745 NW2d 816 (2007):

> The [MCAC] must review the magistrate's decision under the "substantial evidence" standard, and we review the [MCAC's] findings of fact under the "any evidence" standard. Our review begins with the [MCAC's] decision, not the magistrate's. "Findings of fact made or adopted by the [MCAC] are conclusive on appeal, absent fraud, if there is any competent evidence in the record to support them." We review de novo "questions of law involved in any final order of the [MCAC]." "[A] decision of the [MCAC] is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." [Citations omitted; second to last alteration in original.]

When the facts are undisputed, the question of whether a plaintiff's injury arose out of and in the course of the plaintiff's employment is a question of law. *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994).

III. ANALYSIS

Plaintiff argues that the MCAC erred when it determined that plaintiff's injury did not arise out of or in the course of his employment. We agree.

"Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault." *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000). "An employee who receives a personal injury arising out of and in the course of employment by an employer who is subject to the act at the time of the injury, shall be paid compensation." *Thomason v Contour Fabricators, Inc*, 255 Mich App 121, 123-124; 662 NW2d 51 (2003), citing MCL 418.301(1), and mod on other grounds 469 Mich 960 (2003). "An employee is entitled to compensation where the nexus between the employment and the injury is sufficient to conclude that the injury was a circumstance of employment." *Thomason*, 255 Mich App at 124.

Generally, "an employee who suffers injury while going to or coming from work cannot receive worker's compensation benefits." *Ruthruff v Tower Holding Corp (On Reconsideration)*, 261 Mich App 613, 616; 684 NW2d 888 (2004). However, "exceptions to the general rule exist where"

> (1) the employee is on a special mission for the employer, (2) the employer derives a special benefit from the employee's activity at the time of the injury, (3) the employer paid for or furnished employee transportation as part of the employment contract, (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to traffic risks, or (6) the travel took place as a result of a split-shift working schedule or employment requiring a

> similar irregular nonfixed working schedule. [*Bowman v R L Coolsaet Constr Co (On Remand)*, 275 Mich App 188, 191; 738 NW2d 260 (2007) (quotation marks and citations omitted).]

"Injuries that occur under the above circumstances are compensable because there is a sufficient nexus between the employment and the injury such that the injury was a circumstance of the employment." *Id*.

Although the magistrate and the MCAC analyzed this case principally under *Stark* (which, as noted, recognized four exceptions),[3] the developed caselaw now recognizes six exceptions, as set forth in *Bowman*, 275 Mich App at 191, and as initially summarized in *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444, 452 n 6; 320 NW2d 858 (1982). Compare *Stark*, 58 Mich App at 443, with *Bowman*, 275 Mich App at 191. Resolution of plaintiff's appeal therefore requires that we analyze whether any of the six *Bowman* exceptions apply.

Before doing so, we note, first, that both the magistrate and the MCAC appeared to consider the exceptions to the general rule as elements of a balancing test. In doing so, they misconstrued the law. We instead read *Stark*, as well as prior and subsequent caselaw, as establishing "exceptions" to the general rule, and each of those exceptions is independent of the

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[3] In *Stark*, this Court enumerated four "exceptions" or "[c]onsiderations relevant to the ultimate determination of whether an injury to an employee while on the way to work is sufficiently employment-related to be compensable . . . : 1. Whether employer paid for or furnished employee transportation, 2. Whether the injury occurred during or between working hours, 3. Whether the employer derived a special benefit from the employee's activities at the time of the injury, [and] 4. Whether the employment subjected the employee to excessive exposure to traffic risks[.]" *Stark*, 58 Mich App at 443 (citations and paragraph structure omitted).

others. Indeed, the cases from which *Stark* derived the exceptions support this conclusion. For example, in *Chrysler v Blue Arrow Transp Lines*, 295 Mich 606, 609-610; 295 NW 331 (1940), our Supreme Court upheld an award in favor of the plaintiff, in part because of the defendant's "furnish[ing] week-end transportation between Grand Rapids and Chicago . . . ." And in *Howard v Detroit*, 377 Mich 102, 110; 139 NW2d 677 (1966), the Court, in concluding that the plaintiff was entitled to benefits, noted that the plaintiff was injured during working hours. In *Nemeth v Mich Bldg Components*, 390 Mich 734, 737-738; 213 NW2d 144 (1973), our Supreme Court noted that the plaintiff was engaged in activity that specially benefited the defendant by "promot[ing] and maintain[ing] good employer-employee relationships." And in *Chrysler*, 295 Mich at 609, and *Dent v Ford Motor Co*, 275 Mich 39, 42; 265 NW 518 (1936), the Court considered whether the plaintiff was subjected to excessive traffic risks, rather than risks "incident to any user of the street," *Dent*, 275 Mich at 42.

Subsequent caselaw has also addressed the exceptions as independent considerations, rather than factors to be balanced. In *Bush*, for example, our Supreme Court noted that the general rule was "riddled with exceptions," and described those exceptions as "including" the six situations later described in *Bowman*. *Bush*, 413 Mich at 452 n 6. And in *Bowman*, the Court described the issue before it as "the applicability of *any* exceptions . . . to the general rule . . . ." *Bowman*, 275 Mich App at 190 (emphasis added). After individually considering the exceptions, it then upheld the commission's finding that "*none* of the exceptions . . . applied." *Id*. at 193 (emphasis added). *Bowman*'s use of the terms "any" and "none" confirm that the applicability of any one of the exceptions would have been sufficient

(and therefore that the exceptions are independent considerations, not factors to be balanced).

The MCAC's misapplication of the *Stark* factors as a balancing test may have been based on this Court's opinion in *Forgach v George Koch & Sons Co*, 167 Mich App 50; 421 NW2d 568 (1988),[4] inasmuch as the MCAC cited *Forgach* in stating that "[n]o prong of the exception test is dispositive." What the Court in *Forgach* in fact stated, however, was that "[u]nder [the *Stark*] analysis, no one factor in and of itself necessarily determines that plaintiff establish all four factors in plaintiff's favor; it is only necessary that the [MCAC] or reviewing authority look to all four factors before deciding whether the requisite was proven." *Id*. at 58. The *Forgach* Court also cited *Pappas v Sport Servs, Inc*, 68 Mich App 423; 243 NW2d 10 (1976), as illustrative of how *Stark*'s "four-factor analysis" is to be applied. *Forgach*, 167 Mich App at 58-59. However, in *Pappas*, 68 Mich App at 427-432, this Court again analyzed whether the facts of the case fit into *any* of the four exceptions. Finding that the facts did not fit within any of the four exceptions, this Court affirmed the commission's order denying workers' compensation benefits. *Id*. at 432. Nothing in *Pappas* supports a conclusion that the *Stark* factors operate as a balancing test, and to the extent that *Forgach* can be read as having presumed the existence of or establishing such a test, we clarify that no such test exists.

As noted, cases after *Forgach* have also treated the relevant factors generally as independent exceptions, each of which should be examined on its own merit. See, e.g., *Bush*, 413 Mich 444; *Bowman*, 275 Mich App 188; *Camburn v Northwest Sch Dist*, 459 Mich 471,

[4] Court of Appeals opinions issued before November 1, 1990, are not precedentially binding. See MCR 7.215(J)(1).

478-479; 592 NW2d 46 (1999); *Thomas v Staff Builders Health Care*, 168 Mich App 127, 129; 424 NW2d 13 (1988); *Collier v J A Fredman, Inc*, 183 Mich App 156, 160; 454 NW2d 183 (1990). For this reason alone, the MCAC (which found that one of the four *Stark* exceptions applied, but which nevertheless reversed the magistrate's decision because it concluded, in an apparent balancing test, that the other three exceptions did not apply) erred.

We next turn to a consideration of the *Bowman* factors in relation to this case. In doing so, we conclude, with regard to the first *Bowman* exception, that plaintiff was on a special mission for his employer at the time of the accident. *Bowman*, 275 Mich App at 191. In *Camburn*, 459 Mich at 479, our Supreme Court determined that the plaintiff in that case was not on a special mission by traveling to an education seminar because the "defendant was not directly benefited by [the] plaintiff's attendance at the seminar and that the attendance was neither compulsory nor definitely expected." The *Camburn* Court cited *Bush* in quoting a treatise discussing the special-mission exception:

> "When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself." [*Camburn*, 459 Mich at 479, citing *Bush*, 413 Mich at 452, and quoting 1 Larson, Workmen's Compensation Law, § 16.10, pp 4-123.]

In this case, the record shows that plaintiff's main base of operations was the CTC in Auburn Hills, which was the location where his in-office work occurred and the

location specified by his "employee location code." However, plaintiff testified that approximately 70% to 80% of his employment consisted of traveling to various locations across the western hemisphere. In other words, it was plaintiff's job to travel to different locations to conduct audits—plaintiff did not merely work different shifts at different locations. Accordingly, we agree with the magistrate that plaintiff was on a special mission to the JANAP because defendant directed plaintiff to be away from his place of employment at the CTC that day to perform his duties; the "particular circumstances" of his trip to JANAP were "an integral part" of his employment. *Camburn*, 459 Mich at 479 (quotation marks and citations omitted).

Additionally, the third *Bowman* exception, which addresses whether the employer paid for or furnished the employee's transportation as part of the employment contract, was satisfied in this case. *Bowman*, 275 Mich App at 191. As is undisputed, defendant paid for plaintiff's travel mileage when he traveled to perform his job duties at this and other locations. Accordingly, there was "a sufficient nexus between the employment and the injury such that the injury was a circumstance of the employment" rather than a mere commute to work. *Id*.[5]

Because the first and third *Bowman* exceptions apply in this case (either of which would be sufficient), we need not address the applicability of the other exceptions, and we conclude that the MCAC erred when it determined that plaintiff was not entitled to compensation. *Thomason*, 255 Mich App at 124.

We accordingly reverse the MCAC's opinion, which denied plaintiff workers' compensation benefits be-

[5] Even the MCAC found that this exception was satisfied.

cause plaintiff's injury did not arise out of and was not in the course of his employment, and we remand for further proceedings before the MCAC consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

FORT HOOD, P.J., and BECKERING, J., concurred with BOONSTRA, J.

PEOPLE v BURGER

Docket No. 343332. Submitted February 12, 2020, at Detroit. Decided February 25, 2020, at 9:05 a.m. Leave to appeal denied 506 Mich 914 (2020).

Joshua M. Burger was convicted following a jury trial in the Wayne Circuit Court of arson of insured real property, MCL 750.76(1)(b), in connection with a fire at his pawn shop. Defendant co-owned the pawn shop, which was profitable, with his father. The two fire chiefs who investigated the fire stated in their reports that there were two points of origin for the fire and that the cause of the fire was not electrical, mechanical, or natural. Before trial, both fire chiefs changed their opinion regarding the point of origin of the fire—concluding that there was only one point of origin, not two—but they did not update their reports, and defendant was not informed of the changes until the start of trial. Defendant's expert also concluded that the fire had only one point of origin and that the cause was most likely spontaneous combustion. At trial, defendant sought to admit the testimony of senior public insurance adjuster Craig Becker as an expert in first-party property insurance to testify about defendant's insurance coverage; the prosecution objected. The court, Paul John Cusick, J., excluded Becker's testimony, reasoning that because Becker was not a licensed insurance counselor, he was precluded under MCL 500.1232 from giving an opinion with respect to benefits, promised coverage, terms, value, effect, and advantages or disadvantages. Defendant appealed.

The Court of Appeals *held*:

1. MCL 500.1232 provides that a person shall not audit or abstract policies of insurance or annuities, provide advice, counsel, or opinion with respect to benefits promised, coverage afforded, terms, value, effect, advantages, or disadvantages of a policy of insurance or annuity, nor advertise, solicit business, or hold himself or herself out to the public as an insurance counselor unless he or she is licensed as an insurance counselor. The statute distinguishes between insurance agents and insurance counselors, with agents being essentially order takers while insurance counselors function primarily as advisers. MRE 702 provides that a

court may allow expert testimony under certain circumstances if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. While Chapter 12 of the Insurance Code, of which MCL 500.1232 is a part, pertains to licensing requirements, it does not address the admissibility of evidence in a court proceeding. Accordingly, MCL 500.1232 does not bar an expert witness, whose testimony is otherwise admissible under MRE 702, from providing testimony about the terms of an already purchased insurance policy. In this case, Becker's testimony would have described the coverage defendant's policy provided and the losses incurred; he would not have been acting as an insurance counselor. The trial court legally erred by exceeding the scope of MCL 500.1232 by applying it to bar Becker's testimony regarding the terms of coverage of an already purchased insurance policy. Without Becker's testimony, defendant was unable to fully present a defense, and it was more probable than not that the error was outcome-determinative. In addition, the trial court erred by excluding the testimony of defendant's landlord that allegedly would have shown a lack of financial motive to commit arson.

2. Generally, a criminal defendant does not have a constitutional right to discovery. However, a defendant's right to due process may be violated when the prosecution fails to produce exculpatory evidence in its possession. To establish a violation under *Brady v Maryland*, 373 US 83 (1963), a defendant must establish that (1) the prosecution has suppressed evidence, (2) that is favorable to the accused, and (3) that is material. The prosecution's failure to disclose the fire chiefs' opinion changes regarding the point of origin of the fire constituted a *Brady* violation because it was suppressed and it was material to defendant's case. While the opinion changes were not necessarily exculpatory, they were favorable to defendant because the revised opinions were consistent with his expert's testimony and provided a basis to impeach the fire chiefs' testimony. The unpreserved issue did not require reversal because defendant failed to demonstrate that earlier disclosure of the fire chiefs' changes of opinion would have affected the outcome of the trial.

Conviction reversed and vacated; case remanded for a new trial.

INSURANCE — LICENSING REQUIREMENTS FOR INSURANCE COUNSELORS — APPLICATION TO EXPERT TESTIMONY REGARDING INSURANCE POLICIES.

MCL 500.1232, which prohibits a person from providing an opinion with respect to insurance benefits and coverage unless they are

licensed as an insurance counselor, does not bar an expert witness, whose testimony is otherwise admissible under MRE 702, from providing testimony about the terms of an already purchased insurance policy.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Tara Mathena Hindelang*, Assistant Prosecuting Attorney, for the people.

Gentry Nalley, PLLC (by *Kevin S. Gentry*) for defendant.

Before: SHAPIRO, P.J., and JANSEN and M. J. KELLY, JJ.

JANSEN, J. Defendant, Joshua M. Burger, appeals as of right his conviction of arson of insured real property, MCL 750.76(1)(b). Defendant was sentenced to 15 months to 20 years' imprisonment. We reverse, vacate defendant's conviction and sentence, and remand for a new trial.

I. RELEVANT FACTUAL BACKGROUND

This case arises out of a fire that occurred on April 12, 2017, at defendant's pawn shop, for which defendant made an insurance claim. Defendant, together with his father, Christian Whitt, co-owned the pawn shop called Pawn Max, or Southgate Exchange Incorporated. The pawn shop was purchased in 2012 for $125,000 on a five-year land contract and was paid off within six months.

At trial, Whitt testified that the rent, utilities, payroll, and taxes were current. In 2016, the pawn shop had

turned a profit of $427,000. As of April 12, 2017, the pawn shop had turned $126,000 in profit and was on track to make more than $500,000. Whitt further testified that defendant had no financial problems, had a credit score above 790, and believed financial stability was important.

On the day of the fire, defendant had been staining a guitar with linseed oil on a rag. Defendant was storing the project on a plywood shelf in the pawn shop's storage room. At 7:23 p.m., security cameras showed defendant leaving the storage room for 10 seconds, then returning. Defendant stayed in the storage room until 7:27:39 p.m. before walking out of the room alone and locking the door. At 7:27:55 p.m., a fire could be seen in the storage room. Defendant turned off the lights in the pawn shop office, set the alarm, and left the building at 7:28:13 p.m.

Justin Graves, a Southgate firefighter, testified that he was one of the first firefighters to respond to the fire at the pawn shop on the evening of April 12, 2017. After being alerted by the alarm company that there was a fire, defendant returned to the pawn shop and unlocked the building for first responders. Graves and another firefighter came to a locked door inside the building and forced entry into that room, which was a storage area fully on fire "from floor to ceiling." Graves stated that it "took a few more seconds of water" than usual to dampen the fire; although the fire still extinguished relatively quickly, the extra time struck him as odd because fires typically dampen immediately once sprayed with water. Graves testified that another room separated from the main sales area by a wall was also on fire. Another firefighter extinguished that fire, and Graves confirmed that the fire had not spread elsewhere.

The fire was investigated by Southgate Fire Chief Michael Sypula, Wyandotte Fire Chief Jeffrey Carley, and Richard Kovarsky, a forensic engineer and owner of the forensic engineering firm Pyro-Technical Investigations who was called by the defense and qualified as an expert in the field of fire investigation.

Chief Carley testified at trial that three wooden shelves in the storage room had significant charring and that the second of the three shelves in the storage room was the point of origin of the fire. Chief Carley was able to identify this shelf as the point of origin because the charring of the higher shelves and the ceiling was consistent with the fire moving "up and out," as fires typically do, while some equipment stored below the shelf that was the point of origin was "relatively undamaged." Chief Sypula also identified the shelf in the storage area as the point of origin because of the "burn pattern," or the amount of charring.

Chief Sypula stated that he ultimately determined that the cause of the fire was not electrical, mechanical, or natural. Chief Carley also stated that he did not discover a mechanical or electrical source of fire and that he ruled out natural causes, such as lightning. Chief Carley testified that he concluded that the "fire was incendiary," meaning that it had been set intentionally and was not caused accidentally, because there were no mechanical or electrical explanations for why the fire began. Chief Sypula testified that in addition to ruling out electrical, mechanical, and natural causes of the fire, he relied on the firefighters' statements that there were two separate fires and the security camera footage showing defendant in the storage area 60 to 90 seconds before the fire started to conclude that the fire was incendiary. Chief Sypula also relied on video

footage showing defendant "repositioning a camera" inside the storage room earlier that day and defendant putting rubber gloves on at 7:20 p.m. Chief Sypula did not determine what actually started the fire.

Kovarsky also concluded that the fire had one point of origin: the storage room. Indeed, relying on photographs from the scene, Kovarsky testified that he believed a shelf in the storage room was the point of origin. On or near the shelf were a guitar, a "metal paint container" without a label that Kovarsky was led to believe contained linseed oil, and some "fairly undamaged rags . . . at the top of the container." Kovarsky learned from defendant that he had been using linseed oil to refinish a guitar and had been placing the used rags in a metal can. Kovarsky stated that something else must have been on top of the rags because the cleanliness of the rags was inconsistent with the heat damage to the outside of the paint can. Kovarsky testified that the cause of the fire in this case was uncertain, but spontaneous combustion was his primary theory.

Christina Swan, "a technical specialist" who "handle[d] first[-]party property claims" for Northfield Insurance, a subsidiary of Travelers Insurance, testified that defendant filed a claim related to the April 12, 2017 fire on April 27, 2017, in the amount of $574,954.68. Defendant's insurance policy included coverage for fire damage, but a claim would not be paid if defendant were found to be responsible for the damage. Swan stated that defendant submitted the claim on behalf of Southgate Exchange Incorporated and listed himself as the sole owner with no third-party beneficiaries. Defendant listed the cause of the fire on the insurance claim as "unknown."

Ultimately, defendant was convicted by a jury of arson of insured real property with intent to defraud. The trial court sentenced defendant to 15 months to 20 years' imprisonment. This appeal followed.

II. EXCLUSION OF DEFENSE WITNESSES

Defendant first argues on appeal that the trial court erroneously excluded the testimony of two defense witnesses. We agree.

A. STANDARD OF REVIEW

"A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion." *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017), citing *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018), quoting *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks omitted). "A trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015).

B. ANALYSIS

Defendant sought to admit the testimony of senior public insurance adjuster Craig Becker at trial.[1] Defendant sought to have Becker qualified as an expert in "first[-]party property insurance" and expected Becker

[1] Like insurance counselors, all insurance adjusters, with few exceptions, are required to be licensed in the state of Michigan. MCL 500.1222(1). However, an insurance counselor and an insurance adjuster serve separate and distinct purposes. See MCL 500.100 *et seq*.

to testify about defendant's insurance coverage. The prosecution objected to the introduction of Becker's testimony under MCL 500.1232, which provides, in relevant part:

> A person shall not audit or abstract policies of insurance or annuities, provide advice, counsel, or opinion with respect to benefits promised, coverage afforded, terms, value, effect, advantages, or disadvantages of a policy of insurance or annuity, nor advertise, solicit business, or hold himself or herself out to the public as an insurance counselor unless he or she is licensed as an insurance counselor. . . . This section does not prohibit the customary advice offered by a licensed insurance agent nor does this section apply to a person admitted to the practice of law in this state.

Defendant countered, arguing that Becker's testimony was admissible under MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant proffered that Becker would be qualified to testify regarding his review of defendant's insurance policy, the pawn shop's finances, and the inventory supporting defendant's insurance claim. The trial court agreed with the prosecution, and it excluded Becker's testimony on the basis of MCL 500.1232, noting that Becker was not "a licensed insurance counselor" and that he was, therefore, precluded from "giv[ing] an

opinion with respect to benefits, promised coverage afforded, terms, value, effect, advantages or disadvantages."

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature. The objective of statutory interpretation is to discern the intent of the Legislature from the plain language of the statute." *People v Barrera*, 278 Mich App 730, 735-736; 752 NW2d 485 (2008) (citation omitted). When the language of the statute is clear and unambiguous, the Court applies that language without further judicial construction. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "[S]ound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." *Id*. at 58 (quotation marks and citation omitted). Statutory provisions should be read "as a whole, focusing on not only the individual words and phrases but also the placement of those words and phrases in the context of the broader legislative scheme." *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012). The Court may look beyond the language of the statute to determine legislative intent only when the language of the statute is ambiguous. *People v Schumacher*, 276 Mich App 165, 168; 740 NW2d 534 (2007). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *People v Savage*, 327 Mich App 604, 618; 935 NW2d 69 (2019) (quotation marks and citation omitted).

As already quoted in relevant part, MCL 500.1232 reflects a longstanding distinction "between insurance agents and insurance counselors, with agents being essentially order takers while it is insurance counselors who function primarily as advisors." *Harts v Farmers Ins Exch*, 461 Mich 1, 9; 597 NW2d 47 (1999).

Because of this difference, insurance agents generally have no duty to advise a potential customer about coverage. *Id*. at 8-9. Such a duty may arise if a special relationship arises between the insurance agent and the customer. *Id*. at 9-10. This Court has applied this test to determine the bounds of an insurance agent's duty to advise a prospective insured. For example, in *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 13-14; 837 NW2d 686 (2013), this Court concluded that an insurance agent had a duty to provide the customer with advice about coverage because the agent calculated the replacement cost of the customer's building. In those cases, MCL 500.1232 applied to an insurance agent's relationship with a customer in the context of buying and selling insurance and to whether the liability landed with the insurance agent if a client was underinsured after relying on the agent's advice.

Indeed, Michigan jurisprudence has yet to address whether MCL 500.1232 bars a witness from testifying about the terms of an insurance policy when the witness is not a licensed insurance counselor. We now take the opportunity to do so and conclude that MCL 500.1232 does not bar an expert witness, whose testimony is otherwise admissible under MRE 702, from providing testimony regarding the terms of an insurance policy. In this case, MCL 500.1232 did not bar the admission of Becker's testimony, and the trial court's conclusion to the contrary was an abuse of discretion because it was an error of law. *Al-Shara*, 311 Mich App at 566.

MCL 500.1232 and MRE 702 are not in conflict. MCL 500.1232 does not contain any reference to the admissibility of evidence in a court proceeding. Indeed, the entirety of Chapter 12 of the Insurance Code, MCL 500.1200 *et seq*., pertains to the licensing requirements and serves as a licensing framework for agents,

solicitors, adjusters, and counselors. MCL 500.1232, the statute at issue here, prohibits anyone who is not a licensed insurance counselor from "audit[ing] or abstract[ing] policies of insurance or annuities, provid[ing] advice, counsel, or opinion with respect to benefits promised, coverage afforded, terms, value, effect, advantages, or disadvantages of a policy of insurance or annuity, [or] advertis[ing], solicit[ing] business, or hold[ing] himself or herself out to the public as an insurance counselor . . . ." Moreover, a person who is not licensed as an insurance counselor is also prohibited from "us[ing] terms such as consultant, consulting services, or any other language in a way which implies that he or she is a licensed insurance counselor." *Id*.

In this case, the insurance policy under which defendant sought to recover was purchased in February 2017. The purpose of Becker's testimony was to describe the coverage provided and the losses incurred. Becker would not have been acting as an insurance counselor by providing an expert witness opinion about the already existing insurance coverage and the losses incurred. Indeed, Becker's testimony is typical of a public insurance adjuster, which Becker is. In sum, MCL 500.1232 prohibits an individual not licensed as an insurance counselor from doing the work of an insurance counselor, i.e., advising clients about what type of insurance coverage they will need. None of the statutory licensing provisions refers to providing testimony in court, and MRE 702 therefore applies. The trial court committed a legal error by applying MCL 500.1232 to bar the testimony of a public adjuster regarding the terms of coverage of an already purchased insurance policy.

We also conclude that " 'after an examination of the entire cause, it . . . affirmatively appear[s]' that it is

more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. The trial court's exclusion of Becker's testimony deprived defendant of the ability to fully mount the defense that he had no financial motive to defraud the insurance company or set the building on fire. Because defendant should have the opportunity to fully present a defense, we vacate his conviction and sentence and remand for a new trial.

Defendant also argues that the trial court committed legal error by excluding the testimony of his landlord and owner of the building, Diane Desantis. Desantis's testimony was offered to show that defendant was current on his rent and to thus further his theory that he had no financial motive to commit arson.

Relevant evidence is generally admissible. MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Financial motive may be relevant evidence of arson. *People v Carter*, 250 Mich App 510, 521; 655 NW2d 236 (2002).

Given that financial motive may be relevant evidence of arson, *id*., it logically follows that a lack of financial motive is also relevant to whether a defendant committed arson. Thus, Desantis's testimony was relevant, and it should have been admitted. Defendant should have the opportunity to fully pursue his defense on remand.

III. BRADY VIOLATION

Defendant also argues that the prosecution violated *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to disclose the fire chiefs' amended conclusions regarding the fire until the start of trial. Although we agree that a *Brady* violation occurred, we cannot conclude that defendant is entitled to relief.

A. STANDARD OF REVIEW

Defendant failed to preserve his claim that the prosecution improperly suppressed evidence by moving in the trial court for a new trial or for relief from judgment. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Although this Court generally reviews de novo constitutional claims, such as an asserted *Brady* violation, *People v Dimambro*, 318 Mich App 204, 212; 897 NW2d 233 (2016), we review unpreserved claims for plain error, *People v Dickinson*, 321 Mich App 1, 15; 909 NW2d 24 (2017). To establish plain error, the defendant must establish that "(1) an error occurred, (2) the error was 'plain'—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected." *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (quotation marks and citation omitted).

B. ANALYSIS

The United States Supreme Court held in *Brady*, 373 US at 87, that "the suppression by the prosecution

of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a *Brady* violation, a defendant must establish that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). In *Chenault*, our Supreme Court explained these elements in further detail:

> The government is held responsible for evidence within its control, even evidence unknown to the prosecution, *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995), without regard to the prosecution's good or bad faith, *United States v Agurs*, 427 US 97, 100; 96 S Ct 2392; 49 L Ed 2d 342 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). Evidence is favorable to the defense when it is either exculpatory or impeaching. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*]."), quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). To establish materiality, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985). This standard "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 US at 434. The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. In assessing the materi-

> ality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal. *Id*. at 436. [*Chenault*, 495 Mich at 150-151 (alteration in original).]

Defendant's argument presumes that the disclosure of the fire chiefs' changes in opinion for the first time at trial amounts to a *Brady* violation. Defendant's presumption is correct. Generally, a criminal defendant does not have a constitutional right to discovery. *People v Bosca*, 310 Mich App 1, 27; 871 NW2d 307 (2015). However, "a defendant's right to due process may be violated by the prosecution's failure to produce exculpatory evidence in its possession." *Id*. It is undisputed in this case that defendant learned for the first time at trial that the fire chiefs had changed their respective opinions regarding the fire's point of origin. In their original reports, which were disclosed to defendant, both chiefs opined that the fire had two points of origin. However, the chiefs later altered their conclusions, indicating that indeed, the fire had a single point of origin. We conclude that this information was suppressed, because it was not disclosed until the beginning of trial, and that it was material to defendant's case.

The change in the chiefs' respective opinions was not necessarily exculpatory because it did not change their ultimate conclusions that the fire was incendiary. However, it was favorable to defendant because it was consistent with Kovarsky's testimony and provided a basis to impeach the fire chiefs' testimony. Chief Sypula and Chief Carley testified on direct examination that they previously believed the fire had two points of origin and had since changed their opinions. Chief Sypula further testified on direct examination that he changed his opinion after he had seen the evidence report showing no ignitable liquids on the evidence

collected from the office but had not amended his written report. Defendant confronted Chief Sypula with his report and his preliminary-examination testimony, in which he testified about two points of origin, and Chief Sypula again admitted that he had not amended his report after changing his opinion before trial. Defendant likewise confronted Chief Carley with his report that stated the fire had two points of origin and with his failure to provide an amended report when he changed his initial opinion in preparing for trial. Although the prosecution elicited testimony about this change of opinion first, defendant emphasized on cross-examination that Chief Sypula and Chief Carley changed their opinions about the number of points of origin before trial without notifying defendant and that this change of opinion before trial was favorable to defendant because it allowed him to undermine the reliability of their testimony.

Although the evidence suppressed by the prosecution was favorable to defendant and material to the case, defendant has not shown that he is entitled to relief on his *Brady* violation claim because defendant has not shown that earlier disclosure would have affected the outcome of trial. *Cain*, 498 Mich at 116. As discussed, defendant was still able to effectively cross-examine Chief Sypula and Chief Carley regarding their respective changes of opinion and prior inconsistent statements. Additionally, defendant was able to present Kovarsky's testimony, which concluded that the chiefs' reports were deficient, citing as an example their failure to include a description of the wall that was one foot lower than the ceiling, which affected the progression of the fire, and the conclusion about the point of origin. Defendant cross-examined Chief Carley about this missing detail about the shorter wall after Chief Carley agreed that details about building con-

struction were important. Kovarsky further testified about his disagreement with the fire chiefs' initial opinions that the fire had two sources of origin. Although the prosecution elicited testimony from Chief Sypula and Chief Carley on direct examination about the change of testimony, their respective changes of opinion and their revelations of those changes for the first time at trial could be perceived as ineptitude, as defendant argued in closing.

Moreover, defendant's primary theory of the case, as stated in his closing argument, was spontaneous combustion of the rag soaked with linseed oil that he had been using to finish a guitar in the days leading up to the fire. One of defendant's employees testified about defendant using linseed oil on a rag to finish a guitar the day of the fire and for about five days preceding the fire. Kovarsky testified about rags and a metal paint container found on a shelf in the storage area believed to be the point of origin and his belief that the fire started as a result of spontaneous combustion. Indeed, defendant's spontaneous-combustion theory was consistent with the fire chiefs' amended opinions that the single point of origin was a shelf in the storage room. Regardless, defendant has not shown that the prosecution's late disclosure of the fire chiefs' opinion changes would have likely affected the outcome of the trial.

We reverse, vacate defendant's conviction and sentence, and remand for a new trial. We do not retain jurisdiction.

SHAPIRO, P.J., and M. J. KELLY, J., concurred with JANSEN, J.

SUTARIYA PROPERTIES, LLC v ALLEN & I-75, LLC

Docket No. 344481. Submitted February 11, 2020, at Detroit. Decided February 25, 2020, at 9:10 a.m.

Sutariya Properties, LLC, brought an action in the Wayne Circuit Court against Allen & I-75, LLC, and Bilal Saad, alleging that a promissory note was in default and seeking to foreclose on a mortgage, have a receiver appointed, and recover the balance of the promissory note. Allen & I-75 entered into an agreement with Warren Bank, borrowing $1,650,000 so that it could purchase real property in Southgate, Michigan. Along with the loan agreement, Allen & I-75 executed a promissory note, a mortgage on the property in favor of Warren Bank, and an assignment of leases and rents in favor of Warren Bank (collectively, the Allen Loan Package). In addition, Allen & I-75's sole member, Saad, executed a guaranty for the debt. In 2009, Warren Bank was closed by the Michigan Office of Financial and Insurance Regulation, and the Federal Deposit Insurance Corporation (the FDIC) was appointed as the receiver for its holdings. Thereafter, the FDIC partnered with Colony Capital, a real-estate private-equity firm, to create North CRE Venture 2010-2, Inc. As it relates to this case, North CRE held a portfolio of debts including the Allen Loan Package. Colony Capital acted as North CRE's managing member to resolve nonperforming debts, and the FDIC maintained a 60% controlling interest in North CRE. Starting on May 27, 2011, Allen & I-75 and Saad sought to exercise the option under ¶ 8.11 of the loan agreement to convey the property to the lender in full satisfaction of the liability associated with the loan, as well as the liability of the guarantors. Allen & I-75 and Saad sent numerous letters invoking ¶ 8.11 to North CRE or those affiliated with North CRE. North CRE acknowledged that Allen & I-75 had the right to exercise the tender-back option in ¶ 8.11; however, because of the terms of the agreement between Colony Capital and the FDIC, North CRE claimed that it was unable to accept title to the property. In an effort to resolve the issue, North CRE informally agreed to extend the six-month period within which ¶ 8.11 required Allen & I-75 to convey the property to North CRE. The Allen Loan Package was ultimately sold to FRACN Holdings, LLC, in the spring of 2014. Although North CRE did not provide

a written disclosure regarding the modification of the loan agreement, FRACN received an e-mail indicating that the note for the property had been "modified/rewritten" to forgive the debtor for any responsibility in paying back the outstanding balance on the note as long as the debtor made a demonstrative effort to sell the asset. Almost immediately after North CRE assigned the Allen Loan Package to FRACN, FRACN assigned it to Sutariya Properties, without providing any notice of the issues regarding its enforceability. Sutariya Properties brought the instant action, and Allen & 1-75 and Saad denied that the note was in default, indicating that they had complied with the tender-back provision in ¶ 8.11. Allen & I-75 and Saad additionally filed a counterclaim against Sutariya Properties, alleging that by refusing to honor the tender-back provision in ¶ 8.11, Sutariya had breached the agreement. The parties filed numerous competing motions for summary disposition. Sutariya Properties argued that any modification of the loan agreement was oral and therefore was ineffective under MCL 566.132(2)(b). The trial court, Brian R. Sullivan, J., determined that MCL 566.132 did not apply, that ¶ 8.11 had been modified so as to release Allen & I-75 and Saad from liability, and that the negotiated release was conveyed to FRACN's broker. The court entered an order granting Allen & I-75 and Saad summary disposition and dismissing Allen & I-75 and Saad's counterclaims as moot. After further litigation unrelated to the issues raised in this appeal, the trial court entered a final judgment in Sutariya Properties' favor against FRACN. Sutariya Properties appealed the trial court's order granting summary disposition in favor of Allen & I-75 and Saad.

The Court of Appeals *held*:

MCL 566.132(2)(b) provides that an action shall not be brought against a financial institution to enforce a promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution. MCL 566.132(3) defines a "financial institution" as a state or national chartered bank, a state or federal chartered savings bank or savings-and-loan association, a state or federal chartered credit union, a person licensed or registered under the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq*., or the Secondary Mortgage Loan Act, MCL 493.51 *et seq*., or an affiliate or subsidiary thereof. In this case, the issue was whether North CRE, the entity that modified the loan agreement with

Allen & I-75 and Saad, qualified as a financial institution. Sutariya Properties argued that North CRE was an affiliate or subsidiary of a state or nationally chartered bank. Specifically, Sutariya Properties claimed that the FDIC is a state or nationally charted bank because it was appointed as the receiver for Warren Bank. The FDIC, however, is a corporation created pursuant to the federal deposit insurance act, 12 USC 1811 *et seq*., to insure deposits held by various institutions and to act as receiver for insured institutions under certain circumstances. The fact that the FDIC was appointed as the receiver for Warren Bank (which was presumably a state or nationally chartered bank) did not mean that the FDIC was also a state or nationally chartered bank. The Legislature opted to include affiliates and subsidiaries of state or nationally chartered banks within the definition of a financial institution; it did not, however, also include receivers of state or nationally chartered banks within the definition. Accordingly, under the plain language of MCL 566.132(3), the FDIC is not a financial institution, so North CRE could not qualify as a financial institution by virtue of being an affiliate or subsidiary of the FDIC. The trial court did not err by granting summary disposition in favor of Allen & I-75 and Saad.

Affirmed.

STATUTE OF FRAUDS — WORDS AND PHRASES — "FINANCIAL INSTITUTION."

MCL 566.132(3) defines a "financial institution" as a state or national chartered bank, a state or federal chartered savings bank or savings-and-loan association, a state or federal chartered credit union, a person licensed or registered under the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq*., or the Secondary Mortgage Loan Act, MCL 493.51 *et seq*., or an affiliate or subsidiary thereof; this definition does not include receivers of nationally chartered banks; the Federal Deposit Insurance Corporation, a corporation created pursuant to the federal deposit insurance act, 12 USC 1811 *et seq*., to insure deposits held by various institutions and to act as receiver for insured institutions under certain circumstances is not a financial institution under the plain language of MCL 566.132(3).

Law Office of Michael S. Holmes, PLLC (by *Michael S. Holmes*) for Sutariya Properties, LLC.

Kecskes, Gadd & Parker, PC (by *Lawrence S. Gadd* and *Keith J. Kecskes*) for Allen & I-75, LLC, and Bilal Saad.

Before: SHAPIRO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM. Appellant, Sutariya Properties, LLC, appeals as of right a judgment in its favor against FRACN Holdings, LLC. On appeal, Sutariya Properties challenges the trial court's prior order granting summary disposition in favor of appellees, Allen & I-75, LLC, and Bilal Saad. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

The events leading to the underlying conflict in this matter are largely undisputed. On April 28, 2009, Allen & I-75 entered into an agreement with Warren Bank, borrowing $1,650,000 so that it could purchase real property in Southgate, Michigan. Paragraph 8.11 of the loan agreement, which is referred to by the parties as the tender-back provision or the put-back provision, provides:

> During the period from May 1, 2011 through November 1, 2011 and provided that no Event of Default exists, Borrower may, with not less than 30 days' nor more than 60 days' prior written notice to Bank, deed the Real Property and convey or cause to be conveyed the Personal Property to Bank by warranty deed conveying marketable fee simple title and warranty bill of sale, free and clear of any interests, encumbrances and liens of any third parties, and without any new restrictions against the Real Property that do not exist of record as of the date of this Loan Agreement, with all real and personal property taxes and assessments due and payable as of the date of such conveyance fully paid, in full satisfaction of Borrower's and Guarantors' liability for the remaining unpaid non-delinquent principal and interest then due on the Loan. If Borrower elects to exercise such right to convey the Real Property and Personal Property as provided herein, there

> shall be an orderly transfer at a mutually agreeable date and time within the notice period with real and personal property taxes pro-rated on a DUE DATE BASIS and with final utility readings and surrender of all keys to the Real and Personal Property, and any improvements to the Real Property and Personal Property by or on behalf of Borrower or any Guarantor shall remain with the Real Property and Personal Property and will be considered the property of Bank without liability to Borrower or any Guarantor.

Along with the loan agreement, Allen & I-75 executed a promissory note, a mortgage on the property in favor of Warren Bank, and an assignment of leases and rents in favor of Warren Bank. In addition, Allen & I-75's sole member, Saad, executed a guaranty for the debt. Collectively, the loan agreement, promissory note, mortgage, assignment of leases and rents, and guaranty will be referred to as the Allen Loan Package.

In 2009, Warren Bank was closed by the Michigan Office of Financial and Insurance Regulation, and the Federal Deposit Insurance Corporation (the FDIC) was appointed as the receiver for its holdings. Thereafter, the FDIC partnered with Colony Capital, a real estate private-equity firm, to create North CRE Venture 2010-2, Inc. As it relates to this case, North CRE held a portfolio of debts including the Allen Loan Package. Colony Capital acted as North CRE's managing member to resolve nonperforming debts, and the FDIC maintained a 60% controlling interest in North CRE.

Starting on May 27, 2011, Allen & I-75 and Saad sought to exercise the option under Paragraph 8.11 of the loan agreement to convey the property to the lender in full satisfaction of the liability associated with the loan, as well as the liability of the guarantors. Between May 27, 2011 and July 2011, Allen & I-75 and Saad sent numerous letters invoking Paragraph 8.11

to North CRE or those affiliated with North CRE. In early September 2011, North CRE's lawyer finally contacted Allen & I-75 and Saad. Initially, North CRE indicated that there was some question as to whether Allen & I-75's payment obligations were current. Yet, it was eventually determined that the payment obligations were current and that Allen & I-75 was not in default. Further, North CRE acknowledged that Allen & I-75 had the right to exercise the tender-back option in Paragraph 8.11 of the loan agreement. However, because of the terms of the agreement between Colony Capital and the FDIC, North CRE claimed that it was unable to accept title to the property. Therefore, in an effort to resolve the issue, North CRE informally agreed to extend the six-month period within which Paragraph 8.11 of the loan agreement required Allen & I-75 to convey the property to North CRE. It was also agreed that Allen & I-75 would remain on the property, without making further loan payments, to operate the gas station business and would still be able to exercise its tender-back rights under Paragraph 8.11 when a final resolution was reached.[1]

The Allen Loan Package was ultimately sold to FRACN in the spring of 2014 as part of a debt portfolio consisting of negotiable instruments related to several properties. The record reflects that although North CRE did not provide a written disclosure regarding the modification of the loan agreement, FRACN received an e-mail indicating that "[t]he note for [the property at issue in this case] has been modified/rewritten to forgive the debtor (Bill [sic] Saad) for any responsibility in paying back the $1,649,416 outstanding balance on the

[1] The parties dispute whether the loan modification was strictly an oral modification or whether it was committed to a signed writing sufficient to satisfy the statute of frauds.

note as long as the debtor makes a demonstrative effort to sell the asset." Almost immediately after North CRE assigned the Allen Loan Package to FRACN, FRACN assigned it to Sutariya Properties, without providing any notice of the issues regarding its enforceability.

On July 18, 2014, Sutariya Properties initiated this action by filing a complaint against Allen & 1-75 and Saad alleging that the 2009 promissory note was in default and seeking to foreclose on the mortgage, have a receiver appointed, and recover the balance of the promissory note. Allen & 1-75 and Saad denied that the note was in default, indicating that they had complied with the tender-back provision in Paragraph 8.11 of the loan agreement. Allen & I-75 and Saad additionally filed a counterclaim against Sutariya Properties, alleging that by refusing to honor the tender-back provision in Paragraph 8.11 of the loan agreement, Sutariya had breached the agreement.

The parties filed numerous competing motions for summary disposition. Relevant to this appeal, Sutariya Properties argued that any modification of the loan agreement was oral, but that an oral modification was ineffective because MCL 566.132(2)(b), which is applicable in actions against a financial institution, requires a "promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation" to be "in writing and signed with an authorized signature by the financial institution[.]" Following oral arguments, the trial court determined that MCL 566.132 did not apply because there was no attempt to enforce an oral agreement against a "financial institution," and the statutory language did not indicate that it applied to "an individual who takes an assignment of a note, in the course of business,

further down the road." The court also determined that Paragraph 8.11 of the loan agreement had been modified so as to release Allen & I-75 and Saad from liability on the outstanding indebtedness and that the negotiated release was conveyed to FRACN's broker. The trial court, therefore, concluded that Allen & I-75 and Saad were entitled to summary disposition and entered an order granting their motion and denying Sutariya Properties' motion for summary disposition. The order also dismissed Allen & I-75 and Saad's counterclaims as moot. After further litigation unrelated to the issues raised in this appeal, the trial court entered a final judgment in Sutariya Properties' favor against FRACN, from which this appeal was taken.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Sutariya Properties argues that the trial court erred by denying its motion for summary disposition and by granting Allen & I-75 and Saad's motion for summary disposition. Challenges to a court's decision to grant or deny motions for summary disposition are reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted). Issues of statutory interpretation are reviewed de novo. *Mich Ass'n of Home Builders*, 504 Mich at 212.

B. ANALYSIS

Sutariya Properties argues that Allen & I-75 and Saad cannot enforce the modification of Paragraph 8.11 of the loan agreement because the modification is oral and, therefore, its enforcement is barred by the statute of frauds set forth in MCL 566.132(2). "The statute of frauds, MCL 566.132, requires certain types of agreements to be in writing before they can be enforced." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548; 619 NW2d 66 (2000). When interpreting a statute, this Court must first examine the statutory language, and "[i]f the statute is unambiguous on its face, we simply enforce the statute as written." *Id*. at 549. MCL 566.132(2) provides:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

This Court has held that MCL 566.132(2) acts as "an unqualified and broad ban" on claims *against financial institutions*. *Crown Technology Park*, 242 Mich App at 550. The term "financial institution" is statutorily defined as

> a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a

> state or federal chartered credit union, a person licensed or registered under the mortgage brokers, lenders, and servicers licensing act, Act No. 173 of the Public Acts of 1987, being sections 445.1651 to 445.1683 of the Michigan Compiled Laws, or [the Secondary Mortgage Loan Act,] Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, or an affiliate or subsidiary thereof. [MCL 566.132(3).]

The question at issue in this case is whether North CRE, the entity that modified the loan agreement with Allen & I-75 and Saad, qualifies as a financial institution. At the outset, it is clear that North CRE is not a bank, a savings bank or savings-and-loan association, a credit union, or a person licensed or registered under the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq*., or the Secondary Mortgage Loan Act, MCL 493.51 *et seq*. On appeal, Sutariya Properties argues that North CRE is an "affiliate or subsidiary" of "a state or nationally chartered bank."

Specifically, Sutariya Properties proclaims that the FDIC is a state or nationally chartered bank because it was appointed as the receiver for Warren Bank. The FDIC, however, is a corporation created pursuant to the federal deposit insurance act, 12 USC 1811 *et seq*., to insure deposits held by various institutions and to act as receiver for insured institutions under certain circumstances. 12 USC 1811; 12 USC 1822; see also *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 107 n 15; 825 NW2d 329 (2012). The fact that the FDIC was appointed as the receiver for Warren Bank (which was presumably a state or nationally chartered bank) does not mean that the FDIC is also a state or nationally chartered bank. The Legislature opted to include affiliates and subsidiaries of state or nationally chartered banks within the definition of a financial

institution.[2] It did not, however, also include receivers of state or nationally chartered banks within the definition. When interpreting a statute, this Court is not at liberty to read provisions not included by the Legislature into the statutory language. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 102; 693 NW2d 170 (2005). Accordingly, under the plain language of MCL 566.132(3), the FDIC is not a financial institution, so North CRE cannot qualify as a financial institution by virtue of being an affiliate or subsidiary of the FDIC. The trial court did not err by granting summary disposition.[3]

Affirmed. Allen & I-75 and Saad may tax costs as the prevailing parties. MCR 7.219(A).

SHAPIRO, P.J., and JANSEN and M. J. KELLY, JJ., concurred.

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[2] MCL 566.132(3) provides that affiliates or subsidiaries of state or nationally chartered banks qualify as financial institutions. Because these terms were not defined by the Legislature and have a peculiar legal meaning, it is appropriate to consult a legal dictionary to ascertain their meaning. *Safdar v Aziz*, 327 Mich App 252, 262; 933 NW2d 708 (2019). According to *Black's Law Dictionary* (11th ed), "affiliate" means "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." A "subsidiary" is a shortened term for "subsidiary corporation," which refers to "[a] corporation in which a parent corporation has a controlling share." *Black's Law Dictionary* (11th ed), p 432. The FDIC is not a subsidiary or an affiliate of Warren Bank.

[3] Given our resolution, we decline to address Allen & I-75 and Saad's alternative arguments in favor of affirming the trial court's decision to grant their motion for summary disposition and deny Sutariya Properties' motion for summary disposition.

PEOPLE v DEL CID (ON REMAND)

Docket No. 342402. Submitted November 21, 2019, at Lansing. Decided February 27, 2020, at 9:00 a.m.

Juan J. Del Cid was convicted following a jury trial of two counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b) (sexual penetration by a person 17 years of age or older against an individual less than 13 years of age); MCL 750.520b(1)(b)(*i*) (sexual penetration of a person at least 13 but less than 16 years of age by a member of the same household). The complainant, AC, lived in an apartment with her siblings, her mother, and defendant. At trial, the prosecution presented testimony from Dr. N. Debra Simms, a pediatrician and an expert in the field of child abuse pediatrics. Dr. Simms had examined AC, had noted that there were no physical signs of sexual abuse, and had diagnosed AC with possible pediatric sexual abuse. Defendant testified that he never had sex with AC or touched her in a sexual manner. The jury convicted defendant. Defendant appealed as of right, arguing, in part, that Dr. Simms had vouched for AC's testimony in violation of *People v Smith*, 425 Mich 98 (1986). In an unpublished per curiam opinion issued May 21, 2019 (Docket No. 342402), the Court of Appeals, SHAPIRO, P.J., and BORRELLO and BECKERING, JJ., affirmed defendant's convictions, reasoning that Dr. Simms's testimony did not constitute improper vouching because she did not state a finding of sexual abuse or even probable abuse and that trial counsel's failure to object to her testimony did not result in a denial of the effective assistance of counsel. Defendant sought leave to appeal in the Supreme Court, and in lieu of granting leave to appeal, the Supreme Court vacated, in part, the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration in light of *People v Harbison*, the companion case to *People v Thorpe*, 504 Mich 230 (2019). 504 Mich 995 (2019).

On remand, the Court of Appeals *held*:

1. There is a distinction between expert testimony that a particular child-complainant was abused and testimony about the common characteristics of abused children. Although an expert opinion may not be excluded simply because it concerns

the ultimate issue to be decided in a trial, *Smith* established a straightforward, bright-line rule that an examining physician may only opine with respect to whether a complainant has been sexually assaulted when the opinion is based on physical findings and the complainant's medical history. In the absence of physical findings, a physician's opinion of abuse is necessarily based only on an assessment of the complainant's statements. Because of that, a diagnosis of sexual abuse absent physical findings is merely a term of art and has no probative value at trial. In *Harbison*, the Supreme Court followed the bright-line rule set forth first in *Smith* to hold that an examining physician qualified as an expert in child abuse cannot testify that a complainant has been sexually assaulted or has been diagnosed with "probable" pediatric sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly invades the jury's province to determine witness credibility. A diagnosis of "possible" sexual abuse is similarly inadmissible without corroborating physical findings because, in both instances, the examining physician testifies about the likelihood of abuse in the absence of any physical evidence and couches that testimony in terms of a medical diagnosis.

2. In this case, the admission of Dr. Simms's testimony that AC suffered possible pediatric sexual abuse was plain error because it was contrary to *Smith* and *Harbison* given that there was no physical evidence corroborating the complainant's account of sexual assault or abuse. And given that the case involved a credibility contest between AC and defendant, the error affected defendant's substantial rights and seriously affected the integrity of defendant's trial because the doctor's testimony had the effect of vouching for AC's veracity and improperly invaded the jury's territory of determining witness credibility. Dr. Simms's reliance in her testimony on a pediatric journal, the use of which was expressly criticized by the *Harbison* Court, compounded the initial error of introducing her diagnosis into evidence.

Judgment reversed and case remanded for a new trial.

CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — EXPERT WITNESSES — PHYSICIANS.

Examining physicians cannot testify that a complainant has been diagnosed with possible sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Ronald Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

Wendy Barnwell for defendant.

ON REMAND

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

SHAPIRO, P.J. Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC-I) against AC, the daughter of his longtime girlfriend. On appeal, we affirmed defendant's convictions.[1] Defendant then applied for leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated our judgment in part and remanded the case for reconsideration[2] in light of *People v Harbison*, the companion case to *People v Thorpe*, 504 Mich 230, 235; 934 NW2d 693 (2019).[3] There, the Court held "that examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity

[1] *People v Del Cid*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2019 (Docket No. 342402).

[2] *People v Del Cid*, 504 Mich 995 (2019).

[3] The first case name in the caption of the Supreme Court's opinion in these consolidated cases is *People v Thorpe*. Because the Supreme Court order referred us to *People v Harbison* and our discussion largely focuses on that case, we will refer to the Supreme Court's opinion in the text of this opinion as *Harbison*, but our citations refer to *Thorpe*.

and improperly interferes with the role of the jury." *Id*. The question in this case is whether an examining physician may testify that she made a "diagnosis" of "possible pediatric sexual abuse" in the absence of supporting physical findings. We conclude that *Harbison* and the cases it relied on bar this testimony, and because we cannot say that this error was harmless, we reverse defendant's convictions and remand for a new trial.

AC lived in a two-bedroom apartment with her siblings, her mother (Nelly), and her mother's boyfriend (defendant). Defendant and Nelly have three children together, and Nelly has two children of her own, including AC. AC refers to defendant as her "step-dad."

The allegations arose in June 2016, when AC was 14 years old. AC had been caught stealing by her aunt and mother, and her mother was angry with her. After her mother fell asleep, AC decided to go to a weeknight church service through the church's "bus ministry" because she did not want to be at home. According to AC, while at church, a friend asked her if she was a virgin, to which she responded that she was not. AC testified that, by way of explanation, she mentioned her boyfriend and told her friend that "my step-dad was doing this stuff," referring to the allegations of sexual abuse. When the church bus was returning the teenagers home, AC requested to be dropped off last because she did not want to go home. She testified that the "main reason" was that her mother was mad at her. When AC's friend left the bus, she whispered something to the bus driver, who then announced that he could not return AC to her home. A chaperone then began questioning AC, who responded that her stepdad was "molesting" her.

The police were contacted and interviewed AC that night. About a week later, AC underwent a forensic interview and the police interviewed defendant, who denied the allegations. The next day, defendant was arrested and charged with one count of CSC-I. He was bound over following a preliminary examination, and the information charged him with sexual penetration by a person 17 years of age or older against an individual less than 13 years of age, MCL 750.520b(2)(b), and sexual penetration of a person who is at least 13 but less than 16 years of age by a member of the same household, MCL 750.520b(1)(b)(*i*).

At trial, AC testified that the first incident of abuse occurred when she was eight years old. She stated that one day when she and the other children were playing with defendant, he slid his hand down her pants. She was not sure whether defendant touched her on top of or underneath her underwear, but she was certain that defendant touched her vaginal area. AC told her mother about this incident shortly after it occurred. Nelly asked AC to repeat her allegations in front of defendant, but AC said that she did not feel comfortable doing so. Defendant told Nelly that he was "just playing around" and tickling the victim, and AC agreed with defendant's story "to get it over with" and because she was scared of getting in trouble.

According to AC's testimony, the next incident occurred when she was 12 years old. She testified that defendant picked her up, carried her into his bedroom, and took off her pants. AC stated that when she realized what defendant was doing, she began crying and told him that she did not want to have sex with him because she did not want to get pregnant. AC asserted that defendant said it was okay because he had a condom. She testified that defendant then had

sexual intercourse with her, which was "very painful." She further testified that she then went to the bathroom and discovered she was bleeding. She said that she told defendant about the bleeding and that he simply looked at her and walked away.

AC testified that defendant had sex with her two to three times a week after she turned 13 and that it was so often that she came to see it as "a normal thing." She testified that she did not tell her mother about what was going on; the only incident she ever revealed to her mother was the one that occurred when she was eight years old. AC's mother worked nights, and defendant cared for the children while she was working. AC testified that usually the other children were at home when defendant had sexual intercourse with her, but they never witnessed it because they were always either asleep or in another room playing games when it occurred. She also testified that there were a few times when defendant had sex with her while her mother was in the shower getting ready for work. She also recalled defendant having sex with her while her youngest brother, then a baby, was asleep in the same bed.

Dr. N. Debra Simms, M.D., performed the medical evaluation of AC following disclosure of the allegations and was admitted as an expert in "child abuse pediatrics" at trial. Before she conducted a physical examination of AC, Dr. Simms obtained a history from her mother; the nurse obtained a history from AC. The nurse relayed to Dr. Simms that AC alleged penile-vaginal contact and penile-digital contact while she was between the ages of 12 and 14 and that there had been pain and bleeding after the first penile-vaginal contact. Dr. Simms then performed a physical examination, which revealed no signs of sexual abuse.

Dr. Simms diagnosed AC with "possible pediatric sexual abuse." She gave the following explanation for her opinion:

> *Q*. Okay. I want to focus on kind of the genital area regarding the physical examination. Did you ultimately form an opinion in this case after doing the physical examination?
>
> *A*. Yes, I did.
>
> *Q*. What was your opinion?
>
> *A*. I made a medical diagnosis, based upon the history and the physical examination, and I diagnosed her with possible pediatric sexual abuse.
>
> *Q*. Why is that?
>
> *A*. The history was given that there had been penile/vaginal contact, that there had been contact to her hand, obviously, when you look at a hand, you're not going to see a penis print or anything like that, so you're going to have a normal exam. [AC], in—as part of our history, we're very specific, [AC] had actually started her menstrual period when she was 12 years of age. [AC] was also reported to use tampons. So, as part of the history, I knew that there was an object that was regularly going into the vaginal area, that I knew that her menstrual cycle had begun two-and-a-half years prior to my examination. The changes that occur with puberty adapt a child, even though we don't want children becoming sexually active at that age . . . . But, the body, from the fact that it is regulating and having menstruation and whatever the potential is there at that time. So, there are physical changes that occur to the body. . . . You go from birth, which is one, to fully mature, you're not going to get any more developed is five. . . . So, in looking at her body, she was a sexual maturity five of the genital area. . . . So, the—the opening to the vagina is there, and in front of that opening is a piece of tissue called the hymen. . . . In the case of sexually mature young ladies, that tissue is the one that will really change. . . . I've personally seen children before puberty and after puberty and it's night and

day differences, because of those affects [sic]. [AC], when I'm examining her and looking at those tissues, she has what is called a petaled configuration. . . . That allows intrusion of a tampon or intrusion of something else without necessarily tearing the tissue. A lot of people believe that the first time you have sex that tissue has to tear. It doesn't have to, depending upon the shape and depending upon the sexual maturity rating of the individual. So, in [AC's] case, I found that she had this petaled configuration. So, her physical examination was normal. Her physical examination was normal. It neither confirmed nor ruled out her history given that there had been penile/vaginal contact. My diagnosis as a physician was based upon the history that was given, and that's what we do.

Q. So, based upon the history and the anatomical findings, if you will, it's possible that she was sexually abused.

A. It was possible that she was sexually abused, yes, sir.

Q. But, her medical evaluation was normal.

A. Her—her physical examination was normal, yes, sir.

Q. Is that abnormal?

A. It's normal to be normal.

Q. Okay. What do you mean by that?

A. There are actually—as I mentioned, there are a lot of people that think that the body, especially the hymen, is like a solid wall. . . . And they think that, for virgins, that that actually has to be broken the first time they have intercourse. That is not true. . . . So, because a lot of people believe certain things and there are myths about what the normal structures are, there has been research and there have been papers published. One of the papers that was published was called, "It's Normal to be Normal". They took 236 children that they wanted to look at their examinations and say, "If these children were abused, then what do their examinations look like", well, you come to the problem of whether or not you know if a child has

> been abused. So, what they did, is they took 236 children where there had been convictions . . . ; 77 percent of those children had normal or non-specific findings. So, even though we knew that someone had decided that they had been abused, it was normal to be normal. That was in a wide age range. Then, what they did, is they did another study in which they took 36 pregnant adolescents . . . . And so, of those 36 pregnant teenagers, all but two of them did not have definitive findings of penetration. So, that paper was actually titled, "Normal Does Not Mean Nothing Happened." So, when we say that it's normal to be normal, the human body, especially as it goes through puberty, is adapted to this kind of function, and—and it can occur with little or no damage to the body.
>
> *Q*. So, ultimately, in conclusion, the findings that you found on [AC] were normal?
>
> *A*. She was normal, yes, sir.
>
> *Q*. And it's normal to be normal, that's—that's nothing that's abnormal?
>
> *A*. That's nothing—I guess so.
>
> *Q*. Did you follow that? She—it was normal to be normal, which is normal?
>
> *A*. Yes.

On cross-examination, Dr. Simms confirmed that "there were no hematomas, no lacerations, no scars, nothing, that it was normal."

In addition to AC and Dr. Simms, the prosecution called as witnesses the bus chaperone and two other church members who spoke with AC on the night of her disclosure. The forensic interviewer also testified as well as two police officers. Officer Jose Mendoza, who interviewed defendant following the allegations, testified that defendant denied sexually abusing or touching AC. Mendoza further testified that defendant told him that about two weeks before the interview, AC had come into his bedroom late at night, jumped him, and

straddled her legs around his torso. Defendant said that he told her that was inappropriate, but she did it four more times and then touched his "genital area" with her hands; defendant told her "not to do that."

The defense called numerous witnesses. AC's mother, Nelly, testified that she "never witnessed . . . anything out of the normal" between AC and defendant. Nelly also asserted that AC had lied to her "on many occasions" and that she "started being very dishonest" once she began high school. Nelly believed that "something may have happened to [AC]," but she did not believe that defendant was the perpetrator. AC's sister, KC, testified that she lived in the same household as AC and defendant and that she did not recall ever seeing anything strange between them. KC did not think that she could trust her sister because of the "many lies that she had been telling." The defense's other witnesses testified about defendant's character. Defendant then testified and denied that he had ever had sex with AC or touched her in a sexual manner.

The jury deliberated for about an hour on the first day of deliberations. About midday on day two, they asked to listen to AC's and defendant's testimonies. An audio disc of the testimonies was prepared for the jury. They then deliberated for about two more hours before finding defendant guilty of the charged offenses.

On appeal, defendant argued, in part, that Dr. Simms vouched for AC's testimony in violation of *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986). According to defendant, Dr. Simms's diagnosis of possible pediatric sexual abuse signaled her acceptance of AC's allegations. Defendant also argued that trial counsel was ineffective for failing to object to Dr. Simms's testimony. We rejected those arguments, reasoning that admission

of the testimony was not plainly erroneous when Dr. Simms "did not state a finding of sexual abuse or even probable abuse." Given that, we concluded that Dr. Simms's testimony did not amount to impermissible vouching. We further concluded that any objection by trial counsel would have been futile and that defendant was therefore not denied the effective assistance of counsel by the lack of an objection. *People v Del Cid*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2019 (Docket No. 342402), p 2.[4]

After our decision, the Supreme Court decided *Harbison*. In lieu of granting defendant's application for leave to appeal, the Supreme Court vacated the part of our judgment concerning Dr. Simms's testimony and remanded the case for reconsideration in light of *Harbison*. Having done so, we now conclude that an examining physician's testimony diagnosing a child-complainant with "possible sexual abuse" is inadmissible without corroborating physical evidence, that admission of Dr. Simms's testimony to that effect was plainly erroneous, and that reversal is required.

The Supreme Court has repeatedly overruled decisions permitting testimony from expert witnesses that has the effect of bolstering a child-complainant's testimony. See, e.g., *People v Beckley*, 434 Mich 691, 727; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.); *People v McGillen #2*, 392 Mich 278, 285; 220 NW2d 689 (1974). Even before *Harbison*, it was established that an examining physician could not opine that sexual abuse had occurred unless that opinion was supported

[4] We also rejected defendant's argument that his due-process rights were violated when, during voir dire, a potential juror stated that she was a victim of sexual abuse and described a situation that was similar to the facts of the present case. *Del Cid*, unpub op at 2-3.

by physical findings. In *Smith*, 425 Mich at 112, the examining physician testified that in his opinion, the complainant had been sexually assaulted based "not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant." The Supreme Court held that admission of this testimony was erroneous and required reversal. *Id*. at 113. In *Harbison*, the Court summarized the rationale for that holding:

> Citing MRE 704, we stated that "[i]t is . . . well-established that expert opinion testimony will not be excluded simply because it concerns the ultimate issue[.]" Yet, we acknowledged that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth." An examining physician's opinion is objectionable when it is solely based "on what the victim . . . told" the physician. Such testimony is not permissible because a "jury [is] in just as good a position to evaluate the victim's testimony as" the doctor. Nonetheless, an examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history. [*Thorpe*, 504 Mich at 255 (citations omitted; alterations in original).]

The *Harbison* defendant was convicted of, among other charges, two counts of CSC-I and two counts of second-degree criminal sexual conduct. *Id*. at 242-243, 249. At the defendant's trial, Dr. Simms[5] testified that following her examination of the complainant, TH, she diagnosed her with " 'probable pediatric sexual

[5] Dr. Simms was the testifying expert in *Harbison* as well as in this case.

abuse.' " *Id*. at 244. Dr. Simms acknowledged that TH's physical examination was normal; it " 'did not show any acute or remote indications of trauma[.]' " *Id*. at 245. She also explained that she had not expected to find any indications of trauma given TH's descriptions of the alleged sexual contact. *Id*. at 244-246. She explained that a finding of "probable pediatric sexual abuse" is appropriate when there is a "clear, consistent, detailed and descriptive" account of the abuse. *Id*. at 247-248.

The Supreme Court determined that Dr. Simms's testimony that TH had suffered "probable pediatric sexual abuse" amounted to impermissible vouching:

> Dr. Simms candidly acknowledged that her examination of TH showed no physical evidence of an assault. Her conclusion that TH suffered "probable pediatric sexual abuse" was based solely on her own opinion that TH's account of the assaults was "clear, consistent, detailed and descriptive." This testimony clearly falls within *Smith*'s holding that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth." An examining physician's opinion is objectionable when it is solely based "on what the victim . . . told" the physician. Such testimony is not permissible because a "jury [is] in just as good a position to evaluate the victim's testimony as" the doctor. [*Id*. at 261-262 (citations omitted; alterations in original).]

The Court concluded that this error was obvious because "*Smith* was unanimous and has never been called into question," and it "provides a very straightforward bright-line test that trial courts can readily observe." *Id*. at 262. The Court then concluded that "Dr. Simms's testimony that TH suffered 'probable pediatric sexual abuse' affected [the] defendant's substantial rights." *Id*. at 263. The Court recounted its

precedent establishing the prejudicial effect of an expert vouching for a child-complainant's credibility:

> [W]e believe the most prejudicial aspect of Dr. Simms's testimony was that she clearly vouched for TH's credibility. This Court has previously drawn a distinction between expert testimony that a particular child was abused and testimony about the common characteristics of abused children:
>
> > Therefore, any testimony about the truthfulness of this victim's allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness. To hold otherwise would allow the expert to be seen not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of victims, but to possess some specialized knowledge for discerning the truth.
>
> As we recognized in *Beckley* and embraced in [*People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995)]:
>
> > The use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation. Given the nature of the offense and the terrible consequences of a miscalculation—the consequences when an individual, on many occasions a family member, is falsely accused of one of society's most heinous offenses, or, conversely, when one who commits such a crime would go unpunished and a possible reoccurrence of the act would go unprevented—appropriate safeguards are necessary. To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat. [*Thorpe*, 504 Mich at 263-264 (citations omitted).]

The Court then reiterated its view that Dr. Simms's testimony amounted to impermissible vouching and

determined that the error was not harmless because the case was a credibility contest:

> [T]he Court of Appeals found no error in Dr. Simms's testimony, reasoning that Dr. Simms did not opine on whether [TH] was abused by [the defendant] but only diagnosed [TH] with "probable pediatric sexual abuse." We disagree. Regardless of whether "probable pediatric sexual abuse" is a term of art that can be used as a diagnosis with or without physical findings, we conclude that Dr. Simms's testimony had the clear impact of improperly vouching for TH's credibility.
>
> . . . [T]he instant case is largely a credibility contest. The only evidence against [the defendant] was TH's uncorroborated testimony. To bolster its case, the prosecution presented testimony from a pediatrician who is board-certified in child abuse pediatrics; who is currently a medical director at the Safe Harbor Children's Advocacy Center; who has examined, in her estimate, thousands of children that have been sexually abused; and who has testified as an expert witnesses [sic] in 32 counties. Given the lack of compelling testimony that forms the basis for the verdict and the plainly erroneous testimony that TH suffered "probable pediatric sexual abuse," we conclude that the plain error affected [the defendant's] substantial rights. [*Id*. at 264.]

The Court further concluded that this was far more than "a mere evidentiary error." *Id*. The Court stated:

> Rather, this error strikes at the heart of several important principles underlying our rules of evidence. Dr. Simms's testimony that TH suffered "probable pediatric sexual abuse" based solely on TH's statements about her history not only had the effect of vouching for TH's credibility, but it also invaded the province of the jury to determine the only issue in the case. Then, Dr. Simms reinforced this plain error by claiming that her diagnosis was based on a "national [consensus]" of pediatricians when even a cursory review of the article on which she relies reveals that the authors did not intend for pediatricians to rely on the

> article to make a diagnosis of "probable pediatric sexual abuse" at trial. This improperly admitted testimony very likely bolstered TH's credibility and affected the verdict. We conclude that the gravity of this significant error seriously affected the integrity of [the defendant's] trial. [*Id*. at 264-266 (first alteration in original).]

The Court reversed this Court's judgment affirming the defendant's convictions and remanded the case to the circuit court for a new trial. *Id*. at 266.

Harbison, *Smith*, and the cases on which they relied establish a bright-line rule that an examining physician's opinion that a complainant was sexually abused is admissible only if supported by physical findings. Dr. Simms's testimony is contrary to that caselaw because, despite the lack of any physical evidence of abuse, she diagnosed AC with possible pediatric sexual abuse. In the absence of physical findings, it necessarily follows that the physician's opinion is solely based on her assessment of the complainant's statements. The Supreme Court could not have been clearer that such testimony is inadmissible because it invades the jury's province to determine witness credibility. See *id*. at 262.

The question then is whether Dr Simms's otherwise inadmissible testimony should be allowed in this case because she testified that AC was "possibly," rather than "probably," sexually abused. We conclude that this is a distinction without a meaningful difference. "Possible pediatric sexual abuse" is not significantly different from "probable pediatric sexual abuse" in terms of the physician's endorsement of the accusation. In both instances, the examining physician speaks about the likelihood of abuse in the absence of any physical evidence and couches it in terms of a medical diagnosis. This necessarily leads the jury to believe that the expert witness finds the complainant's ac-

count credible.[6] And were we to consider "possible sexual abuse" as significantly different from "probable sexual abuse" it would be inadmissible under MRE 403. Testimony that the "diagnosis" is merely "possible" has very little probative value while, for the reasons discussed in *Harbison*, such testimony is highly prejudicial.[7]

Indeed, *Harbison* strongly indicated that a "diagnosis" of sexual abuse made by a physician has no place at trial absent positive physical findings. As in this case, in *Harbison*, Dr. Simms explained that the lack of supporting physical findings regarding the hymen did not mean that penetration had not occurred because it's " 'normal to be normal.' " *Thorpe*, 504 Mich at 246. The Supreme Court stated that to the extent that Dr. Simms's diagnosis was based on *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal*, 94 Pediatrics 310 (1994)—the same article she referred to in her testimony in the instant case—her reliance on it was "seriously misplaced." *Thorpe*, 504 Mich at 265 n 65. The Court explained:

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[6] In *Harbison*, Dr. Simms testified that a diagnosis of possible pediatric sexual abuse is given if a child's " 'statement is limited,' " possibly because the child has a developmental disability, is young, or is unable to really communicate what happened. *Thorpe*, 504 Mich at 247. In this case, the jury was not provided that context. But even if the jury had heard that explanation, it would not change our view of the case because the opinion would still be solely based on the complainant's statements, and any diagnosis from an expert witness may be viewed by the jury as a "stamp of approval." See *People v Shaw*, 315 Mich App 668, 677; 892 NW2d 15 (2016).

[7] To be clear, when there are no physical findings, a physician may not testify that the complainant suffered "possible pediatric sexual abuse" or other phrases indicating a conclusion as to the likelihood that such abuse actually occurred. At the same time, however, a medical expert may offer the opinion that a lack of physical findings does not affirmatively establish that no abuse occurred.

Relying on this article to testify at trial concerning whether a complainant suffered "probable pediatric sexual abuse" actually undermines the integrity of the study by proving the very premise that it accepts as true, i.e., that legally confirmed convictions are a valid measure of the truth. The article admits as much by acknowledging that "since the examiner testified in court in 34 of the cases in which the perpetrator was convicted following a jury trial, it is possible that *testimony concerning medical findings contributed to the conviction.*" [*Examination Findings In Legally Confirmed Child Sexual Abuse*, 94 Pediatrics] at 315 (emphasis added). Given that the article notes that it "is possible that testimony concerning medical findings contributed to the conviction," it seems likely that testimony concerning a "diagnosis" would further contribute to the conviction, especially, as in this case, when there are no physical findings to be found. *Id*. In many respects, relying on the article in this manner is akin to offering into evidence conviction rates to establish that those charged with crimes will "probably" be convicted.

We conclude that the article is clearly directed toward making a "diagnosis" on the basis of " 'proof' *before* proceeding with criminal charges" and does not support a "diagnosis" of pediatric sexual abuse at trial. *Id*. at 317 (emphasis added). The article only once refers to the term "diagnosis" and only does so by placing the term in scare quotes, which are "used to express esp. skepticism or derision concerning the use of the enclosed word or phrase." *Merriam-Webster's Collegiate Dictionary* (11th ed). In other words, the term "diagnosis" is not being used in its traditional sense. This makes sense, as even Dr. Simms herself explained that the purpose of the "diagnosis" was "to allow pediatricians that do child abuse evaluations to communicate with one another effectively . . . ."

Rather, the article is directed at pediatricians who must make referrals of possible sexual abuse and to inform prosecutors that the absence of medical "findings" does not mean that the complainant did not suffer sexual abuse. This reading of the article not only makes sense but

> is consistent with Michigan law and likely the law of every other state. Indeed, the Michigan Legislature set a very low bar for triggering a report of sexual abuse, requiring a report if one only "has reasonable cause to suspect child abuse or child neglect . . . ." MCL 722.623(1)(a). [*Thorpe*, 504 Mich at 265 n 65.]

Harbison thus recognized that a "diagnosis" of sexual abuse absent physical findings is a term of art and has no probative value at trial. That the Court spoke disapprovingly of such diagnoses without qualification supports our conclusion that a diagnosis of "possible pediatric sexual abuse" is also inadmissible without corroborating physical findings. And in this case, Dr. Simms expressly referred to the article discussed in *Harbison*, thus compounding the initial error of introducing her diagnosis into evidence. See *id*. at 265.

In sum, we conclude that the admission of Dr. Simms's testimony that AC suffered possible pediatric sexual abuse was plain error because it was contrary to *Smith* and *Harbison*.[8] We further conclude that this error affected defendant's substantial rights. The present case was a credibility contest. The testimony of the prosecution's other witnesses did not corroborate AC's testimony that defendant repeatedly had sexual intercourse with her while she was between the ages of 12 and 14. Defendant testified that he never touched AC in a sexual manner and that he never touched her

[8] The defendant in *Harbison* did not object to Simms's testimony, and the Supreme Court unanimously held that its admission was plain error under *Smith*. We see no reason to reach a different conclusion. Moreover, reversal is merited under *Harbison* even though it was decided after the original verdict in this case because defendant raised the issue on appeal. At a minimum, *Harbison* should be given limited retroactive effect. See *People v Quinn*, 305 Mich App 484, 490; 853 NW2d 383 (2014).

vagina. His testimony was supported by AC's mother and sister who testified that they did not witness anything inappropriate between defendant and AC and offered negative opinions regarding AC's character for truthfulness. Because Dr. Simms testified that she was board-certified in child abuse pediatrics, had "lots" of years of experience, was the child abuse pediatrician for the Center for Child Protection and Ottawa County Children's Advocacy, and had been qualified as an expert in 32 counties in Michigan, the introduction of her diagnosis undermined the reliability of the verdict. See *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.). For the same reasons stated by the Supreme Court in *Harbison*, we also conclude that Dr. Simms's testimony seriously affected the integrity of defendant's trial. An opinion from Dr. Simms as to whether AC was sexually abused not only had the effect of vouching for AC's credibility, but it also invaded the province of the jury to determine whether defendant sexually abused the victim. Therefore, admission of that testimony was not a mere evidentiary error. *Thorpe*, 504 Mich at 264-265.

Reversed and remanded. We do not retain jurisdiction.

BORRELLO and BECKERING, JJ., concurred with SHAPIRO, P.J.

PEOPLE v ANDERSON

Docket No. 345601. Submitted March 3, 2020, at Grand Rapids. Decided March 10, 2020, at 9:00 a.m. Leave to appeal denied 507 Mich 881 (2021).

Kim Anderson was convicted following a jury trial in the Kent Circuit Court, Dennis B. Leiber, J., of first-degree criminal sexual conduct (CSC-I), MCL 750.520b; kidnapping, MCL 750.349; unlawful imprisonment, MCL 750.349b; unlawful driving away of a vehicle (unlawful driving), MCL 750.413; and assault with a dangerous weapon (felonious assault), MCL 750.82. While in the victim's home, defendant sat on the victim's back, cut off the victim's belt with a knife, and told the victim to take off her pants. The victim complied, and as she was standing bent over facing the ground, defendant placed his penis in the crease of her buttocks and ejaculated. According to the victim, defendant then told her to dress and get into the closet in the dining room. The victim complied, and defendant placed a knife in the crease of the door in a manner that prevented the victim from opening the closet door. Defendant then indicated that he wanted money from the victim and allowed the victim to go upstairs to a spare bedroom, where the victim kept change in a water jug. Defendant tied the victim up and told her to enter the closet, after which he wrapped a wire around her neck and attached it to the clothes bar. Defendant took the victim's change jug and a few other valuables and drove off in the victim's car. He was arrested a few days later and convicted after a four-day jury trial. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to prison terms of 50 to 75 years for his CSC-I and kidnapping convictions; 19 to 60 years for his unlawful-imprisonment conviction; 3 to 30 years for his unlawful-driving conviction; and 4 to 15 years for his felonious-assault conviction. Defendant appealed.

The Court of Appeals *held*:

1. MCL 750.520b provides, in pertinent part, that a person is guilty of CSC-I if he or she engages in sexual penetration with another person and if any of the enumerated circumstances in that statute exists. MCL 750.520a(r) defines "sexual penetration" as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body

or of any object into the genital or anal openings of another person's body, but emission of semen is not required. In this case, defendant argued that he could not have been convicted of CSC-I because the prosecution presented no evidence of sexual penetration. Defendant pointed to the victim's initial statements to police officers and a sexual-assault nurse examiner that defendant did not penetrate her. However, the victim testified that defendant placed his penis between the fold of her buttocks before he ejaculated. The jury was presented with all statements and made a credibility determination in the victim's favor. The question was whether defendant's conduct in this case—the intrusion of defendant's penis into the crease of the victim's buttocks, but not into the anal cavity itself—was sufficient to satisfy the penetration element of CSC-I. There was no binding precedent answering this question, but several Court of Appeals panels have concluded in unpublished opinions that similar intrusions satisfy the penetration element of CSC-I. Drawing on the analysis of these opinions, the Legislature intended the term "anal opening" to be read broadly to include both the anal canal and the crease of the buttocks. Two considerations supported this conclusion: first, the Court of Appeals has already concluded that the "genital opening" of a female includes the labia, and therefore because the Legislature defined "genital opening" broadly, there was no reason to restrict "anal opening" to the anal canal; and second, the defining difference between a sexual penetration and sexual contact is the intrusion into the victim's body, rather than the unwanted touching of sensitive areas of the body, and the statute broadly prohibits sexual intrusions of all types, regardless of the cavity entered. Accordingly, defendant's conduct in this case qualified as a sexual penetration.

2. Under MCL 750.349(1)(c), a person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to commit a criminal sexual offense. MCL 750.349(2) provides that "restrain" means to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority; the restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. Defendant argued that he could not be convicted of kidnapping because he did not restrain the victim with the intent to commit a sexual assault given that the closet confinements occurred after the sexual assault. However, the closet confinements were not the restraint that warranted defendant's kidnapping conviction; rather, the restraint underlying defendant's kidnapping conviction was his confinement of the victim preced-

ing the sexual assault. Viewing the evidence in the light most favorable to the prosecutor, the record showed that defendant sat on the victim while scraping a knife over her back, used that knife to cut off her belt, and instructed her to remove her clothes. Defendant then committed the sexual assault. Defendant restrained the victim by using his own body weight and the knife; that this restraint was accomplished with the intent to commit a sexual assault is evidenced by the fact that defendant removed the victim's belt while she was constrained and committed the sexual assault immediately after the confinement, while the victim was still under the strain of the prior restraint. Accordingly, there was sufficient evidence for a rational jury to convict defendant of kidnapping.

3. Defendant made two unpreserved arguments on appeal: that the trial court erred by admitting a DNA report into evidence because the reliability of the report was doubtful and that the prosecutor misled the jury during opening and closing arguments by stating that defendant's semen was found on the victim. With regard to the first argument, defendant provided no evidence suggesting that the DNA samples were tampered with or that the report was otherwise suspect; accordingly, defendant's argument was without merit. With regard to the second argument, the results of a differential DNA analysis used to isolate sperm cells showed a high correlation between the sample and defendant's DNA, which implied that defendant contributed semen to the victim's anal area. Accordingly, it could not be concluded that the prosecutor misled the jury, and in any event, the jury was property instructed that the prosecutor's arguments were not evidence.

4. MCL 776.21(5) provides that a defendant who allegedly has committed a crime under MCL 750.520b shall be given a polygraph examination or lie detector test if the defendant requests it. Defendant was charged with CSC-I pursuant to MCL 750.520b and would have been entitled to a polygraph examination had he requested it; however, defendant provided no evidence to support his assertion that he had requested an examination. Accordingly, defendant's argument that he was improperly denied a polygraph examination was without merit.

5. Defendant's argument that the trial court erred by sentencing him as a fourth-offense habitual offender under MCL 769.12 was unclear and ultimately had no merit. Defendant could not show that his habitual enhancement was improper.

Affirmed.

CRIMINAL LAW — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — WORDS AND PHRASES — "SEXUAL PENETRATION."

MCL 750.520b provides, in pertinent part, that a person is guilty of criminal sexual conduct in the first degree (CSC-I) if he or she engages in sexual penetration with another person and if any of the enumerated circumstances in that statute exists; MCL 750.520a(r) defines "sexual penetration" as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required; intrusion into the crease of a victim's buttocks, but not into the anal cavity itself, is sufficient to satisfy the penetration element of CSC-I.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, *James K. Benison*, Chief Appellate Attorney, and *Andrew J. Lukas*, Assistant Prosecuting Attorney, for the people.

Kim Anderson, *in propria persona*, and *Strauss & Strauss, PLLC* (by *Gary D. Strauss*) for defendant.

Before: MURRAY, C.J., and METER and K. F. KELLY, JJ.

METER, J. Defendant appeals as of right his jury-trial convictions for first-degree criminal sexual conduct (CSC-I), MCL 750.520b; kidnapping, MCL 750.349; unlawful imprisonment, MCL 750.349b; unlawful driving away of a vehicle (unlawful driving), MCL 750.413; and assault with a dangerous weapon (felonious assault), MCL 750.82. Among other issues, defendant argues that the prosecution did not present sufficient evidence of penetration to convict him of CSC-I. We conclude, as have many panels before us, that defendant sexually penetrated the victim under MCL 750.520a(r) by inserting his penis into the crease of her buttocks. Accordingly, we conclude that sufficient evidence supported defendant's CSC-I conviction. Finding

no merit to the remainder of defendant's claims of error, we affirm defendant's convictions and sentences.

I. BACKGROUND

Defendant's convictions result from his assault of the victim in her home. The victim and defendant were friends before the assault but were not romantically or sexually involved. After spending the morning together on the day in question, defendant asked the victim for a hug. She obliged, but when defendant held her for longer than she wished, she pushed him away. At that point, defendant told the victim that he loved her. The victim, however, informed defendant that she did not have any romantic feelings for him. According to the victim, she then noticed that defendant had a knife in his hands, and she tried to take it from him. The two struggled and eventually ended up on the floor, where defendant sat on the victim's back, "scraping" the knife across her back. Defendant hit the victim on her face and back, cut off the victim's belt with the knife, and told her to take off her pants. The victim complied, and as she was standing bent over facing the ground, defendant placed his penis in the crease of her buttocks and ejaculated.

According to the victim, defendant then told her to dress and get into the closet in the dining area. The victim complied, and defendant placed a knife in the crease of the door in a manner that prevented the victim from opening the closet door. Defendant paced back and forth, talking about how the victim had humiliated him on numerous occasions. Defendant stated that he wanted the victim to feel his pain and asked her if she wanted to die. Eventually defendant indicated that he wanted money from the victim, and the victim told him that she had collected change in a

water jug. Defendant then allowed the victim to exit the closet, and the two went upstairs to a spare bedroom. Defendant instructed the victim to lie on her stomach, and after she complied, defendant tied up the victim with speaker wire and masking tape and placed tape over her mouth. Defendant instructed the victim to enter the closet and, after she did so, wrapped a wire around her neck and attached it to the clothes bar. Defendant took the victim's change jug, as well as a few other valuables, and left in the victim's car. Defendant abandoned the car at a friend's home but was arrested a couple days later.

Defendant was convicted of the aforementioned crimes after a four-day jury trial. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to prison terms of 50 to 75 years for his CSC-I and kidnapping convictions; 19 to 60 years for his unlawful-imprisonment conviction; 3 to 30 years for his unlawful-driving conviction; and 4 to 15 years for his felonious-assault conviction. This appeal followed.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant first challenges the sufficiency of the evidence underlying his CSC-I and kidnapping convictions. We review de novo challenges to the sufficiency of the evidence. *People v Solloway*, 316 Mich App 174, 180; 891 NW2d 255 (2016). On appeal, we must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the prosecution proved each essential element of the crime beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85

(2012). A trier of fact may consider circumstantial evidence and all reasonable inferences the evidence creates. *Solloway*, 316 Mich App at 180-181. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Flick*, 487 Mich 1, 24-25; 790 NW2d 295 (2010) (quotation marks and citation omitted). We review de novo issues of statutory interpretation. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

1. CSC-I

In this case, defendant was charged under alternate theories of CSC-I pursuant to MCL 750.520b(1)(c) and (f), which provide, in pertinent part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
>
> * * *
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.

MCL 750.520a(r) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal inter-

course, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

Defendant argues that he could not have been convicted under either theory because the prosecution presented no evidence of sexual penetration. In making this argument, defendant points to the victim's initial statements to police officers and a sexual-assault nurse examiner that defendant did not penetrate her, as well as the victim's testimony at trial that defendant ejaculated quickly after she took her clothes off. In making the latter argument, defendant appears to acknowledge that DNA evidence was presented at trial which tended to show defendant's DNA in the area of the victim's buttocks; however, defendant avers that the "rational inference" from this evidence and the victim's testimony "is that semen dripped down in the anal area or that it migrated from her clothing to that area after she went upstairs." Regarding these arguments, we need only note that the victim testified that defendant placed his penis between the fold of her buttocks before he ejaculated. The victim's previous statements were presented to the jury, which made a credibility determination in the victim's favor. It is the jury's role to determine credibility, and we will not usurp that role on appeal.[1]

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[1] Defendant argues in his appellate brief that the victim's testimony was a series of agreements with the prosecutor's questions. The jury, however, heard the victim's testimony and was privy to her previous statements to officers and the nurse examiner. Again, credibility determinations are reserved for the fact-finder. To the extent that defendant has attempted to argue that the prosecutor's questioning was improper, we decline to address this issue because it was not properly raised in the statement of questions presented. MCR 7.212(C)(5).

The victim's testimony, however, presents us with a different question: is intrusion into the crease of the buttocks, but not into the anal cavity itself, sufficient to satisfy the penetration element of CSC-I? We conclude that it is. There is no binding precedent in this jurisdiction answering the question; however, several panels of this Court have concluded that similar intrusions satisfy the penetration element of CSC-I. For instance, in *People v Motley*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2006 (Docket No. 258281), p 3, a panel of this Court reasoned that the " 'anal opening' includes the crease of the buttocks immediately next to the anus itself." In doing so, the *Motley* panel referred to *People v Peterson*, 450 Mich 349, 354; 537 NW2d 857 (1995), noting that the "facts of [that] case distinguish anal canal from anal opening." *Motley*, unpub op at 3.

Similarly, in *People v Person*, unpublished per curiam opinion of the Court of Appeals, issued June 7, 2002 (Docket No. 232243), p 2, the panel concluded that "the act of placing one's penis in between another's buttocks in the area of the anal opening is indeed an act of sufficient physical invasiveness to constitute 'sexual penetration.' " The *Person* panel reasoned by analogy to *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992), in which this Court concluded that the "genital openings" of a female victim are not limited to the vagina itself but also include the labia. *Person*, unpub op at 2. Indeed, our unpublished cases leave little doubt that this Court interprets the term "anal opening" in MCL 750.520a(r) broadly to include both the anal canal and the crease of the buttocks. See *People v Li-Hua Wei*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 308353), p 2; *People v Novak*, unpublished per curiam opinion of the

Court of Appeals, issued January 26, 2010 (Docket No. 284838), p 4.[2]

Unpublished cases, however, are not precedentially binding. MCR 7.215(C)(1). Thus, despite several cases touching on the issue, this Court has not provided definitive guidance to trial courts applying MCL 750.520a(r) in these circumstances. Therefore, to the extent that any question exists regarding whether an intrusion need enter the anal canal to constitute sexual penetration, we intend to resolve it in precedential fashion. Drawing upon the analysis of several of this Court's panels in recent years, we conclude—now in a published decision—that the Legislature intended the term "anal opening" to be read broadly to include both the anal canal and the crease of the buttocks, that is, as the victim explained, the void between the "butt cheeks." In coming to this conclusion, we need not restate at length what has already been discussed. Rather, we highlight two considerations.

First, this Court has already concluded that the "genital opening" of a female includes the labia. We see no reason why the Legislature would define "genital opening" broadly but restrict "anal opening" to the anal canal. Second, the defining difference between a sexual penetration and sexual contact is the intrusion into the victim's body, rather than the unwanted touching of sensitive areas of the body. The statute broadly prohibits sexual intrusions of all types, regardless of the cavity entered. In this sense, the statute protects a person's bodily integrity, and there can be no question that defendant's conduct in this case sufficiently in-

[2] Judge GLEICHER dissented in *Novak*, concluding that the evidence was insufficient to convict defendant of CSC-I when, at most, the evidence showed that the defendant penetrated the victim's buttocks but not her anus. *Novak* (GLEICHER, J., dissenting), unpub op at 8-10.

truded upon the victim's bodily integrity to qualify it in the same class as other recognized sexual penetrations.

Defendant does not challenge the other elements underlying his sexual-assault conviction. Accordingly, we affirm defendant's conviction of CSC-I.

2. KIDNAPPING

Next, defendant argues that the prosecutor presented insufficient evidence for a rational jury to find him guilty of kidnapping. As relevant here, a person commits the crime of kidnapping if he or she "knowingly restrains another person with the intent" to commit a criminal sexual offense. MCL 750.349(1)(c).

> "[R]estrain" means to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. [MCL 750.349(2).]

Defendant argues that he cannot be convicted of kidnapping because he did not restrain the victim with the intent to commit a sexual assault. We disagree. Defendant's argument focuses on his restraint of the victim in the downstairs and upstairs closets. Defendant makes much of the fact that no sexual assault occurred while or after the victim was so confined. Yet, the closet confinements were not the restraint that warranted defendant's kidnapping conviction; rather, the restraint underlying defendant's kidnapping conviction was his confinement of the victim preceding the sexual assault.

Viewing the evidence in the light most favorable to the prosecutor—and crediting the victim's testimony

accordingly—the record shows that defendant sat on the victim while scraping a knife over her back. He then used that knife to cut off the victim's belt before instructing her to remove her clothes and then committing the sexual assault. Although the closet confinements were of longer duration, restraint for the purposes of the kidnapping statute need not be for any specific period of time. By using his own body weight and the knife to restrict the victim, defendant "restrained" the victim within the meaning of the kidnapping statute. That this restraint was accomplished with the intent to commit a sexual assault is evidenced by the fact that defendant removed the victim's belt while she was constrained and committed the sexual act immediately after the confinement, while the victim was still under the strain of the prior restraint. Accordingly, the prosecutor presented sufficient evidence for a rational jury to convict defendant of kidnapping.

B. DNA EVIDENCE[3]

Defendant raises two arguments with regard to the trial court's admission of evidence of a DNA analysis performed on anal and perianal swabs from the victim. At trial, Erica Castor, an expert in DNA analysis employed by the Michigan State Police in Northville, testified that the Michigan State Police laboratory in Grand Rapids received the victim's sexual-assault kit in October 2017, at which point it was itemized. Michelle Schmitt, a DNA-analysis expert with the Michigan State Police laboratory in Grand Rapids, testified that the actual date the Grand Rapids laboratory received the kit was November 13, 2017. According to Castor, the

[3] This issue and the remaining issues discussed in this opinion were raised by defendant in a brief filed pursuant to Michigan Supreme Court Administrative Order No. 2004-6, Standard 4, 471 Mich c, cii (2004).

Northville laboratory received the kit on December 6, 2017. In January 2018, Castor took samples (cuttings) of swabs in the victim's sexual-assault kit to determine whether any tested positive for the presence of male DNA. Castor generated a report of her work on January 29, 2018. The anal and perianal cuttings contained the highest amount of DNA, and she sent a sample of those cuttings for additional DNA testing back to the Grand Rapids laboratory.

Schmitt testified that she began her testing on the cuttings in March 2018 and prepared her report the next month. Schmitt explained that she analyzed two different "fractions" from the anal and perianal swab. Fraction one contained skin cells or cells from the body, while Schmitt attempted to isolate possible sperm cells for fraction two. DNA analysis on the first fraction revealed likely skin cells with a correlation to the DNA of the victim, defendant, and one unknown person. Regarding the second fraction, Schmitt testified that, although no one looked at the cells under a microscope, the differential extraction technique employed was intended to isolate sperm cells. Schmitt stated that she could not "definitely" say that the cells were sperm cells but that the technique was used to try to isolate sperm cells. The results of the analysis of the second fraction revealed cells with a strong correlation to defendant's DNA.

On appeal, defendant first argues that the trial court erred by admitting Schmitt's report into evidence because the reliability of the report was doubtful, given that Schmitt's report predates Castor's report, despite the fact that Schmitt's report used the cuttings Castor created. We review this unpreserved argument for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The record clearly shows that Castor took the cuttings

and created her report before Schmitt. Defendant has provided this Court with no evidence that would suggest that the DNA samples were tampered with or that the report was otherwise suspect. Defendant's argument is therefore without merit.

Next, defendant argues that the prosecutor misled the jury during his opening and closing arguments by stating that defendant's semen was found on the victim. We review this unpreserved allegation of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Id*. "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64.

The record in this case indicates that, although Schmitt could not say definitively that the second-fraction cells were sperm cells, the differential analysis employed attempted to isolate sperm cells. Moreover, the results of her analysis showed high correlation between the DNA on the second-fraction cells and defendant's DNA. These results imply that defendant contributed semen to the victim's anal area. Accordingly, we are unable to conclude that the prosecutor misled the jury, and in any event, the jury was properly instructed that the attorney's arguments were not evidence. See *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001) ("Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence."); *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011) ("Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors.").

C. POLYGRAPH EXAMINATION

Next, defendant argues that he is entitled to a new trial because his request to take a polygraph examination was improperly denied. MCL 776.21(5) provides that "[a] defendant who allegedly has committed a crime under [MCL 750.520b] shall be given a polygraph examination or lie detector test if the defendant requests it." A defendant can request such an examination until he or she is convicted of the offense. *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003). In this case, defendant was charged with CSC-I pursuant to MCL 750.520b. Therefore, he would be entitled to a polygraph examination if he requested it. On appeal, however, defendant has provided no evidence to support his assertion that he requested an examination. Accordingly, defendant's argument is without merit.

D. FOURTH-OFFENSE HABITUAL ENHANCEMENT

Finally, defendant argues that the trial court erred by sentencing him as a fourth-offense habitual offender, MCL 769.12. We review de novo issues involving the interpretation of the legislative sentencing guidelines. *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016). The trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence," but application of those facts to the statute is a question of law reviewed de novo. *Id*. (quotation marks and citation omitted).

MCL 769.12(1)(a) provides:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if

> obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under [MCL 769.13] as follows:
>
> (a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years. Not more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction for the purposes of this subsection only.

Defendant's arguments regarding MCL 769.12 are unclear. Defendant appears to argue that he should have been subject to a 25-year minimum sentence instead of being sentenced as a fourth-offense habitual offender. The 25-year minimum, however, is a sentence applied to a fourth-offense habitual offender, not a separate sentencing scheme. Indeed, defendant was sentenced as a fourth-offense habitual offender consistently with the 25-year minimum set forth in MCL 769.12(1)(a). Defendant argues that he was not given notice of the fourth-offense habitual enhancement, but notice was contained in both the original and amended informations. Accordingly, defendant has not shown any entitlement to relief from his enhanced sentence. Because defendant has not shown that the habitual enhancement was improper, we also find without merit his argument that his counsel was constitutionally ineffective for failing to challenge the enhancement. *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000).

Affirmed.

MURRAY, C.J., and K. F. KELLY, J., concurred with METER, J.

VECTREN INFRASTRUCTURE SERVICES CORPORATION v DEPARTMENT OF TREASURY

Docket No. 345462. Submitted November 3, 2019, at Lansing. Decided March 12, 2020, at 9:05 a.m. Vacated and remanded 506 Mich 964 (2020).

Vectren Infrastructure Services Corporation, the successor in interest to Minnesota Limited, Inc. (MLI) sued the Department of Treasury in the Court of Claims, alleging that the Department had improperly assessed a tax deficiency against MLI after auditing MLI's Michigan Business Tax (MBT) returns for 2010 and part of 2011. In 2010, a Michigan company retained MLI, a Minnesota-based company, to assist in the cleanup of a severe oil spill in Kalamazoo. MLI rented most of the equipment it used on the Kalamazoo project and hired Michigan union employees to perform the work. In March 2011, while the Kalamazoo project was ongoing, MLI sold all of its assets to plaintiff for $80 million. MLI treated the sale for tax purposes as a sale of its assets under the federal tax code. MLI timely filed its MBT returns for 2010 and for the period in 2011 before the sale, January 1, 2011 to March 31, 2011 (the Short Year). To accurately tax only Michigan business activity, the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., employs an apportionment formula. For a taxpayer whose business activities are subject to tax within and outside Michigan, its tax base is apportioned to Michigan by multiplying its tax base by the sales factor calculated under MCL 208.1303. The sales factor is a fraction, in which the numerator is total sales in the state during the tax year and the denominator is total sales of the taxpayer everywhere during the tax year. In its MBT return for the Short Year, MLI included the sale of its assets in the denominator of its sales factor. Following the audit, the Department determined that MLI had improperly included its gain from the sale of its assets in the sales-factor denominator, resulting in an overstatement of its total sales and the reduction of its Michigan tax liability. The auditor excluded MLI's sale of assets from the sales factor and included it in MLI's preapportioned tax base, which increased MLI's sales factor from 14.9860% to 69.9761% and consequently increased its tax liability. MLI asked the Department for an alternate apportionment for the Short Year, but the Department denied MLI's request and

determined that MLI had not overcome the presumption that the statutory apportionment fairly represented MLI's business activity in Michigan for the Short Year. Plaintiff filed suit in the Court of Claims, arguing, in part, that the Department's formulation of the sales factor for the Short Year resulted in a grossly distortive tax that violated the Equal Protection, Due Process, and Commerce Clauses of the Constitution. Both parties moved for summary disposition, and the court, COLLEEN A. O'BRIEN, J., granted summary disposition for the Department. According to the court, the Department had properly included MLI's gain from the sale of its assets in MLI's tax base because the sale qualified as "business income" within the meaning of the MBTA. The court further concluded that MLI was not entitled to an alternate apportionment because its dispute did not concern the constitutionality of the apportionment formula as applied to its MBT but rather concerned the inclusion of the gain from the sale of its assets in its tax base. Plaintiff appealed.

The Court of Appeals *held*:

1. The United States Supreme Court has held that the Due Process and Commerce Clauses do not require the use of a particular apportionment formula; rather, the Constitution requires only that the formula be fair, in that it must fairly determine the portion of income that can be fairly attributed to in-state activities. Fairness also requires that the choice of factors used in the formula actually reflect a reasonable sense of how the income was generated. A formula is not fair when the taxpayer proves by clear and cogent evidence that the income attributed to the state was out of all appropriate proportion to the business transacted in that state or has led to a grossly distorted result. Vectren presented clear and cogent evidence that the statutory formula, as applied by the Department, attributed business activity to Michigan that was out of all appropriate proportion to the actual business activity transacted in the state, contrary to MCL 208.1309(3). Much of the activity and assets involved in the sale did not have any connection to Michigan, but because the sale occurred during the Short Year, when an unusually large percentage of MLI's business activity took place in Michigan, an unreasonably large portion of the sale was attributed to Michigan and taxed under the MBT. Therefore, the apportionment formula was unconstitutional as applied to MLI under the circumstances.

2. MLI filed its MBT return using an alternate apportionment method that included its gain from the sale of its assets in the sales-factor denominator. Under the MBTA, however, a taxpayer must petition the Department for an alternate apportionment

before filing its MBT return. Although the Department pointed out this procedural irregularity in the Court of Claims, the Department entertained MLI's request at the informal level and did not argue before the Court of Claims that MLI's request should be denied for failure to strictly comply with the statutory directive. Therefore, the Department waived this issue or impliedly consented to try the substantive issue of whether the MBT assessed to MLI was distortive.

Reversed, tax assessment and penalty vacated, and case remanded to determine an alternate method of apportionment.

TAXATION — MICHIGAN BUSINESS TAX ACT — OUT-OF-STATE BUSINESS ACTIVITY — INCOME APPORTIONMENT.

The apportionment formula used to calculate the amount of tax attributable to the state by an out-of-state company that is also liable to another state for tax on its business activity must be fair under the federal Constitution; that is, the formula must fairly determine the portion of income that can be fairly attributed to in-state activity, and the factors used in the formula must actually reflect a sense of how the income was generated; a formula is not fair when the taxpayer proves by clear and cogent evidence that the income attributed to the state was out of all appropriate proportion to the business transacted in the state or when it has led to a grossly distortive result.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *David W. Thompson* and *Justin R. Call*, Assistant Attorneys General, for the Michigan Department of Treasury.

Honigman Miller Schwartz and Cohn LLP (by *Lynn A. Gandhi* and *June Summers Haas*) for Vectren Infrastructure Services Corporation.

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

PER CURIAM. This case presents the complex question of how the gain on the sale of an out-of-state business, which conducts some of its business activities in Michigan, should be taxed under the Michigan Business Tax (MBT). Defendant, the Department of Treasury (the

Department), applied the statutory formula and declined to allow calculation under an alternate formula. The trial court agreed with the Department. We agree, at least in part, with plaintiff and reverse.

Minnesota Limited, Inc. (MLI) was an S corporation headquartered in Big Lake, Minnesota, engaged in the business of constructing, maintaining, and repairing oil and gas pipelines, as well as providing HAZMAT response. MLI, which originated as a family business, had grown over the course of its 52-year history to employ more than 600 employees at seasonal peak and serve a 24-state territory. MLI's service territory primarily included locations in the northern Midwest, such as Minnesota, Wisconsin, Iowa, the Dakotas, and, in some years, the state of Michigan. MLI provided services to its customers on a contract-by-contract basis, such that MLI's project locations were different every year. At no time did MLI maintain a permanent business location in Michigan or retain permanent employees in the state.

Around the mid-1990s, MLI was owned 50-50 by two siblings; when one began experiencing health issues around 2010 and no longer wished to be involved in the company, the siblings decided to sell MLI. Notably, during the period that MLI was seeking a buyer in the summer of 2010, Enbridge Energy retained MLI to assist in the cleanup of a severe oil-pipeline spill in Kalamazoo, Michigan. MLI brought minimal equipment and employees to this project, which was performed, in part, during the off-season when the ground was frozen, making it difficult to service pipelines. MLI rented most of the equipment it used and hired Michigan union employees to perform the work.

While the Enbridge project was still ongoing, MLI sold all its assets on March 31, 2011, including capital

assets and intangible assets of receivables, retainages, cash, prepaid expenses, inventory, and goodwill to Vectren (the Sale). MLI elected to treat the sale of its stock as a sale of its assets under the federal Internal Revenue Code, 26 USC 338(h)(10). The purchase price was $80,000,000.

MLI timely filed its MBT return for the 2010 tax year, as well as its MBT return for the period before the Sale, i.e., the short year between January 1, 2011 and March 31, 2011 (the Short Year). To accurately tax only Michigan business activity, the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., employs an apportionment formula: mainly, the MBTA determines tax liability by multiplying the taxpayer's preapportioned "tax base" by the taxpayer's "sales factor," which is the taxpayer's Michigan sales divided by sales everywhere, to arrive at the taxpayer's Michigan tax base. The tax rate is then applied to this tax base. See MCL 208.1201(1); MCL 208.1301; MCL 208.1303(1). In its return for the Short Year, MLI included the Sale in its preapportioned tax base and in the denominator of the sales factor; i.e., MLI included the Sale in the "sales everywhere" part of the formula. Inclusion of the Sale in this manner resulted in a sales factor of 14.9860%.

In December 2014, the Department initiated an audit of MLI's MBT return for the 2010 calendar year and the Short Year between January 1, 2011 and March 31, 2011. For the Short Year, the auditor found that MLI had improperly included the gain from the Sale in the denominator of the sales factor, thereby overstating its total sales and reducing its Michigan tax liability. The auditor adjusted the sales factor by including the gain on the Sale in the preapportioned tax base but excluding it from the sales factor. This calculation increased the sales factor from 14.9860% to 69.9761%, resulting

in additional tax liability. Thereafter, the Department issued an intent to assess for the tax deficiency.

MLI sent a letter to the Department asking for an informal conference and requesting alternative apportionment for the Short Year. In its request, MLI asserted that all the receipts and income from the Sale should be treated as a "sale" under MCL 208.1115(1) and should be sourced to Minnesota in the sales factor to arrive at an equitable apportionment. MLI posited that the Department's treatment of the Sale would result in an unconstitutional distortion by sourcing to Michigan a percentage of income "out of all proportion" with business actually transacted in the state and also attributing the long-term gain in the company's assets to Michigan. See MCL 208.1309. Alternatively, MLI asked that the Sale be treated as not subject to tax, given that it is unconstitutional to tax value earned outside the state's borders. MLI explained that the Sale was not conducted in MLI's regular course of business and, therefore, was nonbusiness income. MLI pointed out that other jurisdictions treat the liquidation of business assets as cessation of business activity rather than a transaction in the regular course of business, and that the Sale should therefore be treated as nonoperational, nonbusiness income earned from a company's business activities over time.

Ultimately, the Department denied MLI's alternative apportionment request. The Department first noted that MLI's burden was to show by clear and cogent evidence that the statutory formula is distortive before alternate apportionment is allowed. The Department found that MLI had failed to meet its burden, stating:

> While you have provided detail on how the selling price was derived, you have not provided any evidence to the

> Department that the business activities in Michigan did not contribute to the gain realized or that the formula does not provide Michigan with an equitable allocation of income. Further, including gain in the tax base is not an unusual fact situation or one that necessarily demonstrates that application of the statutory apportionment formula does not reflect [MLI's] business activity in Michigan.

Consequently, the Department determined that MLI had not overcome the presumption that the statutory apportionment formula fairly represents MLI's business activity in Michigan for the period at issue. Soon after the denial, the Department issued its Final Assessment for the Short Year, reflecting $2,926,765.07 due including a penalty and interest.

Thereafter, plaintiff filed suit in the Court of Claims, raising four counts. In Count I, plaintiff alleged that the Department's failure to include the gain from the Sale in the sales-factor denominator for the Short Year results in a grossly distortive tax because the calculation used does not fairly represent MLI's business activities in the state and violates the Equal Protection, Due Process, and Commerce Clauses of the Constitution, necessitating the use of an alternative formula. In Count II, plaintiff alternatively alleged that the gain on the Sale was nonoperational, nonrecurring, nonbusiness income that should be excluded from MLI's tax base and that its inclusion results in taxation of extraterritorial values in violation of the Equal Protection, Due Process, and Commerce Clauses of the Constitution. Count III posited that the Department unlawfully calculated MLI's tax base by including the gain on the Sale; specifically, plaintiff alleged that under the plain language of the MBTA, the sale of shareholder's stock is not a "business activity" to be included in an S corporation's tax base and the federal

method of accounting (i.e., MLI's election to treat the liquidation as a sale of assets under the Internal Revenue Code) is irrelevant. Count IV alleged that the penalty should be abated because plaintiff timely paid the tax on the basis of reasonable interpretations of the MBTA.

The parties filed cross-motions for summary disposition. After oral argument, the Court of Claims granted summary disposition for the Department. The court determined that the Department had properly included the Sale in MLI's tax base because the Sale qualified as "business income" within the meaning of the MBTA. In so concluding, the court rejected plaintiff's argument that the Sale does not qualify as "business income" because it cannot be "attributable" to MLI and relied heavily on the fact that the shareholders had elected to treat the Sale as a sale of all of MLI's assets under 26 USC 338(h)(10). As to MLI's request for alternate apportionment, the court, relying on *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 159 n 21; 445 NW2d 428 (1989), concluded that MLI's dispute was simply a disagreement with the inclusion of the Sale in the computation of its tax base, which the court stated did not concern the constitutionality of the apportionment formula. For this reason alone, the court held that "plaintiff's appeal to alternative apportionment [wa]s unavailing." As to plaintiff's contention that the tax imposed taxed extraterritorial activity, the court determined that plaintiff had failed to provide any documentary evidence in support of its argument. The court viewed the historical data as merely an indication that MLI's Michigan activity for the tax years at issue was out of proportion with activity in previous years and noted that no evidence had been submitted to show that MLI's goodwill should be sourced entirely to Minnesota. Given its conclusion

that plaintiff's claim of unfair apportionment was meritless, the court held that plaintiff's constitutional claims failed as well. Finally, the court rejected plaintiff's claim that the penalty should be waived because plaintiff had failed to meet its burden to justify abatement of the penalty.

Plaintiff raises several issues on appeal. We need not address all of these issues as we find one to be dispositive in plaintiff's favor. We do note, however, that we do not necessarily disagree with the Department's basic position on how to calculate the tax under the statutory formula. Its position is reasonable in light of the differing definitions of "business activity," "business income," and "sales" and how those terms are employed in calculating the tax base and applying the sales factor to apportion the sales to Michigan. But, for the reasons discussed below, we conclude that to apply the statutory formula, as the Department did, to the circumstances of this case would result in the imposition of a tax in violation of the Commerce Clause. Accordingly, allowing for an alternate formula, as plaintiff requested, is necessary to avoid the constitutional violation.

In recognition of the difficulty in identifying purely intrastate activity when a unitary business is involved, the United States Supreme Court has not required the use of a particular apportionment formula to the exclusion of others. Rather, under the Due Process and Commerce Clauses, the formula must simply be "fair," *Container Corp of America v Franchise Tax Bd*, 463 US 159, 169; 103 S Ct 2933; 77 L Ed 2d 545 (1983); i.e., the formula must fairly determine the portion of income that can be "fairly attributed to in-state activities," *Trinova*, 433 Mich at 157 (quotation marks and citation omitted). Fairness, in part, requires that the

"choice of factors used in the formula 'must actually reflect a reasonable sense of how [the business activity] is generated.' " *Id*. at 158, quoting *Container Corp of America*, 463 US at 169 (alteration in original). An apportionment formula will be struck "if the taxpayer can prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result." *Container Corp of America*, 463 US at 170 (quotation marks and citations omitted).

The Michigan Legislature recognized the conundrum of allocating income to the state and, consistent with Supreme Court precedent, provided for alternate apportionment under MCL 208.1309 for situations in which the statutory formula resulted in a tax that was not fair. That provision governs the procedural and substantive requirements for seeking alternate apportionment and provides:

> (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the treasurer may require the following, with respect to all or a portion of the taxpayer's business activity, if reasonable:
>
> (a) Separate accounting.
>
> (b) The inclusion of 1 or more additional or alternative factors that will fairly represent the taxpayer's business activity in this state.
>
> (c) The use of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.
>
> (2) An alternate method may be used only if it is approved by the department.
>
> (3) The apportionment provisions of this act shall be rebuttably presumed to fairly represent the business

> activity attributed to the taxpayer in this state, taken as a whole and without a separate examination of the specific elements of either tax base unless it can be demonstrated that the business activity attributed to the taxpayer in this state is out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result or would operate unconstitutionally to tax the extraterritorial activity of the taxpayer.
>
> (4) The filing of a return or an amended return is not considered a petition for the purposes of subsection (1).

Plaintiff presented clear and cogent evidence that the statutory formula, as applied, attributed business activity to Michigan "out of all appropriate proportion to the actual business activity transacted in this state," MCL 208.1309(3), and led to a grossly distorted result, and also operated to unconstitutionally tax extraterritorial activity. See also *Hans Rees' Sons, Inc v North Carolina*, 283 US 123, 135; 51 S Ct 385; 75 L Ed 879 (1931). Our basis for this conclusion is, unlike many other aspects of this case, fairly straightforward. The value of the business and its assets was built up over many years and attributable to activity in many states. Indeed, much of the activity and assets involved in the Sale never had any connection to Michigan. However, the Sale occurred during a period (the Short Year) in which an unusually large percentage of the business activity took place in Michigan. Then, with the application of the statutory formula, an unreasonably large portion of the Sale was attributed to Michigan and taxed under the MBT. Simply put, the apportionment formula is unconstitutional as applied to MLI under the circumstances of this case.

To rebut the presumption that the statutory apportionment formula is fair, a taxpayer must show by "clear and cogent evidence," *Trinova Corp*, 433 Mich at 158, that (1) "the business activity attributed to the

taxpayer in this state is out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result," or alternatively, (2) the apportionment formula "would operate unconstitutionally to tax the extraterritorial activity of the taxpayer," MCL 208.1309(3).

A state may not tax more than its fair share of interstate commerce, and to be valid, a tax imposed on a business that conducts taxable activities both within and outside a state's borders must be apportioned to the activities within the state. See *ASARCO, Inc v Idaho State Tax Comm*, 458 US 307, 315; 102 S Ct 3103; 73 L Ed 2d 787 (1982). However, the profitability of such modern business organizations—which take advantage of functional integration, centralization of management, and economies of scale across state borders—is tied to the business as a whole, which makes it misleading to characterize business income as having a single isolated source. *Mobil Oil Corp v Comm'r of Taxes of Vermont*, 445 US 425, 438; 100 S Ct 1223; 63 L Ed 2d 510 (1980). Exact precision in apportionment, therefore, is not required, a general approximation is permitted, and a formula that incidentally taxes some out-of-state business activity is constitutionally permissible. *Moorman Mfg Co v Bair*, 437 US 267, 272; 98 S Ct 2340; 57 L Ed 2d 197 (1978). Yet, while the United States Supreme Court has not required use of a particular formula, it has required that such an apportionment formula be fair. *Container Corp of America*, 463 US at 164, 169. An apportionment formula is valid if it does not operate to unreasonably and arbitrarily attribute to the taxing state a "percentage of income out of all appropriate proportion to the business transacted by the [taxpayer] in that State." *Hans Rees' Sons, Inc*, 283 US at 135. Stated differently, a formula that has a palpably dispropor-

tionate result that patently taxes out-of-state activity will be nullified. See *Int'l Harvester Co v Evatt*, 329 US 416, 422-423; 67 S Ct 444; 91 L Ed 390 (1947).

The difficulty with these general principles is their application. In discerning whether impermissible distortion has occurred, courts are swayed by numerous factors unique to each case, making it nearly impossible to discern any set of general rules as to when impermissible distortion occurs. A review of pertinent caselaw demonstrates this point, but it will also aid in determining whether distortion occurred in this case.

In *Hans Rees' Sons*, the United States Supreme Court struck down a one-factor apportionment formula that was based on ownership of tangible property. *Hans Rees' Sons*, 283 US at 128-129, 135-136. The taxpayer was in the business of manufacturing leather for wholesale and retail, with warehouses in New York and its manufacturing plant in North Carolina. *Id*. at 126-127. The evidence showed that no more than 21% of the taxpayer's income could be properly attributed to the taxing state, but that between 66% and 85% of the taxpayer's total income had been attributed to the state. *Id*. at 128, 134-135. The Supreme Court struck down the one-factor formula's application to that taxpayer because, although fair on its face, it operated "so as to reach profits which are in no just sense attributable to transactions within its jurisdiction" and unreasonably and arbitrarily attributed profits to North Carolina that were "out of all appropriate proportion to the business transacted by the [taxpayer] in that State." *Id*. at 134-136.

In *Container Corp of America*, the Supreme Court upheld a three-factor apportionment formula, which used an averaged ratio of payroll, property, and sales to apportion in-state activity and rejected evidence in-

tended to show systematic distortion. *Container Corp of America*, 463 US at 170, 181-182. Mainly, the taxpayer asserted that the formula failed to consider that the taxpayer's foreign subsidiaries were significantly more profitable and consequently distorted the true allocation of income. *Id*. at 181. The Court found that this argument was based on "geographical accounting," which fails to account for contributions that result from the operation of a multistate business as a whole, and that the three-factor formula had gained wide approval because "payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated." *Id*. at 183. Further, the taxpayer had failed to demonstrate a substantial margin of error in the three-factor apportionment formula; the difference between the formula used and that advocated by the taxpayer resulted in an increase of only 14%, which the Court noted fell far short of the 250% increase in *Hans Rees' Sons*. *Id*. at 183-184.

The Michigan Supreme Court, in *Trinova Corp v Dep't of Treasury*, also considered whether application of the three-factor apportionment formula of Michigan's now-repealed Single Business Tax Act (SBTA), formerly MCL 208.1 *et seq*., was constitutional. *Trinova*, 433 Mich at 144-147. The SBTA, which was the predecessor of the MBTA, imposed a value-added tax on business activity in the state; the taxpayer's tax base was allocated to Michigan by multiplying the total tax base by the ratio of Michigan sales, Michigan wages, and Michigan property to which the tax rate then applied. *Id*. at 150-153. The Court rejected the contention that compensation 40 times greater than actuality and depreciation 1000 times greater than actual depreciation was evidence of an unfair apportionment "out of all appropriate proportion" to the

taxpayer's actual business transactions in Michigan. *Id*. at 163-164. In so concluding, the Court made clear that it could not "ignore the integrated nature of formulary apportionment," which is better suited to take account of a unitary enterprise's business activity, and consequently rejected geographical accounting, which fails to account for contributions to business activity as a result of functional integration. *Id*. at 162. According to the Court, the fact that the plaintiff could show that its apportioned compensation and depreciation were not accurate did not demonstrate distortion given that the taxpayer's apportioned tax base was almost $20 million, or approximately 9% of its total tax base, and that it had sales of nearly $104 million in Michigan. *Id*. at 164.

Well before *Trinova*, however, the Michigan Supreme Court struck down application of a formula that imposed a corporate franchise tax that burdened interstate commerce. *Panhandle Eastern Pipe Line Co v Corp & Securities Comm*, 346 Mich 50, 56; 77 NW2d 249 (1956). In that case, the taxpayer was a Delaware corporation engaged in the business of distributing natural gas through pipelines it owned, including pipelines in Michigan. *Id*. at 52. The taxpayer had 7% of its pipeline mileage in Michigan, 5% of its total property in Michigan, about 3.5% of its payroll in Michigan, and 2% of its operating expenses in Michigan, and its Michigan sales were around 6%. *Id*. at 56. In calculating the tax, the tax commission had included 50% of the taxpayer's interstate receipts. *Id*. In striking down that formula as an arbitrary and "unjust burden upon interstate commerce," the Court simply concluded, "In our opinion it is clear that the formula used by the commission includes receipts from a business not related to plaintiff's intrastate business . . . ." *Id*.

We conclude that this is an exceptional case in which the taxpayer has met its burden of providing clear and cogent evidence that the business activity attributed to it "is out of all appropriate proportion to the actual business activity transacted in this state and [has led] to a grossly distorted result." MCL 208.1309(3). The statutory formula as applied, which includes 100% of the gain on the Sale in MLI's preapportioned tax base, includes income from the Sale that is not related to MLI's Michigan business activities. Application of the statutory formula results in an allocation of 70% of the gain on the Sale to Michigan, meaning approximately $38 million is attributed to MLI's business activity in the state of Michigan. While some of MLI's value can undoubtedly—and should undoubtedly—be attributed to its business activity in Michigan, the undisputed history of MLI's sales in the state is that those sales averaged around 7% of its total sales. This demonstrates that most of the value inherent in MLI stemmed not from its activity in Michigan during the Short Year or even over previous years but from intangible assets built up in multiple other states over time. To impose a tax on 70% of the gain of the Sale is not commensurate with the "protection, opportunities and benefits" that Michigan conferred on MLI because the majority of the activities making up MLI's fair market value at the time of the Sale had occurred outside Michigan's borders. See *Wisconsin v JC Penney Co*, 311 US 435, 444; 61 S Ct 246; 85 L Ed 267 (1940). Again, by relying upon the Short Year and its unusual concentration of activity in Michigan, an unconstitutional distortion is created.

Application of the statutory formula in this case runs afoul of the Due Process and Commerce Clauses, incorporated in the statute, because it does not fairly determine the portion of income from the Sale that is

reasonably attributed to in-state activities. Fairness, in part, requires that the choice of "factors used in the apportionment formula must actually reflect a reasonable sense of how [the business activity] is generated." *Container Corp of America*, 463 US at 169. Looking only at the Short Year does not actually and reasonably reflect how the income from the Sale was generated. As in *Hans Rees' Sons*, the statutory formula when applied in this case operates "so as to reach profits which are in no just sense attributable to transactions within its jurisdiction." *Hans Rees' Sons*, 283 US at 134.

Additionally, both the Court of Claims and the Department rely on *Trinova* to support the Department's apportionment. But *Trinova* involved the SBTA's three-factor apportionment formula. The *Trinova* Court effectively held that showing a distortion as to a single factor after the ratios are averaged did not impeach the basic premise of the three-factor formula, given that the business was to be viewed as a whole and that the *averaged* ratios actually reflected a reasonable sense of how the taxpayer's business activity was generated. *Trinova* is not helpful to the Department's position; that the Court accepted a distortion of up to 1000 times greater than actuality is immaterial to this case in which the three-factor apportionment formula is not at issue. Rather, the MBT uses a single factor: sales. And, unlike the three-factor formula in *Trinova*, MLI's Michigan sales alone do not reasonably reflect how the gain on the Sale was generated. *Trinova* is inapposite.

We should briefly address the argument that plaintiff did not follow the statute's procedural requirements by petitioning for alternate apportionment before filing its MBT return. Instead, it filed its return using an alternate apportionment method that in-

cluded the Sale in the sales-factor denominator, and only after the Department's audit removing the Sale to the tax base did MLI ask for an alternate accounting. The Department, however, entertained MLI's request at the informal level, and while pointing out the procedural irregularity in the Court of Claims, the Department did not argue that the request should be denied for failure to strictly comply with the statutory directive. The Department also did not ask for such relief before this Court. Consequently, to the extent that the Department raises this argument, it should be considered to have waived the issue of procedural irregularity or to otherwise have impliedly consented to try the substantive issue of whether the tax is distortive absent compliance with the statute's procedural requirements. See *Fraser Twp v Haney (On Remand)*, 331 Mich App 96, 99; 951 NW2d 97 (2020) (indicating that when a party fails to object to an issue that has been raised and the court subsequently addresses the issue absent objection, the issue is tried by implied consent). Moreover, as discussed above, if an alternate formula is not applied, the constitutional defect cannot be cured.

The Legislature anticipated that use of the statutory formula could result in constitutional defects in particular cases, and therefore it provided for the possibility of an alternate apportionment under MCL 208.1309. Reading this section as a whole, if a taxpayer believes the apportionment provisions unfairly represent the extent of the taxpayer's business activity in the state, the taxpayer must (1) petition to propose a "reasonable" alternative method of apportionment, which may be used only if approved by the Department; and (2) rebut the presumption that the statutory apportionment formula fairly represents the taxpayer's business activity in the state. We, however, decline

plaintiff's request that we ascertain the alternate method to be employed. The statute clearly directs that this must be settled between the parties; that is, the method must ultimately be approved by the Department.

Accordingly, this matter must be returned to the Department for the determination of the appropriate alternate method to be used. We encourage the parties to engage in a good-faith collaboration to arrive at such a method. Ultimately, just as the Department may not rely on the statutory formula in this case, neither can it insist on an alternate method that does not cure the constitutional defect by continuing to attribute out-of-state revenue to Michigan. And if plaintiff believes that the method ultimately adopted by the Department is constitutionally flawed, it may renew its challenges.

The trial court's decision is reversed, and the tax assessment and penalty in this case are vacated. The matter is remanded for the parties to determine an alternate method of apportionment. We do not retain jurisdiction. No costs, neither party having prevailed in full.

TUKEL, P.J., and SAWYER and RIORDAN, JJ., concurred.

PEOPLE v ALLEN

Docket No. 342999. Submitted December 10, 2019, at Lansing. Decided March 17, 2020, at 9:00 a.m. Vacated in part and remanded 507 Mich 856 (2021).

Gerald L. Allen was convicted following a jury trial in the Saginaw Circuit Court of felonious assault, MCL 750.82(1), and assault with intent to commit great bodily harm less than murder, MCL 750.84(1)(a), for assaulting his wife in their home. After the assault, defendant drove the victim to a hospital in a different county. The victim's injuries were treated, and she and defendant left the hospital together the next day; the police were not contacted about her injuries when they were at the hospital. Defendant took the victim to a hotel for two days and did not allow her access to her cell phone. Defendant left the victim alone in the car after driving to another location. The victim retrieved her cell phone from her bag in the trunk, took the car, drove away, and called her brother for help. The jury found defendant guilty, and the court, Manvel Trice, J., sentenced defendant as a third-offense habitual offender to concurrent terms of 8 to 20 years in prison for the assault-with-intent-to-commit-great-bodily-harm-less-than-murder conviction and 3 to 8 years in prison for the felonious-assault conviction. In calculating the guidelines minimum sentence range on which the sentence was based, the trial court assessed 15 points for Offense Variable (OV) 8. Defendant appealed, challenging his sentence and moving to remand for a new trial and for a hearing regarding his claims of ineffective assistance of counsel; the Court of Appeals granted the remand motion. On remand, the trial court denied defendant's motion for a new trial, concluding that defendant's numerous assertions of ineffective assistance of counsel were without merit.

Following the proceedings on remand, the Court of Appeals *held*:

1. Under MCL 777.38(1), a trial court must assess 15 points for OV 8 when a victim was (1) asported to another place of greater danger or to a situation of greater danger or (2) held captive beyond the time necessary to commit the offense. OVs are properly scored by reference only to the sentencing offense

except when the language of a particular offense-variable statute specifically provides otherwise. With regard to asportation, OV 8 does not provide for consideration of conduct after the completion of the sentencing offense, so it must be scored solely on the basis of the defendant's conduct before or during the sentencing offense. When evaluating the phrase "to another place of greater danger or to a situation of greater danger," trial courts must consider whether the risk of danger to the victim is increased by the defendant's movement of the victim. In determining whether a victim was held captive beyond the time necessary to commit the offense, trial courts must assess 15 points for a defendant's postoffense conduct of holding a victim captive even after the sentencing offense has been completed. Given the dictionary definitions related to the undefined word "captive," a victim is held captive for purposes of OV 8 when the defendant exerts either physical restraint or psychological influence over the victim. In this case, defendant moved the victim to the hospital after the sentencing offense of assault with intent to do great bodily harm less than murder had concluded. The trial court therefore erred by concluding that defendant's postoffense movement of the victim constituted asportation for purposes of OV 8. In addition, defendant did not take the victim to another place of greater danger or to a situation of greater danger when he took her from their private residence to a public hospital. Accordingly, the trial court erred by assessing 15 points for OV 8 on the basis of asportation. However, there was conflicting evidence regarding whether defendant held the victim captive beyond the time necessary to complete the offense of assault with intent to commit great bodily harm less than murder. Because the trial court did not make factual findings as to whether the victim was held captive, the case was remanded for the trial court to resolve the scoring issue and to resentence defendant if the guidelines minimum sentence range was affected.

2. Defendant's allegations of ineffective assistance of counsel were without merit. Trial counsel's performance did not fall below an objective standard of reasonableness; regardless, defendant was unable to demonstrate that but for the alleged deficient performance, a different result would have been reasonably probable. Accordingly, the trial court correctly denied defendant's motion for a new trial on the basis of ineffective assistance of counsel. Because defendant failed to establish any instances of ineffective assistance of counsel, there was no cumulative effect of errors requiring reversal.

3. Given the victim's testimony, the evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Convictions affirmed but case remanded for further proceedings.

1. SENTENCING — SENTENCING GUIDELINES — OFFENSE VARIABLE 8 — ASPORTATION.

Under MCL 777.38(1), a trial court must assess 15 points for Offense Variable (OV) 8 when a victim was (1) asported to another place of greater danger or to a situation of greater danger or (2) held captive beyond the time necessary to commit the offense; if OV 8 is being scored on the basis of asportation, the asportation must have occurred before or during the sentencing offense and when evaluating the phrase "to another place of greater danger or to a situation of greater danger," trial courts must consider whether the risk of danger to the victim is increased by the defendant's movement of the victim.

2. SENTENCING GUIDELINES — OFFENSE VARIABLE 8 — WORDS AND PHRASES — "CAPTIVE."

Under MCL 777.38(1), a trial court must assess 15 points for Offense Variable (OV) 8 when a victim was (1) asported to another place of greater danger or to a situation of greater danger or (2) held captive beyond the time necessary to commit the offense; in determining whether a victim was held captive beyond the time necessary to commit the offense, trial courts must assess 15 points for a defendant's postoffense conduct of holding a victim captive even after the sentencing offense has been completed; a victim is held captive for purposes of OV 8 when the defendant exerts either physical restraint or psychological influence over the victim.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Heidi M. Williams*, Chief Appellate Attorney, for the people.

Ian Kierpaul for defendant.

Before: LETICA, P.J., and GADOLA and CAMERON, JJ.

CAMERON, J. Defendant, Gerald Lynn Allen, was convicted by a jury of felonious assault, MCL 750.82(1), and assault with intent to commit great bodily harm less than murder, MCL 750.84(1)(a), for assaulting his wife. Allen was sentenced as a third-offense habitual offender, MCL 769.11, to serve 8 to 20 years' imprisonment for assault with intent to commit great bodily harm less than murder and 3 to 8 years' imprisonment for felonious assault. Allen appeals his convictions and sentences. We affirm Allen's convictions but remand to the trial court for proceedings consistent with this opinion.

I. FACTS

Allen assaulted his wife while they were alone in their home in Saginaw, Michigan, on the evening of April 21, 2017. After the assault, Allen drove the victim to a hospital in a different county[1] because he wanted to conceal the victim's injuries from her family. At the hospital, the victim received medical treatment for her injuries. The police were not contacted, and the victim left the hospital with Allen the next day.

After leaving the hospital, Allen took the victim to a hotel, where they stayed for two days without eating or leaving the room. The victim did not have her cell phone during this time because Allen had taken it away. After leaving the hotel, Allen told the victim that they were traveling to Wisconsin but that he had to first stop at the courthouse in Saginaw. When Allen went inside the courthouse, the victim retrieved her cell phone from the trunk of the vehicle, took the car, and drove away. The victim called her brother for help,

[1] Allen took the victim from Saginaw County to McLaren Hospital in Flint, Michigan.

and her brother later found Allen at a bus station. Law enforcement was contacted, and Allen was arrested and charged for assaulting the victim.[2]

After Allen's arrest, the police searched his home. The police observed blood in different rooms of the home and found a machete between a bedframe and the wall in a bedroom. Officer DeShawn Harris noted that the machete did not have any blood on it, which suggested to him that it had not been used to cause the victim's injuries.

At trial the victim testified that on the evening of the assault, Allen "came up" to her with a machete while she was in bed. The victim testified that the machete "nicked" her shoulder and that she grabbed the machete by the blade to protect herself, cutting her hand and causing it to bleed. The victim further testified that Allen threw a computer at her, strangled her, threw her down the stairs, poked her under the left breast with a kitchen knife, pulled her hair, and kicked her in the face and in the mouth. The victim testified that at one point, Allen threatened to kill her. The jury convicted Allen of assault with intent to commit great bodily harm less than murder and felonious assault in connection with the machete. The trial court sentenced Allen to terms of imprisonment, and this appeal followed.

II. *GINTHER* HEARING

This Court granted Allen's motion to remand so that he could file a motion for a new trial and have a

[2] Allen was initially charged with one count of assault with intent to murder, MCL 750.83, two counts of felonious assault, and one count of assault with intent to commit great bodily harm less than murder. The count of assault with intent to murder and one count of felonious assault were dismissed before trial.

Ginther[3] hearing concerning his claims of ineffective assistance of counsel.[4] Allen argued in the trial court that trial counsel was ineffective for (1) failing to call as witnesses the two physicians who treated the victim at McLaren Hospital, (2) failing to request a missing-witness instruction, (3) failing to seek production of the victim's mental health records, (4) failing to object to testimony from Officer Harris and Detective Patrick Busch that bolstered the victim's credibility, and (5) failing to request a lesser-included-offense instruction.

At the *Ginther* hearing, Dr. Craig Hicks, an emergency medicine physician at McLaren Hospital, testified that he had treated the victim for her injuries related to the assault. Dr. Hicks explained that he had observed that the victim had been injured and was in pain. Dr. Hicks noted that the victim had what appeared to be defensive wounds on her hand that were consistent with a weapon like a kitchen knife, not a machete. Dr. Hicks agreed that the hospital records did not reflect that the victim had suffered a cut to her shoulder and that he had ordered a CT scan of the victim's chest and neck. Dr. Hicks testified that the victim had suffered "multiple blows" to her face and head, which could have been done by a fist, hand, or "implement." During treatment, the victim told Dr. Hicks that she had been assaulted, but she did not identify Allen as the person who assaulted her.

Dr. Stephen Defriez, a radiologist at McLaren Hospital, testified that the victim's CT scan did not show evidence that the victim had been strangled. He testified that in order for the CT scan to detect such an injury, the victim would have had needed to be

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[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[4] *People v Allen*, unpublished order of the Court of Appeals, entered June 24, 2019 (Docket No. 342999).

strangled with sufficient force to break the capillaries in her neck. Dr. Defriez also testified that the CT scan of the victim's chest did not show evidence of penetrating trauma. However, a different CT scan showed that the victim had soft tissue swelling on her scalp and forehead region, which Dr. Defriez opined was caused by blunt trauma. The x-ray of the victim's hand did not reveal any additional injuries.

Allen's trial counsel testified at the *Ginther* hearing. He explained that he did not call Dr. Hicks or Dr. Defriez during trial because he wanted to distract the jury's attention from the fact that Allen drove the victim to another county for medical treatment, which counsel believed would demonstrate Allen's consciousness of guilt.[5] Trial counsel believed that Dr. Hicks's and Dr. Defriez's testimony was not necessary because he could still highlight the fact that the police were not called to the hospital while downplaying the fact that Allen took the victim to Flint to seek medical treatment. Because trial counsel decided it would not be beneficial to call Dr. Hicks and Dr. Defriez, a missing-witness instruction was not requested. Trial counsel also explained that he did not request a lesser-included-offense instruction because Allen denied injuring his wife; instead, the main issue at trial was the identity of the attacker. Further, trial counsel did not recall Allen requesting that he obtain the victim's mental health records and opined that he did not object to certain portions of Officer Harris's and Detective Busch's testimony because they were not harmful to the case and because he did not want the jurors to believe that he was trying to hide information from them.

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[5] Trial counsel testified that he made this decision during trial after the prosecutor agreed to produce Dr. Hicks and Dr. Defriez.

The trial court denied Allen's motion for a new trial. The trial court concluded that trial counsel's decision to not call Dr. Hicks or Dr. Defriez as witnesses constituted reasonable trial strategy. The trial court also rejected Allen's claims that trial counsel was ineffective for failing to request a missing-witness jury instruction or a lesser-included-offense instruction, for failing to file a *Stanaway*[6] motion, and for failing to object to testimony that allegedly bolstered the victim's credibility.

III. ANALYSIS

A. OFFENSE VARIABLE 8

Allen argues that he is entitled to resentencing because the trial court erred by assessing 15 points for Offense Variable (OV) 8.

This Court reviews for clear error the trial court's factual determinations at sentencing and "review[s] de novo whether the factual determinations were sufficient to assess points under OV [8]." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

When concurrent sentences are imposed, a trial court is required to calculate a guidelines minimum sentence range for the offense assigned the highest

[6] *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

crime class. MCL 771.14(2)(e)(*ii*). In this case, the trial court imposed concurrent sentences, and assault with intent to commit great bodily harm less than murder is the offense with the highest crime class. MCL 777.16d. Therefore, that is the relevant offense to examine for the purpose of resolving this scoring issue. *People v Lopez*, 305 Mich App 686, 690; 854 NW2d 205 (2014) ("[T]he trial court was not required to independently score the guidelines for and sentence the defendant on each of his concurrent convictions if the court properly scored and sentenced the defendant on the conviction with the highest crime classification.").

A trial court is required to assess 15 points for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a); see also *People v Barrera*, 500 Mich 14, 16-17; 892 NW2d 789 (2017). Accordingly, in order for 15 points to be assessed for OV 8, a victim must either be (1) "asported to another place of greater danger or to a situation of greater danger" or (2) "held captive beyond the time necessary to commit the offense."[7] MCL 777.38(1)(a).

1. ASPORTATION TO ANOTHER PLACE OR SITUATION OF GREATER DANGER

The trial court assessed points for OV 8 based exclusively on Allen's postoffense conduct. Specifically, at sentencing, the trial court concluded that Allen's act

[7] Statutes are interpreted according to their plain language. *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). Generally, "or" is a disjunctive term, *People v Gatski*, 260 Mich App 360, 365; 677 NW2d 357 (2004) (quotation marks omitted), which indicates a choice between alternatives, *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011).

of driving the victim from their home to the hospital, and later to the hotel, constituted asportation.[8] However, the undisputed evidence is that defendant's movement of the victim occurred after the sentencing offense of assault with the intent to do great bodily harm less than murder was completed. Therefore, the Michigan Supreme Court's holding in *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009), requires us to conclude that the trial court erred by considering Allen's postoffense conduct as the basis for assessing points under OV 8, at least in connection with the issue of asportation.

In *McGraw*, our Supreme Court considered whether OVs are to be scored using an offense-specific approach or a transactional approach. *Id*. at 124. The *McGraw* Court concluded that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *Id*. at 135. As already stated, MCL 777.38(1)(a) provides, in relevant part, that a court must assess 15 points for OV 8 if the "victim was asported to another place of greater danger or to a situation of greater danger . . . ." Because this portion of MCL 777.38(1)(a) does not provide for consideration of conduct after the completion of the sentencing offense, it must be scored solely on the basis of Allen's conduct before or during the sentencing offense. See *Barrera*, 500 Mich at 22.

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[8] At sentencing, the prosecution urged the trial court to assess points for OV 8 because Allen moved the victim to another county "even though he did take her to a hospital[.]" The trial court responded, "And *in addition to that* . . . [s]he was then transported to a motel . . . ." (Emphasis added.) This exchange suggests that the trial court adopted the prosecutor's arguments as well as the finding that Allen moved the victim to the motel for purposes of asportation.

Although Allen undeniably moved the victim to the hospital, this asportation occurred after the sentencing offense of assault with intent to commit great bodily harm less than murder had concluded. Specifically, the victim testified that the physical assault took place in their home when Allen threw a computer at her, strangled her, poked her with a knife in an upstairs bedroom, pushed her down several stairs, and kicked her in the head and mouth in the living room. The victim testified that during the assault, Allen was acting like a "crazy person." This evidence formed the entire basis for the sentencing offense. When Allen stopped beating the victim, she suggested that they leave the home. At that time, Allen's sense of reason "came back," and he agreed to leave the house. It was at this moment that the sentencing offense of assault with intent to commit great bodily harm less than murder was over, and it was after the assault was completed that Allen transported the victim to the hospital and later to a hotel. Therefore, because the movement of the victim occurred after the sentencing offense was complete, the trial court erred by concluding that Allen's postoffense movement of the victim constituted asportation as contemplated in MCL 777.38(1)(a).

Indeed, even if we were not bound to follow *McGraw*, Allen argues that driving the victim from their home after the assault to a hospital does not constitute asportation "to another place of greater danger or to a situation of greater danger . . . ." We agree.

Places or situations of greater danger include, but are not limited to, "places where others [are] less likely to see defendant committing crimes." *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009). In this case, Allen drove the victim from a private home to a

public hospital in search of medical attention for her injuries. This movement did not increase the danger to the victim; instead, it plainly reduced it. The evidence is that Allen beat the victim in their private home where there were no witnesses or people who could intervene. The victim was alone, isolated, and injured. Allen then drove the victim to a public hospital where she received CT scans, x-rays, stitches, and medical treatment from physicians who treated her injuries. When evaluating the phrase "to another place of greater danger or to a situation of greater danger," trial courts must consider whether the risk of danger to the victim is increased by the defendant's movement of the victim. Here it was not. Therefore, the trial court erred when it assessed points for OV 8 for asportation.[9]

2. CAPTIVITY

Nevertheless, the trial court could still assess 15 points for this OV if the victim "was held captive beyond the time necessary to commit the offense[.]" MCL 777.38(1)(a). Unlike asportation, this clause allows a trial court to consider a defendant's conduct "beyond the time necessary to commit the offense." *Id*. Thus, OV 8 requires the trial court to assess points for a defendant's postoffense conduct of holding a victim captive even

[9] When assessing points for OV 8, the trial court noted that Allen transported the victim "away from Saginaw County." We recognize that the trial court may have been referring to the practice of some domestic violence offenders of isolating their victims from family, friends, and resources. Although this can be a relevant consideration when scoring OV 8, in this case, the only record evidence is that Allen took the victim to a hospital for medical treatment and chose the particular hospital to conceal her injuries from the victim's family. The trial court did not make any findings about how taking the victim from her home to a public hospital in another county put her at a greater risk of danger than remaining untreated and injured in her home.

after the completion of the sentencing offense. See *McGraw*, 484 Mich at 126.[10] Consequently, the trial court was required to evaluate whether Allen held the victim captive after he had completed the sentencing offense.

Because the term "captive" is not defined by the Legislature, it is proper to consult dictionary definitions. *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012). "Captive" is defined as "kept within bounds" or "held under control of another . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). "Control" is defined as "to exercise restraining or directing influence over," and "influence" is defined as "the act or power of producing an effect without apparent exertion of force or direct exercise of command[.]" *Id*. Thus, we hold that a victim is held captive under OV 8 when the defendant exerts either physical restraint[11] or psychological influence over the victim.

In this case, the trial court did not make findings as to whether the victim was held captive. Because the record contains conflicting evidence concerning whether Allen held the victim captive beyond the time necessary to complete the offense of assault with intent to commit

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[10] We note that when interpreting the captivity portion of MCL 777.38(1)(a), this Court has considered whether the defendant held the victim captive *after* the sentencing offense was completed. For example, in *People v Bosca*, 310 Mich App 1, 52; 871 NW2d 307 (2015), this Court affirmed the trial court's decision to score OV 8 at 15 points when four individuals "were physically restrained while they were threatened and struck with fists and other implements after having been moved to, and after having their egress prevented from, the basement of [the] defendant's residence."

[11] This Court has previously concluded that OV 8 is properly scored at 15 points for the offense of unlawful imprisonment when the defendant physically restrained the victim for any amount of time after the imprisonment occurred because the defendant's physical restraint of the victim, even for a moment, was sufficient to constitute that offense. *People v Chelmicki*, 305 Mich App 58, 70; 850 NW2d 612 (2014).

great bodily harm less than murder, we remand this scoring issue to the trial court to resolve.

Certainly, reasonable minds can differ regarding whether the victim was held captive. Allen argues that the victim was not in custody because the assault was over in the home and the victim was the one who asked to leave. Allen also argues that the victim cannot be found to be in custody when she was driven to a public hospital where she received medical treatment. However, the record could also support the conclusion that Allen held the victim psychologically captive from the time the assault ended until she escaped his control several days later in front of the courthouse. Evidence during trial supported that Allen had told the victim that he was taking her to a hospital, and she may not have had any choice in the matter. Allen then controlled the decision about medical treatment by choosing a hospital that would reduce the risk that anyone would recognize the victim. The victim testified that she was "completely traumatized and shocked" from the assault and could not recall the exact details of everything that occurred at the hospital. But she testified that she believed that Allen never left her alone at the hospital; in fact, he even slept in the same hospital bed with her. After the victim was released from the hospital, Allen took her directly from the hospital to the hotel room, not to their home, where they remained for two days and where Allen denied her possession of her cell phone. It was not until Allen left her briefly alone in front of the courthouse that she fled and called her brother for help. Thus, there is also record evidence to support that the victim was held psychologically captive at the hospital and at the hotel during a continuous series of events that did not end until she was able to escape.

Nevertheless, because the trial court failed to make any factual findings on this issue, we remand this issue

to the trial court to hold a hearing to consider whether the evidence supports that Allen held the victim captive beyond the time necessary to complete the offense of assault with intent to commit great bodily harm less than murder. After making this determination, the trial court shall assess the appropriate points for OV 8. If the relevant guidelines minimum sentence range is affected, the trial court must resentence Allen. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Allen argues that he is entitled to a new trial because trial counsel provided ineffective assistance for several reasons. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010), rev'd on other grounds 493 Mich 872 (2012).

> A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (citations omitted).]

1. PRIVILEGED RECORDS

Allen first argues that trial counsel was ineffective for failing to seek production of the victim's mental health records because the records were necessary to his defense. We disagree.

It is well established that "there is [generally] no right to discover information or evidence that is protected from disclosure by . . . privilege[.]" MCR 6.201(C)(1). In *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994), our Supreme Court balanced the opposing interests of protecting the confidentiality of privileged records with a criminal defendant's right to obtain evidence necessary to his defense. The *Stanaway* Court held that "where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id*. (emphasis added). The Court held, however, that a defendant's "generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id*. at 650.

In this case, Allen does not dispute that the victim's psychiatric records contain privileged information and are protected under MCL 767.5a(2). Thus, Allen was only entitled to have the trial court conduct an *in camera* review of the victim's mental health records if he could "establish a reasonable probability that the privileged records [were] likely to contain material information necessary to his defense[.]" *Stanaway*, 446 Mich at 649. Allen's affidavit supports that "about a week prior to April 21, 2017," the victim's psychiatrist informed Allen and the victim that the victim "needed to stay off Facebook because someone was manipulating her through Facebook . . . ." Allen speculates, without factual support, that the victim's mental health

records "would also reveal that whoever was manipulating her through Facebook, was controlling her and manipulating her to blame [Allen] for everything that happened to [the victim] on April 21, 2017." Allen makes this pronouncement despite the lack of any factual support that the victim's psychiatrist treated her after she was assaulted and made an evaluation that the victim's identification of Allen as her assailant was the product of someone controlling and manipulating her. Because Allen failed to establish a reasonable probability that the privileged records were likely to contain material information necessary to his defense, counsel's failure to make a meritless motion did not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (stating that counsel is not ineffective for failing to raise a meritless argument).[12]

2. MISSING WITNESSES

Allen argues that his trial counsel was ineffective for failing to call Dr. Hicks and Dr. Defriez as witnesses

[12] Additionally, the absence of the victim's psychological records did not make it impossible for Allen to present a defense. Allen's defense at trial was that the victim falsely accused him of felonious assault and assault with intent to commit great bodily harm less than murder. During cross-examination of the victim, trial counsel impeached the victim with testimony that she gave at Allen's preliminary examination, and the victim and the victim's brother both acknowledged that Allen believed that the victim was being controlled through Facebook in the time leading up to the April 21, 2017 assault. During closing arguments, trial counsel argued that the victim lacked credibility because the statements she provided to law enforcement were not consistent with her testimony at trial and because her testimony concerning the assaults was not believable given the relatively moderate injuries the victim sustained. Consequently, because Allen was not deprived of a substantial defense, trial counsel's failure to seek disclosure of the privileged materials did not affect the outcome at trial. See *Armstrong*, 490 Mich at 289-290.

because their testimony would have undermined the victim's credibility regarding the assault and thereby provided Allen with a substantial defense to the charges. We disagree.

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy[.]" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel's failure to present certain evidence does not constitute ineffective assistance of counsel unless the defendant has been deprived of a substantial defense. *People v Jackson (On Reconsideration)*, 313 Mich App 409, 432; 884 NW2d 297 (2015). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

In this case, aspects of Dr. Hicks's and Dr. Defriez's testimony likely would have enhanced trial counsel's argument that the victim was not credible. However, defendant's trial counsel could have reasonably concluded that the absence of their testimony would not result in a fundamentally unfair trial. The victim testified that although she was assaulted with a machete by Allen, she only suffered a "nick[]" to her shoulder and cuts on her hand that required stitches. The victim agreed on cross-examination that she was not given medical attention for the shoulder injury at the hospital, and the jury was able to view the machete and photographs of the injuries on the victim's shoulder and hand. Trial counsel also elicited from police that the machete recovered after the assault did not have blood on it and appeared to be unused. Also acknowledged by police was that the victim's trial testimony that she was strangled and thrown down the

stairs was inconsistent with the report that she made to the police after the assault. Trial counsel used the victim's prior inconsistent statements throughout the trial and her failure to identify Allen as her assailant at the hospital to undermine her credibility. Trial counsel further exploited the prosecutor's failure to present medical testimony about how the victim's wounds were treated at the hospital, urging the jury to use its common sense to conclude that the machete would have caused far more serious injuries than cuts on the victim's shoulder and hand. Finally, the trial court instructed the jurors to use their common sense when weighing and judging the evidence,[13] and jurors are presumed to follow their instructions, *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). Because Allen was not deprived of a substantial defense, trial counsel's decision not to call Dr. Hicks and Dr. Defriez as witnesses at trial did not fall below an objective standard of reasonableness and counsel was not ineffective in this respect. See *Armstrong*, 490 Mich at 289-290.

3. MISSING-WITNESS INSTRUCTION

Allen next argues that his trial counsel was ineffective for failing to request a missing-witness instruction under M Crim JI 5.12. We disagree. A missing-witness instruction is given only when it can be shown that the prosecution did not exercise due diligence to produce the witnesses. See *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). In this case, trial counsel testified at the *Ginther* hearing that he informed the prosecutor during trial that he did not wish to call Dr. Hicks and Dr. Defriez because he did not believe that it

[13] See M Crim JI 3.5(9).

would benefit the defense. Because trial counsel agreed that the prosecution was excused from producing the endorsed doctors, Allen has failed to show that trial counsel's failure to request a missing-witness instruction was deficient. See *Ericksen*, 288 Mich App at 201.

4. PRIOR CONSISTENT STATEMENTS

Allen next argues that his trial counsel was ineffective for failing to object to testimony concerning statements that the victim made to Officer Harris and Detective Busch because such evidence constituted prior consistent statements that served to bolster the credibility of the victim.

In general, it is impermissible for a party in a criminal trial to bolster a witness's trial testimony using a prior consistent statement made by that witness. *People v Hallaway*, 389 Mich 265, 276-277; 205 NW2d 451 (1973). However, "[t]he admission of a prior consistent statement through a third party is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied." *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

At trial, prior statements that the victim made were admitted during the testimony of Officer Harris and Detective Busch. Allen does not explain on appeal how the prior statements were consistent with the victim's trial testimony. Moreover, to the extent that any portions of the statements were consistent with the victim's trial testimony, Allen fails to acknowledge that admission of the statements may have been proper in accordance with MRE 801(d)(1)(B).

Despite the fact that the victim testified at trial, the fact that Allen has repeatedly challenged the victim's credibility, and the fact that the trial court relied on MRE 801(d)(1)(B) when denying Allen's motion for a

new trial, Allen does not address any of these requirements or explain why any consistent statements were inadmissible under MRE 801(d)(1)(B). Allen "may not simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his argument[] . . . ." *People v Bowling*, 299 Mich App 552, 559; 830 NW2d 800 (2013) (quotation marks and citation omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue" on appeal. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Consequently, Allen's claim that his counsel was ineffective for failing to object is abandoned. See *id*.

5. OPINION TESTIMONY

Allen argues that trial counsel was ineffective for failing to object to Officer Harris's and Detective Busch's testimony when they testified about the behavior patterns of crime victims because the testimony bolstered the victim's credibility. We disagree.

At trial, Officer Harris was asked on direct examination if he asked the victim "about leaving or why she left or didn't call police[.]" In response, Officer Harris testified that he did not ask the victim that question and noted that he had participated in department-wide mental health training. Through this training, Officer Harris testified that he learned that

> victims in this situation, they have a number of responses, but the two main [responses are] either fight or flight and sometimes freeze, and that's a little less prevalent. . . . But, it tells you that in an instance your body just does whatever it needs to survive. So to her, maybe calling the police or running away would have been her death sentence and she did not want to die that night.

After Officer Harris acknowledged on cross-examination that the victim did not report to him that she had been strangled or thrown down the stairs, the following exchange occurred during redirect examination:

> [*The Prosecutor*]: Officer Harris, and we've touched on the situation with [the victim] and her version of events. Given your training, would you classify this, at least what you were told, the version of events, as something traumatic?
>
> [*Officer Harris*]: Yes.
>
> [*The Prosecutor*]: And I guess in your training that would create one of those three memory recalls that you had mentioned?
>
> [*Officer Harris*]: Yes, sir, it would.
>
> [*The Prosecutor*]: And those were fight or flight—
>
> [*Officer Harris*]: Yes, fight or flight, and the least prevalent is freeze.

During direct examination of Detective Busch, the following exchange occurred:

> [*The Prosecutor*]: And do you also have any training or background in like stress trauma or type of interviews with victims?
>
> [*Detective Busch*]: I do. Part of our training is interviewing victims of trauma, as well as just interviewing general mental health.
>
> [*The Prosecutor*]: And did you do a follow-up interview with [the victim]?
>
> [*Detective Busch*]: I did.
>
> [*The Prosecutor*]: And during the course of that interview were you able to ascertain if this was a traumatic situation or not?
>
> [*Detective Busch*]: I was. I mean, the training obviously dictates that, but, any situation like this is going to be a

> traumatic experience for the average individual. Waking up in that situation is not a good process. Even the way she presented in her statements to me though was typical of victims of a crime such as this. She presented in a typical way that a victim would say stuff, is how she was saying it to me, if that makes sense.

We conclude that Officer Harris's and Detective Busch's testimony was admissible under MRE 701, which provides the standard for lay opinion testimony. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Officer Harris's and Detective Busch's opinions were based on their observations and training. Review of the record establishes that their testimony was rationally based on their perceptions of victims of trauma and was presumably helpful to provide the jury with a clear understanding of the victim's conduct. See MRE 701. Additionally, their testimony was not a "technical or scientific" analysis. Rather, their understanding of trauma and crime victims was acquired through training and experience. Accordingly, because Officer Harris's and Detective Busch's testimony was not improper, trial counsel was not ineffective for failing to make a futile objection. See *Ericksen*, 288 Mich App at 201 (holding that counsel is not ineffective for failing to make a futile objection).

Further, even if trial counsel's failure to object fell below the objective standard of reasonableness, Allen cannot establish that the result of the proceedings would have been different. See *Armstrong*, 490 Mich at 289-290. Officer Harris and Detective Busch were called as witnesses by the prosecutor, and the jury was aware that criminal prosecution against Allen was pursued. Consequently, even without Officer Harris's and Detective Busch's testimony, the jury surely understood that Officer Harris and Detective Busch believed that the victim was telling the truth.

People v Dobek, 274 Mich App 58, 71; 732 NW2d 546 (2007) ("Given that [the detective] was called as a witness by the prosecutor and that a criminal prosecution against [the] defendant was pursued, the jurors surely understood that [the detective] believed that the victim was telling the truth even without the disputed testimony."). Lastly, after review of the record in its entirety, we find it doubtful that Officer Harris's and Detective Busch's brief references to the fact that the victim had suffered from a traumatic event and that her behavior was consistent with that of a crime victim would have resulted in a different outcome at trial. Accordingly, Allen cannot demonstrate that he was prejudiced by trial counsel's failure to object, and he is not entitled to relief on this issue. See *id*.

6. LESSER-INCLUDED-OFFENSE INSTRUCTION

Allen argues that trial counsel was ineffective because he failed to request a jury instruction on simple assault as a lesser included offense. We disagree.

This Court has held that declining to request a particular jury instruction can constitute effective trial strategy. *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013). Indeed, deciding what instructions to request falls within the wide range of discretion accorded to counsel. *Id*. Furthermore, this Court has specifically recognized that an all-or-nothing defense is a legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). When the defense's trial strategy is to obtain an outright acquittal, an instruction or argument on a lesser offense may reduce the defendant's chance of acquittal. *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986).

In this case, Allen has not shown that trial counsel's decision not to request an instruction for simple as-

sault was anything other than reasonable trial strategy. Trial counsel's actions at trial demonstrate his effort to convince the jury that the victim was not credible and that someone other than Allen caused her injuries. At the *Ginther* hearing, trial counsel testified that whether to request a lesser-included-offense instruction was something he would usually discuss with clients. Although he did not recall discussing the matter with Allen, trial counsel recalled that Allen was very involved in his defense and that he adamantly denied assaulting the victim. Therefore, requesting an instruction on simple assault would have been inconsistent with the strategy of attempting to force an all-or-nothing verdict. Whether counsel's trial strategy was succesful does not render counsel's performance ineffective, and it does not overcome the presumption that counsel provided reasonable professional assistance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). This Court will not assess counsel's competence with the benefit of hindsight. *Dunigan*, 299 Mich App at 590; *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Therefore, Allen is not entitled to relief based on this argument.

7. CUMULATIVE ERROR

Allen argues that he was denied a fair trial because of the cumulative effect of the alleged instances of ineffective assistance of counsel described earlier. This Court reviews a claim of cumulative error to determine whether the combination of alleged errors denied the defendant a fair trial. *Dobek*, 274 Mich App at 106. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). The cumu-

lative effect of the errors must have been "seriously prejudicial" in order to conclude that the defendant was denied a fair trial. *Id*. Moreover, "the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Id*. Because Allen has failed to establish any errors, there can be no cumulative effect of errors requiring reversal. *Id*.

C. GREAT WEIGHT OF THE EVIDENCE

Allen argues that the trial court improperly denied his motion for a new trial because the jury verdict was against the great weight of the evidence. We disagree.

We review for an abuse of discretion a trial court's decision to deny a motion for a new trial. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). "It is well recognized that the threshold necessary for a judge to overrule a jury and grant a new trial is unquestionably among the highest in our law." *People v Bosca*, 310 Mich App 1, 13; 871 NW2d 307 (2015) (quotation marks and citation omitted).

In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "A verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.' " *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Absent compelling circumstances, the cred-

ibility of witnesses is for the jury to determine. See *Lemmon*, 456 Mich at 642-643.

Considering the victim's testimony, the evidence does not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. See *id*. at 627. Allen's great-weight argument essentially consists of an attack on the sufficiency of the evidence and an implication that the victim was not credible. However, the jury was to assess the weight and reliability of the circumstantial evidence and the credibility of witnesses. *Id*. at 643-644. Given that the testimony at trial cannot be said to have "contradict[ed] indisputable physical facts or laws" or to have been "so inherently implausible that it could not be believed by a reasonable juror," *People v Galloway*, 307 Mich App 151, 167; 858 NW2d 520 (2014) (quotation marks and citation omitted), rev'd in part on other grounds 498 Mich 902 (2015), we conclude that the jury's verdict was not against the great weight of the evidence. Consequently, the trial court's decision to deny Allen's motion for a new trial was not outside the range of reasonable and principled outcomes. See *Abraham*, 256 Mich App at 269.

We affirm Allen's convictions but remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

LETICA, P.J., and GADOLA, J., concurred with CAMERON, J.

NEW PRODUCTS CORPORATION v HARBOR SHORES BHBT LAND DEVELOPMENT, LLC

Docket No. 344211. Submitted December 3, 2019, at Grand Rapids. Decided December 19, 2019. Approved for publication March 17, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 857 (2021).

New Products Corporation brought an action in the Berrien Circuit Court against Harbor Shores BHBT Land Development, LLC, and Harbor Shores Golf Course, LLC (the Harbor Shores defendants); the city of Benton Harbor; Benton Charter Township; and others, seeking to quiet title to a parcel of land south of the Paw Paw River in Benton Harbor, as well as other declaratory and injunctive relief. Confusion regarding the ownership of the disputed parcel dates back to the early 1950s when Benton Harbor engineers relocated the Paw Paw River, which marked both the border of a piece of property owned by Elwood and Evelyn McDorman and the border between Benton Harbor and Benton Charter Township. In connection with the river relocation project, the city entered into a deal with the McDormans that allowed the city a right-of-way over the McDormans' property, and, in exchange, the city gave the McDormans a parcel of land south of their existing parcel. In 1955, plaintiff acquired the parcel that the city had transferred to the McDormans along with the disputed parcel, which was the part of the McDormans' property that lay south of the Paw Paw River after its relocation. Although plaintiff paid taxes on both parcels to Benton Harbor, Benton Charter Township was also continuing to assess taxes on the disputed parcel—not to plaintiff, but to a man named Frank Hoffman, who had bought the parcel of the McDormans' land that lay north of the relocated Paw Paw River. For a time, Hoffman evidently paid taxes on the disputed parcel in the mistaken belief that it was his; but in 1970, the township foreclosed on the disputed parcel for unpaid taxes. Hoffman bought it back from the state through a redemption deed in 1973. In 1991, Hoffman sold the disputed parcel to Larry and Heidi Heald, who sold it to Harbor Shores BHBT Land Development, LLC, in 2007. Harbor Shores Development then conveyed a portion of the disputed parcel to Benton Harbor and a portion to Harbor Shores Golf Course, LLC, as part of a large development project. In 2006 or

2007, plaintiff became aware that the Harbor Shores defendants planned to build the 18th hole of a tournament golf course on the parcel; however, plaintiff did not file a complaint regarding the property until September 2011, by which time the golf course and associated residential developments had been completed. The Harbor Shores defendants filed a counterclaim, seeking to quiet title under MCL 600.2932 and the marketable record title act, MCL 565.101 *et seq*. The trial court, John M. Donahue, J., ruled that plaintiff was subject to tax foreclosure for failing to pay property tax to the township on the disputed parcel. The trial court also found that it was the nonpayment of property tax by John and Barbara Crow, who had bought the disputed parcel from the McDormans and sold it to plaintiff in 1955, that caused the county to foreclose on the disputed parcel, eventually leading to the state's conveyance of the disputed parcel to Hoffman via the redemption deed. The trial court further ruled that plaintiff's delay in asserting its legal rights to ownership of the disputed parcel until after the completion of the 18th hole and the opening of the golf course barred plaintiff from asserting title to the disputed property under the equitable doctrines of laches, unclean hands, and estoppel. The trial court also concluded that the Harbor Shores defendants had title to the parcel under the marketable record title act. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by quieting title in defendants' favor on the basis of the tax proceedings. The trial court's conclusion that the Crows' nonpayment of property tax on the disputed parcel caused the county to foreclose on the property was not supported by the record, and the court provided no authority for the proposition that a nonowner can oust the owner of real property and obtain title by paying the owner's tax delinquency. Further, there was no evidence that the township gave plaintiff notice of its tax assessments or the foreclosure proceeding or that plaintiff received actual notice as required by due-process principles. Even if the redemption deed were to be considered akin to a tax sale, plaintiff never received notice of the sale, which at the time was required by statute.

2. The trial court did not err by concluding that defendants were entitled to judgment in equity under the doctrines of laches, unclean hands, and estoppel. Estoppel by laches results from the failure to do something that should be done under the circumstances or the failure to claim or enforce a right at a proper time. To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by

the delay. The unclean-hands doctrine bars equitable relief for a party tainted with inequitableness or bad faith relative to the matter in which that party seeks relief, however improper the behavior of the opposing party may have been. Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief under the unclean-hands doctrine. Equitable estoppel occurs when a party—by representation, admissions, or silence—intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on this belief, and the other party will be prejudiced if the first party is permitted to deny the existence of the facts. In the context of property rights, estoppel may be invoked as an equitable defense when the plaintiff has observed the defendant dealing with his property in a manner inconsistent with the plaintiff's rights and makes no objection, while the defendant changes his position in reliance on the plaintiff's silence. In this case, although plaintiff knew about the Harbor Shores defendants' plan to build the 18th hole of their golf course on the disputed property in March 2008, plaintiff waited until 2011—after the golf course had been completed and opened to the public—to file a complaint and seek an injunction. Although plaintiff was in communication with the relevant defendants, plaintiff did not renew its objection to defendants' claim of title while the 18th hole was under construction. Accordingly, the trial court correctly concluded that plaintiff's silence on the title issue inequitably induced defendants' belief that the issue was resolved and that the Harbor Shores defendants justifiably relied on this belief to complete their development on the disputed parcel. Plaintiff's arguments that defendants could not rely on laches were without merit given that any remedy under MCR 3.411(F) would have been inadequate and there was no absolute rule prohibiting laches from defeating a recorded property interest.

3. The trial court did not err by concluding that defendants were also entitled to judgment under the marketable record title act. Under the version of that statute in effect at the relevant time, a person was considered to have an unbroken chain of title to an interest in land when the official public records disclose either (1) a conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transaction purports to create the interest in that person, with nothing appearing of record purporting to divest that person of the purported interest, or (2) a conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other

interests, which conveyance or other title transaction purports to create the interest in some other person and other conveyances or title transactions of record by which the purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of the purported interest. The 1971 tax deed was recorded on August 6, 1971. Although the tax deed and subsequent redemption deeds were defective, they nonetheless purported to create an interest in the state, and the redemption deed purported to pass this interest to Hoffman. Contrary to plaintiff's argument that the tax deed was nullified by the redemption deed and that the redemption deed did nothing more than restore the status quo before the tax foreclosure, the pertinent inquiry is not whether the recorded instruments were based entirely on valid transactions but whether they purported to declare a conveyance of record. Consequently, the recorded tax deed had a 40-year chain of unbroken record title as of the date plaintiff filed its complaint in September 2011.

Affirmed.

Demorest Law Firm, PLLC (by *Mark S. Demorest*, *Stephen D. Kursman*, *Michael K. Hayes*, and *Lisa Okasinski*) for New Products Corporation.

Dickinson Wright PLLC (by *John G. Cameron, Jr.*, *K. Scott Hamilton*, *Scott R. Knapp*, and *Christina K. McDonald*) for Harbor Shores BHBT Land Development LLC; Harbor Shores Golf Course LLC; Cornerstone Community Asset Fund, Inc.; and Whirlpool Corporation.

Plunkett Cooney (by *Jeffrey C. Gerish*) for the city of Benton Harbor.

Jessica A. Fette for Benton Charter Township.

Kreis, Enderle, Hudgins & Borsos, PC (by *Mark E. Kreter* and *Stephen L. Simons*) for Horizon Bank.

Before: METER, P.J., and O'BRIEN and TUKEL, JJ.

PER CURIAM. In this action to quiet title, plaintiff appeals as of right the trial court's order quieting title in defendants' favor under multiple theories. We affirm, albeit on narrower grounds than those underlying the trial court's order.

I. BACKGROUND

This action concerns a strip of land that now comprises the 18th hole of the Harbor Shores Golf Course—a Jack Nicklaus Signature championship golf course at which the Senior Professional Golf Association (PGA) Tour Championship Tournament is held biennially. The disputed parcel sits along the relocated Paw Paw River to the north. To the south, the disputed parcel is bordered by a parcel on which plaintiff, New Products Corporation, operates a large factory producing automobile and machine parts; there is no dispute that plaintiff holds title to this southernmost parcel. In its natural state, the disputed parcel consisted mostly of marshland, suitable mainly for river-adjacent recreation or as a floodplain. With the approval of the National Parks Service and other governmental entities, the wetland has now been filled to create land suitable for golfing.

Ownership of the disputed parcel can be traced back to a parent parcel owned in 1950 by Elwood and Evelyn McDorman. Since then, however, ownership of the disputed parcel has been less than clear. As described by this Court in an opinion resolving an interlocutory appeal:[1]

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[1] This Court held that plaintiff's claims to quiet title, for a permanent injunction against trespass, and declaratory relief were to be decided by the trial court, not a jury. *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 641; 866 NW2d 850 (2014).

> In 1950, Elwood and Evelyn McDorman owned a 250-foot-wide parcel of land running south from Higman Park Road to the then existing channel of the Paw Paw River, which served as the boundary between the city of Benton Harbor (Benton Harbor) and Benton Charter Township (the Township). At around that time, engineers relocated the river approximately 500 feet north. To facilitate the relocation, Benton Harbor purchased a right of way over the McDormans' land for the new channel and transferred to them a 250-foot-wide parcel located to the south of their existing parcel. After that transfer, the McDormans owned a 250-foot-wide strip of land extending from Higman Park Road in the north to Klock Road in the south. The parcel in dispute is that part of the McDormans' land that was located in the Township before the relocation of the river, but which is now south of the relocated river.
>
> New Products owns and operates a manufacturing facility in Benton Harbor along Klock Road. In 1955, New Products acquired the parcel that Benton Harbor transferred to the McDormans as part of the project to relocate the river along with the disputed parcel. [The parcel was first transferred from the McDormans to John Crow and Barbara Crow, who conveyed the property to New Products by quitclaim deed in 1955.] Benton Harbor taxed both parcels and New Products paid the taxes. However, the Township continued to tax the disputed parcel and listed the taxpayer of record as Frank Hoffman. [*New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 641-642; 866 NW2d 850 (2014).]

At the time, Frank Hoffman was the owner of the parcel of land situated north of the Paw Paw River, which was previously owned by the McDormans. The McDormans transferred this northernmost parcel to Glenlord Realty in 1961 via a deed that stated that land south of the relocated Paw Paw River was not included in the sale, as it was otherwise previously conveyed. Glenlord Realty subsequently transferred the northernmost parcel to Frank Hoffman, whom the township taxed both for the northernmost parcel and

the disputed parcel. The township did not assess taxes against plaintiff for the disputed parcel. In 1968, plaintiff recorded its deed to the southernmost parcel and the disputed parcel. Then, in 1970,

> the Township foreclosed against Hoffman's property for unpaid taxes. The state acquired the property, but transferred it back to Hoffman in 1973 [via redemption deed]. Larry and Heidi Heald acquired the property from Hoffman and his co-owners in 1991. Harbor Shores Development then purchased the disputed parcel from the Healds in 2007. As part of a large development project, Harbor Shores Development conveyed a portion of the disputed parcel to Benton Harbor and a portion to defendant Harbor Shores Golf Course, LLC[.] [*New Prod Corp*, 308 Mich App at 642.]

When the Healds purchased the property in 1991, their realtor contacted plaintiff's then president, Stanley Miller, to clarify ownership of the now-disputed parcel, indicating that the Hoffmans had paid taxes on the parcel for 38 years, although, "unknown to them, it was not legally theirs." There is no indication in the record that Miller ever took any action with regard to this correspondence. In 2005, Chicago Title investigated the chain of title regarding the disputed parcel and was unable to determine who, in fact, owned the property.

Sometime in 2006 or 2007, plaintiff's now president, Cheryl Miller, became aware that Harbor Shores BHBT Land Development, LLC, and Harbor Shores Golf Course, LLC (the Harbor Shores defendants) planned to use the disputed parcel for part of its golf course and surrounding residential improvements. In 2007, Miller[2] retained a land-surveying firm to survey plaintiff's property, which resulted in the firm posting

[2] Hereinafter, "Miller" refers to Cheryl Miller, not Stanley Miller.

"no trespassing" signs on the disputed parcel. Also in 2007, Miller contacted the Michigan Department of Environmental Quality regarding the Harbor Shores defendants' application for a permit to fill wetlands and floodplains on the disputed parcel, indicating that defendants were not the rightful owners of the property.

Sometime in 2008, Miller saw plans for the proposed development in the *Herald Palladium*, which indicated that a golf-course hole would be placed on the disputed parcel. In March 2008, she contacted a trustee of Harbor Shores requesting a final version of the plans. In April 2008, Harbor Shores' counsel sent Miller a letter arguing that plaintiff's assertion of ownership over the disputed parcel was incorrect, stating:

> While I have not had an opportunity to review the vesting deed by which New Products took title to its portion of the property in question, the tax description of that property on file with Berrien County purports to run to the center of the Paw Paw River. If the New Products property in fact extended to the center of the Paw Paw River as it exists today, then New Products would own a great deal more property than it originally acquired, the Heald's [sic] would not have owned the property they sold Harbor Shores, and the conclusions set forth in New Products' letter would be correct. But, of course, this cannot be, and there is an explanation.
>
> The bed of the Paw Paw River was physically moved some years ago from its former location to a place considerably north of that. Moving a monument that demarks a property boundary does not, of course, actually extend the property's area. Instead, one seeking to ascertain the actual boundaries of the property must reestablish the original location of the boundary. A river, like a tree, a pile of stones, or a concrete post, is nothing more than a monument. When the river was moved north, the boundary of the New Products property did not follow it.

> Instead, that boundary remained the same, and its location can be ascertained through proper surveying techniques.

Plaintiff responded to the letter through its own legal counsel, who emphasized that plaintiff's deed referenced the Paw Paw River "as relocated" and indicated that any future encroachment on the disputed parcel would be considered a trespass. In turn, Harbor Shores' counsel sent plaintiff a final letter dated July 1, 2008, stating that if plaintiff held an interest in the disputed parcel, it was divested of any title to the property by its failure to pay property taxes. Harbor Shores' counsel attached to the letter a copy of the 1973 redemption deed and reiterated Harbor Shores' position that the boundary of plaintiff's property was south of the original river channel. Harbor Shores' counsel invited further communication with plaintiff, stating, "To the extent it would be helpful, I would be pleased to discuss this matter with you by telephone or in person." Plaintiff's counsel did not respond to this last letter.

For her part, Miller attended a meeting with Harbor Shores representatives in September 2008, at which the parties discussed potential conflicts between the disputed parcel's use as a golf course and plaintiff's factory operation. Before the meeting, Miller had sent Harbor Shores' counsel a letter indicating that there was no record of any tax delinquency or property sale pertaining to plaintiff. At the meeting, however, ownership of the disputed parcel was not discussed. Follow-up correspondence indicates that Miller was concerned about flood protection, given that plaintiff had erected flood-control berms on or near the disputed parcel. Again, ownership was not discussed.

In late September 2008, defendants began filling wetlands on the disputed property in preparation for their construction of the 18th hole of the proposed golf course. About that time, Miller urged plaintiff's counsel to file a lawsuit preventing the construction of the golf course. Plaintiff's counsel agreed that a lawsuit and a preliminary injunction were necessary to protect plaintiff's interests but never filed a complaint. Other communications indicate that plaintiff and its counsel were disputing attorney fees at the time.

Harbor Shores opened the golf course in 2010. The Senior PGA Championship Tournament was scheduled to be held at Harbor Shores in even-numbered years through 2024. The course is a Jack Nicklaus Signature championship golf course, and the 18th hole sits on the disputed parcel. The remaining 17 holes sit on contiguous property, part of which made up the original northernmost McDorman parcel. Also completed in tandem with the golf course were several residential developments; in total, the mixed-use development encompasses 530 acres. Additionally, part of the disputed parcel was deeded to the city of Benton Harbor in exchange for the city's agreement to repurpose a city park within the development for the golf course. Construction on the disputed parcel ultimately required 34,000 yards, or 1,200 truckloads, of dirt. The 18th hole was seeded in 2009 and opened for play in August 2010. As it currently stands, there is no land available for an alternative 18th-hole location; although an alternative location existed as late as September 2010, residential housing has since been constructed there. Testimony indicated that alterations to the 18th hole would require the approval of Jack Nicklaus's design firm and would likely result in the loss of the course's status as a championship course.

Plaintiff did not file its complaint until September 2011, asserting *inter alia* a claim for quiet title. The Harbor Shores defendants filed a counterclaim, seeking to quiet title under MCL 600.2932 and the marketable record title act, MCL 565.101 *et seq*. The trial court ruled that plaintiff was subject to tax foreclosure for failing to pay property tax to the township on the disputed parcel. The trial court also found that the Crows' nonpayment of property tax caused the county to foreclose on the disputed parcel, eventually leading to the state's conveyance of the disputed parcel to Hoffman via the redemption deed. Regarding equity, the trial court ruled that plaintiff's delay in asserting its legal rights to ownership of the disputed parcel until after the completion of the 18th hole and the opening of the golf course barred plaintiff from asserting title to the disputed property under the doctrines of laches, unclean hands, and "waiver and estoppel." The trial court also concluded that the Harbor Shores defendants had title to the parcel under the marketable record title act. This appeal followed.

II. ANALYSIS

A. TAX FORECLOSURE AND REDEMPTION

We first address plaintiff's challenges to the trial court's conclusion that plaintiff was divested of title by the tax events of 1971 to 1973. We review the trial court's factual findings for clear error, *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005), and its legal conclusions de novo, *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 6; 732 NW2d 458 (2007).

Plaintiff raises several arguments on appeal challenging the trial court's factual findings and conclu-

sions. As an initial matter, we note that the trial court's conclusion that the Crows' nonpayment of property tax on the disputed parcel caused the county to foreclose on the property is not supported by the record. There is no evidence that the township taxed the Crows for the disputed parcel or that the Crows failed to pay any property tax; rather, the record shows that the township taxed the disputed parcel to Hoffman, whose nonpayment led to the foreclosure proceedings and whose subsequent payment of the delinquency led to the redemption deed. The trial court mistakenly concluded that the Crows' nonpayment caused the county to foreclose on the disputed parcel and eventually issue a redemption deed to Hoffman. Not only is this finding inaccurate, the trial court also provided no authority for the proposition that a nonowner can oust the owner of real property and obtain title by paying the owner's tax delinquency.

Moreover, while we will not address all of plaintiff's arguments regarding the trial court's tax-proceedings findings, perhaps the most significant of plaintiff's arguments concerning the property tax history is that plaintiff was never given notice of the tax proceedings. " '[D]ue process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ' " *In re Petition by Wayne Co Treasurer*, 478 Mich at 9 (citations omitted). There is no evidence that the township gave plaintiff notice of its tax assessments or the foreclosure proceeding, or that plaintiff received actual notice. Additionally, even if we were to consider the redemption deed to Hoffman akin to a tax sale, plaintiff never received notice of the sale, which at the time was required by statute. See 1970 CL 211.140, repealed by 2001 PA 94 (requiring notice to be

given to the last grantee in the regular chain of title before property may be transferred via tax sale).

In short, the trial court's analysis of the tax proceedings between 1971 and 1973 was inaccurate factually and incomplete legally. Accordingly, we conclude that the trial court erred by quieting title in defendants' favor on the basis of the tax proceedings.

B. EQUITY

Although we conclude that the trial court's tax-proceeding conclusions were erroneous, we nonetheless affirm the trial court's rulings in equity. The statute that authorizes an action to quiet title, MCL 600.2932, provides that "[a]ctions under this section are equitable in nature." MCL 600.2932(5). Thus, "[a] suit to quiet title or remove a cloud on a title is one in equity." *McFerren v B & B Inv Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). We "review de novo a trial court's decision whether to apply equitable doctrines," *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 579; 939 NW2d 705 (2019), but review the trial court's factual findings supporting its decision for clear error, *McFerren*, 253 Mich App at 522. Although we closely scrutinize the trial court's factual findings in an equity case, we are cognizant of the trial court's special opportunity to view the evidence in the first instance. *In re Conant Estate,* 130 Mich App 493, 498-499; 343 NW2d 593 (1983).

The trial court concluded that defendants were entitled to judgment in equity under the doctrines of laches, unclean hands, and estoppel. Estoppel by laches results from "the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537; 847

NW2d 657 (2014) (citation and quotation marks omitted). "A party guilty of laches is estopped from asserting a right it could have and should have asserted earlier." *Perkins*, 328 Mich App at 589 (citation and quotation marks omitted). "To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay." *Wells Fargo Bank*, 304 Mich App at 538 (citation and quotation marks omitted). The doctrine of laches may bar a claim even if the action is brought within the applicable limitations period. *Rowry v Univ of Mich*, 441 Mich 1, 11; 490 NW2d 305 (1992).

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]." *Rose v Nat'l Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002) (citations and quotation marks omitted). Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief. *Stachnik v Winkel*, 394 Mich 375, 386; 230 NW2d 529 (1975).

Equitable estoppel occurs when "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." *Williamstown Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 553; 927 NW2d 262 (2018) (citations and quotation marks omitted). "Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence

of a particular fact." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). In the context of property rights, "estoppel may be invoked as an equitable defense where the plaintiff has observed the defendant dealing with his property in a manner inconsistent with his rights and makes no objection, while the defendant changes his position in reliance on the plaintiff's silence." *Thiel v Goyings*, 504 Mich 484, 523 n 37; 939 NW2d 152 (2019) (VIVIANO, J., concurring), quoting 42 Am Jur Proof of Facts 3d, § 10, pp 463, 482 (discussing estoppel in the context of a breach of covenant).

In this case, plaintiff knew about the Harbor Shores defendants' plan to build a golf-course hole on the disputed property by at least March 2008. Plaintiff initially asserted its title to the disputed property; by the end of September, however, defendants had made clear that they would not recognize plaintiff's title, asserting instead that the tax proceedings granted title to their predecessors in interest. The Harbor Shores defendants invited plaintiff to discuss the issue further, but plaintiff did not avail itself of this opportunity. Despite having at least one meeting and other further communications with defendants, plaintiff did not again raise the ownership issue.

The Harbor Shores defendants started filling wetlands on the disputed property in late September 2008. Plaintiff's president, Miller, recognized that this action was inconsistent with plaintiff's claim to title, but, despite Miller's concerns, she did not further discuss the ownership issue with defendants, and plaintiff's counsel did not file a complaint or seek an injunction. Rather, plaintiff waited until 2011—after the golf course had been completed and had opened to the public—to file its complaint and seek an injunction.

Plaintiff lodged no complaint while 1,200 truckloads filled the disputed parcel with 34,000 yards of dirt; while construction crews installed drainage, graded, and seeded the parcel; and while the Harbor Shores defendants undertook other construction projects in places that the 18th hole could have been placed. Plaintiff waited for months while the grass grew on the 18th hole and only took action after the public started golfing on it.

The record reveals that open lines of communication existed between plaintiff and the relevant defendants. In fact, after explaining its position regarding its title to the disputed property, Harbor Shores' attorney invited additional discussion on the issue. Having received no further objections on the title issue, despite communication on other issues, defendants reasonably believed that plaintiff's objection to their claim of title had ceased. Indeed, this belief could only have been enhanced by plaintiff's silence on the issue throughout the entirety of the construction of the 18th hole. On this record, we agree with the trial court that plaintiff's silence on the title issue inequitably induced defendants' belief that the issue was resolved and that the Harbor Shores defendants justifiably relied on this belief to complete their development of the disputed parcel and related property.[3]

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[3] To the extent that plaintiff blames its delay on its counsel, we note that plaintiff could have ended its relationship with its counsel and hired alternative counsel. In any event, any error on counsel's part may be remedied monetarily through a malpractice action. Similarly, plaintiff blames the delay on its preoccupation with the bankruptcy of one of its most important clients, General Motors. That an unrelated legal entity filed for bankruptcy, however, does not absolve plaintiff of its duty as a landowner to assert its ownership interests. Plaintiff was aware of the development, and there is no indication in the record that General Motors' bankruptcy precluded plaintiff in any way from asserting its legal rights.

We also agree with the trial court that defendants were sufficiently prejudiced by plaintiff's delay to estop plaintiff from reviving its objection to defendants' title claim in the quiet-title action. By the time the case came before the trial court, the golf course had already been completed and opened to the public. The Harbor Shores defendants had already constructed residential housing or other buildings in places where the 18th hole could have been placed. Moreover, they had deeded a mitigation parcel on the disputed property to the city of Benton Harbor in exchange for the city's agreement to redevelop a city park, and there was no other suitable land left to be used as this mitigation parcel. Theoretically, at the time of trial, the 18th hole could have been shortened from a par-4 to a par-3 hole that would not encroach on the disputed parcel; however, doing so would have required the approval of Jack Nicklaus's firm, of which there was no guarantee. Moreover, shortening the hole would have jeopardized the course's designation as a Jack Nicklaus Signature course and would likely have meant that the course would no longer be considered a championship golf course. Losing its status as a championship course likely would have meant that the course could no longer host the Senior PGA Championship Tournament, despite plans to hold the tournament there biennially through 2024. In turn, loss of these statuses jeopardized Harbor Shores Golf Course's customer base, particularly those customers attracted to the course because of its status as a Jack Nicklaus Signature championship golf course associated with the PGA. Even harder to quantify would be the economic impact of the loss of the Senior PGA championship and the course's championship designation on the residential portions of the development.

In short, we agree with the trial court that, under the doctrines of laches, unclean hands, and estoppel, plaintiff should be estopped from reviving its objection to defendants' title to the disputed parcel. Plaintiff, however, raises two arguments on appeal challenging the application of the doctrine of laches to the instant dispute, which require further discussion. Neither argument is meritorious.

First, plaintiff argues that defendants cannot rely on laches because a remedy exists under MCR 3.411(F). MCR 3.411 governs procedure in civil actions to determine interests in land under MCL 600.2932, and MCR 3.411(F) provides a procedure in which the nonprevailing party may present a claim for the value of buildings erected and improvements made on the disputed property:

> (1) Within 28 days after the finding of title, a party may file a claim against the party found to have title to the premises for the amount that the present value of the premises has been increased by the erection of buildings or the making of improvements by the party making the claim or those through whom he or she claims.
>
> (2) The court shall hear evidence as to the value of the buildings erected and the improvements made on the premises, and the value the premises would have if they had not been improved or built upon. The court shall determine the amount the premises would be worth at the time of the claim had the premises not been improved, and the amount the value of the premises was increased at the time of the claim by the buildings erected and improvements made.
>
> (3) The party claiming the value of the improvements may not recover their value if they were made in bad faith.

While it is true that MCR 3.411(F) would grant defendants the right to recover for the physical improvements made to the disputed property—e.g., the

installation of drainage and the filling, grading, and seeding of the property—such a remedy would be wholly inadequate in this case. Indeed, as already shown, the bulk of the Harbor Shores defendants' losses from an adverse title ruling would not be in the form of lost construction costs, but rather by the loss of an opportunity to erect the 18th hole in a different location to retain the golf course's status as a Jack Nicklaus Signature championship golf course. Without repeating the above analysis, the record shows that plaintiff's delay in filing its suit artificially increased the risks associated with the property action, such that an adverse property ruling would have drastic, potentially permanent economic consequences for the development as a whole, which could not be remedied by a monetary award equal to the increased value of the disputed parcel itself. Accordingly, we conclude that MCR 3.411(F) poses no impediment to the trial court's laches ruling because the remedy provided by MCR 3.411(F) is inadequate to cure the prejudice defendants suffered by plaintiff's delay in filing its suit.

Similarly, plaintiff argues that the doctrine of laches has no application when a title has been validly recorded. In support of this position, plaintiff cites *Angeloff v Smith*, 254 Mich 99, 101; 235 NW 823 (1931), for its proposition that "[w]here the right is not an executory one but is a vested legal title, the doctrine of laches has little, if any, application. . . . This is particularly true where the title is of record for the world to see." Having reviewed this case, which involved a divorcee's challenge to the sale of joint property after a divorce, see *id*. at 100-101, we cannot conclude that *Angeloff* establishes such a broad prohibition. Rather, despite this seemingly expansive language, the *Angeloff* Court actually engaged in a traditional laches analysis, noting that the equities ran in the plaintiff's favor

because she did not engage in any undue delay and the purchasers bought the property with notice of her title. *Id*. at 101-102. Our Supreme Court concluded, "The case is not accompanied by elements of estoppel, and plaintiff cannot, *under the circumstances*, be held guilty of laches." *Id*. at 102 (emphasis added).

This is not the type of analysis that establishes an absolute rule prohibiting laches from defeating a recorded property interest; at most, *Angeloff* stands for the proposition that only in rare cases will laches defeat a recorded property interest. See *Zlydasdyk v Lucas*, 29 Mich App 584, 587-588; 185 NW2d 838 (1971) (reversing the trial court's ruling rejecting the defendant's argument that the doctrine of laches could not apply where the plaintiff held record title to land). If it is indeed a rare case in which laches will defeat a recorded property interest, we believe that the drastic consequences attendant to plaintiff's delay in this case establish the exception to the general proposition. In any event, we agree with the trial court that plaintiff was estopped from challenging defendants' title under the doctrines of unclean hands and estoppel, and we are unable to find any challenge to those theories in *Angeloff*.

Accordingly, we affirm the trial court's ruling that defendants were entitled to judgment in equity under the doctrines of laches, unclean hands, and estoppel.

C. MARKETABLE RECORD TITLE ACT

Finally, although we technically need not address this case further, given our affirmance of the trial court's equity rulings, we will briefly address the trial court's conclusion that the Harbor Shores defendants held title to the disputed parcel under the marketable record title act, MCL 565.101 *et seq*.

MCL 565.101(1) provides:

> Any person, that has the legal capacity to own land in this state, that has an unbroken chain of title of record to any interest in land for 20 years for mineral interests and 40 years for other interests, is at the end of the applicable period considered to have a marketable record title to that interest, subject only to claims to that interest and defects of title as are not extinguished or barred by application of this act and subject also to any interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record title is formed and that are recorded within 2 years after the effective date of the amendatory act that added section 2(2) or during the 20-year period for mineral interests and the 40-year period for other interests. However, a person is not considered to have a marketable record title by reason of this act if the land in which the interest exists is in the hostile possession of another.

At the time relevant, MCL 565.102 provided:[4]

> A person is considered to have an unbroken chain of title to an interest in land as provided in section 1 when the official public records disclose either of the following:
>
> (a) A conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transac-

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[4] MCL 565.102 was amended by 2018 PA 572, effective March 29, 2019, to add Subsection 2, which provides:

> For purposes of this section, except as to mineral interests, a conveyance or other title transaction in the chain of title purports to divest an interest in the property only if it creates the divestment or if it specifically refers by liber and page or other county-assigned unique identifying number to a previously recorded conveyance or other title transaction that created the divestment.

Because Subsection (2) did not become effective until after plaintiff filed this lawsuit, it is not applicable. If it applied, however, plaintiff would prevail because none of the title transactions created plaintiff's divestment in the disputed parcel or referred by liber and page to a transaction that created a divestment.

> tion purports to create the interest in that person, with nothing appearing of record purporting to divest that person of the purported interest.
>
> (b) A conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transaction purports to create the interest in some other person and other conveyances or title transactions of record by which the purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of the purported interest.

The 1971 tax deed was recorded on August 6, 1971. Although the tax deed and subsequent redemption deeds were defective for the reasons described earlier, they nonetheless "purport[] to create" an interest in the state. MCL 565.102(1)(b). The redemption deed "purports" to pass this interest to Hoffman. Plaintiff emphasizes that the tax deed was nullified by the redemption deed and that the redemption deed did nothing more than restore the status quo before the tax foreclosure, but the key word in the statute is "purports." The pertinent inquiry is not whether the recorded instruments were based entirely on valid transactions, but whether they purported to declare a conveyance of record. Consequently, the recorded tax deed began a 40-year chain of unbroken record title as of the date plaintiff filed its complaint in September 2011. Accordingly, the trial court did not err by concluding that defendants were entitled to judgment under the marketable record title act.

Affirmed.

METER, P.J., and O'BRIEN and TUKEL, JJ., concurred.

HIGHFIELD BEACH AT LAKE MICHIGAN v SANDERSON

Docket Nos. 343968 and 345177. Submitted August 6, 2019, at Grand Rapids. Decided March 24, 2020, at 9:00 a.m.

Highfield Beach at Lake Michigan (HBLM), a nonprofit corporation that serves as the owners association of a site condominium project in South Haven, brought an action in the Allegan Circuit Court against the owner of a condominium unit, Scott E. Sanderson, requesting declaratory and injunctive relief when Sanderson rented his condominium unit for a period of time that allegedly violated HBLM's amended bylaws. Article VII, § 3(a) of the bylaws had originally provided that "[n]o Co-Owner shall lease his unit for a term less than fourteen (14) days nor shall any Co-owner lease or rent less than an entire unit in the condominium." Section 3(a) further indicated that the requirement of a minimum 14-day rental period also applied "to a Co-Owner who places his unit on rental management[.]" In 2008, HBLM attempted to amend the bylaws to increase the minimum rental term from 14 to 90 days. The record was fairly limited and vague regarding what transpired after the attempt. There was documentation and an affidavit indicating that condominium co-owners in the development unanimously consented to the modification but that a mortgagee, Macatawa Bank, never approved the amendment. Sanderson claimed that evidence existed showing that the amendment had been fully approved and that HBLM should have recorded the amendment and placed it in its files. There was no dispute that the purported 2008 amendment was never recorded, and HBLM documents reflected a belief that a valid or operative amendment never came to fruition. In 2015, Sanderson signed a 15-year contract with CRA Management, LLC (CRA), authorizing CRA to manage the property in relation to future rentals. The CRA contract was labeled a "Lease Agreement" and provided that Sanderson was leasing his unit to CRA for the 15-year period. But the CRA contract also had language characterizing the contract as a rental or property-management agreement. The parties disagreed about whether HBLM approved the contract. In November 2016, HBLM amended Article VII, § 3(a) of the bylaws to prohibit co-owners from leasing their condominium units for terms of less than four months.

Sanderson, through counsel, sent HBLM a letter asserting that the amendment did not apply to Sanderson because HBLM could not legally invalidate the existing lease agreement he had with CRA. After Sanderson and CRA forged ahead with short-term rentals in defiance of the amended bylaw, HBLM commenced the instant lawsuit. Sanderson filed a counterclaim against HBLM and a third-party complaint against HBLM Board Members Mark Coddington, Chris Barczyk, Paul Swanstrom, and Blake Hardin (the Board Members), alleging breach of contract, negligence, and breach of fiduciary duty. HBLM moved for summary disposition, and the court, Roberts A. Kengis, J., granted HBLM's motion pursuant to MCR 2.116(C)(10), determining that the CRA contract was not a lease agreement covered by MCL 559.212(1) of the Condominium Act, MCL 559.101 *et seq*., but instead was a property-management agreement because CRA obtained no ownership or possessory interest in Sanderson's condominium unit under the contract. HBLM and the Board Members moved for summary disposition with respect to Sanderson's counterclaim and third-party complaint, which the court granted. In Docket No. 343968, Sanderson appealed the trial court's summary-disposition orders. HBLM subsequently moved for attorney fees and costs, arguing that fees and costs were authorized by MCL 559.206(b) and Article XII of the bylaws. The trial court granted the motion and determined that the amount HBLM requested—$52,295—was reasonable, but the court reduced the amount by 10% because the fees had improperly included representation of the Board Members. In Docket No. 345177, Sanderson appealed the order awarding HBLM attorney fees and costs. The Court of Appeals consolidated the appeals.

The Court of Appeals, in a lead opinion by MARKEY, J., and a concurring opinion by GADOLA, P.J., and RONAYNE KRAUSE, J., *held*:

1. Condominium bylaws are interpreted according to the rules governing the interpretation of a contract. MCL 559.212(1) of the Condominium Act provides that while a condominium association may amend condominium documents as to the rental of condominium units or occupancy terms, the amendment shall not affect the rights of any lessors or lessees under a written lease otherwise in compliance with the statute and executed before the effective date of the amendment. The crux of Sanderson's argument was that pursuant to MCL 559.212(1), he had rights under the written lease—including his right to lease his unit for terms as short as 14 days—that could not be affected by the subsequent amendment of the bylaws. However, the trial court correctly held that the CRA contract constituted a property-management agree-

ment, not a lease agreement, because CRA itself had no possessory interest; therefore, the exception to the general enforceability of bylaw amendments found in MCL 559.212(1) was not implicated in this case. The amended language in Article VII, § 3(a)—the change from "as if a lease" to "in addition to each lease"—did not transform the property-management agreement into a lease; rather, the language made clear that property-management agreements had to be submitted to and approved by HBLM. Accordingly, the trial court did not err by concluding that the CRA contract was a property-management agreement and not a lease agreement for purposes of MCL 559.212(1).

2. The breach-of-contract count related to the alleged 2008 amendment of the bylaws and the failure to file or record the amendment. With respect to the Board Members, there was no dispute that they were not on the board in 2008. Consequently, they could not have breached any contract or bylaw in 2008 relative to the purported amendment. To the extent that Sanderson's third-party claims of negligence and breach of fiduciary duty against the Board Members were based on shortcomings or nonfeasance related to the alleged 2008 amendment, the claims failed for the same reason—the Board Members were not on the board in 2008.

3. MCL 559.153 provides that the amendment of a bylaw shall be inoperative until recorded. On the basis of MCL 559.153, the alleged 2008 amendment never became operative because it was never recorded. Article I, § 4 of the bylaws required HBLM to maintain for inspection file copies of "any amendments," which meant any adopted or enforceable amendments, not attempted or proposed amendments. Absent recordation, there was no valid, operative amendment. Accordingly, the breach-of-contract claim against HBLM premised on Article I, § 4 of the bylaws could not survive.

4. Sanderson failed to create a genuine issue of material fact with respect to whether the amendment was actually approved and whether HBLM had an obligation to file or record the amendment. Sanderson had the burden to prove his breach-of-contract claim by a preponderance of the evidence. There was no evidence indicating that the mortgagee, Macatawa Bank, had approved the amendment, and Sanderson failed to submit evidence showing that a genuine issue existed for trial. Accordingly, the trial court did not err by granting the motion for summary disposition with respect to the counterclaim and third-party claim for breach of contract.

5. Sanderson's third-party claims of negligence and breach of fiduciary duty against the Board Members also failed as a matter of law. Sanderson's position required a determination that the Board Members had a duty—before the vote was taken on the 2016 amendment—to assess, correctly so, the purely legal question whether Barczyk would be bound by the amendment, to utilize the aid of counsel in the assessment, to ignore or not give any weight to Barczyk's assurances of future compliance, and to inform condominium co-owners of their legal conclusions. Sanderson simply did not provide any pertinent authorities or analysis to support the existence of these duties. Furthermore, on the matter of causation, Sanderson engaged in pure speculation by asserting that, assuming the inapplicability of the short-term rental prohibition to Barczyk's lots, the voting co-owners would have voted against the 2016 amendment. Accordingly, the trial court correctly held that there was no negligence or breach of fiduciary duty.

6. The trial court did not err by awarding attorney fees and costs to HBLM. The question of plaintiff's entitlement to attorney fees involved a straightforward application of MCL 559.206(b). The statutory entitlement to attorney fees is stated as an imperative—"to the extent the condominium documents expressly so provide." In this case, Article XII, § 1(b) of the bylaws mirrored MCL 559.206(b) in making the recovery of attorney fees nondiscretionary, aside from the Court's obligation to determine a reasonable amount of costs and fees. Accordingly, a straightforward application of the statute and the bylaws provision lead to the conclusion that plaintiff was entitled to the attorney fees the trial court awarded.

7. Sanderson argued that the trial court erred by including in its award the attorney fees incurred by HBLM in defending against Sanderson's counterclaim for breach of contract. Consistent with MCL 559.206(b), Article XII, § 1(b) of the bylaws provided that HBLM shall recover attorney fees and costs of any "proceeding" that arose because of an alleged default by any co-owner if HBLM was successful in the proceeding. Giving the language of this unambiguous bylaw its plain and ordinary meaning, the bylaw entitled HBLM to an award of attorney fees and costs associated with defending against Sanderson's counterclaim. The proceeding arose because of Sanderson's alleged default, which has now been established, and the counterclaim was part of and encompassed by the "proceeding." In addition, the attorney fees and costs that the Board Members incurred related to their defense against Sanderson's third-party claims; those

claims arose because of HBLM's proceeding against Sanderson for the default. Because the Board Members' attorney fees and costs arose during this proceeding, HBLM was entitled to recover the indemnification amount as "costs of the proceeding" under MCL 559.206(b) and Article XII, § 1(b) of the bylaws. Even though HBLM was entitled to all the fees and costs associated with defending the Board Members against Sanderson's third-party claims and there should not have been a 10% reduction, reversal and remand was unwarranted because HBLM did not cross-appeal the trial court's reduction decision.

Affirmed.

In her separate, lead opinion, MARKEY, J., set forth most of the Court's holdings and analysis. In addition, she explained her disagreement with the conclusion of GADOLA, P.J., and RONAYNE KRAUSE, J., that it was unnecessary for HBLM to plead a contract claim because statutory authority supported the award. Attorney fees may be recovered if expressly provided for by contract or if authorized by statute. MCL 559.206(b) provides that in a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide. In this case, Article XII, § 1(b) of the bylaws provided that in any proceeding arising because of an alleged default by any co-owner, the association, if successful, shall recover the costs of the proceeding and reasonable attorney fees (not limited to statutory fees), as determined by the court, but in no event shall any co-owner be entitled to recover such attorney fees. Judge MARKEY reasoned that MCL 559.206(b) authorizes the inclusion of attorney-fee and cost provisions in condominium documents, which can then be enforced; the statute, however, does not, in and of itself, serve as the basis to award attorney fees. Ultimately, and effectively, a claim for attorney fees and costs is not a claim brought under MCL 559.206(b); rather, it is a claim brought under the contract, with the statute merely having provided the authority to have a fee-and-cost provision initially included in the condominium documents. Accordingly, when a condominium association seeks the recovery of attorney fees and costs in litigation over a default, it is necessarily presenting a contract claim, and it should be pleaded as such. Pleading a contract claim would require allegations that the co-owner violated a bylaw or a provision in the master deed and that attorney fees and costs are recoverable under a fee-and-cost bylaw on successful completion of the litigation. In this case,

HBLM's complaint, when viewed as a whole, contained such allegations, even though they were not specifically contained in a count identified or labeled as a contract claim. Accordingly, Judge MARKEY concluded that HBLM adequately pleaded a contract claim for attorney fees and costs.

GADOLA, P.J., and RONAYNE KRAUSE, J., concurring, agreed with the lead opinion in all respects other than the basis for its conclusion that the trial court was authorized to grant attorney fees in favor of HBLM. Judge GADOLA and Judge RONAYNE KRAUSE explained their holding that a straightforward application of the statute and the bylaws provision leads to the conclusion that plaintiff was entitled to the attorney fees that the trial court awarded.

McShane & Bowie, PLC (by *Ruth A. Skidmore* and *Andrew C. Shier*) for Highfield Beach at Lake Michigan, Mark Coddington, Chris Barczyk, Paul Swanstrom, and Blake Hardin.

Varnum LLP (by *Eric J. Guerin*) for Scott E. Sanderson.

Before: GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

MARKEY, J. This case concerns the enforceability of an amended condominium bylaw prohibiting short-term rentals when such rentals had been expressly contemplated and allowed under an existing 15-year contract between the owner of a condominium unit and a property-management company. The bylaw in effect when the contract was executed had permitted short-term rentals of 14 days or more, and the contract essentially incorporated the bylaw, authorizing the property-management company to lease the condominium unit for periods as short as 14 days. The amended bylaw required a minimum rental term of four months, effectively precluding the property-management company from leasing the unit to typical

vacationers. Resolution of these consolidated appeals requires construction of the Condominium Act, MCL 559.101 *et seq*. In Docket No. 343968, appellant Scott E. Sanderson, owner of the condominium unit, appeals by right the trial court's orders granting summary disposition in favor of appellees Highfield Beach at Lake Michigan (HBLM), Mark Coddington, Chris Barczyk, Paul Swanstrom, and Blake Hardin.[1] We hold that the amended bylaw is enforceable in regard to the property as urged by HBLM in its complaint for declaratory and injunctive relief and that Sanderson's counterclaim and third-party complaint for monetary damages based on lost rental income fail as a matter of law. Accordingly, we affirm the orders granting appellees' motions for summary disposition in Docket No. 343968. In Docket No. 345177, Sanderson appeals by right the trial court's order awarding attorney fees and costs to HBLM. We hold that HBLM was entitled to an award of attorney fees and costs. Accordingly, we affirm the trial court's order awarding attorney fees and costs to HBLM in Docket No. 345177.

I. FACTUAL AND PROCEDURAL HISTORY

HBLM is a Michigan nonprofit corporation that serves as the owners association of a site condominium project in South Haven that was established in 2007. The master deed and the condominium bylaws affiliated with the development were recorded in the office of the Allegan County Register of Deeds. Pertinent to this case, Article VII, § 3(a) of the bylaws had originally provided that "[n]o Co-Owner shall lease his unit for a term less than fourteen (14) days nor shall any Co-owner lease or rent less than an entire unit in the

[1] We shall refer to the individual appellees as "the HBLM Board Members" or simply "the Board Members."

condominium."[2] Section 3(a) further indicated that the requirement of a minimum 14-day rental period also applied "to a Co-Owner who places his unit on rental management[.]"

In 2008, HBLM attempted to amend the bylaws to increase the minimum rental term from 14 to 90 days. The record is fairly limited and vague regarding what transpired after the attempt. There is documentation and an affidavit indicating that condominium co-owners in the development unanimously consented to the modification but that a mortgagee, Macatawa Bank, never approved the amendment. Sanderson claimed that evidence existed showing that the amendment had been fully approved and that HBLM should have recorded the amendment and placed it in its files. There is no dispute that the purported 2008 amendment was never recorded, and HBLM documents reflected a belief that a valid or operative amendment never came to fruition. This issue will be explored in more detail later in this opinion.

In December 2013, Sanderson purchased a condominium unit in the development. Sanderson then constructed a 5,600 square-foot single-family home on the property. In his deposition, Sanderson agreed that he had reviewed the master deed and the bylaws before buying the property; however, he did not speak to any board members before the purchase.

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[2] A "co-owner" is statutorily defined as "a person, firm, corporation, partnership, association, trust, or other legal entity or any combination of those entities, who owns a condominium unit within the condominium project." MCL 559.106(1). A "condominium unit" consists of "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, recreational, use as a time-share unit, or any other type of use." MCL 559.104(3).

On June 23, 2015, after having constructed the home on the property, Sanderson signed a 15-year contract with CRA Management, LLC, authorizing CRA to manage the property in relation to future rentals. The CRA contract was labeled a "Lease Agreement," and it did provide that Sanderson was leasing his condominium unit to CRA for the 15-year period. But the CRA contract also had language characterizing the contract as a rental or property-management agreement. CRA agreed to pay Sanderson a minimum of $96,000 per year under a formula that applied certain percentages to the "gross rental proceeds" that CRA collected from renters. The CRA contract further provided:[3]

> The nature of this Lease Agreement is to provide for rental management upon terms and conditions that satisfy Owner[']s needs for lease revenue for the duration of the Owner's mortgage obligations while limiting the scope of the Company's leasing activities to comply fully with all requirements of Article VII, Section 3 of the Master Deed, the provisions of the Michigan Condominium Act and the laws and ordinances of Casco Township, as follows:
>
> * * *
>
> c. Company may not lease the Property for less than Fourteen (14) day terms . . . . This provision means that Company may only lease the Property once in any Fourteen (14) day period. In the event the tenant elects not to occupy the Property for the entire term, the Property may be used in such vacated periods only for the personal use of the Owner, whether for recreational use, maintenance, decorating, or such purposes as Owner chooses. During such vacated periods, the Property may

[3] In the contract, "Owner" refers to Sanderson, and the "Company" refers to CRA.

> not be occupied by any individual(s) unless Owner or a member of owner's family is in residence at such times.
>
> d. Company shall require tenants to comply fully with all use restrictions set forth in Article VII, Section 3, as attached as Exhibit A. Company shall take reasonable steps to inform tenants of such requirements and agrees to enforce compliance in a commercially reasonable manner.

After executing the CRA contract, Sanderson e-mailed the document to HBLM for review and approval. Sanderson claimed that HBLM approved the CRA contract. HBLM, however, supplied an affidavit by Board Member Barczyk that reflected the contrary. Barczyk averred that "[t]he Board did not vote to approve the management agreement between Sanderson and CRA . . . , and there is otherwise no record of a decision by the Board to approve the agreement." Sanderson asserted that as rental agreements were signed with vacationing tenants under the CRA contract, copies of the leases were sent to HBLM for review. HBLM indicated that it approved conforming leases that were submitted by or on behalf of Sanderson.

In June 2016, HBLM began the process of amending the bylaws to prohibit short-term rentals. Sanderson voiced an objection to the proposed amendment to the board and co-owners and claimed that it would not apply to his existing contract with CRA and that Board Member Barczyk, who owned nearly half the lots in the development, would not be subject to the rental restriction because he held the status of "successor developer." Barczyk denied that he held any special status that would entitle him to avoid the short-term rental prohibition; he insisted that he would abide by the amendment. HBLM obtained a legal opinion that

Barczyk would indeed be bound by a bar on short-term rentals.[4]

Upon obtaining the consent of 2/3 of the co-owners and mortgagees, HBLM amended Article VII, § 3(a) of the bylaws in November 2016 to prohibit co-owners from leasing their condominium units for terms of less than four months. Specifically, the language of Article VII, § 3(a), as amended, provided, in relevant part, as follows:

> No Co-Owner shall lease his unit for a term of less than four consecutive months, and any such lease for said minimum lease term shall be to the same lessee. Nor shall any Co-Owner lease or rent less than an entire unit in the condominium. The provisions of this Section shall also apply to a Co-Owner who places his Unit under rental management; in which case, the rental management agreement shall also be approved in addition to each lease. It shall be each Co-Owner's responsibility to ensure that each tenant or occupant of his unit abides by all provisions of the Condominium Documents.

Thereafter, Sanderson, through counsel, sent HBLM a letter asserting that the amendment did not apply to Sanderson because HBLM could not legally invalidate an existing lease agreement such as the one that he had signed with CRA. In support of his stance, Sanderson cited MCL 559.212(1), which provides:

> Before the transitional control date, during the development and sales period the rights of a co-owner, including the developer, to rent any number of condominium units shall be controlled by the provisions of the condominium documents as recorded by the developer and shall not be changed without developer approval. After the transitional control date, the association of co-owners may

[4] The parties disputed in the trial court and still dispute on appeal whether HBLM obtained the legal opinion before or after the amendment was voted on and approved.

> amend the condominium documents as to the rental of condominium units or terms of occupancy. *The amendment shall not affect the rights of any lessors or lessees under a written lease otherwise in compliance with this section and executed before the effective date of the amendment*, or condominium units that are owned or leased by the developer. [Emphasis added.]

Sanderson maintained that pursuant to MCL 559.212(1), the 2016 amendment could not infringe his rights or CRA's rights to continue short-term rentals under the CRA contract because the contract was executed before the amendment took effect.

After Sanderson and CRA forged ahead with short-term rentals in defiance of the amended bylaw, HBLM commenced the instant lawsuit in January 2017 requesting declaratory and injunctive relief. HBLM alleged that Sanderson's condominium unit was subject to the four-month lease requirement regardless of the CRA contract. HBLM contended that the contract constituted a property-management agreement and not a lease agreement. Thus, according to HBLM, MCL 559.212(1) did not exclude Sanderson's unit from application of the 2016 amendment barring short-term leases. Sanderson filed an answer challenging HBLM's position, and he set forth numerous affirmative defenses, including waiver, acquiescence, estoppel, unclean hands, and laches.

Sanderson also filed a counterclaim against HBLM, alleging breach of contract, and a third-party complaint against the HBLM Board Members, also alleging breach of contract.[5] MCL 559.168 provides that "[a]n association of co-owners shall keep current copies of . . . all amendments to the master deed . . . available at reasonable hours to . . . prospective purchas-

[5] The counterclaim and third-party complaint were consolidated in a single document filed by Sanderson.

ers . . . of condominium units . . . .” Similarly, Article I, § 4 of the bylaws stated that HBLM “shall maintain on file current copies of . . . any amendments” to the master deed “and shall permit all . . . prospective purchasers . . . interested in the Project[] to inspect the same during reasonable hours.” And MCL 559.173(1) provides that “[a] master deed and an amendment to the master deed shall be recorded.” Relying on these provisions, Sanderson asserted that HBLM and the Board Members had a contractual and statutory obligation to maintain on file and to record the proposed 2008 amendment; that they failed to do so; and that had HBLM and the Board Members complied with their duties, Sanderson would have had notice that short-term rentals were disfavored and would have proceeded differently. Sanderson contended that the breach of contract caused damages consisting of the loss of rental income exceeding $1 million.

Sanderson next alleged a third-party claim of negligence against the Board Members. Sanderson maintained that the Board Members were negligent for failing to educate themselves about the scope of the 2016 amendment; for “misleading” their fellow co-owners regarding the scope, benefits, limitations, and risks inherent in adopting the 2016 amendment; and for neglecting to ensure that the 2008 unrecorded amendment was recorded. Much of Sanderson’s focus was on his insistence that Board Member Barczyk did not have to abide by the short-term rental prohibition and on the refusal of the Board Members to accept that truth. Sanderson claimed that the Board Members’ negligent conduct caused damages consisting of the loss of rental income exceeding $1 million.

Finally, Sanderson alleged a third-party claim of breach of fiduciary duty against the Board Members.

Sanderson asserted that the Board Members breached their fiduciary duties in the same manner that they committed negligence and by failing to provide a meaningful opportunity for the co-owners to consider and debate the 2016 amendment. Sanderson contended that the breach of fiduciary duties caused damages consisting of the loss of rental income exceeding $1 million.

In July 2017, HBLM moved for summary disposition pursuant to MCR 2.116(C)(10) on its complaint for declaratory and injunctive relief. The parties presented their competing interpretations of MCL 559.212(1) and the CRA contract. In August 2017, the trial court issued a written opinion and order granting HBLM's motion pursuant to MCR 2.116(C)(10). The trial court ruled that MCL 559.212(1) "is aimed at protecting the vested rights of parties to a binding lease agreement that was executed prior to any relevant bylaw amendment," which "agreement affords the tenant with certain ownership and possessory rights." The court determined that the CRA contract was not a lease agreement covered by MCL 559.212(1). The trial court reached that conclusion because CRA obtained no ownership or possessory interest in Sanderson's condominium unit under the contract. The court further reasoned that the CRA contract constituted a property-management agreement, simply giving "CRA the right to secure tenants for . . . short-term vacation rentals and [to] manage the tenant's enjoyment of same." The trial court agreed with HBLM's assertion that the 2016 amendment applied to rental agreements entered into by CRA after the amended bylaw took effect despite the fact that the leases were procured under the authority of the CRA contract that had been executed prior to the amendment.

In October 2017, HBLM and the Board Members moved for summary disposition pursuant to MCR 2.116(C)(10) with respect to Sanderson's counterclaim and third-party complaint. In May 2018, the trial court issued a written opinion and order granting summary disposition in favor of HBLM and the Board Members.[6] The trial court addressed each of Sanderson's claims and ruled that there was no genuine issue of material fact that the claims were unsustainable as a matter of law.

In regard to the breach-of-contract claim, the trial court found that it was undisputed that the alleged 2008 amendment was not recorded; therefore, the amendment was inoperative under MCL 559.153. Moreover, the court concluded that the Board Members were not even on the board in 2008. Consequently, they had no contractual duty to record the amendment even if it was valid. The trial court also determined that HBLM did not have a contractual obligation to "record an amendment that is not properly adopted." The court observed that there was no evidence that the mortgagee, Macatawa Bank, had approved the amendment and that there was no legal authority to support the proposition that HBLM was required to record an instrument that was not fully approved. The trial court explained that without proof of the mortgagee's approval, Sanderson could not establish any contractual duty or breach.

The trial court next rejected Sanderson's negligence claim. The court determined that there was no legal authority or evidence supporting a negligence theory based on a failure of the Board Members "to educate

[6] The trial court judge who issued the ruling with respect to the earlier motion for summary disposition retired; his replacement issued the second written opinion and order.

themselves about the scope" of the 2016 amendment. Additionally, the trial court stated that, as revealed in their affidavits, the Board Members had educated themselves regarding the 2016 amendment through the assistance and advice of legal counsel. With respect to Sanderson's claim that the Board Members misled fellow co-owners regarding the effect of the new lease restrictions on Board Member Barczyk, the court found that there was nothing improper or negligent about the Board Members' reliance on legal advice that Barczyk would be bound by the 2016 amendment and conveyance of that information to co-owners. This was true even though Sanderson's attorney had informed the Board Members to the contrary. The trial court noted that there was no testimony or affidavit from any co-owner about feeling misled and that Sanderson failed to produce any documentary evidence indicating that co-owners were misled. To the extent that the negligence claim concerned the purported 2008 amendment, the trial court repeated the findings that it made in relation to the amendment and the breach-of-contract claim. Moreover, according to the trial court, Sanderson was aware of the fact that HBLM could amend the bylaws at any time.

Finally, the trial court ruled that Sanderson's claim of breach of fiduciary duty also failed as a matter of law, concluding that the Board Members had no duty to "educate themselves," that there was no evidence that they misled co-owners, and that they properly relied on the opinion of counsel that Barczyk and his 24 lots would be bound by the 2016 amendment. The court's reasoning mimicked its discussion of the negligence claim. The trial court also found that the Board Members did not breach a fiduciary duty for allegedly failing to provide a meaningful opportunity for debate before the 2016 amendment was finalized. The court

determined that there was no evidence that the Board Members violated the master deed or the bylaws in approving the 2016 amendment and that there was no statutory provision mandating a "meaningful opportunity" for debate. Lastly, the trial court stated that there was no evidence or law to support the view that the Board Members breached a fiduciary duty by failing to record the inoperative 2008 amendment.

In sum, the trial court granted summary disposition in favor of HBLM and the Board Members, dismissing Sanderson's counterclaim and third-party complaint. The court enjoined Sanderson "and his agents from continuing to lease his unit in violation of [the] bylaws . . . ." In Docket No. 343968, Sanderson appeals the trial court's summary-disposition orders by right.

Subsequently, HBLM moved for attorney fees and costs, arguing that fees and costs were authorized by MCL 559.206(b) and Article XII of the bylaws. HBLM maintained that Sanderson's refusal to comply with the bylaws required him to pay the attorney fees and costs incurred by HBLM in enforcing the bylaws through the litigation. HBLM requested $52,295 in attorney fees and expenses and attached supporting documentation. The trial court granted HBLM's motion for attorney fees and costs. The court found that an award was proper, rejecting a variety of arguments posed by Sanderson against the award, including his assertion that HBLM failed to plead a contract claim in support of attorney fees and costs. The trial court determined that the amount requested by HBLM was reasonable, except that the court reduced the amount by 10% because the fees had improperly included representation of the Board Members. In August 2018, the trial court entered an order awarding HBLM $44,360 in attorney fees and costs. In Docket No.

345177, Sanderson appeals by right the trial court's order awarding HBLM attorney fees and costs. This Court consolidated the two appeals. *Highfield Beach at Lake Mich v Sanderson*, unpublished order of the Court of Appeals, entered September 4, 2018 (Docket Nos. 343968 and 345177).

II. ANALYSIS

A. STANDARDS OF REVIEW AND GENERAL GUIDING PRINCIPLES

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. A court may only grant the motion 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." MCR 2.116(C)(10); see also *El-Khalil*, 504 Mich at 160. "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). For purposes of MCR 2.116(C)(10), a trial court is not allowed to weigh the evidence, assess credibility, or resolve factual disputes. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10)." *Id*.

"Condominium bylaws are interpreted according to the rules governing the interpretation of a contract." *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015). And we review de novo the interpretation and application of contracts. *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties[;] [t]o this rule all others are subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id*. at 461. If the language of a contract is ambiguous, testimony may be taken to explain the ambiguity. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965); see also *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

This Court reviews de novo issues of statutory construction. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). In *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 633-634; 928 NW2d 709 (2018), this Court explained the rules of statutory interpretation:

> The primary task in construing a statute is to discern and give effect to the Legislature's intent, and in doing so, we start with an examination of the language of the statute, which constitutes the most reliable evidence of legislative intent. When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly expressed,

> requiring enforcement of the statute as written, without any additional judicial construction. Only when an ambiguity in a statute exists may a court go beyond the statute's words to ascertain legislative intent. We must give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage. [Citations omitted.]

"We review for an abuse of discretion a trial court's award of attorney fees and costs." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. Findings of fact related to an award of attorney fees are reviewed for clear error, and questions of law pertaining to an award are reviewed de novo. *Brown v Home-Owners Ins Co*, 298 Mich App 678, 689-690; 828 NW2d 400 (2012).

B. CONDOMINIUM ACT OVERVIEW

In pertinent part, MCL 559.153 provides that "[t]he administration of a condominium project shall be governed by bylaws recorded as part of the master deed, or as provided in the master deed." "Bylaws are attached to the master deed and, along with the other condominium documents, the bylaws dictate the rights and obligations of a co-owner in the condominium." *Tuscany Grove*, 311 Mich App at 393. The Condominium Act defines "condominium documents" as "the master deed . . . and any other instrument referred to in the master deed or bylaws which affects the rights and obligations of a co-owner in the condominium." MCL 559.103(10). MCL 559.206(a) provides that "[f]ailure to comply with any of the terms or provisions of the condominium documents, shall be grounds for relief, which may include without limitations, an action to

recover sums due for damages, injunctive relief, foreclosure of lien if default in payment of assessment, or any combination thereof."

C. DISCUSSION AND RESOLUTION—SUMMARY DISPOSITION AND HBLM'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

In general, "the master deed, bylaws, and condominium subdivision plan may be amended, even if the amendment will materially alter or change the rights of the co-owners or mortgagees, with the consent of not less than 2/3 of the votes of the co-owners and mortgagees." MCL 559.190(2). But MCL 559.190(2) is tempered by MCL 559.212(1), which provides, as noted earlier, that while a condominium association may amend condominium documents as to the rental of condominium units or occupancy terms, "[t]he amendment shall not affect the rights of any lessors or lessees under a written lease otherwise in compliance with this section and executed before the effective date of the amendment . . . ."[7]

The crux of Sanderson's argument is that pursuant to MCL 559.212(1), he and CRA, as lessor and lessee respectively, had "rights" under the written lease, i.e., the CRA contract, that included participating in future rentals or leases of the condominium unit for terms as short as 14 days and that those rights could not be affected or imperiled by the subsequent amendment of the pertinent bylaw. Sanderson argued that he had an expectation that the 15-year CRA contract, which obligated CRA to pay him at least $96,000 per year, would allow CRA to lease the condominium unit to persons for minimum rental periods of 14 days.

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[7] Bylaws may contain "restrictions on the sale, *lease*, license to use, or occupancy of condominium units." MCL 559.156(b) (emphasis added).

We hold that the CRA contract constituted a property-management agreement, not a lease agreement; therefore, the exception to the general enforceability of bylaw amendments found in MCL 559.212(1) was not implicated in this case. The term "lease," as used in MCL 559.212(1), is not defined in the Condominium Act. *Black's Law Dictionary* (7th ed) defines a "lease" as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usu. rent." See *People v Flick*, 487 Mich 1, 11-12; 790 NW2d 295 (2010) (using a legal dictionary to define a term that had a unique legal meaning but was undefined in the statute being construed). Our Supreme Court has observed that "[a] lease is defined to be a contract for the possession . . . of lands and tenements on the one side, and a recompense of rent or other income on the other." *Miles v Shreve*, 179 Mich 671, 676; 146 NW 374 (1914) (quotation marks and citation omitted); see also *Flick*, 487 Mich at 11 (stating that when words adopted in a statute have a settled, definite, and well-known meaning, we assume that they are used with the meaning that they had at common law absent a contrary intent plainly shown). A "lessor" is "[o]ne who conveys real or personal property by lease," and a "lessee" is "[o]ne who has a possessory interest in real or personal property under a lease[.]" *Black's Law Dictionary* (7th ed).

In closely examining the language of the CRA contract, it becomes clear that CRA had no actual right to possess, occupy, or use the condominium unit. Although CRA had the authority Sanderson granted it to rent the unit to others, CRA itself had no possessory interest. During periods of vacancy, Sanderson retained the right to possess and occupy the premises. The property was either to be possessed by a tenant or by Sanderson under the contract. And the CRA con-

tract required the unit to "be decorated, furnished, and maintained" by Sanderson, not CRA, so CRA had no on-site presence for upkeep. CRA's exclusive role under the plain and unambiguous language of the contract entailed marketing, financial management, and oversight. Indeed, the contract specified that CRA "is in the rental management business . . . ." Regardless of the nomenclature used in the CRA contract, the contract was not a "lease," and CRA was not a "lessee."

At the time that the CRA contract was executed, Article VII, § 3(a) of the bylaws had provided that the requirement of a minimum 14-day rental period also applied "to a Co-Owner who places his unit on rental management; in which case, the rental management agreement shall be approved *as if a lease* in accordance with this Article." (Emphasis added.) Sanderson seizes on the emphasized language, arguing that HBLM chose to treat property-management agreements as leases and thus that the exception in MCL 559.212(1) was implicated. This argument lacks merit. Article VII, § 3(a) of the bylaws required the submission of leases to HBLM for "written approval . . . prior to renting" a condominium unit. The language in Article VII, § 3(a) on which Sanderson relies simply—though clumsily—indicated that a property-management agreement, like a lease, had to be submitted to and approved by HBLM. The language was not intended to—and did not—convert or transform property-management agreements into leases. With the 2016 amendment, Article VII, § 3(a) of the bylaws was modified to state, "The provisions of this Section shall also apply to a Co-Owner who places his Unit under rental management; in which case, the rental management agreement shall also be approved *in addition to each lease*." (Emphasis added.) In our view, this language merely clarified the awkward drafting of the

prior provision, making clear that property-management agreements had to be submitted to and approved by HBLM. We reject Sanderson's contention that the change in language from "as if a lease" to "in addition to each lease" established that the earlier modified language meant that property-management agreements and leases were effectively one and the same. The trial court did not err by concluding that the CRA contract was a property-management agreement and not a lease agreement for purposes of MCL 559.212(1).

Moreover, even assuming that there were a lease component to the CRA contract with Sanderson as the lessor and CRA as the lessee, we believe that it would only encompass, at most, part of the contract. Stated otherwise and being generous to Sanderson, the CRA contract could be viewed as part lease and part property-management agreement. The "lease" portion of the contract would include the provisions making the agreement operative for 15 years and mandating payments from CRA to Sanderson over the 15-year period. The aspects of the CRA contract requiring CRA "to assure an optimal supply of high quality, financially responsible recreational tenants," to use its "personnel, expertise and financial resources to undertake . . . leasing responsibilities," and to market the property "in a manner intended to result in a reasonable number of rentals" all pertained to *property management relative to future leasing*. Accordingly, future leasing of the condominium unit by CRA to tenants would fall under the property-management part of the CRA contract, again failing to implicate the exception in MCL 559.212(1) unless a lease had been signed in the short time frame between execution of the 2015 CRA contract and the 2016 bylaw amendment. In sum,

the trial court did not err by granting summary disposition in favor of HBLM on its complaint for declaratory and injunctive relief.

D. DISCUSSION AND RESOLUTION—SUMMARY DISPOSITION AND SANDERSON'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT

We begin with a discussion of the counterclaim and third-party claim of breach of contract. The breach-of-contract count related to the alleged 2008 amendment of the bylaws and the failure to file or record the amendment. With respect to the Board Members, we note that there is no dispute that they were not on the board in 2008. Consequently, they could not have breached any contract or bylaw in 2008 relative to the purported amendment. See *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014) (stating that a party alleging breach of contract must establish that there was a contract between the parties). Assuming that there was a contractual obligation in 2008 that was breached, we again note that the present-day Board Members cannot be held legally accountable for the presumed breach that did not occur during their board tenure. To the extent that Sanderson's third-party claims of negligence and breach of fiduciary duty against the Board Members were based on shortcomings or nonfeasance related to the alleged 2008 amendment, the claims fail for the same reason—the Board Members were not on the board in 2008.

With regard to the breach-of-contract counterclaim against HBLM, we must admit to some confusion. In the counterclaim, the breach-of-contract count referred to two statutory provisions, MCL 559.168 (requiring associations to keep copies of all amendments on file) and MCL 559.173 (requiring master-deed amendments to be recorded), but the only *contractual* provision cited

was Article I, § 4 of the bylaws. Once again, this bylaw provided that HBLM "shall maintain on file current copies of . . . any amendments" to the master deed "and shall permit all . . . prospective purchasers . . . in the Project[] to inspect the same during reasonable hours." Yet, much of the focus of the parties' arguments was on recordation, which is not covered by that particular bylaw. That said, Sanderson did additionally assert, and he renews the argument on appeal, that HBLM both failed to maintain in its files and have available for inspection a copy of the claimed 2008 amendment and to record the amendment.

There is no factual dispute that HBLM neither recorded nor maintained the proposed 2008 amendment in its files. HBLM's position is that the bylaw on rentals was not actually amended in 2008; therefore, there was no contractual or statutory obligation to record or file the claimed amendment.

MCL 559.153 provides that the amendment of a bylaw "shall be inoperative until recorded." On the basis of MCL 559.153, the alleged 2008 amendment never became operative because it was never recorded. Article I, § 4 of the bylaws required HBLM to maintain for inspection file copies of "any amendments," which we construe to mean any adopted or enforceable amendments, not attempted or proposed amendments. Absent recordation, there is no valid, operative amendment. Accordingly, the breach-of-contract claim against HBLM premised on Article I, § 4 of the bylaws cannot survive.

Sanderson, however, argues that in 2008, an amendment prohibiting short-term rentals was actually fully approved; therefore, it should have been filed and recorded. He contends that had it been filed and recorded, he would never have purchased the property

because his plan in buying the unit was to construct a home and rent it to vacationers. As noted earlier, MCL 559.190(2) provides that a master deed or bylaw may be amended "with the consent of not less than 2/3 of the votes of the co-owners and mortgagees," with a mortgagee having "1 vote for each mortgage held."[8] And MCL 559.173(1) provides that "[a] master deed and an *amendment* to the master deed *shall be recorded*." (Emphasis added.)[9] The question that arises is whether HBLM was obligated under these statutory provisions to record the alleged 2008 amendment so as to have made it operative under MCL 559.153 and thereby require HBLM to have maintained the amendment in its files under Article I, § 4 of the bylaws. The answer hinges on whether, along with the approval of the HBLM co-owners, which is not in doubt, there was the requisite mortgagee approval.

The proposed 2008 amendment was referred to during a March 2012 board meeting. The minutes of that meeting provided, in relevant part, as follows:

> Considerable discussion took place about short term leasing restrictions. Several years ago an Amendment to the Master Deed was prepared which sought to restrict short term rentals. The amendment was never submitted to Macatawa Bank for approval (which was required because of their mortgage interest in the property). As such, the previous amendment is not valid.

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[8] We note that "condominium documents may be amended without the consent of co-owners or mortgagees if the amendment does not materially alter or change the rights of a co-owner or mortgagee and if the condominium documents contain a reservation of the right to amend for that purpose to the developer or the association of co-owners." MCL 559.190(1). This provision was not applicable because the proposed 2008 amendment to end short-term rentals would have constituted a material alteration.

[9] Bylaws are "recorded as part of the master deed . . . ." MCL 559.153.

Sanderson argues that the reference to the failure to obtain the mortgagee's approval constituted hearsay. Sanderson provides no legal citation or analysis regarding hearsay. He does direct our attention to a document labeled, "INTRODUCTION TO RENTAL DISCUSSION AND SURVEY QUESTIONS."[10] We shall refer to this document as the "survey letter." The survey letter was unsigned and provided, in pertinent part:

> During the past year, there has been an increased interest in leasing units. Highfield's previous experience regarding rentals occurred back in 2008, with an extremely negative impact on the community. As a result, in 2008, the Co-Owners voted and unanimously passed an Amendment to the Bylaws, increasing the minimum lease term from 14 days to a 90 day minimum lease term. This Amendment was never recorded with the County, however, and therefore may not be enforceable. As such, we assume that the original 14 day minimum lease term still applies.

Sanderson argues that because this excerpt from the survey letter did not allude to any failure to secure mortgagee approval, we can reasonably infer that mortgagee approval had been obtained. Sanderson also relies on his own deposition testimony, wherein he claimed that three of the Board Members had informed him that the 2008 amendment had passed unanimously but that a "David Sacks or somebody failed to record it." When confronted with the March 2012 board meeting minutes indicating that the consent of mortgagee Macatawa Bank had not been procured, Sanderson testified that the three Board Members with which he spoke never "questioned Macatawa's role in that."

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[10] The document contained the following opening sentence: "For those of you who were not able to attend the February 7, 2015 annual association meeting, a significant amount of time at the meeting was dedicated to discussing the issue of short term rentals."

Board Member Barczyk executed an affidavit and averred that although he was not on the board in 2008, he did "know that the effort [to amend] ultimately failed, was not approved by the required mortgage holders and, accordingly, was not subject to recording and/or enforcement." Barczyk further averred:

> Also on information and belief (and by reference to minutes . . . dated 3/20/12), efforts to impose greater restrictions on rental activity were abandoned because Macatawa Bank had no interest in imposing additional restrictions on the units. Accordingly, the 2008 effort to impose greater restrictions failed.

We hold that Sanderson failed to create a genuine issue of material fact with respect to whether the amendment was actually approved and whether HBLM had an obligation to file or record the amendment. Sanderson had the burden to prove his breach-of-contract claim "by a preponderance of the evidence." *Miller-Davis Co*, 495 Mich at 178. In filing its motion for summary disposition under MCR 2.116(C)(10), HBLM was required to submit documentary evidence in support of the motion. MCR 2.116(G)(3)(b). HBLM submitted the board meeting minutes from March 2012 and Barczyk's affidavit, both of which indicated that mortgagee Macatawa Bank had not consented to or approved the proposed 2008 amendment.[11] In response, Sanderson was required to submit documentary evidence "showing that there is a genu-

[11] Given Sanderson's inadequate briefing on the claim that the meeting minutes constituted hearsay, we deem the argument abandoned. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (providing that an appellant cannot simply announce his or her position or assert error and leave it to the court to unravel and elaborate the arguments, to discover and rationalize the basis for the claims, and to then search for authority to sustain that position). We do note that MRE 803(6) provides a hearsay exception for records of regularly conducted activity.

ine issue for trial." MCR 2.116(G)(4). The survey letter, assuming that it can even be considered despite the vagueness regarding its author and origin, was silent on the issue of whether mortgagee Macatawa Bank had given its approval. We do not find it reasonable to infer from the silence that Macatawa Bank had, in fact, consented to the 2008 amendment. Similarly, Sanderson's deposition testimony did not suffice to create an issue of fact because Sanderson ultimately did not testify that the Board Members informed him that Macatawa Bank had approved the 2008 amendment. Sanderson's testimony that Board Members told him that the purported 2008 amendment was not recorded left open the possibility that it was not recorded because Macatawa Bank had not approved the amendment. Sanderson did not submit evidence sufficient to "show[] that there is a genuine issue for trial." MCR 2.116(G)(4).[12] In sum, the trial court did not err by granting the motion for summary disposition with respect to the counterclaim and third-party claim for breach of contract.

With regard to Sanderson's third-party claims of negligence and breach of fiduciary duty against the Board Members, we agree with the trial court that these claims fail as a matter of law. The factual bases

[12] Sanderson, citing MCL 559.173(1), presents a cursory argument that even if Macatawa Bank failed to approve the alleged 2008 amendment, that failure did not excuse HBLM from complying with "its mandatory duty to record an amendment approved by its membership, thereby providing record notice of its action." This argument lacks merit. Again, MCL 559.173(1) provides that "an amendment to the master deed shall be recorded." We construe this provision to require the recordation of an amendment that was actually fully approved in accordance with law, not an attempted amendment. Without the approval or consent of the mortgagee, the proposed 2008 amendment failed, MCL 559.190(2), and thus MCL 559.173(1) did not require HBLM to record anything.

of the claims were that the Board Members failed to educate themselves about the scope of the 2016 amendment, misled their fellow co-owners regarding the scope, benefits, limitations, and risks inherent in adopting the 2016 amendment, and neglected to ensure that the 2008 unrecorded amendment was recorded. Additionally, in regard to the fiduciary-duty claim, Sanderson maintained that the Board Members failed to provide a meaningful opportunity for the co-owners to consider and debate the 2016 amendment.

"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." *Loweke*, 489 Mich at 162. A claim of breach of fiduciary duty "sounds in tort." *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of duty. *Delphi Auto PLC v Absmeier*, 167 F Supp 3d 868, 884 (ED Mich, 2016).[13]

We initially reiterate that the Board Members here cannot be held liable for negligence or breach of fidu-

[13] "This Court has explained that a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999). A breach of fiduciary duty arises when a person holding a position of influence and confidence abuses the influence and betrays the confidence. *Id*. at 581. "A person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Id*.

ciary duty in connection with the failed 2008 amendment because they were not on the board in 2008.[14] Moreover, in light of our reasoning in rejecting the breach-of-contract claim associated with the failed 2008 amendment, we agree that the Board Members would not be liable for failing to file or record the attempted amendment even had they been on the board in 2008.

Sanderson argues that Board Member Barczyk fit the statutory definition of "successor developer," MCL 559.235(1), because of the large number of lots that he owned; therefore, pursuant to Article VII, § 14 of the bylaws, Barczyk's properties were not subject to the prohibition on short-term rentals found in the 2016 amendment. Sanderson further contends that there was a genuine issue of material fact regarding whether the Board Members actually relied on the advice and opinion of counsel concerning the Barczyk matter given that there was evidence that the opinion of counsel was not communicated to the Board Members until after the 2016 amendment was approved. Sanderson next maintains that the trial court erred by dismissing the negligence and fiduciary-duty claims because it was undisputed that the Board Members approved the 2016 amendment to bar short-term rentals on the basis of Barczyk's assurances that he would not engage in short-term rentals. Finally, Sanderson argues that the trial court erred by finding that no duties were owed to prospective purchasers under the Condominium Act. Specifically, Sanderson asserts, without citation to any particular legal authorities, that the Board Members had a duty to ensure that

[14] We reject any suggestion that all future board members were susceptible to liability for alleged failures that occurred during the tenure of past board members.

HBLM complied with its bylaws and Michigan law, to avoid misleading prospective purchasers who rely on recorded condominium documents, and "to not act cavalierly or mislead its members to secure fundamental and material changes to the [bylaws]."

We find it unnecessary to substantively resolve Sanderson's arguments that Barczyk's lots were not subject to the short-term rental prohibition, that there were issues of fact regarding whether a prevote legal opinion was procured, and that it was improper for Board Members to rely on Barczyk's assurances that he would not engage in the business of short-term rentals. At its core, Sanderson's position requires a determination that the Board Members had a duty—before the vote was taken on the 2016 amendment—to assess, correctly so, the purely legal question whether Barczyk would be bound by the amendment, to utilize the aid of counsel in the assessment, to ignore or not give any weight to Barczyk's assurances of future compliance, and to inform condominium co-owners of their legal conclusions. Sanderson has simply not provided us with any pertinent authorities or analysis to support the existence of these duties. Perhaps these various obligations or duties might arise under circumstances in which a bylaw was unlawfully amended, but the bylaw in the instant case could legally be amended to prohibit short-term rentals *even if the units owned by Barczyk were not subject to the restriction*. Furthermore, on the matter of causation, Sanderson engages in pure speculation by asserting that, assuming the inapplicability of the short-term rental prohibition to Barczyk's lots, the voting co-owners would have voted against the 2016 amendment. And as noted by the trial court, Sanderson failed to submit any evidence of a co-owner who felt misled.

Additionally, while the Condominium Act defines the term "successor developer," MCL 559.235(1), it also separately defines the term "developer," MCL 559.106(2). And Article VII, § 14 of the bylaws, which is the provision that Sanderson relies on in support of his Barczyk-related argument, refers solely to the "Developer." Given the distinction in the terms "successor developer" and "developer" under the Condominium Act, it would be reasonable to conclude that the terms should also be distinguished for purposes of the bylaws. We, however, choose not to answer the question whether the properties Barczyk owned were subject to the short-term rental restriction. But we do hold that this legal question is subject to reasonable dispute and debate such that we conclude as a matter of law that there was no negligence or breach of fiduciary duty on the part of the Board Members.[15] Moreover, we similarly conclude as a matter of law that relying on assurances by Barczyk that he would not engage in short-term renting did not constitute negligence or breach of fiduciary duty.

Sanderson's remaining arguments ultimately relate to the failed 2008 amendment and do not warrant reversal for the reasons discussed earlier. To the extent that Sanderson is arguing, outside the filing and recording requirements of the bylaws and Condominium Act, that the Board Members had a duty to inform Sanderson that HBLM tried but failed to prohibit short-term rentals in 2008, we are not prepared to recognize such a duty, nor has Sanderson supplied us with any authority supporting that proposition. In

[15] To be clear, in this part of the discussion we are operating under the assumption that a duty or duties existed. Furthermore, we are also assuming that the relationship between the Board Members and the co-owners actually constituted a fiduciary relationship, which is questionable.

sum, the trial court did not err by granting the motion for summary disposition with respect to the claims of negligence and breach of fiduciary duty.

E. DISCUSSION AND RESOLUTION—ATTORNEY FEES AND COSTS

We unanimously conclude that the trial court did not err by awarding attorney fees and costs to HBLM. And we likewise all agree with respect to the analysis of Sanderson's various arguments in challenging the award, except in regard to Sanderson's argument that the trial court erred because HBLM failed to plead a contract claim to enforce the bylaws in regard to the recovery of attorney fees and costs. In my view, the law required HBLM to plead a contract claim for attorney fees and costs. My two colleagues disagree with my position, concluding that it was unnecessary for HBLM to plead a contract claim because statutory authority supported the award. Despite our analytical disagreement, I do find that attorney fees and costs were nonetheless properly awarded because the complaint indicates that HBLM's allegations were sufficient to plead a contract claim for fees and costs.

"As a general rule, attorney fees are not recoverable as an element of costs or damages absent an express legal exception." *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). Attorney fees may be recovered if expressly provided for by contract. *Id*. Attorney fees are also recoverable if authorized by statute. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

MCL 559.206(b) provides as follows:

> In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and

> reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide.

And Article XII, § 1(b) of the bylaws provided:

> In any proceeding arising because of an alleged default by any Co-Owner, the Association, if successful, shall recover the costs of the proceeding and reasonable attorney fees (not limited to statutory fees), as determined by the Court, but in no event shall any Co-Owner be entitled to recover such attorney fees.

Sanderson cites *Pransky v Falcon Group, Inc*, 311 Mich App 164; 874 NW2d 367 (2015), to support his argument that HBLM was required to plead a contract claim in order to recover attorney fees and costs under the applicable bylaw. *Pransky* involved a dispute over the validity of a consulting agreement. *Id*. at 167. After the defendant, Falcon Group, Inc., prevailed on its motion for summary disposition, Falcon Group moved for attorney fees and costs "as permitted under the consulting agreement." *Id*. at 172. The trial court granted the motion. *Id*. On appeal, this Court reversed the trial court's award of attorney fees, holding that "the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party." *Id*. at 195. The *Pransky* panel explained:

> Falcon Group did not file a counterclaim for damages under the consulting agreement. Instead, it moved for an award of attorney fees and relied on the consulting agreement as authority for the award. *However, because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the contract*. By entering an order requiring [the plaintiff] to pay Falcon Group's attorney fees, the trial court in effect entered a judgment

> against [the plaintiff] on a claim that was never brought. A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding. [*Id*. (emphasis added).]

At first blush, *Pransky* appears distinguishable because, in the instant case, attorney fees and costs are authorized by statute, MCL 559.206(b), and by contract, Article XII, § 1(b) of the bylaws. I conclude, however, that on close scrutiny of the language in MCL 559.206(b), *Pransky* is not, in fact, distinguishable. MCL 559.206(b) allows for the recovery of attorney fees and costs, but only "to the extent the condominium documents expressly so provide." Thus, a more accurate characterization of MCL 559.206(b) is that it authorizes the inclusion of attorney-fee and cost provisions in condominium documents, which can then be enforced. The statute, however, does not, *in and of itself*, serve as the basis to award attorney fees. For example, if a co-owner committed a default under the applicable condominium documents, but those documents did not include any language regarding an award of attorney fees and costs, the condominium association could not recover fees and costs in a successful lawsuit on the basis of the statute because the contractual documents did not expressly provide for such an award. Ultimately, and effectively, a claim for attorney fees and costs is not a claim brought under MCL 559.206(b); rather, it is a claim brought under the contract, with the statute merely having provided the authority to have a fee-and-cost provision initially included in the condominium documents. Accordingly, when a condominium association seeks the recovery of attorney fees and costs in litigation over a default, it is necessarily presenting a contract claim, and it should be pleaded as such.

As indicated earlier, under the bylaw, HBLM can recover attorney fees and costs incurred in a proceeding if HBLM successfully establishes that there was a default by a condominium co-owner. Thus, pleading a contract claim would require allegations that the co-owner violated a bylaw or a provision in the master deed and that attorney fees and costs are recoverable under a fee-and-cost bylaw on successful completion of the litigation. HBLM's complaint, when viewed as a whole, contains such allegations, even though they are not specifically contained in a count identified or labeled as a contract claim. See *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim."). Accordingly, I conclude that HBLM adequately pleaded a contract claim for attorney fees and costs.

Respectfully, I do find it necessary to briefly respond to my colleagues who disagree with my conclusion that a condominium association must plead a contract claim in order to recover attorney fees and costs. First, to be clear, the premise of my position is that bylaws are, in fact, contracts or contractual in nature. *Conlin v Upton*, 313 Mich App 243, 255; 881 NW2d 511 (2015) ("When validly promulgated, an entity's bylaws or similar governing instrument will constitute a binding contractual agreement between the entity and its members."). Indeed, earlier in this opinion we indicated that "[c]ondominium bylaws are interpreted according to the rules governing the interpretation of a contract." *Tuscany Grove*, 311 Mich App at 393. Second, while *Pransky* did not involve a condominium, it applies to any case in which attorney fees are being sought under the terms of an agreement, which neces-

sarily includes condominium bylaws. As explained earlier, MCL 559.206(b) does not entitle HBLM to attorney fees and costs; rather, it simply entitles HBLM to include an enforceable fee-and-cost provision in its condominium documents, the absence of which would result in no recovery. MCL 559.206(b) merely reflects a legislative blessing for condominium associations to contractually bind co-owners to pay for costs and attorney fees if a default is established in litigation. Finally, the cases cited in support of my colleagues' position are simply inapposite because they predate *Pransky* and did not address the issue confronting this panel.

Sanderson next argues that the trial court erred by including in its award the attorney fees incurred by HBLM in defending against Sanderson's counterclaim for breach of contract.[16] We disagree. Consistent with MCL 559.206(b), Article XII, § 1(b) of the bylaws provides that HBLM shall recover attorney fees and costs of any "proceeding" that "aris[es] because of an alleged default by any Co-Owner" if HBLM is successful in the proceeding. Giving the language of this unambiguous bylaw its plain and ordinary meaning, *Rory*, 473 Mich at 464, we hold that the bylaw entitled HBLM to an award of attorney fees and costs associated with defending against Sanderson's counterclaim. The proceeding arose because of Sanderson's alleged default, which has now been established, and the counterclaim was part of and encompassed by the "proceeding."

Furthermore, assuming for the sake of argument that the counterclaim must be viewed as its own "proceeding" apart from the complaint for purposes of

[16] It is my understanding that all members of this panel are in agreement with respect to the analysis of the remaining arguments and issues.

the bylaw, the counterclaim for breach of contract still constituted a proceeding arising because of an alleged default. Sanderson only filed the counterclaim because he was accused of a default for violating the amended bylaw restricting rentals—without the default there would have been no responsive counterclaim. Indeed, the breach-of-contract counterclaim sought monetary damages on the possibility that Sanderson would not be permitted to use his property for short-term rentals because of the amended bylaw.[17] Accordingly, the trial court did not err by awarding HBLM attorney fees and costs incurred in defending against the counterclaim.[18]

Finally, Sanderson argues that the trial court erred by reducing the amount of the award by only 10% absent any explanation with respect to how the court arrived at that particular percentage. The trial court made the 10% reduction on the basis that HBLM had improperly included attorney fees connected to representation of the Board Members in defense against Sanderson's third-party claims.

Article I, § 7 of the bylaws provided, in relevant part, as follows:

> Every director and every officer of the corporation shall be indemnified by the corporation against all expenses

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[17] Contrary to HBLM's argument, the counterclaim was not, in essence, an affirmative defense. The breach-of-contract counterclaim would not have defeated HBLM's assertion that a default occurred. Rather, Sanderson's breach-of-contract theory was that the breach resulted in Sanderson having no notice that HBLM contemplated rental limitations as early as 2008, which, had he known this, would have led him to choose against purchasing the property in the first place.

[18] Sanderson's reliance on *Cohan v Riverside Park Place Condo Ass'n, Inc*, 123 Mich App 743; 333 NW2d 574 (1983), is misplaced because in that case the condominium co-owner filed suit against the condominium association and the co-owner's complaint did not arise because of a default. To the extent that *Cohan* could be construed differently, it is not binding precedent. MCR 7.215(J)(1).

> and liabilities, including counsel fees, reasonably incurred by or imposed upon him in connection with any proceeding to which he may be a party, or in which he may become involved, by reason of his being or having been a director or officer when expenses are incurred, except in such cases wherein the director or officer is adjudged guilty of willful or wanton misconduct or gross negligence in the performance of his duties[.]

The attorney fees and costs that the Board Members incurred related to their defense against Sanderson's third-party claims. Those claims arose because of HBLM's proceeding against Sanderson for the default. Because the Board Members' attorney fees and costs arose during this proceeding, HBLM was entitled to recover the indemnification amount as "costs of the proceeding" under MCL 559.206(b) and Article XII, § 1(b) of the bylaws. Even though we conclude that HBLM was entitled to all the fees and costs associated with defending the Board Members against Sanderson's third-party claims and that there should not have been a 10% reduction, reversal and remand is unwarranted because HBLM did not cross-appeal the trial court's reduction decision.

We affirm. Having fully prevailed on appeal, defendants may tax costs under MCR 7.219.

GADOLA, P.J., and RONAYNE KRAUSE, J. (*concurring*). We concur with the lead opinion in all respects other than the basis for its conclusion in Part II(E) that the trial court was authorized to grant attorney fees in favor of Highfield Beach at Lake Michigan. We concur with the lead opinion's result and with its analysis regarding the amount of the attorney-fee award, but we offer an alternative rationale for the award itself. We believe that the question of plaintiff's entitlement

to attorney fees involves a rather straightforward application of the relevant provision of the Condominium Act, MCL 559.101 *et seq*. The lead opinion quotes MCL 559.206(b), to wit:

> In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, *shall* recover the costs of the proceeding and reasonable attorney fees, as determined by the court, *to the extent the condominium documents expressly so provide*. [Emphasis added.]

In this instance, Article XII, § 1(b) of the condominium documents does "expressly so provide":

> In any proceeding arising because of an alleged default by any Co-Owner, the Association, if successful, shall recover the costs of the proceeding and reasonable attorney fees . . . as determined by the Court . . . .

The statutory entitlement to attorney fees is stated as an imperative, so long as the condominium documents allow for their recovery. In this case, of course, the quoted portion of the bylaws mirrors the statute in making the recovery of attorney fees nondiscretionary, aside from the Court's obligation to determine a reasonable amount of costs and fees. Thus, a straightforward application of the statute and the bylaws provision should lead to the conclusion that plaintiff is entitled to the attorney fees the trial court awarded.

The lead opinion relies on *Pransky v Falcon Group, Inc*, 311 Mich App 164; 874 NW2d 367 (2015), in reaching the conclusion that plaintiff ideally should have pleaded a separate contract claim for attorney fees and costs. It bears noting that *Pransky* did not involve an application of the Condominium Act. Instead, in an action rooted in a consulting agreement, the Court concluded that the prevailing defendant,

Falcon Group, was not entitled to an award of attorney fees, despite the fact that the contract made them recoverable, because the defendant had not filed a counterclaim for damages under the parties' agreement. The Court reached this conclusion specifically because "the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement . . . ." *Id*. at 195.

In this case, of course, the applicable statute appears to entitle plaintiff to an award of attorney fees. Additionally, this case is not, as was *Pransky*, a contract action. Instead, the plaintiff association filed a complaint for declaratory and injunctive relief, and in its prayer for relief sought an order "awarding the Association its costs, attorneys' fees, and expenses incurred in connection with this action . . . ."

It appears to us that this question is controlled by this Court's earlier decision in *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681; 713 NW2d 814 (2006). In that case, applying the same statutory provision at issue here—and what would appear to be an identical bylaws provision—the Court reversed the trial court's refusal to award attorney fees to the prevailing condominium association. *Id*. at 684. The Court concluded that the "plaintiff prevailed in its action against [the] defendants, and therefore, pursuant to MCL 559.206(b) and the association bylaws, it was entitled to costs and reasonable attorney fees." *Id*. Also instructive is *Cohan v Riverside Park Place Condo Ass'n, Inc*, 123 Mich App 743; 333 NW2d 574 (1983). Again relying on the statute and a bylaws provision permitting the recovery of attorney fees, this Court held that "the trial court properly awarded costs and attorney fees incurred by [the association] in prosecuting [its] counterclaim for inspection." *Id*. at 751.

Because the Condominium Act and relevant bylaws provision appear to dictate the recovery of attorney fees in this instance, we would affirm the trial court's award on this alternative basis.

GADOLA, P.J., and RONAYNE KRAUSE, J., concurred.

PEOPLE v ROBERTS (ON REMAND)

Docket No. 339424. Submitted November 22, 2019, at Lansing. Decided March 24, 2020, at 9:05 a.m.

Terrell M. Roberts was convicted following a jury trial in the Ingham Circuit Court of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury found Roberts not guilty of assault with intent to commit murder, MCL 750.83, as an aider and abettor, MCL 767.39. In 2015, Roberts was a patron of a nightclub when a shooting occurred inside the club. Following this shooting, another shooting occurred outside the club. Video evidence showed LaDon Jackson firing a weapon into a crowd outside the club, and the video also showed that before the shooting, defendant had passed a gun to Jackson. The trial court, Joyce A. Draganchuk, J., sentenced Roberts for being a felon-in-possession as a second-offense habitual offender to 48 to 90 months in prison, an upward departure from defendant's guidelines minimum sentence range. The court further sentenced him to a mandatory two-year term of imprisonment for felony-firearm, to be served consecutively with the felon-in-possession sentence. Roberts appealed, and the Court of Appeals, RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ., affirmed. Roberts then sought leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court vacated those parts of the Court of Appeals opinion that addressed Roberts's departure sentence and the trial court's assessment of 25 points for Offense Variable 9, and it remanded the case for reconsideration in light of *People v Beck*, 504 Mich 605 (2019). 504 Mich 995 (2019).

On remand, the Court of Appeals *held*:

1. The sentencing court's factual determinations must be supported by a preponderance of the evidence. The fact that a jury was not persuaded of the proofs beyond a reasonable doubt is not conclusive under the less-stringent preponderance-of-the-evidence standard. However, under *Beck*, sentencing courts may not consider any "acquitted conduct" when imposing a sentence, although the courts may still consider "uncharged conduct." The term "acquitted conduct" means any conduct underlying charges of

which the defendant was acquitted. This definition indicates that for purposes of sentencing, none of a defendant's acts or omissions could have been relied upon by the jury to find that the essential elements of any acquitted offense were proven beyond a reasonable doubt. Nevertheless, *Beck* expressly permits trial courts to consider uncharged conduct and other circumstances or context surrounding the defendant or the sentencing offense. Moreover, *Beck* does not preclude the court from considering that the acquitted conduct was committed by someone, so long as that conduct is not attributed to the defendant.

2. Offense Variable 9 of the sentencing guidelines is set forth in MCL 777.39 and is scored based on the number of victims. The trial court assessed 25 points for OV 9, which is required if there were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss. Roberts's sentencing offense was felon-in-possession, which, in and of itself, did not place anyone in danger of physical injury or death. Nevertheless, the context within which he committed the offense of felon-in-possession intrinsically placed people in grave danger, and nothing in *Beck* precludes a sentencing court from considering the time, place, and manner in which an offense was committed. *Beck* also does not exclude from consideration the contextual fact that the acquitted conduct was committed by someone, so long as that conduct is not attributed to the defendant. Therefore, the trial court was justified in finding that Roberts's actions placed at least 10 victims in danger of physical injury or death, and its score of 25 points for OV 9 was appropriate.

3. A sentencing court may, in its discretion, depart from the guidelines minimum sentence range if it explains how the departure is reasonable and proportionate. In this case, the trial court found the guidelines minimum sentence range inadequate under the circumstances. Considering this departure in light of *Beck*, although the definition of "acquitted conduct" covers a broad range of conduct, *Beck* does not preclude all consideration of the entire res gestae of an offense of which a defendant was acquitted. Under *Beck*, the sentencing court was permitted to consider the fact that Roberts was a felon on probation who brought a firearm into a crowded nightclub. Although the court could not determine under *Beck* that Roberts provided the gun for the purpose of shooting it into the crowd or that he allowed the shooting, the court was free to conclude that Roberts knowingly acted in a manner that increased the likelihood that others would be placed in danger. The trial court reasonably concluded that the manner in which Roberts

committed the offense of felon-in-possession warranted a significant departure from the guidelines range.

Affirmed.

SWARTZLE, J., concurring dubitante in the judgment, agreed with the majority that the trial court's sentence did not violate *Beck* or due-process principles but wrote separately to discuss the difficulty in consistently identifying what constitutes "acquitted conduct." Judge SWARTZLE noted that although in some cases identifying "acquitted conduct" will be relatively straightforward, in a significant number of cases, isolating the acquitted conduct that cannot be considered at sentencing will present greater difficulty. Judge SWARTZLE disagreed with the majority's apparent support for a categorical "elements-based" approach to identifying acquitted conduct, and he suggested that a better approach might be similar to the collateral-estoppel rule used in double-jeopardy cases and set forth in *Ashe v Swenson*, 397 US 436 (1970). The collateral-estoppel rule directs a court to examine the record of the prior proceeding, including the pleadings, evidence, and charge, to determine whether a rational jury could have based its verdict on an issue other than the one the defendant seeks to foreclose from consideration. In the context of acquitted-conduct determinations, the rational-jury standard would allow the court to consider, for example, evidence that a victim was robbed or killed, even if the defendant was not found to be responsible. In this case, Judge SWARTZLE concluded that the sentencing court did not justify the upward departure by relying on defendant having passed around a firearm or having used it in an indiscriminate shooting. Had the sentencing court relied on such evidence, then the resulting departure sentence would likely have been in violation of *Beck*. But this was not the case, and therefore, defendant's sentence did not violate due process.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Carol A. Siemon*, Prosecuting Attorney, and *Joseph B. Finnerty*, Appellate Division Chief, for the people.

Mary A. Owens for defendant.

ON REMAND

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

RONAYNE KRAUSE, J. Defendant was convicted by a jury of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury found defendant not guilty of assault with intent to commit murder (AWIM), MCL 750.83, on an aiding-and-abetting theory, MCL 767.39. The trial court sentenced defendant for felon-in-possession as a second-offense habitual offender, MCL 769.10, to 48 to 90 months' imprisonment, an upward departure from his minimum sentencing guidelines range of 14 to 36 months, consecutive to a mandatory two years' imprisonment for felony-firearm. Defendant previously appealed his convictions and sentences, and we affirmed.[1] Our Supreme Court vacated those parts of our opinion addressing defendant's departure sentence and the trial court's assessment of 25 points for Offense Variable 9, MCL 777.39, and remanded for reconsideration in light of *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019). *People v Roberts*, 504 Mich 995 (2019). We again affirm.

I. BACKGROUND

In our previous opinion, we provided the following summary of the facts:

> This case arises out of a shooting that occurred at Secrets Nightclub (Secrets) in downtown Lansing in the early morning hours of May 24, 2015. At approximately 12:30 a.m., a Secrets patron was shot while inside of the nightclub. Defendant was inside Secrets when the shooting occurred, and he, along with other patrons, fled the club. Sergeant Brian Curtis of the Lansing Police Department and several other officers were parked in their patrol vehicles monitoring the club. Sergeant Curtis observed

[1] *People v Roberts*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 339424).

several patrons leave the club "in a panic." Shortly after, dispatch informed Sergeant Curtis of the shooting, and he activated the mobile vehicle recording device ("MVR") on the front of his patrol car.

Sergeant Curtis heard gunshots and simultaneously observed two individuals, later identified as defendant and LaDon Jackson, advancing towards a group of people outside the club. Sergeant Curtis later reviewed the MVR video and observed that it was Jackson who fired these shots. The MVR video, which was admitted into evidence and played for the jury at trial, also showed defendant and Jackson make contact with each other. Sergeant Curtis testified at trial that he believed that, during this contact, defendant passed a gun to Jackson, who then fired the shots and returned the gun to defendant.

After Jackson fired the shots, Sergeant Curtis observed both defendant and Jackson run south, and another officer informed Sergeant Curtis that these individuals might be in possession of a firearm. Sergeant Curtis pursued defendant and Jackson in his patrol vehicle and commanded them to stop, but they refused to comply. Jackson executed a "button hook" maneuver to evade police, but defendant continued running south alone. Sergeant Curtis pursued defendant and observed him pass by a red Impala and make certain movements that, in Sergeant Curtis's training and experience, led him to believe that defendant had discarded a firearm in that area. After passing the red Impala, defendant continued along the sidewalk, and he was arrested shortly thereafter. Police found no firearm in either Jackson's or defendant's possession. However, a canine unit trained to detect firearms located a firearm next to the red Impala that defendant had passed.

* * *

. . . As the jury was shown the MVR video, Sergeant Curtis testified:

> [Y]ou're going to see a transaction what I believed [sic] where LaDon Jackson receives the firearm from

> the Defendant. LaDon Jackson advances at the crowd, does the shooting, comes back and exchanges the firearm back to the Defendant.
>
> * * *
>
> It is my belief that they're exchanging a firearm right there.
>
> * * *
>
> And here is LaDon Jackson advancing, firing his gun.
>
> * * *
>
> Here [defendant's] reaching into his upper torso.
>
> * * *
>
> And now here he goes right here to the passenger side. I believe he discretely tossed the gun right there.

> Sergeant Curtis explained that, in his experience and training, weapons often "change hands" on the streets. He further explained "that people do not hold onto firearms. They trade them off with one another, especially during an event like this." Sergeant Curtis testified that after he heard the gunshots, he observed defendant and Jackson both "run back in a south direction after they advanced on a group to the north." Sergeant Curtis stated that he observed defendant reach "into his upper torso." . . . Additionally, Sergeant Curtis commanded defendant to stop, but he refused to comply, "continued to evade," and passed "directly near the passenger side of this red Impala," which is where the gun was eventually found. In contrast, Sergeant Curtis testified that Jackson was never in the vicinity of the red Impala. [*People v Roberts*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 339424), pp 1-4 (alterations in original).]

Additionally, we now set forth in full the trial court's stated reasons for imposing its departure sentence:

Well, Mr. Roberts, your attorney said something about your [sic] very capable of being a highly functioning member of the community and I 100% agree with that. I think you are very capable of that. Your actions have definitely not demonstrated that. Not only for this offense that you've been convicted of, these offenses, but you were on probation out of Eaton County for 2nd Degree Home Invasion, another very serious offense, at the time that you committed this offense. So, you are taking whatever potential that you have to be a highly functioning and contributing member of society and you're making decisions consciously and intentionally that are destroying that. And when it comes to gun violence, I agree that this is the scourge of this community. It is something that tears families apart, no matter what side of this they are on. It tears families apart. It destroys lives. And that's speaking again from both sides, it destroys lives. It has to be stopped and I don't know how to stop it other than to send a strong message that running around the streets of Lansing with a gun is not tolerated, not acceptable and will be significantly punished. And I do consider this to be different than the person who possesses a firearm while convicted of a felony under different circumstances. I see people convicted of that when they've possessed a gun in their own home but, they've been convicted of a felony and they may not have a possession of a gun.

That's one thing. This is much higher up on the scale as far as I'm concerned than that. And I hold you not one bit accountable for what happened in the night club, not part of the charge, not part of the conviction. But what I hold you accountable for is possessing a firearm on the streets of Lansing under these circumstances where a shooting had just taken place by someone else. And I consider that to be at the highest end of the scale as far as seriousness of the offense goes for possession of a firearm by a felon.

So, I have considered the guidelines of 14 to 36 months and they are presumptively reasonable in my mind but, I also consider then [sic] somewhat inadequate for the circumstances of this particular case.

II. STANDARDS OF REVIEW

Sentencing courts are required to properly score the statutory sentencing guidelines and take the resulting minimum sentence range into account when crafting a particular sentence. *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015); *People v Steanhouse*, 500 Mich 453, 474-475; 902 NW2d 327 (2017). However, sentencing courts are not otherwise bound by the sentencing guidelines. *Lockridge*, 498 Mich at 392; *Steanhouse*, 500 Mich at 467-470. The sentencing court may, in its discretion, depart from the guidelines range if it explains how that departure is reasonable and proportionate. *Lockridge*, 498 Mich at 392; *Steanhouse*, 500 Mich at 473-475. We review the trial court's ultimate sentence for reasonableness under an abuse-of-discretion standard to determine whether it is proportionate to the offender and the circumstances of the offense. *Steanhouse*, 500 Mich at 459-460, 473-474. A minimum sentence that falls within the properly calculated guidelines range is presumptively reasonable and proportionate. See *People v Carpenter*, 322 Mich App 523, 532; 912 NW2d 579 (2018).

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. The sentencing court may consider "facts not admitted by the defendant or found beyond a reasonable doubt by the jury." *Lockridge*, 498 Mich at 392. "Offense variables are properly scored by reference only to the sentencing offense except when

the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).

III. *BECK*

It has long been understood that failure to persuade a jury beyond a reasonable doubt is not conclusive as to proofs under the less-stringent preponderance-of-the-evidence standard. *Stone v United States*, 167 US 178, 188-189; 17 S Ct 778; 42 L Ed 127 (1897); *Martucci v Detroit Comm'r of Police*, 322 Mich 270, 273-274; 33 NW2d 789 (1948). Nevertheless, our Supreme Court has recently taught us that sentencing courts may not consider any "acquitted conduct" in crafting their sentences, although they remain free to consider "uncharged conduct." *Beck*, 504 Mich at 626-627. "Acquitted conduct" means any "conduct . . . underlying charges of which [the defendant] had been acquitted." *United States v Watts*, 519 US 148, 153-154; 117 S Ct 633; 136 L Ed 2d 554 (1997), cited by *Beck*, 504 Mich at 609 n 1. We infer from this broad definition that under *Beck*, a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding that the essential elements of any acquitted offense were proved beyond a reasonable doubt. Nevertheless, as we will discuss in more detail below, *Beck* expressly permits trial courts to consider uncharged conduct and any other circumstances or context surrounding the defendant or the sentencing offense.

IV. OFFENSE VARIABLE 9

As we explained in our previous opinion in this case, "[o]ffense variable 9 is number of victims." MCL 777.39(1). The trial court assessed 25 points for OV 9,

which is required if "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss[.]" MCL 777.39(1)(b). "[E]ach person who was placed in danger of physical injury or loss of life or property" is to be counted as a victim. MCL 777.39(2)(a). However, "only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). Defendant's sentencing offense was felon-in-possession, which "in and of itself, simply did not place anyone in danger of physical injury or death." *People v Biddles*, 316 Mich App 148, 167; 896 NW2d 461 (2016).

The trial court explicitly declined to hold defendant responsible for "what happened in the night club," implicitly meaning the trial court did not consider any victims placed in danger *by the shooting* of which defendant was acquitted. Nevertheless, we agree with the trial court that a substantial and qualitative difference exists between possessing contraband in one's own home and unlawfully possessing and passing around a concealed firearm in a crowded bar during a shooting. Nothing in *Beck* precludes a sentencing court from generally considering the time, place, and manner in which an offense is committed. We conclude that *Beck* does not exclude from consideration the contextual fact that the acquitted conduct was committed by someone, so long as that conduct is not actually attributed to the defendant. Irrespective of whether defendant participated in the shooting, the context within which he committed the offense of felon-in-possession intrinsically placed people in grave danger. We therefore reiterate our previous conclusion that the trial court was justified in finding that defendant's actions

placed at least 10 victims in danger of physical injury or death. The trial court therefore did not err in assigning 25 points under OV 9.

V. DEPARTURE SENTENCE

In our previous opinion, we set forth the following reasoning:

> In this case, the trial court stated that it had considered the guidelines and found them to be "somewhat inadequate for the circumstances of this particular case." The factors the trial court identified in support of the departure were the danger of gun violence to the local community, the seriousness of the particular offense, and defendant's poor potential for rehabilitation. Although some of the factors the court stated as reasons for departure were somewhat considered by the guidelines, those guidelines were not adequately tailored for this specific type of offense, and therefore departure was appropriate. As the trial court noted, felon in possession of a firearm can take many forms, some more dangerous than others. The trial court properly noted that the conduct in the present case, where defendant supplied a weapon for use in an indiscriminate shooting on a busy street, was vastly different than the case of a felon being found in possession of a firearm in their home.
>
> The trial court noted the danger that gun violence presented to the local community and the seriousness of this particular offense. The trial court stated that it held defendant "accountable for . . . possessing a firearm on the streets of Lansing *under these circumstances where a shooting had just taken place by someone else*" (emphasis added). It reasoned that defendant's possession of the firearm under these circumstances was more serious than was ordinarily the case with a felon-in-possession offense. Further, defendant's potential for rehabilitation has been held to be a valid consideration for departure, see [*People v Dixon-Bey*, 321 Mich App 490, 525 n 9; 909 NW2d 458 (2017)]. The fact that defendant was on probation, while

> accounted for in the guidelines, is further proof of the seriousness of the specific offense and lack of potential for rehabilitation. Defendant was not merely a felon, but was currently being punished for a serious felony offense in a neighboring county. The fact that he proceeded to bring a concealed handgun to a crowded night club and then allow that weapon to be fired into a crowd in an indiscriminate manner is not something that can be adequately captured by the guidelines system. This is precisely the type of situation where the ability to consider all of the evidence and the factors involved in the commission of a crime is more valuable than the rote, mathematical system conceived in a purely determinant sentencing system.
>
> In summary, the trial court, presented with a crime and defendant that do not neatly fit within the sentencing guidelines, properly applied its discretion and articulated valid reasons for doing so and exceeding guidelines by 12 months. Defendant did not fit in to the more benign categories of a felon in possession and, based on the risk of his actions and his apparent lack of rehabilitation, the trial court found departure to be necessary. Therefore, we affirm defendant's sentence. [*Roberts*, unpub op at 6-7.]

Beck requires us to clarify our reasoning in small part, but we find no basis for revisiting our prior conclusion.

As discussed, the definition of "acquitted conduct" covers a broad range of conduct. Nevertheless, we do not understand *Beck* to preclude all consideration of the entire res gestae of an acquitted offense.[2] As noted, defendant was acquitted of AWIM under an aiding-and-abetting theory. "Aiding and abetting" requires *intentionally* assisting another person in the commis-

[2] We wholeheartedly agree with our concurring colleague's discussion regarding the implementation concerns left by *Beck*, as well as our concurring colleague's thoughts on how best to address those concerns, and we adopt them as our own. We further note that "I know it when I see it" as a standard for determining what constitutes "acquitted conduct" is literally no standard at all.

sion of a *particular* crime. See *People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004); *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). We conclude that even under *Beck*, a sentencing court may consider, for example, the fact that a felon on probation bringing a concealed gun into a crowded nightclub demonstrates—at a minimum—an appallingly reckless disregard for the predictable outcome. Defendant may not be deemed to have provided a weapon for the purpose of shooting it into a crowd, nor can defendant be deemed to have "allowed" the shooting. Nevertheless, defendant can certainly be deemed to have knowingly acted in a manner that drastically increased the likelihood that such a tragedy, whether or not this particular tragedy, would occur. As discussed above, the trial court appropriately observed that it is "one thing" to illegally possess a gun in one's own home, but quite another to introduce an illegally possessed and concealed gun into an environment that was already chaotic and unstable.

Consequently, even though defendant may not be considered to have engaged in any conduct that aided and abetted the shooting, the trial court nevertheless reasonably concluded that the manner in which defendant committed the offense of felon-in-possession, particularly in light of defendant's history and apparent intelligence, warranted a significant departure from the guidelines range. We reiterate our previous conclusion.

Affirmed.

RIORDAN, P.J., concurred with RONAYNE KRAUSE, J.

SWARTZLE, J. (*concurring*). Typically, a judge who writes a separate opinion does so with a certain confidence in the correctness of the position stated. This is

not one of those opinions. In this appeal on remand, we are presented with the facially benign question, what is "acquitted conduct"? The majority in *People v Beck*, 504 Mich 605, 620; 939 NW2d 213 (2019), provided a description of acquitted conduct, but Justice CLEMENT in her dissent identified several problems with this description, *id*. at 659-660 (CLEMENT, J., dissenting). Since then, panels of this Court have had occasion to apply *Beck*, but I believe that they have done so with some inaccuracy in what precisely is acquitted conduct. While I have a couple of minor quibbles with the majority's analysis in this case, the state of the law is such that I cannot fully concur or even partially dissent. Accordingly, for the reasons provided below, I concur dubitante in the judgment.

In *Beck*, the majority described acquitted conduct as conduct that "has been formally charged and specifically adjudicated [not guilty] by a jury." *Id*. at 620. In some circumstances, identifying the acquitted conduct might be relatively straightforward. For example, if a defendant is acquitted by a jury using a special-verdict form, then the sentencing court should be able to isolate the particular aspect or element of the offense on which the jury acquitted the defendant without much difficulty. Similarly, if a jury acquits a defendant of a particular crime but convicts of a lesser-included crime, then, again, it may be easy to isolate the specific aspect or element that the prosecutor did not prove beyond a reasonable doubt. Finally, if a defendant stipulates to a particular element, and the jury still acquits, a process of elimination might point to the particular aspect or element that the jury found not to have been proven beyond a reasonable doubt. Even taken together, however, these will likely not be the majority of cases when acquitted conduct must be identified and excluded for purposes of sentencing.

In a not-insubstantial number of cases, when a jury renders its verdict by a general-verdict form and acquits on some charge but convicts on another, isolating the acquitted conduct that cannot be considered at sentencing will present several epistemological challenges. Fundamentally, these challenges will arise because, as the United States Supreme Court recognized in *United States v Watts*, 519 US 148, 155; 117 S Ct 633; 136 L Ed 2d 554 (1997) (cleaned up): "[a]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences . . . ." Yet, after *Beck*, our sentencing courts will now have to draw "factual finding inferences" based on the jury's acquittal.

As Justice CLEMENT observed in her dissent, much in *Beck* was left unexplained with respect to the "parameters of what constitutes acquitted conduct." *Beck*, 504 Mich at 668 (CLEMENT, J., dissenting). As Justice CLEMENT asked, "Is acquitted conduct defined only as the exact conclusion that the defendant committed the acquitted charge?" *Id*. at 668-669. "But does acquitted conduct extend beyond this ultimate conclusion to all facts that supported a charge for which a defendant was acquitted?" *Id*. at 669. "What if it is unclear why the jury acquitted the defendant of the particular crime?" *Id*. And, "If there is no indication as to which element the jury found lacking, is the sentencing court prohibited from considering the facts underlying either element?" *Id*. These questions were left unanswered by the majority—maybe appropriately so given the record in the case—but all will need to be addressed at some point.

Panels of this Court have started to address these questions, though I am not confident of all of our answers. For example, in *People v Parker (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 335165), p 4, the Court framed the inquiry as a categorical one: "Once a defendant is acquitted of a certain crime, it violates due process to sentence the defendant using an essential element of the acquitted offense as an aggravating factor." This cannot, however, be the proper approach.

Take, for example, someone acquitted of felon-in-possession but convicted of another crime. There are only two elements of felon-in-possession—(1) the defendant is a felon, and (2) the defendant possessed a firearm. MCL 750.224f. If the defendant in this hypothetical did not concede at trial that he was a felon but instead left the prosecution to its proofs, then does the jury's acquittal on the felon-in-possession charge preclude the sentencing court from considering evidence that the defendant did, in fact, have a prior felony conviction when scoring the guidelines and fashioning an appropriate sentence? It is theoretically possible, after all, that one of the jurors simply did not trust the prosecutor's evidence of a prior felony and voted to acquit on that basis. But yet, it seems absurd to suggest that the sentencing court cannot consider the defendant's actual criminal background when sentencing on the unrelated conviction.

As another example, in a felony-murder case involving a robbery, if a defendant was acquitted of both felony murder and robbery, but was convicted of a third unrelated charge, then would the sentencing court have to ignore evidence that a person was, in fact, killed and before he was killed, the person was, in fact,

robbed? Arguably under a pure "elements-based" approach, the sentencing court would have to ignore this evidence, but this again seems quite absurd. Rather, under my reading of *Beck*, the sentencing court could not consider evidence that this particular defendant did the robbing or killing, but it need not ignore that a robbery and killing occurred.

As a final example, assume that a defendant was charged with two separate crimes, each crime had four total elements, and the two crimes shared three elements in common. The jury convicted the defendant on one charge and acquitted on the other. Under the categorical approach stated in *Parker*, a sentencing court could not consider the four elements of the acquitted charge, which would also necessarily mean that the sentencing court could not consider three of the elements of the convicted charge. I cannot conclude that this is what *Beck* requires. Similar issues arise with respect to inconsistent verdicts. A categorical "elements-based" approach is simply unworkable as a general principle of law.

At the other extreme, one could take an "I know it when I see it" approach. Cf. *Jacobellis v Ohio*, 378 US 184; 84 S Ct 1676; 12 L Ed 2d 793 (1964). Merely stating the approach, however, highlights its unworkability. Whatever merit it has in distinguishing erotic art from obscenity, it has little merit in the criminal-sentencing context, where due process requires fair notice and clear standards.

So where does this leave a sentencing court when having to identify *precisely* the acquitted conduct in a particularly thorny case? It is unclear to me, although one possible approach could be something similar to the collateral-estoppel rule set out in *Ashe v Swenson*, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970).

See Johnson, *If At First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 NC L Rev 153, 157 n 14 (1996). In the double-jeopardy context, a court might have to determine whether a defendant had been acquitted of a particular crime in a prior proceeding. When faced with this issue, the Supreme Court in *Ashe* explained that a court should "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a *rational jury* could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 US at 444 (quotation marks and citation omitted; emphasis added).

The salient feature of this approach is the "rational jury" standard. A rational jury would not, for example, close its collective eyes to uncontroverted evidence of a prior felony conviction. Nor would a rational jury close its collective eyes to uncontroverted evidence of a murder or robbery victim. Nor would a rational jury, when faced with two separate four-element charges that share three common elements, conclude that the prosecutor had satisfied all four elements of one charge but none of the elements of the other charge. While it might not answer every question raised by the *Beck* dissent, *Ashe*'s rational-jury standard would seem to provide a workable model for a sentencing court to use when having to identify acquitted conduct in a difficult case, one that satisfies the due-process concerns noted above and discussed in detail by the *Beck* majority.

With these matters in mind, I turn to the present appeal on remand. I agree with much of the majority's analysis, and my disagreements are relatively minor.

First, in its statement of what *Beck* requires, the majority appears to come close to a categorical "elements-based" approach when it states, "We infer from this broad definition that under *Beck*, a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding the essential elements of any acquitted offense proved beyond a reasonable doubt." As I have explained, I think a categorical approach is generally not advisable, though admittedly this might be what the *Beck* majority intended. Second, I do not read the sentencing court as relying on defendant having passed around a firearm or that defendant's firearm was, in fact, "use[d] in an indiscriminate shooting" as justifications for the upward departure. Had the sentencing court relied on such evidence, then the resulting departure sentence would likely be in violation of *Beck*. But this was not the case, and, based on my reading of *Beck* and related caselaw, defendant's sentence does not violate due process.

For these reasons, I concur dubitante in the judgment.

PEOPLE v DAVIS

Docket No. 343432. Submitted December 3, 2019, at Lansing. Decided April 2, 2020, at 9:00 a.m. Reversed and remanded 509 Mich ___ (2022).

Donald W. Davis, Jr., was convicted following a jury trial in the Genesee Circuit Court of multiple felonies in connection with the shooting death of Devante Hanson. During a recess on the second day of the trial, the mother of the victim's child made contact with a juror in the hallway. When trial resumed, the court, Geoffrey L. Neithercut, J., ordered the woman and all other spectators, with the exception of the victim's mother, removed from the courtroom and directed them not to return for the remainder of the trial. After his conviction, defendant appealed and moved to remand for an evidentiary hearing, arguing that he had been denied his constitutional right to a public trial and that trial counsel had been ineffective for failing to object to the closure of the courtroom. The Court of Appeals granted the motion. On remand, following the evidentiary hearing, the trial court denied defendant's motion for a new trial, stating that it had not actually closed the courtroom to the public and that the doors were never locked. In addition, the court concluded that while it had poorly worded its directive to the spectators not to return during the trial, defendant was not prejudiced by the removal because no one supporting defendant had been affected by the removal order.

The Court of Appeals *held*:

1. The Sixth Amendment of the United States Constitution and Article 1, § 20 of Michigan's 1963 Constitution provide that a criminal defendant has the right to a public trial. However, that right is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection. Thus, with regard to jury tampering, the state may punish or regulate speech intended to interfere with court proceedings or with the right of an accused to have his case decided by an impartial jury. Closing a courtroom to all spectators for the vast majority of a trial may be too broad of a measure to protect the valid interest in having and maintaining a fair and impartial jury. The right to a public trial is structural in nature. A defendant cannot waive his or her right to a public

trial by remaining silent when a closure of the courtroom occurs. Instead, the failure to assert the constitutional right constitutes a forfeiture of that right unless the defendant can establish that (1) the error occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. With regard to the fairness, integrity, or public reputation of judicial proceedings, the goal is to ensure a fair trial, remind the prosecution and court of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. In this case, the trial court did not close the courtroom as alleged by defendant; instead, the trial court cleared the courtroom. Although trial counsel testified on remand that he had strategically and intentionally not challenged the removal of spectators from the courtroom because it benefited defendant by masking the fact that defendant had no one in the courtroom to support him, counsel did not affirmatively approve that decision. Accordingly, if the courtroom were closed, defendant did not waive his right to a public trial and the unpreserved issue had to be analyzed for plain error. Under the facts of this case, defendant was not entitled to a new trial because although closing the courtroom was plain error that affected defendant's substantial rights, the error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. In addition, trial counsel was not ineffective for failing to object to the closure because his silence was logical under the circumstances of the case.

2. Assuming the trial court erred by admitting an e-mail message that defendant sent to a detective from jail, the error did not affect defendant's substantial rights and it was not more probable than not that a different outcome would have resulted without the error.

Affirmed.

SWARTZLE, P.J., concurring in part and dissenting in part, agreed with the majority that trial counsel did not provide ineffective assistance and that the court's admission of defendant's e-mail message did not require reversal. But contrary to the majority, Judge SWARTZLE concluded that the court closed the courtroom and that the violation of defendant's right to a public trial warranted a new trial. The trial court clearly closed the courtroom when it stated, "I'm going to bar everyone from this courthouse except for [the victim's] mother. . . . The rest of you

leave. Don't you come back." The trial court's closure constituted plain error, and the violation of defendant's right to a public trial was structural error. A defendant's claim regarding the violation of his constitutional right to a public trial should not be dismissed on the ground that the defendant was not prejudiced. Rather, a defendant's claim should be examined through the lens of whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant of the protections conferred by the Sixth Amendment. Given all that happened behind closed doors in this case—most of the witness testimony, arguments, instructions, and the rendering of the verdict—the closure seriously affected the fairness, integrity, and public reputation of this trial, and defendant was denied his constitutional right to a public trial. Judge SWARTZLE would have reversed defendant's convictions and remanded for a new, public trial.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Rebecca Jurva-Brinn*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann* and *Steven D. Helton*) for defendant.

Before: SWARTZLE, P.J., and MARKEY and REDFORD, JJ.

MARKEY, J. Defendant appeals by right his convictions of first-degree felony murder, MCL 750.316(1)(b); first-degree premeditated murder, MCL 750.316(1)(a); four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; assault with intent to rob while armed, MCL 750.89; felon in possession of a firearm, MCL 750.224f; and felon in possession of ammunition, MCL 750.224f(6). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment without the possibility of parole for the first-degree murder conviction (alternate theories), two years' imprisonment for each of the felony-firearm convictions, 25 to 50 years' imprisonment for the assault conviction, and 5 to 10

years' imprisonment for each of the felon-in-possession convictions. On appeal, defendant contends that he was denied his constitutional right to a public trial and that the trial court erred by admitting into evidence an e-mail defendant had sent to a detective. Because we conclude that the trial court did not close the courtroom to the public the second day of trial and because we find the admission of the e-mail did not constitute error that requires reversal, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On April 27, 2016, a security officer working at an apartment complex saw a running car parked outside the complex. When the security officer approached the parked car, he saw the victim, Devante Hanson, sitting in the driver's seat. The security officer could see that Hanson had blood on his chest and called 911. When police officers arrived, Hanson was pronounced dead, and it was determined that Hanson had suffered gunshot wounds.

Video surveillance from the apartment complex showed two men, purportedly Spencer Holiday and defendant, entering Hanson's car. Holiday sat in the front passenger seat and defendant sat in the back passenger seat behind the driver's seat, which was occupied by Hanson. Hanson exited the car, went to the trunk of the vehicle, and then returned to the driver's seat. The video footage showed that there was a lot of movement in the car, after which both Holiday and defendant left the vehicle and went back into the apartment complex. They proceeded through the lobby and subsequently entered another nearby apartment complex.

Holiday, who accepted a plea offer in exchange for his testimony against defendant, stated that on the

date of the homicide, Holiday was with defendant in defendant's apartment when defendant told Holiday that he was looking for someone to rob. When Holiday left the apartment to buy marijuana and cigarettes, defendant accompanied Holiday. Holiday told defendant that Hanson was going to meet them and sell them some marijuana.

Holiday testified that when Hanson arrived, defendant and Holiday climbed into Hanson's car. Defendant, sitting in the backseat, pulled out a gun and demanded money and marijuana from Hanson. According to Holiday, Hanson grabbed defendant's gun, and defendant shot Hanson. After defendant shot Hanson, he pointed his gun at Holiday and told him to shoot Hanson or else defendant would shoot Holiday. Holiday acknowledged that he then shot Hanson in the ribs.

On February 21, 2018, the first day of trial, jury voir dire was conducted, a jury was selected, and the trial court gave the jurors their preliminary instructions. On February 22, opening statements were made and the prosecution presented three witnesses before a break for lunch. After the last morning witness was called but before the court recessed for the lunch hour, the following colloquy between the trial court and counsel took place:

> *The Court*: Go ahead deputies. Yeah, just stay there please.
>
> *Mr. Sawka* [prosecutor]: I just want to let the Court know for the record, there were—
>
> *Mr. White* [defense counsel]: Yeah, I want to make sure that's—
>
> *Mr. Sawka*: —family members in the hallway, but there was no contact with the jury from what—as they passed by. I don't want there to be any issues.
>
> *The Court*: That's why I wanted everybody to wait.

Mr. Sawka: Oh, yeah. They were—

Unidentified speaker: They were outside the door.

Mr. Sawka: They were already outside, that was the problem, so sorry.

(At 11:46 a.m., court recessed)

During the break, a woman who identified herself as Daundria Frye and as the mother of Hanson's child made contact with a member of the jury. When court reconvened, the following is reflected in the trial transcript:

(At 1:58 p.m., court reconvened)

Mr. Ellis [court clerk]: All rise.

The Court: Okay. Thank you. Are we ready, Mr. Sawka?

Mr. Sawka: Yes, Your Honor.

The Court: Then we'll bring the jury in and you all can sit down until the jury enters the room please. Well no, we're not ready. We are not ready. Who is in the gallery that works at Hurley Hospital? Nobody in the gallery. You maybe? Do you work there or not?

Unidentified speaker: Pardon me, sir?

Ms. Frye: I work there.

The Court: Sit down. I want you to come up and stand at that lectern right there please.

Ms. Frye: Right there?

The Court: Yes. I want you to come up here and stand where that microphone is.

Ms. Frye: Okay.

The Court: What is your name?

Ms. Frye: Daundria Frye.

The Court: Say it again?

Ms. Frye: Daundria Frye.

The Court: Frye?

Ms. Frye: Uh-hum.

The Court: Spell it for me.

Ms. Frye: Um, D-A-U-N-D-R-I-A. Frye, F-R-Y-E.

The Court: Where do you work at Hurley Hospital?

Ms. Frye: Housekeeping. Environmental Services.

The Court: And you are here watching this trial why?

Ms. Frye: Why am I watching it?

The Court: Yes.

Ms. Frye: Because Devante Hanson was my kid's father.

The Court: So you know, counselors, the jury has complained that that woman has tried to talk to them.

Ms. Frye: No. I didn't try to talk, I just saw a lady and I asked—I'm like did you—do you work at Hurley's? I know I'm not supposed to talk to them.

The Court: I've got two choices. One is to find you in contempt of court and lock you up.

Ms. Frye: [Are] you serious?

The Court: I'm serious. The other is to order everyone in the gallery to leave the courthouse and not come back. What we're going to do is this; in order to lock you up I'd have to get you a lawyer first and that wastes time because we have things to do here. So instead, I'm going to bar everyone from this courthouse except for [Hanson's] mother . . . . The rest of you leave. Don't you come back.

Ms. Frye: Okay.

The Court: Shame on you trying to subvert the justice system.

The Deputy: Just have them hold until somebody (inaudible). Your Honor, we're gonna have a deputy escort them out.

The Court: That's a good idea.

The Deputy: We're gonna get a deputy to escort you out.

Unidentified Speaker: Judge, you did mean for the remainder of the trial correct?

The Court: For the remainder of the trial, all the way into next week.

Unidentified Speaker: All right.

The Court: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

Mr. White: Your Honor, may we approach?

The Court: Yes. Do you want this on the record or off the record?

Mr. Sawka: It probably should be on because I think it's for both of our benefit here.

The Court: Okay.

Mr. Sawka: Do you want to have the jurors who have a complaint to come in to double check to make sure that there has been no comment that has been made that's gonna prejudice the—anything?

The Court: No.

Mr. Sawka: Okay. Fair enough.

The Court: No. It was a short comment. What she asked one juror was, do you work at Hurley Hospital.

Mr. Sawka: Okay. So, there's nothing about the case itself that was implicated?

The Court: Right.

Mr. White: Well it's still enough to sit there to cause some concerns, but I guess you worked it out. I understand why the concern (inaudible).

The Court: Sure.

Mr. Sawka: It's up to you. Do you want him—are you okay with it?

Mr. White: (inaudible) with the Judge's decision.

Mr. Sawka: I don't have a need for a hearing if that's all that was said.

The Court: I don't think it's necessary.

Mr. Sawka: Okay. Thank you.

The Court: I don't want to make the jury nervous. Now we'll bring the jury out.

Mr. Ellis: All rise for the jury.

The jury then heard from two witnesses on the afternoon of February 22, 2018. On February 27 and 28, during two full days of trial, the jury heard from 11 prosecution witnesses and one defense witness. On March 1, closing arguments were presented, the jury was given final instructions, and verdicts were returned. Except for Hanson's mother, there is no indication any other spectators attended the trial from the afternoon on the second day of trial until the verdicts were returned.

Defendant was convicted as indicated and filed his claim of appeal. Defendant subsequently moved for remand, requesting the case be remanded for an evidentiary hearing and to allow defendant the opportunity to file a motion for new trial on a variety of issues. This Court granted the motion in part, remanding the case to the trial court "to expand the factual record regarding its decision to close the trial to all members of the public except for the victim's mother, and to allow defendant to file a motion for new trial based on his claim that trial counsel was ineffective for failing to object to the court's decision." *People v Davis*, unpublished order of the Court of Appeals, entered November 13, 2018 (Docket No. 343432).

The record reflects that on February 21, 2016, the first day of trial, the court was in session from 9:41 a.m. until 12:45 p.m., and from 2:21 p.m. until 3:04 p.m. On February 22, 2016, the second day of trial, the court was in session from 9:19 a.m. until 11:46 a.m., and from 1:58 p.m. until 3:14 p.m.

An evidentiary hearing was conducted on remand, and the trial court denied defendant's motion for new trial. Defendant's sister testified at the evidentiary hearing that she came to the courthouse during the trial and found the courtroom door locked, but she was

unsure whether it was during a lunch break or other type of break. She came back the next day but then left after feeling threatened by the victim's family.

There was also testimony by Bryan Wooten, a man who had dated defendant's mother for about nine years. He stated that he came to the courthouse to attend the trial and was able to freely enter the courtroom without any difficulty. The courtroom door was not locked. No sign was posted excluding any person or persons. When he entered, a deputy was present. The deputy took no action whatsoever to exclude, remove, or otherwise deny access to Wooten. Once in the courtroom, however, defendant gestured for him to leave and he left the premises. Only defendant acted in a way to convince Wooten to leave the courtroom.

The court cleared the courtroom of the individuals the court felt were disruptive, all of whom were apparently there on behalf of the victim. Those individuals did not return to the courtroom for the remainder of the trial. There is, however, no evidence to suggest that the court was closed. On remand, the trial court specifically stated:

> The Court emptied the courtroom because there was a conversation that occurred between one of the victim's family and the jury, and I didn't want that to happen by either side so I ordered the courtroom emptied. But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should've said don't come back today. That's my error. However, there was no one from the defendant's side to evict from the courtroom and the Court doesn't see any prejudice to him if his family were not present during the proceedings.
>
> I agree with [the prosecutor] that [the] testimony [of defendant's sister] is not relevant, nor is Mr. Wooten's. And so, the motion for a new trial is denied and the record is made for the Court of Appeals. Thank you.

At the evidentiary hearing, defendant's trial counsel testified. He was asked why he did not object to the trial court's decision to close the courtroom. Counsel explained that when the court made its decision, *none* of the spectators or members of the public who were present in the courtroom was there to support defendant—no family, friends, or acquaintances. Instead, according to counsel, the three to ten individuals in the gallery were the victim's friends and family and were there to support the prosecution's case against defendant. Counsel indicated that it was preferable and less prejudicial to defendant to solely have the victim's mother present. Counsel testified as follows:

> *Q*. So did you think it was actually better to only have the victim's mother here as opposed to having a large group of people?
>
> *A*. Absolutely.

II. ANALYSIS

On appeal, defendant argues that the trial court closed the courtroom to all members of the public except for the victim's grieving mother and that this resulted in an inherently unfair trial that requires defendant to receive a new trial. Defendant further contends that trial counsel was ineffective for failing to object to the trial court's decision to close the courtroom. Finally, defendant maintains that the trial court erred by allowing the admission of an e-mail that defendant sent to a detective while defendant was incarcerated. Defendant also claims that trial counsel was ineffective for failing to challenge the admission of the e-mail under MRE 403.

A. STANDARDS OF REVIEW

Defendant did not object to the trial court's actions, which he argues resulted in the closure of the court

room. In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), our Supreme Court set forth the plain-error test generally applicable to forfeited error:

> 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. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. [Quotation marks, citations, and brackets omitted.]

Whether counsel was ineffective presents a mixed question of fact and constitutional law, and factual findings are reviewed for clear error while we review de novo issues of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

B. THE COURTROOM

The Sixth Amendment of the United Stated Constitution provides that a criminal defendant "shall enjoy

the right to a . . . public trial . . . .” “The Sixth Amendment right to a public trial is incorporated to the states by the Due Process Clause of the Fourteenth Amendment.” *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). In addition, Article 1, § 20 of the 1963 Michigan Constitution guarantees that “the accused shall have the right to a speedy and public trial . . . .” “A defendant’s Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant’s objection[.]” *Vaughn*, 491 Mich at 653.

1. THE COURTROOM IN THIS MATTER WAS NOT CLOSED

We conclude based on a review of the entire record, both at trial and on remand, that the courtroom in this case was not closed. The record reflects that the trial judge *cleared* the courtroom of persons then present because Frye, the mother of Hanson’s child, had intentionally sought to have improper contact with the jury. Following the court’s colloquy with Frye, as already set forth, the court ordered the persons then present in the courtroom, with the exception of the victim’s mother, to leave the courtroom and not return.

2. EVEN ASSUMING ARGUENDO THAT THE COURTROOM WAS CLOSED, REVERSAL IS NOT APPROPRIATE GIVEN THE FACTS AT BAR

The Court in *Vaughn* noted that the constitutional right to a public trial is structural in nature. *Id*. at 655. Nevertheless, the *Vaughn* Court held “that a defendant’s right to a public trial is subject to the forfeiture rule articulated in . . . *Carines* . . . .” *Id*. at 646. The *Vaughn* Court continued, stating:

> Thus, the failure to assert a constitutional right ordinarily constitutes a forfeiture of that right. In analyzing a

> forfeited claim of error, a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 654.

The Court rejected the proposition that the right to a public trial can be waived by remaining silent when a closure of the courtroom is ordered. *Id*. at 661-664. In this case, as ascertained during the evidentiary hearing, the facts are different: defense counsel intentionally voiced no opposition to the trial court's clearing the courtroom because he thought it inured to defendant's benefit. Hence, we conclude that defendant purposely waived the right to a public trial in light of trial counsel's testimony at the evidentiary hearing following remand, if, indeed, the courtroom was actually closed, a fact not established in view of the testimony of the witnesses at the evidentiary hearing. Counsel strategically and intentionally relinquished or abandoned the right to a public trial in order to vastly reduce the number of supporters for the victim in the courtroom in an effort to mask the fact that no one was there for defendant. Trial counsel, however, did not *affirmatively* indicate an approval of the court's decision, so we will review the matter under the plain-error test in order to avoid any conflict with *Vaughn*.

We first hold that if the trial court had, in fact, closed the courtroom for almost the entire trial, it would have been plain error.[1] The trial court certainly had an

[1] The trial court stated that it did not actually close the courtroom to the public and that the doors were never locked, and no one was ejected from the courtroom after Frye and the victim's other supporters were ejected. We decline to call into question the highly respected jurist's credibility, so we shall proceed with our analysis on the *assumption* that

overriding interest in preventing the jury from being tampered with or tainted through improper contact initiated by an individual with close ties to the victim. See *People v Wood*, 326 Mich App 561, 578; 928 NW2d 267 (2018) ("[W]hen it comes to the prevention of jury tampering, it has long been held that states may punish or regulate speech *intended to interfere* with court proceedings or with the right of an accused to have his case decided by an impartial jury."). But in closing the courtroom to all spectators for the vast majority of the trial,[2] the trial court would have implemented a mechanism to protect against jury tampering that was, under the circumstances, much broader than necessary to protect the valid interest in having and maintaining a fair and impartial jury. There were reasonable alternatives to closing the courtroom to all interested observers for the remainder of the trial following the incident involving Frye. The trial court could have held Frye in contempt, could have solely barred Frye from the courtroom for the day or duration of the trial, or, perhaps, the court could have closed the courtroom to all spectators, but only for the afternoon proceedings on February 22, 2018. The trial court's action in closing the courtroom for the entirety of the trial was not supported by adequate findings and reflected a bit of an overreaction to Frye's conduct. Moreover, we are operating under the assumption that Frye was acting with some nefarious intent by asking the juror about her employer instead of simply making an innocent mistake. If the trial court closed the

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the courtroom was closed for the remainder of the trial. We also note that the victim's mother had a statutory right to be present during the trial. See MCL 780.761 and MCL 780.752(1)(m)(*ii*)(C).

[2] For ease of reference, we shall not continually note that the victim's mother was permitted to be in the courtroom.

courtroom, it was error and the error was clear and obvious, i.e., it constituted *plain* error. *Carines*, 460 Mich at 763.

The next question under the plain-error test is whether the plain error affected defendant's substantial rights or, stated otherwise, whether the plain error prejudiced defendant. *Id*. With respect to this third prong of the plain-error test in the context of a constitutional violation of the right to a public trial, the *Vaughn* Court stated:

> While the Supreme Court of the United States has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights, this Court[] . . . has explained that structural errors are intrinsically harmful, without regard to their effect on the outcome . . . . Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong.
>
> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we must exercise . . . discretion and only grant defendant a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. While any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors. [*Vaughn*, 491 Mich at 666-667 (quotation marks and citations omitted).]

While our Supreme Court framed its discussion by stating that "our caselaw *suggests* that a plain structural error satisfies the third *Carines* prong," we, as an intermediate appellate court, are not emboldened by this somewhat equivocal language to rule otherwise.

Id. at 666 (emphasis added). Accordingly, we hold that the trial court's plain error in closing the courtroom affected defendant's substantial rights as a matter of law, thereby satisfying the third prong of the *Carines* plain-error test.

The next step in the analysis requires us to exercise our discretion and determine whether the plain error resulted in the conviction of an actually innocent defendant or, in the alternative, whether the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. We first conclude that the plain error in closing the courtroom did not result in the conviction of an actually innocent defendant. Rather, the prosecution presented evidence from which reasonable jurors could find defendant guilty beyond a reasonable doubt, and closing the courtroom likely had no impact on the jury's verdict. Accordingly, we must assess whether closing the courtroom seriously affected the fairness, integrity, or public reputation of the judicial proceedings. In *Vaughn*, 491 Mich at 667, the Supreme Court observed:

> The United States Court of Appeals for the Second Circuit has recognized that it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would require that a conviction be overturned. While the Second Circuit's analysis does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer prejudice or specific injury, it examines whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment. The goals sought by these protections include (1) ensuring a fair trial, (2) reminding

> the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury. [Quotation marks and citations omitted.]

In this case, we are not addressing a situation involving a temporary, brief, or trivial instance of unjustified exclusion of the public, nor was the public barred solely during inconsequential portions of the proceedings. Instead, the courtroom was closed to the public during the testimony of 14 witnesses spanning several days of trial, along with being closed during closing arguments and final instructions. *Vaughn* and the Second Circuit opinion discussed in *Vaughn* concerned the closing of the courtroom during jury selection and voir dire, with the *Vaughn* Court noting that the protected values of encouraging witnesses to come forward and discouraging perjury were not implicated because no witnesses testified. *Vaughn*, 491 Mich at 667-668. Again, in the instant case, 14 witnesses testified during the closure.

Despite these circumstances, we simply cannot find that the closure of the courtroom seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. We reach this conclusion because of the circumstances surrounding the closure of the courtroom and the testimony by trial counsel and others at the evidentiary hearing. The initial closure effectively cleared out spectators who supported the prosecution, reduced the perception that the gallery was pro-victim and against defendant, and it made less glaring the fact that no one was there who supported defendant. According to defendant's counsel at the remand hearing, this is exactly why counsel did not object to the closure of the courtroom—it was to defendant's benefit at the time. Furthermore, under these circumstances, we cannot

conclude that trial counsel's performance in failing to object to the closure fell below an objective standard of reasonableness, considering that there was much logic to counsel's silence. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Thus, counsel was not ineffective.

C. ADMISSION OF DEFENDANT'S E-MAIL

The prosecutor introduced evidence of an e-mail that defendant sent to a detective while defendant was in jail. Before trial, the detective had approached defense counsel and asked counsel to see if defendant would be interested in sharing information with the police regarding another case in exchange for some possible assistance relative to the pending charges. Counsel conveyed the message to defendant, and then defendant sent an e-mail to the detective asking what kind of a deal he could receive in exchange for the information. The prosecutor filed a pretrial motion seeking an order allowing the admission of defendant's e-mail to show consciousness of guilt. The prosecutor argued that the e-mail did not violate MRE 410 regarding the inadmissibility of plea discussions and related statements because a police officer and not a prosecutor was involved in the communications. Defendant maintained that the e-mail was not relevant, citing MRE 401 and 402. The trial court ruled that the e-mail was admissible, stating that it was up to the jury to interpret the e-mail's meaning. On appeal, defendant argues that the evidence was not relevant to consciousness of guilt, that the evidence was not admissible under MRE 403, and that trial counsel was ineffective for not raising an MRE 403 argument below.

We question the relevancy of the e-mail and whether it was probative of a consciousness of guilt, especially

considering that no specific "deal" was ever offered or discussed. Also, we tend to believe that the evidence was problematic under MRE 403. Nevertheless, assuming error in the admission of the e-mail, we cannot conclude that the presumed error affected defendant's substantial rights, *Carines*, 460 Mich at 763, or that it "is more probable than not that a different outcome would have resulted without the error," *Lukity*, 460 Mich at 495. The evidence of defendant's guilt was substantial, and the e-mail was of little probative value.

For the reasons stated, we conclude that the courtroom was not closed by the trial judge. We further conclude that under all of the facts and circumstances of this matter, if it were closed, reversal and remand for a new trial is not warranted for the reasons stated in this opinion. Finally, regarding the introduction of the e-mail sent by defendant to the detective, we conclude that it is not more probable than not that a different outcome would have resulted without the admission of the e-mail.

We affirm.

REDFORD, J., concurred with MARKEY, J.

SWARTZLE, P.J. (*concurring in part and dissenting in part*). As our Supreme Court explained long ago, "Constitutions were written to be obeyed." *People v Micalizzi*, 223 Mich 580, 582; 194 NW 540 (1925). In this case, our Constitutions were not obeyed, specifically with respect to defendant's right to a public trial guaranteed under Article 1, § 20 of Michigan's 1963 Constitution and the Sixth Amendment to the United States Constitution. Although I agree with the majority that defense counsel did not render ineffective

assistance of counsel and the admission of defendant's e-mail message into evidence was not outcome-determinative, I cannot agree with the majority's conclusion that the violation of the right to a public trial does not warrant a new trial in this case. Therefore, I respectfully concur in part and dissent in part.

The Trial Court Ordered the Courtroom Closed. At the outset, I disagree with the majority regarding its characterization of the trial court's decision to close the courtroom to all members of the public—with the notable exception of the victim's mother—from the afternoon on the second day of defendant's trial until the jury returned its verdict. The trial court ordered from the bench, "I'm going to bar everyone from this courthouse except for [the victim's] mother. . . . The rest of you leave. Don't you come back." When immediately asked for clarification, the trial court explained that the order applied "[f]or the remainder of the trial, all the way into next week. . . . The only person allowed to watch this trial is the mother of the young man who died." Although, when on remand from this Court, the trial court subsequently interpreted its earlier order more narrowly, the contemporaneous record is clear—the trial court ordered the courtroom closed for the rest of the trial, and we should not second-guess whether the trial court really meant what it said at the time.[1]

[1] The majority notes that, on a single occasion, Bryan Wooten attempted to observe the trial, but defendant gestured Mr. Wooten to leave. It is unknown on this record whether defendant gestured because he did not want to anger the trial court by having a supporter defy the trial court's earlier order or, rather, because he did not want someone who supported him to observe the trial, though the latter conclusion would seem to be an odd one to draw. Moreover, whether a single person on a single occasion was able to enter the courtroom briefly is a far cry from showing that the courtroom was open to the general public

Forfeiture, Not Waiver. Moreover, defendant did not waive his constitutional right to a public trial. Waiver is the "intentional abandonment of a known right," *LME v ARS*, 261 Mich App 273, 277; 680 NW2d 902 (2004) (cleaned up), while forfeiture is the failure to object or otherwise preserve a right, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In the context of criminal law, "waiver is where the defendant *affirmatively agrees* with the course of action taken by the trial court . . . ." 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 21:15, p 22 (emphasis added). Here, regardless of what defense counsel or defendant might have thought at the time, it is undisputed that neither counsel nor defendant himself made any affirmative statement requesting, concurring with, or otherwise approving the trial court's decision to close the courtroom. Nor was there an objection, so it is appropriate that the Court reviews defendant's public-trial claim under the plain-error standard. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Trial Court Plainly Erred. I agree with the majority that the trial court's closure of the courtroom to all but the victim's mother constituted plain error. I note that the trial court failed to make any factual findings that the person who spoke to a juror—the mother of the victim's child—intended to interfere with court proceedings or intended to engage in jury tampering. Although her actions could be interpreted in this manner, it would be inappropriate for this Court to make its own factual evaluation on the issue in the absence of affirmative factual findings by the trial

throughout the trial. In any event, rather than rely on supposition, it would seem to be the better practice to rely on the trial court's order from the bench, which, as I have explained, is quite clear.

court at the time the trial court decided to close the courtroom. And, even if the trial court had made such findings, the record confirms that closure of the courtroom to all but the victim's mother was much broader than necessary to protect the valid interest in having and maintaining a fair and impartial jury. The trial court failed to comply with the requirements set forth in *People v Vaughn*, 491 Mich 642, 653; 821 NW2d 288 (2012), for closing a courtroom during a criminal trial. Not only was the closure broader than necessary, but the trial court failed to consider reasonable alternatives to closing the courtroom. Therefore, the trial court committed plain error, and both the first and second prongs of the plain-error test have been satisfied. See *Carines*, 460 Mich at 763.

I also agree with the majority that the trial court's violation of defendant's constitutional right to a public trial was a structural error. See *Vaughn*, 491 Mich at 655, 666-667. Therefore, the trial court's plain error affected defendant's substantial rights, and the third prong of the plain-error test has also been satisfied. See *Carines*, 460 Mich at 763.

Serious Impact on Fairness, Integrity, or Public Reputation of Proceeding. Our Supreme Court has made clear that even though the "denial of the right to a public trial is a structural error," it remains subject to the fourth prong of the *Carines* plain-error test. See *Vaughn*, 491 Mich at 666-667. Therefore, defendant must show that "the plain, forfeited error resulted in the conviction of an actually innocent defendant" or the error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763 (cleaned up). I agree with the majority that defendant has failed to demonstrate on appeal that he was

actually innocent of the crimes for which he was convicted. Yet, this does not end our review.

In *Vaughn*, our Supreme Court found persuasive the analysis of the United States Court of Appeals for the Second Circuit, recognizing that a defendant's claim regarding the violation of his constitutional right to a public trial should not be dismissed "on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury[.]' " *Vaughn*, 491 Mich at 667, quoting *United States v Gupta*, 650 F3d 863, 867 (CA 2, 2011). Rather, a defendant's claim should be examined through the lens of " 'whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.' " *Vaughn*, 491 Mich at 667, quoting *Gupta*, 650 F3d at 867. This analysis is consistent with well-established precedent from our Supreme Court:

> We are not concerned with the guilt or the innocence of this defendant. We are concerned with whether his constitutional rights have been invaded. Constitutions were written to be obeyed. Their provisions are mandatory. They protect the humblest as well as the powerful, the meanest as well as the upright. The defendant by the Constitution was guaranteed a public trial, not one behind locked doors; he was guaranteed a trial to which the public was admitted, not part of the public and part of the time, but the public generally and all of the time. [*Micalizzi*, 223 Mich at 582.]

Under this rubric, we must consider the degree of impact the trial court's decision had on the fairness, integrity, or public reputation of defendant's trial. "While any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires

us to consider whether an error *seriously* affected those factors." *Vaughn*, 491 Mich at 667 (cleaned up). It is at this juncture that I fundamentally part ways with my colleagues, as I believe that the closure had a serious impact on these concerns, not just a marginal impact.

Compare the Closure Here With People v Vaughn. " 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .' " *Gannett Co, Inc v DePasquale*, 443 US 368, 380; 99 S Ct 2898; 61 L Ed 2d 608 (1979) (cleaned up), quoting *In re Oliver*, 333 US 257, 270 n 25; 68 S Ct 499; 92 L Ed 682 (1948). In addition to ensuring that the judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. See *In re Oliver*, 333 US at 270 n 24. To this end, the goals of the protections conferred by the Sixth Amendment include "(1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Vaughn*, 491 Mich at 667.

When compared with the courtroom closure in *Vaughn*, the seriousness of the closure here becomes evident. *Vaughn* involved a trial court's temporary closure of the courtroom during voir dire of the jury. See *id*. at 647, 665. Our Supreme Court found it notable that the venire was present during this portion of the trial-court proceedings, and it concluded that " 'the presence of the *venire* lessens the extent to which [the court's] closure implicates the defendant's public trial right because the *venire*, derived from and repre-

sentative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review.' " *Id*. at 668 (alteration in original), quoting *Gupta*, 650 F3d at 870-871. In contrast, the trial court in this case closed the courtroom after the jury had been seated and the venire had been dismissed. The closure was of far greater extent than the closure considered in *Vaughn*, and because the venire was not present during the closure, defendant's trial proceedings were not "subject to a substantial degree of continued public review." *Vaughn*, 491 Mich at 668 (cleaned up).

Furthermore, the *Vaughn* Court acknowledged that, like in *Gupta*, no witnesses testified during the closure of the courtroom, as the trial court closed only the voir dire proceedings. *Id*. at 668. Again, in contrast, during the period when the courtroom was closed here, the jury heard the testimony of 14 witnesses, 13 of whom testified for the prosecution. Counsel then presented their closing arguments, the trial court instructed the jury, and the jury returned its verdict—all in private. The first, third, and fourth values protected by the constitutional right to a public trial were undermined here, unlike the situation presented in *Vaughn*.

If Not Here, Where? There are certainly situations when it is appropriate to close the courtroom (fully or partially): for example, when a witness has a legitimate fear of reprisal from specific spectators, when there is limited seating capacity during voir dire, or when public-health measures involve social distancing (e.g., the novel coronavirus). See *id*. at 653; *E W Scripps Co v Fulton*, 100 Ohio App 157, 168; 125 NE2d 896 (1955) (noting that a trial judge can exclude the public when necessary to "protect the public health, the public morals and the public safety"). This was not

one of those situations. Given all that happened behind closed doors—most of the witness testimony, arguments, instructions, and the rendering of the verdict—I find little to doubt that the closure seriously affected the fairness, integrity, and public reputation of this trial.

In *Micalizzi*, the trial court physically barred the public. Here, the trial court orally barred the public. No matter, the effect was the same. As our Supreme Court put the matter, "If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. If one constitutional right may be violated with impunity, all may be, and the bill of rights becomes but a scrap of paper. The defendant has not had the public trial guaranteed him by the Constitution." *Micalizzi*, 223 Mich at 585.

Accordingly, I would reverse defendant's convictions and remand for a new, public trial.

LaFAVE v ALLIANCE HEALTHCARE SERVICES, INC

Docket No. 345986. Submitted March 3, 2020, at Lansing. Decided April 2, 2020, at 9:05 a.m. Leave to appeal sought.

Eva LaFave brought an action in the Marquette Circuit Court against Alliance Healthcare Services, Inc., which owned and operated a mobile magnetic resonance imaging (MRI) unit, alleging two counts of ordinary negligence and, in the alternative, a medical malpractice claim for injuries she sustained when she fell off an MRI examination table. Defendant's employee, Chelsea Perry, who was an MRI technician certified by the American Registry of Radiologic Technologists (ARRT), had gone to the next room to call for assistance, leaving plaintiff briefly unattended. Plaintiff fell off the table while unattended. Defendant moved for summary disposition, arguing that plaintiff's claims all sounded in medical malpractice, not ordinary negligence, and therefore plaintiff's ordinary-negligence claims were subject to summary disposition. With regard to plaintiff's medical malpractice claim, defendant argued that because plaintiff's standard-of-care expert had admitted in her deposition that she was unfamiliar with the local standard of care that applied in this matter, summary disposition of the medical malpractice claim was also appropriate. The trial court, Karl A. Weber, J., granted defendant's motion, holding that plaintiff's claims were all medical malpractice claims and that plaintiff had failed to produce any substantively admissible evidence in support of the alleged standard of care. The trial court therefore granted defendant summary disposition on all claims. Plaintiff appealed.

The Court of Appeals *held*:

Courts apply a two-pronged test to distinguish between ordinary-negligence claims and medical malpractice claims. A claim sounds in medical malpractice when (1) the claim pertains to an action that occurred within the course of a professional relationship and (2) the claim raises questions of medical judgment beyond the realm of common knowledge and experience. However, the first issue in any purported medical malpractice case concerns whether the claim is being brought against someone who—or an entity that—is capable of malpractice. Under

MCL 600.5838a(1), a claim for medical malpractice may be brought against a person or entity who is or who holds himself or herself out to be a licensed healthcare professional, a licensed health facility or agency, or an employee or agent of a licensed health facility or agency. MCL 600.5838a(1)(a) and (b) provide that the definitions for "licensed health facility or agency" and "licensed healthcare professional" are found within Articles 17 and 15, respectively, of the Public Health Code, MCL 333.1101 *et seq*. In this case, it was undisputed that defendant did not qualify as a "licensed health facility or agency" because defendant disavowed any contention that it was a contractual agent of the hospital when it provided plaintiff with MRI services. Accordingly, defendant was not itself an entity that could have committed malpractice against plaintiff. Furthermore, Perry did not qualify as a licensed healthcare professional because licensure is not available for MRI technicians in Michigan and because Perry's certification to be an MRI technician through the ARRT did not qualify as a "specialty certification." MCL 333.16109(1) defines "specialty certification" to mean an authorization to use a title by a licensee who has met qualifications established by a board for registration in a health profession specialty field. MCL 333.16105(3), in turn, defines "health profession specialty field" as an area of practice established under Article 15 that is within the scope of activities, functions, and duties of a licensed health profession and that requires advanced education and training beyond that required for initial licensure. In this case, defendant conceded that Perry was not licensed for purposes of Article 15. Defendant did not offer any statutory authority or caselaw to suggest that a person or entity who does not fall squarely within the category set out in MCL 600.5838a(1) (and Articles 17 and 15 by reference) can somehow otherwise qualify as a professional susceptible to a medical malpractice suit. Accordingly, because neither an MRI technician nor an MRI provider qualifies as a person or entity capable of committing medical malpractice under current law, the gravamen of plaintiff's claim was one sounding in ordinary negligence. The trial court erred by granting summary disposition to defendant.

Reversed and remanded.

HEALTH — MEDICAL MALPRACTICE CLAIMS — HEALTHCARE PROFESSIONALS — MRI PROVIDERS AND MRI TECHNICIANS ARE NOT CAPABLE OF COMMITTING MEDICAL MALPRACTICE.

Under MCL 600.5838a(1), a claim for medical malpractice may be brought against a person or entity who is or who holds himself or herself out to be a licensed healthcare professional, a licensed

> health facility or agency, or an employee or agent of a licensed health facility or agency; neither a magnetic resonance imaging (MRI) technician nor an MRI provider qualifies as a person or entity capable of committing medical malpractice.

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger* and *Stephanie L. Arndt*) for plaintiff.

Scott L. Feuer for defendant.

Before: TUKEL, P.J., and MARKEY and SWARTZLE, JJ.

SWARTZLE, J. In *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004), our Supreme Court distinguished between a claim of ordinary negligence and one of medical malpractice with a two-pronged test. First, is there a professional relationship between the plaintiff and the defendant, and second, does the claim involve a question of medical judgment? As a preface to this two-pronged test, however, it must be established that the particular defendant is one actually capable of committing professional malpractice (as opposed to ordinary negligence).

Here, the prefatory condition is fatal to defendant's argument that this is a medical-malpractice case rather than one sounding in ordinary negligence. Accordingly, we reverse the trial court's grant of summary disposition to defendant and remand for proceedings consistent with this opinion.

I. BACKGROUND

This case arises from injuries that plaintiff, Eva LaFave, sustained when she fell off a magnetic resonance imaging (MRI) examination table in a mobile MRI unit. Because the underlying facts have little bearing on whether defendant is an entity capable of

committing professional malpractice, we offer only an abbreviated version of the factual allegations here.

In May 2015, plaintiff went to the emergency room of Bell Memorial Hospital in Ishpeming, complaining of back pain. At the conclusion of her examination, plaintiff obtained a prescription for an MRI. Several days later, plaintiff returned to the hospital to undergo the MRI. Because the hospital did not have its own MRI machine, the test was performed in a mobile MRI unit owned and operated by defendant, Allied Healthcare Services, Inc. The mobile MRI unit is enclosed in a trailer and is towed from hospital to hospital to provide MRI coverage for otherwise underserved rural populations.

At Bell Memorial, the mobile MRI unit was parked adjacent to the hospital building. After she presented her prescription for the MRI, plaintiff was greeted by defendant's employee, Chelsea Perry, an MRI technician certified by the American Registry of Radiologic Technologists (ARRT). Plaintiff experienced severe pain while inside the MRI machine and asked to be removed. After removing plaintiff, Perry went to the next room to call for assistance. While briefly unattended, plaintiff fell off the MRI's examination table and was injured.

Plaintiff subsequently sued defendant. In her amended complaint, plaintiff set forth three counts against defendant. She alleged that defendant was vicariously liable for its employees' (1) ordinary negligence in leaving plaintiff alone on the MRI table and (2) ordinary negligence in failing to provide adequate staff in the mobile MRI unit. Plaintiff also alleged in the alternative a medical-malpractice claim, contending that the same conduct constituted a breach of the local standard of care for medical professionals.

Following discovery, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendant argued that, despite the fact that plaintiff had labeled two of the counts in her amended complaint as claims for ordinary negligence, all of her claims sounded in medical malpractice. Therefore, plaintiff's claims for ordinary negligence were subject to summary disposition. With regard to plaintiff's medical-malpractice claim, defendant argued that because plaintiff's standard-of-care expert had admitted in her deposition that she was unfamiliar with the local standard of care that applied in this matter, summary disposition of the medical-malpractice claim was also appropriate.

The trial court granted defendant's motion. Citing *Bryant*, the trial court held that plaintiff's claims captioned as ordinary negligence actually presented claims of medical malpractice because (1) a professional relationship existed between plaintiff and defendant, and (2) the claims involved questions of medical judgment that were outside the common knowledge and experience of lay jurors. Turning to plaintiff's claim captioned as medical malpractice, the trial court held that plaintiff had failed to produce any substantively admissible evidence in support of the alleged standard of care. Therefore, the trial court granted defendant summary disposition under MCR 2.116(C)(10) on all of plaintiffs' claims.

This appeal followed.

II. ANALYSIS

Plaintiff's primary contention on appeal is that the trial court erred by concluding that the gravamen of her claims was medical malpractice, not ordinary negligence. We review de novo a trial court's ruling regard-

ing a motion for summary disposition. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). This appeal involves various legal questions of statutory construction and the distinction between ordinary negligence and medical malpractice, all of which we review de novo. *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 408; 716 NW2d 236 (2006) (statutory construction); *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 517; 918 NW2d 645 (2018) (ordinary negligence versus medical malpractice).

Ordinary Negligence and Medical Malpractice, Generally. "A medical malpractice claim is sometimes difficult to distinguish from an ordinary negligence claim. But the distinction is often critical." *Trowell*, 502 Mich at 517-518 (citation omitted). A court determines the gravamen of a claim by examining the underlying facts rather than the label attached to the claim. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999).

In *Bryant*, 471 Mich at 422, our Supreme Court set forth the now-familiar two-pronged test for distinguishing between ordinary-negligence claims and medical-malpractice claims: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." If the two questions are answered in the affirmative, then the claim sounds in medical malpractice, but with a necessary (though sometimes overlooked) caveat.

As our Supreme Court cautioned in *Bryant*, "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." *Id*. at 420

(emphasis added). This is a necessary condition for bringing a malpractice suit. "A malpractice action cannot accrue against someone who, or something that, is incapable of malpractice." *Adkins v Annapolis Hosp*, 420 Mich 87, 95; 360 NW2d 150 (1984).

The scope of who can be sued for medical malpractice has expanded over the years. Initially, "[u]nder the common law, only physicians and surgeons were potentially liable for medical malpractice." *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008). With MCL 600.5838a, the Legislature expanded the scope of who may be subject to a medical-malpractice action to include other professionals and entities. *Bryant*, 471 Mich at 420, citing *Adkins*, 420 Mich at 94-95. Specifically, the Legislature provided for medical-malpractice claims to be brought 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." MCL 600.5838a(1). For these purposes, a "licensed health facility or agency" means "a health facility or agency licensed under article 17 of the public health code," and a "licensed health care professional" means "an individual licensed or registered under article 15 of the public health code." MCL 600.5838a(1)(a) and (b).

MRI Provider Not Capable of Professional Malpractice (as a Principal). In this case, it is undisputed that defendant does not qualify as a "licensed health facility or agency." There is no question that defendant is not (and cannot under current law) be licensed under Article 17 of the Public Health Code, MCL 333.1101 *et seq*. Furthermore, although Bell Memorial does qualify as a "licensed health facility or agency" under Article 17, it is not a party to this case. At oral argument

before this Court, defendant expressly denied that it was claiming that it acted as the hospital's agent (by contract). Therefore, even though an "agent of a licensed health facility . . . engaging in or otherwise assisting in medical care or treatment," MCL 600.5838a(1), can be sued for medical malpractice, *Bryant*, 471 Mich at 420, 425, defendant has disavowed any contention that it was the hospital's contractual agent when it provided plaintiff with MRI services. Accordingly, we conclude that defendant is not itself an entity that could have committed malpractice against plaintiff.

MRI Technician Cannot Be Licensed or Registered Under Article 15. The parties dispute, however, whether Perry qualifies as a "licensed health care professional" who is capable of committing malpractice. Plaintiff argues that Perry does not qualify as a "licensed health care professional" because she is not "an individual licensed or registered under article 15 of the public health code." MCL 600.5838a(1)(b). Defendant concedes that licensure is not available for MRI technicians in this state. Defendant nonetheless argues that Perry qualifies as a "licensed health care professional" because she is certified by the ARRT.

There are several flaws with defendant's argument. The Legislature made clear that the appropriate test is whether an individual is "licensed or registered *under article 15 of the public health code*." MCL 600.5838a(1)(b) (emphasis added). Article 15 is found at MCL 333.16101 to 333.18838. As defendant has conceded that Perry was not licensed, we focus on whether she was "registered" for purposes of the malpractice claim. Article 15 defines "registration" as "an authorization only for the use of a designated title which use would otherwise be prohibited under this

article," and a "registrant" means "an individual to whom a registration, a specialty certification, or a health profession specialty field license is issued under that part." MCL 333.16108(2) and (3).

While Perry holds a certification to be an MRI technician, this certification does not qualify as "a specialty certification" under Article 15. As defined in the code, "specialty certification" means "an authorization to use a title by a *licensee* who has met qualifications established by a board for registration *in a health profession specialty field*." MCL 333.16109(1) (emphasis added). In turn, "health profession specialty field" is defined as "an area of practice established under this article that is within the scope of activities, functions, and duties of a *licensed* health profession and that requires advanced education and training *beyond that required for initial licensure*." MCL 333.16105(3) (emphasis added). Thus, a person can hold a specialty certification or health profession specialty field license only in a field for which the person is already licensed. And defendant has already conceded that Perry was not licensed for purposes of Article 15. Although there appears to be some redundancy between being "licensed" under Article 15 and being "registered" under the article (as several ways of being a "registrant" also involve being "licensed"), relatively minor, partial redundancies are not fatal when the meaning of the statutory text is otherwise plain. See, e.g., *Mercy Hosp, Inc v Azar*, 436 US App DC 62, 68; 891 F3d 1062 (2018); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 176-177.

Defendant further argues that, by virtue of the ARRT certification, Perry works in a "health profession" under MCL 333.16105(2). Once again, however,

resort to the statutory definition belies defendant's claim. The cited provision defines a "health profession" as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued *under this article*," i.e., Article 15. MCL 333.16105(2) (emphasis added). As noted, defendant concedes that Perry is not licensed under Article 15, and as explained, Perry is not registered under that article.

MRI Technician Not Otherwise Capable of Medical Malpractice (as a Principal). Finally, defendant argues in the alternative that a person or entity need not qualify as a "licensed health facility or agency" or a "licensed health care professional" under MCL 600.5838a(1) to be susceptible to a claim for medical malpractice. Rather, according to defendant, our Supreme Court set forth in *Bryant*, 471 Mich at 421 n 9, that a claim sounds in medical malpractice, rather than ordinary negligence, whenever "the particular assistance rendered to that patient involved a professional relationship and implicated a medical judgment."

But as we have already explained, the *Bryant* Court also made clear that there is a prefatory condition for finding that a claim sounds in medical malpractice—i.e., the person or entity is capable of committing such malpractice (as opposed to ordinary negligence). *Id*. at 420. The Court reiterated this condition in *Kuznar*, 481 Mich at 177, when it explained that two parties can have a "professional relationship" for purposes of medical malpractice only when one of the parties is "a person or an entity capable of committing medical malpractice." Although the *Bryant* Court cautioned that MCL 600.5838a(1) is "an accrual statute that indicates when a medical malpractice cause of action accrues," the Court also stated that this provision set forth "the category of who may be subject to a medical malpractice

action." *Bryant*, 471 Mich at 420-421; see also *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 337-338; 941 NW2d 685 (2019). Defendant has not offered this Court any statute or caselaw to suggest that a person or entity who does not fall squarely within the category set out in MCL 600.5838a(1) (and Articles 17 and 15 by reference) can somehow otherwise qualify as a professional susceptible to a medical-malpractice suit. We conclude that the Legislature has expressly identified the category of persons or entities who can be subject to a medical-malpractice suit, and if the category is to be expanded to include an MRI technician or MRI provider, then it is the place of the Legislature, not this Court, to make the expansion. See *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 560; 912 NW2d 593 (2018).

III. CONCLUSION

In sum, neither an MRI technician nor an MRI provider qualifies as a person or entity capable of committing medical malpractice under current law, and defendant has disclaimed any reliance on whether it was an agent of the hospital for purposes of MCL 600.5838a(1). Therefore, the gravamen of plaintiff's claim is one sounding in ordinary negligence. Given this conclusion, we decline to address whether the trial court erred by striking plaintiff's medical-malpractice expert witness.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, having prevailed in full, is entitled to tax costs under MCR 7.219.

TUKEL, P.J., and MARKEY, J., concurred with SWARTZLE, J.

In re BM BAHAM, MINOR

Docket No. 349595. Submitted January 14, 2020, at Grand Rapids. Decided April 2, 2020, at 9:10 a.m.

Respondent's parental rights to the minor child, BB, were terminated following a hearing in the Van Buren Circuit Court. In October 2017, respondent and two men entered the home of respondent's father, where the two men beat her father with a baseball bat and robbed him. Respondent pleaded guilty to armed robbery, and in May 2018, she was sentenced to serve 5 to 20 years in prison, with an earliest potential release date of January 8, 2023. While incarcerated, respondent learned that she was pregnant with BB. Respondent spoke with a pregnancy counselor before BB's birth and planned to place BB with her mother, her brother and his wife, or with a family friend until respondent was released from prison, and she planned to establish a legal guardianship for BB's caregiver. However, respondent's plans for BB's care were not implemented prior to the birth and no guardianship was ever established. After BB's birth in September 2018, the Department of Health and Human Services (DHHS) filed a petition seeking temporary custody of BB, given respondent's incarceration and alleged failure to provide an appropriate plan for BB's care and supervision. At a preliminary hearing, a worker from Child Protective Services informed the court that respondent wanted BB to reside with her brother. The court placed BB with respondent's brother, although no guardianship was established. Respondent entered a plea of admission to the allegations in the petition, and the court determined that respondent's plea was a sufficient basis to assume jurisdiction over BB pursuant to MCL 712A.2(b)(1). Although respondent successfully adhered to a Parent Agency Treatment Plan as a condition of potential reunification, in March 2019, the DHHS filed a petition to terminate respondent's parental rights. The DHHS argued that termination was proper under MCL 712A.19b(3)(h) and (j). The trial court, Jeffrey J. Dufon, J., terminated respondent's parental rights, making factual findings allowing for an inference that it found statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(h) and (j) and that termination was in

the best interests of BB, although the court's order did not specifically identify the statutory grounds it found had been established. Respondent appealed.

In separate opinions, the Court of Appeals *held*:

The trial court did not plainly err by exercising jurisdiction over BB under MCL 712A.2(b)(1). However, because the court clearly erred by finding statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(h) and (j), the trial court's termination order had to be vacated.

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

M. J. KELLY, J., wrote the lead opinion, in which Judge GLEICHER concurred to the extent that it held that the circuit court erred by terminating respondent's parental rights based on evidence that did not satisfy the clear-and-convincing-evidence standard, and in which Judge MARKEY concurred with respect to Judge KELLY's analysis of the adjudicative phase of the proceedings and the determination that the trial court had jurisdiction. Respondent did not demonstrate that the trial court's decision to exercise jurisdiction over BB was plainly erroneous or that it affected her substantial rights. A trial court can exercise jurisdiction over a minor child in a child-protective proceeding if a respondent-parent enters a plea of admission or no contest to the allegations in the petition, but the court must first find that a statutory basis exists for exercising jurisdiction. If the court does not find that there is support for one or more of the statutory grounds alleged in the petition, the respondent's plea of admission is an inaccurate plea and is therefore invalid. In this case, the court properly exercised jurisdiction over BB pursuant to MCL 712A.2(b)(1) because respondent testified that she had failed to make an appropriate plan for BB's care and maintenance, and BB was therefore without proper custody or guardianship. Nevertheless, respondent argued on appeal that jurisdiction was improper because BB was placed in the care of respondent's brother, whose home was not unfit. Although caselaw supports that the "without proper custody or guardianship" language is not satisfied if a *parent* places a child in the care of a relative whose home is not unfit, there was no evidence that respondent placed BB with any relative before the petition was filed. Although BB was placed with respondent's brother at the time that respondent entered her plea of admission, respondent cannot show plain error because respondent had not provided for the proper care and maintenance of her child before the petition was filed. The trial court, however, erred by terminating respon-

dent's parental rights. In order to terminate parental rights, a trial court must find that at least one of the statutory grounds in MCL 712A.19b(3) has been proved by clear and convincing evidence. In this case, the trial court failed to specifically identify a statutory basis for its decision to terminate respondent's parental rights. Instead, the court focused exclusively on the best interests of the child. Termination is proper under MCL 712A.19b(3)(h) when the court finds by clear and convincing evidence that the respondent is imprisoned for more than two years and has not provided for the child's proper care and custody. Although the trial court in this case found that respondent's incarceration would exceed a two-year period, her inability to personally provide care for BB was not dispositive because a parent need not be personally able to do so. Rather, proper care and custody can be achieved through a relative. Therefore, although evidence that respondent planned to place BB with her brother after the petition was filed was insufficient to defeat a finding of statutory grounds for jurisdiction under MCL 712A.2(b), this same evidence was sufficient to support a finding that respondent provided for BB's proper care and custody under MCL 712A.19b(3)(h). Because BB was placed with respondent's brother, regardless of the DHHS's involvement, respondent provided proper care and custody. Additionally, other evidence showed that respondent was utilizing services while in prison that would allow her to care for BB when respondent was released from prison. Therefore, the court clearly erred when it concluded that termination of parental rights was proper under MCL 712A.19b(3)(h). Termination was also not proper under MCL 712A.19b(3)(j). The record showed that respondent was demonstrating appropriate parenting during parenting time with BB and seeking to improve her parenting skills through parenting classes, and she was making plans and progress toward supporting herself and BB after her release from prison. In light of respondent's undisputed progress toward reunification, to the extent that the court found a reasonable probability of harm if BB was returned to respondent's care, its finding was clearly erroneous.

MARKEY, J., concurring in part and dissenting in part, agreed with the lead opinion that the trial court properly took jurisdiction over BB but disagreed that the court committed clear error in finding clear and convincing evidence in support of termination. Judge MARKEY noted that although the trial court did not specifically refer to either statutory provision raised in the petition, the record was sufficient to show that the court terminated respondent's parental rights under MCL 712A.19b(3)(h).

The record was clear that respondent would be incarcerated for at least three years, depriving BB of a normal home for a period exceeding two years; that she had not provided for BB's proper care and custody; and that there was no reasonable expectation that respondent would be able to do so within a reasonable time considering BB's age. Moreover, Judge MARKEY noted that with respect to an older child to whom her rights had also been terminated, respondent had a poor record of parenting and had failed to adhere to a parenting plan just before she was incarcerated. Therefore, the court properly gave greater weight to respondent's recent record of parenting while not incarcerated than to her record of good behavior and progress toward reunification while in the highly structured environment of prison. Judge MARKEY would have affirmed termination of parental rights.

GLEICHER, J., concurring in part and dissenting in part, agreed with the lead opinion that the trial court clearly erred when it terminated respondent's parental rights but disagreed that the court had properly assumed jurisdiction of BB, and she would have vacated the trial court's adjudication order. Judge GLEICHER believed that respondent's plea was defective because she did have an appropriate plan for BB, noting that she had planned for BB's care and supervision prior to BB's birth with the prison's pregnancy counselor and that the DHHS had placed BB with respondent's brother and sister-in-law in accordance with respondent's expressed wishes. Additionally, Judge GLEICHER disagreed that respondent had left BB "without proper custody or guardianship," noting that before the petition was filed by the DHHS, respondent had participated in the placement plan to the extent that she was able to do so while incarcerated. Judge GLEICHER believed that the trial court and the Court of Appeals had improperly relied on respondent's incarceration in concluding that the court had statutory grounds to assume jurisdiction, contrary to *In re Mason*, 486 Mich 142 (2010).

Swiderski & Ward PC (by *David J. Swiderski*) for respondent.

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

M. J. KELLY, J. Respondent appeals as of right the trial court order terminating her parental rights to

her minor child, BB, presumably[1] under MCL 712A.19b(3)(h) and MCL 712A.19b(3)(j). On appeal, respondent challenges the trial court's decision to take jurisdiction over BB and its decision to terminate her parental rights. We affirm the trial court's order taking jurisdiction over the child because respondent cannot establish plain error affecting her substantial rights with regard to that decision. We vacate the trial court's termination order, however, because after review of the whole record we are left with a definite and firm conviction that the trial court made a mistake by finding clear and convincing evidence of statutory grounds to terminate respondent's parental rights to BB.

I. BASIC FACTS

In October 2017, respondent and two men entered her father's home. Using a baseball bat, the two men robbed and attacked respondent's father. Respondent and the men left, leaving respondent's father badly beaten. Although respondent did not know it at the time of the armed robbery, her young son was in the home, and as a result of the robbery was left without proper care and custody.[2] On January 3, 2018, respondent was arrested for the armed robbery of her father. She

[1] Although the trial court order states that the court found statutory grounds to terminate respondent's parental rights, the trial court wholly failed to specifically identify the statutory grounds it found had been established. Petitioner, the Department of Health and Human Services, however, sought termination under MCL 712A.19b(3)(h) and (j), and the trial court's findings—despite being myopically focused on best interests—arguably indicate that it found both statutory grounds satisfied. The trial court's findings will be discussed in detail later in this opinion.

[2] Respondent's son was removed from her care approximately one week later. Her parental rights to her son were subsequently terminated and are not at issue in this appeal.

pleaded guilty, and in May 2018, she was sentenced to 5 to 20 years in prison. Her earliest release date is January 8, 2023.

Respondent did not discover that she was pregnant with BB until after she was incarcerated. Respondent testified that she knew Child Protective Services (CPS) would be involved, and she recounted that before she gave birth she spoke with a pregnancy counselor, who "set up a plan." At the termination hearing, respondent testified that she had three alternative plans for when the child was born: to place the child with her mother, with her brother and sister-in-law, or with a close family friend until respondent was released from prison. Respondent believed that the pregnancy counselor was trying to implement one of the plans, and she believed that the child would be provided with care via a legal guardianship. BB was born in September 2018.

Within days of BB's birth, the Department of Health and Human Services (DHHS) filed a petition seeking temporary custody of BB, alleging that respondent was incarcerated, was unable to physically provide care for BB, and had "not provided an appropriate plan for [BB's] care and supervision." At the time that the petition was filed, BB was at the hospital and no plan for her care had been successfully implemented. At the initial preliminary hearing, a CPS worker informed the court that respondent "would like" BB "to reside with [respondent's] biological brother." And respondent stated that she would not need a lawyer "if we got everything figured out." On further questioning from the court, respondent explained that the plan was for BB to reside with respondent's brother. Thereafter, the child was placed with respondent's brother. No guardianship was put in place, however. On October 9, 2018, respondent entered a plea of admission to the allegations in the petition, and the trial court found that,

given respondent's admission, there was a statutory basis under MCL 712A.2(b)(1) to assume jurisdiction of BB.

Respondent was provided with a Parent Agency Treatment Plan, which required her to address her issues with substance abuse, to improve her deficient parenting skills, and to improve her emotional stability.[3] At the termination hearing, respondent's caseworker testified that respondent was compliant with her case planning, noting that respondent "actually did a really good job all things considered." Furthermore, respondent testified that she had completed a parenting class and that she was able to incorporate some of the techniques she learned into her weekly parenting-time sessions with BB. Respondent also testified that she was taking GED classes and that she anticipated earning her GED within one month. She was on a waiting list for cosmetology training, which she hoped would permit her to obtain employment shortly after her release from prison. In addition, respondent testified that she was on the waiting list for other services, including an additional parenting class, a program that would allow her to record herself reading a book and to send the recording to her child, and Narcotics Anonymous (NA) classes. Respondent was also participating in a "Moving On" class, which she explained had taught her how to distinguish good relationships from

[3] We note that the case services plan, even at the outset, demonstrated that the DHHS did not genuinely intend to allow for the possibility of reunification. The initial case services plan stated that "[d]ue to [respondent's] being incarcerated for an extended period, it would be in the child's best interest to change her permanency planning goal to adoption." In another section, the report candidly states that "[d]ue to the length of time [respondent] will be incarcerated, it is in [BB's] best interest to change the goal to adoption . . . ." The case services plan was signed October 2018, which is before respondent even had an opportunity to attempt to participate in reunification services.

bad relationships. Respondent's Moving On instructor indicated to her that after completing the class, if she did well, she could become eligible for an earlier release from prison.[4] The caseworker explained that she received documentation showing all the services that respondent had participated in, the services she was on a waiting list for, and the dates of services completed. She also agreed that respondent's testimony regarding her services while incarcerated was "accurate." The caseworker also testified that the prison staff reported that respondent was compliant and had not "gotten into any trouble" or received any tickets since being incarcerated.

Despite respondent's undisputed compliance with the case services plan, on March 27, 2019, the DHHS filed a petition to terminate respondent's parental rights. The petition alleged that termination was proper under MCL 712A.19b(3)(h) and MCL 712A.19b(3)(j). Following a termination hearing, the trial court made a number of factual findings allowing for an inference that it found statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(h) and MCL 712A.19b(3)(j), and it found that termination of respondent's parental rights was in BB's best interests.

This appeal follows.

II. JURISDICTION

A. STANDARD OF REVIEW

Respondent argues that the trial court erred by finding grounds to exercise jurisdiction under MCL 712A.2(b)(1). Respondent did not challenge the court's

[4] Although the DHHS attempted to introduce evidence that respondent would not, in fact, be eligible for an early release, the trial court declined to take judicial notice of the evidence.

jurisdictional decision until after the court entered an order terminating her parental rights. Accordingly, we review her challenge for plain error affecting her substantial rights. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). In order to prevail, respondent "must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected [her] substantial rights." *Id*. "A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.' " *In re Pederson Minors*, 331 Mich App 445, 463; 951 NW2d 704 (2020) (citation omitted). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). Moreover, reversal is unwarranted unless the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Ferranti*, 504 Mich at 29 (quotation marks, citation, and brackets omitted).

B. ANALYSIS

Respondent argues that the trial court erred by assuming jurisdiction over BB because the facts that respondent admitted to are insufficient to support a finding of statutory grounds under MCL 712A.2(b)(1). She has not, however, established that an error occurred, that it was plain, and that it affected her substantial rights. Nor has she offered any analysis as to how the alleged plain error seriously affected the fairness, integrity, or public reputation of the child-protective proceedings.

After authorizing a petition to take jurisdiction over a minor child, the trial court "can exercise jurisdiction [over the child] if a respondent-parent enters a plea of admission or no contest to [the] allegations in the

petition . . . ." *Ferranti*, 504 Mich at 15; MCR 3.971.[5] However, before it may do so, the court must find that a statutory basis exists for exercising jurisdiction over a minor in a child-protective proceeding. *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). Thus, even if a respondent enters a plea of admission to all or some of the allegations in the petition, the trial court may not accept that plea "without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true . . . ." MCR 3.971(D)(2). If the trial court does not establish support for a finding that one or more of the statutory grounds alleged in the petition is true, then the respondent's plea of admission is invalid because it is not an accurate plea. MCR 3.971(D)(2).

The court in this case exercised jurisdiction over BB under MCL 712A.2(b)(1), which provides:

> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or *who is without proper custody or guardianship*. [Emphasis added.]

Under this statutory provision, there are a number of alternative grounds for taking jurisdiction. Relevant to this appeal, the trial court specifically stated in its written order of adjudication that it was exercising

[5] The court may also exercise jurisdiction over the child if the DHHS proves the allegations alleged in the petition at a trial. *Ferranti*, 504 Mich at 15.

jurisdiction over BB because there was "a lack of proper custody or guardianship."[6] The phrase "without proper custody or guardianship" is defined by the statute, which provides that " '[w]ithout proper custody or guardianship' does not mean a parent has placed the juvenile with another person who is *legally responsible* for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance." MCL 712A.2(b)(1)(C) (emphasis added).

At the adjudication hearing, respondent's lawyer indicated that respondent desired to enter a plea of admission to the allegation of improper supervision contained in ¶ B of the petition. After the court advised respondent of the rights she was giving up by entering a plea and the consequences of entering a plea, respondent testified. She admitted that she was BB's mother, that she was incarcerated for armed robbery, and that her earliest release date is January 8, 2023. The following exchange then occurred between respondent's lawyer and respondent:

> *Q*. And because you-re in the—because you're there at least through 2023, are you able to care for [BB]?
>
> *A*. No, I can't.
>
> *Q*. You can't provide physical care for [BB] at this time?
>
> *A*. No.
>
> *Q*. And you wouldn't be able to provide any financial care at this time, minimal?
>
> *A*. No.
>
> *Q*. All right. And basically the last thing says that you don't really have a—*you do have a plan but you don't*

[6] "[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).

really have an appropriate plan for [BB] at this point in time? You have some ideas of what you'd like to do with her?

A. Yeah.

Q. But you can't really do 'em cause you're in there, correct?

A. Yeah.

Q. Okay. And you can't again and I've already asked this kind of but you can't provide any supervision, you can't watch her or do anything with her at this time?

A. No. [Emphasis added.]

Viewing the above, it is clear that respondent admitted that she was incarcerated. Although respondent also stated that she had an "idea" of what she wanted to happen and that she had a "plan," she nevertheless testified—under oath—that she did not have an *appropriate* plan for BB's care. Given respondent's testimony, therefore, the court could find—and did find—that BB was left without proper custody and guardianship. Because respondent's testimony was sufficient to establish support for a finding that jurisdiction was proper under MCL 712A.2(b), we discern no plain error in the court's decision.

Despite her testimony that she did not have an appropriate plan for BB's care, respondent contends on appeal that jurisdiction was not proper because BB was placed into the care of respondent's brother and his home was not unfit. Caselaw supports that if *a parent* places a child in the care of a relative whose home is not unfit, then the "without proper custody or guardianship" language is not satisfied. For example, in *In the Matter of Curry*, 113 Mich App 821, 824, 826-827; 318 NW2d 567 (1982), this Court held that the trial court erred by finding the respondents' children had been left "without proper custody or guard-

ianship" because the respondents had placed their children in the custody of relatives before the probate court hearing and there was no evidence showing that the children's living environment was unfit or unwholesome. The Court explained that "[u]ntil there is a demonstration that the person entrusted with the care of the child by that child's parent is either unwilling or incapable of providing for the health, maintenance and well being of the child, the state should be unwilling to interfere." *Id*. at 826-827. Similarly, in *In re Ward*, 104 Mich App 354, 360; 304 NW2d 844 (1981), this Court held that a child "who was placed by her natural mother in the custody of a relative who properly cared for her . . . is not a minor 'otherwise without proper custody or guardianship' " under MCL 712A.2(b)(1).

In this case, unlike the respondents-parents in *Ward* and *Curry*, there is no evidence that respondent placed her child with any relative before the petition was filed. See *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004) (holding that because MCL 712A.2 "speaks in the present tense, . . . the trial court must examine the child's situation at the time the petition was filed"). Instead, at the time the petition was filed, BB was in the hospital. And, although respondent had been discussing arrangements for BB's care with a pregnancy counselor, respondent did not implement any of the potential plans prior to the filing of the petition. Again, as noted above, respondent testified at the termination hearing that she had "three plans for when the baby was born." And she stated that she "thought" the care was supposed to be through a guardianship, which is what the pregnancy counselor was "trying to work out." However, she agreed that "something happened and the guardianship wasn't done." No guardianship was ever established, either before or after the adjudication hearing was held. As a result, notwithstanding

the child's placement with respondent's brother at the time she entered her plea of admission, respondent cannot show plain error.

Finally, even if respondent could show plain error, she made no attempt to establish that the plain error affected her substantial rights. Respondent made a decision to enter a plea of admission to the allegations in the petition. As a result, the adversarial process was never engaged. We can glean from the record that respondent discussed multiple options for giving a guardianship over BB to a relative or a close family friend. We cannot, however, discern whether any relative or family friend was willing—prior to the involvement of the DHHS—to actually serve as the child's guardian. We could discern that respondent's brother was willing to take care of the child. The record shows that he and his wife—after the DHHS became involved—accepted placement of the child. But the record also reflects that he thought adopting BB was the best option. There is nothing indicating that he would have accepted a legal guardianship as an alternative. Nor is there any indication that, again, absent the involvement of the DHHS, he would have been willing and capable of providing for BB's care and custody for the duration of respondent's incarceration. Ultimately, because respondent entered a plea of admission, these factual matters remain ambiguous, open to speculation either in support of or in opposition to respondent's argument on appeal. Speculation and suspicion that a plain error may have occurred is insufficient to establish a reasonable probability that the outcome of the proceedings would have been different. For the same reasons, we conclude that even if there were an error, it did not seriously affect the integrity, fairness, or public reputation of the child-protective proceedings.

The trial court did not err by finding statutory grounds to exercise jurisdiction under MCL 712A.2(b).

III. TERMINATION OF PARENTAL RIGHTS

A. STANDARD OF REVIEW

Respondent next argues that the trial court erred by finding statutory grounds to terminate her parental rights. Challenges to a court's finding that a statutory ground for termination has been established are reviewed for clear error. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake." *In re Dearmon*, 303 Mich App 684, 700; 847 NW2d 514 (2014). We defer to the trial court's special opportunity to view the witnesses before it. *Id*.

As recently explained by this Court in *Pederson Minors*, 331 Mich App at 472 (some alterations in the original):

> "To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App [30, 32; 817 NW2d 111 (2011)]. The clear and convincing evidence standard is "the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Evidence is clear and convincing if it
>
> > produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the

> truth of the precise facts in issue. [*Id*. (quotation marks, citation, and brackets omitted).]
>
> "Evidence may be uncontroverted, and yet not be 'clear and convincing.' " *Id*. (quotation marks and citation omitted). "Conversely, evidence may be 'clear and convincing' despite the fact that it has been contradicted." *Id*. (quotation marks and citation omitted).

B. ANALYSIS

We first address whether reversal is required because the trial court failed to specifically identify the statutory grounds upon which it was terminating respondent's parental rights. MCR 3.977(I)(3) provides that "[a]n order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order." The court must "state on the record or in writing its findings of fact and conclusions of law[;] [b]rief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1). In its lengthy opinion, the trial court did not specifically identify either MCL 712A.19b(3)(h) or (j) as a basis for its termination decision, nor did it directly quote the language of either statutory provision. In fact, the language used in its opinion showed that, as it related to respondent,[7] the court was focused exclusively on the best interests of the child.[8] Nevertheless, in its

[7] In contrast, when determining whether to terminate the parental rights of BB's unidentified father, the court specifically found that termination was proper under MCL 712A.19b(3)(a)(*i*) because the father had deserted BB for a period of 28 or more days and had not sought custody during that period. Then, only after finding statutory grounds for termination, the court turned to whether termination of the father's parental rights was in BB's best interests.

[8] The trial court, for example, discussed the existence of a bond between BB and respondent, but determined the child's bond with the

written order, the court did proclaim that it found statutory grounds to terminate respondent's parental rights. And although an articulation of the statutory grounds and the facts the court found to support them would have greatly aided this Court's review, the findings the court did make are adequate for appellate review.

The DHHS sought termination under MCL 712A.19b(3)(h) and (j), presented evidence in support of those statutory grounds, and argued during closing that the grounds had been established by the evidence presented. Termination is proper under MCL 712A.19b(3)(h) if the court finds by clear and convincing evidence:

> The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

As explained by our Supreme Court in *In re Mason*, 486 Mich 142, 160-161; 782 NW2d 747 (2010), "MCL 712A.19b(3)(h) authorizes termination only if *each* of [the] three conditions" set forth in the statute are met. We examine each condition in turn.

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foster parents (who had more contact with BB) was stronger. The court then stated that "[t]he child has a great need for permanency, stability and finality," noting her young age and her possibility of developmental delays. The court considered, at length, the "advantage[s] of the foster home over the parent's home," as well as the existence of a bond between BB and her cousins. The court expressly stated that "[t]he child is doing extremely well in current care" and noted that the "possibilities of adoption in the current placement is great." Then, finally, the court looked at "the issue of relative placement," but determined that it did not outweigh the need to terminate. Ultimately, at the conclusion of all of its findings of fact, the court stated that it was in BB's best interests to terminate respondent's parental rights.

First, the court must find by clear and convincing evidence that the respondent "is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years . . . ." MCL 712A.19(b)(3)(h); *Mason*, 486 Mich at 160. The second condition requires the trial court to find that "the parent has not provided for the child's proper care and custody." MCL 712A.19(b)(3)(h); *Mason*, 486 Mich at 160. Here, the court found that respondent's earliest release date was January 8, 2023, which means that respondent's incarceration will necessarily exceed a two-year period. Furthermore, it is clear that, because she is imprisoned, respondent will be unable to provide a normal home for BB for a period exceeding two years. Yet, respondent's inability to personally provide care for her child is not dispositive because a parent does not have to be personally able to provide proper care and custody. Rather, he or she can "achieve proper care and custody through placement [of the child] with a relative." *Mason*, 486 Mich at 161 n 11. In this case, the record reflects that respondent and the DHHS worked together to place BB with respondent's brother. It does not matter that the child was placed with the DHHS before respondent could voluntarily place the child with her brother. See *id*. at 163-164. BB was, in fact, placed in the care of respondent's brother, who as recounted by the trial court, was providing exceptional care and custody for the child in respondent's absence. Therefore, given that the undisputed record shows that respondent was providing proper care and custody to BB by placing her with a relative, we are left with a definite and firm conviction that a mistake was made.[9]

[9] It should be noted that MCL 712A.19b(3)(h) requires a finding that a parent has not provided for a child's *proper care and custody*, and our Supreme Court has expressly held that a parent can achieve proper care

In addition, there is insufficient evidence to support a finding that the third element of MCL 712A.19b(3)(h) is satisfied. The third condition "is forward-looking" and "asks whether a parent 'will be able to' provide proper care and custody within a reasonable time." *Mason*, 486 Mich at 161. In this case, the caseworker opined that it would take respondent 8 to 12 months after being released from prison to be able to provide BB with proper care and custody, noting that respondent would have to maintain stable housing and employment, have childcare in place, participate in substance-abuse classes or NA meetings, and participate in parenting classes. Yet, the caseworker acknowledged that her opinion was "based on the normal life span of a CPS case." The caseworker's opinion, thus, is "largely unsupported" by evidence specific to *respondent's circumstances*. See *id*. at 162 (noting that the trial court erred by relying on a caseworker's largely unsupported opinion regarding how long it would take the respondent to provide care after being released from prison).

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and custody by placing a child with a relative. *Mason*, 486 Mich at 163-164. The fact that the placement may occur after the trial court has exercised jurisdiction under MCL 712A.2(b), and that the placement may have only been accomplished with the aid of the DHHS and the court, is irrelevant. The evidentiary standard requires proof by clear and convincing evidence. In contrast, MCL 712A.2(b)(1)(C) provides that a child is without proper care and custody if the parent does not place the child with someone legally responsible for that child's care. Further, it requires the court to examine the circumstances *at the time the petition is filed*. *In re MU*, 264 Mich App at 279. The evidentiary standard only requires proof by a preponderance of the evidence. Therefore, although evidence that respondent planned with the DHHS to place BB with her brother and that BB was actually placed with respondent's brother after the petition was filed is insufficient to defeat a finding of statutory grounds for jurisdiction under MCL 712A.2(b), that same evidence is sufficient to support a finding that the respondent did, in fact, provide for her child's proper care and custody under MCL 712A.19b(3)(h).

Moreover, the caseworker's unsupported opinion was contradicted by the evidence admitted at the termination hearing. First, while in prison, respondent had completed a parenting class and was on a waiting list for another one. She was able to incorporate some of the techniques she learned into her parenting-time visits. There are no reports that she was inappropriate at parenting time.[10] Therefore, even if she had to take another parenting class upon release from prison, there is nothing to suggest that she might need to take multiple classes or that her parenting skills would be at a preprison level such that it would take her up to a year to resolve any parenting problems. Second, respondent was on a waiting list for cosmetology school and intended to seek employment in that field upon release. She was also in the process of obtaining her GED. Therefore, although the caseworker opined that employment might be a problem, it was a problem that respondent was actively seeking to remedy prior to her release. Third, despite the caseworker's opinion that respondent might not have any support to assist her in caring for her daughter, the record reflects that her parents were very supportive of her. Moreover, given the undisputed bond between respondent's brother's family and BB, it defies logic to assume that respondent's brother would be unwilling to provide any assistance with BB's care once respondent was released from prison. Finally, with regard to housing, respondent stated that she intended to reside with her parents until she could earn enough money for her own

[10] The caseworker testified that, although none of the visits was observed by her, the foster parents reported that BB would cry "a lot" during the visits. However, the foster parents apparently attributed the crying to being at the prison. In addition, given that BB was an infant at the time, it would have been more alarming if she did not cry at all during the visits.

apartment. There is nothing on the record to suggest that she would be required to live independently before her child could be returned to her.

Finally, the trial court found that respondent was complying with her services and was doing well in prison, which further negates an inference that she somehow would be noncompliant with services if released.[11] Specifically, the trial court found—and the record confirms—that

> since [respondent's] been incarcerated since January of 2018, she's done extremely well. And while in prison, it appears she's a model prisoner. She's been doing everything she could, doing all the classes she can, doing parenting classes. . . .
>
> * * *
>
> It sound like things are going very, very, very well in prison for her and that's a good thing. And what's also telling of the type of family she has is that even she says here today that her goal would be once she's released from prison, that she'd probably return to her father's home. That's where her son is apparently and where this crime occurred that caused her to go to prison. And so her family has apparently forgiven her. She's indicated that her mother, her father, brother or sister brings [BB] up for parenting time with her and that she's apparently mended whatever damage she's done with her family which is a good thing and it really shows what kind of a strong family they have . . . .
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> * * *

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[11] The trial court recited respondent's history of noncompliance with services in an earlier child-protective proceeding. However, given that respondent *had* been compliant for nine months and was still seeking out services, the inference of noncompliance created by her conduct in the earlier case was weakened.

> The parent's compliance with [the] case service plan has been great as far as [respondent] has been concerned. . . . [S]ince this child has come into care which was shortly after birth in September of 2018, she has done everything possible that she could. [Respondent] has done every program that she can get her hands on while she's institutionalized. She's been doing the visits that she could. Her parenting visitation with the child, the history of visitation has been extremely good. Any time she can, she's there, and has been showing she's trying to do what she can to better herself and if at all possible to have the child returned to her care. So she's done very well with compliance with the case service plan as well as visitation.

Considering all of the above, we are left with a definite and firm conviction that the court made a mistake by terminating respondent's parental rights under MCL 712A.19b(3)(h).

In addition, termination was not proper under MCL 712A.19b(3)(j). The court may terminate a parent's parental rights under Subdivision (j) if it finds by clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Again, the record reflects that—despite her prior history—respondent was compliant with services and was seeking out additional services. She was demonstrating appropriate parenting during the parenting-time visits and was making plans for how to support herself and BB in the future, including by earning a GED and attending vocational school while in prison. Her family was supportive of her, both financially and emotionally, and would visit her at the prison. Respondent's behavior in prison was exemplary, with the prison staff reporting that she had no tickets and was not causing any trouble. In light of respondent's undisputed progress toward reunification, to the extent that the court

found a *reasonable* probability of harm to BB if returned to respondent's care, the court's finding was clearly erroneous.

IV. CONCLUSION

The trial court did not plainly err by exercising jurisdiction over BB under MCL 712A.2(b)(1). Accordingly, we affirm the order of adjudication. However, because the court clearly erred by finding statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(h) and (j), we vacate the trial court's termination order.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

MARKEY, P.J. (*concurring in part and dissenting in part*). I fully agree with the analysis and conclusion set forth in the lead opinion with respect to the adjudicative phase of the proceedings and the determination that the trial court had jurisdiction. But I strongly disagree with my colleagues that the trial court committed clear error by finding clear and convincing evidence in support of termination. I would affirm the order terminating respondent-mother's parental rights under MCL 712A.19b(3)(h) (parent is imprisoned for such a period that the child will be deprived of a normal home for more than two years). Accordingly, I concur with regard to the issue of jurisdiction and dissent on the matter of termination under MCL 712A.19b(3)(h).

With respect to the dispositional phase of the proceedings and termination, I begin with respondent's argument that the court failed to articulate the specific statutory grounds upon which it was terminating her parental rights. MCR 3.977(I)(3) provides that "[a]n

order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order." The court must "state on the record or in writing its findings of fact and conclusions of law[,] [and] [b]rief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1).

The Department of Health and Human Services (DHHS) pursued termination under MCL 712A.19b(3)(h) and (j). Section 19b(3)(h) provides for termination when "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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." Section 19b(3)(j) provides for termination when "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

My review of the trial court's ruling from the bench reveals that the court did not specifically refer to § 19b(3)(h) or (j).[1] The court did, however, devote a great deal of time to discussing respondent, her lengthy imprisonment, BB, and BB's best interests. But, the fact is, although the trial court implied as much, it did not make the requisite specific findings that there existed a reasonable likelihood that BB

[1] The order terminating respondent's parental rights also did not specifically identify the particular statutory ground or grounds that the court relied on in making its ruling.

would be harmed if placed in respondent's care. Therefore, I must agree that termination cannot be affirmed on the basis of § 19b(3)(j).

On the other hand, the record is more than adequate to discern that the trial court terminated respondent's parental rights under § 19b(3)(h). The trial court noted the horrendous armed robbery that respondent aided and abetted against her own father, a crime that left her father near death, that was perpetrated in the presence of her own son, and that led to her conviction for armed robbery and a lengthy prison sentence. The court also observed that respondent would serve at least three years before she might be released from prison. Further, the trial court heavily referenced the prior termination proceedings regarding respondent's son (BB's half-brother) who was present during the crime and who is not at issue here.[2]

The trial court additionally alluded to the three-month period before respondent was arrested and incarcerated for armed robbery in January 2018. While acknowledging that respondent had done well in prison, the court stressed that that three-month window was "the only time that [it could] really look at to determine what [respondent] would be like outside of incarceration because she has been incarcerated since

[2] In October 2017, respondent participated in the armed robbery. The DHHS removed respondent's son from her care in November 2017. In January 2018, respondent was arrested for aiding and abetting the armed robbery. After pleading guilty, she was sentenced to 5 to 20 years' imprisonment in May 2018. Her earliest release date is January 8, 2023. BB was born in September 2018 while respondent was in prison. In November 2018, respondent's parental rights to her son were terminated, and respondent did not appeal that termination. In the proceedings regarding her son, respondent failed to comply with her treatment plan with respect to participating in substance-abuse counseling, random drug screens, parenting education, and mental health services.

January of 2018." Moreover, the court noted that respondent had failed miserably at compliance with the treatment plan and that she then basically disappeared. The trial court further stated:

> Obviously, [respondent] is unable to provide for [BB] and her parenting ability, as far as we could tell with the other child, is extremely poor. The child was left with [respondent's] dad a lot apparently and left with other people and she appears to have some issues when she is stressed and possibly some developmental problems herself and certainly did not have great parenting skills when she was with the other child.

The court reiterated that it would be about three years, at the earliest, before respondent was released from prison. The trial court continued:

> And then obviously the child would not be back in her care immediately. She'd have to once again show that she's dealing with whatever issues she needs to deal with, including any mental health issues, work-related issues, housing issues, looking at whether she has a substance abuse problem and whether or not that would come to light again once she's released so there's a lot of things that would have to be taken care of before this child would be able to be returned home. So at minimal, we're looking at three-and-a-half to four years. And right now [BB] is . . . almost nine months old so we're looking at a child who would most likely be five years old before she's looking at being returned to the care of her mother.

The court additionally found that "the fact that [BB] would be almost five years old before there'd be any chance of reunification make[s] it clear that we cannot for this child's sake allow — not terminate today." The trial court then concluded that "[t]here is clear and convincing evidence that a statutory basis exists for the termination of parental rights . . . ."

When read in context and in their entirety, the court's observations and findings as discussed above sufficed to reflect a proper determination that respondent was imprisoned for a period exceeding two years, that she had not provided for BB's proper care and custody, and that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering BB's age. MCL 712A.19b(3)(h).

Next, respondent contends that even assuming the statutory grounds the court relied on were MCL 712A.19b(3)(h) and (j), the court clearly erred by finding that those grounds were proven by clear and convincing evidence. Given my conclusion regarding § 19b(3)(j), I examine this issue solely in the context of § 19b(3)(h). And I again strongly disagree with the lead opinion that the trial court clearly erred by terminating respondent's parental rights under § 19b(3)(h).

If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding . . . is clearly erroneous if the reviewing court has a definite and firm conviction that

a mistake has been committed[.]" *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). When applying the clear-error standard in parental termination cases, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); see also MCR 2.613(C).

"A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). The doctrine of anticipatory neglect provides that how a parent treats one child is probative of how that parent may treat other children. *In re LaFrance Minors*, 306 Mich App 713, 730; 858 NW2d 143 (2014). It is clear that the trial court in the instant case relied on these two legal principles or doctrines in making its ruling, emphasizing respondent's treatment-plan failures in relation to her son. I find no clear error in the court's doing so. Respondent's abysmal failures resulting in the termination of her parental rights to her son reflected an inability to properly care for a child. Respondent's failure to comply with her treatment plan and to utilize services designed for her did not occur years ago—they occurred immediately *before* respondent was incarcerated. Respondent's in-prison compliance with the treatment plan *while in the early stages of her imprisonment* was not enough to be predictive of her future and overcome or obviate the reality of her prior conduct. For the factual and legal reasons the trial court carefully articulated and that I recited, quoted, and referenced earlier, I cannot conclude that the court clearly erred by finding that there was clear and convincing evidence to support termination of respondent's parental rights to BB under MCL 712A.19b(3)(h). Respondent does not challenge the

trial court's ruling regarding BB's best interests, so it is not our job to do so here.

I certainly recognize that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010). I also acknowledge that "Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative." *Id*. at 161 n 11. But here, respondent not only has a serious history of poor parenting and a prior termination of rights regarding an older child, she will be in prison for several more years. BB will be four years old when or if her mother is released in January of 2023. Respondent will be a complete stranger to this child who will have been living in a stable environment her entire life. And we must not be oblivious to the fact that respondent's incarceration arose from her assistance in a frightening, near-fatal assault against her own father while he was caring for her son, the child respondent lost in her prior termination proceedings. My colleagues view this case in a vacuum, focusing exclusively on respondent's time in prison, i.e., while in a very structured, confined, and controlled setting, far removed from her everyday life. But respondent's "good" behavior during this period of imprisonment is, frankly, in my view, irrelevant to predicting her behavior three-plus years in the future upon release from prison. My colleagues' focus on this period in concluding that the trial court *clearly* erred by terminating respondent's rights to BB is mystifying at best, and in my opinion, legally incorrect. My colleagues are also misguided in their focus on BB instead of giving context to the proceedings and considering the far more telling circumstances pertaining to the previous termination of respondent's parental rights to her son and her long-term, unacceptable, pre-incarceration behavior.

Along with the termination of her parental rights to her son and her treatment-plan failures, we must also consider, as did the trial court, respondent's psychological status. According to a caseworker from the DHHS, respondent's psychological evaluation indicated that she was detached from her son, that she was "extremely dependent on others," and that she was fearful of rejection and abandonment. The psychological report further revealed that respondent's cognitive functioning fell within a "borderline range" and that she would have difficulty with planning and anticipating situations and consequences in her life. In terms of parenting, respondent was deemed at risk for patterns of abuse and neglect. Additionally, the psychological report noted that respondent was "quite self-preoccupied," easily overwhelmed, and would have difficulties subjugating her needs to the needs of a child. Surely this evidence, coupled with respondent's undisputed history, weighs far more heavily and serves as a far better predictor of respondent's behavior three years hence than does her conduct exhibited during only the first year or so of her 5-20 year prison sentence. How can my colleagues conclude under these facts that the trial court clearly erred?

I do not read *In re Mason* for the proposition that an imprisoned parent can avoid termination under § 19b(3)(h) in all cases where the child at issue is placed with relatives who provide the child with proper care and custody. In the instant case, the termination of respondent's parental rights to her son, her past noncompliance with services and failure to provide proper care or custody to a child, and her precarious psychological state all support the trial court's basis for termination under MCL 712A.19b(3)(h) no matter that respondent's brother and sister-in-law were caring for BB. In sum, there was sufficient evidence showing that

BB would be deprived of a normal home for a period exceeding two years due to respondent's imprisonment, that respondent had not provided for BB's proper care and custody,[3] and that there was no reasonable expectation that respondent would be able to provide proper care and custody "within a *reasonable* time considering [BB's] age." MCL 712A.19b(3)(h) (emphasis added). In my view, reversal is wholly unwarranted. I would affirm the termination of respondent's parental rights. Finally, I urge the DHHS to seek leave to our Supreme Court for the important task of clarifying this issue.

I concur in part and dissent in part.

GLEICHER, J. (*concurring in part and dissenting in part*). The lead opinion holds that the circuit court erred by terminating respondent's parental rights based on evidence that did not satisfy the clear and convincing standard, and I agree. But I respectfully disagree that the circuit court properly assumed jurisdiction in the first place. The child at issue, BB, was not "without proper custody" at the time of the adjudication hearing, and that fact should have precluded a jurisdictional finding.

I. THE ADJUDICATION ERRORS

As the lead opinion explicitly acknowledges, a court may not accept a respondent's plea to jurisdiction "without establishing support for a finding that one or more of the statutory grounds alleged in the petition

[3] I note that it was not "the parent" who "provided for the child's proper care and custody," MCL 712A.19b(3)(h); rather, it was the DHHS that ultimately provided for BB's care and custody by placing her with respondent's brother and sister-in-law. Respondent simply had multiple unexecuted ideas regarding BB's care.

are true[.]" MCR 3.971(D)(2).[1] "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *In re Sanders*, 495 Mich 394, 405-406; 852 NW2d 524 (2014) (quotation marks, citation, and brackets omitted). "The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead." *In re Ferranti*, 504 Mich 1, 16; 934 NW2d 610 (2019). To avoid unwarranted disruption of a parent-child relationship and to safeguard a parent's rights, close adherence to the adjudicatory rules is required.

The lead opinion holds that the trial court properly assumed jurisdiction under MCL 712A.2(b)(1) because respondent-mother is incarcerated and had not provided an "appropriate" plan for BB's care. The record firmly refutes that conclusion. Respondent was incarcerated throughout her pregnancy and therefore could not have *personally* placed her newborn with the caregivers she selected. Nevertheless, respondent diligently planned for her newborn's care, and this fact was well-known to the Department of Health and Human Services (DHHS) before the court assumed jurisdiction. Shortly after her birth and weeks before the adjudication hearing, BB was safely placed with respondent's brother and sister-in-law, at respondent's suggestion. In my view, this placement deprived the court of jurisdiction.

Respondent learned of her pregnancy while in prison. With the assistance of the prison's "pregnancy counselor," respondent helped arrange for her brother

[1] At the time respondent's plea was taken, this requirement was codified at MCR 3.971(C)(2).

and his wife to assume custody of the child after her birth. Here is the relevant testimony at the first preliminary hearing, conducted in Washtenaw County four days after BB's birth (and before the newborn's hospital discharge):

> *The Court*: Do you want an attorney appointed?
>
> [*Respondent*]: I don't think I need one if *we got everything figured out*.
>
> *The Court*: Okay. I'm not sure what you mean by that but —
>
> [*Respondent*]: Well, cause my caseworker —
>
> *The Court*: All right. Well, I'll hear from you in a moment.
>
> [*Respondent*]: Okay.
>
> * * *
>
> *The Court*: . . . Ms. House [DHHS worker], do you know what she's referring to?
>
> *Ms. House*: Yes, your Honor. [*Respondent*] *would like* [*BB*] *to reside with her biological brother. I got his name over here, I'm sorry, and his wife in Van Buren County*.
>
> *The Court*: All right. *Well, is that what you were referring to*, [*respondent*], *when you said you have everything worked out?*
>
> [*Respondent*]: Yeah.
>
> *The Court*: Okay. That's the placement but what that doesn't address is your rights. . . . [Emphasis added.][2]

When the trial court further inquired about BB's placement, the DHHS worker advised, "A 588, a home

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[2] Respondent referred to the task of "figuring out" the child's placement as a *joint* enterprise: "*we* got everything figured out." The context, fairly read, makes the point unmistakable: respondent was personally and deeply involved in the placement process.

assessment with relative home assessment was already completed because they knew the baby was coming and that was the home that was speculated as to being able to provide for [BB]."

The preliminary hearing was continued so that the court could appoint counsel for respondent. At the continued hearing on October 2, the prosecutor advised that "[t]he child is placed with a relative, the respondent mother's brother in Van Buren County." BB remains in that placement today.

Given respondent's testimony at the preliminary hearing that she helped establish the placement, it was utterly disingenuous for the DHHS to proceed with a petition asserting that she "abandoned the child[] without proper custody or guardianship." See MCL 712A.2(b)(1). As the DHHS was aware, this contention was untrue.

The lead opinion asserts that jurisdiction was proper under a different clause of MCL 712A.2(b)(1), which refers to a child "who is without proper custody or guardianship." According to the lead opinion, quoting MCL 712A.2(b)(1)(C), the phrase "without proper custody or guardianship" is "defined" by the statute as follows: " 'Without proper custody or guardianship' does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance."

A sentence proclaiming what something does *not* mean hardly qualifies as a "definition." In my view, the statutory language ("without proper custody or guardianship") is plain and unambiguous. If a child has "proper custody" or is in a guardianship, a court may not take jurisdiction. I would read MCL 712A.2(b)(1)(C) as an *additional* caution that MCL 712A.2(b)(1) does not

apply when "a" parent has placed the child with a legally responsible person. In other words, MCL 712A.2(b)(1)(C) highlights that a court does not have jurisdiction when a child is being cared for by a legally responsible person, regardless of whether *the respondent* or the other parent arranged for the placement. This interpretation is easily synchronized with the "big picture" meaning of the words "without proper custody or guardianship." A child in "proper custody," even if placed there by a parent other than the respondent, is not subject to the court's jurisdiction.

BB was in "proper custody" before the adjudication because respondent did everything she could to achieve that placement. That she needed help arranging for that "proper custody" due to her incarceration is legally irrelevant. Our Supreme Court explained in *Sanders*, 495 Mich at 420-421:

> An incarcerated parent *can* exercise the constitutional right to direct the care of his or her children while incarcerated, and [the respondent-father] has tried to do just that. For example, an incarcerated parent can choose who will care for his children while he is imprisoned. *In re Mason*, 486 Mich [142, 161 n 11; 782 NW2d 747 (2010)] ("Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative."). [Citation omitted.]

The DHHS knew that BB was in "proper custody," the prosecutor knew it, respondent knew it, and respondent's attorney knew it, too. The circuit court should have similarly understood that BB was not legally subject to the court's jurisdiction, despite the contrived colloquy conducted by respondent's counsel:

> [*Respondent's Counsel*]: All right. And basically the last thing says that you don't really have a — you do have a

plan but you don't really have an appropriate plan for [BB] at this point in time? You have some ideas of what you'd like to do with her?

[*Respondent*]: Yeah.

[*Respondent's Counsel*]: But you can't really do 'em cause you're in there, correct?

[*Respondent*]: Yeah.

[*Respondent's Counsel*]: Okay. And you can't again and I've already asked this kind of but you can't provide any supervision, you can't watch her or do anything with her at this time?

[*Respondent*]: No.

That respondent could not personally provide "supervision" was not determinative or even relevant to the inquiry required under MCL 712A.2(b)(1). The pertinent question was whether respondent had arranged for someone else to do so. That question was never asked.[3] The answer was already in the record: she had. A fair reading of the questions and answers reveals that the questioner (respondent's counsel) understood full well that respondent had a "plan" for the child that would have defeated jurisdiction, and deliberately changed the subject to *present* care and custody.

Despite this inadequate testimony, the court accepted a plea to jurisdiction. To establish jurisdiction, the DHHS had to prove the allegations set forth in the petition by a preponderance of the evidence. MCR 3.972(C)(1) and (E). Alternatively, respondent could admit the allegations, as counsel attempted to accomplish here. MCR 3.971. But a plea of admission does

[3] The transcript is certainly susceptible to a reading that places responsibility for calculated avoidance of the central issue on the shoulders of respondent's counsel. That does not excuse the court or the DHHS from their independent obligations to recognize that this plea was defective.

not relieve the court of its responsibility to verify a plea's accuracy. MCR 3.971(D)(2).[4] Nor does a plea excuse a court from considering whether the facts admitted amount to an actual ground for taking jurisdiction. For example, in *Ferranti*, 504 Mich at 30, the Supreme Court held that the circuit court "violated MCR 3.971(C)(2) by failing to establish support for a finding that one or more of the statutory grounds alleged in the petition were true. Therefore, the manner in which the trial court assumed jurisdiction violated the respondent-mother's due process rights." Similarly, in *In re Wangler/Paschke*, 498 Mich 911, 911; 870 NW2d 923 (2015), the Supreme Court held that the circuit court "violated MCR 3.971(C)(2) by failing to establish support for a finding that one or more of the statutory grounds alleged in the petition were true." Here, the plea colloquy was inadequate and inaccurate, and the assumption of jurisdiction was therefore erroneous.

The lead opinion holds that because respondent testified that she did not have an "*appropriate*" plan for BB, the court correctly found that the child "was left without proper custody and guardianship." Therefore, the lead opinion continues, there was no plain error in the court's decision. The lead opinion fails to explain, however, why respondent's plan was inappropriate, particularly since the child remains to this day in the placement originally selected by respondent. Lest there be any doubt about the plan and respondent's role in forming it, the issue was revisited at the termination trial:

> *The Court*: Did you know that [Child Protective Services] would become involved with [BB]?

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[4] At the time respondent's plea was taken, this provision was codified at MCR 3.971(C)(2).

[*Respondent*]: Yeah.

The Court: Did you talk to an attorney or seek out any information about a guardianship for the baby?

[*Respondent*]: Yes, I talked to a pregnancy counselor.

The Court: Okay. What happened with that?

[*Respondent*]: She set up a plan. *I had three plans* for when the baby was born and she did a home check for them to take the baby.

The Court: So do you remember what the three options were, what the difference was?

[*Respondent*]: It was for mom to take her until I came home, and then it was my brother and my sister-in-law, and then there was also a family friend that would have took her until I came home.

The Court: And was that supposed to be through a guardianship?

[*Respondent*]: I thought so when I talked to the pregnancy lady, that's what she was trying to work out. [Emphasis added.]

This testimony unmistakably demonstrates that *respondent* made the plan that resulted in placement. The lead opinion dodges this fact by asserting that "there is no evidence that respondent placed her child with any relative before the petition was filed" and that "respondent did not implement any of the potential plans prior to the filing of the petition." True, but irrelevant.

First, respondent could not have personally made a placement because she was in prison. Second, *Sanders* instructs that "an incarcerated parent can choose who will care for [her] children" while the parent is incarcerated, and that is good enough. *Sanders*, 495 Mich at 421. The key is the parent's personal investment and involvement in the plan, not the ability to carry it out on her own. And to the extent that the lead opinion

insinuates that three plans do not constitute "a plan," I respectfully disagree. Good planners make backup, contingency plans. That is exactly what happened here. The record reflects that respondent did whatever she could from prison to see to it that her daughter was placed in a stable and appropriate relative's home.

As in *Ferranti*, the jurisdictional error committed here was plain. The lead opinion asserts that even if plain error occurred, it did not affect respondent's substantial rights because the facts are "ambiguous" regarding whether respondent's brother was "willing and capable of providing for BB's care and custody for the duration of respondent's incarceration." I find no such ambiguity. A caseworker's note dated January 14, 2019, states that BB's "permanency planning goal is reunification with a concurrent planning goal of adoption . . . . [BB]'s placement is a pre-adoptive placement and her relatives state that they are willing to provide permanency *if reunification efforts are unsuccessful*." (Emphasis added.) Respondent's family willingly brought BB to visit respondent in prison, a substantial drive from their homes, on more than one occasion.[5] As in *Ferranti*, 504 Mich at 31, the

[5] Respondent's family evidently understands the concepts of rehabilitation and forgiveness. The Legislature also recognized that a parent convicted of a crime can grow and change by including in MCL 712A.19b(3)(h) the requirement that the state prove, clearly and convincingly, that "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." In *Mason*, our Supreme Court explained that this statutory subsection is "forward-looking," and elucidated:

> Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the

jurisdictional error seriously affected the fairness, integrity, or public reputation of the proceedings, as it "allowed the state to interfere with and then terminate the respondent['s] fundamental right to parent [her] child."

II. THE TERMINATION-HEARING ERRORS

The evidence adduced at the termination hearing was remarkable. Respondent not only adhered perfectly to her case service plan—she excelled. Respondent availed herself of all classes and services available to her, and she placed herself on the waiting list for others. Her prison record was clean; she had earned no "tickets." At the recommendation of the attorney who represented BB, respondent's family brought BB to visit respondent in the prison on three or four occasions.[6] The circuit court's findings reflect the progress respondent had made:

> However, since she's been incarcerated since January of 2018, she's done extremely well. And while in prison, it appears she's a model prisoner. She's been doing everything she could, doing all the classes she can, doing parenting classes. . . .
>
> * * *

> parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. [*Mason*, 486 Mich at 161, 165].

This means that the Legislature, as well as our Supreme Court, has rejected the notions that an incarcerated parent's past is her future and that evidence of past misconduct suffices to terminate parental rights.

[6] Our partially dissenting colleague asserts that when released from prison "[r]espondent will be a complete stranger to this child who will have been living in a stable environment her entire life." The record refutes that statement.

> It sounds like things are going very, very, very well in prison for her and that's a good thing. And what's also telling of the type of family she has is that even she says here today that her goal would be once she's released from prison, that she'd probably return to her father's home. That's where her son is apparently and where this crime occurred that caused her to go to prison. And so her family has apparently forgiven her. She's indicated that her mother, her father, brother or sister brings [BB] up for parenting time with her and that she's apparently mended whatever damage she's done with her family which is a good thing and it really shows what kind of a strong family they have . . . .
>
> * * *
>
> The parent's compliance with [the] case service plan has been great as far as [respondent] has been concerned. . . . [S]ince this child has come into care which was shortly after birth in September of 2018, she has done everything possible that she could. [Respondent] has done every program that she can get her hands on while she's institutionalized. She's been doing the visits that she could. Her parenting visitation with the child, the history of visitation has been extremely good. Any time she can, she's there, and has been showing she's trying to do what she can to better herself and if at all possible to have the child returned to her care. So she's done very well with compliance with the case service plan as well as visitation.

Judges of this Court do not often read comments like these for the simple reason that model respondents retain their parental rights. The reason that respondent lost hers comes down to one fact: her incarceration. As the lead opinion explains, *Mason* teaches that in light of her efforts to arrange for placement of her child, her incarceration—and MCL 712A.19b(3)(h)—did not supply an appropriate ground for termination.

The partial dissent insists that termination was warranted based on respondent's "psychological sta-

tus" and her previous "treatment plan failures." As to the first, the partial dissent quotes extensively from a psychological report apparently prepared while respondent was incarcerated in the county jail before her criminal case concluded. The report itself is not part of the record. Excerpts from it were read aloud by a DHHS worker at the preliminary hearing. The report has little to contribute in this case, as it was written before the then 18-year-old respondent turned her life around. And because it is not evidence of record, it supplies no legal basis for termination.

More troubling is the partial dissent's reliance on respondent's past as a predictor of her future. This Court has emphasized that the doctrine of anticipatory neglect, on which the partial dissent relies, does not suffice to prove a statutory ground for termination. See *In re LaFrance Minors*, 306 Mich App 713; 858 NW2d 143 (2014). In *LaFrance*, we stressed that age and other differences between children decrease the probative value of a negative inference arising from a parent's poor treatment of one child. *Id*. at 730-731. We reiterated the same common-sense principles more recently in *In re Kellogg*, 331 Mich App 249; 952 NW2d 544 (2020). I would add that the doctrine of anticipatory neglect also fails to take into account that parents can grow and change. That's why the Legislature mandates services in all but the rarest of situations. If our Legislature believed that past is prologue, it would not have wasted the taxpayers' money on helping struggling parents achieve meaningful and lasting change. And to hold that an incarcerated parent who has committed a "horrendous" crime can never be redeemed simply eviscerates *Mason*.

Finally, I believe that the circuit court additionally erred by finding that termination served BB's best

interests. First, no evidence was presented that BB's custodians favored or even sought termination of respondent's rights. To the contrary, the evidence depicted a family in which BB would be safe and well cared for even if respondent maintained her parental rights while incarcerated. A guardianship, if one were established, would continue that protection even after respondent's release. Second, *Mason* instructs that "placement with relatives weighs *against* termination under MCL 712A.19a(6)(a)." *Mason*, 486 Mich at 164 (emphasis added). The circuit court applied the opposite presumption: that because BB lived with relatives, respondent's inability to care for the child supported termination of her rights. Had the circuit court properly applied the *Mason* presumption, it would have concluded that termination of respondent's parental rights did not serve BB's best interests.

III. CONCLUSION

Exercising their powers as rulemakers, the Legislature and our Supreme Court have insisted that a court identify with some particularity the grounds and the evidence for depriving a parent of the care and custody of his or her child. Those rules mandate specific findings at both the adjudication and dispositional stages that were not made here. The rules help ensure the fairness and accuracy of the process. Because it violated a variety of these rules, the circuit court lacked the authority to take jurisdiction and to terminate respondent's parental rights.

Rules are important, but this case also presents a more fundamental problem. A court may not take jurisdiction or terminate an incarcerated parent's rights when the parent has planned for their child's care and custody. Respondent made a plan deemed

highly appropriate by the DHHS and the circuit court. Her child is thriving. We are left with this: respondent's rights were terminated because she is incarcerated. As *Mason* and a host of cases from this Court have held, incarceration alone is not an adequate ground for either jurisdiction or termination.

I would vacate *both* the adjudication and termination orders and on remand would permit the DHHS to file a new petition if and only if a jurisdictional ground actually exists.