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COURT OF APPEALS CASES

BROWN v BROWN

Docket No. 350576. Submitted February 4, 2020, at Detroit. Decided April 9, 2020, at 9:00 a.m.

Plaintiff, Benjamin Brown, and defendant, Michelle Brown, entered into a consent judgment of divorce in 2014; plaintiff was awarded primary physical custody of the children, and the parties were awarded joint legal custody. In 2016, the parties entered a stipulated order granting plaintiff sole legal and physical custody of the children, permitting defendant to move to Ohio, and reserving to defendant a specified amount of parenting time and "reasonable parental rights." Defendant moved to Ohio, and plaintiff and the children began living with plaintiff's parents near Dundee, Michigan. In 2018, defendant filed a motion *in propria persona* for change of custody. Defendant raised numerous concerns about the children's care in plaintiff's custody, including unsafe and cramped housing conditions, failure to provide the children with basic sanitation and clothing needs, failure to provide adequate supervision, neglect of the children's emotional needs, denigration of defendant, and interference with defendant's visitation time and ability to communicate with the children. Plaintiff generally denied defendant's assertions or contended that some of them were one-time aberrant occurrences. In 2019, represented by counsel, defendant filed another motion for change of custody, asserting that there had been a change of circumstances since the 2016 stipulated order. The trial court held a thorough hearing, taking detailed testimony from the parties, two of the parties' adult children, and various witnesses familiar with the family. The court also conducted *in camera* interviews with all five of the minor children regarding their preferences. Following the hearing, the trial court, Frank L. Arnold, J., granted defendant's motion for change of custody, awarding defendant sole legal and physical custody of the minor children. Plaintiff appealed.

The Court of Appeals *held*:

1. As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the

court may proceed to an analysis of whether the requested modification is in the child's best interests. To establish the 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, and the appropriate ground 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. In this case, the trial court found appropriate grounds to consider modifying custody. The trial court's findings regarding domestic violence and the deficiencies in the care that the children received from plaintiff were well supported by the record. Furthermore, those matters related to several best-interest factors under MCL 722.23, including Factors (c) (capacity and disposition to provide food, clothing, medical care, and other material needs), (h) (home, school, and community record), and (k) (domestic violence). Accordingly, the trial court did not err by finding proper cause to revisit the parties' custody arrangement.

2. The trial court did not err by characterizing plaintiff's use of corporal punishment as domestic violence in this case. The state's interest in protecting children from harm outweighs any religious beliefs regarding the propriety of corporal punishment, and a parent may not administer excessive physical discipline or physical discipline that actually harms a child, no matter what the parent might subjectively believe. Under MCL 722.23(k), domestic violence is a factor that must be explicitly considered in custody disputes. The Child Custody Act, MCL 722.21 *et seq*., does not provide its own definition of domestic violence, but MCL 400.1501(d) of the domestic violence prevention and treatment act, MCL 400.1501 *et seq*., defines domestic violence as the occurrence of any of the following acts by a person that is not an act of self-defense: (*i*) causing or attempting to cause physical or mental harm to a family or household member; (*ii*) placing a family or household member in fear of physical or mental harm; (*iii*) causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress; (*iv*) engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. Under MCL 400.1501(e), a "family or household member" may include a spouse, former spouse, present or former dating or sexual partner, present or former "individual" coresident, present or former relative by marriage, other parent of the individual's child, or minor child of any of the above. In *Merriam-Webster's Collegiate Dictionary* (11th ed), domestic violence is defined as

"the inflicting of physical injury by one family or household member on another; *also* : a repeated or habitual pattern of such behavior." *Black's Law Dictionary* (11th ed) defines the term as "[v]iolence between members of a household or between romantic or sexual partners; an assault or other violent act committed by one member of a household on another or by a person on the person's romantic or sexual partner." Thus, the dictionary definitions of "domestic violence" closely match the definition provided in MCL 400.1501. The definition of "domestic violence" in MCL 400.1501 also is clearly consistent with the Child Custody Act's overriding goal of promoting the best interests of the children involved in custody disputes. Therefore, "domestic violence" as used by MCL 722.23(k) includes domestic violence as defined in MCL 400.1501. Consequently, the trial court's conclusion that plaintiff's use of corporal punishment constituted domestic violence was not against the great weight of the evidence. It was undisputed that plaintiff's standard response to "willful disobedience" involved discussing with the child the reason he or she was being punished, prayer, spanking the child on the buttocks approximately five times with a PVC pipe, and expressions of love at the end of the ritual. Plaintiff commonly used sufficient force to leave red marks on the children's skin for the rest of the day, and his spankings once left a child with bruises. "Domestic violence" also unambiguously includes the infliction of mental harm, and a combination of cruelty and serious physical harm with expressions of love would further inflict mental harm upon any reasonable person. In further support of its finding of proper cause, the trial court cited plaintiff's abusive treatment of family pets. There was evidence that plaintiff threw a family dog against the wall for chewing on shoes, kneed another dog in the chest for stealing food, and shot an airsoft pistol at a cat that was on the counter. While harmful or abusive conduct toward an animal is not per se domestic violence, intentionally harming an animal with whom a child has a significant emotional bond could constitute domestic abuse directed at the child under MCL 400.1501(d)(*iv*). Accordingly, harmful or abusive conduct toward a pet can constitute domestic violence under either MCL 400.1501(d)(*i*) or MCL 400.1501(d)(*iv*), if done for the purpose of distressing or coercing a person emotionally bonded to that pet. The resolution of that issue in a given case will turn on the trial court's factual findings regarding the reason or reasons why someone engaged in particular actions with regard to an animal and the nature of the bond between a child and the animal at issue. The trial court in this case properly relied on plaintiff's abusive treatment of the family pets to support its finding of proper cause.

3. A trial court's analysis of a child's best interests is guided by the statutory factors set forth in MCL 722.23: (a) the love, affection, and other emotional ties existing between the parties involved and the child; (b) the capacity and disposition of the parties involved to give the children love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any; (c) the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs; (d) the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity; (e) the permanence, as a family unit, of the existing or proposed custodial home or homes; (f) the moral fitness of the parties involved; (g) the mental and physical health of the parties involved; (h) the home, school, and community record of the child; (i) the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference; (j) 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; (k) domestic violence, regardless of whether the violence was directed against or witnessed by the child; (*l*) any other factor considered by the court to be relevant to a particular child custody dispute. In this case, plaintiff did not challenge the trial court's finding that Factor (a) favored both parties equally. The trial court properly found that Factor (b) weighed in favor of defendant as to the children's education; defendant promoted the children's religious development and planned to enroll the children in a highly rated public school, whereas plaintiff enrolled the students in a church-based school that was not accredited and provided little guidance to the children in their academic studies. The trial court properly found that Factor (c) favored defendant; defendant arranged health appointments for the children and enrolled the daughter with a history of self-harming in professional counseling, whereas plaintiff failed to provide proper clothing, medical care, and the appropriate feminine hygiene products for the children. The trial court properly found that Factor (d) favored defendant; while plaintiff had been the children's primary caregiver since the divorce, plaintiff failed to create an acceptable environment for the children, and therefore the longevity of his care did not cause the weight of this factor to tip in his favor. Furthermore, plaintiff relocated to a different city while defendant's motion was pending, which would require the children to change their church and school, substantially decreasing the stability they had with plain-

tiff. The trial court's determination that Factor (e) weighed in favor of defendant was contrary to the great weight of the evidence. It was legal error for the trial court to consider acceptability, rather than permanence, of the custodial unit when making findings under Factor (e). In this case, the children had consistently resided with plaintiff and his wife as a family unit since the parties' divorce; the children had only visited defendant a few times a year. Accordingly, the trial court erred by weighing Factor (e) in defendant's favor. The trial court properly weighed Factor (f) in defendant's favor because of the domestic and psychological violence that existed in plaintiff's home, including plaintiff's use of corporeal punishment and mistreatment of family pets. Neither party challenged the trial court's finding that Factor (g) slightly favored plaintiff on the basis of defendant's physical health. The trial court's findings under Factor (h) were neither against the great weight of the evidence nor internally inconsistent. The parties did not challenge the trial court's finding regarding Factor (i). The trial court properly weighed Factor (j) in defendant's favor; plaintiff readily admitted that he prevented parenting time from taking place by refusing to reach mutually agreeable dates for defendant to see the children. The trial court properly weighed Factor (k) in defendant's favor given plaintiff's domestic violence. Finally, the trial court properly weighed Factor (*l*) in defendant's favor. In sum, with the exception of Factor (e), the trial court did not commit clear legal error or make findings against the great weight of the evidence, and the trial court's error regarding Factor (e) was harmless and did not require reversal. Accordingly, the trial court's ultimate decision to award defendant sole legal and physical custody of the children was not an abuse of discretion.

Affirmed.

K. F. KELLY, J., concurred in the result only.

PARENT AND CHILD — CHILD CUSTODY ACT — BEST-INTEREST FACTORS — WORDS AND PHRASES — "DOMESTIC VIOLENCE" — FAMILY PETS.

Under MCL 722.23(k), domestic violence is a factor that must be explicitly considered in custody disputes; the Child Custody Act, MCL 722.21 *et seq*., does not provide its own definition of domestic violence, but MCL 400.1501(d) of the domestic violence prevention and treatment act, MCL 400.1501 *et seq*., defines domestic violence as the occurrence of any of the following acts by a person that is not an act of self-defense: (*i*) causing or attempting to cause physical or mental harm to a family or household member; (*ii*) placing a family or household member in fear of physical or mental harm; (*iii*) causing or attempting to cause a family or household member

> to engage in involuntary sexual activity by force, threat of force, or duress; (*iv*) engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested; "domestic violence" as used by MCL 722.23(k) includes domestic violence as defined in MCL 400.1501; for purposes of weighing MCL 722.23(k), harmful or abusive conduct toward a pet can constitute domestic violence under either MCL 400.1501(d)(*i*) or MCL 400.1501(d)(*iv*) if done for the purpose of distressing or coercing a person emotionally bonded to that pet.

Ronald D. French for plaintiff.

Leslie M. Carr for defendant.

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and TUKEL, JJ.

RONAYNE KRAUSE, P.J. In this child custody dispute, plaintiff appeals as of right the trial court's order modifying the parties' prior custody arrangement to grant sole legal and physical custody of the parties' five minor children to defendant. We affirm.

I. BACKGROUND

During the course of their marriage, the parties had eight children, five of whom are still minors. In the parties' 2014 consent judgment of divorce, plaintiff was awarded primary physical custody of the children, and the parties were awarded joint legal custody of the children. The consent judgment contained a definition of "joint legal custody" enumerating various rights and obligations of the parties. In 2016, the parties entered a stipulated order purporting to grant plaintiff sole legal and physical custody of the children, permitting defendant to move to Ohio, and reserving to defendant a specified amount of parenting time and "reasonable parental rights, defined as spelled out on attached

sheet." The attached sheet enumerated a list of rights and obligations that was precisely identical to the definition of "joint legal custody" in the consent judgment of divorce, including punctuation and formatting. The parties' last custody order was entered in 2016 by stipulation and granted plaintiff sole legal and physical custody of the children. Defendant moved to Ohio around the same time, and plaintiff and the children began living with plaintiff's parents near Dundee, Michigan.

In 2018, defendant filed a motion *in propria persona* for change of custody. Defendant raised numerous concerns about the children's care in plaintiff's custody, including unsafe and cramped housing conditions, failure to provide the children with basic sanitation and clothing needs, failure to provide adequate supervision, neglect of the children's emotional needs, denigration of defendant, and interference with defendant's visitation time and ability to communicate with the children. Plaintiff generally denied defendant's assertions or contended that some of them were one-time aberrant occurrences. In 2019, represented by counsel, defendant filed another motion for change of custody. She further asserted that there had been a change of circumstances since the 2016 stipulated order because plaintiff had moved and was living in an unsafe residence; plaintiff enrolled the children in an unaccredited school without consulting defendant; plaintiff threatened to block defendant entirely from seeing the children if she attempted to have any say in the children's welfare; and defendant had obtained stable employment, a stable relationship, stable housing, and ties to her community. She further cited plaintiff's history of perpetrating domestic violence and that all the children had expressed a desire to be in defendant's custody.

The trial court held a thorough hearing, taking detailed testimony from the parties, two of the adult children, and various witnesses familiar with the family. The court also conducted *in camera* interviews with all five of the minor children regarding their preferences. Following the hearing, the trial court granted defendant's motion for change of custody, awarding defendant sole legal and physical custody of the minor children. This appeal followed.

II. STANDARDS OF REVIEW

In matters involving child custody, " 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Yachcik v Yachcik*, 319 Mich App 24, 31; 900 NW2d 113 (2017), quoting MCL 722.28. This Court will not interfere with the trial court's factual findings "unless the facts clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Discretionary rulings, including a trial court's decision to change custody, are reviewed for an abuse of discretion. *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017). In child custody cases specifically, an "abuse of discretion" retains the historic standard under which the trial court's decision must be "palpably and grossly violative of fact and logic." *Moote v Moote*, 329 Mich App 474, 477-478, 478 n 2; 942 NW2d 660 (2019) (quotation marks and citation omitted). Clear legal error occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014). This Court reviews the trial court's determination regarding a child's best interests for clear

error. *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016). This Court gives deference to the trial court's factual judgments and special deference to the trial court's credibility assessments. *Moote*, 329 Mich App at 478.

III. THRESHOLD FOR MODIFYING CUSTODY

Plaintiff first argues that the trial court erred by finding that defendant established the threshold requirement for reconsidering the parties' previous custody arrangement. We disagree.

A. APPLICABLE LEGAL STANDARDS

"As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests." *Lieberman*, 319 Mich App at 81. "[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." *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). "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." *Id*.

In arguing that the trial court erred by finding appropriate grounds to consider modifying custody, plaintiff first focuses on the sufficiency and weight of the allegations contained in defendant's written motion to change custody. Plaintiff's argument is unpersuasive because the trial court's finding of proper cause

was not strictly based on the allegations in defendant's motion. The court also considered other matters that arose at the evidentiary hearing, namely, the domestic violence taking place in plaintiff's household and the historic living conditions related to the children's housing, medical, and material needs while in plaintiff's care. Plaintiff contends that the trial court erred by making findings concerning these matters that went against the great weight of the evidence. We disagree.

B. TRIAL COURT'S FACTUAL FINDINGS

The trial court determined that plaintiff's use of corporal punishment as a disciplinary method constituted domestic violence. Plaintiff maintains that he always acted in good faith and on the basis of his religious beliefs regarding the propriety of corporal punishment. We find his argument unavailing. However sacrosanct parental rights may be, they do not extend to abusing one's children. See *Corrie v Corrie*, 42 Mich 509, 510; 4 NW 213 (1880); *In re Gould*, 174 Mich 663, 669-670; 140 NW 1013 (1913). The state's interest in protecting children from harm outweighs any religious beliefs regarding the propriety of corporal punishment. *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 388; 455 NW2d 1 (1990). It has long been established that a parent may not administer excessive physical discipline, or physical discipline that actually harms a child, no matter what the parent might subjectively believe. *People v Green*, 155 Mich 524, 529-533; 119 NW 1087 (1909). We conclude that the trial court did not err by characterizing plaintiff's use of corporal punishment as domestic violence in this case.

Domestic violence is a factor that must be explicitly considered in custody disputes. MCL 722.23(k). The

Child Custody Act, MCL 722.21 *et seq*., does not provide its own definition of domestic violence. However, the domestic violence prevention and treatment act, MCL 400.1501 *et seq*., defines "domestic violence" as

> the occurrence of any of the following acts by a person that is not an act of self-defense:
>
> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. [MCL 400.1501(d).]

A "family or household member" may include a spouse, former spouse, present or former dating or sexual partner, present or former "individual" coresident, present or former relative by marriage, other parent of the individual's child, or minor child of any of the above. MCL 400.1501(e).

We recognize that it is generally improper to construe a statute by referring to a definition provided in an unrelated statute. *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 19; 894 NW2d 758 (2016). Rather, the meaning of undefined words should usually be ascertained by referring to a common dictionary, *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005), or a legal dictionary if the term has a peculiar meaning in the law, *Safdar v Aziz*, 327 Mich App 252, 262; 933 NW2d 708 (2019). In *Merriam-Webster's Collegiate Dictionary* (11th ed), domestic vio-

lence is defined as "the inflicting of physical injury by one family or household member on another; *also* : a repeated or habitual pattern of such behavior." *Black's Law Dictionary* (11th ed) defines the term as "[v]iolence between members of a household or between romantic or sexual partners; an assault or other violent act committed by one member of a household on another or by a person on the person's romantic or sexual partner." Thus, the dictionary definitions of "domestic violence" closely match the definition provided in MCL 400.1501. The definition of "domestic violence" in MCL 400.1501 also is clearly consistent with the Child Custody Act's overriding goal of promoting the best interests of the children involved in custody disputes. See *Lieberman*, 319 Mich App at 78. We therefore hold that "domestic violence" as used by MCL 722.23(k) includes "domestic violence" as defined in MCL 400.1501.[1]

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[1] The instant matter is not criminal in nature, so we are not presented with any question of whether the criminal offense of assault under MCL 750.81, which defines certain offenses in the same terms as does the Child Custody Act (e.g., MCL 750.81(2) refers to "an individual who assaults . . . his or her spouse or former spouse"), is *in pari materia* with that act. We hold only that conduct that constitutes "domestic violence" within the meaning of the domestic violence prevention and treatment act necessarily constitutes "domestic violence" within the meaning of the Child Custody Act. It is generally improper to apply a definition from one statutory scheme to another by rote. See *Coalition Protecting Auto No-Fault*, 317 Mich App at 19. Furthermore, the trial court cited plaintiff's abusive treatment of family pets, and specific animal cruelty criminal statutes already exist. See MCL 750.49 through MCL 750.70a. If multiple penal statutes are potentially applicable, prosecutors may charge a defendant with both a more general and a more specific offense only if the two offenses are actually distinct; if the statutes prohibit the same conduct, prosecutors must charge under the most specific statute. *People v LaRose*, 87 Mich App 298, 302-304; 274 NW2d 45 (1978); *People v Ford*, 417 Mich 66, 77-83; 331 NW2d 878 (1982). Likewise, in the context of personal protection orders, causing or threatening harm to an animal is already

Consequently, the trial court's conclusion that plaintiff's use of corporal punishment constituted domestic violence was not against the great weight of the evidence. It was undisputed that plaintiff's standard response to "willful disobedience" involved discussing with the child the reason he or she was being punished, prayer, spanking the child on the buttocks approximately five times with a PVC pipe, and expressions of love at the end of the ritual. Plaintiff commonly used sufficient force to leave red marks on the children's skin for the rest of the day, and his spankings once left a child with bruises. The parties' eldest daughter indicated that she could sometimes hear "the swing of the paddle" and "the cries of the kids" from another room. Even if plaintiff was acting on the basis of his religious beliefs and without malicious intent, the fact remains that his corporal punishment involved the infliction of injury on members of his household. We further observe that "domestic violence" unambiguously includes the infliction of mental harm, and it is obvious that a combination of cruelty and serious physical harm with expressions of love would further inflict mental harm upon any reasonable person.

In further support of its finding of proper cause, the trial court cited plaintiff's abusive treatment of family pets. There was evidence that plaintiff threw a family dog against the wall for chewing on shoes, kneed another dog in the chest for stealing food, and shot an airsoft pistol at a cat that was on the counter. Plaintiff admitted the truth of the latter two allegations. We hold that the trial court did not err.

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an explicit basis for obtaining a personal protection order. MCL 600.2950(1)(k). Our opinion would therefore be not only dicta, but substantively superfluous in the criminal or personal-protection-order contexts.

We first emphasize that although it is likely criminal—and certainly reprehensible—harmful or abusive conduct toward an animal is not per se domestic violence. A pet cannot be a spouse, MCL 400.1501(e)(*i*), in any legal jurisdiction of which we are aware. The word "individual" used in MCL 400.1501(e)(*ii*) to (*vii*) is not defined by statute, so we again consult a dictionary. The word "individual" is typically limited to human beings. See, e.g., *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, a pet cannot satisfy any of the possibilities in MCL 400.1501(e) under which it would be a "family or household member" within the meaning of the domestic violence prevention and treatment act or the Child Custody Act. Accordingly, a pet cannot be a victim of "domestic violence" under either act.

Nevertheless, it is well known that many people consider their pets to be part of their family, form deep and lasting emotional bonds with their pets, and feel tremendous personal responsibility for their pets. In most cases, this would be all the more true for a child. Harmful or abusive conduct toward an animal is not per se domestic violence, for the reasons already noted. However, intentionally harming an animal with whom a child (a "person" under the act) has a significant emotional bond could constitute "[e]ngaging in activity toward a family or household member," i.e., toward the child, "that would cause a reasonable person" (again, the child) "to feel terrorized, frightened, intimidated, threatened, harassed, or molested," MCL 400.1501(d)(*iv*), or, in other words, would constitute domestic abuse directed at the child. Directing such activity toward a minor child (a "family member" under the act, MCL 400.1501(e)(*vii*)), for the purpose of compelling obedience by such a minor child often, if not invariably, is also an act of intimidation that would

place the minor child in reasonable fear of mental harm, MCL 400.1501(d)(*i*), and thus could constitute domestic abuse under the act as well. Accordingly, harmful or abusive conduct toward a pet can constitute domestic violence under either MCL 400.1501(d)(*i*) or MCL 400.1501(d)(*iv*), if done for the purpose of distressing or coercing a person emotionally bonded to that pet. The resolution of that issue in a given case will turn on the trial court's factual findings regarding the reason or reasons why someone engaged in particular actions with regard to an animal and the nature of the bond between a child and the animal at issue.[2] In any event, such misconduct is at least relevant to plaintiff's creation of an atmosphere harmful to the children's well-being. See *Vodvarka*, 259 Mich App at 512. For either reason, the trial court here properly relied on plaintiff's abusive treatment of the family pets to support its finding of proper cause.

The trial court also found proper cause to revisit the custody order on the basis of the children's living conditions while in plaintiff's care. Again, the trial court's findings were not against the great weight of the evidence. There was evidence that plaintiff did not always ensure that the children received routine medical care while in his custody, that he was not diligent in following up on the specific medical needs of particular children, that the girls did not always have access to appropriate feminine hygiene products, and that he encouraged one of his daughters to seek religious guidance upon learning that she was self-harming but

[2] In other words, whether harmful or abusive conduct toward a pet constitutes "domestic violence" within the meaning of the domestic violence prevention and treatment act and the Child Custody Act turns greatly on the actor exploiting a child-victim's emotional bond with the pet and, in effect, using harm or threats to the pet as an instrumentality directed at a child, who thereby becomes a victim of domestic violence for purposes of the Child Custody Act.

refused any kind of professional mental-health treatment. Plaintiff also made the decision to enroll the children in a church-based school for several years. We do not in any way mean to suggest that a religious educational institution is improper *per se*, but this particular school was not accredited and provided little guidance to the children in their academic studies. The children were required to teach themselves from packets of information and were primarily supervised by volunteer "monitors" who were not always prepared to respond to the students' questions. There was evidence that some of the children were not well-suited for such an independent style of learning, and both of the parties' children who reached the age of 18 while attending the school dropped out without completing the program.[3] Even if they had completed the program, they would not receive a legally valid diploma. The most recent child to leave the school was seriously behind in several core subjects. Such abject neglect of the children's educational needs and failure to provide them with basic necessities for survival in the real world is inherently harmful to them.

C. CONCLUSION

The trial court's findings regarding domestic violence and the deficiencies in the care that the children received from plaintiff were well supported by the record. Furthermore, those matters related to several best-interest factors, including Factors (c) (capacity and disposition to provide food, clothing, medical care, and other material needs), (h) (home, school, and community record), and (k) (domestic violence). MCL 722.23. Plaintiff's neglect and mistreatment of the

[3] The parties' eldest son never attended the church-based school, but he also dropped out of school at the age of 18 while in plaintiff's care.

children posed a significant risk to each child's mental health, physical well-being, and very ability to survive in the future. Accordingly, the trial court did not err by finding proper cause to revisit the parties' custody arrangement.

IV. BEST-INTEREST ANALYSIS

Plaintiff also argues that the trial court erred in its analysis of the statutory best-interest factors. We agree that the trial court erred with respect to one factor, but we conclude that the trial court's ultimate decision to grant defendant's motion for change of custody was not an abuse of discretion.

A. APPLICABLE LEGAL STANDARDS

The parties do not dispute that the children had an established custodial environment, MCL 722.27(1)(c), with plaintiff. Therefore, changing that custodial environment by granting defendant sole legal and physical custody of the children requires defendant to prove by clear and convincing evidence that the modification would be in the children's best interests. *Foskett v Foskett*, 247 Mich App 1, 5-6; 634 NW2d 363 (2001); *Griffin v Griffin*, 323 Mich App 110, 119; 916 NW2d 292 (2018). A trial court's analysis of a child's best interests is guided by the statutory factors set forth in MCL 722.23. *Griffin*, 323 Mich App at 114-115. "Clear and convincing evidence" is a less stringent evidentiary standard than "beyond a reasonable doubt," but it is the most demanding civil standard and requires the evidence to be significantly more persuasive than a mere preponderance. *In re Martin*, 450 Mich 204, 225-228; 538 NW2d 399 (1995); see also *Serafin v Serafin*, 401 Mich 629, 638-640; 258 NW2d 461 (1977) (COLEMAN, J., concurring).

B. BEST-INTEREST FACTORS

Factor (a) considers the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). Plaintiff does not challenge the trial court's finding that this factor favored both parties equally. We agree. The witnesses generally agreed that both parties had loving bonds with the minor children, even if defendant's relationship with some of the children was strained at times after the divorce. The trial court's finding regarding this factor was not against the great weight of the evidence.

Factor (b) considers the "capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court found that the parties had an equal capacity and disposition to continue raising the children in their religion but that Factor (b) favored defendant as to the children's education.

Regarding the parties' religious guidance, it is undisputed that plaintiff promoted the children's religious development and would continue to do so in the future. Defendant testified that she regularly visited the children on the weekends, but she did not take them on community outings on Sundays because she understood that they had church-related activities. When the children were in her care, she took them to her local church every Sunday. Defendant indicated that her church conformed to the same general doctrines to which the children were accustomed, and she ensured that the children had access, in her home and at church, to the same version of the King James Bible with which they had grown up. The trial court's finding that the parties had an equal capacity for providing the

children with religious guidance was not against the great weight of the evidence.

Regarding the children's education, we have already discussed the severe and debilitating deficiencies in plaintiff's provision of education to the children. In contrast, defendant planned to enroll the children in a highly rated public school district and had already made arrangements with the school district to accommodate the children's delayed start for the new academic year in the event she was awarded physical custody. Defendant was also helping the parties' eldest daughter to fill in the gaps left by plaintiff in her education so that she could obtain a GED and pursue a college education. In light of the foregoing, the trial court's determination that Factor (b) favored defendant was not against the great weight of the evidence.

Factor (c) considers the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). The trial court found that although plaintiff *could* have provided for the children, he nevertheless failed to do so, particularly regarding clothing, medical care, sanitation, and hygiene. There was some dispute whether the children's occasional use of clothing that was in poor condition or seasonally inappropriate was by their own choice. Nevertheless, one of the children developed sores or rashes because she did not have a properly fitted bra. Plaintiff indicated that he attempted to order a new bra for that child, but someone else ultimately helped the child get appropriate undergarments. A friend of the family also testified that she had to purchase feminine hygiene products for the girls because they had inadequate supplies in plaintiff's

home. Plaintiff did not have a regular family doctor for the children and had not taken them for routine examinations in over a year. Plaintiff failed to consistently follow up on speech therapy and vision care for one of the children or pursue timely orthodontic care for another child.

In contrast, although defendant had little opportunity to address the children's medical needs while they remained primarily in plaintiff's physical custody, she arranged sports physicals for the children while they stayed with her during these proceedings; enrolled the daughter who had a history of self-harming in professional counseling; selected a family physician, dentist, and optometrist for future care; and was prepared to add the children to her health insurance policy if she received custody. Defendant also purchased clothing and other items for the children during their stay, sent them school supplies in the past, and had a history of paying child support. The trial court's finding that Factor (c) favored defendant was not against the great weight of the evidence.

Factor (d) considers the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court recognized that the children had stability with plaintiff in the sense that he had been their primary caregiver since the parties' divorce. It concluded that Factor (d) still weighed in favor of defendant because plaintiff's care had not been satisfactory. The plain language of MCL 722.23(d) includes the desirability of maintaining the existing environment within its scope. Thus, in light of the trial court's conclusion that plaintiff failed to create an acceptable environment for the children, the longevity of his care did not cause the weight of this factor to tip in his favor.

Furthermore, the children had spent the last three years living with plaintiff in his father's home in Dundee, but plaintiff relocated to Gaylord, Michigan, while defendant's motion was pending. Although the children had previously lived with plaintiff in the same home in Gaylord, the move would require that they change their school and church yet again, which substantially decreased the overall stability they had with plaintiff. The trial court's finding that Factor (d) favored defendant was not against the great weight of the evidence.

Factor (e) considers the "permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court found that this factor favored defendant because plaintiff's home involved a setting in which domestic violence existed, whereas plaintiff provided a more loving and affirming setting that was free from domestic violence. The trial court's concern is appropriate, as we have discussed. However, the acceptability of the custodial home or homes is not pertinent to this factor. *Fletcher v Fletcher*, 447 Mich 871, 884-885; 526 NW2d 889 (1994). It is "legal error for the trial court to consider . . . acceptability, rather than permanence, of the custodial unit" when making findings under Factor (e). *Id*. at 885. The stability, health, or safety of the environment provided by a party is considered in other factors. Here, the children had consistently resided with plaintiff and his wife as a family unit since the parties' divorce. In contrast, before defendant's 2018 motion, the children only visited defendant a few times a year and physically resided with her only a few days at a time. Thus, there was less of a sense of permanence in defendant's prospective household, physically or as a family unit. The trial court's determination that Factor

(e) weighed in favor of defendant was contrary to the great weight of the evidence.

Factor (f) considers the "moral fitness of the parties involved." MCL 722.23(f). A parent's "questionable conduct is relevant to [this factor] only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Fletcher*, 447 Mich at 887. The trial court found that Factor (f) favored defendant because of the "domestic violence and psychological violence" that existed in plaintiff's home. The trial court determined that plaintiff's use of corporal punishment crossed the line between effective discipline and wrongful conduct and that his mistreatment of the family pets perpetuated a fearful environment to compel good behavior. For the reasons already explained, the court's finding was not against the great weight of the evidence. Further, because plaintiff's tendency toward violent behavior was a significant factor in how he functioned as a parent, the trial court did not err by considering these issues under Factor (f). See *id*. at 887 n 6 (identifying abusive behavior as relevant to moral fitness).

Plaintiff relies on testimony indicating that defendant began drinking and smoking after the divorce, contrary to the way the children had been raised. This testimony does not undermine the trial court's finding regarding this factor. First, defendant explained that she had never smoked in front of her minor children, did not keep alcohol in the house, and only consumed a single alcoholic beverage when she drank in the children's presence. There was no evidence that these activities affected how she functioned as a parent, so they are not relevant to Factor (f). *Id*. at 887. Secondly, although smoking and drinking may not be healthy behaviors to model for a child, it would not be against

the great weight of the evidence to conclude that violent and cruel behavior is a far more serious moral failing. The trial court did not err by finding that Factor (f) favored defendant.

Factor (g) considers the "mental and physical health of the parties involved." MCL 722.23(g). The trial court found that this factor slightly favored plaintiff on the basis of defendant's physical health. Neither party challenges the trial court's finding regarding Factor (g).

Factor (h) considers the "home, school, and community record of the child." MCL 722.23(h). The trial court found that Factor (h) favored plaintiff as to the children's home record because of his longstanding role as primary caregiver. However, this factor favored defendant as to schooling because the children did not receive an appropriate education under plaintiff's care. Insofar as we can discern, plaintiff does not actually challenge the trial court's findings under Factor (h), and he seemingly agrees that Factor (h) favors both parties. Rather, he argues that the trial court's finding that Factor (h) favored him as to the home and community record is inconsistent with its findings in favor of defendant under other factors. We disagree. Although plaintiff's home environment was undesirable, plaintiff nevertheless raised the children in a strong community setting, with substantial support from family and members of their church, an aspect of the children's lives not considered in the same manner under other factors. The trial court's findings were neither against the great weight of the evidence nor internally inconsistent.

Factor (i) considers the "reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). The trial

court determined that the minor children, the youngest of whom was then nine years old, were old enough to express a preference. The trial court questioned the children in a separate, confidential record, and the trial court's comments on the record indicate that its interviews were thorough. To the extent that the children expressed a preference, the trial court took their preferences into account. The parties do not challenge the trial court's treatment of this factor.

Factor (j) considers 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." MCL 722.23(j). Plaintiff argues that the trial court "found for [defendant] and did not elaborate on this issue." However, the trial court clearly explained its reasoning that Factor (j) favored defendant because plaintiff refused to allow defendant to exercise overnight weekend parenting time in her home while she was "living in sin" with her fiancé. The trial court acknowledged that plaintiff's position was rooted in his religious beliefs but found that plaintiff's decision interfered with the relationship between defendant and the children, even if that was not his intention. The trial court further reasoned that because of plaintiff's firm-set beliefs and values, he was not fully able to encourage the children's relationship with defendant. Indeed, plaintiff never allowed the children to stay with defendant overnight outside of the specific holiday parenting time set forth in the parties' previous custody order. The order also granted defendant overnight parenting time during 16 weekends each year and "reasonable parental rights" identical to the parties' previously agreed-upon definition of "joint legal custody." Nevertheless, plaintiff readily admitted that he prevented that parenting time from taking

place by refusing to reach mutually agreeable dates. Whatever plaintiff's motives, the trial court's findings regarding Factor (j) were fully supported by the record and were not against the great weight of the evidence.

Factor (k) considers "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court found that this factor weighed substantially in favor of defendant because of plaintiff's violent behavior. We have already extensively discussed the issue of plaintiff's domestic violence. The trial court's finding that this factor favored defendant was not against the great weight of the evidence.

Finally, Factor (*l*) considers "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." Plaintiff offers a confusing, conclusory, and unexplained statement that the trial court erred by finding that this factor favored defendant. We cannot find in the record any ruling or statement by the trial court regarding Factor (*l*), and plaintiff does not suggest any "other factor" that the trial court should have considered relevant.[4] The trial court therefore cannot have erred under Factor (*l*).

C. CONCLUSION

In sum, with the exception of Factor (e), the trial court did not commit clear legal error or make findings against the great weight of the evidence. The trial

[4] Plaintiff presents a perfunctory argument concerning the trial court's failure to consider a recommendation offered by a Friend of the Court investigator who, in pertinent part, proposed that plaintiff retain primary physical custody of the children. Plaintiff cites no authority for his implicit suggestion that the trial court must consider an investigator's recommendation. We therefore deem plaintiff's unsupported argument abandoned. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). Furthermore,

court's error regarding Factor (e) was harmless and does not require reversal, because in all other respects the remaining best-interest factors overwhelmingly supported defendant's motion for change of custody. Therefore, the trial court's ultimate decision to award defendant sole legal and physical custody of the children was not an abuse of discretion. See *Maier v Maier*, 311 Mich App 218, 227; 874 NW2d 725 (2015) (finding error regarding two factors harmless when several other factors supported the trial court's decision). The trial court engaged in a thoughtful and detailed analysis of the facts and properly granted defendant's motion.

Affirmed.

TUKEL, J., concurred with RONAYNE KRAUSE, P.J.

K. F. KELLY, J. (*concurring*). I concur in the result only.

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we would consider it inappropriate for the trial court to abdicate its own responsibility to determine the children's best interests.

PEOPLE v CADDELL
PEOPLE v WILLIAM-SALMON

Docket Nos. 343750 and 343993. Submitted February 5, 2020, at Detroit. Decided April 9, 2020, at 9:05 a.m. Leave to appeal sought by William-Salmon; leave denied 506 Mich 1032 (2020).

Defendant Antonio Caddell was convicted in the Wayne Circuit Court, following a joint trial before separate juries with codefendant Ricco William-Salmon, of first-degree murder, MCL 750.316(1)(a), conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, related to the death of Corey Reed. Caddell was also convicted of first-degree premeditated murder for the death of Ben Keys, conspiracy to commit murder involving Keys and Laura Zechman, solicitation of the murders of Keys and Zechman, and an additional count of felony-firearm related to these charges. The trial court, Timothy M. Kenny, J., sentenced Caddell to life in prison without parole for the murder and conspiracy convictions, 30 to 60 years in prison for the solicitation conviction, and two years for each felony-firearm conviction. Caddell's first trial in May 2017 resulted in a mistrial after the jury was unable to reach a verdict. At the joint trial, two hours after beginning deliberations, Caddell's jury sent a note to the trial court indicating that the jury felt deadlocked and expressing concerns about Juror No. 3. According to the note, Juror No. 3 was "closed off" and refused to participate in deliberations. After questioning Juror No. 3, the trial court removed her from the jury and replaced her with an alternate juror. The jury subsequently convicted Caddell.

Defendant William-Salmon was convicted following the joint jury trial of first-degree murder, conspiracy to commit first-degree murder, and felony-firearm related to the death of Reed. William-Salmon was sentenced to life in prison without parole for murder and conspiracy and to two years in prison for the felony-firearm conviction. William-Salmon initially pleaded guilty to second-degree murder, MCL 750.317, and felony-firearm in exchange for a sentence of 13 to 22 years in prison for the murder conviction and two years in prison for felony-firearm and for his agreement to testify truthfully against his codefendants. William-Salmon's

testimony at Caddell's first trial was evasive and contradictory, and he denied much of the testimony he had admitted at his recent plea hearing. The prosecution moved to vacate William-Salmon's plea deal because of his lack of truthfulness, and the court vacated the deal. William-Salmon was later convicted following the joint jury trial.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion when it denied Caddell's motion for a mistrial. A mistrial may be granted if a jury is unable to reach a verdict, but a court may first give a supplemental instruction to encourage the jury to continue deliberating, such as the standard deadlocked-jury instruction at M Crim JI 3.12. A trial court may also require the jury to continue deliberations when the jury is unable to agree after the court has provided a deadlocked-jury instruction so long as the court does not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. In this case, the trial court provided a deadlocked-jury instruction to the jury when the jury informed the court after two hours of deliberations that it was unable to reach a verdict. The next day, the jury informed the court that Juror No. 3 was refusing to participate and that no further progress could be made without her participation. Rather than declare a mistrial, the trial court requested specific examples of the juror's refusal to participate in deliberations. Following just two days of deliberations, after a 13-day trial, the court did not require or threaten to require the jury to continue to deliberate for an unreasonable length of time or for unreasonable intervals after being informed that the jury felt it was unable to reach agreement. Therefore, a new trial was not warranted at this point, so the court did not abuse its discretion by denying Caddell's motion for a mistrial.

2. Caddell was deprived of his state constitutional right to a unanimous verdict when the trial court removed Juror No. 3, and he is entitled to a new trial. A defendant has a fundamental interest in retaining the jury members that were originally chosen. However, a defendant has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, and this right is protected by removing a juror who is unable or unwilling to cooperate. The trial court, in its discretion, must weigh these rights when determining whether to remove a juror. Previous decisions of the Court of Appeals support removing a juror in the event that a medical condition impedes the juror's ability to be of further service. However, the circumstances in these cases were unrelated to the

jury's deliberative process and did not address the trial court's authority to delve into the jury's deliberations. In this case, the court removed Juror No. 3 after finding that she was failing to adhere to her juror's oath by not engaging in deliberations. In determining whether to remove a juror for refusing to deliberate, a court must take care not to intrude on the secrecy of the jury's deliberations. The court must also balance the competing concern of ensuring that jurors are obeying and adhering to their oath. The court must conduct an investigation into allegations of juror misconduct that is carefully circumscribed to protect the secrecy of deliberations and the defendant's state constitutional right to a unanimous verdict, but it may not be so limited that it precludes a fair determination of whether the juror is deliberating as required by law. A refusal to deliberate may take a number of different forms, including expressing a fixed conclusion at the beginning of deliberations and refusing to speak to other jurors or to consider their points of view. However, if the record evidence discloses any *reasonable possibility* that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Although the trial court in this case went to great lengths to protect the secrecy of the jury's deliberations while investigating juror misconduct, the record evidence discloses a reasonable possibility that the (unintended) reason Juror No. 3 was removed from the jury panel was her views on the merits of the case. The statements made by Juror No. 3 during questioning by the court reveal a juror who was deliberating and who understood her obligations and was attempting to fulfill them, although perhaps not in an effective manner. Although a trial court is entitled to make a credibility determination regarding juror misconduct, the court here crossed the threshold into the deliberative process by discharging a reluctant juror who repeatedly said that she was minimally cooperating. Given that there was a good deal of conflicting evidence as to whether Juror No. 3 was deliberating and that only a minimal investigation can be conducted to determine what is transpiring among the jurors, the court should have erred on the side of protecting defendant's rights.

3. Caddell did not establish that other-acts evidence was improperly admitted in violation of MRE 404(b). Evidence of the shootings that prompted the retaliatory killings of the victims in this case was relevant to show Caddell's motive for committing the instant offenses as a hired hit man. Although this evidence was prejudicial, its prejudicial effect was not outweighed by its probative value.

4. The trial court did not abuse its discretion when it vacated William-Salmon's guilty plea. The terms of the plea agreement required William-Salmon to "cooperate and testify if needed," but William-Salmon's testimony at Caddell's first trial was evasive and contradictory and denied much of his earlier testimony at the plea hearing. When the prosecutor gave William-Salmon another opportunity to cooperate with investigators after trial regarding other coconspirators, he failed to do so. Given William-Salmon's lack of truthfulness and lack of overall cooperation, the trial court had sufficient grounds for granting the prosecutor's motion to vacate William-Salmon's plea agreement.

5. William-Salmon argued that the prosecutor's motion to vacate his guilty plea was untimely because it should have been brought immediately after William-Salmon testified at Caddell's trial, instead of after the court declared a mistrial in that case. However, MCR 6.310(E) provides that a court may vacate a plea on a prosecutor's motion if the defendant has failed to comply with the terms of a plea agreement; MCR 6.310(E) does not otherwise limit when a prosecutor may move to vacate the plea. Under the court rule, the prosecutor's motion was not untimely, so the trial court did not abuse its discretion by granting the motion.

6. The trial court did not abuse its discretion when it allowed the prosecutor to introduce evidence of William-Salmon's guilty plea. William-Salmon argued that this evidence was inadmissible under MRE 410. However, MRE 410 was not applicable because William-Salmon did not withdraw his plea; rather, the prosecutor moved to vacate it, and the trial court granted the motion under MCR 6.310(E). William-Salmon's statements during the plea hearing were also admissible as admissions of a party-opponent under MRE 801(d)(2)(A).

7. William-Salmon argued that the trial court abused its discretion by allowing the prosecutor to read into the record prior statements of an unavailable witness, Mark Slappey, under the forfeiture-by-wrongdoing rule. Additionally, William-Salmon argued that Slappey's statements were inadmissible hearsay and that their admission violated his right of confrontation. The trial court did not abuse its discretion when it admitted Slappey's statements under MRE 804(b)(6) because Slappey was unavailable, and the record established that defendants procured his unavailability through wrongdoing. Evidence established that Slappey had cooperated with the police and the prosecutor in this case since 2014, but after he was mistakenly transported to court with defendants (in violation of

a no-contact order) he refused to testify at the preliminary examination. Additionally, the court found that Slappey was assaulted and intimidated in jail at the direction of defendants and that they had engaged in other efforts to harass and intimidate him in order to prevent him from testifying in court. Given these findings, the trial court's decision to admit Slappey's prior statements did not violate William-Salmon's right of confrontation.

8. William-Salmon argued that evidence of the murders of Keys and Zechman was not relevant to his case and that the court abused its discretion by admitting it at the joint trial in violation of MRE 403. The prosecutor argued that William-Salmon had conspired with Caddell to murder not only Reed, but also Keys and Zechman. Phone calls that William-Salmon made while in jail provided support for the prosecution's theory that William-Salmon was involved in the planning of these murders, and therefore, evidence of the murders was relevant to his case and was not more prejudicial than probative.

9. William-Salmon argued that the prosecutor improperly shifted the burden of proof to him when she questioned why he had initiated plea negotiations. Because evidence of William-Salmon's guilty plea was admissible at trial, the prosecutor was entitled to comment on it during closing argument. Further, her remarks were responsive to arguments made by the defense and did not improperly shift the burden of proof.

Caddell's convictions and sentences vacated and his case remanded for a new trial. William-Salmon's convictions and sentences affirmed.

1. CRIMINAL LAW — JURY TRIAL — ALLEGED JUROR MISCONDUCT — REMOVING A JUROR DURING DELIBERATIONS.

When presented with allegations of juror misconduct during deliberations, the trial court must balance two competing interests in investigating the allegations: the need to preserve the secrecy of juror deliberations and the duty to ensure that jurors are obeying instructions and adhering to their oath; the investigation must be circumscribed to protect the secrecy of deliberations and the defendant's state constitutional right to a unanimous verdict, but it must not be so limited that it precludes a fair determination of whether a juror is deliberating as required by law; refusal to deliberate is a proper ground for juror removal, but if there is a reasonable possibility that the juror was targeted for removal because of their views on the merits of the case, the court must err on the side of keeping the juror on the panel.

2. CRIMINAL LAW — PLEAS — MOTIONS TO VACATE — TIMELINESS.

MCR 6.310(E) provides that a court may vacate a plea on a prosecutor's motion if the defendant has failed to comply with the terms of a plea agreement; MCR 6.310(E) does not otherwise limit when a prosecutor may move to vacate the plea.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Deborah K. Blair*, Assistant Prosecuting Attorney, for the people.

Phillip D. Comorski and *Gabi D. Silver* for Antonio Caddell.

Jonathan B. D. Simon for Ricco R. William-Salmon.

Before: MURRAY, C.J., and SWARTZLE and CAMERON, JJ.

MURRAY, C.J. Defendants Antonio Caddell and Ricco William-Salmon were tried jointly before separate juries. The charges against Caddell arose from two separate cases that were joined for trial. In LC No. 16-007204-01-FC, the jury convicted Caddell of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, related to the shooting death of Corey Reed. In LC No. 16-007144-01-FC, the jury convicted Caddell of first-degree premeditated murder for the death of Ben Keys,[1] conspiracy to commit first-degree murder involving Keys and Laura Zechman, solicitation of the murders of Keys and Zechman, MCL 750.157b, and felony-firearm. The trial court sentenced Caddell to life

[1] The jury acquitted Caddell of an additional count of first-degree premeditated murder related to the death of Laura Zechman.

in prison without parole for the murder and conspiracy to commit murder convictions, 30 to 60 years in prison for the solicitation of murder conviction, and two years in prison for each felony-firearm conviction. Caddell appeals as of right in Docket No. 343750.[2] We vacate Caddell's convictions and remand for retrial.

In Docket No. 343993, William-Salmon appeals as of right his jury-trial convictions of first-degree premeditated murder for the death of Reed, conspiracy to commit first-degree murder, and felony-firearm. The trial court sentenced William-Salmon to life in prison without parole for the murder and conspiracy convictions and to two years in prison for the felony-firearm conviction. We affirm.

Defendants' convictions arise from their participation in the hired murders of three victims, Reed, Keys, and Zechman, allegedly in retaliation for an earlier "Eastside Barbershop shooting" on November 6, 2013. Reed was killed on Hull Street in Detroit on November 23, 2013. Keys and Zechman were killed inside a vehicle in Detroit on April 30, 2014. In LC No. 16-007204-01-FC, the prosecutor charged both Caddell and William-Salmon with first-degree premeditated murder, conspiracy to commit murder, and felony-firearm in connection with Reed's death. In LC No. 16-007144-01-FC, the

[2] Although Caddell's convictions arise from two different cases that were joined for trial, Caddell's claim of appeal was filed only from LC No. 16-007204-01-FC, apparently because only that lower court number was listed on the Notice of Right to Timely Appeal and Request for Appointment of Attorney form filed in the trial court. However, the parties discuss both underlying cases in their briefs, and neither party suggests that the scope of Caddell's appeal was intended to be or should be limited only to LC No. 16-007204-01-FC. Because the same jury decided both cases, Caddell was convicted of first-degree murder and sentenced to life without parole in both cases, and the issues on appeal implicate the validity of Caddell's convictions in both cases. Therefore, we exercise our authority under MCR 7.216(A)(7) to modify the claim of appeal to also include LC No. 16-007144-01-FC.

prosecutor charged Caddell with two counts of first-degree premeditated murder, conspiracy to commit murder, solicitation of murder, and felony-firearm in connection with the deaths of Keys and Zechman.

William-Salmon initially pleaded guilty to second-degree murder, MCL 750.317, and felony-firearm in exchange for a sentence agreement of 13 to 22 years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction and his agreement to cooperate and testify truthfully against other codefendants. William-Salmon testified at Caddell's first trial in May 2017. The jury was unable to reach a verdict, and the court declared a mistrial. Thereafter, the trial court granted the prosecution's motion to vacate William-Salmon's plea on the ground that he violated his plea agreement to cooperate and provide truthful testimony at Caddell's trial. Defendants were later tried jointly in February 2018 and convicted of the crimes specified above.

Within two hours of submitting the case to the jury, the trial court received a note indicating that the Caddell jury felt deadlocked and expressing concerns about Juror No. 3. Despite the court's repeated instructions to the jury to "share your opinions and the reasons for them" and to "keep[] an open mind with regards to what each other has to say" without "giving up your own opinion just for the sake of reaching a decision or just because other people disagree with you," the jury, less than two hours later, sent another note to the court about the "completely closed off" juror who refused to articulate reasonable doubt. All of the other jurors later approved a note that stated as follows:

(1) Juror No. 3 was not participating in deliberations.

(2) Juror No. 3 stated that she had her mind "made up before [she] came in here."

(3) Juror No. 3's emotions and beliefs, not the facts, were her "driving force."

(4) Juror No. 3 would not provide factual, rational support for her beliefs.

(5) Juror No. 3 would not even acknowledge actual evidence or the smallest of facts.

(6) Juror No. 3 frequently put her head down and closed her eyes.

(7) Juror No. 3 was disrespectful to other jurors.

(8) Juror No. 3 had said, "[Y]ou're not from the hood. You just don't understand."

Juror No. 3 also appeared late to court and engaged in a shouting match with other jurors in which she used profanity. After discussing the situation with counsel and reviewing federal caselaw[3] addressing this situation, the trial court decided to question Juror No. 3 separately from the other jurors. Juror No. 3 was brought out for questioning and was properly cautioned not to disclose her or any other juror's vote on any of the counts. After making a sarcastic comment under her breath (that was apparently heard only by the trial court and prosecutor), Juror No. 3 denied the allegations by the other jurors. She stated that she read from the notes she took during trial to her fellow jurors when supporting her view of the evidence. When confronted with the other jurors' allegation that she did not provide the facts and reasons supporting her position, she stated:

> I have shared. I've read from my notes why I answered certain questions, you know, what is my opinion, why I feel that way.

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[3] The court specifically cited *United States v McGill*, 815 F3d 846 (CA DC, 2016), and *United States v Ebron*, 683 F3d 105 (CA 5, 2012).

> I even came in here yesterday and wrote about the things on the paper that I had been thinking about all weekend long. I gave it to them, the head guy back there to read. He read them or maybe he read some of it. I think that not agreeing with–in the courtroom they told us to come up with reasonable doubt, and that is what I'm working toward because what I heard here.

She also denied initiating the shouting match overheard by the court. In deciding to remove Juror No. 3, the trial court stated,

> I think in light of her answers in terms of what she said that, you know, presumably everybody else is wrong except her, and I think it really in essence does boil down to the notion of do I think that juror number three is being truthful with regards to her answers, and I do not believe that she is.

Juror No. 3 was then removed from the jury, and an alternate was placed onto it. The jury subsequently convicted Caddell as noted above.

I. DOCKET NO. 343750 (DEFENDANT CADDELL)

A. JURY DELIBERATIONS AND REMOVAL OF JUROR NO. 3

With respect to the trial court's removal of Juror No. 3, Caddell makes two separate but related arguments. First, he argues that the trial court should have declared a mistrial instead of removing Juror No. 3. Second, Caddell argues that the trial court erred in removing Juror No. 3 and that by removing Juror No. 3, his constitutional rights to a unanimous jury[4] and due process of law were violated.

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[4] *State v Ramos*, 231 So 3d 44, 54; 2016-1199 (La App 4 Cir 11/2/17), cert gtd 586 US ___; 139 S Ct 1318 (2019), is currently before the United States Supreme Court to address whether a state criminal defendant has the right to a unanimous jury verdict under the Sixth

1. MOTION FOR MISTRIAL

Caddell argues that the trial court abused its discretion by failing to grant a mistrial at several points during jury deliberations. This Court reviews a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "An abuse of discretion occurs when the trial court 'chooses an outcome that falls outside the range of principled outcomes.' " *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016) (citation omitted).

"A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). A mistrial may be granted if a jury is unable to reach a verdict. See *People v Riemersma*, 104 Mich App 773, 777-779; 306 NW2d 340 (1981); *Arizona v Washington*, 434 US 497, 509-510; 98 S Ct 824; 54 L Ed 2d 717 (1978). "[T]rial courts are to exercise caution in discharging the jury before a verdict is reached[.]" *People v Lett*, 466 Mich 206, 216; 644 NW2d 743 (2002). Recently, in *People v Walker*, 504 Mich 267, 276-278; 934 NW2d 727 (2019), our Supreme Court explained:

> When a jury indicates it cannot reach a unanimous verdict, a trial court may give a supplemental

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Amendment of the United States Constitution as incorporated through the Fourteenth Amendment of the United States Constitution. As of now, it is not. See *McDonald v Chicago*, 561 US 742, 765 n 13; 130 S Ct 3020; 177 L Ed 2d 894 (2010) (recognizing that the Sixth Amendment right to a unanimous jury verdict in a criminal case has not yet been incorporated against the states). But our state Constitution, Const 1963, art 1, § 14, provides criminal defendants with the right to a unanimous jury.

> instruction—commonly known as an *Allen*[5] charge—to encourage the jury to continue deliberating. *People v Sullivan*, 392 Mich 324, 329; 220 NW2d 441 (1974). The goal of such an instruction is to encourage further deliberation without coercing a verdict. *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984). See *Allen v United States*, 164 US 492, 501; 17 S Ct 154; 41 L Ed 528 (1896) ("While undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views . . . ."). "If the charge has the effect of forcing a juror to surrender an honest conviction, it is coercive and constitutes reversible error." *Sullivan*, 392 Mich at 334 (quotation marks and citation omitted).
>
> In *Sullivan*, this Court adopted a standard deadlocked-jury instruction that has since been incorporated into our model jury instructions. *Id*. at 341; M Crim JI 3.12.[6] Although the model instruction is an example of an instruction that strikes the correct balance, it is not the only instruction that may properly be given. The relevant question is whether "the instruction given [could] cause a juror to abandon his [or her] conscientious dissent and defer to the majority solely for the sake of reaching agreement[.]" *Hardin*, 421 Mich at 314. The inquiry must consider the factual context in which the instruction was given and is conducted on a case-by-case basis. *Sullivan*, 392 Mich at 332-334. [Some citations omitted.]

Caddell argues that the trial court erred when it denied his motion for a mistrial and refused to accept that the jury was unable to reach a verdict after the jury sent a note—about a day after the court provided a deadlocked-jury instruction—informing the court

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[5] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

[6] M Crim JI 3.12(2) provides, in relevant part, "it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment."

that Juror No. 3 was refusing to participate and no further progress could be made without her participation. In *Hardin*, the Court explained that after a deadlocked-jury instruction is provided and the jury has been unable to agree, a court may still require the jury to continue deliberations and "may give or repeat an instruction." *Hardin*, 421 Mich at 318 (quotation marks and citation omitted). The *Hardin* Court warned, however, that the trial court " 'shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.' " *Id*. at 318-319, quoting American Bar Association (ABA) instruction 5.4(b).[7]

What the trial court was presented with, almost from the start of deliberations, was a situation in which it was advised that the jury's inability to reach a verdict was because of a lone juror's refusal to participate in the deliberation process. Like the trial court in *Hardin*, after the first few hours of deliberation, and after receiving a note from the jury only two hours after being given the case, the trial court sent the jury home for the evening. When the jury returned the next day, it soon again indicated an inability to further deliberate, and the trial court then requested specific examples of the lone juror's refusal to participate in deliberations. At that point, only two days into deliberations after a 13-day trial, the court did not require, or threaten to require, the jury to deliberate for an unreasonable length of time, or for unreasonable intervals. *Id*. at 318-319. A new trial was not warranted at that point.

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[7] M Crim JI 3.12 mirrors ABA instruction 5.4. *People v Pollick*, 448 Mich 376, 382 n 12; 531 NW2d 159 (1995). "Any substantial departure [from this instruction] shall be grounds for reversible error." *Sullivan*, 392 Mich at 342.

2. REMOVING A JUROR DURING DELIBERATIONS

Caddell's arguments in support of a mistrial leads our discussion to Caddell's related, but more difficult argument, which is that the trial court's decision to remove Juror No. 3 and replace her with an alternate juror violated his state constitutional right to a unanimous verdict, see Const 1963, art 1, § 14, and interfered with the secrecy of deliberations, depriving him of a fair trial. Although Caddell objected below to the trial court's removal of Juror No. 3, he did not do so on the basis of his constitutional rights to a fair trial and a unanimous verdict. Therefore, his constitutional arguments are unpreserved. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Caddell's unpreserved constitutional claims are reviewed for plain error affecting his substantial rights. *People v Brown*, 326 Mich App 185, 192; 926 NW2d 879 (2018). "This generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009) (quotation marks and citation omitted). "[R]eversal is only warranted if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id*. at 220 (quotation marks and citation omitted).

As with all issues we address on appeal, the first question we must answer—and often it is one of the more critical ones—is what standard to apply when reviewing the trial court's decision. Here, we know that the Legislature has granted trial courts with discretion to remove a juror throughout the trial proceedings, and therefore, we apply the deferential abuse-of-discretion standard to the trial court's decision. See MCL 768.18 ("Should any condition arise during the trial of the

cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12."); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001), and *People v Dry Land Marina, Inc*, 175 Mich App 322, 327; 437 NW2d 391 (1989) (the decision to call an alternate juror is a "reasonable alternative" to a mistrial). The trial court's factual findings are reviewed for clear error. *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016).

We explained in *Tate*, 244 Mich App 562, "that, while a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." "Removal of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *Id*.

Although *Tate* and *Dry Land Marina* recognize the trial court's broad authority to remove jurors, those cases addressed significantly different circumstances from those involved here. For example, in *Tate*, 244 Mich App at 560, we concluded that the trial court did not abuse its discretion by removing a juror who developed a possibly contagious rash after deliberations began. Similarly, in *Dry Land Marina*, 175 Mich App at 324, the juror was excused because she broke

her arm the previous weekend and was experiencing related problems. Both of these decisions dealt with circumstances unrelated to the jury's deliberative process and thus did not address what authority a trial court had to delve into what was actually transpiring among jurors. Additionally, to establish good cause for the removal of a juror under MCR 6.411, it must be established that one of the reasons listed in MCR 2.511(D) exists or that another "reason recognized by law" exists. The reasons set forth in MCR 2.511(D), excluding Subrules (2) and (3), are, like the issues dealt with in *Tate* and *Dry Land Marina*, essentially unrelated to the jury's deliberative process. Therefore, in order to determine their applicability, a court need not discover the extent of a juror's participation in deliberations.

Here, of course, Juror No. 3 was not removed because of a medical condition or other objective physical restraint or factor that would impede her ability to serve on the jury, such as being subject to outside influence, bias, injury, or other similar situation. Instead, Juror No. 3 was removed because the trial court found that she was failing to adhere to her juror's oath by not engaging in deliberations and had not done so since the start of deliberations. In making its ruling, the trial court looked to federal caselaw addressing the balance between removing a juror who is not following instructions, protecting the secrecy of deliberations, and preserving the right to a unanimous jury. We now turn to those and other decisions because our appellate courts have yet to speak on the issue. *Auto Owners Ins Co v Seils*, 310 Mich App 132, 147 n 5; 871 NW2d 530 (2015) ("Cases from other jurisdictions are not binding precedent, but we may consider them to the extent this Court finds their legal reasoning persuasive.").

We must first determine the proper standard that a trial court should employ when deciding whether to remove a juror for refusing to deliberate. To do so, several important principles need to be recognized. First and foremost is the sanctity of private jury deliberations. The secrecy of jury deliberations is a vital part of our jury-trial system, as secrecy provides jurors with the freedom to discuss all aspects of a case and engage in the free-flow of ideas, concerns, and opinions regarding, as in this case, the guilt or innocence of a fellow community member. See, e.g., *Clark v United States*, 289 US 1, 13; 53 S Ct 465; 77 L Ed 993 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); *United States v Thomas*, 116 F3d 606, 618 (CA 2, 1997) ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. . . . [It] is essential to the proper functioning of juries."); *In re Globe Newspaper Co*, 920 F2d 88, 94 (CA 1, 1990) ("It is undisputed that the secrecy of jury deliberations fosters free, open and candid debate in reaching a decision."). The secrecy of jury deliberations also plays an important role in isolating the jury from undue influence. *United States v Olano*, 507 US 725, 737-738; 113 S Ct 1770; 123 L Ed 2d 508 (1993) ("[T]he primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence."). And of course, trial courts have always been the gatekeepers for protecting the secrecy of jury deliberations. *People v France*, 436 Mich 138, 150; 461 NW2d 621 (1990) ("The secrecy of the deliberations of the jury is a responsibility of the trial judge.") (quotation marks and citation omitted); *Wilson v Hartley*, 365 Mich 188, 190; 112 NW2d 567 (1961) (same).

For these reasons, courts must always be cautious not to "intrude on the secrecy of the jury's deliberations." *United States v Brown*, 823 F2d 591, 595 (CA DC, 1987). As the court stated in *United States v Ebron*, 683 F3d 105, 125 (CA 5, 2012), quoting *Thomas*, 116 F3d at 620, "[p]reserving the secrecy of jury deliberations 'requires not only a vigilant watch against external threats to juror secrecy, but also strict limitations on intrusions from those who participate in the trial process itself, including counsel and the presiding judge.' "

Competing concerns are ensuring that jurors comply with their oath and that Michigan law regarding the competency of jurors to sit is followed. MCR 6.411; MCR 2.511(D). "It is well-settled that jurors have a duty to deliberate." *United States v Baker*, 262 F3d 124, 130 (CA 2, 2001). More than a century ago, the United States Supreme Court put into perspective each juror's duties relative to the other jurors:

> The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. [*Allen*, 164 US at 501-502.]

Consistent with *Allen*, in every jury trial held in this state jurors are instructed about their obligations, which include the duty to keep an open mind and discuss the issues with their fellow jurors. M Crim JI 3.11 provides, in part:

> (3) A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.
>
> (4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.
>
> (5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

Likewise, when the jury indicates that it cannot reach a unanimous decision, the deadlocked-jury instruction is given, which reminds the jurors that "it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment." M Crim JI 3.12(2). This instruction, which mirrors ABA Instruction 5.4, provides jurors "with some guidance concerning their duties during deliberations." *People v Goldsmith*, 411 Mich 555, 559; 309 NW2d 182 (1981). "While they are obligated to deliberate with the goal in mind of reaching an agreement, the instruction also emphasizes that no juror need surrender his honest convictions concerning the evidence solely for the purpose of obtaining a unanimous agreement." *Id*. The deadlocked-jury instruction "advises jurors that they should 'carefully and seriously consider the views of . . . fellow jurors' and '[t]alk

things over in a spirit of fairness and frankness.' " *Walker*, 504 Mich at 279, quoting M Crim JI 3.12(3). Paragraph (4) of the instruction "addresses how jurors might meaningfully engage with one another rather than just stating their positions: 'You should each not only express your opinion but also give the facts and the reasons on which you base it.' " *Walker*, 504 Mich at 279, quoting M Crim JI 3.12(4).

The trial court's duty to ensure that the jury's deliberations remain secret while also ensuring that jurors obey instructions and adhere to their oath greatly complicates the trial court's task in determining whether to remove a juror during deliberations. Nevertheless, it is a task that must be performed,[8] and only the trial court can perform this function through a careful investigation of the circumstances:

> Balancing these two interests is a challenge a district court must undertake when faced with allegations of juror misconduct during deliberations. "[A] district court should be more cautious in investigating juror misconduct during deliberations than during trial, and should be exceedingly careful to avoid any disclosure of the content of deliberations." *United States v. Boone*, 458 F.3d 321, 329 [CA 3, 2006]. While exercising due caution, a district court may conduct an investigation in situations where it is presented with substantial evidence of jury misconduct. *See id*. (holding that "where substantial evidence of jury misconduct—including credible allegations of jury nullification or of a refusal to deliberate—arises during deliberations, a district court may, within its sound discretion, investigate the allegations") (citations omitted). Such an investigation may be conducted via careful juror questioning or any other appropriate means. *Id*. (citations omitted). In adopting this

[8] As the trial court did here, when a refusal to deliberate is first presented to the court, generally a court should first reinstruct the jury on any necessary issue, such as the jurors' duties or what it means to be deadlocked.

> standard, "we emphasize that a district court, based on its unique perspective at the scene, is in a far superior position than [we are] to appropriately consider allegations of juror misconduct, both during trial and during deliberations." *Id*. [*Ebron*, 683 F3d at 125-126.]

This investigation must be carefully circumscribed to protect the secrecy of deliberations, and to protect the defendant's state constitutional right to a unanimous verdict, but not so limited that it would preclude a fair determination of whether a juror is deliberating as required by law. As the *Thomas* court stated:

> Where, however, as here, a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations. There is no allegedly prejudicial event or relationship at issue, nor is the court being asked to assess whether a juror is so upset or otherwise distracted that he is unable to carry out his duties. Rather, to determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes. Such an investigation must be subject to strict limitations. Without such an inquiry, however, the court will have little evidence with which to make the often difficult distinction between the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence. Yet this distinction is a critical one, for to remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict. [*Thomas*, 116 F3d at 621.]

As was done by the esteemed trial judge here,

> [t]he inquiry should focus on the conduct of the jurors and the *process* of deliberations, rather than the *content* of discussions. The court's inquiry should cease if the trial judge becomes satisfied that the juror in question is par-

> ticipating in deliberations and does not intend to ignore the law or the court's instructions. Finally we recognize that if inquiry occurs, it should reflect an attempt to gain a balanced picture of the situation; it may be necessary to question the complaining juror or jurors, the accused juror, *and* all or some of the other members of the jury. [*State v Elmore*, 155 Wash 2d 758, 774; 123 P3d 72 (2005).]

Finally, after conducting this limited investigation, the court must determine whether the juror is actually engaging in misconduct by refusing to deliberate. We find instructive the discussion of what constitutes a "refusal to deliberate" in *People v Cleveland*, 25 Cal 4th 466, 485; 21 P3d 1225 (2001):

> [P]roper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.

The courts are split on the verbiage for a test to apply in determining whether a juror is refusing to deliber-

ate, though all three variations err on the side of keeping a juror on the panel if there is some possibility that removal is sought because of the juror's views on the case.

The United States Court of Appeals for the District of Columbia Circuit has held that if there is "any possibility" that the subject juror is being pinpointed because of his or her view of the government's case, the juror should remain on the jury. *Brown*, 823 F2d at 596 (concluding that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request") (emphasis added). Somewhat differently, the United States Courts of Appeals for the Third and Eleventh Circuits have held that " 'a juror should be excused only when no "substantial possibility" exists that she is basing her decision on the sufficiency of the evidence.' " *United States v Kemp*, 500 F3d 257, 304 (CA 3, 2007), quoting *United States v Abbell*, 271 F3d 1286, 1302 (CA 11, 2001). In *United States v Symington*, 195 F3d 1080, 1087 (CA 9, 1999), the United States Court of Appeals for the Ninth Circuit held that a court must not dismiss a juror "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." Other courts have used this same "reasonable possibility" formulation, see *Elmore*, 155 Wash 2d at 761, and *Wofford v Woods*, 352 F Supp 3d 812, 823 (ED Mich, 2018), because it strikes a good balance between the rights at issue and the discretion to be exercised by the trial court:

> The "any reasonable possibility" standard is not insurmountable, but it is sufficiently high to err on the side of protecting important constitutional rights. *See Symington*, 195 F.3d at 1087 n. 5 (The reasonable possibility standard,

> in this context, "is a threshold at once appropriately high and conceivably attainable."). Moreover, this standard takes into account our presumption that jurors have followed the court's instructions in that it requires the court, where there is conflicting evidence, to retain a juror if there is any reasonable possibility that the dispute among the jury members stems from disagreement on the merits of the case. Emphasis on the trial judge's discretion recognizes that the trial court is "uniquely situated to make the credibility determinations that must be made in cases like this one: where a juror's motivations and intentions are at issue." *Abbell*, 271 F3d at 1303. [*Elmore*, 155 Wash 2d at 777-778 (some citations omitted).]

We now turn to some analogous decisions to assist us in reviewing the specific decision of the trial court in removing Juror No. 3. Caddell relies on *Brown*, 823 F2d 591, a decision which, as we noted, used the "any possibility" test. In *Brown*, a juror (Bernard Spriggs) sent a note to the trial court stating that he could no longer discharge his duties on the jury. *Id*. at 594. The court briefly questioned the juror concerning his reasons, and the juror indicated that he had difficulties with " 'the way [the Racketeer Influenced and Corrupt Organizations (RICO) statute is] written and the way the evidence has been presented.' " *Id*. To avoid intruding on the secrecy of deliberations, the court did not further clarify the juror's request. *Id*. at 595. The prosecutor then argued that dismissal was proper because the juror expressed an unwillingness to follow the court's instructions on the law, while defense counsel argued that the juror's concern stemmed from the prosecutor's failure to sufficiently prove the RICO counts. *Id*. The court agreed with the prosecutor and dismissed the juror for refusing to follow the law. *Id*.

On appeal, the D.C. Circuit Court of Appeals concluded that the dismissal violated the defendant's

Sixth Amendment right to be convicted by a unanimous jury because the record indicated a "possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction." *Id*. at 596. The court reasoned that "when a request for dismissal stems from the juror's view of the sufficiency of the evidence that the government offered at trial, a judge may not discharge the juror: the judge must either declare a mistrial or send the juror back to deliberations with instructions that the jury continue to attempt to reach agreement." *Id*. In confronting "the problem that the reasons underlying a request for a dismissal will often be unclear," the court concluded that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Id*. (emphasis added).

Wofford, a habeas case, is analogous to the case at bar. There, the trial court received several notes from the jury indicating that they could not agree, and the court twice gave the deadlocked-jury instruction. *Wofford*, 352 F Supp 3d at 814. The holdout juror (Juror M) eventually retained her own attorney to inform the court that the other jurors were harassing her. *Id*. Instead of declaring a mistrial, the trial court removed Juror M for violating its instruction not to discuss the case with anyone; an alternate juror was seated, and the defendant was convicted. *Id*. This Court affirmed the defendant's conviction, holding that the trial court did not abuse its discretion when it removed Juror M under *Tate*, 244 Mich App at 562, because the juror had failed to cooperate. *People v Wofford*, unpublished per curiam opinion of the Court of Appeals, issued March 17, 2015 (Docket No. 318642), pp 2-3.

The United States District Court for the Eastern District of Michigan determined that the defendant was deprived of his Sixth Amendment right[9] to a unanimous verdict because a reasonable possibility existed that the impetus for Juror M's dismissal was her status as the holdout. *Wofford*, 352 F Supp 3d at 823. Because the trial court received several notes indicating that there was a holdout juror, and the deadlocked-jury instruction was given twice, the record evidence established "a reasonable possibility that what led to the notes, what led to Juror M contacting an attorney, and what put the issue of Juror M's removal before the judge was Juror M's views about the merits of the case." *Id*. "So even if the trial judge removed Juror M because she violated his instructions, there remains a reasonable possibility that the 'impetus' for Juror M's removal was that she was the holdout." *Id*. (citations omitted).

Turning back to the trial court's decision here, although the trial court went to great lengths to follow the appropriate procedure of investigating juror misconduct while protecting the secrecy of jury deliberations, we conclude that the record evidence discloses a reasonable possibility that the unintended reason for removing Juror No. 3 stemmed from her views on the merits of the case. For two reasons, we conclude that the record evidence establishes a reasonable possibility that what led to the multiple notes from the jury, and what put the issue of Juror No. 3's removal before the judge, was her view on the merits of the case and her

[9] The court subsequently recognized that the Sixth Amendment right to a unanimous verdict has not been incorporated against the states, but still ruled that the defendant's right to due process was violated. *Wofford v Woods*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 9, 2019 (Case No. 16-cv-13083), pp 2-3.

status as the holdout juror. See *Symington*, 195 F3d at 1088 n 8 ("Indeed, it appears that it was only because of their disagreement with [the juror] on the merits that the other jurors had occasion to question her ability to deliberate."); *id*. at 1088 n 9 ("[B]ecause it was reasonably possible that the problems all stemmed from the other jurors' disagreement with [the holdout juror's] position on the merits, it was error to continue the case without her.").

First, the note signed by all eleven other jurors reflects that a number of the issues they had with Juror No. 3 could have stemmed from her disagreement with the other jurors regarding the merits of the case. For example, one complaint about Juror No. 3 was that her decision-making was driven by emotions and beliefs, not facts. But to know that emotions were controlling her thoughts means Juror No. 3 was *communicating* her thoughts. Another complaint was that Juror No. 3 would not provide factual, rational support for her beliefs. Again, the implication is that Juror No. 3 provided support for her beliefs, but that support was just not "factual" or "rational" to the other eleven jurors. Finally, the eleven jurors complained that Juror No. 3 would not even "acknowledge the actual facts presented" or "agree to the smallest of facts," again implying that there had been discussion about the case with Juror No. 3, but frustration with her not accepting "actual" evidence or "the smallest of facts." Though the other complaints more directly addressed concerns that Juror No. 3 was not deliberating because she had made her mind up from the start, this made the evidence from the note quite equivocal.

Second, Juror No. 3 stated that she participated in deliberations, and although she perhaps did not deliberate effectively with the other jurors, she relied upon

her notes to make her decision and read them to her fellow jurors. When confronted with the other jurors' allegation that she did not provide the facts and reasons supporting her position she stated:

> I have shared. I've read from my notes why I answered certain questions, you know, what is my opinion, why I feel that way.
>
> I even came in here yesterday and wrote about the things on the paper that I had been thinking about all weekend long. I gave it to them, the head guy back there to read. He read them or maybe he read some of it. I think that not agreeing with—in the courtroom they told us to come up with reasonable doubt, and that is what I'm working toward because what I heard here.

Juror No. 3 also repeatedly stated that she had not entered deliberations with her mind made up, and that she was focusing on the reasonable-doubt standard. She also indicated that although curse words had been used the day before, everyone was presently fine in the jury room, and she did not take anything said during deliberations personally. These statements, admittedly read from a cold record, reveal a juror who was deliberating. Perhaps not fully engaged, but one who understood her obligations, and who was attempting to fulfill them.

We are acutely aware that we are reviewing a cold record, and that we did not see Juror No. 3 when she spoke to the court, nor do we know what she purportedly said with sarcasm at the start of the hearing. Nevertheless, despite the fact that the trial court is entitled to make a credibility determination regarding juror misconduct, we conclude that the trial court crossed the threshold into the deliberative process by discharging a reluctant juror who repeatedly said that she was minimally cooperating. In doing so we ac-

knowledge that a trial court's ability to make credibility determinations under these circumstances presumes that removal will not be limited to jurors who *admit* to refusing to deliberate. Otherwise there would be no need to make credibility determinations. But because there was a good deal of conflicting evidence on whether she was deliberating, and given that only a minimal investigation can be conducted to determine what the real concerns are, we must err on the side of protecting defendant's rights:

> We may not be able to say for a certainty that Spriggs' desire to leave the jury stemmed from his view of the adequacy of the government's evidence. But we cannot say with any conviction that Spriggs' request to be dismissed stemmed from something *other* than this view. Given the possibility—which in this case we think a likelihood—that Spriggs' desire to quit deliberations stemmed from his belief that the evidence was inadequate to support a conviction, we must find that his dismissal violated the appellants' right to a unanimous jury verdict. [*Brown*, 823 F2d at 597.]

We are therefore firmly of the opinion that when, as is the case here, a juror specifically indicates that he or she is engaging in some form of exchange with fellow jurors, and there is other evidence to support that possibility, a trial court should deem that sufficient to keep the juror on the panel so as to avoid a reasonable possibility that the juror is being removed for his or her views on the merits of the case presented by the government.

By erring on the side that a juror is properly following the trial court's instructions on how to deliberate, we can best preserve the state constitutional right to a unanimous jury and avoid any unnecessary intrusion into private jury deliberations. If Juror No. 3 presented a situation like that in *Baker*, where the

juror admitted to (1) making her mind up before deliberations and (2) refusing to participate in discussions from the start of deliberations, *Baker*, 262 F3d at 131-132, we would uphold the trial court's decision without hesitation. But, for the reasons expressed above, the actions of Juror No. 3 did not rise to the level of refusing to deliberate. See *Cleveland*, 25 Cal 4th at 485. Therefore, Caddell was deprived of his state constitutional right to a unanimous verdict, a plain error affecting his substantial rights, and he is entitled to a retrial.

Although ordering a new trial resolves both of Caddell's related arguments on appeal, we address Caddell's remaining issue on appeal should it arise on retrial.

B. OTHER-ACTS EVIDENCE

Caddell argues that evidence of another murder that occurred around October 15, 2013, was improperly admitted at trial, contrary to MRE 404(b). Although William-Salmon objected to this evidence, and Caddell joined in the objection, the trial court did not rule on the objection at that time, and Caddell never renewed his objection. Accordingly, this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, we review this issue for plain error affecting Caddell's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing

> an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Relevant other-acts evidence is admissible unless the proponent's sole theory of relevance is to show the defendant's criminal propensity to prove that he committed the charged offenses. *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Accordingly, MRE 404(b)(1) is inclusionary rather than exclusionary. *Id*. at 64. In *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009), this Court explained:

> In deciding whether to admit evidence of other bad acts, a trial court must decide: first, whether the evidence is being offered for a proper purpose, not to show the defendant's propensity to act in conformance with a given character trait; second, whether the evidence is relevant to an issue of fact of consequence at trial; third, [under MRE 403] whether its probative value is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and fourth, whether a cautionary instruction is appropriate.

In *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994), our Supreme Court explained what can constitute unfair prejudice under MRE 403:

> Obviously, evidence is offered by an advocate for the always clear, if seldom stated, purpose of "prejudicing" the adverse party. Recognizing this, the Supreme Court in adopting MRE 403 identified only unfair prejudice as a factor to be weighed against probative value. This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock. [Citation and quotation marks omitted.]

In *People v Johnigan*, 265 Mich App 463, 465-466; 696 NW2d 724 (2005), the defendant argued that the trial court abused its discretion and violated MRE 404(b) by admitting evidence from an informant that the defendant told him about a separate murder and weapons unrelated to the charged offense that were stockpiled in the defendant's house. This Court explained that the evidence was admissible under MRE 404(b) for two purposes. First, the evidence was admissible to prove motive, namely, that the defendant acted in his role as a hired killer. *Id*. Second, the evidence demonstrated a lack of mistake (or fabrication) in the informant's accusations. *Id*. at 465-467.

Similarly, here, evidence of the Eastside Barbershop shooting and the subsequent retaliatory hits between the feuding sides, including the Chapmans (in particular, Edward Chapman, "Ed Bone" or "Bone") and Larry Walker ("Shank"), were relevant to Caddell's motive for committing the instant offenses as a hit man for the Chapmans. Mark Slappey's statements to the police that sometime after October 15, 2013, Caddell said that he completed one hit on behalf of the Chapmans against one of Shank's men, and that Caddell received payment in the form of money and a car, were probative of Caddell's role as a hired killer in these retaliatory killings. "Though motive is not an essential element . . . , it is generally relevant to show the intent necessary to prove murder." *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). Although the evidence of the series of retaliatory murders was inherently prejudicial, Caddell has not established any unfair prejudice because of the evidence's tendency to elicit bias, sympathy, anger, shock, or other considerations extraneous to the merits of the charged offenses that substantially outweighed the probative value of the evidence. *Pickens*, 446 Mich at 336-337.

Accordingly, Caddell has not established that the evidence was inadmissible under MRE 404(b)(1).

II. DOCKET NO. 343993 (DEFENDANT WILLIAM-SALMON)

A. VACATION OF GUILTY PLEA

William-Salmon first argues that the trial court erred by concluding that he failed to comply with the terms of his plea agreement and thereby granting the prosecutor's motion to vacate his guilty plea. He also argues that the prosecutor's motion to vacate his guilty plea was not timely brought. He maintains that the prosecutor should have brought the motion immediately after his testimony at Caddell's first trial, rather than waiting for the outcome of that trial—a hung jury. A trial court's decision on a motion to vacate a plea is reviewed for an abuse of discretion. *People v Martinez*, 307 Mich App 641, 646; 861 NW2d 905 (2014). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id*. (quotation marks and citation omitted).

MCR 6.310 provides, in relevant part:

> (A) Withdrawal Before Acceptance. The defendant has a right to withdraw any plea until the court accepts it on the record.
>
> (B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,
>
> (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice . . . .
>
> * * *
>
> (C) Motion to Withdraw Plea After Sentence.

(1) The defendant may file a motion to withdraw the plea within 6 months after sentence or within the time provided by subrule (C)(2).

(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:

(a) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and

(c) the motion to withdraw the plea is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(3) Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500.

* * *

(D) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

(E) Vacation of Plea on Prosecutor's Motion. 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 trial court may exercise its discretion to vacate an accepted plea only under the parameters of the court rule." *People v Strong*, 213 Mich App 107, 111-112; 539 NW2d 736 (1995).

The terms of William-Salmon's plea agreement required him to "cooperate and testify if needed." As this Court explained in *People v Abrams*, 204 Mich App 667, 672; 516 NW2d 80 (1994):

> [C]ooperation agreements that affect the disposition of criminal charges must be reviewed within the context of their function to serve the administration of criminal justice. Contractual analogies may not be applicable, and so the terms of an agreement must be reviewed to determine whether the ends of justice are served by enforcing the terms. [Citations omitted.]

In *People v Hannold*, 217 Mich App 382, 384; 551 NW2d 710 (1996), overruled in part on other grounds by *People v Smart*, 497 Mich 950 (2015), the defendant entered a plea agreement that required his " 'assistance to the police including testimony and full statement in an investigation involving John Hud Grover.' " The defendant later "changed his story and failed to testify at Grover's preliminary examination." *Hannold*, 217 Mich App at 390. The defendant's "breach led to the dismissal of charges against Grover," and then the trial court granted the prosecutor's motion to set aside the defendant's plea. *Id*. at 384-386, 390. This Court concluded that the trial court did not clearly err by finding that the defendant breached his plea agreement, and therefore the trial court did not abuse its discretion by vacating the plea. *Id*. at 386-391.

After entering his plea and agreeing to cooperate and testify, William-Salmon testified at Caddell's first trial. William-Salmon's testimony at Caddell's first trial was evasive and replete with contradictions. When ques-

tioned about Reed's murder, William-Salmon initially testified, "[I]t's been so long, I can't remember everything," and he denied much of the testimony that he had admitted at his plea hearing, which occurred only a week earlier. These denials repeatedly required the prosecutor to rehabilitate his testimony with questioning and citation to the plea transcript. After admitting that the contents of the plea transcript were true, William-Salmon nevertheless repeated some of the contradictory testimony. William-Salmon also demonstrated a lack of cooperation during trial regarding jail calls. He maintained that he would only admit that he had said something in a jail call if the prosecutor first located the call and played it for the jury. Moreover, he attempted to whitewash the contents of calls that would support an inference that Caddell was culpable.

Despite the fact that some of his testimony provided sufficient evidence to support a conviction of Caddell for Reed's murder, the trial court found that the inconsistencies between William-Salmon's testimony and the evidence and his evasive testimony called his credibility into question. Given William-Salmon's numerous inconsistencies, contradictions, and evasive testimony, the trial court did not clearly err by concluding that he failed to comply with the terms of his plea agreement at Caddell's trial. MCR 6.310(E).

Furthermore, despite William-Salmon's inconsistent and evasive testimony at Caddell's trial, the prosecutor gave William-Salmon another opportunity to cooperate after the trial. When the court asked the prosecutor at trial if she intended to move to vacate William-Salmon's plea, the prosecutor replied that she would only file the motion if William-Salmon did not cooperate with investigators who planned to visit that weekend. During that May 14, 2017 visit by detectives, William-Salmon failed

to cooperate with regard to other coconspirators. As a result, the prosecutor filed the motion based on both William-Salmon's lack of truthfulness at Caddell's trial and his lack of overall cooperation. His subsequent lack of cooperation with regard to other coconspirators was alone grounds for vacating his plea agreement.

We also reject William-Salmon's argument that the prosecutor's motion to vacate his guilty plea was not timely filed because it was not brought immediately after William-Salmon testified at Caddell's trial, but rather, was filed shortly after the court declared a mistrial at Caddell's first trial. The plain language of MCR 6.310(E) sets no limits on when the prosecutor must file the motion to vacate a plea. Interpretation of a court rule, which includes the rules of evidence, is subject to the same basic principles that govern statutory interpretation. *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996). We begin with the plain language of the court rule. *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). "When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Id*. (quotation marks and citations omitted). Common words must be understood to have their everyday, plain meaning. *Id*.

MCR 6.310(E) provides that a court may vacate a plea on a prosecutor's motion "if the defendant has failed to comply with the terms of a plea agreement." The rule does not delineate when the prosecutor's motion must be filed or granted. By contrast, other portions of MCR 6.310 specifically limit when a defendant may move to withdraw a plea and what is required at each timeframe. For example, MCR 6.310(A) addresses withdrawing a plea before acceptance by the court on the record, MCR 6.310(B) addresses withdrawing a plea

after acceptance but before sentencing, and MCR 6.310(C) addresses withdrawing a plea during the six months after sentencing. Had the drafters intended to limit when a prosecutor could file a motion to vacate a plea, they would have included similar limiting language in MCR 6.310(E). The history of this court rule also shows that language from its 1989 adoption allowing the court to vacate the plea on the prosecutor's motion "before sentence is imposed" was removed in 2005 subsequent amendments. Compare MCR 6.310 (staff comment to 1989 adoption), with MCR 6.310 as amended in 2005, repealing and replacing the language in the former MCR 6.310(C) and adding a new Subrule (E) that omitted the prior "before sentence is imposed" limitation, 473 Mich xlii, lxiv-lxvi (2005) ("Vacation of Plea on Prosecutor's Motion. 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."). Hence, the prosecution's motion, filed less than three weeks after Caddell's first trial ended, and after William-Salmon refused to cooperate with investigators, was not untimely. The trial court did not abuse its discretion by granting the prosecutor's motion to vacate William-Salmon's guilty plea.

B. EVIDENCE OF GUILTY PLEA

Next, William-Salmon argues that the trial court erred by allowing the prosecutor to introduce evidence of his earlier guilty plea. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014).

William-Salmon argues that evidence of his earlier guilty plea was inadmissible under MRE 410, which provides, in relevant part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

William-Salmon's reliance on this rule is misplaced because he did not *withdraw* his plea under MCR 6.310(A), (B), or (C). Rather, the prosecutor moved to *vacate* the plea, and the trial court granted the motion under MCR 6.310(E). Because MRE 410(1) only precludes evidence of a plea of guilty that was later *withdrawn*, not *vacated*, and William-Salmon's statements at the plea hearing were otherwise admissible under MRE 801(d)(2)(A) (a statement is not hearsay if it is the admission of a party-opponent), the trial court did not abuse its discretion by admitting William-Salmon's statements related to his plea.

C. SLAPPEY'S PRIOR STATEMENTS

William-Salmon next argues that the trial court abused its discretion by allowing the prosecutor to introduce portions of Slappey's prior statements at trial under the forfeiture-by-wrongdoing rule.

William-Salmon argues that the statements were inadmissible hearsay and that their admission also violated his constitutional right of confrontation.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Chelmicki*, 305 Mich App at 62. The trial court's factual findings are reviewed for clear error. *Garland*, 286 Mich App at 7. "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *Blevins*, 314 Mich App at 348-349.

Slappey's prior statements qualify as hearsay. MRE 801. Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998). In addition, in every criminal trial, the federal and state Constitutions protect a defendant's right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). " 'The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness.' " *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994).

The trial court ruled that Slappey's prior statements were admissible under MRE 804(b)(6) and did not violate William-Salmon's constitutional right of confrontation. In *People v Burns*, 494 Mich 104, 110-111; 832 NW2d 738 (2013), our Supreme Court explained:

> A defendant can forfeit his right to exclude hearsay by his own wrongdoing. MRE 804(b)(6) provides that a statement is *not* excluded by the general rule against hearsay if the declarant is unavailable, and the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." This rule [is] commonly known as the forfeiture-by-wrongdoing rule . . . .
>
> . . . The forfeiture doctrine not only provides a basis for an exception to the rule against hearsay; it is also an exception to a defendant's constitutional confrontation right. Insofar as it applies to the Sixth Amendment, however, the forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify. [Citations omitted.]

The Court clarified that "[t]o admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability." *Id*. at 115. In addition, the Court noted, "While the timing of the wrongdoing is by itself not determinative, it can inform the inquiry: a defendant's wrongdoing *after* the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability." *Id*. at 116.

Relying on Slappey's statements when refusing to testify, as well as recorded jail calls from Caddell and William-Salmon and other evidence of their threats against Slappey and his family members, the trial court found that defendants made a concerted effort to pressure and intimidate Slappey with the specific intent of precluding his testimony. Accordingly, the court found that defendants engaged in wrongdoing. The trial court

noted that Slappey had voluntarily cooperated with the police and prosecutor since 2014, but then, in 2016, despite a no-contact order with defendants, Slappey was transported to court with them and handcuffed to Caddell. Thereafter, Slappey refused to testify at the preliminary examination despite being held in contempt of court. The court also cited evidence of defendants' other attempts to pressure Slappey, including: (1) visits from Caddell's relatives, (2) shooting the windows of Slappey's home, and (3) assaults and intimidation of Slappey in jail at the direction of Caddell and William-Salmon. The trial court found "that both defendants engaged in . . . encouraging wrongdoing to pressure and prevent Mr. Slappey from coming to testify," and that "the wrongdoing that took place, the threats, that the harassment, the shooting out of the windows were intended for the purpose of procuring Mr. Slappey's unavailability at trial and that this wrongdoing has in fact caused his unavailability."

Unlike the defendant's warnings to the victim in *Burns*, 494 Mich at 115, which occurred contemporaneously with the offense, Caddell's and William-Salmon's wrongdoing with regard to Slappey occurred during the investigation and prosecution of the case, which allowed a strong inference of intent to cause Slappey's unavailability. *Id*. at 116. Moreover, given Slappey's statement that "I'm not going to end up on a slab" and his refusal to testify because he did not want to be next on the hit list, the trial court did not clearly err by finding that defendants' wrongdoing procured Slappey's unavailability. Therefore, the trial court did not abuse its discretion by admitting Slappey's prior statements under the forfeiture-by-wrongdoing rule in MRE 804(b)(6). Further, given the trial court's express finding that "the wrongdoing that took place . . . [was] intended for the purpose of procuring Mr. Slappey's

unavailability at trial," which again is not clearly erroneous, the admission of Slappey's statements did not violate William-Salmon's constitutional right of confrontation. *Burns*, 494 Mich at 111.

D. RELEVANCE

William-Salmon also argues that evidence of the Keys and Zechman murders was not relevant to his case and that the admission of this evidence at his joint trial with Caddell was more prejudicial than probative under MRE 403.

This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *Chelmicki*, 305 Mich App at 62. Generally, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." MRE 402. Evidence is relevant if it has "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.

The prosecutor's theory of the case was that William-Salmon conspired with Caddell and others to perform hits on behalf of the Richbows (in particular, David Richbow) and the Chapmans. Contrary to William-Salmon's argument on appeal, the charge for conspiracy was not limited to the Reed murder. Rather, as the prosecutor argued at trial, William-Salmon's jail calls also evidenced his participation in the conspiracy to murder Keys and Zechman. The trial court instructed the jury that the agreement that formed the basis for the conspiracy charge "took place or continued during the period from . . . November 23rd of 2013 until April 30th of 2014," and thus could encompass an agreement that related to the murders of Keys and Zechman.

William-Salmon admitted that he spoke to Caddell on the phone about "people spending money to put hits out on people," and he told Caddell that he would help find one of the victims. William-Salmon also admitted to connecting another person with Caddell to help perform the hits. In addition, the record demonstrated that Caddell's group had failed to murder Keys on several occasions because Zechman had been present. The group did not want to kill her because there were rumors that she was pregnant. William-Salmon's statement to Caddell to "f**k her" established his contribution to the plan to kill both Keys and Zechman, regardless of the potential pregnancy. Therefore, evidence of the Keys and Zechman murders was relevant to the charge of conspiracy in William-Salmon's case.

"Although 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. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). William-Salmon notes that he was not charged with the murders of Keys and Zechman, and he was incarcerated at the time of their murders. But again, he was charged with conspiracy to commit murder, which included a conspiracy related to the murders of Keys and Zechman. And although he was incarcerated at the time of the murders, the jury could still conclude that William-Salmon conspired and planned the murders from within jail. The trial court did not abuse its discretion by admitting this evidence in William-Salmon's case. *Chelmicki*, 305 Mich App at 62.

E. PROSECUTORIAL ERROR[10]

Last, William-Salmon argues that the prosecutor improperly shifted the burden of proof to him during her rebuttal argument when she questioned why he had initiated plea negotiations. We review this preserved argument of prosecutorial error de novo by examining the challenged remarks in context to determine whether William-Salmon received a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the 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). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Prosecutors are given latitude with regard to their arguments. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). "They are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id*. (quotation marks and citation omitted).

"While the prosecution may not use a defendant's failure to present evidence as substantive evidence of guilt, the prosecution is entitled to contest fairly evidence presented by a defendant." *People v Reid*, 233

[10] This Court explained in *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015), that a more accurate label for most claims of prosecutorial misconduct is "prosecutorial error," while only the most extreme cases rise to the level of "prosecutorial misconduct."

Mich App 457, 477; 592 NW2d 767 (1999). Our Supreme Court explained in *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), that "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant."

As discussed earlier, evidence of William-Salmon's guilty plea was admissible at trial. Thus, the prosecutor was entitled to comment on that evidence during closing argument. Further, the prosecutor's remarks were responsive to defense counsel's arguments regarding the weaknesses of the prosecution's case and that William-Salmon's guilty plea was not truthful (as evidenced by the prosecutor's motion to vacate the plea). It was not improper for the prosecutor to respond by arguing that William-Salmon's decision to initiate plea negotiations refuted the alleged weaknesses identified by the defense. The prosecutor's comments in rebuttal regarding that theory did not shift the burden of proof to William-Salmon. Rather, the prosecutor's argument that William-Salmon initiated the plea only tended to debunk William-Salmon's alternative theory. The remarks did not deny William-Salmon a fair and impartial trial.

III. CONCLUSION

We vacate Caddell's convictions and sentences and remand the case to the trial court for a new trial. We do not retain jurisdiction. William-Salmon's convictions and sentences are affirmed.

SWARTZLE and CAMERON, JJ., concurred with MURRAY, C.J.

TRUGREEN LIMITED PARTNERSHIP v DEPARTMENT OF TREASURY

Docket No. 344142. Submitted August 13, 2019, at Detroit. Decided April 10, 2020, at 9:00 a.m. Leave to appeal sought.

TruGreen Limited Partnership filed an action in the Court of Claims against the Department of Treasury, seeking a refund of taxes it paid under the Use Tax Act, MCL 205.91 *et seq*., for the fertilizer, grass seed, chemicals, and other products it used in its commercial lawn-care business for the tax years 2012 through 2016. TruGreen had sought a refund of use tax it had paid for the 2012 through 2016 tax years, asserting that it was exempt from the use tax under MCL 205.94(1)(f). The department denied the refund claim, reasoning that TruGreen did not qualify for the MCL 205.94(1)(f) exemption because, while it was a business enterprise, the property used by TruGreen was not used and consumed within agricultural production as required by Mich Admin Code, R 205.51(1) and (7). TruGreen then filed its complaint in the Court of Claims, demanding a refund of $1,160,201.49 plus costs and interest. The court, MICHAEL J. TALBOT, J., affirmed the department's denial of the requested refunds, reasoning that MCL 205.94(1)(f) and caselaw interpreting that provision required the claimant to create or contribute to an agricultural or horticultural product to qualify for the exemption. TruGreen appealed.

The Court of Appeals *held*:

1. Tax exemptions are narrowly construed and are, in general, construed in favor of the taxing authority. The meaning of statutory language must be read in context with the whole statute, taking into account its structure in relation to its many parts. In other words, the particular statutory language is construed in conjunction with the design of the statute as a whole as well as the statute's object.

2. MCL 205.94(1)(f), as amended by 2012 PA 474, provided, in part, that property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural

products, including transfers of livestock, poultry, or horticultural products for further growth, was exempt from Michigan's use tax. The terms "caring for" and "planting" could apply to lawn-care services if read in isolation from the remainder of the statute. However, the words adjoining the phrase "planting" and "caring for . . . things of the soil"—that is, "tilling," "harvesting," and "the transfer of livestock, poultry, or horticultural products"—as well as other language in the same subsection, indicated that the Legislature intended the exemption to apply to agricultural activities (i.e., products of farms and horticultural businesses) only. Moreover, caselaw has consistently referred to the statutory provision as the agricultural-production exemption. In conjunction with the exemption being referred to as such, *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570 (1991), highlighted that while a taxpayer need not engage in the business of producing agricultural products to qualify for the exemption, the touchstone was involvement in an agricultural endeavor. Therefore, read as a whole, the MCL 205.94(1)(f) exemption applied only to those businesses that contributed to Michigan's agricultural sector. In this case, TruGreen was in the business of providing lawn-care services unrelated to agricultural activities. Accordingly, TruGreen did not qualify for the MCL 205.94(1)(f) exemption, and the Court of Claims correctly affirmed the department's denial of TruGreen's use-tax refund claim.

Affirmed.

SHAPIRO, P.J., concurring, agreed fully with the majority opinion but wrote separately to state that the phrase "things of the soil" was a term of art that could not be defined by patching together dictionary definitions of certain words used in MCL 205.94(1)(f). Reading the statute as a whole, not parts of it in isolation, the exemption only applied to horticultural products. That definition was consistent with decades of Michigan caselaw through which "things of the soil" came to mean crops grown for harvest and sale and did not include residential lawns. The department's longstanding construction of the statute as applying only to agricultural production did not conflict with the indicated spirit and purpose of the statute and was entitled to respectful consideration. The judiciary is responsible for interpreting statutes in light of the Legislature's intent, and using dictionaries to decide a case—which allows for dictionary shopping and cherry-picking—has become a fetish that improperly renders irrelevant reasoned analysis, criticism, and concern for actually existing conditions.

SWARTZLE, J., dissenting, disagreed with the majority's analysis of MCL 205.94(1)(f). The provision contained only two requirements that had to be met to qualify for the exemption—(1) the taxpayer had to be engaged in a business enterprise and (2) the property sold to the taxpayer had to be used by the taxpayer for planting or for caring for the things of the soil—both of which TruGreen met. The phrase "things of the soil" was not defined in the statute and did not have a unique meaning at common law. A dictionary is simply a tool for interpretation. Applying the dictionary definition of "things," and considering that each of the activities listed in the exemption involved vegetative growth, the phrase clearly meant some kind of vegetative being or entity belonging to the plant kingdom, including the grass seed that TruGreen planted for some of its customers. This plain reading of the exemption was supported by the broader context of the exemption, in which the term "agricultural production" could not be found. Moreover, the only use of the term "products" in the entire exemption was with respect to the wholly separate phrase dealing with livestock, poultry, or horticultural products. Similarly, the statute's legislative history supported that by 2004, the Legislature had broadened the exemption to include more than agricultural products. The majority's analysis placed too much emphasis on the department's interpretation of the statute, which was contrary to the Legislature's intent and the statute's clear language. In addition, while courts have previously referred to MCL 205.94(1)(f) as the agricultural-production exemption, this Court was not bound by that label because no published opinion had interpreted the phrase "things of the soil." With its holding, the majority stepped outside the judiciary's role and competency. In sum, given the text, context, and legislative history of MCL 205.94(1)(f), Judge SWARTZLE would have concluded that TruGreen qualified for the exemption.

TAXATION — USE TAX ACT — EXEMPTIONS — WORDS AND PHRASES — "THINGS OF THE SOIL" — AGRICULTURAL ACTIVITIES.

MCL 205.94(1)(f), as amended by 2012 PA 474, provided, in part, that property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth, was exempt from Michigan's use tax; the use-tax exemption applied only to those businesses that contributed to Michigan's agricultural sector; the term "things of the soil" pertained only to the products of farms and horticultural

businesses, and MCL 205.94(1)(f) thus permitted a tax exemption only for property used in agricultural production and supply.

Bursch Law PLLC (by *John J. Bursch*) and *Honigman Miller Schwartz and Cohn LLP* (by *June Summers Haas*) for TruGreen Limited Partnership.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Emily C. Zillgitt* and *Justin R. Call*, Assistant Attorneys General, for the Department of Treasury.

Before: SHAPIRO, P.J., and GLEICHER and SWARTZLE, JJ.

GLEICHER, J. Michigan's use tax exempts property consumed in the tilling, planting, caring for or harvesting things of the soil, or in the breeding, raising or caring of livestock, poultry or horticultural products for further growth. These words conjure images of our state's bean fields, dairy farms, and cherry orchards. The question presented is whether the Legislature intended that a lawn-care company would reap the fruits of this exemption. The statutory vocabulary describes a tax subsidy aimed at growing Michigan's agricultural economy, not ornamental grass and shrubs. The Court of Claims reached the same conclusion. We affirm.

I

The history of the statute at issue dates back to 1935, when the Legislature first exempted from "sale at retail" under the General Sales Tax Act "any transaction . . . of tangible personal property . . . for consumption or use in industrial processing or agricultural producing[.]" 1929 CL 3663-1(b.1), as amended by 1935 PA 77. Two years later, the Legislature exempted the

same transactions from the use tax. 1929 CL 3663-44(g), as amended by 1937 PA 94.

Between 1937 and 2012 the Legislature revised the use-tax language several times. For more information regarding the amendments, see Legislative Service Bureau, *MCL 205.94* <http://bit.ly/2Rc7zG5> [https://perma.cc/T9JV-WH2K]. The version of the statute in effect during the tax years relevant here exempts from the use tax:

> *Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth*. This exemption includes machinery that is capable of simultaneously harvesting grain or other crops and biomass and machinery used for the purpose of harvesting biomass. This exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin, which means a structure that is used or is to be used to shelter grain and that is designed to be disassembled without significant damage to its component parts. This exemption does not include transfers of food, fuel, clothing, or similar tangible personal property for personal living or human consumption. This exemption does not include tangible personal property permanently affixed to and becoming a structural part of real estate. As used in this subdivision, "biomass" means crop residue used to produce energy or agricultural crops grown specifically for the production of energy. [MCL 205.94(1)(f), as amended by 2012 PA 474 (emphasis added).]

Our task is to determine whether the italicized language applies to plaintiff, TruGreen Limited Partnership.

TruGreen offers its customers lawn- and ornamental-plant-care services. An affidavit submitted by TruGreen's director of technical operations describes that TruGreen's business is built around seasonal or annual service subscriptions entered into by residential homeowners and commercial, institutional, and private landowners. For a set fee, the company cares for grass, trees, and shrubbery at a variety of locations in addition to homes, including schools, parks, athletic fields, business parks, malls, airports, roadways, and pastures not used for agricultural production. TruGreen utilizes fertilizers, herbicides, and insecticides to care for its customers' turfs and ornamental plants, providing nutrients, controlling weeds, and preventing insects. Sometimes TruGreen must "amend" the soil after testing it by adding additional ingredients (such as lime, sulfur, gypsum, or iron) to enhance the health of grass, trees, or shrubs. It also aerates lawns and adds additional seed to remedy bare spots. TruGreen does not offer services to nurseries, tree or nut farms, or individuals or entities engaged in fruit or vegetable production. The affidavit elucidates: "Our branch location business licenses are specific to turf and ornamental plant care only."

In November 2015, TruGreen requested a use-tax refund in the amount of $4,745.39 for the fertilizer, grass seed, and other products it used in its commercial lawn-care business during a 31-day period in 2012. Defendant, the Department of Treasury, denied the refund claim, and TruGreen requested an informal conference. Before the conference could be held, TruGreen submitted another use-tax refund claim for a longer period (four and a half years) in the amount of $1,168,333.49.

A referee concluded that TruGreen had established its eligibility for the exemption and was entitled to a refund. The referee reasoned that "there are only two requirements for this exemption, (1) that a person be engaged in a business enterprise, and (2) the tangible personal property be used and consumed in the . . . planting [or] caring for . . . things of the soil . . . ." (Alteration in original.) In 2004, the referee noted, the Legislature removed language from the statute requiring that an entity be engaged in "agricultural or horticultural production."[1] The referee concluded: "Petitioner is engaged in a business enterprise (servicing lawns) and used and consumed the tangible personal property purchased (grass seed and fertilizer) in the planting and caring for of [sic] things of the soil. As such, the grass seed and fertilizer it purchased meets the two requirements set forth in [MCL 205.94(1)(f)] for exemption from use tax in Michigan."

The department issued a "Decision and Order of Determination" denying the refund claim, reasoning that "the statute and administrative rules requiring tangible personal property to be used within agricultural production remained valid notwithstanding [the 2004] amendment." According to the department, caselaw following the amendment continued to construe the exemption as implicating "agricultural production." "In giving proper meaning to the undefined

[1] The 2004 amendment eliminated two sentences from the statute: "At the time of the transfer of that tangible personal property, the transferee shall sign a statement, in a form approved by the department, stating that the property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. The statement shall be accepted by the courts as prima facie evidence of the exemption." Compare MCL 205.94(1)(f) as amended by 2002 PA 669 with MCL 205.94(1)(f) as amended by 2004 PA 172. We discuss the 2004 amendment later in the opinion.

phrase 'things of the soil,' " the department advocated, "it is important to consider that Michigan follows the doctrine 'that a word or phrase is given meaning by the context of its setting.' " The department concluded that other words in the statutory "setting" support that the Legislature envisioned that "things of the soil" meant growing, cultivating, or extracting crops or comparable things.

TruGreen appealed in the Court of Claims, where the parties filed cross-motions for summary disposition. TruGreen raised two arguments in support of its eligibility for the exemption. First, TruGreen contended, its activities satisfy the plain language of the statute, as the company is engaged in " 'tilling, planting . . . [and] caring for . . . things of the soil . . . .' " (Alteration in original.) Second, TruGreen argues that this Court's opinion in *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570, 571; 473 NW2d 783 (1991), compels the same conclusion, asserting that it stands for the proposition "that agricultural production is not required by the statute."

The Court of Claims rejected both arguments, ruling that the statute required the claimant to create or contribute to an agricultural or horticultural product. Citing several of this Court's cases interpreting MCL 205.94(1)(f), the Court of Claims observed that all "support the conclusion that production of horticultural or agricultural products *is* necessary." The Court of Claims denied TruGreen's motion for reconsideration, and TruGreen now appeals as of right.

II

Because this case presents a purely legal question, our review is de novo. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698

(2010). A few tax principles, combined with a couple of interpretive precepts, inform our analysis.

"Tax exemptions are the antithesis of tax equality," and therefore, they must be "strictly construed," generally "in favor of the taxing authority." *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 31; 558 NW2d 444 (1996). Justice COOLEY explained the underlying rationale for considering tax exemptions cautiously and conservatively as follows:

> "Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." [*Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

Thus, TruGreen bears a heavy burden. It must demonstrate that the Legislature had the economic interests of lawn-care companies in mind when it enacted the exemption, MCL 205.94(1)(f). Implications and inferences do not suffice.[2]

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[2] The dissent takes issue with Justice COOLEY's approach to the construction of tax exemptions, preferring the views expressed in Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul:

Against this legal backdrop, we turn to the words. In relevant part, the exemption applies to the following:

> Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. [MCL 205.94(1)(f), as amended by 2012 PA 474.]

TruGreen contends that because it "plants" grass and is engaged in "caring for things of the soil," it is excused from paying use taxes on the fertilizer, insecticides, and myriad other products it consumes to keep customers' lawns green and healthy. Employing a purely textual approach, TruGreen urges that its activities fall within the realm of "horticulture" and "caring for" soil. The analysis is simple, TruGreen insists. Because it uses and consumes tangible per-

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Thomson/West, 2012). Justice COOLEY's conclusion "cannot be taken at face value," the dissent maintains, because a reasonable-doubt standard of proof could not possibly apply in a civil case involving a tax exemption. True enough, and likely the dissent correctly pegs that aspect of the quotation as a "rhetorical flourish." But "rhetorical flourish" or not, our Supreme Court put its thumb on Justice COOLEY's side of the scale in 1948 in *Detroit Commercial College*, 322 Mich at 149, and kept it there as recently as 1980 in *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 754; 298 NW2d 422 (1980) ("Justice COOLEY best summarized the rule of law in his treatise on taxation[.]"). As Scalia and Garner point out, *Reading Law*, p 359, the United States Supreme Court has set out the same principles as recently as 2011 in *Mayo Foundation for Med Ed & Research v United States*, 562 US 44, 59-60; 131 S Ct 704; 178 L Ed 2d 588 (2011) ("[W]e have instructed that 'exemptions from taxation are to be construed narrowly[.]' "). (Citation omitted.) And our Supreme Court has oft repeated that statutory exceptions to governmental immunity are to be "*narrowly* construed," *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000), another "rule" that is entirely judge-made. But see *Schaub v Seyler*, 504 Mich 987, 990-993 (2019) (VIVIANO, J., concurring), which seems to call into question the application of such rules.

sonal property to "plant" and "care for" grass, trees, and shrubs—indisputably things of the soil—it is plainly and unambiguously entitled to the use-tax exemption.

Often, "[w]hat is 'plain and unambiguous' . . . depends on one's frame of reference." *Shiffer v Gibraltar Sch Dist Bd of Ed*, 393 Mich 190, 194; 224 NW2d 255 (1974). Were we to consider the words and phrases cherry-picked by TruGreen in isolation from the rest of the text, we might agree that TruGreen should prevail. TruGreen's proposed interpretive methodology, however, reduces the statute's meaning to a couple of selectively harvested words and buries the balance of the text. This approach risks an interpretation in tension with the whole text's most logical and natural meaning. Rather than plucking words from the statute, we focus on the whole textual landscape. We endeavor to harmonize *all* the words, thereby cultivating a coherent reading that promotes the Legislature's goals while maintaining fidelity to underlying legal principles. Here, those principles counsel in favor of a narrow reading of the exemption, rooted in the rationale for relieving certain entities from the burden of paying the tax.

"[T]he meaning of statutory language, plain or not, depends on context." *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Id*. (cleaned up).[3] This focus on the big picture echoes a primary canon of construction: the

[3] 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,

individual, discrete words of a statute must be read holistically "with a view to their place in the overall statutory scheme." *Davis v Mich Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367-368; 917 NW2d 603 (2018) ("However, we do not read statutory language in isolation and must construe its meaning in light of the context of its use.").[4]

The exemption's first relevant sentence is a string of participles: tilling, planting, caring for, harvesting, breeding, and raising. The words describe actions respecting "things of the soil" or "livestock, poultry or horticultural products." They are located in a statute creating an exemption from taxation, which we must strictly construe. Although grass and trees are "things of the soil," that phrase is surrounded by words describing activities that take place on farms. A "funda-

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internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

[4] Like TruGreen, the dissent champions a purely textual approach, emphasizing that "things of the soil" means "things" (grass is a "thing") that come from the "soil" (grass comes from the soil). True enough—no one disputes that grass is a "thing of the soil." But the meaning of a phrase also depends on how its constituent parts are joined and interact. Sometimes "things of the soil" do not grow from the soil at all. See 1 *The Schocken Bible: The Five Books of Moses* (Random House 2000), Genesis 1:25 ("God made the wildlife of the earth after their kind, and the herd-animals after their kind, and all crawling things of the soil after their kind.").

mental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v United States*, 508 US 129, 132; 113 S Ct 1993; 124 L Ed 2d 44 (1993). TruGreen plants grass and cares for it. But the grass it plants and tends is decorative, and the work it does is unrelated to crop cultivation or agriculture in general. Considered within its contextual milieu, the term "things of the soil" pertains to the products of farms and horticultural businesses, not to blades of well-tended grass.[5]

Independent of the rest of the statute, the terms "caring for" and "planting" could apply to TruGreen's lawn-care enterprise, and the vivisectionist model of statutory interpretation supports that result. Our Supreme Court has applied that approach, we acknowledge, in cases such as *Robinson v Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000) (relying on a dictionary definition of the word "the"), and *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159-162; 615 NW2d 702 (2000) (examining the four sentences of a single statutory subsection separately and independently to discern their meaning). Nevertheless, the "context is king" method we employ today has a long and healthy pedigree. For example, the United States

[5] TruGreen's interpretation would extend the use-tax exemption to every lawn-care and tree-service company doing business in Michigan. And consistently with TruGreen's interpretation of "things of the soil," those businesses would be eligible for a *sales*-tax exemption on lawn and garden-related purchases given that Michigan's sales tax includes the same exemption. See MCL 205.54a(1)(e) (stating that "a sale of tangible personal property to a person engaged in a business enterprise that uses or consumes the tangible personal property, directly or indirectly, for either the tilling, planting, draining, caring for, maintaining, or harvesting of things of the soil or the breeding, raising, or caring for livestock, poultry, or horticultural products" is exempt from sales tax).

Supreme Court has explained that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v United States*, 494 US 152, 158; 110 S Ct 997; 108 L Ed 2d 132 (1990). The Michigan Supreme Court has frequently followed the same interpretive pathway, counseling that words "must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). More recently, in *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003), the Supreme Court highlighted that the statutory language at issue in that case did not "stand alone" and "should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." (Cleaned up.) Our Supreme Court continued, "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context," which requires interpreting courts to refrain from "divorc[ing]" "words and clauses . . . from those which precede and those which follow." *Id*. (cleaned up). "[W]ords grouped in a list should be given related meaning." *Id*. at 422 (cleaned up).

The words closely adjoining "planting" and "caring for . . . things of the soil" are: "tilling," "harvesting of things of the soil," "breeding," "raising," "caring for livestock, poultry, or horticultural products," and "the transfers of livestock, poultry, or horticultural products for further growth." This collection of words and phrases logically connotes that the use-tax exemption incentiv-

izes investment in the agricultural realm.[6] Farmers "till," "plant," "care for," and "harvest" things of the soil; they also "care for" animals. Several sentences that followed these, then located in the same statutory subsection, reinforce that the Legislature intended the exemption to apply to agricultural activities.[7] The second sentence of MCL 205.94(1)(f), as amended by 2012 PA 474, stated that the "exemption includes machinery that is capable of simultaneously harvesting grain or other crops and biomass and machinery used for the purpose of harvesting biomass."[8] The third sentence further provided that the "exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin . . . ." Read as a cohesive whole, MCL 205.94(1) was and is intended to benefit businesses that contribute to our state's agricultural sector.

III

We are not the first judges to conclude that MCL 205.94(1) applies to businesses associated with agriculture. Caselaw has consistently referred to the statutory subdivision at issue as the "agricultural-production ex-

[6] Promoting agricultural investment benefits Michigan's economy and helps put local food on our tables. Lawns, on the other hand, demand fertilizer, water, energy, and land. The exemption from taxation at issue encourages the *production* of market resources, not their consumption.

[7] The remaining sentences of MCL 205.94(1)(f), as amended by 2012 PA 474, have since been moved to other subsections of the statute.

[8] The subdivision defined "biomass" as "crop residue used to produce energy or agricultural crops grown specifically for the production of energy." MCL 205.94(1)(f), as amended by 2012 PA 474.

emption." See *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 50 n 14; 869 NW2d 810 (2015); *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 235; 818 NW2d 489 (2012); *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 488; 618 NW2d 917 (2000); *Kappen Tree Serv, LLC v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 2016 (Docket No. 325984), pp 1, 3.

William Mueller & Sons, 189 Mich App 570, is instructive. In that case, we held the exemption applicable to Mueller & Sons' purchase of fertilizer equipment. Mueller & Sons was "in the business of testing farm soil, recommending fertilizer mixes, and selling seed and fertilizer to farmers." *Id*. at 571. The company also purchased produce from farmers and both used fertilization-application equipment and offered it for rent to farmers. *Id*. This Court rebuffed the department's argument that to qualify for the exemption the taxpayer had to *directly* produce agricultural products and instead explained that "Section 4(f), by its plain language, exempts property sold to a business enterprise if the property is used for agricultural or horticultural growth." *Id*. at 573. The taxpayer itself need not engage "in the business of producing agricultural products." *Id*. at 573-574. The touchstone, we highlighted, was involvement in an agricultural endeavor. *Id*. at 574.

TruGreen asserts that *Mueller* is inapposite because the statute in effect at that time included the following two sentences:

> [A]t the time of the transfer of that tangible personal property, the transferee shall sign a statement, in a form approved by the department, stating that the property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enter-

> prise. The statement shall be accepted by the courts as prima facie evidence of the exemption. [MCL 205.94(f), as amended by 1978 PA 262.]

In 2004, the Legislature eliminated this signed-statement requirement. 2004 PA 172. The elimination of statutory language sometimes supplies an indicator of legislative intent. *Sam v Balardo*, 411 Mich 405, 430; 308 NW2d 142 (1981). Here, however, all that was removed was a certification requirement. The Court of Claims noted that this amendment was part of a larger legislative plan to adopt the Streamlined Sales and Use Tax Administration Act, MCL 205.801 *et seq*. The seller now bears the burden of identifying the ground for an exemption, not the purchaser. See MCL 205.104b(1). This administrative change did not alter the design, structure, purpose, or meaning of the rest of the statute.

MCL 205.94(1) permits a tax exemption for property used in agricultural production and supply. TruGreen is not involved in any agricultural endeavors. Applying an organic approach to *all* the statutory words, we affirm the Court of Claims.

SHAPIRO, P.J., concurred with GLEICHER, J.

SHAPIRO, P.J. (*concurring*). I concur fully with Judge GLEICHER's majority opinion. I write separately only to address some aspects of the dissenting opinion. First, despite its fine prose, the dissent's analysis rests on a single point: that the phrase "things of the soil" as used in MCL 205.94(1)(f) is not a term of art. I disagree. The phrase is plainly a term of art, and patching together definitions of its individual component words is not consistent with proper statutory interpretation. Second, the dissent's approach would greatly expand the scope of this tax exemption beyond what it has been for 70 years. To so expand the exemption, however, requires

more than a dictionary. Third, the dissent does not give respectful consideration to the statutory interpretation of the body charged with applying the statute.

I. "THINGS OF THE SOIL" IS A TERM OF ART

The dissent rests on its assertion that interpretation of the statute at issue does not require "an effort to unearth the meaning of oft-obscure, technical language." To the contrary, the origin and meaning of the phrase "things of the soil" is most certainly obscure. I doubt that any member of this Court has ever heard the phrase in conversation or even seen it in a book other than perhaps the Bible.[1]

"Term of art" has been defined as "a word or phrase that has a specific meaning or precise meaning within a given discipline or field and might have a different meaning in common usage[.]"[2] Accordingly, we are to construe the term by its established use in the law, not by looking up the individual words in the dictionary. This is not a new idea, and it is mandated by statute. MCL 8.3(a) provides that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but *technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be*

[1] Some translations of Genesis 9:20 describe Noah, after the flood, as "a man of the soil," see English Standard Version (2001); New International Version (2011), while other translations describe him as a "farmer," see New American Standard Bible (1995); New King James Version (2020).

[2] Dictionary.com <http://www.dictionary.com/browse/term-of-art?s=t> (accessed March 18, 2020) [https://perma.cc/N48R-6DRK]. The phrase is similarly defined elsewhere as "[a]n expression or phrase that has a defined meaning when used in a particular context or knowledge environment . . . ." Justia <http://www.justia.com/dictionary/term-of-art/> (accessed March 23, 2020) [https://perma.cc/K92S-5JJR].

construed and understood according to such peculiar and appropriate meaning." (Emphasis added.)

I conclude that the phrase "things of the soil" has an established meaning in Michigan law, i.e., crops grown for harvest and sale. This conclusion is consistent with decades of caselaw. Despite the dissent's confidence that every reasonable person would know that this phrase includes residential lawns, no case has even suggested that reading in 70 years. Nor has any taxpayer—until this case—made such a claim.

II. THE CONTEXT

The dissent reads the first sentence of the statute in isolation. For example, the second sentence does not refer to the "caring for horticulture" but to the "caring for . . . horticultural products[.]" MCL 205.94(1)(f). A product is an object that may be sold to another. Plaintiff, TruGreen Limited Partnership, does not explain how the grass it cares for is a "product" and for good reason. With rare exceptions (which will likely fall within the exemption) private residential plants and lawns are not for sale. They are not "products." TruGreen does not care for something that will become a product. Rather, it provides a service to residential property owners who would never qualify for the exemption themselves. Certainly, "products" are used to care for the private lawn, but no product, horticultural or otherwise, is created.

Reading the rest of the statute leads to the same conclusion. The items specifically listed in MCL 205.94(1)(f)[3] as falling within the exemption are:

- Machinery capable of simultaneously harvesting grain or other crops and biomass;

[3] As amended by 2012 PA 474.

- Agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land "used in the production of agricultural products"; and
- Portable grain bins.

It would be highly unusual for a private residence to use portable grain bins, grain and biomass harvesting machinery, or any of the other items that were intended to fall within the exemption and exemplify its scope. And of course, the list of examples does not include anything that would be particularly used to maintain a private lawn or garden.[4]

The dissent suggests that the Legislature could have made its intention regarding nonagricultural application of the exemption clear by including the terms "for agricultural purposes." This is a straw-man argument—one could just as easily say that the Legislature could simply have added the phrase "including lawn care" or "including services to residential property."

III. THE DEPARTMENT'S INTERPRETATION

In my view, defendant, the Department of Treasury, has not overstepped its authority; rather, it has exer-

[4] TruGreen and the dissent rely on *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570; 473 NW2d 783 (1991)—the only case to apply the exemption to nonfarmers. However, *William Mueller & Sons* extended the exception to only one category of businesses—those that provide services to farms. The sole property for which the exemption was sought and granted was fertilizer equipment, which the petitioner used to perform "a contractual service *to farmers* for the application of fertilizer and for rental *to farmers* who apply fertilizer purchased from other sources." *Id*. at 571 (emphasis added). It is one thing to apply the exemption to those who contract to do the work farmers would otherwise do themselves. See also *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486; 618 NW2d 917 (2000). It is quite another to apply it to every company whose work involves anything that is found in soil.

cised its lawful authority to apply the law defining the scope of this particular tax exemption and has done so consistently with the statute. It is well settled that "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935) (quotation marks and citation omitted). Moreover,

> while not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws, and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*Id*. at 296-297 (quotation marks and citation omitted).]

The department's longstanding construction of the statute is not in conflict with "the indicated spirit and purpose" of the statute, *id*., yet the dissent gives its construction no credence whatsoever, let alone respectful consideration. The dissenting opinion reads as though interpretation of this statute did not exist before the time its author picked up the dictionary.[5]

IV. JURISPRUDENCE BY DICTIONARY

The use of dictionaries as a source of law is a very recent phenomenon. For 140 years, from 1845 through

[5] I am not impressed by the dissent's view of the statute's legislative history. First the dissent reminds us that legislative history is of no moment; only the literal text of the statute matters. Then, the dissent reverses course and speculates at length about the motives of the Legislature through a number of revisions over decades. The dissent's bottom line, however, is that by adopting the phrase "things of the soil" in 1949, the Legislature unambiguously intended to allow the exemption to apply beyond farming; an intent that eluded discovery for nearly 70 years.

1984, the Michigan Supreme Court cited a lay dictionary in less than 1% of its cases. From 1985 through 1994, it cited lay dictionaries in about 8% of cases and from 1995 to 2005 (as the "textualist" era began) in 14% of cases. Since then, there has been an explosion in reliance on the dictionary; from 2005 to the present, the Court has cited lay dictionaries in an astonishing 37% of its cases.[6] More Supreme Court cases were decided using lay dictionaries in the era since 2000 than in the entire 155 years that preceded it.

This explosion in courts' use of dictionaries has occurred in the face of intense criticism from legal scholars, language experts, and even dictionary editors. Critics note that it allows for dictionary shopping and cherry-picking;[7] that it is inconsistent with lan-

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[6] From preliminary data supplied by Professor Joseph Kimble for a work in progress. The cases do not include orders.

[7] There are many dictionaries, and each assigns multiple meanings to most words. This invites judges to cherry-pick the definition that suits their position and to ignore the others. For example, the dissent cites the definition of "thing" in *The Oxford English Dictionary* (1933) (*OED*) and asserts that it is defined as " '[a]pplied (usually with qualifying word) to a living being or creature; occasionally to a plant.' " By citing that definition, the dissent is clearly cherry-picking. First, the definition refers to "a living being or creature," which, if relied on, would mean that earthworms, voles, and other creatures must also be considered "things of the soil," a view the dissent rejects without explanation. Second, the dissenting opinion reads as if its selected definition is the only relevant one in the *OED*. To the contrary, the definition of "thing" in the 1933 *OED* runs more than two full pages in a font so small as to be barely readable. Thus, the definition underlying the dissent's entire analysis has been picked not merely from one cherry tree, but from an entire orchard. Some examples of the definitions not mentioned in the dissent include "[a] being without life or consciousness; an inanimate object," "[a] piece of property," "an event, occurrence, incident," "a material substance," "what is proper," "that with which one is concerned," "that which is done or to be done," "[a]n entity of any kind," "a being or entity consisting of matter, or occupying space," and many, many others. *Id*. Moreover, there is a section for the use of the word

guage theory; and that legislative drafters themselves apparently do not rely on dictionaries to any great extent.[8] The authors of one exhaustive study of United States Supreme Court opinions concluded that "the image of dictionary usage as . . . authoritative is little more than a mirage."[9]

Nevertheless, jurisprudence by dictionary remains tempting; it requires no effort beyond looking up a few words and picking the definition that supports the author's position. More insidiously, it implies that reasoned good-faith discussion, analysis of caselaw and context, and stare decisis are not aids to interpretation but, rather, stumbling blocks on the path to the absolute clarity that can only be provided by a dictionary. Dictionary usage has become a fetish by which reasoned analysis, criticism, and concern for actually existing conditions are rendered irrelevant to the judi-

"thing" in "[p]hrases, special collocations, and combinations," yet the phrase "things of the soil" is not defined there.

[8] See, e.g., Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000–2015*, 62 Wayne L Rev 347, 359-360 (2017) (summarizing, with references, some of the grounds for criticism). See also Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz St L J 275, 334 (1998) ("[The] purpose of giving readers and speakers approximate meanings of words so that they begin to understand the meaning of the word in context makes dictionaries ill-suited for determining the meaning of a particular word in a particular statute."); Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts,* 6 NYU J Legis & Pub Pol'y 401, 401 (2003) ("[J]ust as medical science has progressed since the time of leech treatments, the science of linguistics has progressed since the time that scholars believed that dictionaries held the key to sentence meaning. Dictionaries simply are not capable of explaining complex linguistic phenomena, but they are seductive.") (paragraph structure omitted).

[9] Brudney & Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm & Mary L Rev 483, 492 (2013).

cial process. Despite the ease of deciding cases by dictionary, the question is what the intent of the Legislature was, not what the intent of a dictionary editor is. The Legislature has no official dictionary and has not commanded us to conclusively rely on a particular, or indeed any, dictionary to understand its intent.

The fetishizing of dictionaries has even led thoughtful jurists like our dissenting colleague to conclude that any attempt by the courts to interpret a statute by means other than a dictionary is "outside of our proper role and competency." Such an approach dispenses with the constitutional fact that the judiciary is an independent co-equal branch of government that is ultimately responsible for the interpretation of statutes and their fair application in individual cases.[10] The judiciary is not subservient to the editors of dictionaries, and the dictionary is not established by Michigan's Constitution as the guiding force in jurisprudence. I suggest that it is time we put the dictionary back on the shelf and resume our constitutional role.

SWARTZLE, J. (*dissenting*). Some tax cases present questions of byzantine statutory construction. One's Latin must be refreshed, venerable treatises and opinions consulted, the warp and woof of the code analyzed, all in an effort to unearth the meaning of oft-obscure, technical language.

This is not one of those cases—or, rather, it should not have been one.

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[10] "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." *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803).

As it must, the legal analysis follows, but the analysis seems superfluous. The reasonable reader knows what "things of the soil" means: a vegetative entity of some sort (e.g., a wheat plant, a shrub). This reader knows that every "product" is a thing, but not every "thing" is a product, so it logically follows that every "product of the soil" (a/k/a agricultural product) is a thing of the soil, but not every "thing of the soil" is a product of the soil. This reader knows that farmers plant seeds and care for plants so that agricultural products can be reaped, but this reader also knows that others plant seeds and care for plants for purposes apart from such reaping. This reader knows that when the Legislature removes words that were actually in a statute or bill (e.g., "agricultural product," "agricultural production," "agricultural purpose"), it does so for a reason. This reader knows that an imprecise label like "agricultural-production exemption" does not become more precise through mere repetition. And last but certainly not least, this reader knows that, under the separation of powers enshrined in our Constitution, the Executive and Judicial branches are supposed to defer to the Legislature on matters of public policy like tax law. This is all that a reasonable reader needs to know to conclude that the taxpayer in this case is entitled to the use-tax exemption.

The majority and department, however, read things differently. Because I cannot abide their reading, I respectfully dissent.

I. STATUTORY INTERPRETATION IN GENERAL

Under separation-of-powers principles, courts must give effect to the Legislature's intent as expressed in statute absent a particular constitutional constraint. "Courts may not speculate regarding legislative intent

beyond the words expressed in a statute." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014) (cleaned up).

Therefore, to determine the meaning of a statute, we must first look to the text. When doing so, we must consider both the meaning of the particular term or phrase at issue as well as its statutory context and history. *People v Pinkney*, 501 Mich 259, 268, 276 n 41; 912 NW2d 535 (2018); *2000 Baum Family Trust v Babel*, 488 Mich 136, 175; 793 NW2d 633 (2010). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003) (cleaned up). "Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554-555; 912 NW2d 593 (2018). "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." *Id*. at 554 (cleaned up).

II. THE TEXT, CONTEXT, AND HISTORY OF "THINGS OF THE SOIL"

To begin, I focus initially on the *actual* semantic meaning of the "things of the soil," then on the *actual* syntactic context of that phrase, and finally on the *full* statutory and legislative history of the exemption. This approach comports with the "fair reading" school of interpretation: "The interpretation that would be given to a text by a reasonable reader, fully competent in the language, who seeks to understand what the text meant at its adoption, and who considers the purpose of the text but derives purpose from the words actually used."

Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 428.

The Specific Text. The parties agree that TruGreen's refund claims are subject to the following exemption from the use tax:

> Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. [MCL 205.94(1)(f), as amended by 2012 PA 474.]

Although the statutory provision can be subdivided in various ways, and some parts have no relevance to the dispute here (e.g., breeding of livestock), the provision sets forth two conditions relevant to this dispute that must be satisfied to qualify for the use-tax exemption—(1) the taxpayer must be engaged in a business enterprise; and (2) the property sold to the taxpayer must be used by that taxpayer for "planting" or "caring for . . . the things of the soil." There are no other listed conditions or exceptions found in the text of MCL 205.94(1)(f) that are relevant to TruGreen's refund claims. Nor have the parties brought to the Court's attention any other provision of the tax code that expressly conditions or otherwise restricts TruGreen's claims, and my own review has likewise found none.

On its face, this provision has a rather straightforward application. If a taxpayer is engaged in a business enterprise, and if the business activity—with the attendant costs for property used to engage in the activity—includes planting or caring for "things of the soil," then the taxpayer qualifies for an exemption from the use tax. The phrase "things of the soil" is not defined in the statute, nor has it "acquired a unique

meaning at common law" that should be read into the statute. *Pinkney*, 501 Mich at 273 (cleaned up). Turning to *The Oxford English Dictionary* (1933), the most relevant definitions of "thing" in this context are "An entity of any kind" and "Applied (usually with qualifying word) to a living being or creature; occasionally to a plant,"[1] and the phrase "of the soil" seems clearly to mean that the living being or entity comes from, lives in, is connected with, or is otherwise related to soil. And considering that each of the activities listed—"tilling, planting, caring for, or harvesting"—somehow involves vegetative growth (as opposed to worms and the like), it is evident that "things of the soil" means some kind of vegetative being or entity, i.e., beings or entities belonging to the plant kingdom.

With respect to TruGreen, the record confirms that it is a business enterprise and that it plants grass seed for some of its customers. More generally, in its brief on appeal, the department has *conceded* that TruGreen "cares for its customers' lawns, shrubs, and trees," and in the next sentence, the department *equates this* with " 'caring for the things of the soil.' " The record supports this concession. Thus, based on a plain reading of the operative language of the tax exemption, it would appear that TruGreen is off to a good start.

The Broader Statutory Context. Turning to the broader statutory context, a careful analysis supports

[1] As explored in greater detail *infra*, the phrase "things of the soil" was added by our Legislature in 1949. Accordingly, when considering a particular word, the Court "must look to the meaning of words at the time they were enacted." *People v Rogers*, 331 Mich App 12, 24; 951 NW2d 50 (2020). As indicated in *The Oxford English Dictionary*, the meaning of "thing" referenced here derives from various texts, ranging in date from 888 to 1858 to 1910 CE. Apart from the occasional devotee of Martin Heidegger, it is doubtful that any reasonable reader will take umbrage at the definition of "thing" offered here.

this plain reading. To begin, the operative use-tax exemption language from MCL 205.94(1)(f), as amended by 2012 PA 474, can be grammatically outlined as follows:

- The following are exempt from the tax levied under this act,
  - Property sold
  - to a person
  - engaged in a business enterprise and
  - using and consuming the property
    - in the tilling, planting, caring for, or harvesting of the things of the soil or
    - in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth.

Several observations flow from analyzing the context. First and most obviously, nowhere in this operative text is the term "agricultural production" or a similar term even found. This observation alone cuts against a contrary reading, given how easy it would have been simply to write—"agricultural products"—if that is what the Legislature had actually intended. (More on this later.)

Second, diving a bit deeper, structurally there are two wholly separate prepositional phrases, each beginning with "in," one ending with "things of the soil" and the other ending with "for further growth." The two phrases are separated by "or," and there is nothing to suggest that this "or" should be read as anything other than disjunctive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). Thus, structurally, each phrase stands separate on its own.

Flowing from the first and second observations, it is further observed that the only use of the term "products" in the entire exemption is with respect to the wholly separate phrase dealing with "livestock, poultry, or horticultural products." While one must be cautious not to put too much weight on the canon that "the express mention of one thing implies the exclusion of other similar things," *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45 (2014), it does seem worth mentioning that this illustrates, at the very least, the Legislature's ability to limit the exemption with respect to certain kinds of "products" when it wants to do so, i.e., "livestock, poultry, or horticultural *products*," MCL 205.94(1)(f) (emphasis added).

Fourth, the four activities listed in the relevant phrase—"tilling, planting, caring for, or harvesting of"—are similarly separated by "or" rather than "and." There is nothing in the statute to suggest that this "or" should be read as a conjunctive, see *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995), and, in fact, it appears quite clear that the exemption is available to a business enterprise that, for example, uses equipment to till "things of the soil" but does not also harvest those things. Thus, an entity need not engage in all four activities to be eligible for the exemption.

Fifth, the four activities all encompass the life cycle of a vegetative entity, but only a vegetative entity that involves some human management or involvement. The activities do not include, for example, the growth of a plant in the middle of a rainforest untouched by human hands. The activities are *human* ones (with or without the aid of machinery, chemicals, or other human technology), and the activities are centered on or otherwise involved in the care and management of a vegetative entity.

Sixth and finally, encompassed within the set of activities is certainly agricultural production. But the object of the activities—"things of the soil"—is not itself limited to agricultural products, and the four activities are necessarily broader than mere agriculture. One can certainly plant and care for a vegetative entity without necessarily harvesting something from it for sale in the future. A contrary reading would necessarily imply that any "thing[] of the soil" that is tilled, planted, cared for, or harvested would always and everywhere have to result in an agricultural product. In other words, the contrary reading would equate *things of the soil that are tilled, planted, cared for, or harvested* with *agricultural products*.

But this is question begging and, more critically, it is a false equivalency. Many vegetative things (e.g., plants, flowers, trees) are planted or otherwise cared for but do not themselves produce or otherwise result in a product for sale on the market. While it is not necessary to identify what "things of the soil" means in every conceivable context, it can be said with some confidence that "things" is a more expansive concept than "products." Thus, the set of all *"things of the soil" that are tilled, planted, cared for, or harvested* encompasses each and every agricultural product, but the set of all *agricultural products* does not encompass each and every "thing[] of the soil" that is tilled, planted, cared for, or harvested. Simply put, the phrase "things of the soil" in this context has a logically broader meaning than mere agricultural products.

The Legislature could have used the phrase "agricultural products" or even "products of the soil" as the object of the four listed activities, but it eschewed those and similar labels and instead chose a logically broader one, "things of the soil." Under the plain meaning and

statutory context of the use-tax exemption, TruGreen remains on solid ground.

The Lengthy History. Next, statutory and legislative history. With respect to this history, it should be noted at the outset that (i) the history is lengthy and (ii) not outcome-determinative, but (iii) several pertinent observations can be made. Taking a cue from the majority, I will not recite the full history of the exemption in exhaustive detail; instead, a few key highlights will suffice:

- In 1937, the Legislature enacted a use-tax exemption for tangible personal property consumed or used in "agricultural producing." 1937 PA 94, § 4(g).
- In 1949, the Legislature revised the exemption by deleting "agricultural producing" and replacing the term with "things of the soil." It also added a certification provision for the production of "horticultural or agricultural products." 1949 PA 273, § 4(f).
- The Legislature revised the exemption again in 1970. This time it added a catch-line heading ("Agricultural production") and made other changes not relevant to this dispute. 1970 PA 15, § 4(f).
- The provision remained much the same until 2004, when the Legislature left out the catch-line heading and deleted the certification provision, among other revisions. This omitted *any* legislative mention of "agricultural production" with respect to the exemption. 2004 PA 172, § 4(1)(f).
- In 2008 and 2012, the Legislature made further minor revisions to the exemption. These are the provisions relevant to the tax years in question.

The operative language is identical in both versions:

> (1) The following are exempt from the tax levied under this act, subject to subsection (2):
>
> * * *
>
> (f) Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. [2012 PA 474, § 4(1)(f).]

In 2017, a package of bills amending various tax exemptions was introduced in our House of Representatives. Two of the bills, 2017 HB 4561 and 2017 HB 4564, involved exemptions for "things of the soil." As introduced, the bills would have made the exemptions expressly limited to "agricultural purposes"—i.e., the relevant language would have changed to ". . . . things of the soil *for agricultural purposes* . . . ." (Emphasis added.) Not surprisingly, the department supported the change. The House passed the bills with the included express limitation, but the language was eventually stripped from the bills in the Senate. The Senate passed the bills without the language, the House concurred, and the Governor signed the bills. See 2018 PA 114. The current exemption thus reads:

> (1) The following are exempt from the tax levied under this act, subject to subsection (2):
>
> * * *
>
> (f) Except as otherwise provided under subsection (3), property sold to a person engaged in a business enterprise that uses or consumes the property, directly or indirectly,

> for either the tilling, planting, draining, caring for, maintaining, or harvesting of things of the soil or the breeding, raising, or caring for livestock, poultry, or horticultural products, including the transfers of livestock, poultry, or horticultural products for further growth. [MCL 205.94(1)(f), as amended by 2018 PA 114.]

What can the reasonable reader glean from this history? A few things. The original use-tax exemption was enacted in 1937 to focus on "agricultural producing," but then twelve years later, any mention of "agricultural producing" was omitted and replaced with "things of the soil." When the Legislature uses a different word or phrase in revising a statute, absent clear indication that it was done for purely stylistic reasons, the new word or phrase should signal a change in meaning. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

At the same time that the Legislature added "things of the soil," it also added the term "agricultural products" in the new certification provision. Yet, as this Court held in *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570, 574; 473 NW2d 783 (1991), the certification provision did not create a requirement related to "agricultural products," but rather provided a means for the creation of prima facie evidence in support of an exemption claim. Thus, the fact that the Legislature added the term "agricultural products" in 1949 is of little moment here. Moreover, the entire certification provision was omitted from the exemption in 2004.

At first blush, it would seem significant that the Legislature added the catch-line heading in 1970. The Legislature has long instructed, however, that catch-line headings "shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the

section would indicate." MCL 8.4b. A catch-line heading is merely for the "convenience to persons using publications of the statutes," *id*., and therefore courts and departments must ignore the heading for purposes of determining what the statute means, *In re Lovell*, 226 Mich App 84, 87 n 3; 572 NW2d 44 (1997). In any event, the catch-line heading was omitted by the Legislature in subsequent amendments. See, e.g., 2004 PA 172.

This statutory history, while somewhat muddled, does suggest that by at least 2004, the Legislature had settled on a broad exemption. Specifically, by 2004, (i) the Legislature had jettisoned the original "agricultural producing" scope and replaced it with "things of the soil"; (ii) it had added and then removed the narrower catch-line heading; and (iii) it had omitted any mention of "agriculture" or "agricultural" in the operative part of the exemption (the only references are later in the provision regarding land tiles). While not conclusive by itself, this history is consistent with and supports the reading presented here.

What to make of the recent legislative history, i.e., 2017 HB 4561 and 2017 HB 4564? In one respect, it is not relevant because we are interpreting prior versions of the statute. See *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). In another respect, however, it is relevant because this legislative activity shows, at a minimum, that the Legislature knows full well how to draft a provision that would clearly narrow the exemption to "agricultural purposes." In fact, the department supported such a provision, the House (originally) supported such a provision, but the Senate did not. By the time the Senate sent the legislation back to the House for a concurrence vote, the proposed provision had been stripped out and replaced with the

existing provision ("things of the soil"), with nary a mention of "agricultural producing," "agricultural products," or "agricultural purposes."

The reasonable reader can speculate on why the language was removed as the bills traversed the Legislature. Maybe, for instance, some of the legislators observed that well-manicured lawns provide esthetic benefits to third parties, and those legislators wanted to subsidize the provision of such benefits.[2] Or, maybe, other legislators simply supported lower taxes on businesses like TruGreen. These and other speculations are, however, just that—speculations. What can be known for certain from the recent legislative activity is that (i) the Legislature was asked to narrow the exemption at the same time that this dispute was working its way through the courts, (ii) the Legislature considered narrowing the language, but (iii) the Legislature ultimately rejected the narrower language. *Id*. (noting that the "highest quality" of legislative history is that which includes "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted").

After considering the text, context, and history of the use-tax exemption, where does this leave our

[2] Some have argued that tax laws must further some public good. There is no logical reason that esthetic goods—which grass, trees, and ornamental plants surely are—cannot be considered public goods. A public good is one whose benefit inures largely to the public as opposed to a single person or firm—technically, the good is nonexcludable and nonrivalrous. The esthetic values of well-manicured lawns, parks, and commercial and other public spaces are, by and large, nonexcludable, and the enjoyment by one does not diminish the enjoyment by another. Whether the esthetic values created by TruGreen's services *should* qualify as a "public good" for tax purposes is a policy question for the Legislature, not a judicial one for this Court or an administrative one for the department.

reasonable reader? A few takeaways seem unavoidable. The meaning of the phrase "things of the soil" is broader than the phrase "agricultural products" or even "products of the soil." The context of the statute supports the plain, broader meaning of the phrase. And while not itself conclusive, the statutory and legislative history lends support to a broader understanding of the exemption, especially when the reader compares the phrase chosen and retained by the Legislature ("things of the soil") with the phrases rejected and jettisoned by it ("agricultural producing," "agricultural products," "agricultural purposes"). Frankly, one has to wonder how the Legislature could have more clearly evidenced that a broad meaning was intended. It replaced a narrow term with a broad one; it reserved the term "products" for a logically separate category in a grammatically separate phrase; it eschewed any mention of "agriculture" or "agricultural" in the relevant part of the provision; and when recently asked to modify "things of the soil" with "agricultural purposes," the Legislature said *No*.

Given all of this, I submit that the reasonable reader is left with but one conclusion—TruGreen qualifies for the use-tax exemption.

III. THE MAJORITY OPINION

The reasonable reader need go no further. My analysis has been set out in detail, and the reader can compare this with the majority's analysis and determine on their own who has the sounder case. For those who want to press on, however, I offer a few additional observations, none of which are necessary to my analysis.

Thumb on the Scale. The majority starts out its opinion by placing a collective thumb on the interpre-

tative scale in favor of the department. In support, the majority references a quote from Justice Cooley's treatise on taxation that the grant of an exemption " 'must be beyond reasonable doubt.' " *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403. But this cannot be taken at face value. "Beyond reasonable doubt" is the burden needed for the government to take a person's liberty (and, in other jurisdictions, possibly even life) away; it cannot plausibly be the burden needed for a taxpayer to obtain a tax exemption. This rhetorical flourish should remain just that.

More substantively, while our Supreme Court has stated that courts should strictly construe tax exemptions, it has also clarified that this does not mean that tax exemptions should be given "a strained construction which is adverse to the Legislature's intent." *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664-665; 378 NW2d 737 (1985). "Like any other governmental intrusion on property or personal freedom, a tax statute should be given its fair meaning, and this includes a fair interpretation of any exceptions it contains." *Reading Law*, p 362.

I read our caselaw to mean that, when construing a tax exemption, a court should—as with any other statute—start by analyzing the text, context, and history of the exemption using common, generally accepted interpretive tools (e.g., definitions, rules of grammar, changes in statutory language). If the exemption is ambiguous (i.e., it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning), only then should the court turn to various interpretive canons of construction, one of which being that when there remains doubt about a

tax exemption's meaning, the push goes against the taxpayer. It is not at all clear to me how the majority is using the "strictly construed" canon, but I suspect it is using it more strictly than it should.

Bones and Tarot Cards. Even more concerning is the majority's contextual analysis. From what I can tell, the majority's analysis consists of ripping words from their context, jumbling them together, and then drawing conclusions from the resulting "collection of words and phrases." Take this example: "The exemption's first relevant sentence is a string of participles: tilling, planting, caring for, harvesting, breeding, and raising. The words describe actions respecting 'things of the soil' or 'livestock, poultry or horticultural products.' " Or take another example: "The words closely adjoining 'planting' and 'caring for . . . things of the soil' are: 'tilling,' 'harvesting of things of the soil,' 'breeding,' 'raising,' 'caring for livestock, poultry, or horticultural products,' and 'the transfers of livestock, poultry, or horticultural products for further growth.' " Compare the majority's lists with the actual language of the statute set out earlier.

The majority has indeed identified a "collection of words and phrases" from the exemption—just not the "collection of words and phrases" as they actually appear in the actual statutory language. As shown earlier, the grammatical structure of the exemption does not suggest that "breeding" or "raising" has anything to do with "things of the soil." Nor does "livestock, poultry, or horticultural products" or "for further growth" having anything to do with the prior, separate prepositional phrase. In fact, the use of "products" in the separate phrase argues against the majority's reading, but by jumbling everything together into a "collection of words and phrases," the majority can

infer meanings that are not there. This is a bones-and-tarot-cards method of contextual analysis.

An Imprecise Label Does Not Become More Precise by Repetition. The majority seems also to draw support from several prior decisions of this Court. Under principles of stare decisis, if our Supreme Court or a panel of this Court had held in a published decision that the department's interpretation was the correct one, then I would be bound to follow the holding, notwithstanding my understanding of the plain meaning of the statute set out earlier. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016).

All parties agree that there is no Supreme Court decision on-point. As for the decisions of this Court cited by the majority, I readily concede that those decisions have referred to the exemption as the "agricultural production exemption." See, e.g., *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 50 n 14; 869 NW2d 810 (2015); *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 234; 818 NW2d 489 (2012); *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 491; 618 NW2d 917 (2000). This is not surprising, though, since the Legislature at one time referred to this exemption by a similar catch-line heading (though no longer), and end uses of "things of the soil" certainly include (though are not limited to) agricultural products.

In *William Mueller & Sons*, 189 Mich App at 571, the taxpayer was assessed a use tax on fertilizer equipment that it claimed was involved in agricultural production. The Court held that the taxpayer qualified for the exemption because it was undisputed that the taxpayer was a business enterprise and the equipment was used in the "tilling, planting, caring for, or har-

vesting of things of the soil." *Id*. at 573. The Court rejected the department's position that the taxpayer had to be "in the business of producing agricultural products" for the exemption to apply. *Id*. at 573-574. Importantly for this case, there is no holding or even analysis in *William Mueller & Sons* related to what "things of the soil" means.

Likewise, the Legislature's intended scope of the phrase "things of the soil" was not at issue in *Mich Milk Producers Ass'n*, 242 Mich App 486, or *Sietsema Farms*, 296 Mich App 232. In *Mich Milk Producers*, 242 Mich App at 487-488, 495, there was no question that "milk production" was within the scope of the exemption, and the question was whether the use of the equipment was for producing milk (exempt) or marketing milk (not exempt). Similarly, in *Sietsema Farms*, 296 Mich App at 240, there was no question that feeding livestock and poultry fit within the scope of the exemption, and the question was whether the property was actually being used to feed livestock and poultry.

While I acknowledge that prior panels have used the term "agricultural production" to refer to the exemption, this Court is bound by the holdings of prior published decisions, not the shorthand labels used in those decisions. And an imprecise shorthand label does not become more precise with mere repetition.

IV. THE DEPARTMENT'S REMAINING ARGUMENTS

In addition to those accepted by the majority, the department offers alternative arguments in support of its position. Unlike those accepted by the majority, these other arguments have little to do with the statute's text. The department asserts, for instance, that use-tax exemptions are intended to prevent the pyramiding of taxes on commercial products. Tax pyra-

miding means the imposition of a tax on a tax, and for those who want their taxes to be transparent, such pyramiding is generally frowned upon. Because TruGreen's services do not directly or even indirectly result in the sale of a taxable agricultural product to an end user, the department maintains that there is no risk of pyramiding a sales tax on top of a use tax, and, therefore, the purpose of the exemption would be undermined if TruGreen received the use-tax exemption.

Accepting that tax pyramiding is a policy vice to be avoided, the department's reliance on this argument has several flaws. Rather than cite the "highest quality" of legislative history in support of its argument, such as actual, official activity of the Legislature (e.g., votes and amendments), *In re Certified Question*, 468 Mich at 115 n 5, the department points us to a journal article and a legislative analysis. Neither is particularly reliable in determining whether MCL 205.94(1)(f) was intended, in fact, to eliminate any risk of tax pyramiding with respect to "things of the soil."

Furthermore, although the department couches this as an argument from historical development, this is really an argument from policy implication. The department has identified a cogent tax policy—use-tax exemptions are intended to avoid tax pyramiding—and because TruGreen's commercial activities purportedly do not run the risk of tax pyramiding, then the rationale for the tax policy does not support an exemption for TruGreen. But, as this Court recognized in *D'Agostini*, 322 Mich App at 560, "It is not our place to divine *why* the Legislature" enacted a tax statute to favor or disfavor a particular taxpayer or taxable activity. "Rather, it is our place only to determine *whether* the Legislature did or did not do so . . . ." *Id*.

Similarly, our Supreme Court made clear in *Pinkney*, 501 Mich at 285-288, that if the plain meaning of the statute is clear but a court believes that the Legislature made a mistake that may "frustrate [the] purpose" of the statute, then the court must apply the statute as written and leave it to the Legislature to determine whether a change is needed.

In fact, the very concept of tax pyramiding is suspect with respect to agricultural products. To illustrate, it is important to recognize first that many agricultural products are ultimately sold to end users as food or food ingredients for human consumption. In Michigan, most food for human consumption is exempt from sales tax, MCL 205.54g(1)(a), so there is no risk of tax pyramiding with respect to these food products, at least as it relates to the imposition of a sales tax on an end-product on top of a use tax on the inputs of production. And yet, even though there is no risk of tax pyramiding on sweet corn, for example, a Michigan farmer would likely be eligible for a use-tax exemption when harvesting sweet corn for sale at the local farmers' market. This is not the place nor the record for an extensive examination of tax pyramiding with respect to all agricultural products, but needless to say, the department's policy-based argument—(i) TruGreen's services are not subject to sales tax, (ii) tax pyramiding is not a risk, and therefore (iii) the use-tax exemption does not apply—has little persuasive force here.

Finally, the department asks this Court to defer to Mich Admin Code, R 205.51(7), the department's administrative rule implementing the use-tax exemption. Unlike the statute itself, the rule specifically prohibits a taxpayer from claiming a use-tax exemption when the property is for "use on homes or other noncommercial gardens, lawns, parks, boulevards, and golf courses or

for use by landscape gardeners." The department promulgated the rule under the Administrative Procedures Act, MCL 24.201 *et seq*., in accordance with authority delegated to it by the Legislature, MCL 205.3(b), MCL 205.59(2), and MCL 205.100(2). Yet, because the statute is clear that "things of the soil" is broader than mere agricultural production, the department cannot impose a requirement that the Legislature did not see fit to add itself. "An administrative rule cannot exceed the statutory authority granted by the Legislature." *William Mueller & Sons*, 189 Mich App at 574.

V. CONCLUSION

Tax laws have consequences. Some consequences might be thought of as "intended"—e.g., raising revenue, avoiding pyramiding, cultivating a favored industry—and some might be thought of as "unintended"—e.g., a "tax loophole" if favoring the taxpayer, a "jobs killer" if disfavoring the taxpayer. The reasonable reader might surmise that TruGreen was not whom the Legislature considered when it enacted and subsequently amended (several times) the use-tax exemption for "things of the soil."

But this surmising is outside of the Court's proper role and institutional competence. See *People v Al-Saiegh*, 244 Mich App 391, 399; 625 NW2d 419 (2001). Our role, rather, is to interpret and apply the statute as written, and when, as here, the text has a plain meaning, supported by context and history, then it is that plain meaning that we should apply. Once we have laid the particular consequence bare, it is up to the Legislature to determine whether it intends the consequence to endure or not. With its ruling today, the majority has stepped outside of our proper role and competency. And finally, speaking of consequences, it

will not be lost on the reasonable reader that, although no doubt unintended by the majority, the unavoidable consequence of today's ruling is that the department has gained in the Judiciary what could not be gained in the Legislature.

For all of these reasons, I cannot join the majority and thus respectfully dissent.

POSTSCRIPT

There is a certain futility when a dissent responds to a separate concurring opinion. Neither opinion garnered a majority vote, so it is just one failed opinion responding to another failed opinion. Frankly, had the concurring opinion concluded with its Part III, this postscript would not have been written.

After all, does it really need to be observed that there is a certain disconnect in suggesting, on the one hand, that a phrase is "most certainly obscure," but then asserting, on the other hand, that the phrase is a well-established term of art based on decades of caselaw—caselaw without a single holding to that effect? Does it really need to be pointed out that in the use of context, the concurring opinion repeats (and compounds) the majority's error of abusing context by picking a phrase in one part of the sentence ("horticultural products") and applying it to a grammatically separate part? Does it really need to be said that, with respect to the department's interpretation, I have given it the same respectful consideration as did its own referee at the outset of this tax dispute? These hardly seem points worth making in response to the concurring opinion.

But then we get to Part IV and the so-called "fetishization of dictionaries." Several observations are in order. First, that is a rather odd accusation, but let us

leave the word choice alone and get to the substance. Second, for the life of me I cannot find anything in the dissent to suggest that the use of *The Oxford English Dictionary* absolves this Court from "reasoned good-faith discussion, analysis of caselaw and context, and stare decisis." Maybe I shouldn't have summarized my dissenting analysis in the introduction? Maybe I should have moved my discussion of case law and stare decisis closer to the beginning? I thought these were merely stylistic choices.

Third and more substantively, this is not the place for a general defense of the use of dictionaries to aid with the interpretation of statutes and contracts. There are already two long, detailed opinions and a separate concurring opinion, so whatever follows after the proverbial beating of the dead horse, we're there. So, my concluding observations. A dictionary is a tool for interpretation, nothing more, nothing less. Just as a hammer is a tool that can be used expertly, poorly, or even maliciously (just ask Rusty Sabich's wife in *Presumed Innocent*), the same can be said about a dictionary. Scalia & Garner, *Reading Law*, pp 415-424. And, just as an expert carpenter may use a hammer and other tools to construct a new kitchen, the expert judge may use a dictionary and other tools to interpret a statute or contract. Given that the concurring judge has done precisely this in literally dozens of opinions as recently as October 2019 for such obscure terms as "should," *Jendrusina v Mishra*, 316 Mich App 621, 626 & n 1; 892 NW2d 423 (2016), "continuing," *People v Carll*, 322 Mich App 690, 704-705; 915 NW2d 387 (2018), and "health care," *People v Anderson*, 330 Mich App 189, 199 n 6, 199-200; 946 NW2d 825 (2019), I presume that the concurring judge understands this proper usage, but he just wants to make a rhetorical point. Fair enough, but was the concurring judge

eschewing his "constitutional role" in those and scores of other cases when he consulted a dictionary?

We expect citizens to abide by our government's laws, and this is right. We use the government's police powers to enforce those laws, and this is also right. Is it going too far to suggest that a citizen should be able to use a good dictionary from the shelf as one tool in the interpretive toolbox to understand what our government's laws mean? It seems rather undemocratic to argue the contrary.

OMER v STEEL TECHNOLOGIES, INC

Docket No. 344310. Submitted March 10, 2020, at Lansing. Decided April 16, 2020, at 9:00 a.m. Affirmed in part and vacated in part 507 Mich 492 (2021).

Ahmed Omer filed an application with the Worker's Compensation Board of Magistrates, seeking compensation from Steel Technologies, Inc., and New Hampshire Insurance Company for a work-related lower-back injury. After a trial, the magistrate issued an opinion finding that Omer sustained a work injury on January 3, 2011, arising out of and in the course of his employment and that Omer was totally disabled and entitled to weekly wage benefits for a closed period from April 12, 2011 through December 29, 2011. The magistrate found that Omer was a credible witness, that a physical-therapy report noting Omer's back-pain complaint was credible, and that the testimony of Dr. Nabil Suliman, a specialist in internal medicine who signed a medical certificate for Omer and testified that Omer was "totally disabled," was credible. The magistrate also found that the deposition of Barbara Feldman, a vocational-rehabilitation counselor, was credible. Feldman testified that Omer would not be capable of returning to a job at which he earned his highest wages. Steel Technologies submitted the deposition of Dr. Brian Roth, who performed a defense medical examination of Omer, and the magistrate accepted Dr. Roth's opinion that Omer's period of disability ended on December 29, 2011. Defendants appealed the magistrate's decision in the Michigan Compensation Appellate Commission (the MCAC), contending that the magistrate erred by concluding that Omer proved he was disabled as a result of a work-related incident and that Omer was totally disabled during the identified time period. Omer filed a cross-claim arguing that he was entitled to either an open award of benefits or a remand to permit the magistrate to explain why he found Dr. Roth credible. The MCAC reversed the magistrate's decision, denying Omer's claim for wage-loss benefits on two grounds. First, the MCAC concluded that when a magistrate's finding of total disability is based on a physician's conclusory declarations of total disability, rather than a quantification of limitations described through physical restrictions that may lead to wage loss, the magistrate's finding is unsupported by competent evidence. Second, the MCAC concluded that Omer failed to sustain

his burden of proving entitlement to total disability benefits. Omer sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application.

The Court of Appeals *held*:

1. The MCAC reviews the magistrate's findings of fact under the substantial-evidence standard. Under MCL 418.861a(3), substantial evidence is such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion. The MCAC must consider as conclusive the findings of fact made by a workers' compensation magistrate as long as those facts are supported by competent, material, and substantial evidence on the whole record. However, whether a statute permits or precludes the admission of evidence is a legal question that is reviewed de novo, and this case presented two evidentiary questions: whether the testimony of a treating physician is competent evidence of disability in a workers' compensation case, and whether the evidence in this case satisfied the competent-evidence standard.

2. The MCAC's competency ruling conflated two different legal analyses: witness competence and evidentiary competence. Regarding witness competence, the MCAC erred when it concluded that treating physicians "generally" may not provide competent testimony regarding whether a patient's condition results in a compensable disability. Under the Michigan Rules of Evidence, Dr. Suliman was competent to testify. As a board-certified specialist in internal medicine, Dr. Suliman was presumptively qualified to offer opinion testimony predicated on "knowledge, skill, experience, training, or education" pursuant to MRE 704. And if qualified as an expert, MRE 704 permitted Dr. Suliman to opine regarding Omer's disability. In this case, Dr. Suliman testified that he personally examined Omer, identified disk abnormalities on Omer's scans, and diagnosed Omer with lumbar disk disease and radiculopathy. These underlying facts supplied "sufficient facts or data" under MRE 704 for Dr. Suliman to offer a disability opinion. Furthermore, treating physicians commonly provide testimony regarding disability in workers' compensation matters. There was no rule of evidence or a single case holding that a treating physician cannot provide competent evidence (or a competent opinion) regarding a claimant's disability. Accordingly, a general, per se rule deeming "incompetent" the opinion testimony of treating physicians regarding disability lacks any legal basis, and the MCAC erred when it concluded otherwise. Regarding evidentiary competence, the MCAC must consider the magistrate's findings of fact conclusive if the findings are supported by competent, material, and substantial evidence on the whole record; to satisfy that

standard, the evidence must be more than a scintilla, but it may be less than a preponderance. In this case, the MCAC grossly misapplied the substantial-evidence standard in holding that Omer failed to present competent evidence of disability. Omer himself testified regarding his disability, and that testimony, in combination with the medical evidence and the testimony of Feldman, fully satisfied the "substantial" and "competent" evidence requirements. The MCAC failed to consider the "whole record," which included the testimonies of Omer and Feldman, as well as medical records. The whole record in this case amply supported a finding of total disability for a closed period. Accordingly, the MCAC erred as a matter of law in determining that the evidence underlying the magistrate's decision was incompetent.

3. To satisfy the disability standards in MCL 418.301(4), a claimant must offer certain proofs, including a showing that the work-related injury prevents the claimant from performing some or all of the jobs identified as within the claimant's qualifications and training that pay the claimant's maximum wages. Only if the claimant is capable of performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages must the claimant show that he cannot obtain these jobs. In this case, substantial evidence supported the magistrate's finding that Omer established a disability and was entitled to wage-loss benefits, and therefore the MCAC erred by holding that Omer failed to sustain his burden of proving entitlement to total disability benefits.

Reversed and remanded for entry of an order in Omer's favor.

O'BRIEN, P.J., concurring, agreed with the majority's ultimate conclusion that the MCAC's ruling should be reversed but wrote separately because she read the MCAC's ruling as deciding that Omer failed to establish "total disability" as opposed to the majority's reading of the MCAC's ruling as deciding that Omer failed to establish a prima facie case of disability. Judge O'BRIEN agreed with the majority that a medical doctor's testimony can be used to establish disability and that the evidence Omer presented established a disability; however, the establishment of disability did not create a presumption of wage loss. Therefore, the question that should have been addressed on appeal was whether the magistrate's decision that Omer was totally disabled was supported by substantial, material, and competent evidence. The only evidence of total disability was Dr. Suliman's testimony that Omer was "totally disabled" and Omer's testimony that he was in too much pain to go back to work. The MCAC ruled that Dr. Suliman's testimony that Omer was "totally disabled" was not "competent"

evidence to support a finding of total disability, and Judge O'BRIEN did not disagree with that ruling because she did not read the MCAC's opinion as ruling that a doctor can never testify about whether a claimant is totally disabled. For a doctor to testify that a claimant with restrictions other than being unable to return to any employment is "totally disabled," he or she would have to know the claimant's qualifications and training as well as all work that the claimant could perform with his or her qualifications and training, and in this case, it was never established that Dr. Suliman knew Omer's qualifications and training or that he knew all work that Omer could perform with his qualifications and training. Without that knowledge, Dr. Suliman's testimony that Omer was "totally disabled" had no probative value for establishing total disability; it was a conclusory statement that did not tend to prove that Omer was unable to perform all work suitable to his qualifications and training as a result of his injury. Accordingly, Judge O'BRIEN would have concluded that the MCAC was correct in deciding that Dr. Suliman's testimony did not support a finding of total disability. However, given the low bar of the substantial-evidence test, the magistrate could have concluded that Omer's testimony alone was sufficient to support a finding of total disability. Judge O'BRIEN further agreed with the majority that the MCAC's alternative basis for reversing the magistrate was also incorrect because there was evidence of total disability—Omer's testimony—that the magistrate found credible.

WORKERS' COMPENSATION — EVIDENCE — OPINION TESTIMONY REGARDING DISABILITY — TREATING PHYSICIANS.

MCL 418.841(6) provides, in pertinent part, that the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable in workers' compensation cases, but a magistrate may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs; a general, per se rule deeming "incompetent" the opinion testimony of treating physicians regarding disability lacks any legal basis and contravenes MCL 418.841(6).

Alpert & Alpert (by *Joel L. Alpert*) for Ahmed Omer.

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus* and *Michael D. Sanders*) for Steel Technologies, Inc., and New Hampshire Insurance Company.

Before: O'BRIEN, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM. What is "competent evidence"? Generally speaking, it is evidence that is relevant and tends to establish a fact at issue. In the workers' compensation setting, competent evidence need not be admissible under the rules of evidence. Rather, the rules of evidence are followed only "as far as practicable," and "a magistrate may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." MCL 418.841(6).

Here, the magistrate considered the testimony of Ahmed Omer's treating physician on the question of whether Omer was disabled as a result of a work injury. Crediting that testimony and other record evidence, the magistrate issued a closed award encompassing approximately eight months of work-related disability. The Michigan Compensation Appellate Commission (the MCAC) reversed, holding that the physician's testimony did not constitute competent evidence of disability. Because the MCAC applied an incorrect rule of law, we reverse and remand for entry of an order in Omer's favor.

I. FACTUAL BACKGROUND[1]

Omer began working for defendant Steel Technologies, Inc., in 2004, when he was 18 years old. His first job was as a material handler. He progressed to a truck loader, then a crane operator, and in January 2011, he worked as a slitter operator. In that capacity, while

[1] Our factual summary is drawn solely from the magistrate's factual findings, which specifically referenced and described the testimony and certain medical records. The facts recited are not derived from an independent review of the record.

"tearing down a set-up," Omer felt pain in his groin area. An examining physician at Concentra Medical Center noted on January 3, 2011, that Omer reported "groin pain" that "began abruptly" and radiated to his scrotum and testicles. Omer's symptoms were exacerbated by activity, pressure, or lifting, and he had no urinary complaints. The physician sent Omer back to work on restricted duty.

Omer returned to Concentra on January 10, 2011, for physical therapy. According to the therapist's note, Omer reported injuring his "lower back/groin area while lifting [a] 30-40 [pound] tool," and that "bending, kneeling, lift/carry" exacerbated his pain. Omer testified that his pain was in his mid-lower back and under his belt. He had not experienced this pain before January 2011, Omer maintained.

On March 10, 2011, Omer again felt pain in his lower back while lifting something at work. He was again sent to Concentra, where the examining physician recorded, in relevant part:

> [Patient] reports the pain in his lower back is unchanged. He felt the same pain in his lower back as he had in January. While at work last night, after repeatedly lifting and bending with heavy boxes, he felt sharp pain in his lower back. Patient has been working within the duty restrictions. Patient has not been taking their meds due to not following instructions. Instructions were clarified. The pain is located on midline lower back and lumbosacral region. The pain is described as moderate, sharp and aching. Pain Intensity Level: 6/10. The pain did not radiate. The symptoms are exacerbated by flexion, bending or lifting. [Brackets omitted.]

The examiner's assessment was "lumbar strain." Omer returned to work, again with restrictions (no lifting over 10 pounds, no bending more than four times per

hour, and no pushing or pulling over 10 pounds of force), and he was scheduled for physical therapy.

On April 11, 2011, Omer stopped working. He consulted Dr. Abdelkader Fares, whose notes reflect that Omer complained of "[s]evere low back pain, hard to bend on both sides for the last four weeks." Dr. Fares also noted severe tenderness and bilateral spasms. Omer then saw a chiropractor, Dr. Mohamed Saleh. In May 2011, Dr. Saleh filled out a form indicating that Omer was unable to work as of April 11. That form is part of the record; Dr. Saleh did not testify, however, and his office notes were not produced.

In August 2011, Omer consulted his primary care physician, Dr. Nabil Suliman, a specialist in internal medicine. Dr. Suliman testified that he had never treated Omer for lower-back-related problems before 2011. Dr. Suliman reviewed the report of an MRI scan obtained in April 2011, which revealed a "diffuse disk [sic] bulge at level L4-L5" and "a broad-based disk [sic] protrusion without stenosis at L5-S1." These findings were consistent with an incident occurring around the time of the MRI, Dr. Suliman opined, and likely were caused by heavy lifting or bending. He elaborated:

> Based on my information like I saw him prior to this reported injury, and at that time he never had any of these symptoms or any of these presentations. So from like history, it seems like it's consistent that probably an injury took place around like that time or earlier that year which really attributed to his complaints of low back pain and leg pain.
>
> * * *
>
> Based on my knowledge of his condition and based on the previous like visits that we had prior to this reported injury, I see that there is a correlation between this injury and between the problems that Mr. Omer has since that

> incident. Since basically all his previous office visits that we had never had any reference to any back injuries or lower extremity symptoms, so I feel that it is probably triggered by that incident.

Dr. Suliman referred Omer for physical therapy and pain management. On August 4, 2011, Dr. Suliman signed a medical certificate stating that Omer suffered from "lumbar disc disease, lumbar radiculopathy," was partially disabled, and was restricted to no excessive bending or twisting and no lifting more than 20 pounds. Dr. Suliman testified in accordance with this disability certificate that Omer was "unable to perform his work, and he was totally disabled . . . ."

Barbara Feldman, a vocational-rehabilitation counselor, gave a deposition on Omer's behalf. She testified to his employment background and vocational capabilities, his wage history, and his wage capabilities with and without restrictions in place. Omer's maximum wage, Feldman testified, was earned as a slitter operator. In the sedentary-work category, Feldman explained, Omer would not be capable of returning to a job at which he earned his highest wages.[2] With a 20-pound weight restriction, Feldman was not able to locate a job that paid Omer's maximum preinjury rate of pay. She expressed that Omer's work injury played a role in his inability to return to some or all the jobs in his qualification range that paid the maximum range. For example, with his restrictions, he could not return to work as a slitter operator, as that job required him to do heavy lifting.

Steel Technologies submitted the deposition of Dr. Brian Roth, who performed a defense medical examination of Omer on December 29, 2011, a few days

[2] Sedentary work encompasses work with a 10-pound lifting restriction, primarily involving sitting.

before Omer returned to work. Dr. Roth testified that Omer demonstrated no clinical signs of injury or pain at that time and that the disk disease apparent on the MRI appeared degenerative in nature. His review of Omer's medical records was "nonspecific," Dr. Roth explained, and did not provide "clearcut medical diagnoses." In Dr. Roth's view, Omer could resume full activities without restrictions. Cindy Ballosh, a rehabilitation consultant retained by Steel Technologies, identified a number of jobs that Omer could perform, in her opinion, with light work restrictions.

Omer returned to work in January 2012 and has worked full-time since then in a restricted capacity.

II. THE MAGISTRATE'S OPINION AND THE MCAC RULING

After a brief trial and the filing of a number of depositions and medical records, the magistrate issued a 27-page opinion finding that Omer sustained a work injury on January 3, 2011, arising out of and in the course of his employment and that he was totally disabled and entitled to weekly wage benefits for a closed period from April 12, 2011 through December 29, 2011.

The magistrate found Omer a credible witness. Although the Concentra records did not initially reflect that Omer reported back pain, the magistrate gave credence to the January 10 physical-therapy report referencing his back-pain complaint. The magistrate also credited Omer's testimony that Omer had stopped working on April 11 due to back pain because "[h]e could not do it anymore."

The magistrate found Dr. Suliman credible as well and specifically quoted Dr. Suliman's expressed opinion that a correlation existed between Omer's injury

and his "problems . . . since that incident." The opinion continued:

> Dr. Suliman's credible testimony is supported by the Attending Physician's Statement dated 7/12/2011 prepared by Dr. Saleh which stated 4/11/11 as the date he believes plaintiff was unable to work with subjective symptoms of back pain. Dr. Saleh considered the condition to be due to plaintiff's employment.

Applying the "roadmap" established by the Supreme Court in *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008), the magistrate found that Omer had established a disability arising from the January 3, 2011 injury during the period of April 12, 2011 until December 29, 2011. In the lengthy paragraph quoted below, the magistrate identified several different factual bases for his conclusion that Omer had proven a compensable disability: the testimonies of Omer, Dr. Suliman, and Barbara Feldman; Omer's Concentra records; and the disability slips signed by Dr. Saleh. Contrary to the MCAC's later ruling, the "substantial evidence" underlying the magistrate's disability finding was not limited to Dr. Suliman's testimony, as the paragraph below reflects:

> I find that plaintiff's work-related injury prevented him from performing all of the jobs within his qualifications and training which pay maximum wages. This finding is based on the credible testimony of the plaintiff, the credible testimony of Dr. Suliman, Concentra records, disability slips from Dr. Saleh and the vocational testimony of Barbara Feldman. Plaintiff credibly testified that in the late spring, summer and fall of 2011 before he returned to work, while Dr. Saleh and Dr. Suliman had him on total disability, he did not believe he was able to go back and do any job because he was in too much pain. Plaintiff testified that during the period of time that he was on total disability, he could sit for only 20 to 30 minutes at a time. Dr. Suliman credibly testified that

> plaintiff was unable to perform his work and was totally disabled and needed some assistance in some housekeeping work. Dr. Suliman issued a disability certificate stating that plaintiff was totally disabled from 7/1/11 to 8/31/11. This disability slip was dated August 4, 2011. Dr. Suliman testified that the plaintiff has not been able to return to his prior job as a slitter operator at any point during the course of Dr. Suliman's care. Dr. Suliman testified he tried to get plaintiff back to work with some restrictions on February 2, 2012. The restrictions he imposed at that time were no excessive bending or twisting and no lifting more than 20 pounds. Records from Concentra show that when plaintiff was seen on March 10, 2011 he was given restrictions of no lifting over ten pounds, no bending greater than four time[s] per hour and no pushing and/or pulling over ten pounds of force. Barbara Feldman testified that sedentary work is no lifting over ten pounds and primarily sitting, but it could also include standing and walking. Pursuant to the Concentra restrictions, plaintiff would be limited to sedentary work. Barbara Feldman testified that if plaintiff were limited to sedentary work, he would not be capable of returning to a job at which he earned his highest wages. There was no evidence of any other restrictions until Dr. Suliman imposed restrictions of no excessive bending or twisting and no lifting more than 20 pounds. Barbara Feldman testified that with the 20-pound weight restriction, she was not able to find a job that pays plaintiff's maximum pre-injury rate of pay. Disability slips from Dr. Saleh/Family Wellness state that plaintiff was unable to work, low back pain due to work injury, from 4/12/11 to 6/30/11. [Citations omitted.]

The magistrate also deemed Dr. Roth credible and accepted his opinion that Omer's period of disability ended on December 29, 2011.

Defendants appealed the magistrate's decision to the MCAC, contending that the magistrate erred by concluding that Omer proved he was disabled as a result of a work-related incident and that Omer was totally disabled during the identified time period. Ac-

cording to defendants' brief on appeal, "the Appellate Commission has consistently held that a medical expert may not translate his medical opinion into a vocational outcome by couching his/her ultimate opinion as one of total disability or total inability to work." In support of this proposition, defendants cited two MCAC opinions: *Peterson v Consumers Energy Co*, 2012 Mich ACO 31, and *Lewis v United Parcel Serv, Inc*, 2013 Mich ACO 73.

Omer filed a cross-claim arguing that he was entitled to either an open award of benefits or a remand to permit the magistrate to explain why he found Dr. Roth credible. According to the MCAC, "[e]ssentially, both plaintiff and defendants argued that the magistrate did not sufficiently articulate or establish a basis for his findings." *Omer v Steel Technologies, Inc*, 2018 Mich ACO 15, p 2.

The MCAC adopted the magistrate's summary of the record and left "undisturbed the magistrate's finding of a January 3, 2011, personal injury arising out of and in the course of plaintiff's employment and the award of all reasonable and necessary medical benefits related to plaintiff's back from January 3, 2011 through December 29, 2011." *Id*. at 5. The MCAC next considered defendants' argument that a doctor cannot give competent testimony on the issue of disability. The MCAC adopted this position, reasoning:

> The Commission agrees with defendant's reliance upon *Peterson v Consumers Energy Company*, 2012 Mich ACO 31 at 6, as well as its progeny, such as *Lewis v United Parcel Service Incorporated, et al*, 2013 Mich ACO 73. With respect to proof of disability, the competency of testimony by treating and examining physicians as experts is in the area of identifying injury and/or disease based [on] functional limitations of a physical and/or emotional nature. Their medical training generally does

> not afford them any particular expertise with respect to how such limitations translate into wage earning limitations in the workplace. Instead, it is the vocational expert who is typically possessed of the expertise to translate the medically identified limitations into employability (wage earning) outcomes. For that reason, where a magistrate's finding of total disability is based upon [a] physician['s] conclusory declarations of total disability, rather than quantification of limitations, described through physical restrictions, which may lead to wage loss, that finding is unsupported by competent evidence. The conclusory statements in this regard of Dr. Suliman and the chiropractor are thus not competent evidence of disability (wage loss). On that basis alone, the Commission reverses the award of weekly wage loss benefits and would likewise deny plaintiff's cross claim for benefits beyond December 29, 2011. [*Omer*, 2018 Mich ACO 15, pp 5-6.]

The MCAC then offered a second ground for denying Omer's claim for wage-loss benefits:

> Were a reviewing court of appellate jurisdiction to disagree with this analysis, there remains the misallocation of the burden of proof by the magistrate in addressing the question of partial versus total disability. The burden of proof to show wage loss that results from a work injury always rests with the plaintiff. *Stokes v Chrysler LLC*, 481 Mich [266]; 750 NW2nd [sic] 129 (2008). It is the plaintiff who must demonstrate not only the existence of a disability, but its extent. The magistrate finds a lack of evidence as to whether plaintiff could find, secure and perform jobs paying less than his maximum wage as a failure of proofs by the defendant and so awards reduced wage loss benefits. It is true that the record reveals that plaintiff's vocational expert performed no labor market survey that would gauge the existence and availability of such jobs. It is also true that the record reflects the plaintiff did not look for work of any kind himself. But these deficiencies are failures by the plaintiff to undertake his burden to quantify the claimed work-related limitation in wage earning capacity. To the extent that this lack of evidence

> bears upon quantifying the appropriate weekly wage loss benefit to award, they indicate plaintiff has failed to sustain his burden of proving any entitlement to such a benefit. In the face of such failure, no need for the defendant to present rebuttal evidence arises. For this reason as well, we reverse the magistrate to deny any award of weekly wage loss benefits in this case. [*Omer*, 2018 Mich ACO 15, p 6.]

We granted Omer's application for leave to appeal. *Omer v Steel Technologies Inc*, unpublished order of the Court of Appeals, entered December 7, 2018 (Docket No. 344310).

III. STANDARDS OF REVIEW

The standards of review applicable in this case are multilayered. We begin at ground level with the scope of administrative review by the MCAC and then address the contours of our judicial review.

The MCAC reviews "the magistrate's findings of fact under the 'substantial evidence' standard . . . ." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698; 614 NW2d 607 (2000). Substantial evidence is "such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." MCL 418.861a(3). The MCAC must consider as "conclusive" the findings of fact made by a workers' compensation magistrate, as long as those facts are "supported by competent, material, and substantial evidence on the whole record." *Id*.; see also *Findley v DaimlerChrysler Corp*, 490 Mich 928, 928 (2011).

The MCAC has *limited* fact-finding power. It may substitute its own factual findings for those of the magistrate when a "qualitative and quantitative analysis" of the record yields a different result. MCL 418.861a(13); see also *Mudel*, 462 Mich at 699-700.

However, the MCAC's factual review of the magistrate's opinion is *not* de novo. Rather, it "involves reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material, and substantial evidence." *Mudel*, 462 Mich at 699. In other words, the MCAC must begin by considering the "whole record" to determine whether the evidence considered by the magistrate meets the legislative standard of "competent, material, and substantial evidence." If it does, further review exceeds the MCAC's authority. The MCAC is not empowered to " 'set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.' " *Agueros v Bridgewater Interiors LLC*, 2020 Mich ACO 4, p 2, quoting *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994).

This Court must treat the MCAC's factual findings as conclusive if there is any competent record evidence supporting them. *Mudel*, 462 Mich at 701. But we are empowered to review de novo questions of law embedded within a final order. MCL 418.861a(14); *Stokes*, 481 Mich at 274. "[A] decision of the [MCAC] is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). And whether a statute permits or precludes the admission of evidence is a legal question subject to de novo review. *People v Buie*, 298 Mich App 50, 71; 825 NW2d 361 (2012).

This case first presents two evidentiary questions: whether the testimony of a treating physician is competent evidence of disability in a workers' compensation case, and whether the evidence in this case satisfied the competent-evidence standard.

IV. A TREATING PHYSICIAN'S COMPETENCY TO TESTIFY REGARDING DISABILITY

The MCAC made two "competency" rulings. First, the MCAC expressed that the "competency" of treating physicians "is in the area of identifying injury and/or disease based [on] functional limitations of a physical and/or emotional nature." The MCAC continued: "Their medical training generally does not afford them any particular expertise with respect to how such limitations translate into wage earning limitations in the workplace. Instead, it is the vocational expert who is typically possessed of the expertise to translate the medically identified limitations into employability (wage earning) outcomes." Based on the MCAC's determination that a treating physician is not "competent" to testify regarding disability, the MCAC held that "where a magistrate's finding of total disability is based upon [a] physician['s] conclusory declarations of total disability, rather than quantification of limitations, described through physical restrictions, which may lead to wage loss, that finding is unsupported by competent evidence."

This portion of the MCAC's competency ruling conflates two different legal analyses: evidentiary competence and witness competence. Whether the "whole record" contains "competent evidence" of disability is a different question than whether an individual physician is competent to testify regarding disability. We begin with the latter question.

When Dr. Suliman was deposed, defendants did not object to his qualification to testify as an expert witness regarding disability. Without objection, Dr. Suliman engaged in the following colloquy with Omer's counsel:

Q. And what was your thinking as of the summer of 2011 as to his physical abilities?

A. That he is unable to perform his work, and he was totally disabled, and . . . like he needed some assistance in some housekeeping work.

Defendant's trial brief, filed five months after Dr. Suliman's deposition, asserted that Dr. Suliman was not qualified to "translate an expert medical opinion into a vocational outcome" "by couching his/her ultimate opinion as one of total disability or total inability to work." Dr. Suliman "failed to delineate" Omer's "specific physical capabilities," defendants urged, rendering his views incompetent.

Whether the preservation requirements applicable in circuit court actions apply in workers' compensation matters is an open question. "Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *AFSCME Council 25 v Faust Pub Library*, 311 Mich App 449, 462; 875 NW2d 254 (2015) (quotation marks and citation omitted). Had defense counsel objected to Dr. Suliman's qualifications to render disability-related opinions, Omer's counsel would have been afforded an opportunity to lay a foundation in that regard. But assuming without deciding that the objection was preserved by filing the trial brief, we find no legal merit to the MCAC's determination that treating physicians "generally" may not provide competent testimony regarding whether a patient's condition results in a compensable disability.

The rules of evidence, which the magistrate must follow "as far as practicable," offer several helpful guideposts. MRE 601 sets forth the general rule that "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental

capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." Dr. Suliman was certainly "competent" to testify under this standard. Other rules address the testimony of expert witnesses. MRE 702 provides that if a court determines that expert testimony will be helpful,

> 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.

MRE 704 states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Here, one of the "ultimate issue[s] to be decided by the trier of fact" was whether Omer qualified as disabled.

We glean from these precepts that Dr. Suliman was a "competent" witness as that term is used in the rules of evidence. As a board-certified specialist in internal medicine, Dr. Suliman was presumptively qualified to offer opinion testimony predicated on "knowledge, skill, experience, training, or education." And if qualified as an expert, MRE 704 permitted Dr. Suliman to opine regarding Omer's disability.

The MCAC ruled that "treating and examining physicians" "generally" lack "any particular expertise" regarding how a patient's "functional limitations" "translate into wage earning limitations in the workplace." We find no legal support for that proposition in the rules of evidence, the Worker's Disability Compensation Act, MCL 418.101 *et seq*., or the caselaw. It is certainly true

that a *particular* physician may be unqualified to testify in a *particular* case regarding a *particular* disability. For example, an orthopedic surgeon would likely be unqualified to testify regarding the nature, extent, and disabling characteristics of a cardiac arrythmia. But we are aware of no legal or common-sense reason—and defendants have identified none—that a board-certified internist is disqualified as a matter of law from testifying that a patient's severe and lingering back pain disables the patient from lifting more than 20 pounds.[3] Dr. Suliman testified that he personally examined Omer, identified disk abnormalities on Omer's MRI scans, and diagnosed Omer with lumbar disk disease and radiculopathy. These underlying facts supplied "sufficient facts or data" for Dr. Suliman to offer a disability opinion. The *weight* afforded that opinion was for the magistrate to determine.

Furthermore, treating physicians commonly provide testimony regarding disability in workers' compensation matters. Under MCL 418.841(6), a magistrate may admit and rely on "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of

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[3] According to the American College of Physicians, specialists in internal medicine

> are equipped to handle the broad and comprehensive spectrum of illnesses that affect adults, and are recognized as experts in diagnosis, in treatment of chronic illness, and in health promotion and disease prevention—they are not limited to one type of medical problem or organ system. General internists are equipped to deal with whatever problem a patient brings—no matter how common or rare, or how simple or complex. They are specially trained to solve puzzling diagnostic problems and can handle severe chronic illnesses and situations where several different illnesses may strike at the same time. [American College of Physicians, *About Internal Medicine* <https://www.acponline.org/about-acp/about-internal-medicine> (accessed March 9, 2020) [http://perma.cc/JR75-EUBU].]

their affairs." Historically, the opinion of a treating physician regarding disability—and even disability specifically caused by back pain—has fallen within that realm. For example, the workers' compensation plaintiff in *Woods v Sears, Roebuck & Co*, 135 Mich App 500, 503; 353 NW2d 894 (1984), claimed disability caused by persistent back pain. The magistrate issued a closed award, and the MCAC ruled that the plaintiff was entitled to an open award. *Id*. The defendant appealed in this Court, contending that the evidence did not establish that the plaintiff suffered a permanent disability. *Id*. We found "ample evidence to support the appeal board's finding," including the testimony of one of the plaintiff's "treating physicians." *Id*. at 504.[4] And our Supreme Court did not express any reason to discredit the disability-related testimony of a claimant's treating physicians in *Walker v Loselle Constr Co*, 305 Mich 121; 9 NW2d 29 (1943). To the contrary, the Supreme Court's opinion in that case indicates that the treating physicians' opinions were improperly disregarded by the deputy commissioner. *Id*. at 126-129.

Defendants in this case have not identified a single case holding, as a matter of law, that a treating physician cannot provide competent evidence (or a competent opinion) regarding a claimant's disability. We are unable to locate any rule of evidence, or any logical or legal principle "commonly relied upon by reasonably prudent persons," that might support the MCAC's proposed rule. Nor did the MCAC identify any. Indeed, the MCAC's reliance on this purported rule is contradicted by its rulings in other cases that a mag-

[4] The MCAC has in other cases stated "with specificity" reasons for *favoring* the testimony of a claimant's treating physician. See *Aaron v Mich Boiler & Engineering*, 185 Mich App 687, 697; 462 NW2d 821 (1990).

istrate is permitted, although not required, to give *greater* weight to the testimony of treating physicians. *Parker v Chrysler Corp*, 1997 Mich ACO 57. In *Parker*, 1997 ACO 57, p 4, the MCAC declared: "[I]t is well within the magistrate's authority to accept the most persuasive medical testimony. . . . Although magistrates often place greater weight on the testimony of treating physicians, they are not compelled to do so."[5] And in *Isaac v Masco Corp*, 2004 Mich ACO 81, p 4, the MCAC wrote:

> The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. [Citations omitted.]

This Court has also weighed in on the subject, albeit somewhat indirectly. In *Berger v Gen Motors Corp*, 159 Mich App 171, 175; 406 NW2d 264 (1987), the treating physician answered affirmatively when asked whether the claimant's disability was " 'caused by his work for General Motors or any other employer[.]' " The magistrate awarded benefits, and the MCAC reversed, indicating that only the plaintiff's testimony supported his disability claim as the physician's testimony "was minimal to say the least." *Id*. at 176. We noted that no objection had been raised to the question posed to the claimant's treating physician and that the MCAC never found that the physician's "evaluations or opinions, however cursory, were unworthy of belief." *Id*. at 177. Rather, we held that "[a]s the [MCAC] never rejected

[5] The treating physicians in *Parker* testified that the claimant was not disabled due to a psychiatric condition and was able to return to work without restrictions.

[the physician's] evidence, at least for a proper reason, we are inclined to regard it as undisputed and controlling." *Id*. *Berger* was decided before 1990, and therefore we are not bound by its holding. MCR 7.215(J)(1). Nevertheless, we agree with its reasoning. "Minimal" testimony by a treating physician may suffice as "competent, material, and substantial evidence" of disability.

Many other courts have also concluded that a treating physician may competently offer an opinion regarding his or her patient's work-related disability. See *Plummer v Apfel*, 186 F3d 422, 429 (CA 3, 1999) ("Treating physicians' reports should be accorded great weight, especially 'when their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time.' ") (citation omitted); *Lewis v Callahan*, 125 F3d 1436, 1440 (CA 11, 1997) ("[T]he testimony of a treating physician must be given substantial or considerable weight unless 'good cause' is shown to the contrary."); *Shivers v Carnaggio*, 223 Md 585, 588; 165 A2d 898 (1960) ("We think the sound view is that a physician who has, in addition to his medical knowledge, familiarity with and understanding of the activities and occupation of his patient, may express an opinion as to the extent to which the anatomical disability will cause personal or economic disability. Whether in a particular case the physician has such extra-medical knowledge is primarily for the trial judge to decide in the exercise of a sound discretion."); *Spalding v Dep't of Labor & Indus*, 29 Wash 2d 115, 128-129; 186 P2d 76 (1947) ("[A]n attending physician . . . who has attended a patient for a considerable period of time for the purpose of treatment, and who has treated the patient, is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once."). We hold that a general,

per se rule deeming "incompetent" the opinion testimony of treating physicians regarding disability lacks any legal basis and contravenes MCL 418.841(6).

We turn to the second issue embedded in the MCAC's ruling: *evidentiary* competence. Neither the Worker's Disability Compensation Act nor the rules of evidence defines the term "competent evidence." *Black's Law Dictionary* (6th ed) defines the term as: "That which the very nature of the thing to be proven requires, as, the production of a writing where its contents are the subject of inquiry." The Supreme Court cited this definition approvingly in *Goff v Bil-Mar Foods, Inc*, 454 Mich 507, 514 n 5; 563 NW2d 214 (1997), overruled on other grounds by *Mudel*, 462 Mich at 697. The Supreme Court added in *Goff* that "The New World Dictionary, Second College Edition (1974), similarly defines 'competent' as 'well qualified; capable; fit . . . sufficient; adequate.' " *Goff*, 454 Mich at 514 n 5.

The MCAC grossly misapplied the "substantial evidence" standard in holding that Omer failed to present competent evidence of disability. Omer's evidence was not limited to the testimony of Suliman and the disability slip signed by Dr. Saleh. Omer himself testified regarding his disability, and that testimony, in combination with the medical evidence and the testimony of Barbara Feldman, fully satisfied the "substantial" and "competent" evidence requirements.

"The [MCAC] must consider the magistrate's findings of fact conclusive if the findings are supported by competent, material, and substantial evidence on the whole record." *Blanzy v Brigadier Gen Contractors, Inc*, 240 Mich App 632, 637; 613 NW2d 391 (2000). To satisfy that standard, the evidence must be "more than a scintilla, but it may be less than a preponderance." *Id*. "Expert opinion testimony is 'substantial' if offered

by a qualified expert who has a rational basis for his views, whether or not other experts disagree. To hold otherwise would thus neutralize all expert testimony in cases of conflict and the party with the burden of proof would automatically lose." *Aaron v Mich Boiler & Engineering*, 185 Mich App 687, 698; 462 NW2d 821 (1990) (quotation marks and citation omitted).

The MCAC ruled that Omer failed to present competent evidence in support of his disability claim because "[t]he conclusory statements . . . of Dr. Suliman and the chiropractor are . . . not competent evidence of disability (wage loss)." In so ruling, the MCAC failed to consider the "whole record," which included the testimonies of Omer and Feldman, as well as medical records. There is no magic formula for determining whether the evidence found in the "whole record" satisfies MCL 418.861a(3). Our Supreme Court has held that the "testimony of plaintiff and his wife, *without mor*e, and even though arguably disputed by certain medical witnesses, is sufficient to support" a finding of disability. *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 637; 242 NW2d 393 (1976) (emphasis added). More recently, the Supreme Court highlighted that to prove disability a claimant need not even hire an expert—"[T]here are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits." *Stokes*, 481 Mich at 282.

The magistrate's lengthy and detailed disability ruling cited not only the testimony of Dr. Suliman and the disability slips signed by Dr. Saleh, but also Omer's "credible" testimony that "he did not believe he was able to go back and do any job because he was in too much pain" and that "he could sit for only 20 to 30 minutes at a time." The magistrate also relied on

Dr. Suliman's August 4, 2011 disability slip restricting Omer from excessive bending or twisting and lifting more than 20 pounds, as well as Feldman's testimony and the "Concentra restrictions," which demonstrated that Omer "would be limited to sedentary work" and that "he would not be capable of returning to a job at which he earned his highest wages." The magistrate added, "Barbara Feldman testified that with the 20-pound weight restriction, she was not able to find a job that pays plaintiff's maximum pre-injury rate of pay."[6]

In sum, the MCAC erred as a matter of law in determining that the evidence underlying the magistrate's decision was incompetent. MCL 418.861a(3) compelled the magistrate to consider the "whole record," defined in MCL 418.861a(4) as "the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination." If the magistrate's findings are supported by competent, material, and substantial evidence on the whole record, the MCAC must view them as conclusive. *Findley*, 490 Mich at 928. Our Supreme Court has explained that "the [MCAC] must . . . give deference to the magistrate's factual determinations, and may no longer engage in *de novo* fact finding . . . ." *Id*. Contrary to the MCAC's conclusion, the record amply supports, with competent evidence, a finding of total disability for a closed period.

V. ALLOCATION OF THE BURDEN OF PROOF

The MCAC held that if this Court rejected its competency analysis, it would nevertheless hold that

[6] The MCAC asserted that the magistrate's finding of total disability was premised on "[a] physician['s] conclusory declarations of total disability, rather than quantification of limitations, described through physical restrictions . . . ." The record evidence contradicts this contention, as both Dr. Suliman and the Concentra physician placed specific limitations on Omer's activities.

Omer failed to sustain his burden of proving entitlement to total disability benefits. According to the MCAC, the magistrate "misallocat[ed]" the burden of proof by finding a "lack of evidence as to whether plaintiff could find, secure and perform jobs paying less than his maximum wage as a failure of proofs by the defendant and so awards unreduced wage loss benefits." The "deficiencies," the MCAC declared, are attributable to Omer.

The magistrate found that Omer proved that "his work-related injury prevented him from performing some or all of the jobs within his qualifications and training which pay maximum wages" for the period from April 12, 2011 through December 29, 2011. The magistrate stated that he based this finding on various sources, including Omer's testimony that "he did not believe he was able to go back and do any job because he was in too much pain" and Dr. Suliman's testimony that Omer was "unable to perform his work and was totally disabled and needed some assistance in some housekeeping work." The magistrate recounted that with the restrictions placed by Dr. Suliman and Concentra, Feldman testified that Omer would be limited to sedentary work and "would not be capable of returning to a job at which he earned his highest wages." With the 20-pound weight restriction, Feldman explained (and the magistrate accepted as fact) that "she was not able to find a job that pays plaintiff's maximum pre-injury rate of pay."

Stokes instructs that to satisfy the disability standards in MCL 418.301(4), a claimant must offer certain proofs, including a showing that "his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages." *Stokes*, 481 Mich at

283. Only if the claimant *is* capable of "performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages" must the claimant show that he cannot obtain these jobs. *Id*.

Based on the testimony recapitulated in this opinion, substantial evidence supported the magistrate's finding that Omer established a disability and was entitled to wage-loss benefits. As set forth earlier, the MCAC must consider as "conclusive" the findings of fact made by a workers' compensation magistrate as long as those facts are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); see also *Findley*, 490 Mich at 928. Competent, material, and substantial evidence supported the magistrate's finding. The MCAC misapprehended and grossly misapplied the substantial-evidence standard in holding otherwise.

We reverse and remand for entry of an order in Omer's favor. We do not retain jurisdiction.

JANSEN and GLEICHER, JJ., concurred.

O'BRIEN, P.J. (*concurring*). To be entitled to compensation under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., a claimant must (1) establish a prima facie case of "disability" using the factors from *Stokes v Chrysler LLC*, 481 Mich 266, 281-283; 750 NW2d 129 (2008), and (2) prove a wage loss, see *id*. at 275 n 2. Once the claimant establishes that he or she is entitled to compensation, the amount of that compensation depends on whether the claimant establishes "total disability" or "partial disability."

The majority reads the ruling of the Michigan Compensation Appellate Commission (the MCAC) as decid-

ing that plaintiff, Ahmed Omer, failed to establish a prima facie case of disability, whereas I read the MCAC's ruling as deciding that Omer failed to establish "total disability." While I part ways with the majority on what the MCAC ruled, I nevertheless agree with the majority's ultimate conclusion that the MCAC's ruling should be reversed.

I. STATUTORY FRAMEWORK

To illustrate the difference between "disability" and "total disability" under the Worker's Disability Compensation Act, it is helpful to walk through the act's statutory framework. Under MCL 418.301(1), "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." But proving a work-related injury is not, by itself, enough to receive compensation under the act; "that injury must result in a reduction of the claimant's wage-earning capacity in work suitable to his qualifications and training." *Stokes*, 481 Mich at 281. If this is established, the claimant has established a "disability" under the act. MCL 418.301(4)(a) states, in part, " 'Disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." MCL 418.301(4)(a) goes on to explain, "A limitation of wage earning capacity occurs only if a personal injury covered under this act results in the employee's being unable to perform all jobs paying the maximum wages in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills."

This is where the test from *Stokes* becomes applicable. *Stokes* provides a four-part test for establishing disability:

> First, the injured claimant must disclose his qualifications and training. . . .
>
> Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. . . .
>
> * * *
>
> Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages.
>
> Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. [*Stokes*, 481 Mich at 281-283 (citation omitted).][1]

Stokes states, "Upon the completion of these four steps, the claimant establishes a prima facie case of disability." *Id*. at 283.

The majority focuses on whether the testimony of a medical doctor—here, Dr. Nabil Suliman—can be used to establish a prima facie case of disability. I agree with the majority that a medical doctor's testimony can be used to establish disability, and I further agree that the evidence Omer presented established a disability.[2]

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[1] This four-part test was incorporated into MCL 418.301(5).

[2] Once a claimant establishes a prima facie case of disability, a defendant can rebut that showing. See *Stokes*, 481 Mich at 283-284; MCL 418.301(6). Defendants here did not rebut Omer's evidence, so Omer's establishing a prima facie case of disability established disability.

But establishing a disability does not, without more, entitle a claimant to compensation. "Once a plaintiff makes a prima facie showing of disability, the plaintiff must also prove a wage loss." *Id*. at 275 n 2. MCL 418.301(4)(a) states, "The establishment of disability does not create a presumption of wage loss." Defendants do not argue that Omer failed to establish wage loss, so I presume that defendants do not contest that it was established.

This still does not end the inquiry; there remains the question of what compensation Omer is entitled to receive. This, in turn, depends on whether the claimant's disability is total or partial.[3] See *Cain v Waste Mgt, Inc*, 465 Mich 509, 511; 638 NW2d 98 (2002) (explaining that once a disabled claimant establishes entitlement to compensation under the act, "one must then determine if the disability is total or partial"). MCL 418.301(4)(a) states:

> A disability is total if the employee is unable to earn in any job paying maximum wages in work suitable to the employee's qualifications and training. A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training.

"Total disability arises . . . when an employee proves that he is unable to perform all work suitable to his qualifications and training as a result of his injury." *Haske v Transp Leasing, Inc, Indiana*, 455 Mich 628, 655; 566 NW2d 896 (1997), overruled on other grounds

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[3] If the claimant establishes "total disability," he or she is entitled to "weekly compensation equal to 80% of [his or her] after-tax average weekly wage . . . ." MCL 418.301(7). If the claimant establishes "partial disability," he or she is entitled to "weekly compensation equal to 80% of the difference between [his or her] after-tax average weekly wage before the personal injury and [his or her] wage earning capacity after the personal injury . . . ." MCL 418.301(8).

by *Sington v Chrysler Corp*, 467 Mich 144, 172 (2002)[4]; see also *Irvan v Borman's Inc*, 412 Mich 496, 503; 315 NW2d 521 (1982) (explaining that a totally disabled claimant would have "no earning capacity").

I read the MCAC's decision as ruling that Omer's evidence could not establish "total disability." It stated, "[W]here a magistrate's finding of total disability is based upon [a] physician['s] conclusory declarations of total disability, rather than quantification of limitations, described through physical restrictions, which may lead to wage loss, that finding is unsupported by competent evidence." I think the question we must address on appeal is whether Omer established "total disability," not whether Omer established "disability."[5]

II. EVIDENCE OF "TOTAL DISABILITY"

To be exact, the question we should address on appeal is whether the magistrate's decision that Omer was totally disabled was supported by substantial,

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[4] *Sington* overruled "the *Haske* definition of disability," *Sington*, 467 Mich at 146, but a fair reading of *Sington* makes clear that it did not overrule *Haske*'s single line about "total disability."

[5] This distinction is important because some of the evidence that established Omer's prima facie case of disability does not establish that he was totally disabled. To prove that he was totally disabled, Omer had to establish that he was unable to perform *any* job for which he was qualified because of his work-related injury. *Haske*, 455 Mich at 655. But to prove disability, Omer only needed to establish that he had a work-related injury that resulted "in a reduction of [his] wage-earning capacity in work suitable to his qualifications and training." *Stokes*, 481 Mich at 281. Omer's vocational expert, Barbara Feldman, only testified about disability; she testified that, given Omer's restrictions, "he would not be capable of returning to a job at which he earned his highest wage" and that "she was not able to find a job that pays plaintiff's maximum pre-injury rate of pay." Her testimony would not prove that Omer was totally disabled and is therefore not relevant to the issue that I believe we should address on appeal.

material, and competent evidence. The only evidence of total disability was (1) Dr. Suliman's testimony that Omer was "totally disabled" and (2) Omer's testimony that "he did not believe he was able to go back and do any job because he was in too much pain" and "he could sit for only 20 to 30 minutes at a time."

The MCAC ruled that Dr. Suliman's testimony that Omer was "totally disabled" was not "competent" evidence to support a finding of total disability. I do not disagree with that ruling.

I do not read the MCAC as ruling that a doctor can *never* testify about whether a claimant is totally disabled. As the MCAC recognized, a doctor who treats a claimant will be able to discuss a claimant's restrictions or physical limitations as a result of an injury. It follows that if a claimant's injury is so severe that the restrictions are that he or she cannot return to any employment, then the doctor's testimony could establish total disability.

But Dr. Suliman did not testify that Omer's injury was so severe that he could not work. Rather, Dr. Suliman testified that Omer was restricted to no excessive bending or twisting and no lifting more than 20 pounds. Barbara Feldman, Omer's vocational expert, testified that this allowed Omer to perform sedentary work. Yet Dr. Suliman described Omer as "totally disabled."

Assuming that Dr. Suliman used "totally disabled" to be synonymous with "total disability," it is unclear how Dr. Suliman could make that assessment. "Total disability" is when a claimant "is unable to perform all work suitable to his qualifications and training as a result of his injury." *Haske*, 455 Mich at 655. For a doctor to testify that a claimant with restrictions other than being unable to return to any employment is "totally

disabled," he or she would have to know the claimant's qualifications and training as well as all work that the claimant could perform with his or her qualifications and training. Otherwise, the doctor could not know whether the claimant's restrictions or physical limitations prevented the claimant from "perform[ing] all work suitable to his qualifications and training . . . ." *Id*. That is, the doctor would not have sufficient knowledge to offer an opinion on whether the claimant was "totally disabled." See MRE 702.

It was never established that Dr. Suliman knew Omer's qualifications and training or that he knew all work that Omer could perform with his qualifications and training. Without that knowledge, Dr. Suliman's testimony that Omer was "totally disabled" had no probative value for establishing total disability; it was a conclusory statement that did not tend to prove that Omer was "unable to perform all work suitable to his qualifications and training as a result of his injury." *Haske*, 455 Mich at 655. I would therefore conclude that the MCAC was correct in deciding that Dr. Suliman's testimony did not support a finding of total disability.

But Dr. Suliman's testimony was not the only evidence establishing total disability. Omer testified that he did not think he could do any job because he was in too much pain. This testimony supports a finding of total disability. Of course, a magistrate can choose to not credit a claimant's testimony that he or she could not do any work because of a work-related injury, but the magistrate here chose to credit Omer's testimony. Given the substantial-evidence test's low bar, Omer's testimony was sufficient to support the magistrate's finding of total disability. I therefore agree with the majority's conclusion that the MCAC misapplied the substantial-evidence test and that we must reverse.

III. THE MCAC'S ALTERNATIVE BASIS

As for the alternative ground on which the MCAC reversed the magistrate's opinion, I think that was error as well. The MCAC stated:

> It is the plaintiff who must demonstrate not only the existence of a disability, but its extent. The magistrate finds a lack of evidence as to whether plaintiff could find, secure and perform jobs paying less than his maximum wage as a failure of proofs by the defendant and so awards unreduced wage loss benefits. It is true that the record reveals that plaintiff's vocational expert performed no labor market survey that would gauge the existence and availability of such jobs. It is also true that the record reflects the plaintiff did not look for work of any kind himself. But these deficiencies are failures by the plaintiff to undertake his burden to quantify the claimed work-related limitation in wage earning capacity. To the extent that this lack of evidence bears upon quantifying the appropriate weekly wage loss benefit to award, they indicate plaintiff has failed to sustain his burden of proving any entitlement to such a benefit.

The MCAC appears to have taken issue with the following portion of the magistrate's opinion:

> **Partial Wage Earning Capacity**
>
> There was no testimony from either of the vocational experts that plaintiff was capable of performing any jobs within the Concentra restrictions issued on March 10, 2011 which were the only restrictions applicable during the relevant time period.

I understand the MCAC's concern. "MCL 418.851 places the burden of proof on the claimant to demonstrate his entitlement to compensation and benefits by a preponderance of the evidence." *Stokes*, 481 Mich at 285. To establish the amount of compensation to which he was entitled, Omer had to first establish by a

preponderance of the evidence that he was either totally disabled or partially disabled. Total disability is when a claimant is unable to perform *any* job for which he or she is qualified because of a work-related injury, and partial disability is when a claimant establishes disability less than "total." They are mutually exclusive; to prove total disability requires a claimant to disprove partial disability. I read the MCAC's opinion as being concerned that the magistrate found that no evidence of partial disability constituted evidence of total disability, which would be incorrect. No evidence of partial disability is *not* evidence of total disability; it is a failure of the claimant to carry his or her burden of proof.

But there *was* evidence of total disability: Omer's testimony. His testimony that he was unable to do any work, which the magistrate credited, was sufficient to establish that he was totally disabled. Thus, the MCAC's alternative basis for reversing the magistrate was also incorrect.

For these reasons, I concur with the majority's decision to reverse the MCAC and reinstate the magistrate's decision.

COMERICA, INC v DEPARTMENT OF TREASURY

Docket No. 344754. Submitted March 6, 2020, at Lansing. Decided April 16, 2020, at 9:05 a.m. Affirmed 509 Mich ___ (2022).

Comerica, Inc., and the Department of Treasury cross-appealed in the Michigan Tax Tribunal the decision of the department's hearing referee recommending that the department uphold its decision reducing Comerica's Michigan Business Tax (MBT) refund. In October 2007, Comerica merged two of its subsidiaries, Comerica-Michigan and Comerica-Texas. Upon the merger, Comerica-Michigan ceased to exist, and all of its rights, privileges, powers, franchises, and property, as well as its debts, liabilities, and duties, vested in Comerica-Texas. When Comerica filed its MBT returns for 2008-2011, it included Comerica-Texas as a unitary business group (UBG) member but did not include Comerica-Michigan. In its MBT return for the 2008 tax year (the tax year in which the merger occurred), Comerica included Comerica-Texas's net capital and reported the historical net capital of Comerica-Michigan as effectively belonging to Comerica-Texas. Comerica also claimed tax credits that Comerica-Michigan had earned under the (now repealed) Single Business Tax Act (SBTA), MCL 208.1 *et seq*. In September 2013, the department audited Comerica's 2008–2011 MBT returns and consequently reduced Comerica's refund, due to the department's calculation of Comerica's net capital and its disallowance of the claimed tax credits. The department concluded that Comerica-Texas and Comerica-Michigan should be treated as separate entities with their own net capital under MCL 208.1265, the averaging provision of the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., which required an accounting for the years before the merger when Comerica-Michigan had its own net capital. The department did not permit Comerica-Texas to take the tax credits earned by Comerica-Michigan under the SBTA because the credits had been previously assigned to Comerica-Michigan by a limited-liability company, and the SBTA permitted the assignment of those credits only once. Therefore, the department determined that the credits could not be reassigned to Comerica-Texas. Comerica disputed the refund reduction and requested an informal conference before a departmental hearing

referee; following the conference, the referee recommended upholding the department's decision. Comerica then petitioned the tribunal to review the department's decision, alleging that the department had miscalculated Comerica-Texas's net capital when determining its tax base and had wrongly disallowed the tax credits because they had transferred by operation of law via the merger, and not by assignment. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10), and the tribunal granted partial summary disposition for Comerica and partial summary disposition for the department. The tribunal concluded that the department had improperly calculated Comerica's net capital, but it affirmed the department's decision disallowing the tax credits, concluding that it was not clear that a transfer by operation of law had occurred because the merger was not unintentional or involuntary. The tribunal reasoned that the credits could only be transferred to a successor entity by assignment because the credits were privileges, not property rights. Therefore, the tribunal concluded that because the credits had already been assigned once before the merger, they were extinguished along with Comerica-Michigan when it merged with Comerica-Texas. The tribunal denied the department's motion for reconsideration, and both parties appealed.

The Court of Appeals *held*:

1. The department erred when it calculated Comerica's tax base. Recently, in *TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596 (2019), the Court of Appeals concluded that the averaging formula in MCL 208.1265 must be applied to a UBG as a single taxpayer, rather than to individual members. The tribunal's order directing the department to recalculate Comerica's net capital by considering only the net capital of Comerica-Texas for the current year and its previous years of existence, and averaging the net capital for those years, did not comply with *TCF Nat'l Bank*. Therefore, this portion of the tribunal's order is vacated, and on remand, the tribunal must order the department to recalculate Comerica's net capital consistent with *TCF Nat'l Bank*.

2. Under the SBTA, tax credits could be assigned one time. In this case, the tax credits at issue had been assigned once to Comerica-Michigan, before the merger of Comerica-Michigan and Comerica-Texas. The question here was whether the SBTA permitted the credits to transfer by means other than assignment, such as by operation of law through a merger. A transfer by operation of law has been defined as the manner in which a party acquires rights without any act by the party. The plain language of the SBTA clearly indicated that the single-assignment limitation ap-

plied only to assignments, and not to transfers made by operation of law. Because the tax credits transferred from Comerica-Michigan to Comerica-Texas by operation of law pursuant to the merger statute, MCL 487.13703(1), the credits were not subject to the single-assignment limitation in the SBTA. Additionally, the tribunal's conclusion that the tax credits did not transfer by operation of law because they were privileges rather than property rights is not supported by the relevant law. Property, as ordinarily understood, extends to every kind of valuable right and interest. The tax credits at issue constituted property interests within the meaning of the merger statute, and they transferred by operation of law upon the merger of the separate entities of Comerica-Michigan and Comerica-Texas. By concluding that the credits did not transfer by operation of law, the tribunal conflated the voluntary act of merger with the automatic transfer of assets resulting from that merger. In this case, the voluntary act of merging under MCL 487.13703(1) automatically transferred the tax credits by operation of law.

Vacated and remanded to the tribunal for further proceedings.

TAXATION — SINGLE BUSINESS TAX ACT — TAX CREDITS — TRANSFERS.

Tax credits earned under the Single Business Tax Act may be assigned only once, but this single-assignment limitation does not prevent the transfer of credits by means other than assignment, such as by operation of law through merger (MCL 208.1101 *et seq*., and former MCL 208.1 *et seq*.).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *David W. Thompson* and *Scott L. Damich*, Assistant Attorneys General, for the Department of Treasury.

Ottenwess, Taweel & Schenk, PLC (by *Thomas P. Bruetsch* and *Christopher Kwiecien*) for Comerica, Inc.

Before: BOONSTRA, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM. Respondent appeals, and petitioner cross-appeals, the order of the Michigan Tax Tribunal (the tribunal) granting partial summary disposition in favor of petitioner and partial summary disposition in

favor of respondent under MCR 2.116(C)(10) (no genuine issue of material fact).

This matter involves the calculation of the franchise tax of a unitary business group (UBG)[1] under the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., and the carryforward of tax credits under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*.,[2] when two UBG entities merge and become a single entity. For the reasons stated herein, we vacate in part, reverse in part, and remand to the tribunal for further proceedings consistent with this opinion.

I. FACTS & PROCEDURAL HISTORY

Petitioner is a bank holding corporation which owns about 40 subsidiary financial corporations. One such subsidiary was a state-chartered bank regulated

[1] A "unitary business group" is defined as

> a group of United States persons, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other United States persons, and that has business activities or operations which result in a flow of value between or among persons included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. For purposes of this subsection, flow of value is determined by reviewing the totality of facts and circumstances of business activities and operations. [MCL 208.1117(6).]

[2] The SBTA, MCL 208.1 *et seq*., was repealed by 2006 PA 325, effective December 31, 2007. The SBTA was replaced by the now former MBTA, MCL 208.1101 *et seq*., effective January 1, 2008. See 2007 PA 36. The MBTA was repealed by 2011 PA 39, and replaced with the Corporate Income Tax Act, MCL 206.601 *et seq*., effective January 1, 2012. See 2011 PA 38. Although it was repealed in 2011 subject to certain conditions being satisfied, the MBTA still applies under certain circumstances. *Hudsonville Creamery & Ice Cream Co, LLC v Dep't of Treasury*, 314 Mich App 726, 729 n 1; 887 NW2d 641 (2016).

by Michigan law, Comerica-Michigan. For strategic business reasons, petitioner decided to convert Comerica-Michigan into a Texas banking association. In order to accomplish this, petitioner created another subsidiary on October 8, 2007, a Texas banking association, Comerica-Texas, and on October 31, 2007, Comerica-Michigan merged into Comerica-Texas. At that point, Comerica-Michigan ceased to exist. All of Comerica-Michigan's rights, privileges, powers, franchises, and property (real, personal, and mixed), as well as all of its debts, liabilities, and duties, vested in Comerica-Texas.

Petitioner filed Michigan Business Tax (MBT) returns for tax years 2008–2011 and included Comerica-Texas as a UBG member but not Comerica-Michigan. For the 2008 tax year, the year in which the merger occurred, petitioner included Comerica-Texas's net capital, which is the taxpayer's tax base for purposes of the franchise tax, and reported Comerica-Michigan's historical net capital as effectively belonging to Comerica-Texas. Additionally, petitioner claimed certain tax credits that Comerica-Michigan had earned under the SBTA. Overall, petitioner claimed a refund for each tax year.

In September 2013, respondent audited petitioner's 2008–2011 MBT returns and subsequently reduced petitioner's refund. The adjustment was due to respondent's calculation of petitioner's net capital and its disallowance of the claimed tax credits. Respondent treated Comerica-Texas and Comerica-Michigan as separate entities with their own net capital because the MBTA's averaging provision, MCL 208.1265, required an accounting for the years prior to the merger when Comerica-Michigan still had its own net capital. Respondent disallowed Comerica-

Texas from claiming the Comerica-Michigan tax credits on the basis that the SBTA permitted the assignment of those credits only once. Because the credits previously had been assigned by a limited-liability company to Comerica-Michigan in 2005, respondent concluded that they could not be reassigned to Comerica-Texas.

Petitioner disputed the refund reduction and requested an informal conference with respondent which took place before a departmental hearing referee. Following the informal conference, the hearing referee issued a recommendation upholding respondent's decision, which respondent adopted. Petitioner applied to the tribunal for a review of respondent's assessment and alleged that respondent had double counted petitioner's net capital when calculating the tax base. Petitioner further alleged that respondent wrongly disallowed the tax credits which, petitioner argued, transferred by operation of law via the merger, not by assignment. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10), and each party argued that their calculation of net capital was correct under the MBTA and that their position on the tax credit issue was correct under the SBTA.

After oral argument, the tribunal granted partial summary disposition for petitioner and partial summary disposition for respondent. The tribunal found that respondent improperly calculated petitioner's net capital and ordered that respondent recalculate the amount considering "only . . . the net capital of Comerica-[Texas] for the current year, and previous years it was in existence, and averag[ing] the net capital for those years." The tribunal affirmed respondent's disallowance of the tax credits because the

merger was not unintentional or involuntary and, therefore, it was not clear that a transfer by operation of law had occurred. The tribunal reasoned that the credits could only be transferred to a successor entity by assignment because the credits were privileges, not property rights, and therefore, because the credits had been assigned once, "when Comerica-[Michigan] was extinguished, so were the tax credits."

Respondent moved for reconsideration, and the tribunal denied the motion. This appeal and cross-appeal followed.

II. STANDARDS OF REVIEW

Our review of the tribunal's decision is limited. If fraud is not claimed, we review the tribunal's decision for misapplication of the law or adoption of a wrong principle. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). We deem the tribunal's "factual findings conclusive if they are supported by 'competent, material, and substantial evidence on the whole record.' " *Id*. (citation omitted). We review de novo questions of statutory interpretation. *Id*. A trial court's decision to grant or deny a motion for summary disposition also is reviewed de novo. *Id*. Summary disposition under MCR 2.116(C)(10) is proper if, after viewing all admissible evidence in a light most favorable to the nonmoving party, no genuine issue of material fact exists 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). "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*. (citation omitted).

III. ANALYSIS

A. MICHIGAN BUSINESS TAX ACT

Respondent erred in its calculation of petitioner's tax base. The MBTA imposes a franchise tax on the tax base of financial institutions with a nexus in Michigan, including UBGs. MCL 208.1263(1); MCL 208.1261(f)(*iii*); MCL 208.1265; *TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596, 607-608; 950 NW2d 469 (2019). "For a financial institution, tax base means the financial institution's net capital." MCL 208.1265(1). The MBTA's averaging provision, MCL 208.1265, specifies how net capital is calculated, *TCF Nat'l*, 330 Mich App at 608, and states:

> (1) For a financial institution, tax base means the financial institution's net capital. Net capital means equity capital as computed in accordance with generally accepted accounting principles less goodwill and the average daily book value of United States obligations and Michigan obligations. If the financial institution does not maintain its books and records in accordance with generally accepted accounting principles, net capital shall be computed in accordance with the books and records used by the financial institution, so long as the method fairly reflects the financial institution's net capital for purposes of the tax levied by this chapter. Net capital does not include up to 125% of the minimum regulatory capitalization requirements of a person subject to the tax imposed under chapter 2A.
>
> (2) Net capital shall be determined by adding the financial institution's net capital as of the close of the current tax year and preceding 4 tax years and dividing the resulting sum by 5. If a financial institution has not been in existence for a period of 5 tax years, net capital shall be determined by adding together the financial institution's net capital for the number of tax years the financial institution has been in existence and dividing the resulting sum by the number of years the financial

> institution has been in existence. For purposes of this section, a partial year shall be treated as a full year.
>
> (3) For a unitary business group of financial institutions, net capital calculated under this section does not include the investment of 1 member of the unitary business group in another member of that unitary business group.
>
> (4) For purposes of this section, each of the following applies:
>
> (a) A change in identity, form, or place of organization of 1 financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change.
>
> (b) The combination of 2 or more financial institutions into 1 shall be treated as if the constituent financial institutions had been a single financial institution in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions shall be combined. A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation.

Recently, we interpreted these statutory provisions in *TCF National Bank*, and held that the MCL 208.1265 averaging formula must be applied to a UBG as a single taxpayer, rather than at the individual member level. See *TCF Nat'l*, 330 Mich App at 611.

Respondent argues that *TCF National Bank* is inapplicable here because that case did not involve the merger of two subsidiary banks. We disagree. *TCF National Bank* considered the proper method for calculating net capital of UBGs generally, and we are required to interpret the same statutory provision at issue in this case, MCL 208.1265. See *id*. at 605-606. Our holding in *TCF National Bank*, that the proper

way to apply the averaging provision to a UBG pursuant to MCL 208.1265(1) to (3) is at the member level, is binding here and moots the parties' arguments regarding the interpretation of MCL 208.1265(4).[3]

Respondent further argues that our holding in *TCF National Bank* does not permit the negation of billions of dollars' worth of net capital, as would presumably occur here. However, the possibility that respondent may receive an unfavorable outcome is not a persuasive reason to set aside binding precedent.

Finally, respondent argues that application of *TCF National Bank* would render MCL 208.1265(4) surplusage. Our rules of statutory interpretation require us to give every word in a statute meaning and to avoid a construction that would render any part of the statute surplusage or nugatory. *Duffy v Dep't of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011). However, *TCF National Bank* does not apply to non-UBG financial institutions,[4] the combination of which, we agree, may implicate Subsection (4). But that is not the case in the matter before us. Therefore, respondent's argument fails.

The tribunal's order directs respondent to recalculate petitioner's net capital by looking "only at the net

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[3] See MCR 7.215(C)(2) (our published opinions have precedential effect under the rule of stare decisis); *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 399; 616 NW2d 691 (2000) (a case is stare decisis on a particular point of law if the issue was raised in the action and decided by the Court, and the decision was included in the opinion).

[4] In addition to a UBG and its members, the definition of "financial institution" includes "[a] bank holding company, a national bank, a state chartered bank, an office of thrift supervision chartered bank or thrift institution, a savings and loan holding company other than a diversified savings and loan holding company as defined in 12 USC 1467a(a)(F), or a federally chartered farm credit system institution." MCL 208.1261(f)(*i*).

capital of Comerica-[Texas] for the current year, and previous years it was in existence . . . , and averag[ing] the net capital for those years." This methodology does not comply with our holding in *TCF National Bank*, and therefore, we must vacate the portions of the order regarding petitioner's tax base and remand this case to the tribunal. On remand, the tribunal shall enter an order directing respondent to recalculate petitioner's net capital in a manner consistent with our holding in *TCF National Bank*.

B. SINGLE BUSINESS TAX ACT

Petitioner argues that we should reverse respondent's decision to disallow the tax credits and the tribunal's opinion and judgment affirming that determination. We agree.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature, focusing first on the statute's plain language. *Hudsonville Creamery*, 314 Mich App at 733. Agency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).

If a statute is unambiguous, judicial construction is neither required nor permitted, and the statute must be enforced as written. *Diallo v LaRochelle*, 310 Mich App 411, 417-418; 871 NW2d 724 (2015). "A statute is not ambiguous merely because a term it contains is undefined." *Id*. at 418 (quotation marks and citation omitted). If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word. *Id*. "A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal

meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). However, "nothing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014). In other words, we must not judicially legislate by adding into a statute provisions that the Legislature did not include. *Pike v Northern Mich Univ*, 327 Mich App 683, 697-698; 935 NW2d 86 (2019).

The parties agree that the SBTA permits a single assignment of tax credits and that the credits had been assigned once, before the merger of Comerica-Michigan and Comerica-Texas. However, the parties dispute whether the SBTA permits the credits to transfer by means other than an assignment, i.e., whether there was a transfer by operation of law through the merger. We conclude that the SBTA's single-assignment limitation applies only to assignments, and not to transfers made by operation of law. Because the tax credits here transferred by operation of law pursuant to the merger statute, MCL 487.13703(1), they were not subject to the single-assignment limitation.

MCL 208.38g(18) provides:

> Except as otherwise provided in this subsection . . . the qualified taxpayer may assign all or a portion of a credit allowed under subsection (2) or (3) to its partners, members, or shareholders . . . . A credit assignment under this subsection is irrevocable . . . . A partner, member, or shareholder that is an *assignee shall not subsequently assign a credit* or any portion of a credit assigned under this subsection. [Emphasis added.]

Additionally, MCL 208.39c(7) contains the same single-assignment limitation:

> [T]he qualified taxpayer may assign all or a portion of a credit allowed under this section to its partners, members, or shareholders . . . . A credit assignment under this subsection is irrevocable . . . . A partner, member, or shareholder that is an *assignee shall not subsequently assign a credit* or any portion of a credit assigned to the partner, member, or shareholder under this subsection. [Emphasis added.]

Plainly, the statutory language permits an initial assignment of the credits. By making that assignment irrevocable and mandating that "an assignee shall not subsequently assign a credit or any portion of a credit assigned" under MCL 208.38g(18) or MCL 208.39c(7), the statutes also prohibit any assignment beyond the first initial assignment. However, the statutes address only transfers made by assignment and are silent regarding transfers made by any other mechanism, such as transfers made by operation of law pursuant to a merger of entities. Accordingly, the statutory single-assignment limitation does not apply to these types of conveyances. Under the doctrine of "*expressio unius est exclusio alterius*, which means the express mention of one thing implies the exclusion of another," the Legislature's use of the term "assignment," to the exclusion of other types of transfers, indicates an intent to prohibit only more than one assignment, but not other types of transfers. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). To find otherwise would require that we read into the SBTA additional limitations that the Legislature omitted. *City of Fraser v Almeda Univ*, 314 Mich App 79, 99; 886 NW2d 730 (2016). "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Id*. (quotation marks and citation

omitted). Therefore, we reject respondent's argument that the SBTA prohibits all transfers beyond that permitted by a single assignment.

Additionally, under Michigan jurisprudence, transfers by assignment are distinct from transfers by operation of law. In *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 111; 825 NW2d 329 (2012), our Supreme Court recognized the difference between transfers by assignment and those made by operation of law, such as in the context of a merger. That case addressed the applicability of MCL 600.3204, which requires that all mortgage assignments (except assignments effected by operation of law) must be recorded before initiation of a foreclosure by advertisement, when the mortgage at issue was acquired through a voluntary purchase agreement. *Id*. at 102. The Court considered the nature of transfers made by operation of law, which it defined as "the manner in which a party acquires rights *without any act of his own*." *Id*. at 110 (quotation marks and citation omitted). The Court explained that "a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee." *Id*. The Court concluded that a voluntary purchase agreement did not constitute a transfer by operation of law, as would have happened if a mortgage had transferred as a result of a merger under traditional banking and corporate law. *Id*. at 111 & n 23, citing 12 USC 215a(e) and MCL 450.1724(1)(b). Here, the tax credits were not purchased by Comerica-Texas, but were acquired by operation of law when Comerica-Michigan merged into Comerica-Texas.

In sum, the statutes' failure to reference transfers that occur by operation of law, through merger or otherwise, is not synonymous with a prohibition against such transfers. The tribunal effectively read a prohibi-

tion into the statutes that does not exist on the basis that tax exemption statutes are to be strictly construed against the taxpayer. Although tax credit statutes are to be strictly construed in favor of the taxing unit, *Auto-Owners Ins Co v Dep't of Treasury*, 226 Mich App 618, 621; 575 NW2d 770 (1997), tax credits are distinct creatures of tax law, subject to ordinary rules of statutory construction, and judicial construction is not necessary or permitted where the statute is unambiguous. *Stege v Dep't of Treasury*, 252 Mich App 183, 194; 651 NW2d 164 (2002); *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1, 6-7; 884 NW2d 848 (2015). Had the Legislature intended to prohibit transfer of the tax credits by operation of law, it could have done so, but it did not. We must presume the Legislature intended the language it plainly expressed. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

Additionally, the tribunal found that the credits did not transfer by operation of law because "it [was] far from clear that the transfer of credits from one entity to another was unintentional or involuntary, as the entities were both formed by [petitioner]." We disagree.

"A corporation is a creature of statute, unable to exist except by the force of express law." *Handley v Wyandotte Chemicals Corp*, 118 Mich App 423, 425; 325 NW2d 447 (1982). "Consequently, the effect of a merger or consolidation on the existing constituent corporations depends upon the terms of the statute under which the merger or consolidation is accomplished." *Id*. See also 4 Cox & Hazen, Treatise on the Law of Corporations (3d ed), § 22:2 (in a merger, assets and business are transferred "by operation of law—that is, by force of the statute operating on the [merger] agreement"). Under Michigan law, when a merger occurs,

> the consolidated bank possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations. The title to all property, real, personal, and mixed, is transferred to the consolidated bank, and shall not revert or be in any way impaired by reason of this act. [MCL 487.13703(1).]

The tribunal concluded that tax credits are privileges—not property interests. We disagree. "Property, as ordinarily understood, extends to every kind of valuable right and interest." *United States v Hoffman*, 901 F3d 523, 536 (CA 5, 2018) (holding that state-issued tax credits are "property" within the meaning of federal wire- and mail-fraud statutes), citing *Pasquantino v United States*, 544 US 349, 356; 125 S Ct 1766; 161 L Ed 2d 619 (2005) (holding that tax revenue due to a foreign government is "property" under federal fraud statutes). See also *Segal v Rochelle*, 382 US 375; 86 S Ct 511; 15 L Ed 428 (1966) (holding that under the federal Bankruptcy Act the right to receive a tax refund is a future right, generally recognized as a property interest, and a contingency might affect the value of the interest, but cannot negate the existence of the property interest at the time of filing). While the mere expectation of a government entitlement may not constitute a cognizable property interest, a legitimate claim of entitlement would. See, e.g., *Bd of Regents of State Colleges v Roth*, 408 US 564, 570-572, 576-578; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (considering whether a property interest exists in continued state employment in a due-process claim); *Barrington Cove Ltd Partnership v Rhode Island Housing & Mtg Fin Corp*, 246 F3d 1, 5-6 (CA 1, 2001) (finding in a due-process claim that there was no property interest in a claimed federal tax credit where the federal statute did not

prescribe conditions for obtaining the credits); *Reed v Village of Shorewood*, 704 F2d 943, 948 (CA 7, 1983) (observing that a cognizable property interest "is what is securely and durably yours under state [or federal] law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain"), overruled in part on other grounds by *Brunson v Murray*, 843 F3d 698, 713 (CA 7, 2016). We have held that a claim for a tax refund is a mere expectation, not a vested right subject to due process. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 371; 803 NW2d 698 (2010). But the case before us concerns the transfer of certified tax credits in a merger —not a mere expectation that tax credits could be obtainable in the future. *Id*. Therefore, we conclude that the tax credits in controversy constitute property interests within the meaning of the merger statute, MCL 487.13703(1). See *Hoffman*, 901 F3d at 538. See also *Virginia Historic Tax Credit Fund 2001 LP v Comm'r of Internal Revenue*, 639 F3d 129, 141 (CA 4, 2011) (finding that a transfer of tax credits constituted a transfer of property, but declining to decide whether tax credits always constitute property); *Brandon Bay, Ltd Partnership v Payette Co*, 142 Idaho 681, 684; 132 P3d 438 (2006) (tax credits are not contractual rights, but "rights and privileges" that flow from property and are equivalent to income).[5]

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[5] We are not bound by the decisions of lower federal courts, or decisions of other states, but may look to such sources as persuasive authority. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

MCL 450.1724(1)(b) provides that when a merger occurs, "[t]he title to all real estate and other property and rights owned by each corporation party to the merger are vested in the surviving corporation without reversion or impairment." However, under the Banking Code, MCL 487.11101 *et seq*., both state and out-of-state banks are considered "banking corporations." MCL 487.11201(g); MCL 487.11202(r). The

Because the tax credits are property and fall within the ambit of the merger statute, we conclude that they transferred by operation of law when the merger of Comerica-Michigan and Comerica-Texas, two separate entities, occurred. In concluding that petitioner acted voluntarily and affirmatively in conducting the merger, the tribunal conflated the voluntary act of merger with the automatic transfer of assets resulting from that merger. Here, the voluntary act of merging, subject to MCL 487.13703(1), automatically transferred the tax credits by operation of law and precluded application of the SBTA's single-assignment provisions.[6] Therefore, we reverse the tribunal's decision to disallow the tax credits.[7]

Michigan Business Corporation Act, MCL 450.1101 *et seq*., "does not apply to . . . banking corporations." MCL 450.1123(2). Additionally, between the two merger statutes, MCL 487.13703(1) controls because it is more specific than MCL 450.1724(1)(b). *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94; 869 NW2d 213 (2015) (stating that more specific statutory provisions control over more general statutory provisions). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 183.

Because we conclude that tax credits are property rights, they would transfer by operation of law under either merger statute. Even if we agreed with the tribunal's conclusion that the tax credits are "privileges," they would still fall within the ambit of "all the rights, interests, privileges, powers, and franchises" of Comerica-Michigan as described in MCL 487.13703(1). However, we cannot conclude that the tax credits as "privileges" would transfer by operation of law under the more restrictive language in MCL 450.1724(1)(b), and because that issue is not before us, we decline to make any such finding here.

[6] MCL 208.38g(18) and MCL 208.39c(7).

[7] By concluding that the SBTA does not prohibit the transfer of tax credits by operation of law, and that petitioner obtained the credits by operation of law through the merger, we need not address petitioner's argument regarding the relevancy of federal tax law. Nor do we need to consider respondent's argument that there is an existing question of fact regarding the amount of the tax credits. The parties are free to raise that issue before the tribunal on remand.

IV. CONCLUSION

For these reasons, we vacate the tribunal's grant of partial summary disposition in favor of petitioner on the issue of petitioner's tax-base calculation, and we reverse the tribunal's grant of summary disposition in favor of respondent on the issue of petitioner's claimed tax credits. The matter is remanded to the tribunal for further proceedings consistent with this opinion. We do not retain jurisdiction. Petitioner, having prevailed on appeal, may tax costs pursuant to MCR 7.219.

BOONSTRA, P.J., and RIORDAN and REDFORD, JJ., concurred.

BAUER v SAGINAW COUNTY

Docket No. 344050. Submitted March 11, 2020, at Lansing. Decided April 16, 2020, at 9:10 a.m. Leave to appeal denied 506 Mich 950 (2020).

Saginaw County and the Saginaw County Prosecutor (collectively, Saginaw County) petitioned the Saginaw Circuit Court for review of the decision of an administrative-law judge (ALJ) who had concluded that Beth Bauer was discharged from her position in the Saginaw County Prosecutor's Office in violation of the political freedom act, MCL 15.401 *et seq*. Michael Thomas was first elected Saginaw County Prosecutor in 1989, and he appointed Bauer to the position of legal office manager in the Saginaw County Prosecutor's Office. In 1989, the legal office manager position was not unionized and was an at-will position. In 2004, the prosecutorial staff unionized. According to the 2004 collective-bargaining agreement (CBA), a nonprobationary employee could be disciplined, suspended, or discharged for just cause. The 2004 CBA specifically preserved certain rights of elected officials, including their legal authority to appoint deputies and other personnel pursuant to the relevant laws and regulations of Michigan. In 2008, the CBA was renegotiated and just-cause protection for the legal office manager position was eliminated and replaced with an at-will standard. In an effort to protect Bauer's job as legal office manager in the event that Thomas was no longer the prosecuting attorney, Thomas asked the Saginaw County labor specialist to draft a memorandum of understanding (MOU) as a contract addition to the CBA. The MOU provided that the legal office manager position was an at-will position but that Bauer was not an at-will employee and was subject to discipline under a just-cause standard. Thomas ran for reelection in 2012, and Bauer campaigned for him and served on his campaign committee. Thomas lost the primary election to a challenger, John McColgan, Jr., who went on to be elected Saginaw County Prosecutor. In December 2012, McColgan e-mailed Bauer to inform her that when he took office, he planned to appoint his own office manager to the position of legal office manager as his predecessors had done. McColgan offered Bauer a different position, which she declined. Bauer was eventually terminated, with the reason given that her services were no longer needed and

noting that she was an at-will employee under state law. Bauer filed a grievance regarding her discharge and later filed a wrongful-discharge action in federal district court. The federal district court granted summary disposition in favor of Saginaw County, and the United States Court of Appeals for the Sixth Circuit affirmed its decision. Bauer also filed the instant action in the Michigan Administrative Hearing System alleging that she was terminated for supporting Thomas during the 2012 election in violation of MCL 15.403(1)(d) of the political freedom act. She further argued that she was a just-cause employee and that McColgan had not provided a substantive reason for her discharge. Following a hearing, an ALJ concluded that the position of legal office manager was not an appointed position under the prosecutors' appointment/tenure statute, MCL 49.31 *et seq*., and that Bauer had not been appointed by Thomas but, rather, had been hired by Saginaw County. Further, the ALJ ruled that Bauer's job as legal office manager was a just-cause union position and accordingly she could not be discharged without a review of her job performance. The ALJ concluded that Bauer was discharged because of her political activities in support of Thomas, in violation of the political freedom act. Saginaw County petitioned for review in the circuit court, and following oral argument, the court, Harry P. Gill, J., concluded that the ALJ had erred as a matter of law and reversed the ALJ's decision. The circuit court determined that Bauer's claims regarding the MOU were part of the union grievance process which was pending and should not have been addressed by the ALJ. The court further concluded that the political freedom act did not prevent McColgan from discharging Bauer because the legal office manager position was encompassed by MCL 49.31 and there is no provision in the act that restricts the prosecutor's statutory authority to appoint staff under MCL 49.31. The Court of Appeals granted Bauer's application for leave to appeal.

The Court of Appeals *held*:

1. The prosecutors' appointment/tenure statute grants county boards of supervisors the power to authorize county prosecutors to appoint certain staff positions within the prosecutor's office, including assistant prosecuting attorneys, investigating officers, clerks, stenographers, and other clerical employees. Section 5 of the statute grants prosecutors authority to discharge appointed employees, stipulating that they serve during the pleasure of the prosecuting attorney. Bauer argued that the legal office manager position was not a clerk, stenographer, or other clerical position and so she was not subject to the prosecutor's power of appoint-

ment under MCL 49.31. However, a de novo review of the record showed that the legal office manager's duties were primarily clerical in nature. Although Thomas delegated additional supervisory functions to Bauer in her role as the legal office manager when he was the prosecutor, these tasks did not exclude the position from classification as a clerk or clerical position. Additionally, it would make no sense for the prosecutors' appointment/tenure statute to authorize the prosecutor to appoint and terminate almost everyone in the prosecutor's office except for the legal office manager. The ALJ also erred by concluding that Bauer was not subject to termination by the prosecutor under the prosecutors' appointment/tenure statute because she was not appointed by Thomas but was hired by the county. The evidence and testimony supported that Bauer was appointed by Thomas.

2. Bauer alleged in her complaint that she believed she was discharged by McColgan in retaliation for her political support of his opponent, Thomas, thereby violating her right under MCL 15.403(1)(d) to engage in political activity on behalf of a candidate. The ALJ agreed that Bauer was discharged for this reason, but because he concluded that the prosecutors' appointment/tenure statute did not apply to the position of legal office manager, the ALJ did not address the interplay between that statute and the political freedom act. The political freedom act allows a state employee to engage in partisan political activity while off duty except when doing so interferes with the employee's job performance. In this case, Bauer acknowledged that she engaged in political activity on behalf of Thomas without restriction. Therefore, MCL 15.403(1)(d) was not implicated by her factual allegations. The prosecutors' appointment/tenure statute authorizes the county prosecutor to appoint assistant prosecuting attorneys and other staff. Reading the two statutes together, there is no provision in the political freedom act that restricts the prosecutor's statutory authority under the prosecutors' appointment/tenure statute. While the political freedom act permits state employees to engage in certain political activities, nothing within the act divests a prosecutor of the authority granted by the Legislature to appoint and remove employees under the prosecutors' appointment/tenure statute. The circuit court properly concluded that the political freedom act is not in conflict with the prosecutors' appointment/tenure statute and that McColgan's appointment of his choice for a legal office manager did not violate Bauer's rights under the political freedom act.

Affirmed.

GLEICHER, J., concurring in part and dissenting in part, agreed with the majority that Bauer was an employee of both the prosecutor and Saginaw County, but she disagreed that the political freedom act did not restrict the prosecutor's authority to discharge employees who were appointed under the prosecutors' appointment/tenure statute. Judge GLEICHER would have concluded that the two statutes could be harmonized to allow prosecutors to hire and discharge employees as provided by the prosecutors' appointment/tenure statute without construing that statute so broadly as to excuse a violation of the political freedom act. Alternatively, Judge GLEICHER argued that if the two statutes could not be reconciled, the most recently enacted statute, the political freedom act, should control. She would have reversed the decision of the circuit court and remanded the case for continued administrative proceedings.

1. STATUTORY INTERPRETATION — PROSECUTORS' APPOINTMENT/TENURE STATUTE — CLERICAL EMPLOYEES.

The prosecutors' appointment/tenure statute, MCL 49.31 *et seq*., grants county prosecutors the authority to appoint assistant prosecuting attorneys, investigating officers, clerks, stenographers, and other clerical employees; § 5 of the statute, MCL 49.35, also grants prosecutors the authority to discharge these appointed employees and provides that they serve during the pleasure of the prosecuting attorney; an employee whose duties are primarily clerical is subject to the prosecutor's authority under the statute.

2. STATUTORY INTERPRETATION — PROSECUTORS' APPOINTMENT/TENURE STATUTE — POLITICAL ACTIVITIES BY PUBLIC EMPLOYEES — AUTHORITY OF PROSECUTORS TO HIRE AND DISCHARGE APPOINTED EMPLOYEES.

The political freedom act, MCL 15.401 *et seq*., protects the right of state employees to participate in certain political activities while off duty, but the political freedom act does not limit the authority of the prosecutor to discharge an employee under the prosecutors' appointment/tenure statute, MCL 49.31 *et seq*.

Masud Labor Law Group (by *Joshua J. Leadford* and *Richard R. Vary*) for Beth Bauer.

Cummings, McClorey, Davis & Acho, PLC (by *Douglas J. Curlew* and *Timothy S. Ferrand*) for Saginaw County and the Saginaw County Prosecutor.

Before: O'BRIEN, P.J., and JANSEN and GLEICHER, JJ.

JANSEN, J. Petitioner, Beth Bauer, appeals by leave granted[1] the order of the Saginaw Circuit Court reversing the determination of the administrative-law judge (ALJ) for the Michigan Administrative Hearing System that the newly elected Saginaw County prosecutor discharged petitioner in violation of the political freedom act, MCL 15.401 *et seq*., and vacating the ALJ's decision awarding petitioner damages. We affirm.

I. FACTUAL BACKGROUND

On April 12, 1989, Michael Thomas was appointed Saginaw County prosecutor. According to Thomas, he had the statutory right to appoint staff of his choosing, including the legal office manager, for the appropriated positions under the prosecutors' appointment/tenure statute, MCL 49.31 *et seq*. Thomas chose petitioner, who had been his legal secretary in private practice, as his legal office manager for the prosecutor's office. At the time, the legal office manager position was not unionized and was an at-will position.

The prosecutorial staff subsequently unionized in 2004, with the legal office manager position represented by the United Auto Workers Local 455, Unit 48 Manager Union. The 2004 collective-bargaining agreement (CBA) provided that a nonprobationary employee could be disciplined, suspended, or discharged for just cause. The 2004 CBA specifically preserved certain rights of elected officials in Appendix A to the CBA. Appendix A stated, in relevant part, "Saginaw County Elected Officials and Judges have the legal authority

[1] *Bauer v Saginaw Co*, unpublished order of the Court of Appeals, entered December 14, 2018 (Docket No. 344050).

to appoint their deputy(ies) and other personnel in accordance with the laws, regulations and court rules of the State of Michigan . . . ." Additionally: "Elected Officials' Deputies, and others as provided by law, regulation or court rule, serve at the sole and unabridged discretion of the Elected Official or Judge/Court to whom said employee is assigned. All of said positions shall be filled at the sole discretion of the Elected Official or Judge/Court for which said employee is to work." Appendix A also listed the "Job Positions" for elected officials and judges and "Their Corresponding Employer and/or Co-Employer." Under Appendix A, Saginaw County and Saginaw County Prosecuting Attorney were coemployers of "Chief Assistant Prosecutor," "Assistant Prosecutor IV," and "Legal Office Manager."

During the 2008 collective-bargaining sessions, Saginaw County proposed to eliminate just-cause protection for the legal office manager position and replace it with an at-will employment standard. According to Thomas, he was "considerably older" than petitioner and was uncertain whether he would continue as prosecuting attorney after the next election year in 2012, so he sought to find "a way to make sure that Miss Bauer's employment as [legal office manager] continued" and to "create job protection" for her so that she could retain her position as the legal office manager "whether I was there or not, whether I was dead or alive or whether or not I was the Prosecutor."

Thomas directed the county's labor specialist, Andre Borrello, to draft a memorandum of understanding (MOU) as a contract addition to the CBA. The union and respondents entered into a MOU regarding the legal office manager position. The MOU stated, in relevant part:

WHEREAS, the Employer, Co-Employer and Union have agreed in principle that although Article 8 of the CBA provides a just cause standard for discipline, subject to law and Appendix A, the position of Legal Office Manager in the Prosecuting Attorney's Office shall be an at-will position, subject to the terms and conditions of this Memorandum of Understanding.

NOW THEREFORE, it is agreed as follows:

1. Contingent on ratification of a new CBA, which shall designate in its Appendix that the position of Legal Office Manager in the Prosecuting Attorney's Office is an at-will position, the Employer, Co-Employer and Union agree that the incumbent in said position, Beth Bauer, is not an at-will employee, but rather an employee subject to discipline under a just cause standard.
2. Once the incumbent vacates the position, all subsequent employees holding the Legal Office Manager position in the Prosecuting Attorney's Office shall be at-will employees and not subject to discipline under a just cause standard, unless specifically negotiated in future CBAs.
3. This Memorandum of Understanding shall have no force or effect unless and until a new CBA is ratified, which designates in its Appendix that the position of Legal Office Manager in the Prosecuting Attorney's Office is an at-will position.
4. This Memorandum of Understanding shall not affect any provision of the current or future CBA other than that which is specifically provided herein.

The MOU was signed by Thomas as coemployer and dated December 1, 2009. Thomas acknowledged that the MOU did not address the duration of petitioner's employment as the legal office manager, nor did it contain language limiting the authority of a successor prosecutor to appoint the legal office manager. More-

over, Thomas was told by the county's civil counsel and "[p]rosecutors around the state" that this MOU did not prevent his successor from making a political appointment. The 2008 CBA was ratified and reflected the new at-will employment standard.

In 2012, Thomas faced a challenge in the primary election. Petitioner campaigned for Thomas and served actively on his campaign committee, as she had in prior elections. The challenger, John McColgan, Jr., won the primary election and went on to be elected as prosecuting attorney. On December 10, 2012, prosecutor-elect McColgan sent an e-mail to petitioner that stated, in relevant part: "As I am sure you are aware, I am planning on bringing in my own office manager, as I believe every prosecutor before me has done. It would be greatly appreciated [i]f you could advise as to your future plans, thereby allowing the most efficient transition possible."

Petitioner and the union representatives subsequently met with prosecutor-elect McColgan with respect to the legal office manager position. McColgan stated that he was not bound by the MOU and that he was bringing in his own legal office manager. On McColgan's first official day as prosecutor—January 2, 2013—petitioner reported to the prosecutor's office to find the new legal office manager sitting at the legal office manager's desk. McColgan met with petitioner and offered her a job as a floater in the prosecutor's office, but petitioner did not find the offer "plausible." Later the same day, petitioner was presented with a "notice of lay-off, suspension, demotion, discharge" signed by McColgan, which notified petitioner of both "discharge (permanent employee)" and "not reappointed per statute" effective January 16, 2013. The notice indicated that the general reason for discharge

was "[s]ervices no longer needed. Are an at-will employee under state statute."

II. PROCEDURAL HISTORY

Petitioner grieved her discharge, claiming that the notice of "discharge" and "not reappointed by statute" were "in direct conflict with" the 2008 CBA. While the grievance was pending, petitioner filed a wrongful-discharge action in federal court against McColgan and Saginaw County. The federal complaint presented several counts, including violation of petitioner's First Amendment right to political affiliation under 42 USC 1983, breach of employment agreement, legitimate expectation of just-cause employment, tortious interference with business expectancy, age and race discrimination, and intentional infliction of emotional distress. See *Bauer v Saginaw Co*, 111 F Supp 3d 767 (ED Mich, 2015). The parties agreed to hold the grievance in abeyance pending completion of the federal action. *Id*. at 772.

While the federal action was ongoing, plaintiff filed the present administrative action in the Michigan Administrative Hearing System (MAHS).[2] Petitioner alleged in her complaint that she supported Thomas during the 2012 campaign and that she did not learn until January 2, 2013, that McColgan had removed her from her position as legal office manager. Petitioner asserted that she believed she was discharged in

[2] An employee who believes his or her statutory rights under the political freedom act were violated may file a complaint in the MAHS, which is within the Department of Labor and Economic Opportunity (successor to the Department of Labor). See MCL 15.406(1). If a hearing officer determines that a violation occurred, the officer may order job reinstatement, back pay, reinstatement of work-related benefits, and attorney fees. MCL 15.406(1)(a) through (d).

retaliation for her political support of Thomas in violation of MCL 15.403(1)(d) of the political freedom act. Petitioner also asserted that she was a just-cause employee and that McColgan provided no substantive reason for her discharge.

In response to the complaint, respondents asserted that Saginaw County authorized and appropriated funds under MCL 49.31 and MCL 49.35 of the prosecutors' appointment/tenure statute for the Saginaw County prosecutor to appoint a chief assistant prosecuting attorney, 23 assistant prosecuting attorneys, a legal office manager, and clerical staff. Respondents asserted that under MCL 49.35, each of these employees served "at the pleasure of the prosecuting attorney" and had no right to maintain the position after the conclusion of the prosecutor's term of office. They noted that petitioner testified in her deposition in underlying litigation that she was appointed to the position of legal office manager by Thomas.

Respondents argued that the political freedom act had never been applied to prevent an elected public official from exercising his statutory rights to make a political, partisan appointment and that the political freedom act did not foreclose an elected official's right to appoint. They noted that the federal district court had concluded, with respect to petitioner's First Amendment claim, that the job duties of the legal office manager were inherently "political" and "confidential" so that a "patronage appointment" was permitted. Additionally, respondents argued that the political freedom act was otherwise inapplicable to petitioner's claim and that she had no cause of action under the act because she did not allege that McColgan or the county maintained a policy or practice that prevented her from engaging in political activity on behalf of a candidate.

While the administrative action was pending, the federal district court granted summary judgment in favor of respondents. *Bauer*, 111 F Supp 3d 784. The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision. *Bauer v Saginaw Co*, 641 F Appx 510 (CA 6, 2016). The Sixth Circuit resolved the civil rights, discrimination, and emotional-distress claims, writing:

> [B]ecause political affiliation is an appropriate consideration for the Legal Office Manager position, the defendants did not violate Bauer's constitutional rights by terminating her. And because Bauer failed to exhaust a mandatory grievance procedure in her employment agreement, we do not reach the merits of her breach-of-contract claim. As Bauer has failed to show a dispute of fact in any of her remaining claims, we affirm the district court's grant of summary judgment to the defendants. [*Bauer*, 641 F Appx at 512.]

On November 18, 2015, respondents moved to dismiss petitioner's political freedom act claim in the administrative action on preclusion grounds. Respondents noted that the federal district court had concluded: (1) that the position of legal office manager is an appointee of the county prosecutor and that personal and political affiliation are appropriate requirements for the effective performance of the job; (2) that if petitioner was a clerical employee as she claimed, she would be subject to MCL 49.31; (3) that there was no merit or factual support for petitioner's claim that she was not reappointed to the position of legal office manager because of her race or her age; (4) that petitioner's breach-of-contract claim was barred by her failure to exhaust her administrative remedies through the grievance process established by the 2008 CBA; (5) that petitioner's just-cause employment claim was barred because the MOU was incorporated into

the expired CBA; (6) that petitioner's "legitimate expectation of just cause employment claim" had been abandoned or, in the alternative, that the MOU was incapable of creating an expectation of just-cause employment as a matter of law; and (7) that petitioner's claim for intentional infliction of emotional distress was barred because McColgan was acting within the scope of his authority and discretion under MCL 49.31 when he chose not to reappoint petitioner to the position of legal office manager. Respondents also argued that even if res judicata or collateral estoppel did not preclude relitigation of these issues, petitioner was an appointed employee who served at the pleasure of the prosecutor. The ALJ denied the motion.

During the hearing on the merits of petitioner's claims under the political freedom act, respondents argued that the political freedom act was not applicable in this case and that the act had no impact on the statutory authority of a prosecutor to appoint his or her staff under MCL 49.31. Respondents argued that McColgan "appointed a legal office manager of his choosing . . . and exercised that right as every other Prosecutor before him has done, including Mr. Thomas, his predecessor Judge Boyd, and his predecessor, Mr. Kaczmarek, each appoint[ed] their own legal office manager at the time that they took office in the Prosecutor's Office." Respondents further argued that MCL 49.31 provided the authority to appoint, and that MCL 49.35 provided the authority to terminate because it provided that appointees serve "at the pleasure of the prosecutor" and that the term "at the pleasure of" means that the appointee holds the position during the time the prosecutor is in office and has "no rights extensive of that period of time." Respondents also argued that "[t]he issue in this case is whether or not action was taken against Miss Bauer

simply because she engaged in political activities defined by [MCL 15.403(1)(d)], not whether she was a contract employee or to what degree there was a contract with Miss Bauer. It's irrelevant."

Following the hearing, the ALJ concluded that the position of legal office manager is not "a position listed or subject to" MCL 49.31 and MCL 49.35 of the prosecutors' appointment/tenure statute. The ALJ also found that petitioner was not appointed by Thomas but, rather, that she was hired by Saginaw County. The ALJ ruled that petitioner's job as legal office manager was "a 'just cause' union position and [petitioner] could not simply be discharged without any review of her performance." The ALJ found that there was no reason for petitioner's discharge aside from her political activities in support of Thomas and that her discharge therefore violated the political freedom act. In lieu of entering a damages award, the ALJ gave the parties 30 days to explore settlement.

The parties did not settle, so the ALJ held an additional hearing on damages. The ALJ concluded that petitioner was entitled to back pay plus payment of work-related benefits totaling $144,707. The ALJ also ruled that back pay would continue to accrue until respondents reinstated petitioner. The ALJ awarded attorney fees of nearly $50,000 to petitioner.

Respondents petitioned for review in the circuit court. Following oral argument, the circuit court concluded that the ALJ had erred as a matter of law. The court first determined that petitioner's contract claims regarding the MOU were part of the union grievance process, which remained pending and should not have been addressed in the administrative proceeding. The court next determined that the sole issue before the ALJ was whether petitioner's rights under the political

freedom act were violated. The court said that the issue presented in the case was "the impact, if any, of [the political freedom act] upon the patronage authority granted the prosecutor by MCL 49.31-35." The court found that the ALJ erred by concluding that the political freedom act prevented McColgan from discharging petitioner and that the position of legal office manager is encompassed within MCL 49.31. Moreover, the court concluded that there is no provision in the political freedom act that restricts the prosecutor's statutory authority to appoint under MCL 49.31. The court reversed the ALJ's decision on the merits and vacated the ALJ's award of damages and attorney fees.

Petitioner now appeals the circuit court's decision by leave granted. In granting leave to appeal, this Court limited petitioner's appeal to "the issues raised in the application and supporting brief." *Bauer v Saginaw Co*, unpublished order of the Court of Appeals, entered December 14, 2018 (Docket No. 344050).

III. STANDARD OF REVIEW

In *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002), this Court, setting forth the standard of review applicable to a circuit court's review of a decision of the board, stated:

> A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. Courts should accord due deference to administrative expertise and not invade administrative fact finding

> by displacing an agency's choice between two reasonably differing views. [Citations omitted.]

This Court reviews a lower court's review of an administrative decision to determine "whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear-error standard of review." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 431; 906 NW2d 482 (2017) (quotation marks and citation omitted). Substantial evidence means evidence that "a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Id*. (quotation marks and citation omitted). In other words, the circuit court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009).

IV. POSITIONS WITHIN THE SCOPE OF MCL 49.31

Petitioner first argues that her employment as the legal office manager in the Saginaw County Prosecutor's Office did not fall within the scope of an appointed "clerical employee" as contemplated by MCL 49.31. Therefore, petitioner argues, she was hired by Saginaw County and did not serve at the pleasure of the Saginaw County Prosecutor. We disagree.

The prosecutors' appointment/tenure statute grants county boards of supervisors the power to authorize county prosecutors to appoint certain staff positions within the prosecutor's office. MCL 49.31. Section 1 of the statute describes the positions to be appointed as "assistant prosecuting attorneys" and "investigating officers, clerks, stenographers and other clerical em-

ployees." MCL 49.31.[3] Section 5 of the statute grants prosecutors the authority to discharge appointed employees, as follows: "assistant prosecuting attorneys and other employees appointed by [the] prosecuting attorney under this act shall hold office during the pleasure of the prosecuting attorney." MCL 49.35. This Court has interpreted the appointment/tenure statute to identify only five types of employees that are subject to the prosecutor's appointment and discharge power: (1) assistant prosecutors, (2) investigating officers, (3) clerks, (4) stenographers, and (5) other clerical employees. *Genesee Co Social Servs Workers Union v Genesee Co*, 199 Mich App 717, 721; 502 NW2d 701 (1993).

Petitioner argues that the legal office manager is not an employee subject to the prosecutor's power of appointment under MCL 49.31 because the position of legal office manager is not specifically named in the statute. She asserts that the ALJ properly found that the legal office manager position does not fall within the scope of "clerks, stenographers and other clerical employees" encompassed by MCL 49.31 and that the circuit court erred by disregarding the ALJ's factual finding that the legal office manager is not a clerical employee. Petitioner also asserts that the circuit court committed legal error by finding the legal office manager to fall within the definition of "other clerical employee."

There are no Michigan appellate decisions that specifically address whether certain positions fit within the statutory terms of "clerks, stenographers and other clerical employees" in MCL 49.31. The Sixth Circuit Court of Appeals, when ruling on petitioner's federal

[3] As enacted, MCL 49.31 used the spelling "employes." See 1948 CL 49.31; 1925 PA 329. We use the spelling "employees" throughout when quoting the statute without making further note of this change.

claims, did not directly address whether the legal office manager position was within the scope of the appointment/tenure statute. The Sixth Circuit did, however, consider the appointment/tenure statute with respect to whether McColgan was immune from petitioner's claim of intentional infliction of emotional distress. *Bauer*, 641 F Appx at 519-520. The Sixth Circuit suggested that the legal office manager position is within the scope of the prosecutor's appointment and discharge authority under the appointment/tenure statute as follows:

> The County Prosecutor has the authority to appoint "assistant prosecuting attorneys," "investigating officers, clerks, stenographers and other clerical employees." MCL § 49.31. These employees serve at the pleasure of the Prosecutor. MCL § 49.35. *It would make no sense for McColgan to be authorized to appoint (§ 49.31) and terminate (§ 49.35) assistant prosecutors, investigators, clerks, stenographers, and other clerical employees—basically everyone in the Prosecutor's Office—while lacking the authority to hire and fire the Legal Office Manager*. As such, McColgan was acting within his executive authority when he terminated Bauer and is entitled to absolute immunity. [*Id*. at 520 (emphasis added).]

In contrast, the ALJ in this action concluded that the position of legal office manager is not within the scope of the prosecutors' appointment/tenure statute. The ALJ reasoned that

> the Office Manager Position is not a position listed or subject to this statute. This position was represented by the UAW from 2004-2013. . . . Also, contrary to MCL 49.35's requirements, Petitioner was not appointed by Prosecutor Thomas with authorization of Saginaw County. She was hired by the County.

The ALJ's finding that petitioner was hired by the county was apparently based on petitioner's initial

notice of employment, which is printed on a Saginaw County form.

However, the circuit court determined that petitioner's job duties, as found by the ALJ, were clerical or involved supervision of clerical workers, making her position "somewhat of a 'super clerk'." The circuit court accepted the ALJ's factual findings with respect to petitioner's job duties:

> Beth ensured adequate attendance was maintained and that the clerical staff were performing their assigned job duties. Beth administered the County's personnel policies and might impose discipline related to attendance violations. Beth was also involved with hiring efforts. She followed applicable collective bargaining agreements and posted job opening[s] for clerical staff as they arose. Beth also estimated the office supplies, witness fees, and other standard costs, based on historic usage, to assist with budgeting. Beth reviewed employee time records and posted the information to the County's payroll system.[4]

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[4] According to the job description prepared by petitioner in 2000 for the position of legal office manager, the job duties included: supervising the day-to-day operations of the office; purchasing and maintaining office equipment and supplies; developing and administering the prosecutor's $3.7 million budget; maintaining and inputting payroll; having daily contact with courts, the public, and law enforcement agencies; processing and paying bills; and administering and directing extraditions. The job description also indicated that the legal office manager hired, fired, disciplined, and directed support staff and assisted 23 attorneys with maintaining and preparing files, warrants, and other legal documents. According to Thomas, petitioner's job was to manage the office to the extent of the duties delegated to her. Thomas stated: "I want to be clear that she managed the office and the functions of the office with respect to the public, our public relationship with the Courts, responding to correspondence, kept the clerical staff properly trained and present to do their work. But [she] did not manage or supervise the attorneys in the office." Petitioner did not have authority to hire or fire staff.

Petitioner testified with respect to her job duties that Thomas and the chief assistant prosecutor were her supervisors and that she

The circuit court determined that the fact that petitioner had some autonomy and discretion did not change the nature of her duties within the meaning of MCL 49.31. The circuit court concluded that the ALJ made an error of law in concluding that the legal office manager position did not fall within the scope of MCL 49.31. We agree.

This issue—whether the legal office manager is an employee subject to appointment under MCL 49.31—involves a legal question of statutory interpretation. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). The most reliable evidence of legislative intent is the plain language of the statute. *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Gardner v Dep't of Treasury*, 498 Mich 1, 6; 869 NW2d 199 (2015). The court's interpretation of a statute must give effect to every word, phrase, and clause. *South Dearborn*, 502 Mich at 361.

Further, an interpretation that would render any part of the statute surplusage or nugatory must be

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assisted the assistant prosecutors with clerical matters. She would ensure that employees showed up for work and that they were performing the functions of their jobs. If an employee was late, she would give the employee a verbal warning, but "[a]nything more strict than that, then I would talk to Mr. Thomas about that and he would talk to them." She said that she was not in charge of the budget, but that she would have input on office supplies, witness fees, and extraditions. With respect to payroll, she would "keep the time records of who was there, who wasn't there, whether they used vacation time or not" and input the data into the system. She followed rules and guidelines that were in place for her duties.

avoided. *Id*. Common words and phrases are given their plain meaning as determined by the context in which the words are used, and a dictionary may be consulted to determine the meaning of an undefined word or phrase. *Id*. "In construing a legislative enactment we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used." *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 683; 252 NW2d 747 (1977). Statutes must be construed reasonably, "keeping in mind the purpose of the act, and to avoid absurd results." *Rogers v Wcisel*, 312 Mich App 79, 87; 877 NW2d 169 (2015).

The prosecutors' appointment/tenure statute recognizes the authority of a county prosecutor to appoint certain employees, MCL 49.31, and that these employees serve at the prosecutor's pleasure, MCL 49.35. The terms "clerks" and "clerical employees" are not defined in the statute. Therefore, we seek guidance from a dictionary. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "clerk" as: "an official responsible (as to a government agency) for correspondence, records, and accounts and vested with specified powers or authority (as to issue writs as ordered by a court)"; "one employed to keep records or accounts or to perform general office work"; and "one who works at a sales or service counter." Similarly, *Random House Webster's College Dictionary* (1997) defines "clerk" as "a person employed to keep records, file, type, or do other general office tasks" and as "a person who keeps the records and performs the routine business of a court." Additionally, "clerical" is defined as "of, appropriate for, or assigned to an office clerk" or "doing the work of a clerk." *Id*.

A de novo review of the record shows that the legal office manager's duties were primarily clerical in nature. The additional supervisory functions delegated by the prosecutor to petitioner in her role as legal office manager do not appear to exclude the position from classification as a clerk or clerical employee. Indeed, it is clear to this Court that by including the term "other clerical employees" after specifically delineating certain positions, the Legislature intended to authorize a prosecutor to appoint clerical employees not specifically named. An office manager would fall within this context.

The Sixth Circuit's reasoning, in the context of petitioner's claim of intentional infliction of emotional distress, is also persuasive here. As noted, the Sixth Circuit reasoned:

> The County Prosecutor has the authority to appoint "assistant prosecuting attorneys," "investigating officers, clerks, stenographers and other clerical employees." MCL § 49.31. These employees serve at the pleasure of the Prosecutor. MCL § 49.35. It would make no sense for McColgan to be authorized to appoint (§ 49.31) and terminate (§ 49.35) assistant prosecutors, investigators, clerks, stenographers, and other clerical employees—basically everyone in the Prosecutor's Office—while lacking the authority to hire and fire the Legal Office Manager. [*Bauer*, 641 F Appx at 520.]

Petitioner also argues that the circuit court erred by impliedly rejecting the ALJ's finding that petitioner was not appointed by Thomas to the position of legal office manager but, rather, was hired by Saginaw County. Petitioner contends that the notice of employment, which was printed on a Saginaw County form, as well as "the testimony of Bauer and Prosecutor Thomas that Bauer was hired by the County and not appointed," weighed in favor of a finding that peti-

tioner was not appointed and, therefore, that the prosecutors' appointment/tenure statute did not apply.

A prosecutor is a coemployer with the county as a result of the prosecutors' appointment/tenure statute. *St Clair Prosecutor v American Federation of State Employees*, 425 Mich 204, 225; 388 NW2d 231 (1986). Thomas acknowledged that he appointed petitioner pursuant to an elected prosecutor's statutory authority under MCL 49.31. He also acknowledged that he signed the notice of employment on April 26, 1989. Petitioner testified that she had been appointed by Thomas, that the legal office manager position was not advertised, that she had no experience working in a prosecutor's office or as an office manager, and that the prosecutor could appoint whomever he wanted pursuant to statute. The ALJ's finding that petitioner was not appointed by Thomas to the legal office manager position was not supported by competent, material, and substantial evidence on the whole record. Petitioner's argument that the record supports the ALJ's finding that petitioner was not appointed is misplaced.

In sum, we conclude that the circuit court properly reasoned that the legal office manager position is within the scope of the prosecutors' appointment/tenure statute and that McColgan had statutory authority to appoint a legal office manager under MCL 49.31.

V. PETITIONER'S RIGHTS UNDER THE POLITICAL FREEDOM ACT

Next, petitioner argues that a prosecutor's statutory authority to discharge employees under the prosecutors' appointment/tenure statute is limited by the political freedom act, and she contends that *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385; 292 NW2d 442 (1980), "conclusively establishes" that a

prosecutor can discharge an employee appointed under MCL 49.31 only for off-duty political activity that is shown to adversely affect job performance. Again, we disagree.

Petitioner's complaint alleged that § 3 of the political freedom act, MCL 15.403, applies to employees of political subdivisions of the state and defines permissible political activities. Petitioner alleged that she believed that McColgan discharged her in retaliation for her political support of Thomas and that he thereby violated her right under MCL 15.403(1)(d) to "[e]ngage in other political activities on behalf of a candidate."

McColgan maintained that he had the statutory authority under MCL 49.31 to appoint his own legal office manager. The ALJ expressed understanding of McColgan's reluctance to retain petitioner as legal office manager and that McColgan wanted "his own person in this job because of the close working relationship of the two jobs" but found that the legal office manager is not a position subject to the appointment authority of the prosecutor under MCL 49.31 and that the political freedom act prevented petitioner's discharge because of her political activities on behalf of Thomas. The ALJ found that petitioner was discharged because she had engaged in political activities on behalf of Thomas and that her discharge was in violation of the political freedom act. Because the ALJ concluded that the prosecutors' appointment/tenure statute did not apply to the position of legal office manager, the ALJ did not address the interplay between the prosecutors' appointment/tenure statute and the political freedom act.

The circuit court concluded that the political freedom act did not alter the appointment and discharge

authority granted to prosecutors by the prosecutors' appointment/tenure statute. The circuit court stated in its written opinion:

> The parties concede that Public Act 169 [the political freedom act] restores to public employees the rights granted all citizens under the First Amendment. Essentially[,] a public employee is protected from disciplinary action resulting from his or her participation in the political process on off-duty time. However, there is nothing contained within Public Act 169 that inoculates a public employee who is otherwise subject to patronage dismissal pursuant to MCL 49.31-35. In other words, Public Act 169 does not divest a newly elected prosecutor from appointing a person loyal to him to positions enumerated in the [prosecutors' appointment/tenure] statute simply because that employee has been exercising her rights to support the opponent of the new prosecutor.
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> * * *
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> [I]f the facts of this case had been different, and Bauer had been discharged during Thomas' term for exercising her rights under the [political freedom act], perhaps the result would be different. However, the successor prosecutor is not precluded from hiring key people for his office whose political affiliation is pertinent to the effective performance of their duties.

Petitioner claimed a violation of MCL 15.403(1)(d), which provides that an employee of a political subdivision may "[e]ngage in other political activities on behalf of a candidate." "The political freedom act allows a state employee to engage in partisan political activity except 'during those hours when that person is being compensated for the performance of that person's duties as a public employee.' " *Mich State AFL-CIO v Civil Serv Comm*, 455 Mich 720, 734; 566 NW2d 258 (1997), quoting MCL 15.404 (emphasis omitted). The act prohibits the government, as employer, from regu-

lating the off-duty political activity of its employees unless such activity interferes with job performance. See *Council No 11*, 408 Mich App 385; *Int'l Union v Central Mich Univ Trustees*, 295 Mich App 486, 499-501; 815 NW2d 132 (2012). Petitioner correctly contends that it would be a violation of the political freedom act for a prosecutor to regulate an appointed employee's off-duty political activity that did not affect job performance and then discharge the employee for violating the regulation.

In this case, however, petitioner did not allege that she was prohibited from engaging in political activity on behalf of a candidate by regulation or otherwise. Indeed, she admitted that she engaged in political activity on behalf of Thomas without restriction. It therefore seems that MCL 15.403(1)(d) is not implicated by petitioner's factual allegations. Petitioner asserts that MCL 15.403(1)(d) prohibits "retaliation" for engaging in political activity, but, as petitioner recognizes, the statute contains no such language. Petitioner argues that the political freedom act is "meant to provide far more than . . . is made clear by its remedies" and that the act "is intended to protect public employees from being discharged in retaliation for engaging in off-duty political activity." She asserts that "this very conclusion was unabashedly expressed . . . in [*Council No 11*]," in which our "Supreme Court affirmed a Court of Appeals judgment finding that an employee subject to PA 169 was improperly discharged for engaging in political activity."

However, in *Council No 11*, the employee was discharged for violating a Civil Service Commission rule that the Court found to be invalid because it conflicted with the political freedom act by regulating off-duty political activity. *Council No 11*, 408 Mich at 392,

408-409. Contrary to petitioner's suggestion, the employee in *Council No 11* was not discharged in retaliation for engaging in permissible political activity. In the present case, respondents did not regulate or prohibit petitioner's political activity.

Indeed, at issue in the present case is the narrow issue of whether the political freedom act impacts the prosecutor's statutory authority to appoint employees who shall serve at the prosecutor's pleasure. The parties have cited no Michigan appellate decisions that address this issue.

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC*, 485 Mich at 76. "If two statutes conflict, then the specific prevails as an exception to the general." *In re Forfeiture of Chevrolet Blazer*, 183 Mich App 182, 184; 454 NW2d 201 (1990). "However, if two statutes lend themselves to a construction which harmonizes their meanings and avoids conflict, that construction should control." *Id*.

The political freedom act was enacted to permit civil service employees and employees of political subdivisions of the state to engage in certain political activities. *Council No 11, American Federation of State Employees v Civil Serv Comm*, 87 Mich App 420, 426; 274 NW2d 804 (1978). The act specifies in detail the permitted activities a public employee may engage in. MCL 15.402; MCL 15.403. However, even the permitted activities may not be actively engaged in during those hours that the person is being compensated for the performance of his or her duties as a public employee. MCL 15.404. Public employers may not regulate the off-duty political activity of their employees in a way that preemptively conflicts with the act, although the employer may regulate the off-duty po-

litical activities of public employees when those activities interfere with job performance. *Mich State AFL-CIO*, 455 Mich at 733; *Central Mich Univ Trustees*, 295 Mich App at 500-501. There is no private cause of action for enforcement of the act, *Forster v Delton Sch Dist*, 176 Mich App 582, 586; 440 NW2d 421 (1989), but there is a statutory procedure for complaints by employees of state political subdivisions for violations of their rights under the act, MCL 15.406(1). Remedies provided by the act include the issuance of back pay, reinstatement of employment and all work-related benefits, and attorney fees. MCL 15.406(1)(a) to (d).

The prosecutors' appointment/tenure statute authorizes the appointment by the county prosecuting attorney of "as many assistant prosecuting attorneys as said board of supervisors shall deem necessary," and "authorize[s] the appointment by said prosecuting attorney, of such investigating officers, clerks, stenographers and other clerical employees as said board of supervisors shall deem necessary." MCL 49.31. "Said assistant prosecuting attorneys and other employees appointed by said prosecuting attorney under this act shall hold office during the pleasure of the prosecuting attorney." MCL 49.35.

In reading the two statutes together, there is no provision in the political freedom act that restricts the prosecutor's statutory authority under the prosecutors' appointment/tenure statute. By enacting the political freedom act, the Legislature permitted civil service employees and employees of political subdivisions of the state to engage in certain political activities. In the prosecutors' appointment/tenure statute, the Legislature specifically endowed the prosecutor with the authority to appoint, MCL 49.31, and the power to remove appointed employees at will, MCL 49.35. There

is nothing contained within the political freedom act that divests a newly elected prosecutor of this authority. The act has no language applicable to the prosecutor's appointment authority. And as respondents observe, petitioner's interpretation of the political freedom act would lead to the "absurd result that every newly elected official would be bound to reappoint his predecessor[']s appointees, if they engaged in political activity in support of his predecessor. No elected official could terminate an appointee who was politically active in support of a political opponent." The circuit court properly concluded that the political freedom act is not in conflict with the prosecutors' appointment/tenure statute and that McColgan's appointment of a legal office manager did not violate petitioner's rights under the political freedom act.

VI. COLLATERAL ESTOPPEL

Finally, petitioner argues that the circuit court committed error requiring reversal by concluding that the doctrine of collateral estoppel barred consideration of the MOU. However, because petitioner's application for leave to appeal did not raise this argument, it is not properly before this Court. See *Bauer v Saginaw Co*, unpublished order of the Court of Appeals, entered December 14, 2018 (Docket No. 344050) (stating that this Court limited petitioner's appeal to "the issues raised in the application and supporting brief"). We therefore decline to address it.

Affirmed.

O'BRIEN, P.J., concurred with JANSEN, J.

GLEICHER, J. (*concurring in part and dissenting in part*). This case presents a clash of two statutes.

The prosecutor's appointment/tenure statute, MCL 49.31 *et seq*., enacted in 1925, vests an elected prosecutor with robust powers to make employment decisions. The political freedom act, MCL 15.401 *et seq*., enacted in 1976, broadly protects the right of public-sector employees to engage in political activity without fear of retribution. The majority finds that the statutes are fundamentally incompatible and holds that the political freedom act must yield. In my view, the two statutes may be reconciled in a manner that gives force and effect to both.

I

The material facts are simple and straightforward. In 1989, Saginaw County's then prosecuting attorney, Michael Thomas, hired petitioner Beth Bauer as his legal office manager. Bauer and other clerical employees were members of the United Auto Workers. The terms and conditions of their employment were covered by a collective-bargaining agreement (CBA). A contract addition to the 2008 CBA provided that Bauer's job as legal office manager was a just-cause employment position for as long as she held it.

In 2012, John McColgan defeated Thomas and became the new prosecutor for Saginaw County. McColgan fired Bauer. The notice of her discharge stated: " '[s]ervices no longer needed. Are an at-will employee under state statute.' " *Bauer v Saginaw Co*, 641 F Appx 510, 513 (CA 6, 2016) (brackets in original).

Bauer brought an action in the United States District Court for the Eastern District of Michigan raising federal and state-law claims; that case did not survive summary judgment. See *id*. She also filed an administrative complaint in the Michigan Administrative Hearing System asserting that she was discharged in

violation of the political freedom act. Respondents McColgan and Saginaw County defended against the action, asserting that McColgan had the authority to fire Bauer pursuant to § 5 of the prosecutor's appointment/tenure statute, MCL 49.35. An administrative-law judge (ALJ) found that Bauer held a just-cause position and that "[she] was discharged because of her political activities on behalf of former Prosecuting Attorney Thomas." The discharge violated the political freedom act, the ALJ ruled. The prosecutor's appointment/tenure statute did not apply, the ALJ determined, because Bauer was hired by Saginaw County and not by Thomas.

Respondents sought review in the circuit court, which reversed the decision of the ALJ. We granted leave to appeal. *Bauer v Saginaw Co*, unpublished order of the Court of Appeals, entered December 14, 2018 (Docket No. 344050).

II

The political freedom act protects the right of public employees to engage in political activities outside the workplace. It provides that an employee of a political subdivision of the state may "[e]ngage in . . . political activities on behalf of a candidate or issue in connection with partisan or nonpartisan elections." MCL 15.403(1)(d). The act also includes a remedy provision, as follows:

> (1) An employee of a political subdivision of this state whose rights under this act are violated or who is subjected to any of the actions prohibited by section 5 may make a complaint to that effect with the department of labor. The department shall hold a hearing to determine whether a violation has occurred. If a violation has oc-

curred, the department shall so state on the record and may order any of the following:

(a) Issuance of back pay.

(b) Reinstatement as an employee.

(c) Attorney fees.

(d) Reinstatement of all work-related benefits, rights or privileges which, but for the violation by the employer, would have been accrued by the employee. [MCL 15.406.]

The prosecutor's appointment/tenure statute states that "assistant prosecuting attorneys and other employees appointed by said prosecuting attorney . . . shall hold office during the pleasure of the prosecuting attorney." MCL 49.35. The majority holds that Bauer is an employee subject to the prosecutor's appointment/tenure statute because the legal manager position falls within the scope of MCL 49.31:

In each county of the state of Michigan, the board of supervisors of such counties, at their regular annual meeting, may, by resolution authorize the appointment by the prosecuting attorney of said county of as many assistant prosecuting attorneys as said board of supervisors shall deem necessary, and shall in addition authorize the appointment by said prosecuting attorney, of such investigating officers, clerks, stenographers and other clerical employes [sic] as said board of supervisors shall deem necessary.

I concur with the majority's conclusion that Bauer was a coemployee of the prosecutor and the county; this conclusion is compelled by *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385; 292 NW2d 442 (1980).

The majority further holds that the political freedom act does not restrict the prosecutor's statutory authority to fire at will. I cannot agree with this proposition. In my view, the two statutes can and must be harmonized.

Alternatively, I would hold that the more recently enacted of the two—the political freedom act—controls.

A

The controversy before us is narrower than the majority opinion apprehends, and as a starting point the question presented must be correctly identified. The majority declares that "the Legislature specifically endowed the prosecutor with the authority to appoint . . . and the power to remove appointed employees at will . . . ." True enough. The majority then homes in on the prosecutor's *appointment* power, proclaiming that the political freedom act "has no language applicable to the prosecutor's appointment authority." Bauer does not contest the prosecutor's power to hire whomever the prosecutor selects. Rather, Bauer asserts that the political freedom act circumscribes the prosecutor's power to *fire*. The prosecutor's hiring powers are not at issue here, and by raising them the majority muddles the legal analysis. McColgan did not *hire* Bauer, he *fired* her. The question is whether that act was wrongful.

The majority addresses this issue only superficially, declaring that "[i]n reading the two statutes together, there is no provision in the political freedom act that restricts the prosecutor's statutory authority under the prosecutors' appointment/tenure statute." This is an obvious and accurate observation, but neither relevant nor helpful. Statutes often appear to conflict precisely *because* the newer fails to reference the older, and yet both seem to cover precisely the same ground. See, e.g., *Apsey v Mem Hosp*, 477 Mich 120, 124; 730 NW2d 695 (2007) (holding in a case that involved two statutes addressing the notarization of out-of-state affidavits—one passed in 1963 and the other in 2003—that the Legislature intended for the newer statute to serve as

"an alternative" for authenticating out-of-state affidavits).

The majority's simplistic approach would reduce the construction of conflicting statutory texts to judicial selection of the statute that *should* control based solely on the judge's assessment of which expresses better policy. And that is precisely what the majority does here, concluding that enforcement of the political freedom act would "lead to the 'absurd result that every newly elected official would be bound to reappoint his predecessor[']s appointees, if they engaged in political activity in support of his predecessor.' " Again, this case does not involve "appointment"; Bauer's claim rests entirely on her termination. More to the point, I find nothing "absurd" in the proposition that prosecuting attorneys, like every other employer, must follow the law.

Properly framed, Bauer's case asks us to decide whether *despite* the powers granted by the prosecutors' appointment/tenure statute, respondents' decision to fire Bauer was nonetheless wrongful because it contravened the political freedom act. A long line of cases governing statutory interpretation guides us to the answer: it was.

The majority never engages with this line of caselaw. Instead, it sidesteps the task of statutory reconciliation by asserting that regardless of whether Bauer was terminated because of her political activity, she lacks any "private cause of action for enforcement of the act." But Bauer did not file a case implicating a "private cause of action"; she brought an administrative claim under MCL 15.406. That statute specifically permits aggrieved public employees "whose rights . . . are violated" to complain to the Department of Labor (now the Michigan Department of Labor and Economic Opportunity (DLEO)), MCL 15.406(1), which is precisely what

Bauer did. The same statutory section vests the department with the authority to "hold a hearing to determine whether a violation has occurred." *Id*. If the department finds a violation, it is empowered to award back pay, reinstatement, and attorney fees—exactly what occurred here.[1] Once again, the majority took a detour leading to a dead end.

Which brings us to the majority's resolution of what it describes as "the interplay between the prosecutors' appointment/tenure statute and the political freedom act." Aside from pointing out that no language in the political freedom act applies to prosecutors, the majority offers nothing other than that enforcement of the political freedom act would be "absurd." Yet there *is* a clear pathway allowing for the accommodation of both statutes. In my view, the prosecutors' appointment/tenure statute holds firm, but it must be qualified by a prohibition on terminating just-cause employees based solely on their protected political activities.

B

My analysis governing the construction of the "interplay" between two apparently conflicting statutes rests on well-established interpretive principles. "[W]hen two

[1] Because respondents did not challenge the *form* of Bauer's administrative action, the parties did not brief this issue. I suggest that although Bauer did not pursue one, a private cause of action does exist. "It is well settled . . . that an employer is not free to discharge an employee at will when the reason for the discharge contravenes public policy." *McNeil v Charlevoix Co*, 484 Mich 69, 79; 772 NW2d 18 (2009). In *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982), our Supreme Court pointed out that "some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." In my view, a violation of the political freedom act comfortably fits within this realm.

statutes are capable of co-existence, it is the duty of the courts to regard each as effective." *Radzanower v Touche Ross & Co*, 426 US 148, 155; 96 S Ct 1989; 48 L Ed 2d 540 (1976) (cleaned up).[2] Our Supreme Court adheres to the same axiom. "It is a fundamental rule of statutory construction that apparently conflicting statutes should be construed, if possible, to give each full force and effect." *In re Midland Publishing Co, Inc*, 420 Mich 148, 163; 362 NW2d 580 (1984) (cleaned up).[3] Recently our Supreme Court echoed the same sentiment, encouraging courts to "construe statutes, claimed to be in conflict, harmoniously," and to avoid a construction that impliedly eliminates the effect of one statute in favor of another. *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 651-652; 852 NW2d 865 (2014) (quotation marks and citation omitted).

Our state's jurisprudence offers many examples of this approach. In *Rathbun v Michigan*, 284 Mich 521; 280 NW 35 (1938), the dueling statutes involved gas, oil, and mineral rights. See *id*. at 530-531. The plaintiff claimed that she had obtained absolute title in fee to land deeded to her by her homesteader father-in-law and that her absolute title included the mineral rights. *Id*. at 529-530. In support of this argument, she in-

[2] This opinion uses the new 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).

[3] *In re Midland Publishing Co*, 420 Mich at 163, further provides, "It is also well established that a later-enacted specific statute operates as an exception or a qualification to a more general prior statute covering the same subject matter and that, if there is an irreconcilable conflict between two statutes, the later-enacted one will control." This approach provides an alternate ground for reversing the circuit court.

voked an 1893 tax statute which she contended "provided for the conveyance by the State of an absolute title in fee to the homesteader . . . without any severance of the mineral rights[.]" *Id*. at 529-530. The state insisted that when it provided the homesteader with his certificate and deed, it had reserved the mineral rights pursuant to a 1909 statute empowering the state "to sever the absolute fee in the surface rights from the absolute fee in the mineral rights . . . ." *Id*. at 536. The Supreme Court observed that the newer statute was passed to protect and conserve the state's natural resources and was "designed to correct existing evils, to remedy a deplorable situation which had grown out of private exploitation of the natural resources of the State." *Id*. at 537.

The Supreme Court rejected the plaintiff's argument that the two statutes hopelessly conflicted, despite that the 1893 tax statute clearly stated that a homesteader deed "shall convey an absolute title to the lands sold." *Id*. at 533. "The statutory provision that the State convey to a homesteader an absolute title in fee did not require that the State convey . . . an absolute title in fee to the mineral rights, as well as to the surface rights of the lands in question," the Supreme Court explained. *Id*. at 536. Rather, the Court construed the two statutes together, seeking a way of harmonizing them. It interpreted the subsequently enacted statute as indicating "a growth of general public policy with regard to such disposition and conservation of these resources of the State" and determined that it did not "infringe" on any other statute. *Id*. at 545-546. The Court reasoned:

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection

> with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions. [*Id*. at 543-544 (cleaned up).]

Our Supreme Court recently reembraced the *Rathbun* approach in *Int'l Business Machines Corp*, 496 Mich at 652-653.[4] See also *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996) ("The guiding principle is, to be sure, that we are obliged to determine the will of the Legislature; but where the intent of the Legislature is claimed to be unclear, it is our duty to proceed on the assumption that the Legislature desired both statutes to continue in effect unless it manifestly appears that such a view is not reasonably plausible."). Other cases featuring this reconciliation approach include *Apsey*, 477 Mich 120, and *Stenzel v Best Buy Co, Inc*, 503 Mich 199; 931 NW2d 554 (2019) (harmonizing a statute and a court rule).

Similar to *Rathbun*, the two apparently conflicting statutes at issue in this case were passed at different times and were intended to address different concerns.

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[4] The dissent in *Int'l Business Machines Corp* also cited *Rathbun* approvingly, but maintained that the two tax statutes under consideration could not be reconciled. *Int'l Business Machines Corp*, 496 Mich at 672 (MCCORMACK, J., dissenting).

We must not lose sight of the fact that the newer statute, here and in *Rathbun*, was "designed to correct existing evils." *Rathbun*, 284 Mich at 537. The legislative purpose clearly expressed in the political freedom act is to safeguard the rights of people like Beth Bauer to engage in political activity without fear of losing their jobs. And the political freedom act is but one of several acts protecting the civil rights of public-sector employees that postdate the enactment of the prosecutors' appointment/tenure statute.

In 1976, our Legislature passed two civil rights statutes applicable to the employees of political subdivisions, including Bauer: the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and the Michigan Handicappers' Civil Rights Act (amended by 1998 PA 20 and renamed the Persons with Disabilities Civil Rights Act (PWDCRA)), MCL 37.1101 *et seq*. In 1980, the Legislature enacted the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. All three of these statutes extend protection against wrongful termination to employees of political subdivisions of the state. See *In re Bradley Estate*, 494 Mich 367, 393 n 60; 835 NW2d 545 (2013) (observing that the PWDCRA defines " 'employer' to expressly include state actors" in MCL 37.1201(b)); *Anzaldua v Band*, 457 Mich 530, 533-534; 578 NW2d 306 (1998) (explaining that "the state and its political subdivisions are to be considered employers" for the purposes of the WPA); *Manning v Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993) ("Concerning the sex and age discrimination claims, defendants do not have a governmental immunity defense because the [CRA] specifically includes state and political subdivisions and their agents as employers covered by the act.").

Each of these three acts permits employees to sue if discharged from employment on the basis of a pro-

tected ground. The CRA prohibits an employer from "discharg[ing]" an employee "because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a). The PWDCRA prohibits an employer from "[d]ischarg[ing] . . . an individual . . . because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). The WPA provides that "[a]n employer shall not discharge" an employee because the employee reports "a violation or a suspected violation of a law or regulation . . . ." MCL 15.362.

The political freedom act extends similar protections by prohibiting employers from penalizing employees who exercise their right to participate in the political process. It qualifies as reform legislation intended to remedy a problem the Legislature evidently perceived. See *Council No 11*, 408 Mich 385 (providing a more in-depth discussion of the act). I offer the civil rights statutes as comparators to the political freedom act because they help to demonstrate that the two statutes at issue in this case can be reconciled in a manner that honors both.

The Supreme Court's holding in *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), is also instructive. The plaintiff in *Mack* brought a sexual orientation discrimination case against the city of Detroit, invoking the declaration of rights set forth in the city charter. *Id*. at 189. The Supreme Court held that the governmental tort liability act (GTLA), MCL 691.1407 *et seq*., precluded her claim. *Mack*, 467 Mich at 189-190. The Supreme Court pointed out, however, that "there are other areas outside the GTLA where the Legislature has allowed specific actions against the government to stand, such as the [CRA]." *Id*. at 195. The CRA,

however, did not encompass the plaintiff's sexual orientation discrimination claim. *Id*. at 196. In enacting the political freedom act, the Legislature also "allowed specific actions against the government" to go forward, *id*. at 195, as the act defines the individuals covered by it to include "an employee of a political subdivision of the state who is not an elected official." MCL 15.401. The act specifically permits public employees to engage in political activity and empowers them to bring a claim for any infringement of that right. By defining those covered so capaciously, the Legislature obviously intended that public-sector employees in the executive branch would receive the law's benefit.

Despite that the prosecutors' appointment/tenure statute affords a county prosecutor seemingly unbridled authority to fire an employee covered by the statute, it is beyond comprehension that a prosecutor could fire an employee based on race, sex, disability status, or because the employee engaged in protected whistleblower activity. Although the prosecutor's powers are broad, they do not permit a prosecutor to knowingly and deliberately violate these other laws. Similarly, the prosecutor's powers should not be construed so broadly as to excuse a violation of the political freedom act. Had the Legislature intended to immunize the prosecutor (or any other public official) from the reach of the civil rights statutes, the whistleblower act, or the political freedom act, it surely could have done so.

Interpreting the prosecutors' appointment/tenure statute in a manner that preserves its essence permits the survival of both statutes and comports with our duty to reconcile rather than displace. In my view, the political freedom act merely tempers the reach of the prosecutor's discretionary authority. Analogously, the

Supreme Court reached the same conclusion in *Council No 11*, 408 Mich at 408-409, holding that when it came to regulating employees' political activity, the power of the Civil Service Commission to make rules and regulations governing the civil service had to give way to the act.

But if the majority is correct and the statutes are truly irreconcilable, the majority has chosen the wrong one to enforce. Where two laws conflict and cannot be harmonized, the general rule is that the last one enacted controls. *Metro Life Ins Co v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936). See also *Jackson v Mich Corrections Comm*, 313 Mich 352, 357; 21 NW2d 159 (1946) (cleaned up) ("The rule as stated in the foregoing and other decisions involving the question recognizes that if the provisions of a later statute are so at variance with those of an earlier act, or a part thereof, that both cannot be given effect then the later enactment controls and there is a repeal by implication.").

C

The prosecutors' appointment/tenure statute indisputably afforded McColgan with the authority to hire whomever he wanted as his legal office manager. But the political freedom act prohibited him from terminating Bauer's employment in his office on the sole ground that she had worked on behalf of his competitor for the office. It bears emphasis that Bauer was a just-cause employee. Had McColgan fired her for a just cause unrelated to her political activities (or a protected characteristic), his decision to do so would be beyond question. And in most prosecutor's offices, it is likely that the employees are at-will (as was everyone in McColgan's office other than Bauer), terminable for no stated reason at all.

I would reverse the circuit court and remand to the DLEO for continuation of the administrative proceedings.

MEMBERSELECT INSURANCE COMPANY v FLESHER

Docket No. 348571. Submitted March 5, 2020, at Lansing. Decided April 23, 2020, at 9:00 a.m.

MemberSelect Insurance Company initially brought an action in the Genesee Circuit Court against Kenneth Flesher, Nicholas Fetzer, Kelly Fetzer, John Doe, and Progressive Marathon Insurance Company, asserting, in part, a claim of negligence. In 2016, Flesher was injured in a motorcycle accident when he was struck by a vehicle he ultimately identified as a GMC Yukon; the Yukon was owned by Nicholas. MemberSelect insured the Yukon under a policy that was issued to Kelly (Nicholas's mother) as the principal named insured. Although Nicholas was 33 years old when the accident occurred and did not live with Kelly, Kelly agreed to add the Yukon to her policy because Nicholas informed her that it was less expensive for him to insure the Yukon in Kelly's name; Nicholas reimbursed Kelly for the cost of the premiums. After filing the negligence action, MemberSelect brought this separate action in the same court, seeking a declaration that Kelly had no insurable interest in the Yukon and that the policy covering the vehicle was, therefore, void; the cases were consolidated. Various parties moved for summary disposition in both actions. In the negligence action, the court, Celeste D. Bell, J., granted summary disposition in favor of MemberSelect and Nicholas, finding that there was evidence strongly implying that the Yukon was not involved in the accident and that Flesher had failed to present any evidence that raised a genuine issue of material fact on that issue. In the declaratory action, the court denied MemberSelect's motion for summary disposition, concluding that even though Kelly did not own the Yukon and had not registered it, she still had an insurable interest in the vehicle because, as Nicholas's mother, she had an interest in his well-being, both physically and financially. MemberSelect appealed the court's summary-disposition order in the declaratory action.

The Court of Appeals *held*:

Under *Clevenger v Allstate Ins Co*, 443 Mich 646 (1993), public policy requires that a named insured have an insurable interest to support a valid automobile liability insurance policy. The

insurable-interest requirement is not mandated by any statute (including the no-fault act, MCL 500.3101 *et seq*.) but is premised, instead, on a public policy against wager policies—i.e., those policies in which the insured has no interest—thereby preventing an insured from committing illegal or unethical acts to collect insurance proceeds. Although *Clevenger* held that a no-fault automobile insurance policyholder must have an insurable interest, it is questionable whether this requirement should apply given that the public-policy concern against wager policies is not implicated because the holder of the insurance cannot collect cash on the policy. Owners and registrants have an insurable interest in their motor vehicles because the no-fault act requires owners and registrants to carry no-fault insurance under penalty of criminal liability. An insurable interest need not be in the nature of ownership but, rather, may be any kind of benefit from the thing insured or any kind of loss that would be suffered by its damage or destruction. An insurable interest may be found in the property or the life insured. Accordingly, no-fault automobile liability insurance benefits not only the policyholder or other insured but also the members of the public at large from the effects of an automobile accident. While an insurance policy is void if there is no insurable interest, even a *de minimis* interest may be insured. A person clearly has an insurable interest in his or her own health and well-being. In addition, because family members share large portions of their lives and properties in ways they do not with strangers, public policy recognizes that the family unit is entitled to a special status in the law. For that reason, a parent has a sufficient insurable interest in an adult child's welfare—including ensuring that the child is covered for potential injury, is protected from financial ruin from injuring another, and is protected from any penalties for driving while uninsured—that the parent may insure the adult child's automobile under the parent's automobile liability insurance policy, even though the adult child does not live with the parent. As Nicholas's mother, Kelly had an insurable interest in the no-fault insurance policy issued by MemberSelect for Nicholas's Yukon, and the policy was not void on that basis. Accordingly, the trial court correctly denied MemberSelect's motion for summary disposition in the declaratory action.

Affirmed.

INSURANCE — AUTOMOBILE LIABILITY INSURANCE POLICIES — INSURABLE INTERESTS — ADULT CHILDREN.

Public policy requires that a named insured have an insurable interest to support a valid automobile liability insurance policy;

> a parent has a sufficient insurable interest in an adult child's welfare that the parent may insure the child's automobile under the parent's automobile liability insurance policy, even if the adult child does not live with the parent (MCL 500.3101 *et seq*.).

Ruggirello, Velardo, Novara, Ver Beek, Burke & Reizin, PC (by *Darwin L. Burke, Jr.*) for MemberSelect Insurance Company.

Secrest Wardle (by *Drew W. Broaddus* and *Devon R. Glass*) for Progressive Marathon Insurance Company.

Before: BOONSTRA, P.J., and RIORDAN and REDFORD, JJ.

BOONSTRA, P.J. Plaintiff, MemberSelect Insurance Company (MemberSelect), appeals by right the trial court's order denying its motion for summary disposition.[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On July 4, 2016, defendant Kenneth Flesher (Flesher) was operating his motorcycle when he was struck by a motor vehicle in a hit-and-run accident. At some point following the accident, Flesher came to believe that the vehicle that hit him was a GMC Yukon.[2] The parties agree that defendant Nicholas

[1] The trial court's order was a final order because plaintiff sought a declaratory judgment that its insured, Kelly, lacked an insurable interest under the applicable insurance policy and that the policy was therefore void. The trial court's order concluding that the insured did have an insurable interest was, therefore, an order disposing of all claims and adjudicating the rights of all the parties. MCR 7.202(6)(a)(*i*).

[2] It appears from the record that Flesher's sister, who did not witness the accident, observed that the Yukon was parked in the neighborhood where the accident occurred and had damage to its front end.

Fetzer (Nicholas)[3] owned the Yukon in question. Flesher brought suit against Nicholas alleging negligence.[4] MemberSelect, which insured the Yukon under an insurance policy identifying Nicholas's mother, defendant Kelly Fetzer (Kelly), as the principal named insured, assigned counsel to represent Nicholas in that action. MemberSelect brought this separate action for declaratory relief, seeking a declaration that Kelly had no insurable interest in the Yukon and that the policy covering it was therefore void. The trial court consolidated the two cases for purposes of discovery.

Kelly testified at her deposition that Nicholas had asked her to add the Yukon to her policy. She further testified that Nicholas had told her that it was too expensive for him to insure the Yukon under his own name. According to Kelly, she never rode in the vehicle and had no plans to ride in it in the future. Nicholas was 33 years old at the time of the accident and did not live with Kelly.

Nicholas testified that he owned the Yukon and had asked Kelly to insure it under her policy. He testified that he did so because the monthly premium payment would be significantly cheaper than if he had insured it himself. Nicholas stated that Kelly paid the monthly premiums to MemberSelect and that he reimbursed her for the Yukon's share of those premiums.

Following discovery, motions for summary disposition were filed in both the negligence action and this declaratory action. In the negligence action, Nicholas and MemberSelect argued that Flesher had not raised a

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[3] We will refer to certain persons by their first names because of the commonality of surnames.

[4] The negligence action also involved other claims and parties not relevant to this appeal. For simplicity, we will not summarize those aspects of the trial court proceedings.

genuine issue of material fact regarding whether the Yukon was involved in the accident. In the declaratory action, MemberSelect argued that Kelly had no insurable interest at the time the policy was issued and that the policy was therefore void.

The trial court held a hearing on the motions. It first addressed the motion in the negligence action, noting that there was "admissible evidence that strongly implies that [the Yukon was not] the vehicle involved in the accident" and finding that Flesher had failed to respond with evidence that raised a genuine issue of material fact on that issue. The trial court therefore granted the motion for summary disposition filed by Nicholas and MemberSelect.[5]

Counsel for MemberSelect then argued that notwithstanding the trial court's ruling in the negligence action, the issue in the declaratory action was not moot. Addressing that issue, the trial court held that Kelly had an insurable interest:

> [B]ased on the rest of the filings and the Court's reading of the cases cited, I do find that there was an insurable interest. I did—there's no requirement that the insured actually own or be the registrant of a vehicle in order to have an insurable interest.
>
> In this case, it was the mother of defendant Fetzer, and the cases have acknowledged that there is a—I'm not or—let me try to find the exact language in terms of the family—the interest of the family. Hold on, the familial relationship. That she has an interest in her son's well-being both physically and financially.
>
> So, I would deny your motion to dismiss on the grounds that you've requested it, finding that there is an insurable interest by the mother.

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[5] It appears that aspects of the negligence action remain ongoing and that no party has, as yet, appealed the trial court's order granting summary disposition in favor of Nicholas and MemberSelect in that case.

Counsel for MemberSelect declined the trial court's subsequent offer to revisit his position regarding the issue of mootness. The trial court thereafter entered an order denying MemberSelect's motion and resolving the declaratory action, which, as discussed, functionally decided the case. This appeal followed.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Whether a party has an insurable interest to support the existence of a valid automobile liability insurance policy is also a question of law that we review de novo. *Morrison v Secura Ins*, 286 Mich App 569, 572; 781 NW2d 151 (2009).

III. ANALYSIS

MemberSelect argues that the trial court erred by finding that Kelly had an insurable interest. We disagree.

Michigan law requires that a named insured have an insurable interest to support a valid automobile liability insurance policy. *Id*., citing *Allstate Ins Co v*

State Farm Mut Auto Ins Co, 230 Mich App 434, 439; 584 NW2d 355 (1998); see also *Clevenger v Allstate Ins Co*, 443 Mich 646, 656, 660-662; 505 NW2d 553 (1993). This requirement is not set forth statutorily in either the Insurance Code, MCL 500.100 *et seq*.; the Michigan Vehicle Code, MCL 257.1 *et seq*.; or the no-fault insurance act, MCL 500.3101 *et seq*. Rather, it "arises out of long-standing public policy." *Morrison*, 286 Mich App at 572, citing *Allstate*, 230 Mich App at 438. An insurance policy is void if there is no insurable interest. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 258; 819 NW2d 68 (2012).

Before examining the contours of what may constitute an "insurable interest," we first look at the genesis of the public policy itself. As this Court observed,

> Specifically, it arises out of the venerable public policy against "wager policies"; which, as eloquently explained by Justice COOLEY, are insurance policies in which the insured has no interest, and they are held to be void because such policies present insureds with unacceptable temptation to commit wrongful acts to obtain payment. *O'Hara v Carpenter*, 23 Mich 410, 416-417 (1871). Thus, "fundamental principles of insurance" require the insured to "have an insurable interest before he can insure: a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge." *Agricultural Ins Co v Montague*, 38 Mich 548, 551 (1878). [*Morrison*, 286 Mich App at 572.][6]

As this Court further stated in *Allstate*:

> [T]he "insurable interest" doctrine seems to find its origin in public policy concerns. Among those concerns is a desire to prohibit the use of insurance as a form of wagering, and a desire to prevent the creation of socially undesirable

[6] Thus, the public policy did not arise in relation to automobile liability policies specifically but, instead, likely arose before such policies were invented.

> interests, such as where a creditor buys insurance on the life of a debtor for an amount greatly exceeding the amount of the debt, such that the creditor "might be [tempted] to bring the debtor's life to an unnatural end." *Lakin v Postal Life & Casualty Ins Co*, 316 SW2d 542, 551 (Mo, 1958). [*Allstate*, 230 Mich App at 438-439 (citations omitted; alteration in original).]

In other words, the requirement that an insured possess an insurable interest to obtain a valid insurance policy is based on a desire to avoid a situation in which an insured can receive a payout under a policy despite not actually having lost anything (and possibly with an incentive to act wrongfully to cause the payout). Given that this is the genesis of the public policy requiring an "insurable interest," we note, as did this Court in *Allstate*, that "[t]here is a legitimate question whether [automobile] liability insurance requires an 'insurable interest.' " *Id*. at 438. The *Allstate* Court reasoned that "[t]hese public policy concerns are not implicated in the case of liability insurance, because the holder of the insurance cannot collect cash on the policy." *Id*. See also *Morrison*, 286 Mich App at 574.[7]

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[7] This Court stated in *Morrison*:

> Furthermore, and even more significantly, the purpose behind the "insurable interest" requirement is not present here: we cannot imagine how [the insured], or anyone in her position, could possibly be tempted by the transfer of ownership to commit any illegal or unethical act in order to collect proceeds from the insurance policy at issue. The "insurable interest" requirement arose in the context of insurance policies payable to the insured. In such a circumstance, it is obvious how an insured with "nothing to lose" might be tempted to commit socially intolerable acts for financial gain. But the nature of the no-fault insurance at issue here is radically different. Because the insurance here is less likely to be exploitable as a "wager policy," the basis for the "insurable interest" requirement is weakened. [*Morrison*, 286 Mich App at 574.]

Nonetheless, this Court noted in *Allstate* that our Supreme Court in *Clevenger* "appears [to have] held that an insurable interest is necessary to support a valid automobile liability insurance policy. It also appears that the Supreme Court held that the insurable interest must belong to a 'named insured.' " *Allstate*, 230 Mich App at 437-438. *Allstate* noted that *Clevenger* "did not discuss the underlying rationale for the insurable interest requirement, nor did it cite any authority on the topic." *Id*. at 437. Moreover, *Allstate* noted that while it "recognized that many jurisdictions observe such a requirement," it had "failed to discover any underlying rationale for application of the insurable interest requirement to liability insurance[.]" *Id*. at 439. Nonetheless, *Allstate* was obliged to apply the insurable-interest requirement in the context of automobile liability insurance "with *Clevenger* as [its] only guide" and "because *Clevenger* supports such a requirement[.]" *Id*. at 439-440. *Allstate* thus recognized, as do we, that *Clevenger* appears to hold that the insurable-interest requirement applies to automobile liability insurance policies. *Id*. at 440.[8] Until the Supreme Court says otherwise, we are therefore bound by *Clevenger* and *Allstate*.

Given the resulting apparent applicability of the insurable-interest requirement to automobile liability insurance policies, we must next examine the current

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[8] The *Allstate* Court explained:

> We base our interpretation of *Clevenger* on the fact that (1) the Supreme Court addressed the defendant's "insurable interest" argument on the merits, rather than simply stating that there is no such requirement for automobile liability insurance, and (2) the Supreme Court only addressed the question whether the named insured, Williams, had an insurable interest, when it was clear that Preece [the person to whom she had sold the car] had an insurable interest. [*Allstate*, 230 Mich App at 438.]

state of the caselaw in an effort to ascertain the contours of what may constitute an "insurable interest." As noted, the insurable-interest requirement seems to have been initially applied to automobile liability insurance policies in *Clevenger*, a case in which the insured had sold a vehicle, transferred title to the purchaser, and allowed the purchaser to drive the vehicle home with the insured's license plate, registration, and certificate of insurance. Along the way, the purchaser was involved in an automobile accident. Among the issues addressed by our Supreme Court was whether, notwithstanding that she was no longer the titleholder of the vehicle, the seller still had an insurable interest in the vehicle at the time of the accident, such that the seller's insurer still had a duty to defend and indemnify under the policy. The Supreme Court held that because the seller remained the registrant of the vehicle, her "insurable interest was not contingent upon title of ownership to the automobile but, rather, upon personal pecuniary damage created by the no-fault statute itself." *Clevenger*, 443 Mich at 661.[9]

In *Allstate*, this Court again considered a situation in which the seller of a vehicle had transferred title to the buyer, but in that case had removed his license plate, registration, and certificate of insurance from the vehicle before turning over possession to the buyer. The Court noted that in doing so, the seller in that case "did exactly what the Supreme Court [in *Clevenger*] suggested a seller do[.]" *Allstate*, 230 Mich App at 440. Therefore, the Court held, the seller was not only no longer the owner of the vehicle but was also no longer

[9] As the Court in *Clevenger* noted, the no-fault act requires the registrant of a vehicle to provide certain insurance under threat of criminal sanctions. *Clevenger*, 443 Mich at 661.

the registrant of the vehicle. Having no remaining interest in the vehicle, the seller therefore had no insurable interest and the policy was void. *Id*. at 440-441.

Clevenger and *Allstate* thus both addressed the insurable-interest issue in the context of an owner or registrant of a motor vehicle. The reason they did so is that "owners and registrants have an insurable interest in their motor vehicles because the no-fault act requires owners and registrants to carry no-fault insurance and MCL 500.3102(2) makes it a misdemeanor to fail to do so." *Corwin*, 296 Mich App at 258. But neither *Clevenger* nor *Allstate* stands for the proposition that *only* owners or registrants can ever have an insurable interest in the context of an automobile liability insurance policy.

This brings us to *Morrison*, 286 Mich App at 571, which (unlike *Clevenger* and *Allstate*) is somewhat more factually akin to the situation before us in that the named insured was the mother of the vehicle's adult driver. And at the time of the accident, like here, the son was the titleholder of the vehicle, the mother having transferred title to him shortly before the accident. But unlike in this case, the mother was both the owner and the registrant of the vehicle at the time the policy was issued.[10] *Id*. This Court noted that the mother "did have an 'insurable interest' in the [automobile] at the time the insurance policy was bought and paid for, the insured-against risk did not change, the basis for the 'insurable interest' requirement is weak, and the public policy favoring family units is

[10] Also unlike in this case, the mother and son in *Morrison* resided together at all relevant times, and the son was listed as a " 'driver' " of the vehicle under the insurance policy at issue. *Morrison*, 286 Mich App at 571.

strong."[11] *Id*. at 575. The Court further noted that "[t]he caselaw we have found on the genesis and development of the 'insurable interest' requirement shows that public policy forbids the *issuance* of an insurance policy where the insured lacks an insurable interest" and that "[p]ublic policy does not appear to require an otherwise valid insurance policy to become void automatically." *Id*. at 573-574. In light of these considerations, the Court held that it did not need to decide whether the mother had an insurable interest at the time of the accident.[12] *Id*. at 574-575.

Important to our consideration of the contours of an "insurable interest" is *Morrison*'s statement that "an 'insurable interest' need not be in the nature of ownership, but rather can be any kind of benefit from the thing so insured or any kind of loss that would be suffered by its damage or destruction." *Id*. at 572-573, citing *Crossman v American Ins Co*, 198 Mich 304,

[11] This comment by the *Morrison* Court hearkens back to its discussion, as we addressed earlier in this opinion, of whether the public policy that gave rise to the insurable-interest requirement should even apply in the context of automobile liability insurance.

[12] We note that *Morrison* is among those cases that characterize an insurable interest as relating to a particular vehicle. However, in *Madar v League Gen Ins Co*, 152 Mich App 734, 739; 394 NW2d 90 (1986), this Court held, with respect to personal protection benefits, as follows: "[T]here is no requirement that there be an insurable interest in a specific automobile since an insurer is liable for personal protection benefits to its insured regardless of whether or not the vehicle named in the policy is involved in the accident. A person obviously has an insurable interest in his own health and well-being. This is the insurable interest which entitles persons to personal protection benefits regardless of whether a covered vehicle is involved." *Madar* is not binding on this Court but may be persuasive. See MCR 7.215(J)(1). See also *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 362; 764 NW2d 304 (2009), overruled on other grounds by *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012); *Corwin*, 296 Mich App at 258.

308-311; 164 NW 428 (1917). See also *Corwin*, 296 Mich App at 257, citing *Morrison*. Moreover, "[a]n insurable interest in property is broadly defined as being present when the person has an interest in property, as to the existence of which the person will gain benefits, or as to the destruction of which the person will suffer loss." *Madar v League Gen Ins Co*, 152 Mich App 734, 738; 394 NW2d 90 (1986), citing *Crossman v American Ins Co*, 198 Mich at 309.[13]

As mentioned, this Court has, on several occasions, also noted that "[a] person obviously has an insurable interest in his own health and well-being." *Corwin*, 296 Mich App at 257 (quotation marks and citation omitted; alteration in original). And in *Allstate*, we also noted that "the no-fault automobile liability insurance required in Michigan is not simply for the benefit of the policy holder or other insured. Rather, it is intended ' "to protect the members of the public at large from the ravages of automobile accidents." ' " *Allstate*, 230 Mich App at 439, quoting *Clevenger*, 443 Mich at 651 (citation omitted). Therefore, *Allstate* observed that "in the case of automobile liability insurance, the insurable interest appears to lie, at least to some degree, with an injured party rather than an insured." *Id*.

Although none of these cases decided the issue that confronts us in this case, they persuade us that we should leave intact the trial court's determination that Kelly had an insurable interest in this case. To begin with, the *Morrison* Court recognized that "[f]amily members share large portions of their lives and properties in ways they do not share with strangers" and that "[p]ublic policy clearly recognizes that the family unit is, and always has been, entitled to a special

[13] *Crossman* in turn cited *Harrison v Fortlage*, 161 US 57; 16 S Ct 488; 40 L Ed 616 (1896).

status in the law." *Morrison*, 286 Mich App at 574-575. *Morrison* also noted, as did *Allstate*, that in the context of a no-fault automobile liability policy, "the basis for the 'insurable interest' requirement is weak," *id*. at 575, and further stated:

> Parents who provide vehicles for their children are obviously interested in something other than personal pecuniary gain, and they are understandably concerned—not to mention of the view that it is a significant life event—when those children are finally "on their own." Furthermore, no-fault insurance is fundamentally not something from which one could profit anyway, its goal being indemnification rather than compensation. Considering, additionally, parents' natural interest in the well-being—physical, emotional, and financial—of their children, we would, at a minimum, conclude that the trial court's conclusion is worthy of serious consideration in an appropriate case. [*Id*. at 573 n 4.]

We conclude, reaching the issue that this Court declined to reach in *Morrison*, that Kelly had a sufficient interest in the well-being of her adult child that we should not void her insurance policy on public-policy grounds. An insurable interest may be found, at least in some instances, in "the property, or the life insured" by an insurance policy. *Crossman*, 198 Mich at 308. Although, unlike the adult child in *Morrison*, Nicholas does not live with Kelly (and in fact has several children of his own), we do not believe that is so dispositive a factor as to divest Kelly of an insurable interest; our courts have long noted that even a *de minimis* insurable interest may be insured, see *Morrison*, 286 Mich App at 572 n 2, citing *Hill v Lafayette Ins Co*, 2 Mich 476, 484-485 (1853). We conclude that the interest of a parent in an adult child's welfare, including such aspects as being covered for potential injury, being protected from financial ruin

from injuring another, even the avoidance of civil infraction or other legal penalties for driving while uninsured, is sufficient to avoid temptations and social ills of "wager policies." *Allstate*, 230 Mich App at 438-439.

Moreover, although in the context of the no-fault act specifically rather than in the context of applying a public-policy doctrine that existed before the act was enacted, our Supreme Court has recently held that a registrant or owner of a vehicle may satisfy his or her statutory obligation to maintain the security required by the no-fault act when "someone other than that owner or registrant purchased no-fault insurance for that vehicle . . . ." *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167, 193; 934 NW2d 674 (2019). The *Dye* Court stated that "determining whether no-fault benefits are available to an injured person does not depend on 'who' purchased, obtained, or otherwise procured no-fault insurance." *Id*. at 181.

While *Dye* concerned the interpretation of specific provisions of the no-fault act, see MCL 500.3101(1) and MCL 500.3113(b), we conclude that *Dye* demonstrates that tensions may exist between the goals of the no-fault act and the application of the insurable-interest rule so as to void an insurance policy from its inception. It may be that the insurable-interest requirement in fact conflicts with the goals of the no-fault act; as discussed, other panels of this Court have questioned the applicability of such a requirement for policies (specifically, automobile liability insurance policies) that do not readily lend themselves to gambling and rarely, if ever, result in noncompensatory cash payouts to an insured. In light of *Clevenger* and *Allstate*, we cannot go so far as to say that the insurable-interest requirement does not apply to auto-

mobile liability insurance policies; rather, we merely hold under the circumstances of this case that Kelly had a sufficient insurable interest in Nicholas's well-being that we should not declare the policy void on public-policy grounds.[14] We would, however, be delighted if our Supreme Court would take the opportunity in this or some other case to clarify the insurable-interest requirement, its applicability in the context of automobile liability insurance, and the continued viability of *Clevenger* in that regard.[15]

Affirmed.

RIORDAN and REDFORD, JJ., concurred with BOONSTRA, P.J.

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[14] We are mindful of the fact that public-policy determinations are generally the province of the Legislature, see *Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010) (opinion by YOUNG, J.). We thus express some consternation over the prospect that age-old judicial public policymaking in this sphere may have been extended, by rote application, to situations that were never originally intended, and we decline to exacerbate any such unintended consequences by further rote application here. We believe it more appropriate to leave such matters to the Legislature.

[15] Nothing in this opinion should be read as limiting an insurer from asserting appropriate contract-based or other traditional defenses to coverage, such as fraud in the procurement of the policy, see, e.g., *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), or from seeking rescission, and we offer no opinion about the applicability of any such claims or defenses in this case.

BOFYSIL v BOFYSIL

Docket No. 351004. Submitted April 8, 2020, at Lansing. Decided April 23, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 1020 (2021).

Bridget L. Bofysil filed for divorce from Sarah L. Bofysil in the Jackson Circuit. Bridget and Sarah were married in 2014 and decided that Sarah would stay home to raise their child, AB, for an unspecified period of time while Bridget would continue to work outside the home as a canine officer. However, the parties' relationship began to deteriorate after AB's birth. Bridget testified that during their marriage, both she and Sarah served as primary caretakers for AB. Bridget further testified that she arranged her work schedule to allow her to spend as many hours during the day with AB as possible. Sarah left the marital home with AB and moved in with her parents in Montague. Bridget moved to Redford Township, more than two hours away from Sarah and AB. Bridget testified that Sarah kept AB from her for an entire month following their separation and thereafter allowed her to take AB for just two days every other week. Bridget accused Sarah of arranging parenting-time schedules that conflicted with Bridget's work schedule and of being inflexible. Ultimately, following a conciliation meeting, the parties received a definitive parenting-time schedule from the Friend of the Court. Sarah accused Bridget of denying her requests to FaceTime AB during parenting time. And Sarah testified that Bridget had specifically refused to coparent, instead preferring to "parallel parent" with Sarah, exchanging communication about AB in a notebook. Ultimately, the court, Richard N. LaFlamme, J., awarded sole legal and physical custody of AB to Sarah, with "reasonable rights parenting time" to Bridget. The court began by finding that AB's established custodial environment was with Sarah alone, reasoning that because Sarah was the stay-at-home mom, AB was with Sarah the majority of the time. When considering the best-interest factors of MCL 722.23, the court weighed most factors in favor of Sarah, expressing a decided preference for Sarah as the stay-at-home caretaker. Bridget moved for reconsideration, and the court denied the motion. Bridget appealed.

The Court of Appeals *held*:

1. Before making a custody determination, the trial court must determine whether the child has an established custodial environment with one or both parents. An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. An established custodial environment may exist with both parents when a child looks to both for guidance, discipline, the necessities of life, and parental comfort. If a proposed change would modify the child's established custodial environment, the proponent must demonstrate by clear and convincing evidence that the proposed change is in the child's best interests; however, if the proposed change would not modify the established custodial environment, the proponent need only demonstrate by a preponderance of the evidence that the proposed change is in the child's best interests. In this case, the court determined that AB had an established custodial environment exclusively with Sarah; therefore, Sarah was only required to establish by a preponderance of the evidence that granting her sole physical custody was in AB's best interests, but Bridget had to prove by clear and convincing evidence that granting her sole physical custody would be best for her child. The evidence in this case preponderated against the circuit court's established-custodial-environment finding. Both parties agreed that from AB's January 2016 birth until Sarah left the home with AB in the middle of June 2018, both parents shared in the care of AB. Although Bridget worked outside the home, she arranged her schedule to maximize her time home during AB's waking hours. Even Sarah conceded that Bridget was usually the one to make lunch for the family and that the whole family often would be present when Bridget took on side jobs. AB clearly had a homelife in which both her parents provided for her care and needs. Although AB might have looked to her parents to fulfill different needs and likely understood at some level their distinct household roles, both provided her with security, stability, and permanence. The court erred by finding that an established custodial environment existed with Sarah alone.

2. A trial court must consider the factors outlined in MCL 722.23 when determining a custody arrangement in the best interests of the child. In this case, the court's findings on many factors preponderated against evidence that Bridget was regu-

larly and routinely involved in AB's daily care even though Bridget worked outside the home. The court erroneously weighed Factor (a)—the love, affection, and other emotional ties existing between the parties involved and the child—in Sarah's favor when it found that Sarah had closer parental and emotional ties to AB than did Bridget by virtue of Sarah's ability to spend more time with AB. The court similarly erred by weighing Factor (b)—the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any—in Sarah's favor on the basis of its conclusion that Sarah was the primary caregiver and that Sarah's "commitment to remain home with the child until she reaches school age, rather than place her in day care or the care of another, will enable her to be far better able to provide her with love, affection and guidance than [Bridget], who spends much of her days at work." The fact that the parties agreed before conceiving a child that one parent would stay at home to raise the child while the other would financially support the family does not equate with one parent loving the child more or having more affection for the child. The court declined to credit Bridget for her ability and willingness to earn an income and provide health insurance for her child when the court treated the parties equally under Factor (c)—the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs—after deeming child support and "the additional support [Sarah] receives from her family" as "more than sufficient to meet [AB's] material needs." The court also erred throughout its best-interest analysis by focusing heavily on Bridget's new romantic relationship with a married woman. Michigan courts have repeatedly held that infidelity cannot be used to measure a parent's moral fitness under Factor (f)—the moral fitness of the parties—unless that infidelity actually interferes with the parent's ability to parent his or her child. However, the court made those exact same judgments in analyzing Factors (d)—the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity—and Factor (e)—the permanence, as a family unit, of the existing or proposed custodial home or homes. Bridget also challenged the circuit court's analysis of Factor (j)—the willingness of the parties to encourage the child to have a continuing relationship with the other party. The court commenced its analysis of this factor by committing a factual error, stating that the testimony of both parties indicated that

Sarah set a parenting-time schedule for Bridget. However, Bridget testified that Sarah purposely scheduled parenting time to conflict with her schedule, refused requests for additional days to coincide with her vacation time, and withheld AB for one month. The remainder of the court's findings related to Factor (j) were a fair resolution of the parties' conflicting evidence. Given the circuit court's improper reliance on Bridget's relationship with a married woman and its bias against Bridget's role as a working parent, the court did not act within its discretion in awarding sole physical custody to Sarah with limited parenting time to Bridget. Further proceedings with up-to-date information were required to consider the custodial arrangement that best serves AB's best interests.

3. Under MCL 722.26a(1)(b), in determining whether joint legal custody is in the best interests of the child, the court must consider whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. In this case, there was no clear indication on the record that the parties could not agree on major decisions for AB. The larger concern was the parties' ability and willingness to communicate. The parties communicated about issues relevant to AB in a notebook, and given that both parties were not civil, this indirect communication method appeared to be appropriate for maintaining a safe and efficient approach to shared parenting responsibilities. On this record, it appeared that the circuit court abused its discretion in awarding sole legal custody to Sarah. Therefore, on remand, the circuit court was directed to reconsider its award of legal custody based on up-to-date information and to take into account alternative communication methods, if feasible.

Judgment of divorce affirmed in part, custody award vacated, and case remanded for further consideration.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for Bridget L. Bofysil.

Judith A. Curtis for Sarah L. Bofysil.

Before: CAVANAGH, P.J., and BECKERING and GLEICHER, JJ.

GLEICHER, J. A recent Pew Research Center study reports that in 2016, 18% of parents in the United

States stayed home to raise their children. Twenty-seven percent of mothers elected stay-at-home parenting. Livingston, *Stay-At-Home Moms and Dads Account for About One-In-Five U.S. Parents*, Fact Tank (September 24, 2018), available at <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/> (accessed April 10, 2020) [https://perma.cc/UQ6G-ZN32]. For one parent to stay home to raise the children, the other must go out into the world and generate an income to support the family. Does working outside the home compromise a parent's ability to forge and maintain a strong, healthy relationship with her children? What if both parents work outside the home? Is the child essentially without a parent truly committed to parenting and all that the job entails?

In this case, the trial court found that the young child had an established custodial environment only with defendant Sarah Bofysil, largely because Sarah "was the stay at home mom while the parties were together" and the child "is with her the majority of the time." It was error to discount the role of the child's other parent, plaintiff Bridget Bofysil, simply because Bridget worked outside the home to support her family. This error influenced the applicable burden of proof and permeated the court's assessment of the child's best interests. Accordingly, we affirm in part the judgment of divorce, but vacate the custody award and remand for further proceedings.

I. BACKGROUND

Bridget and Sarah married in April 2014. The couple decided to have a child, using Bridget's egg fertilized with a sperm donor and implanted in Sarah. Bridget and Sarah agreed that Sarah would stay home

to raise their child for an unspecified period of time while Bridget would continue to work outside the home as a canine officer with the Eastern Michigan University Police Department. Sarah stopped working in December 2015, and the couple's daughter, AB, was born in January 2016.

Bridget and Sarah's relationship began to deteriorate after AB's birth. Money was tight, and Bridget claimed that Sarah rejected Bridget's requests that she return to work. Sarah, on the other hand, accused Bridget of belittling her role as a stay-at-home parent. Bridget worked overtime when possible and was sometimes required to travel for work events. Bridget's absence put a strain on the relationship. Eventually, the couple's arguments, suspicions, and verbal mistreatment of each other took its toll, and Bridget filed for divorce in June 2018.

Bridget testified that during their marriage, both she and Sarah served as "primary caretaker[s]" for AB. Bridget asserted that she "picked [her] shift at work to make it so that [she] could have the most amount of hours with [AB] during the day as possible." Bridget described:

> I was there every day when [AB] woke up. I was there for lunch. I was there to take her to do fun things like go to the park, go run around the mall. We went to family outings together. We did bath time together as much as possible. Every day I was home that I had off I put her to bed. I read her stories. I brushed her hair. I painted her nails. I did everything that a parent does with a child. Cooked meals, tried to get her to try new things, everything.

Sarah described the family situation somewhat similarly. As Bridget worked the night shift, she was still asleep when AB awoke at 7:30 a.m. Sarah asserted that she fed AB breakfast and played with her until Bridget got up at 11:00 a.m. Sarah continued:

> At that point in time, we would spend some family time together. One of us would make lunch. It was typically Bridget because she enjoys to cook more than I do, and I would continue playing with [AB], getting her dressed, um, just everyday activities . . . for a toddler. We would have lunch together.

Sarah testified that Bridget took side jobs as a dog trainer some afternoons. Those jobs sometimes "interrupted" family time after lunch. On other occasions, Sarah assisted and AB went with them. Around 4:00 p.m. during the week, Bridget would prepare for work. Sarah described that Bridget would go into the bedroom alone for 45 minutes to one hour to "get into warrior mode," enabling her to move from family time to a police mindset. Bridget denied ever using this term. When Bridget left for work, she would flash the lights on her cruiser and sound the siren to say goodbye to AB.

When Sarah left the marital home, she took AB and moved in with her parents in Montague. Once the marital home sold, Bridget moved to Redford Township, more than two hours away from Sarah and AB. Bridget asserted that she could not move closer to Sarah's new home because she continued to work in Ypsilanti. And Sarah asserted that as she was unemployed, moving to the Muskegon area with her parents was her only option. Moreover, Sarah expressed her intent to continue living with her parents and to remain unemployed indefinitely in order to maintain consistency for AB.

Bridget testified that Sarah kept AB from her for an entire month following their separation and thereafter allowed her to take AB for just two days every other week. Sarah would allow Bridget to take AB only when Bridget was off work. However, when Bridget suggested using vacation time to spend more time with AB, Sarah refused. Bridget accused Sarah of arranging parenting-

time schedules that conflicted with Bridget's work schedule and of being inflexible. Ultimately, following a conciliation meeting, the parties received a definitive parenting-time schedule from the Friend of the Court (the FOC).

Sarah testified that AB spent "the majority of her time" with her since the separation. She explained that Bridget had parenting time three weekends each month from Saturday evening through Tuesday afternoon. Sarah wished to change that schedule from Friday evening to Monday afternoon to allow AB an additional day to attend preschool. Sarah accused Bridget of denying her requests to FaceTime AB during parenting time. And Sarah testified that Bridget had specifically refused to coparent, instead preferring to "parallel parent" with Sarah, exchanging communication about AB in a notebook. Sarah conceded that shortly after the separation, she denied parenting time to Bridget for approximately one month because Sarah required "a written communication between our two lawyers." Sarah testified that she insisted on this type of confirmation before the entry of the FOC order because Bridget sent her an e-mail "saying that she would be keeping [AB] for an additional week."

Ultimately, the court awarded sole legal and physical custody of AB to Sarah, with "reasonable rights parenting time" to Bridget. The court began by finding that AB's established custodial environment was with Sarah alone. In this regard, the court reasoned:

> [Sarah] was the stay at home mom while the parties were together and she has had primary physical custody continuously since they separated. [AB] naturally looks currently to the parent she is with for love, affection and the necessities of life. Since that parent is usually [Sarah], as she is with her the majority of the time, the Court finds an established custodial environment exists with [Sarah].

The court held Sarah to "a preponderance of [the] evidence" standard to prove that it was in AB's best interests to award Sarah sole physical custody while granting Bridget only "reasonable rights parenting time," but the court required Bridget to prove by clear and convincing evidence that she should have physical custody of AB. However, the court couched, even if it

> were to find that an established custodial environment exists with both parents, changing primary physical custody to [Bridget], as she requests, would destroy the established custodial environment with [Sarah], whereas, reducing [Bridget's] parenting time from three weekends per month to two is not such a drastic change that it would destroy the established custodial environment with [Bridget], and could be ordered even if only a preponderance of evidence supports the change. However, regardless of which standard applies, the Court finds that the evidence supporting the following custody determination is indeed clear and convincing.

The court then addressed legal custody. Throughout the proceedings, the parties had shared joint legal custody. The court noted that the parties could not cooperate or agree on important life decisions. The court faulted Bridget for refusing Sarah's "numerous attempts . . . to engage [her] in joint parenting" and for her insistence on parenting "independently in parallel, instead of in cooperation." The court further determined that Bridget had employed "harsh and abusive communications" that "demonstrated that she is incapable of co-parenting." Accordingly, the court awarded Sarah sole legal custody of AB.

The court continued to consider the best-interest factors of MCL 722.23, weighing most in favor of Sarah. In this analysis, the court expressed a decided preference for Sarah as the stay-at-home caretaker. In finding that Factor (a), "[t]he love, affection, and other emo-

tional ties existing between the parties involved and the child," favored Sarah, the court found that Sarah "has closer parental and emotional ties to [AB] than does [Bridget] by virtue of being able to spend significantly more time with her." The court further found that Sarah's "commitment to remain home with the child until she reaches school age, rather than place her in day care or the care of another, will enable [Sarah] to be far better able to provide [AB] with love, affection and guidance than [Bridget], who spends much of her days at work," tipping the scales in Sarah's favor under Factor (b), "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." And in analyzing "[t]he length of time the child has lived in a stable, satisfactory environment" under Factor (d), the court noted that "[a]lthough both parties have been involved in the care of the child, . . . [Sarah] has been the primary caregiver."

Bridget subsequently moved for reconsideration, arguing, in part, that the evidence established that AB had resided primarily with Sarah since the separation only because Sarah had withheld and alienated AB from her. Bridget further asserted that the court awarded Sarah "primary physical custody largely because the Court assumed that [Bridget] would be forced to use third party child care givers because of her employment . . . ." Bridget contended that this assumption was erroneous and asked the court "to reopen the proofs" to allow her to "present additional evidence as to her work schedule and to prove that [Sarah] plans to enroll the minor child in unnecessary pre-school although [Sarah] is still unemployed." The court denied the motion.

Bridget now appeals.

II. STANDARDS OF REVIEW

"All custody orders must be affirmed on appeal unless the trial court committed a palpable abuse of discretion, made findings against the great weight of the evidence, or made a clear legal error." *Mitchell v Mitchell*, 296 Mich App 513, 517; 823 NW2d 153 (2012). "The great weight of the evidence standard applies to all findings of fact. A trial court's findings . . . should be affirmed unless the evidence clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Further, the "abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. Finally, this Court reviews questions of law for clear legal error. *Id*. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*.

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Before making a custody determination, the trial court must determine whether the child has an established custodial environment with one or both parents, *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011), which "is an intense factual inquiry," *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). An established custodial environment is one

> of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

"An established custodial environment may exist with both parents where a child looks to both . . . for guid-

ance, discipline, the necessities of life, and parental comfort." *Id*. at 707.

Determining a child's established custodial environment is a pivotal step in a custody battle because it dictates the applicable burden of proof. If a proposed change would modify the child's established custodial environment, the proponent must demonstrate by clear and convincing evidence that the proposed change is in the child's best interests. *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). If the proposed change would not modify the established custodial environment, the proponent need only demonstrate by a preponderance of the evidence that the proposed change is in the child's best interests. *Id*. at 92-93. If a child has an established custodial environment with both parents, neither parent's custody may be disrupted absent clear and convincing evidence that the change is in the child's best interests. *Powery v Wells*, 278 Mich App 526, 529; 752 NW2d 47 (2008).

Here, the court determined that AB had an established custodial environment exclusively with Sarah. Therefore, Sarah was only required to establish by a preponderance of the evidence that granting her sole physical custody was in AB's best interests, and Bridget had to prove by clear and convincing evidence that granting her sole physical custody would be best for her child. Left unsaid was that Bridget would have to prove by clear and convincing evidence that even shared custody would serve AB's best interests.

The evidence preponderates against the circuit court's established-custodial-environment finding. Both parties agreed that from AB's January 2016 birth until Sarah left the home with AB in the middle of June 2018, both parents shared in the care of AB. Although Bridget worked outside of the home, she arranged her schedule

to maximize her time home during AB's waking hours. Even Sarah conceded that Bridget was usually the one to make lunch for the family and that the whole family often would be present when Bridget took on side jobs training dogs. AB clearly had a homelife in which both her parents provided for her care and needs. Although AB might have looked to her parents to fulfill different needs and likely understood at some level their distinct household roles, both provided her with "security, stability, and permanence."

The circuit court apparently contemplated that its established-custodial-environment determination might not withstand appellate scrutiny. The court noted, "[R]egardless of which standard applies, the Court finds that the evidence supporting the following custody determination is indeed clear and convincing." However, the court perpetuated its erroneous approach to the working parent throughout the judgment, faulting Bridget for her full-time employment outside the home by treating her as less than a full parent.

IV. BEST-INTEREST FACTORS

A trial court must consider the factors outlined in MCL 722.23 in determining a custody arrangement in the best interests of the children involved. The statute provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

"A trial court's findings regarding each best interests factor are reviewed under the great weight of the evidence standard." *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). And just as when determining AB's established custodial environment, the court's findings on many factors preponderated

against evidence that Bridget was regularly and routinely involved in AB's daily care despite that she worked outside the home.

The court erroneously weighed Factor (a) in Sarah's favor after finding that Sarah "has closer parental and emotional ties to [AB] than does [Bridget] by virtue of being able to spend significantly more time with her." The court similarly erred by weighing Factor (b) in Sarah's favor based on its conclusion that Sarah "has been the primary caregiver and that her commitment to remain home with the child until she reaches school age, rather than place her in day care or the care of another, will enable her to be far better able to provide her with love, affection and guidance than [Bridget], who spends much of her days at work." The fact that the parties agreed before conceiving that one parent would stay at home to raise the child while the other would financially support the family does not equate with one parent loving the child more or having more affection for the child. Nor should that decision foreclose the result of a custodial disagreement if a relationship ends.

Despite treating Bridget as a less viable parent because she chose to work outside the home, the court declined to credit Bridget for her ability and willingness to earn an income and provide health insurance for her child. The court treated the parties equally under Factor (c) after deeming child support and "the additional support [Sarah] receives from her family" as "more than sufficient to meet [AB's] material needs." We discern no rational reason to both punish and yet fail to credit a parent for financially supporting his or her family.

The court also erred throughout its best-interest analysis by focusing heavily on Bridget's new romantic

relationship. The parties presented evidence that since the separation, Bridget had moved on romantically while Sarah had not. In focusing on this factor, the court repeatedly emphasized that Bridget was not yet divorced and her new girlfriend was married, although separated. The court described this relationship as "illicit," expressed that it took "a very dim view of extra-marital relationships" because they "show[] a lack of candor and fidelity," and implied that Sarah therefore had a superior moral character.

Michigan courts have repeatedly held that infidelity cannot be used to measure a parent's moral fitness under MCL 722.23(f) unless that infidelity actually interferes with the parent's ability to parent his or her child. See *Fletcher v Fletcher*, 447 Mich 871, 886-887; 526 NW2d 889 (1994); *Berger*, 277 Mich App at 712-713. The court in this case did not consider Bridget's relationship with a married woman before her divorce was finalized in analyzing Factor (f). However, it made those exact same judgments in analyzing Factors (d) and (e). This was improper under any factor. See *Fletcher*, 447 Mich at 886-887 ("Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*."). Moreover, the circuit court treated the parties disparately. The evidence established that Sarah was married when she began her romantic relationship with Bridget. Surely that "illicit relationship" equally "shows a lack of candor and fidelity" on Sarah's part.

Bridget also challenges the circuit court's analysis of Factor (j)—willingness to foster the other parent's continuing parent-child relationship. The court commenced its analysis by committing a factual error: "the undisputed testimony of both parents indicated that even in the absence of a court order for parenting time,

Sarah immediately set a 'reasonable rights' parenting time schedule for Bridget." In fact, Bridget testified that Sarah purposely scheduled parenting time to conflict with her schedule, refused requests for additional days to coincide with her vacation time, and withheld AB for one month. During that long absence, Bridget asserted, Sarah interfered with her FaceTime conversations with AB. However, the remainder of the court's findings related to Factor (j) were a fair resolution of conflicting evidence presented by the parties. We may not interfere with the court's assessment in that regard. See *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

Finally, Bridget challenges the court's factual findings related to Factor (k), domestic violence. The court acknowledged that "Sarah slapp[ed] Bridget during an emotional exchange." But the court minimized that act, stating that "angry exchanges appear to have been commonplace between the parties, with Bridget being the aggressor." The court continued by describing evidence of Bridget's verbal aggression toward Sarah in front of AB. The parties' tales of aggression conflicted, but Sarah presented text messages (and Bridget presented a video) both supporting Sarah's version of events. In any event, we may not interfere with the court's assessment of the parties' credibility in this regard, either.

Given the circuit court's improper reliance on Bridget's relationship with a married woman and its bias against Bridget's role as a working parent, we cannot hold that the court acted within its discretion in awarding sole physical custody to Sarah with such limited parenting time to Bridget. Further proceedings with up-to-date information will be required to consider the custodial arrangement that best serves AB's best interests.

V. LEGAL CUSTODY

On this record, it also appears that the circuit court abused its discretion in awarding sole legal custody to Sarah. Pursuant to MCL 722.26a(1)(b), in determining whether joint legal custody is in the best interests of the child, the court must consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." As stated in *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982):

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. [Citations omitted.]

There was no clear indication on the record that the parties could not agree on major decisions for AB. Sarah asserted that Bridget did not approve of her plan to baptize AB; Bridget's testimony showed only a desire for more information about Sarah's chosen church's stance on same-sex marriage and the date of the ceremony. Sarah asserted that Bridget did not cooperate with potty training; however, it appears that Bridget simply handled potty training differently.

The larger concern in this case was the parties' ability and willingness to communicate. Evidence established that the parties' direct communications were not civil. Accordingly, the parties agreed to communicate about issues relevant to AB in a notebook. Sarah

did believe this method was inadequate. However, it is not uncommon for the FOC to recommend or for courts to order parents to use a computer program or notebook system to share information or to otherwise communicate. Through these indirect communication methods, parents can interact without danger of hostility, easing their ability to cooperate and agree on major issues. The incivility present in this case ran both ways. Under such circumstances, socially distant parental interactions may be an appropriate method for maintaining a safe and efficient approach to shared parenting responsibilities.

We affirm in part the judgment of divorce but vacate the custody award and remand for further consideration consistent with this opinion. On remand, the court must reconsider its award of legal custody based on up-to-date information and must take into account alternative communication methods, if feasible. We do not retain jurisdiction.

CAVANAGH, P.J., and BECKERING, J., concurred with GLEICHER, J.

In re ESTATE OF HERMANN A VON GREIFF

Docket No. 347254. Submitted January 14, 2020, at Grand Rapids. Decided April 23, 2020, at 9:10 a.m. Affirmed on different grounds 509 Mich ___ (2022).

Carla J. Von Greiff petitioned the Marquette Probate Court under MCL 700.2801(2)(e) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., seeking a declaration that Anne Jones-Von Greiff was not the surviving spouse of Carla's father, Hermann Von Greiff. Anne and Hermann were married in 2003, and Anne filed for divorce in June 2017. However, before the divorce was finalized, Hermann died on June 17, 2018. In her petition, Carla asserted that Anne had been willfully absent from Hermann for a year or more before his death and that, therefore, Anne was not entitled to inherit as Hermann's surviving spouse under EPIC. The probate court, Cheryl L. Hill, J., ruled that Anne was not a surviving spouse under MCL 700.2801(2)(e) because she had been intentionally, physically, and emotionally absent from Hermann for more than a year before his death. Anne appealed.

The Court of Appeals *held*:

In *In re Erwin*, 503 Mich 1 (2018), the Supreme Court held that the term "willfully absent," as used in MCL 700.2801(2)(e)(*i*), should be interpreted consistently with the meanings of "desertion" and "willful neglect" and with the rule that a divorced spouse is not a surviving spouse of a decedent spouse. The *Erwin* Court stated that whether a spouse was absent is a factual inquiry that requires a court to evaluate whether there was complete physical and emotional absence resulting in an end to the marriage for practical purposes. The *Erwin* Court's analysis indicated that MCL 700.2801(2)(e) generally stands for the proposition that a spouse who informally dissolves a marriage through desertion or neglect loses the right to inherit from the other spouse. By contrast, a divorce action allows both parties to participate in the court's efforts to equitably distribute the marital property. In this case, although the divorce was incomplete at the time of Hermann's death, Anne did not intend to abandon or desert Hermann, but rather to exercise her legal right to seek a divorce and to enforce her rights as a divorcing spouse.

The common law recognizes the distinction between a divorcing couple and a couple who are living separately as the result of one party's desertion. Common sense also dictates that a spouse is not subject to disinheritance for willful absence if a divorce is pending at the time of the other spouse's death. In this case, an error by the circuit court in its spousal-support order caused a delay in the issuance of the final judgment of divorce. If MCL 700.2801(2)(e)(*i*) were held to be enforceable while a divorce was pending, delays and gamesmanship would be inevitable. Additionally, the Legislature amended MCL 700.2801 in 2016 by adding a provision stipulating that a person who is a party to a divorce proceeding with the decedent at the time of the decedent's death is not a surviving spouse for purposes of being permitted to make funeral arrangements. The fact that the Legislature considered parties to an ongoing divorce in the context of spousal survivorship and limited only their ability to make funeral arrangements indicates that no other limitation was intended. Anne's participation in the legal process of divorce did not disqualify her from survivorship status, and she was entitled to the legal benefits of her status as Hermann's surviving spouse.

Reversed.

M. J. KELLY, J., dissenting, argued that MCL 700.2801(2)(e)(*i*) was applicable to this case, and when that provision was applied as intended by the Legislature, Anne was not a surviving spouse and was not entitled to inherit the marital estate. Judge KELLY argued that the majority had erred by relying on common sense, the common law, and caselaw from other jurisdictions in support of its conclusion that Anne was a surviving spouse for purposes of inheriting the marital estate. Judge KELLY noted that the Michigan Supreme Court interpreted MCL 700.2801(2)(e)(*i*) in *In re Erwin*, 503 Mich 1 (2018), and held that an individual is not a surviving spouse under this provision if they were willfully absent from their spouse for one year or more before the spouse's death. In this case, it was undisputed that Anne had been physically and emotionally absent from Hermann for over a year before his death. Judge KELLY also argued that the majority's review of the common law was unwarranted because EPIC is a comprehensive statutory creation that supersedes the common law. According to Judge KELLY, the legislative intent in MCL 700.2801(2)(e)(*i*) was clear that an individual who is willfully absent from the decedent spouse for a year or more before the decedent's death is not considered a surviving spouse. Judge KELLY would have affirmed the probate court's decision and left it to the Legislature to remedy what he believed would be the unjust

but correct outcome in this case when the statute was properly interpreted and applied: disinheriting Anne.

DIVORCE — SPOUSAL SURVIVORSHIP — ESTATES AND PROTECTED INDIVIDUALS CODE — WILLFULLY ABSENT SPOUSES.

An individual in the process of obtaining a divorce when their spouse dies is not a willfully absent spouse under MCL 700.2801(2)(e)(*i*) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*.; under the statute, a spouse who tries to informally dissolve a marriage through desertion or neglect loses the right to inherit from the other spouse; by contrast, in a divorce action, both parties participate to allow the court to equitably distribute the marital property; when enacting MCL 700.2801(3), the Legislature did not identify an individual who is a party to a divorce proceeding with the decedent at the time of the decedent's death as excluded from the status of a surviving spouse except in the context of making funeral arrangements.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Jonathan M. Colman*) for Carla J. Von Greiff.

McDonald & Wolf, PLLC (by *William I. McDonald*) for Anne Jones-Von Greiff.

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

GLEICHER, J. Anne Jones-Von Greiff and Hermann Von Greiff were married for 15 years. During the marriage, Hermann was unfaithful to Anne. The parties argued, sometimes fiercely. On June 1, 2017, after Hermann repeatedly and angrily told Anne to "get out of my fucking house," Anne filed for divorce.

Over the course of the next year, the parties and their lawyers litigated and negotiated the dissolution of the Von Greiff marriage. Hermann stipulated that Anne could reside in the marital home, and he never returned. Hermann died shortly before the divorce judgment was signed—on June 17, 2018, slightly more than a year after the parties separated. Hermann's

adult daughter, Carla J. Von Greiff, brought this action seeking to dispossess Anne of her right to inherit as Hermann's surviving spouse.

The probate court ruled that Anne did not qualify as Hermann's surviving spouse because she was "willfully absent" from him for more than a year before his death, citing MCL 700.2801(2)(e)(*i*). That statute is inapplicable to the period of time consumed by divorce proceedings. We reverse.

I

Anne and Hermann Von Greiff had a rocky relationship. The couple were previously married and divorced in 2000, but remarried in 2003. Husband and wife sometimes lived separately, as Hermann moved away for extended periods of time to accept various job opportunities. Hermann was often unfaithful. And Hermann suffered from bipolar disorder, making him volatile and difficult to live with. As Hermann grew older, his physical health also declined. In May 2017, Hermann decided to undergo an elective spinal fusion surgery. Anne disagreed that he should undertake the risks of the operation. The couple fought, and Hermann asked Carla to travel to Marquette from Florida to take him for the surgery. Anne described that Hermann said "nasty things" to her during this period, demanded that she leave for the "hundredth time" during a "fierce attack," and told her repeatedly and angrily to "get out of my fucking house." Anne questioned whether Hermann was certain about his decision, and he responded by again ordering Anne out of the home.

Anne did not immediately leave the home, but waited for Carla's arrival. Following Hermann's surgery, he moved to an assisted living facility. In his

absence, Anne and Hermann agreed that only Anne would move back into the marital home. Divorce proceedings followed.

A Michigan spouse may seek a divorce without stating a specific cause. "[A] divorce can be sought on the basis that there has been 'a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.' MCL 552.6(1). Nothing more is required." *In re Erwin*, 503 Mich 1, 12 n 5; 921 NW2d 308 (2018). Anne filed for divorce on June 1, 2017. Although she did not need to, Anne alleged a cause for the breakup of her marital union: infidelity. During the divorce proceedings, Hermann admitted under oath that he had sexual relations with other women while married to Anne.

The divorce moved slowly. The parties eventually resolved all divorce-related issues but apparently could not agree regarding spousal support. The circuit court issued an opinion and order granting Anne spousal support on May 29, 2018, almost a year after the divorce action had been filed. The table was set for the prompt entry of the divorce judgment.

Unfortunately, the circuit court's spousal-support opinion contained a significant error. The opinion inaccurately asserted that "Plaintiff admitted to infidelity during the marriage"; it should have stated that "Defendant admitted to infidelity during the marriage." Anne filed a motion objecting to this aspect of the order and seeking its correction. But Hermann died before her motion could be heard, the error fixed, and the judgment signed. As of June 17, 2018, the date of Hermann's death, the parties had lived apart for little more than a year. In August 2018, the circuit court issued an order

correcting its previous opinion and order to reflect that Hermann had been the unfaithful party.

After Hermann's death, Carla petitioned the probate court under MCL 700.2801(2)(e), seeking a declaration that Anne was not Hermann's surviving spouse. Section 2801(2)(e)(*i*) provides that a "surviving spouse" under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., does not include "[a]n individual who . . . [w]as willfully absent from the decedent spouse" for a year or more before the decedent spouse's death. Carla alleged that Anne had been "willfully absent" from Hermann for more than a year before his death.

The probate court conducted an evidentiary hearing on the petition. Anne and Carla testified extensively. The probate court found that Anne had intentionally absented herself from Hermann, physically and emotionally, for more than a year before Hermann died. Therefore, the probate court ruled, Anne did not qualify as Hermann's surviving spouse.

II

Anne now challenges the probate court's determination that she was "willfully absent" and therefore not qualified as a surviving spouse. Generally, we review for clear error a court's factual findings. *Erwin*, 503 Mich at 9. We review de novo a lower court's determination regarding the applicability of a statute. *Florence Cement Co v Vettraino*, 292 Mich App 461, 473; 807 NW2d 917 (2011).

The evidentiary hearing in this case was unnecessary and the probate court's findings irrelevant, because MCL 700.2801(2)(e) does not apply as a matter of law. Anne did not "willfully absent" herself from Hermann; she sought a divorce and, as many divorcing spouses do,

elected to live separately while the matter made its way through the circuit court. Furthermore, Hermann formally *stipulated* to that living arrangement. Considering a combination of common sense, the common law, and a venerable canon of statutory construction: *expressio unius est exclusio alterius*, it is clear that the Legislature did not intend to disinherit a spouse whose divorce was in progress but not yet finalized when the other spouse dies.

III

We begin with a review of the common law. Just last term, in *In re Erwin*, our Supreme Court explored the meaning of MCL 700.2801(2)(e) in considerable detail. This subsection provides that a surviving spouse does not include

> [a]n individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse.
>
> (*ii*) Deserted the decedent spouse.
>
> (*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. [MCL 700.2801(2)(e).]

Like *Erwin*, this case involves Subparagraph (*i*): willful absence.

In arriving at the meaning of the phrase "willfully absent," the *Erwin* Court observed that the three grounds for disinheriting a spouse listed under Subsection (2)(e) are inherently fault-based and rest on intentional spousal misconduct. "Desertion" and "willful neglect" describe deliberate, unilateral choices designed to destroy the objects of matrimony. The Supreme Court explained, "MCL 700.2801(2)(e)(*ii*) and (*iii*) [addressing desertion and willful neglect] involve

intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved." *Erwin*, 503 Mich at 15. Willful absence is somewhat more difficult to parse; one of the questions presented in *Erwin* was whether the phrase encompassed only physical separation, or "includes consideration of the emotional bonds and connections between spouses." *Id*. at 6.

The Supreme Court interpreted "willful absence" in accordance with its "context"—its placement alongside the terms "desertion" and "willful neglect." *Id*. at 15. "A comprehensive review of the statutory scheme confirms that the term 'willfully absent' should be interpreted consistently" with the meanings of desertion and willful neglect and the rule that a divorced spouse is not a surviving spouse. *Id*. at 15-16. For the *Erwin* majority, context dictated that both physical *and* emotional separation are required to qualify as willful absence under MCL 700.2801(2)(e)(*i*). "Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes." *Erwin*, 503 Mich at 27.

Thus, MCL 700.2801(2)(e) generally stands for the proposition that when a spouse decides to *informally* dissolve a marriage by neglecting or deserting a partner or by withdrawing from that partner both physically and emotionally, that departing spouse loses the right to inherit from the spouse left behind.

These provisions encapsulate readily understood equitable principles. A spouse who contrives an *extralegal* remedy for a failed marriage by desertion, neglect, or abandonment should not be afforded the rights available to those who follow the rules. Simi-

larly, a spouse loses his or her right to survivorship status by willful physical and emotional absence, thereby bringing about "a practical end to the marriage," *Erwin*, 503 Mich at 17, rather than a legal end. As highlighted in *Erwin*, Subsections (2)(e)(*i*), (*ii*), and (*iii*) illustrate intentional acts that destroy a marriage and leave one partner legally adrift. Laws disinheriting the selfish partners "are premised on moral policy, eclipsing the usual desiderata of forced-share laws." Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U Ill L Rev 235, 270.[1]

Divorce is different.

During a divorce action, the court considers the parties' incomes, liabilities, premarital property, and abilities to work. Both partners weigh in. Ideally, the court equitably distributes the marital property in a manner that allows both parties to live independently. The divorce judgment eliminates the need for any property distribution after an ex-spouse dies, which is why a divorced spouse is not a surviving spouse. MCL 700.2801(1).

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[1] Before the advent of no-fault divorce, Michigan law required that the party seeking a divorce prove that the other party was at fault. See *Rosecrance v Rosecrance*, 127 Mich 322; 86 NW 800 (1901). Desertion was a ground for divorce, characterized in the caselaw as: "(1) cessation of cohabitation, (2) abandonment by his spouse without fault on complainant's part, and (3) that the abandonment or separation was against the will and desire of the party seeking the decree." *Ferguson v Ferguson*, 310 Mich 630, 633; 17 NW2d 777 (1945) (quotation marks and citations omitted). A court could find a marital partner "guilty" of desertion, and divorced against that partner's will. See *Fanner v Fanner*, 326 Mich 466, 469; 40 NW2d 225 (1949) ("We honor defendant's scruples against divorce but she has refused to comply with the conditions of married life and under all the circumstances we must consider that she is guilty of desertion since 1944—therefore, for a period much greater than two years, as plaintiff claims."). It makes sense that the Legislature would treat a spouse who deserts or abandons his or her partner as though divorced for the purposes of survivorship.

In this case, however, the divorce was incomplete when Hermann died. As best we can tell, no one deliberately delayed the process; sometimes, divorces take more time than anticipated or hoped. The point is that by filing for divorce, Anne sought to bring about a *legal* end to her marriage. She did not intend to abandon or desert Hermann by consigning him to a marriage with none of the fundamental attributes of a marriage. Rather, Anne intended to exercise her legal right to seek a divorce decree and to enforce the rights due her as a divorcing spouse.[2] Those rights potentially included spousal support and certainly included an equitable division of marital property. Anne's invocation of legal process allowed Hermann to protect his property rights, too.

The common law recognizes the distinction between a divorcing couple and a couple living separately due to one party's desertion. For example, in *In re Ehler's Estate*, 115 Cal App 403, 405-406 (1931), the California Court of Appeals held that a widow could not be automatically disinherited for abandonment because a divorce was pending at the time of the husband's death, in part because whether good cause existed for the separation could not be determined:

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[2] In his answer to Anne's complaint for divorce, Hermann averred, "Defendant does not wish to be divorced but accepts the fact that if Plaintiff is requesting the dissolution of the marriage, then joins in the request for a fair and equitable . . . division of property, resources, and debts, based on the present and future needs of both parties . . . ." Anne's right to a divorce under the circumstances is well established. See *Draggoo v Draggoo*, 223 Mich App 415, 424; 566 NW2d 642 (1997) ("[A] divorce will be granted upon the request of only one of the original marrying parties, i.e., even over the objection of one of the marrying parties."). And a divorce must be granted if a court finds that the marriage is so broken that its "objects . . . have been destroyed" and there is no reasonable likelihood of repair. MCL 552.6(3).

> Appellants contend that the widow voluntarily abandoned decedent and that she thereby waived her right to claim any allowance from his estate. As a matter of fact, the record shows that she left him and instituted an action for divorce against him, which was pending at the date of his death. It was, therefore, never determined whether or not respondent left voluntarily or for good cause. In view of this, we are of the opinion that there was a total absence of any showing that respondent by her conduct lost her statutory rights as the widow of decedent.

Applying statutory language similar to Michigan's, the Iowa Supreme Court held that a surviving wife was a widow who was entitled to inherit when she was living apart from her husband and pursuing a divorce at the time of her husband's death. *In re Quinn's Estate*, 243 Iowa 1271; 55 NW2d 175 (1952).[3] See also *Born v Born*, 213 Ga 830, 831; 102 SE2d 170 (1958) ("A separation by mutual consent of the parties does not constitute desertion, and a libel for divorce by the husband on grounds other than desertion is equivalent to a separation by consent.").

Common sense also dictates that a spouse cannot be disinherited on the ground of "willful absence" if a divorce is pending at the time of the other spouse's death. Many spouses separate during divorce proceedings.[4] Often, one leaves the other, physically and emotionally. If MCL 700.2801(2)(e)(*i*) is enforceable while a

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[3] At the time, Iowa allowed only fault-based divorce. The court elaborated, "It is our conclusion that the statute expresses no legislative intent that the merits of matters pertaining peculiarly to the divorce court should be inquired into upon applications for widow's allowances." *In re Quinn's Estate*, 243 Iowa at 1273. In a no-fault setting, the same rule should apply.

[4] In this case, the parties *stipulated* that Anne "shall have the right to occupy the former marital residence . . . subject to" Hermann's right to remove his personal effects.

divorce is pending, delays and gamesmanship are inevitable, particularly when the spouses are elderly or one is ill.[5]

Had there been no error in the circuit court's spousal-support ruling, the parties would have been divorced within a year and Carla's claim under MCL 700.2801(2)(e)(*i*) would have died aborning. The delay in getting to final judgment was no one's fault. It is nonsensical to believe that the Legislature intended that pure serendipity could dictate whether Anne was disinherited.

IV

An amendment to MCL 700.2801 that took effect in 2016 provides further support. In its entirety, MCL 700.2801 currently provides as follows:

> (1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of married couple is not a divorce for purposes of this section.

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[5] We respectfully disagree with the dissent's contention that we have disregarded either the language of the statute or the Supreme Court's construction of the language in *Erwin*. In *Erwin*, the Supreme Court labored to interpret "willfully absent" in a manner that corresponded contextually with the rest of the statute, and we have done the same. Further, we note that in *Erwin*, the majority held that the inquiry under MCL 700.2801(2)(e)(*i*) "presents a factual question for the trial court to answer: whether a spouse's complete absence *brought about* a practical end to the marriage." *Erwin*, 503 Mich at 17 (emphasis added). Anne's absence during the period that the divorce remained pending did not "bring about" the end of the Von Greiff marriage. The Supreme Court's interpretation of the statute, like ours, "giv[es] effect to the act as a whole." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

(2) For purposes of parts 1 to 4 of this article and of [MCL 700.3203], a surviving spouse does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or live together as a married couple.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.

(c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

(d) An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.

(e) An individual who did any of the following for 1 year or more before the death of the deceased person:

(*i*) Was willfully absent from the decedent spouse.

(*ii*) Deserted the decedent spouse.

(*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

(3) *For purposes of* [*MCL 700.3206*]*, a surviving spouse does not include either of the following:*

(a) An individual described in subsection (2)(a) to (d).

(b) *An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death.* [Emphasis added.]

MCL 700.3206 addresses, in part, the "right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body," MCL 700.3206(1), and is inapplicable here.

In adding MCL 700.2801(3), the Legislature carved out a new exception to the status of surviving spouse. A spouse who is a "party" to a divorce proceeding at the time of the other spouse's death may not have a say in the deceased's funeral arrangements. That's it—funeral arrangements. The Legislature did not identify "[a]n individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death" as otherwise excluded from the status of a surviving spouse. MCL 700.2801(3)(b).

The United States Supreme Court has explained that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v Harris Co*, 529 US 576, 583; 120 S Ct 1655; 146 L Ed 2d 621 (2000) (quotation marks and citation omitted; alteration in original). This canon of construction, known as *expressio unius est exclusio alterius*, means that "the expression of one thing suggests the exclusion of all others." *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003). The enactment of MCL 700.2801(3)(b) implies that the Legislature did not intend for divorcing spouses to fall within the categories of spouses excluded from inheriting under MCL 700.2801(2)(e). The Legislature specifically considered parties to an ongoing divorce in the context of spousal survivorship and limited only their ability to make funeral arrangements. It makes sense that no other limitation was intended. See *Pittsfield Charter Twp*, 468 Mich at 711 ("[T]he Legislature, by explicitly turning its attention to limits on the county siting power and deciding on only one limitation, must have considered the issue of limits and intended no other limitation.").

Anne Jones-Von Greiff had a legal right to divorce Hermann Von Greiff. Had the divorce proceeded a tad

more swiftly, she would have been entitled to spousal support and, presumably, a fair share of the marital property. Hermann's untimely death abated the divorce, but Anne's participation in a legal divorce process, regardless of its length, did not disqualify her from survivorship status. As a matter of law, Anne survived Hermann as his wife and is entitled to the benefits of that legal status.

We reverse.

MARKEY, P.J., concurred with GLEICHER, J.

M. J. KELLY, J. (*dissenting*). MCL 700.2801(2)(e)(*i*)—as written by the Legislature—causes an unjust result when applied to the facts of this case. But the statute is clearly written and recent; binding precedent from our Supreme Court requires that we follow it. Accordingly, I respectfully dissent.

MCL 700.2801(2)(e)(*i*) provides:

> (2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:
>
> * * *
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) *Was willfully absent from the decedent spouse*. [Emphasis added.]

Relying upon "common sense," the "common law," and the maxim *expressio unius est exclusio alterius*, as well as caselaw and statutes from sister states rather than the unambiguous language of the statute, the majority proclaims that, because "[i]t is nonsensical to believe that the Legislature intended that pure serendipity

could dictate whether Anne was disinherited," MCL 700.2801(2)(e)(*i*) is "inapplicable to the period of time consumed by divorce proceedings." I disagree.

Our Supreme Court has already provided binding guidance on the interpretation of MCL 700.2801(2)(e)(*i*), and unlike the majority, the Supreme Court relied upon the plain language of the statute. In *In re Erwin*, 503 Mich 1, 27-28; 921 NW2d 308 (2018), the Court stated that

> an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent," physically and emotionally, from the decedent spouse.

In this case, it is factually undisputed that Anne was both physically and emotionally absent from Hermann, her decedent spouse, for over a year prior to his death. Anne testified that when Hermann died "we were already divorced" and were just "waiting for the final judgment." She further testified that from May 18, 2017, until Hermann's death on June 17, 2018, they lived as a divorced couple. She even obtained an ex parte order prohibiting Hermann from living in the marital home.[1] In addition, Anne unequivocally stated that she did not provide Hermann with any direct emotional support after May 18, 2017.

[1] Eventually the parties stipulated to amend the ex parte order. Under the amended order, Hermann was still excluded from living in the marital home, but was permitted to return to it to collect personal items, so long as he gave Anne notice. The fact that there was an ex parte order

The following excerpt of Anne's testimony—quoted by the probate court in its findings of fact—is telling:

> *Q*. Okay. And Mrs. Jones-VonGreiff, you had no direct personal contact with Hermann VonGreiff after May 18, 2017, is that correct?
>
> *A*. Correct.
>
> *Q*. Okay. And that includes no physical contact, no telephone contact, or no other direct contact with Hermann?
>
> *A*. No.
>
> *Q*. Is that correct?
>
> *A*. Correct.
>
> *Q*. Thank you. Additionally, after May 18, 2017, the only emotional support you alleged to have offered Hermann was via text message to Hermann's daughter, Carla. Is that correct?
>
> *A*. Correct.
>
> *Q*. Okay. And you ceased sending those messages to Carla on May 31, 2017?
>
> *A*. Correct.
>
> *Q*. Okay. And so based on your testimony, you had no physical contact with Hermann VonGreiff after May 18, 2017 and offered no emotional support to him after May 31, 2017, correct?
>
> *A*. Correct.

The probate court was entitled to credit Anne's testimony and find that Anne intended to be completely physically and emotionally absent from Hermann starting on May 18, 2017, when she left the marital home, and continuing without interruption through and even beyond his death on June 17, 2018.

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that was turned into a stipulated order does not negate Anne's admissions that she was physically and emotionally absent from Hermann for over a year prior to his death.

It was during this period of time that she filed for divorce and obtained exclusive occupancy of the home, and Hermann underwent a serious surgical procedure that resulted in his aftercare taking place in a succession of different facilities.

Because the divorce was not finalized before Hermann's death, there will be no judicial division of the marital estate. And because Hermann died more than a year after Anne was physically and emotionally absent from him, she is disinherited under MCL 700.2801(2)(e)(*i*). This is the unfortunate, yet proper result of applying the statute as it is written. It creates an injustice to Anne, as it would to any other divorcing spouse in a similar situation.

Rather than follow the majority's approach of disregarding the language of the statute and the *Erwin* Court's interpretation of it, I would instead affirm the probate court. That the judiciary is tasked with interpreting, and not rewriting, the laws enacted by the Legislature is a tenet firmly established in our jurisprudence. See *McGhee v Helsel*, 262 Mich App 221, 226; 686 NW2d 6 (2004) (noting that this Court "may not rewrite the plain language of the statute and substitute [its] own policy decisions for those already made by the Legislature"); see also *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199; 747 NW2d 811 (2008) (stating that "courts are not to rewrite the express language of statutes"). The remedy to any injustice caused by this statute must come from the Legislature and not from a panel of this Court.

In its effort to wiggle free from the constraints of the statutory language, the majority begins with a review of the common law. This is unwarranted. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., is a comprehensive statutory creation. As a

result, it supersedes the common law. See *Hoertsman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.") (quotation marks and citation omitted). The majority's reliance on the common law—let alone the common law of foreign jurisdictions—is therefore unnecessary and inappropriate. It does not matter that the common law recognizes a distinction between a divorcing couple and a couple living separately due to one party's desertion of the marriage. Under the comprehensive statutory framework set forth in EPIC, that distinction is irrelevant when determining whether a surviving spouse will be disinherited under MCL 700.2801.

I find equally unavailing the majority's reliance on the 2016 amendment to MCL 700.2801 that added Subsection (3). See 2016 PA 57. MCL 700.2801(3) provides:

> (3) For purposes of section 3206, [which addresses funeral arrangements,] a surviving spouse does not include either of the following:
>
> (a) An individual described in subsection (2)(a) to (d).
>
> (b) *An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death.* [Emphasis added.]

The majority believes that by adding MCL 700.2801(3)(b), the Legislature implied that under *all* other circumstances, an individual who is party to a divorce proceeding with the decedent when the decedent dies *is* a surviving spouse. This deduction is

reached, the majority assures us, under the principle of *expressio unius est exclusio alterius*.[2] But this canon of construction cannot be employed if doing so would defeat the statute's clear legislative intent. *American Federation of State, Co & Muni Employees v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).

Here, the legislative intent is clear: an individual is not considered a surviving spouse under MCL 700.2801(2)(e)(*i*) if he or she was willfully absent from the decedent spouse for a year or more preceding the decedent's death. And as explained in MCL 700.2801(3)(b)—without regard to whether a spouse has or has not been willfully absent for the requisite period of time—if the spouse is in the process of a divorce, he or she is never considered a surviving spouse for the purposes of making funeral arrangements. It is not the case, however, that all divorcing spouses are willfully absent for a year prior to the death of their spouse. Some spouses might start divorce proceedings but remain physically present; others might be physically absent, but emotionally supportive. Moreover, an individual who is willfully absent from the decedent spouse for *less* than a year would still be considered a surviving spouse under MCL 700.2801(2)(e)(*i*), but would not be considered a surviving spouse for purposes of funeral arrangements under MCL 700.2801(3)(b). Because the two sections cover different circumstances, it is improper to apply the legislative exclusion that the Legislature expressly set forth for surviving spouses when addressing funeral arrangements and graft it onto MCL 700.2801(2)(e)(*i*) to frustrate the plainly stated legisla-

[2] The maxim "*expressio unius est exclusio alterius*"—the expression of one thing is the exclusion of others—means in this context that the express mention of one thing in a statute implies the exclusion of other similar things. *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012).

tive intent of that subsection. Whether a divorcing spouse is "willfully absent" or is *not* "willfully absent," MCL 700.2801(3)(b) states only that they will never be considered a surviving spouse.

Rather than interpreting the statute, the majority rewrites it to suit the majority's policy preferences. I would apply the actual language of the statute, not the majority's rewrite of it. Under the actual language of the statute, an individual is not a surviving spouse if (1) for a year or more before the decedent's death (2) he or she was willfully absent from the decedent spouse. In contrast, under the majority's reasoning, the statute is rewritten to disinherit a surviving spouse if: (1) for a year or more before the decedent's death, (2) he or she is willfully absent from the decedent spouse, and (3) he or she is not in the process of obtaining a divorce or annulment from the decedent spouse.

Furthermore, while it is true that MCL 700.2801 was amended to add a third subsection dealing with funeral arrangements, this does not lend support to the argument that the Legislature meant something other than what the seven words they chose to put into MCL 700.2801(2)(e)(*i*) plainly say. If anything, it lends support to the opposite conclusion: that the Legislature considered the statute, noted that it needed amendment by way of Subsection (3), and chose *not* to amend Subsection (2)(e)(*i*). If the Legislature is reflective of society at large, then nearly half of its members have been through the unhappy process of divorce, and, even if they have not, it is hardly a secret that a divorce case often can linger for more than a year in court. Yet, even in amending the statute, the Legislature chose to leave Subsection (2)(e)(*i*) as it was. The simple truth is we do not know what their intent was when they enacted the statute, and this fact requires us to be agnostic on the question.

If the Legislature so desires, it can expressly state that a divorcing spouse is not disinherited by statute if his or her spouse dies before a final judgment of divorce is entered. I encourage our legislators to do so. But they have not done so, and it is not the place of the judiciary to rewrite the plain language of this or any other statute enacted by the Legislature. Therefore, because the statute itself is clear and it makes no provision or exception for spouses going through a divorce, we must apply the statute as it is written, and leave the task of amending the statute to the Legislature.

FOSTER v VAN BUREN COUNTY

Docket No. 349001. Submitted March 10, 2020, at Lansing. Decided April 30, 2020, at 9:00 a.m.

Maureen P. Foster petitioned the Michigan Tax Tribunal (the MTT), challenging the Department of Treasury's decision to deny her a principal residence exemption (PRE) under MCL 211.7cc(3)(b) and assess her a $500 penalty under MCL 211.7cc(3)(a). Maureen and her husband, Francis, owned a home together in Illinois. Maureen owned another home in Covert Township, Michigan. For tax years 2016 and 2017, Maureen spent most of her time at the Michigan property and filed Michigan income tax returns as a resident with the filing status "married filing separately." As part of her 2016 and 2017 Michigan taxes, Maureen claimed a PRE for the Covert Township property. For those same tax years, Francis filed state income tax returns in Illinois with the status "married filing separately" and claimed an Illinois exemption for the couple's Illinois home. Also in tax years 2016 and 2017, Maureen and Francis filed joint federal income tax returns. The Department of Treasury denied Maureen's claimed PRE for 2016 and 2017 under MCL 211.7cc(3)(b) because Maureen, the person claiming the exemption, claimed or was granted a substantially similar exemption in another state—Illinois. The department also assessed a $500 penalty. Maureen petitioned the MTT to reverse the department's decision. The MTT issued a final judgment upholding the denial of Maureen's PRE for tax years 2016 and 2017. The MTT held that Maureen was eligible to claim a PRE for her Covert Township property in those years but was disqualified from doing so under MCL 211.7cc(3)(b), reasoning that MCL 211.7cc(3)(b) disqualifies a married couple who are required to file or do file a joint Michigan income tax return if 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. The MTT also upheld the $500 penalty. Maureen appealed.

The Court of Appeals *held*:

1. Michigan's PRE is governed by MCL 211.7cc and MCL 211.7dd. MCL 211.7cc(1) provides that 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 MCL 211.7cc. MCL 211.7cc(3) states conditions in which a person otherwise qualified to receive the PRE in MCL 211.7cc(1) is disqualified from doing so. In pertinent part, MCL 211.7cc(3) states that a married couple who are required to file or who do file a joint Michigan income tax return are entitled to not more than one exemption under this section and that 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, and if a person claims an exemption under this section and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00; (b) subject to MCL 211.7cc(3)(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. In this case, the MTT correctly held that Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b), but the MTT used incorrect reasoning to reach this conclusion. The MTT's interpretation of MCL 211.7cc(3)(b) erroneously conflated the first sentence of MCL 211.7cc(3) with the conditions for disqualification in MCL 211.7cc(3)(b), which did not comport with a plain reading of MCL 211.7cc(3)(b). The first sentence of MCL 211.7cc(3) excludes a "person" from claiming a single PRE if certain conditions are met. The subjects of these provisions are different—one applies to "a married couple," and the other applies to a "person." The question in this case is not whether Maureen and Francis (as "a married couple") are entitled to multiple PREs, but whether Maureen (as a "person") is entitled to a single PRE. Thus, whether Maureen and Francis were required to file a joint Michigan tax return was irrelevant to whether Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b). However, despite the problems with its analysis, the MTT correctly concluded that MCL 211.7cc(3)(b) barred Maureen from claiming a PRE. MCL 211.7cc(3)(b) provides that a person is not entitled to a PRE if (1) that person or his or her spouse owns property in a state other than Michigan and (2) that person or his or her spouse claims an exemption on that property that is substantially

similar to the PRE. Francis is Maureen's spouse, and he (1) owns property in Illinois and (2) claimed an exemption for that property that was substantially similar to the PRE. MCL 211.7cc(3)(b), by its terms, does not disqualify a person from claiming a PRE if that person and his or her spouse file separate income tax returns. Thus, the question was whether Maureen and Francis filed "separate income tax returns" as that phrase is used in MCL 211.7cc(3)(b), and they did not. Maureen and Francis filed separate state income tax returns, but they filed a joint federal income tax return. The plain meaning of "separate income tax returns" is that income tax returns are separate. The phrase is broad and is not limited to state income tax returns; it encompasses all income tax returns—state and federal—and requires that they be "separate." Accordingly, the phrase "separate income tax returns" as used in MCL 211.7cc(3)(b) refers to both separate state and separate federal income tax returns. Maureen and Francis did not file separate federal income tax returns; therefore, Maureen was disqualified under MCL 211.7cc(3)(b) from claiming a PRE. Because the MTT concluded that Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b), it reached the right result, and that result was affirmed.

2. MCL 211.7cc(3)(a) states, in pertinent part, that if a person claims an exemption under MCL 211.7cc and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00. The MTT held that Maureen was subject to the $500 penalty in MCL 211.7cc(3)(a) because (1) MCL 211.7cc(3)(b) is, by its terms, "[s]ubject to subdivision (a)"; (2) Maureen and Francis, as a married couple who filed a joint federal income tax return, are treated "as a single 'taxpayer' " under Michigan law; and (3) Francis (and therefore Maureen) claimed an exemption in Illinois that was substantially similar to the PRE. The MTT's reasoning had a fundamental flaw: MCL 211.7cc(3)(a) refers to a "person," not a "taxpayer," and "person" as used in MCL 211.7cc(3) means a single individual. Under MCL 211.7dd(a)(*i*), "owner," as used in MCL 211.7cc, means, among other things, a "person" with various types of interest in property, including a person who owns property. Under MCL 211.7dd(b), a "person," for purposes of defining "owner" as used in MCL 211.7cc, means an individual. When reading MCL 211.7cc as a whole, it is clear that a "person" to whom MCL 211.7cc(3) applies must also be an "owner" under MCL 211.7cc(1). Under MCL 211.7cc(1), only "an owner" of a "principal residence" can claim a PRE. It follows that if a "person" is not an "owner," he or she cannot claim a PRE, and there is no reason to determine

whether any of the conditions for disqualification under MCL 211.7cc(3) apply. Because "person" as used in MCL 211.7cc can only refer to a single individual, the penalty under MCL 211.7cc(3)(a) can only be assessed if a single individual claimed a PRE and a substantially similar exemption in another state. It was undisputed that the only exemption Maureen claimed was the PRE. Therefore, the MTT improperly assessed Maureen a penalty under MCL 211.7cc(3)(a).

MTT's denial of Maureen's PRE affirmed, but MTT's assessment of a $500 penalty vacated.

1. TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL RESIDENCE EXEMPTIONS — WORDS AND PHRASES — "SEPARATE INCOME TAX RETURNS."

MCL 211.7cc(3)(b) provides, in pertinent part, that a person is not entitled to a principal residence exemption (PRE) if that person or his or her spouse owns property in a state other than Michigan and that person or his or her spouse claims an exemption on that property that is substantially similar to the PRE; MCL 211.7cc(3)(b), by its terms, does not disqualify a person from claiming a PRE if that person and his or her spouse file separate income tax returns; the phrase "separate income tax returns" as used in MCL 211.7cc(3)(b) refers to both separate state and separate federal income tax returns.

2. TAXATION — GENERAL PROPERTY TAX ACT — EXEMPTIONS — PENALTY ASSESSMENT.

MCL 211.7cc(3)(a) states, in pertinent part, that if a person claims an exemption under MCL 211.7cc and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00; under MCL 211.7dd(a)(*i*), "owner," as used in MCL 211.7cc, means, among other things, a "person" with various types of interest in property, including a person who owns property; MCL 211.7dd(b) provides that a "person," for purposes of defining owner as used in MCL 211.7cc, means an individual; because "person" as used in MCL 211.7cc can only refer to a single individual, the penalty under MCL 211.7cc(3)(a) can only be assessed if a single individual claimed a principal residence exemption and a substantially similar exemption in another state.

Maureen P. Foster *in propria persona*.

Kreis, Enderle, Hudgins & Borsos, PC (by *Thomas G. King* and *Charles L. Bogren*) for Van Buren County.

Before: O'BRIEN, P.J., and JANSEN and GLEICHER, JJ.

O'BRIEN, P.J. Petitioner, Maureen Foster, appeals as of right the decision of the Michigan Tax Tribunal (the MTT) denying her claim for a principal residence exemption (PRE) under MCL 211.7cc(3)(b) and assessing her a $500 penalty under MCL 211.7cc(3)(a). By its terms, MCL 211.7cc(3)(b) does not permit a person to claim a PRE if that person or his or her spouse owns property in a different state for which that person or his or her spouse claims an exemption, deduction, or credit substantially similar to Michigan's PRE unless "that person and his or her spouse file separate income tax returns." We hold that "separate income tax returns" as used in MCL 211.7cc(3)(b) refers to separate state and separate federal income tax returns. Because Maureen and her husband, Francis, filed a joint federal return, Maureen was disqualified from claiming a PRE in Michigan given that her husband had claimed a similar exemption in another state. As for the $500 penalty, MCL 211.7cc(3)(a) permits the assessment of a penalty if a "person" claims a PRE "and a substantially similar exemption, deduction, or credit in another state . . . ." We hold that "person" as used in MCL 211.7cc(3) refers only to "an individual." Because it is undisputed that Maureen did not claim an exemption substantially similar to the PRE in another state, she could not be assessed a penalty under MCL 211.7cc(3)(a). For these reasons, we affirm the MTT's denial of Maureen's PRE under MCL 211.7cc(3)(b) but vacate its assessment of a $500 penalty under MCL 211.7cc(3)(a).

I. BACKGROUND

Maureen and Francis own a home together as tenants in the entirety in Brookfield, Illinois. Maureen

owns another home in Covert Township, Michigan, which she has owned for 42 years. Maureen used to treat the Michigan home as a vacation home and would pay its property taxes as a nonresident. But after her children moved away and she retired, Maureen began spending more time at the Michigan property. According to Maureen, for tax years 2016 and 2017, she spent most of her time at the Michigan property and filed Michigan income tax returns as a resident with the filing status "[m]arried filing separately." As part of her 2016 and 2017 Michigan taxes, Maureen claimed a PRE for the Covert Township property.[1] For those same tax years, Francis filed state income tax returns in Illinois with the status "[m]arried filing separately" and claimed an Illinois exemption for the couple's Illinois home. Also in tax years 2016 and 2017, Maureen and Francis filed joint federal income tax returns.

The Michigan Department of Treasury denied Maureen's claimed PRE for 2016 and 2017 because "[t]he person claiming the exemption, claimed or was granted a substantially similar exemption in another state"—Illinois. The department also assessed a $500 penalty.

Maureen filed a petition in the MTT to appeal the department's decision. In her petition, Maureen denied that she "claim[ed] or was granted a substantially similar exemption in another state" in 2016 and 2017. Maureen also noted that she and Francis filed separate state tax returns and that Francis alone claimed and was granted an exemption in Illinois.

In response, Van Buren County contended that Maureen was excluded from claiming a PRE under MCL 211.7cc(3)(b) because her husband claimed an

[1] Maureen also claimed a PRE in 2018, but that tax year is not at issue in this appeal.

exemption substantially similar to the PRE in Illinois and the couple did "not file a separate [federal] tax return[.]"

In a final judgment, the MTT upheld the denial of Maureen's PRE for tax years 2016 and 2017. The MTT held that Maureen was eligible to claim a PRE for her Covert Township property in those years but was disqualified from doing so under MCL 211.7cc(3)(b). The MTT reasoned:

> [MCL 211.7cc(3)(b)] disqualifies a married couple "who are required to file or do file a joint Michigan income tax return" if "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." [T]here is no dispute that Petitioner and her husband filed a joint Federal tax return for 2016 and 2017. If a married couple file[s] joint Federal tax returns, they are required to also file Joint Michigan tax returns. Petitioner, however, argues that her husband is not a "taxpayer" under the Income Tax Act because a taxpayer is a person subject to income taxes, as stated in MCL 206.26, and her husband is not subject to income taxes because he has no Michigan source of income. However, the Income Tax Act treats a husband and wife who file a joint Federal income tax return as a single "taxpayer." Therefore, because Petitioner and her husband filed joint Federal returns, they are considered one "taxpayer" and were thus required to file a joint Michigan return under MCL 211.7cc(3)(b). Because Petitioner and her husband were required to file a joint Michigan return, regardless of whether they did so, Petitioner is not entitled to a PRE in 2016 and 2017 because Petitioner's husband claimed a substantially similar exemption in Illinois. [Citations omitted.]

The MTT likewise upheld the $500 penalty, reasoning:

> With respect to the penalty, MCL 211.7cc(3)(a) provides that "[i]f a person claims an exemption under this section and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00." Petitioner argues that, because she, a person, has not claimed an exemption in another state, that she may not be assessed the $500.00 penalty. As stated above, Petitioner was disqualified under MCL 211.7cc(3)(b). That section begins by stating that it is "[s]ubject to subdivision (a)." Subdivision (a) does not include any language that would nullify the disqualifying factor in subdivision (b). The Tribunal therefore concludes that, by being "subject to" subdivision (a), the Legislature intended that the other administrative clauses in subdivision (a), such as the penalty provision, apply to subdivision (b). In essence, subdivision (a) penalized a single person if they claim similar exemption in another state and Michigan. By applying the rest of subdivision (a) to subdivision (b), the Legislature has also penalized a married couple who files joint tax returns, and are thus a single taxpayer, when one claims a similar exemption in another state and the other claims a PRE in Michigan. [Citation omitted.]

This appeal followed.

II. STANDARD OF REVIEW

If fraud is not alleged, the MTT's decision is reviewed for misapplication of the law or adoption of a wrong principle. *Smith v Forester Twp*, 323 Mich App 146, 149; 913 NW2d 662 (2018). The MTT's interpretation and application of a statute is a question of law reviewed de novo. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 537; 831 NW2d 255 (2013).

When interpreting a statute, our goal is to discern and give effect to the Legislature's intent. *Farris v McKaig*, 324 Mich App 349, 353; 920 NW2d 377 (2018). To do this, we begin by examining the language of the

statute. *Id*. If the language is clear and unambiguous, we enforce the statute as written. *Id*.

III. THE PRINCIPAL RESIDENCE EXEMPTION

Michigan's PRE is governed by MCL 211.7cc and MCL 211.7dd. *Drew v Cass Co*, 299 Mich App 495, 500; 830 NW2d 832 (2013). MCL 211.7cc(1) provides, "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." MCL 211.7cc(3) states conditions in which a person otherwise qualified to receive the PRE in Subsection (1) is disqualified from doing so. As relevant to this case, MCL 211.7cc(3) states:

> Except as otherwise provided in subsection (5), a married couple who are required to file or who do file a joint Michigan income tax return are entitled to not more than 1 exemption under this section. 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. . . . If a person claims an exemption under this section and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00. . . .[2]
>
> (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

[2] When Maureen sought to claim a PRE in 2016, MCL 211.7cc(3)(a) did not include language providing for a $500 penalty. See MCL 211.7cc(3)(a), as amended by 2016 PA 144.

> provided under this section, unless that person and his or her spouse file separate income tax returns.

The MTT held that Maureen was eligible to claim a PRE under MCL 211.7cc(1) for the Covert Township property but that she was disqualified from doing so under MCL 211.7cc(3)(b).

While we agree with the MTT that Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b), we disagree with its reasoning. The MTT's interpretation of MCL 211.7cc(3)(b) erroneously conflated the first sentence of Subsection (3) with the conditions for disqualification in Subsection (3)(b). The MTT stated that MCL 211.7cc(3)(b)

> disqualifies a married couple "who are required to file or do file a joint Michigan income tax return" if "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."

This recitation does not comport with a plain reading of MCL 211.7cc(3)(b). The first sentence of MCL 211.7cc(3) excludes "a married couple" from claiming more than one PRE if certain conditions are met, while MCL 211.7cc(3)(b) excludes a "person" from claiming a single PRE if certain conditions are met. The subjects of these provisions are different—one applies to "a married couple," and the other applies to a "person." The question in this case is not whether Maureen and Francis (as "a married couple") are entitled to multiple PREs, but whether Maureen (as a "person") is entitled to a single PRE. Thus, whether Maureen and Francis were required to file a joint Michigan tax return was

irrelevant to whether Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b).

Despite the problems with its analysis, the MTT correctly concluded that MCL 211.7cc(3)(b) barred Maureen from claiming a PRE. MCL 211.7cc(3)(b) provides that a person is not entitled to a PRE if (1) "that person or his or her spouse owns property in a state other than" Michigan and (2) "that person or his or her spouse claims an exemption" on that property that is "substantially similar to the" PRE. Francis is Maureen's spouse, and he (1) owns property in Illinois and (2) claimed an exemption for that property that was substantially similar to the PRE.[3]

But MCL 211.7cc(3)(b), by its terms, does not disqualify a person from claiming a PRE if "that person and his or her spouse file separate income tax returns." Thus, we must decide whether Maureen and Francis filed "separate income tax returns" as that phrase is used in MCL 211.7cc(3)(b).

We conclude that they did not. Maureen and Francis filed separate state income tax returns, but they filed a joint federal income tax return. The plain meaning of "separate income tax returns" is that income tax returns are separate. The phrase is broad and is not limited to state income tax returns; it encompasses all income tax returns—state and federal—and requires that they be "separate." If the Legislature intended to limit the meaning of "separate income tax returns" in MCL 211.7cc(3)(b) to "separate state income tax returns," it could have done so. Indeed, the Legislature specified "a joint Michigan income tax return" in the first sentence of MCL 211.7cc(3). Moreover, interpreting "separate

[3] The parties do not address on appeal whether the Illinois exemption claimed by Francis was substantially similar to the PRE, so we assume for purposes of this opinion that it was.

income tax returns" to mean separate state and separate federal income tax returns expands the pool of people "not entitled to" a PRE under MCL 211.7cc(3)(b), which effectively narrows the PRE in favor of the taxing authority. This follows the general rules for interpreting tax statutes that grant exemptions: "[T]ax statutes that grant tax credits or exemptions are to be narrowly construed in favor of the taxing authority because such statutes reduce the amount of tax imposed." *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1, 7; 884 NW2d 848 (2015) (quotation marks and citation omitted). We therefore conclude that the phrase "separate income tax returns" as used in MCL 211.7cc(3)(b) refers to both separate state and separate federal income tax returns. Maureen and Francis did not file separate federal income tax returns; therefore, Maureen was disqualified under MCL 211.7cc(3)(b) from claiming a PRE.[4]

Because the MTT concluded that Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b), it reached the right result, and we affirm its ruling. See *Smith*, 323 Mich App at 152.

IV. THE PENALTY ASSESSMENT

We disagree, however, with the MTT's assessment of a $500 penalty against Maureen under MCL 211.7cc(3)(a).

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[4] Maureen argues that the amendments of MCL 211.7cc(3) show a legislative intent to base disqualification under Subsection (b) on the "residency" of the person claiming the PRE and his or her spouse. According to Maureen, her and Francis's filings as residents of different states with the filing status "married filing separately" established their separate residencies and was therefore "in full compliance with MCL 211.7cc(3)(b)." Maureen's contention is belied by the plain language of MCL 211.7cc(3)(b), which does not refer to "residency" but instead requires a person claiming the PRE and his or her spouse to file "separate income tax returns."

MCL 211.7cc(3)(a) states, in pertinent part, "If a person claims an exemption under this section and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00." After holding that Maureen was disqualified from claiming a PRE under MCL 211.7cc(3)(b), the MTT held that Maureen was subject to the $500 penalty in MCL 211.7cc(3)(a) because (1) MCL 211.7cc(3)(b) is, by its terms, "[s]ubject to subdivision (a)"; (2) Maureen and Francis, as a married couple who filed a joint federal income tax return, are treated "as a single 'taxpayer' " under Michigan law; and (3) Francis (and therefore Maureen) claimed an exemption in Illinois that was substantially similar to the PRE.

The MTT's reasoning has a fundamental flaw: MCL 211.7cc(3)(a) refers to a "person," not a "taxpayer," and "person" as used in MCL 211.7cc(3) means a single individual. MCL 211.7cc(1) provides, "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." "Owner," as used in MCL 211.7cc, means, among other things, a "person" with various types of interest in property, including "[a] person who owns property . . . ." MCL 211.7dd(a)(*i*). " 'Person', for purposes of defining owner as used in section 7cc, means an individual . . . ." MCL 211.7dd(b).

The subsection at issue—MCL 211.7cc(3)—states conditions in which "a person is not entitled to" a PRE; it does not refer to conditions in which an "owner" is not entitled to a PRE. Yet, when reading MCL 211.7cc as a whole, it is clear that a "person" to whom MCL 211.7cc(3) applies must also be an "owner" under MCL 211.7cc(1). See *Bush v Shabahang*, 484 Mich 156, 167;

772 NW2d 272 (2009) (explaining that to properly interpret a statute, "the statute must be read as a whole"). Under MCL 211.7cc(1), only "an owner" of a "principal residence" can claim a PRE. It follows that if a "person" is not an "owner," he or she cannot claim a PRE, and there is no reason to determine whether any of the conditions for disqualification under MCL 211.7cc(3) apply. In other words, to apply MCL 211.7cc(3), the "person" to whom it applies must be able to claim a PRE, and only an "owner" can do that. See MCL 211.7cc(1). Thus, a "person" under MCL 211.7cc(3) must be an "owner" under MCL 211.7cc(1). And if a "person" under MCL 211.7cc(3) is necessarily an "owner" under MCL 211.7cc(1), then the definition of "person" in MCL 211.7dd(b)—which is "for purposes of defining owner as used in" MCL 211.7cc—applies to "person" as used in MCL 211.7cc(3).

MCL 211.7dd(b) defines "person" as used in MCL 211.7cc to mean "an individual." While it seems clear based on this definition alone that the term "person" as used in MCL 211.7cc(3) can refer only to Maureen, and not Maureen and Francis as a type of singular legal entity, this conclusion is made abundantly clear when MCL 211.7dd(b) is read as a whole. In its entirety, MCL 211.7dd(b) provides, " 'Person', for purposes of defining owner as used in section 7cc, means an individual and for purposes of defining owner as used in section 7ee means an individual, partnership, corporation, limited liability company, association, or other legal entity." By limiting the definition of "person" when used in MCL 211.7cc to an individual—and then in the same sentence allowing "person" as used in MCL 211.7ee to include various legal entities—the Legislature showed that "person" as used in MCL 211.7cc was not intended to refer to entities beyond "an individual." That is, "per-

son" as used in MCL 211.7cc refers only to a single individual, not to a legal entity such as a married couple.

Because "person" as used in MCL 211.7cc can only refer to a single individual, the penalty under MCL 211.7cc(3)(a) can only be assessed if a single individual claimed a PRE and a substantially similar exemption in another state. It is undisputed that the only exemption Maureen claimed was the PRE. Therefore, the MTT improperly assessed Maureen a penalty under MCL 211.7cc(3)(a).[5]

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[5] In holding that Maureen was subject to the penalty under MCL 211.7cc(3)(a), the MTT relied on this Court's opinion in *Stolper v Dep't of Treasury*, 164 Mich App 407, 415; 417 NW2d 520 (1987), and stated that "the Income Tax Act treats a husband and wife who file a joint Federal income tax return as a single 'taxpayer.' " *Stolper* is not applicable here because its holding that the MTT found relevant concerned whether a husband and wife could be treated as a single "taxpayer" entity, whereas the issue in this case concerns whether a husband and wife can be treated as a single "person" under MCL 211.7cc(3)(a). Moreover, at issue in *Stolper* was a homestead credit under MCL 206.520 of the Michigan Income Tax Act (the MITA), MCL 206.1 *et seq*., whereas this case concerns a PRE under MCL 211.7cc of the General Property Tax Act (the GPTA), MCL 211.1 *et seq*. This Court has questioned the propriety of applying *Stolper* to cases that "arise[] under the separate GPTA," *Stege v Dep't of Treasury*, 252 Mich App 183, 192; 651 NW2d 164 (2002), and this case presents one of the reasons why: the MITA has its own definition of "person"; that definition is starkly different from the relevant definition of "person" in the GPTA, compare MCL 206.16 with MCL 211.7dd(b); and the *Stolper* Court relied on the MITA's definition of "person" to render its holding, *Stolper*, 164 Mich App at 414-415. Thus, the statutory basis for *Stolper*'s holding is not applicable to this case arising under the separate GPTA.

The MTT also reasoned that the penalty under MCL 211.7cc(3)(a) was appropriate because MCL 211.7cc(3)(b) is "[s]ubject to subsection (a) . . . ." That MCL 211.7cc(3)(b) is subject to Subsection (3)(a) does not mean that a penalty under Subsection (3)(a) is appropriate if a person violates MCL 211.7cc(3)(b). Rather, MCL 211.7cc(3)(b) is subject to Subsection (3)(a) because they can be read to both apply to the same person. MCL 211.7cc(3)(a) states that a person is not entitled to a PRE

V. CONCLUSION

The MTT properly denied Maureen her claimed PRE under MCL 211.7cc(3)(b) but improperly assessed her a $500 penalty under MCL 211.7cc(3)(a). We therefore vacate the $500 penalty but otherwise affirm.

JANSEN and GLEICHER, JJ., concurred with O'BRIEN, P.J.

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if "[t]hat person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state." MCL 211.7cc(3)(b) states that a person is not entitled to a PRE if "that person . . . owns property in a state other than this state for which that person . . . claims an exemption, deduction, or credit substantially similar to the exemption provided under this section . . . ." By stating that MCL 211.7cc(3)(b) is "[s]ubject to subsection (a)," the Legislature clarified that, when either subsection could apply, MCL 211.7cc(3)(a) controls.

McKENZIE v DEPARTMENT OF CORRECTIONS
OLDEN v DEPARTMENT OF CORRECTIONS

Docket Nos. 347061 and 347798. Submitted March 2, 2020, at Detroit. Decided May 7, 2020, at 9:00 a.m. Leave to appeal sought.

In Docket No. 347061, Kenneth McKenzie filed an action in the Wayne Circuit Court against the Department of Corrections (MDOC), the state of Michigan, and then Macomb Correctional Facility Warden Randall Haas, claiming that defendants' actions violated the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*.; that the warden's actions violated Title I of the Americans with Disabilities Act (ADA), 42 USC 12111 *et seq*.; and that the actions of the state and the MDOC violated § 504 of the Rehabilitation Act, 29 USC 794. In Docket No. 347798, Fatima Olden filed a similar action in the Wayne Circuit Court against the MDOC, the state of Michigan, and the warden, alleging the same causes of action. The Macomb Correctional Facility began a program in 2015 in which inmates trained future leader dogs for the blind. Plaintiffs, who worked as corrections officers at the facility, alleged that they had allergy-related symptoms when they worked in housing units where the dogs were present. Both plaintiffs filed accommodation requests with the MDOC, requesting to be assigned to housing units that did not have dogs. Ultimately, the MDOC denied plaintiffs' accommodation requests, and the warden refused to assign them to other housing units or positions. In response, plaintiffs separately filed charges of disability discrimination with the Equal Employment Opportunity Commission (EEOC), and the EEOC found probable cause that the MDOC had violated the ADA. The EEOC proposed a conciliation agreement, which the MDOC rejected, and the charges were transferred to the Department of Justice (DOJ). The DOJ did not pursue charges on behalf of either plaintiff, and plaintiffs thereafter filed their separate complaints in the Wayne Circuit Court. Defendants moved for summary disposition of each plaintiff's ADA and Rehabilitation Act claims under MCR 2.116(C)(4), arguing that the trial courts lacked subject-matter jurisdiction to hear the claims because the claims arose under federal law and remedies might be available in federal court, thereby precluding the state courts from hearing the claims. In

Docket No. 347061, the court, Muriel D. Hughes, J., denied defendants' motion, reasoning that, as a circuit court, it had jurisdiction to hear McKenzie's claims. In Docket No. 347798, the court, Dana Margaret Hathaway, J., denied defendants' motion, similarly reasoning that the court had jurisdiction over Olden's claims. In Docket No. 347061, defendants appealed, and in Docket No. 347798, defendants appealed by leave granted. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case. Const 1963, art 6, § 13 provides that circuit courts have original jurisdiction in all matters not prohibited by law and appellate jurisdiction from all inferior courts and tribunals. In turn, MCL 600.605 grants circuit courts original jurisdiction to hear and determine all civil claims and remedies, except when exclusive jurisdiction is given in the Constitution or by statute to some other court or when circuit courts are denied jurisdiction by Michigan's Constitution or statutes. With regard to claims brought under federal law, if Congress does not provide for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims whenever their own constitution allows such jurisdiction. Because state courts possess sovereignty concurrent with that of the federal government, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law. If concurrent jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law. The central question regarding whether states have concurrent jurisdiction over a claim brought under federal law is whether Congress intended to limit jurisdiction to the federal courts and, if not, whether state law allows Michigan courts to exercise subject-matter jurisdiction. The presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by clear incompatibility between state-court jurisdiction and federal interests. There is no explicit or implicit indication that Congress intended to give federal courts exclusive jurisdiction over Title I ADA claims. 42 USC 12202 provides that a state is not immune under the 11th Amendment of the United States Constitution from an action in federal or state court of competent jurisdiction for a violation of the ADA. In other words, federal ADA claims against a state may properly be brought in the state's courts. However, while the ADA prescribes standards applicable to states, 42 USC 12202 does not abrogate the states' sovereign

immunity from suit for money damages. Thus, a private individual may not recover money damages against a state under the ADA but may, instead, only seek injunctive relief for such a claim.

2. The state of Michigan cannot waive its sovereign immunity and be sued without its consent to be sued through a legislative enactment or through the Constitution. The Court of Claims Act, MCL 600.6401(1), which waives the state's immunity by subjecting the state to the authority of the Court of Claims, is an exception to the general jurisdiction of circuit courts. MCL 600.6419 of the Court of Claims Act provides that except as provided in MCL 600.6421 and MCL 600.6440, the jurisdiction of the Court of Claims is exclusive and it has jurisdiction to hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, *ex contractu* or *ex delicto*, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state of any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. Given the dictionary definitions of the words "any" and "notwithstanding," the Court of Claims has jurisdiction over every claim against the state, its departments, and its officers except as provided in MCL 600.6421 (when a party has a right to a jury trial) and MCL 600.6440 (when a claimant has an adequate remedy for his or her claims in federal court). 42 USC 12117, which sets forth the remedies and enforcement provisions for Title I of the ADA, does not grant the right to a jury trial for a violation under that act. While MCL 600.6440 expressly prohibits a claimant from filing a claim in the Court of Claims when he or she has an adequate remedy in federal court, the statute does not explicitly preclude the concurrent jurisdiction of the circuit courts over such claims; in other words, divesting the Court of Claims of jurisdiction does not divest the circuit court of any jurisdiction it may have. Because state courts are presumed to have concurrent jurisdiction with federal courts over federal claims and there was no evidence that Congress intended to limit jurisdiction over ADA claims to the federal courts, circuit courts have jurisdiction to hear ADA claims against the state, its departments, or its officers when the claimant is seeking injunctive and declaratory relief. In this case, plaintiffs were not entitled to a jury trial for their ADA claims; therefore, MCL 600.6421 did not apply as an exception to the Court of Claims' exclusive jurisdiction over actions against the state, its departments, and its officers. However, the respective trial courts had subject-matter jurisdiction over plaintiffs' ADA claims against the MDOC, the state, and the warden because (1) circuit courts

have concurrent jurisdiction over federal claims, (2) MCL 600.6440 did not preclude that concurrent jurisdiction, and (3) plaintiffs were seeking injunctive and declaratory relief only. Accordingly, the trial courts correctly denied defendants' motions for summary disposition brought under MCR 2.116(C)(4).

3. 42 USC 2000d–7(a)(1) provides that a state is not immune from suit in federal court for a violation of § 504 of the Rehabilitation Act. Although 42 USC 2000d–7(a)(1) uses the phrase "suit in federal court," the provision does not limit jurisdiction over such claims to federal courts. States possess sovereignty concurrent with that of the federal government, and the grant of jurisdiction to federal courts does not imply that the jurisdiction is to be exclusive. Because the statute leaves intact the presumption of concurrent jurisdiction of the circuit courts to adjudicate claims arising under federal law, the trial courts in this case did not err by denying defendants' motions for summary disposition of plaintiffs' Rehabilitation Act claims based on a lack of subject-matter jurisdiction.

Affirmed.

STEVENS, P.J., did not participate because of her assignment to the Michigan Court of Claims.

1. COURTS — CIRCUIT COURTS — JURISDICTION — AMERICANS WITH DISABILITIES ACT.

Circuit courts have subject-matter jurisdiction over a private individual's claims against the state, its departments, or its officers when the individual is seeking injunctive or declaratory relief under Title I of the Americans with Disabilities Act (42 USC 12111 *et seq*.).

2. COURTS — CIRCUIT COURTS — JURISDICTION — REHABILITATION ACT.

Circuit Courts have subject-matter jurisdiction over a private individual's claims against the state, its departments, or its officers when the individual is seeking relief under § 504 of the federal Rehabilitation Act (29 USC 794).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kendell Asbenson*, Assistant Attorney General, for the Department of Corrections, the state of Michigan, and the Macomb Correctional Facility Warden.

Rasor Law Firm, PLLC (by *Andrew J. Laurila*) for Kenneth McKenzie and Fatima Olden.

Before: STEPHENS, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM. In Docket No. 347061, defendants[1] appeal as of right the trial court's denial of their motion for summary disposition premised on MCR 2.116(C)(4) (lack of subject-matter jurisdiction). In Docket No. 347798, which this Court consolidated with Docket No. 347061, defendants appeal by leave granted the trial court's order denying their motion for summary disposition, also brought under MCR 2.116(C)(4). *Olden v Dep't of Corrections*, unpublished order of the Court of Appeals, entered April 23, 2019 (Docket No. 347798). We affirm in both cases.

I. FACTS

The facts in both cases are similar and largely undisputed. Plaintiffs, Kenneth McKenzie and Fatima Olden (plaintiffs), are long-term employees of the Michigan Department of Corrections (MDOC) as corrections officers at the Macomb Correctional Facility (the Facility). In 2015, the Facility began a program in which inmates trained dogs to become leader dogs for the blind. The program only took place in certain housing units in the Facility. Plaintiffs were both assigned to one of those housing units and, therefore, frequently came into contact with dogs. Plaintiffs alleged that they were allergic to dogs and would suffer allergic symptoms whenever they came into close contact with the dogs. Plaintiffs alleged that they informed their supervisors of their allergic reactions and

[1] In this opinion, the term "defendants" refers to the Department of Corrections, the state of Michigan, and the Macomb Correctional Facility Warden. In Docket No. 347061, defendant Randall Hass, the now-retired Macomb Correctional Facility Warden, is not involved in the appeal.

then filed "Disability Accommodation Request and Medical Statements" with the MDOC, requesting that they be assigned to the housing units that did not have dogs.

While the Facility warden allowed plaintiffs to briefly move to different housing units, plaintiffs were ultimately returned to the housing units in which dogs were kept and trained. The MDOC denied plaintiffs' requests for accommodation, and the Facility warden also refused to accommodate their claimed allergies by assigning them to any other housing units or positions. Thereafter, plaintiffs each filed a charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC), after which they were allegedly subjected to retaliatory acts at the Facility. The EEOC found probable cause that the MDOC was in violation of the Americans with Disabilities Act (ADA) and proposed conciliation agreements between the MDOC and plaintiffs, but the MDOC refused the terms, and plaintiffs' charges were transferred to the Department of Justice (DOJ). The DOJ determined that it would not pursue charges on behalf of either plaintiff, and plaintiffs thereafter filed complaints against the Facility warden, the MDOC, and the state of Michigan. In their complaints, plaintiffs alleged violations of the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*., retaliation in violation of the same act, violation of Title I of the ADA, 42 USC 12111 *et seq*., by the Facility warden, and violation of § 504 of the Rehabilitation Act, 29 USC 794, by the state and the MDOC.

In each case, defendants moved for summary disposition of the respective plaintiff's ADA and Rehabilitation Act claims. Defendants asserted that the trial courts lacked subject-matter jurisdiction to hear the

claims because the claims arose under federal law and remedies for the claims might be available in the federal courts, precluding the state courts from hearing the claims. Specifically, defendants claimed that no Michigan statute provides circuit courts with jurisdiction over claims arising under the ADA or the Rehabilitation Act and that, lacking statutory authority and because the courts lacked jurisdiction for any claim against the state for which there is a remedy available in federal courts, the trial courts lacked subject-matter jurisdiction over plaintiffs' federal claims. The trial courts denied defendants' respective motions for summary disposition, separately opining that the court had subject-matter jurisdiction under Michigan's 1963 Constitution and the Revised Judicature Act (RJA)[2] to hear those claims. These appeals followed.

II. LAW GOVERNING JURISDICTION

On appeal, defendants assert that because the state retains sovereign immunity from suit in its own courts, waiver of that immunity can be achieved only through the Legislature's consent. They contend that while the Legislature has consented to the state being sued for certain things in the Court of Claims under the Court of Claims Act,[3] it has not authorized the state to be sued in the Court of Claims or any other state court for federal Title I ADA or Rehabilitation Act claims. Defendants acknowledge that while state courts generally have concurrent jurisdiction with federal courts over federal claims, Michigan is without a court of competent jurisdiction to hear ADA and Rehabilitation Act claims. According to defendants, the trial courts

[2] MCL 600.101 *et seq*.

[3] MCL 600.6401 *et seq*.

therefore lacked subject-matter jurisdiction over plaintiffs' federal claims and summary disposition should have been granted in their favor with respect to plaintiffs' ADA and Rehabilitation Act claims. We disagree.

"This Court reviews de novo a motion for summary disposition brought pursuant to MCR 2.116(C)(4)." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). A motion under MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004). "When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Weishuhn*, 279 Mich App at 155 (quotation marks and citation omitted). We review de novo as a question of law whether a trial court has subject-matter jurisdiction. *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016). This Court also "reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature." *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 75; 858 NW2d 751 (2014).

The singular issue for our resolution is whether the trial courts had subject-matter jurisdiction over plaintiffs' ADA and Rehabilitation Act claims. "Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case." *Forest Hills Coop v Ann Arbor*, 305 Mich App 572, 617; 854 NW2d 172 (2014). Michigan's circuit courts are courts of general jurisdiction and derive their power from the

Michigan Constitution. *Okrie v Michigan*, 306 Mich App 445, 467; 857 NW2d 254 (2014). Specifically, Const 1963, art 6, § 13 provides:

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

The RJA also provides:

> 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. [MCL 600.605.]

Thus, a circuit court is presumed to have subject-matter jurisdiction over a civil action *unless* (1) Michigan's Constitution or a statute expressly prohibits it from exercising jurisdiction or (2) Michigan's Constitution or a statute gives to another court exclusive jurisdiction over the subject matter of the suit. *Prime Time Int'l Distrib, Inc v Dep't of Treasury*, 322 Mich App 46, 52; 910 NW2d 683 (2017). " '[W]here this Court must examine certain statutory language to determine whether the Legislature intended to deprive the circuit court of jurisdiction,' this Court has explained, '[t]he language must leave no doubt that the Legislature intended to deprive the circuit court of jurisdiction of a particular subject matter.' " *Id*. (citation omitted; alterations in original).

There is no dispute that claims of ADA and Rehabilitation Act violations arise under federal law. With respect to claims sounding in federal law, our Supreme Court has provided guidance concerning the circuit courts' subject-matter jurisdiction:

> It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims whenever, by their own constitution, they are competent to take it. State courts possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause. Thus, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law. If concurrent jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law.
>
> In determining whether our state courts enjoy concurrent jurisdiction over a claim brought under federal law, it is necessary to determine whether Congress intended to limit jurisdiction to the federal courts.
>
> > In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.
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> [*Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 493-494; 697 NW2d 871 (2005) (quotation marks and citations omitted).]

Our inquiry, then, is first "whether Congress intended to limit to federal courts exclusive jurisdiction over such a dispute" and, second, "if not, whether state law

allows our courts to exercise subject-matter jurisdiction over the action." *Id*. at 494.

III. ADA CLAIMS

According to our Supreme Court, federal ADA claims may properly be brought in state courts because "state courts enjoy concurrent jurisdiction over such claims." *Peden v Detroit*, 470 Mich 195, 201 n 4; 680 NW2d 857 (2004), citing *Gulf Offshore Co v Mobil Oil Corp*, 453 US 473, 478; 101 S Ct 2870; 69 L Ed 2d 784 (1981). *Peden* noted the same considerations set forth in *Office Planning Group, Inc*, 472 Mich at 493-494. In support of this conclusion, the *Peden* Court[4] partially quoted 42 USC 12202, which provides, in full:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

By providing that a state is not immune from an action "in Federal *or State court* of competent jurisdiction," Congress has expressly acknowledged that actions against a state for violation of the ADA may lie in state courts. *Id*. (emphasis added).

However, in *Bd of Trustees of Univ of Alabama v Garrett*, 531 US 356, 364; 121 S Ct 955; 148 L Ed 2d 866 (2001), the United States Supreme Court was called on to determine whether, in enacting 42 USC

[4] *Peden*, 470 Mich at 201 n 4, quoting 42 USC 12202.

12202, "Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA." The Supreme Court held that it did not and that "to uphold the [ADA's] application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court . . . ." *Id*. at 374. The Supreme Court also acknowledged:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 US 123[; 28 S Ct 441; 52 L Ed 714] (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress. [*Bd of Trustees of Univ of Alabama*, 531 US at 374 n 9.]

Thus, while the Supreme Court determined that states' sovereign immunity from suit could not be abrogated by 42 USC 12202, suits by private individuals for injunctive relief against individual state officials in their official capacities may still be pursued in state courts. See *Ex parte Young*, 209 US 123. And *Bd of Trustees of Univ of Alabama* held only that states' sovereign immunity from suit for *money damages* could not be abrogated by 42 USC 12202. Accordingly, 42 USC 12202's abrogation of sovereign immunity with respect to injunctive claims brought against state officials in their official capacities under the ADA is still sound.

Applying the test set forth in *Office Planning Group, Inc*, 472 Mich at 494, we conclude that Congress did not intend to give federal courts exclusive jurisdiction over plaintiffs' ADA claims in which they seek declaratory and injunctive relief against the warden, a state official, in his official capacity. Such claims are pursuable in state courts according to *Bd of Trustees of Univ of Alabama*, 531 US at 374 n 9. Moreover, there is no explicit or implicit indication that Congress affirmatively divested state courts of their presumptively concurrent jurisdiction over such claims. Our next inquiry, then, under *Office Planning Group, Inc*, 472 Mich at 494, is whether state law allows our courts to exercise subject-matter jurisdiction over plaintiffs' ADA claims.

As previously indicated, Const 1963, art 6, § 13 provides that circuit courts "have original jurisdiction in all matters not prohibited by law[.]" Defendants argue, however, that under *Greenfield Constr Co, Inc v Dep't of State Hwys*, 402 Mich 172, 193; 261 NW2d 718 (1978), it has long been recognized that a state cannot be sued without its consent granted through a legislative enactment and that because neither the Court of Claims nor the circuit court is statutorily granted jurisdiction to hear and decide federal claims against the state or its actors, the ADA and Rehabilitation Act claims must be dismissed for lack of subject-matter jurisdiction. Indeed, Michigan courts have long recognized that the state, as sovereign, is immune from suit save as it consents to be sued because the state created the courts and, thus, is not subject to them; any relinquishment of sovereign immunity must be strictly interpreted in favor of the sovereign. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118; 782 NW2d 784 (2010). "Essentially, the state can only waive its immu-

nity and, consequently, consent to be sued through an act of the Legislature or through the constitution." *Id*. at 119.

Relevant to the instant matter, the state has waived its immunity and subjected itself to the authority of courts via the Court of Claims Act. The Court of Claims Act thus serves as one exception to the general jurisdiction of circuit courts when another court is given exclusive jurisdiction.[5] The act provides, in relevant part:

> Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. . . . Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1).]

Notably, MCL 600.6419(1)(a) vests the Court of Claims with exclusive jurisdiction to "hear and determine any claim or demand . . . against the state or any of its departments or officers . . . ." Giving the word "any" in this phrase its plain and ordinary meaning (see, e.g., *People v Kloosterman*, 296 Mich App 636,

[5] Because the jurisdiction of the Court of Claims is not constitutionally created but is, instead, constitutionally permitted and derives its power from the Legislature in Michigan statutory law, the Court of Claims does not have extensive and inherent powers akin to those of a constitutional court of general jurisdiction. *Okrie*, 306 Mich App at 456 (quotation marks omitted); *Prime Time Int'l Distrib*, 322 Mich App at 53 (quotation marks and citation omitted).

639; 823 NW2d 134 (2012)), "any" signifies "EVERY" and is used to indicate selection without restriction. See *Merriam-Webster's Collegiate Dictionary* (11th ed). MCL 600.6419(1)(a) further provides that the exclusive jurisdiction applies "notwithstanding another law that confers jurisdiction of the case in the circuit court." The word "notwithstanding" is defined as "[d]espite; in spite of . . . ." *Black's Law Dictionary* (11th ed). Thus, strictly construing the plain language in the statute relinquishing sovereign immunity from suit, *Greenfield Constr Co Inc*, 402 Mich at 197, the exclusive jurisdiction of the Court of Claims applies to every claim against the state, its departments, and its officers, despite any other law that confers jurisdiction of the case to the circuit court.

However, we cannot ignore that the Court of Claims Act *begins* by stating, "Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims . . . is exclusive." MCL 600.6419(1). Thus, at the outset, the Court of Claims Act sets forth two exceptions to the statement that provides it with exclusive jurisdiction over actions against the state, its departments, and officers: MCL 600.6421 and MCL 600.6440.

MCL 600.6421 provides, in relevant part:

> (1) Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be

> heard and determined by a circuit, district, or probate court in the appropriate venue.
>
> (2) For declaratory or equitable relief or a demand for extraordinary writ sought by a party within the jurisdiction of the court of claims described in section 6419(1) and arising out of the same transaction or series of transactions with a matter asserted for which a party has the right to a trial by jury under subsection (1), unless joined as provided in subsection (3), the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ until a final judgment has been entered, and the matter asserted for which a party has the right to a trial by jury under subsection (1) shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ.

Thus, the first exception dictates that the Court of Claims has jurisdiction over claims brought against the state, its departments, or its officers *except* when a party has the right to a trial by jury and asserts that right as required by law. In that situation, "the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue." MCL 600.6421(1).

Plaintiffs' ADA claims are brought under Title I of the act. Title 1, which address employment discrimination, is provided for in Subchapter I of the codified version of the ADA. Within Subchapter I, 42 USC 12112 states as follows:

> **(a) General rule**
>
> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee . . . ;

* * *

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]

Subchapter I, like all of the subchapters in the ADA, contains its own remedy and enforcement provisions. 42 USC 12117(a), setting forth the powers, remedies, and procedures applicable to Title I of the ADA, states:

> The powers, remedies, and procedures set forth in [42 USC 2000e–4, 42 USC 2000e–5, 42 USC 2000e–6, 42 USC 2000e–8, and 42 USC 2000e–9] of [Title 42] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of [Title 42], concerning employment.

Plaintiffs do not claim that any of the sections referred to in 42 USC 12117 provides a right to a jury trial for a claim of violation of Title I of the ADA when injunctive and declaratory relief is requested. Plaintiffs also fail to direct this Court to any authority suggesting a right to a jury trial in these circumstances. Thus, unless the second exception set forth in MCL 600.6419 of the Court of Claims Act applies (that is, MCL 600.6440), their ADA claims would be subject to the exclusive jurisdiction of the Court of Claims.

MCL 600.6440 states:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

A review of the plain statutory language indicates that if a claimant has an adequate remedy for his or her claims in the federal court, the claimant *cannot* file the claim in the Court of Claims. All parties essentially agree that this interpretation is correct. However, defendants contend that the statute also necessarily dictates that if a claimant has an adequate remedy in

the federal court he or she must file the claim *in the federal court*, whereas plaintiffs contend that the circuit court's concurrent jurisdiction applies. We agree with plaintiffs.

While MCL 600.6440 precludes the filing of a claim in the Court of Claims if an adequate remedy in the federal courts exist, it does not explicitly preclude the concurrent jurisdiction of the circuit courts over such claims. Significantly, the statute provides that "[n]o claimant may be permitted to file claim in *said* court . . . ." (Emphasis added.) "Said" is defined as "AFOREMENTIONED." *Merriam-Webster's Collegiate Dictionary* (11th ed). Because the Court of Claims Act governs the Court of Claims, the aforementioned (and thus "said") court referred to in MCL 600.6440 is the Court of Claims. As a result, MCL 600.6440 directs only that if an adequate remedy is available in the federal courts, the claim cannot be filed, specifically, in the Court of Claims. Defendants' more expansive reading of this statute to then require that such actions are limited to the federal courts is incorrect. Divesting the Court of Claims of jurisdiction does not divest the circuit court of any jurisdiction it may already have. And our Supreme Court has directed that state courts are presumed to have concurrent jurisdiction with federal courts over federal claims, with that presumption being rebutted *only* when "*Congress* intended to limit jurisdiction to the federal courts." *Office Planning Group, Inc*, 472 Mich at 493 (emphasis added). "*Congress* . . . may confine jurisdiction to the federal courts either explicitly or implicitly" through "explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id*. at 493-494 (quotation marks and citation omitted; emphasis added). There has been no contention or show-

ing that Congress intended to limit jurisdiction to the federal courts over the specific ADA claims asserted by plaintiffs. Thus, the presumption of concurrent jurisdiction over such claims stands, and plaintiffs' Title I ADA claims against the state officer warden in his official capacity and seeking injunctive and declaratory relief may be heard in the circuit court. As a result, the trial courts properly denied defendants' motions for summary disposition premised on lack of subject-matter jurisdiction over plaintiffs' respective ADA claims.

IV. REHABILITATION ACT CLAIMS

Defendants contend that the trial courts erred by denying their motions for summary disposition concerning plaintiffs' claims of violations of § 504 of the Rehabilitation Act, 29 USC 794. Defendants, however, dedicate very little argument to plaintiffs' Rehabilitation Act claims. Assuming that defendants intend the same arguments concerning sovereign immunity to apply to plaintiffs' Rehabilitation Act claims, we note that the Supreme Court has directed that Congress may, in the exercise of its spending power, condition its grant of funds to the states on their taking certain actions that Congress could not require them to take and require that the acceptance of these funds be conditioned on a constructive waiver of its sovereign immunity. *College Savings Bank v Florida Prepaid Postsecondary Ed Expense Bd*, 527 US 666, 686; 119 S Ct 2219; 144 L Ed 2d 605 (1999). Consistent with this holding and relevant to the instant matter, 42 USC 2000d–7 states:

> **(a) General provision**
>
> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from

> suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . , title IX of the Education Amendments of 1972 . . . , the Age Discrimination Act of 1975 . . . , title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Thus, Congress has clearly and explicitly directed that a state does not enjoy sovereign immunity from suits for violation of § 504 of the Rehabilitation Act—claims that were asserted by plaintiffs.

We note that 42 USC 2000d–7 states that states are not immune from "suit in Federal court" for a violation of § 504 of the Rehabilitation Act. This may, at first blush, lead to a conclusion that claims alleging violations of that section of the Rehabilitation Act must be brought in a federal court. However,

> the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. [*Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013) (quotation marks, citation, and brackets omitted).]

Moreover, in cases "arising under federal law," "there is a deeply rooted presumption in favor of concurrent state court jurisdiction, rebuttable if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim." *Mims v Arrow Fin Servs, LLC*, 565 US 368, 378; 132 S Ct 740; 181 L Ed 2d 881 (2012) (quotation marks and citation omitted). And " 'the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.' "

Id. at 380, quoting *United States v Bank of New York & Trust Co*, 296 US 463, 479; 56 S Ct 343; 80 L Ed 331 (1936).

In *Mims*, the Supreme Court noted that the Telephone Consumer Protection Act, 47 USC 227, permits a private person to seek redress for violations of the act or regulations " 'in an appropriate court of [a] State' " " 'if [such an action is] otherwise permitted by the laws or rules of court of [that] State[.]' " *Mims*, 565 US at 380, quoting 47 USC 227(b)(3). The *Mims* Court determined that while the statute at issue provided state courts with jurisdiction, it did not do so *exclusively* through use of the word "only" or "exclusively" before "State court" in the statute. *Mims*, 565 US at 380. Thus, the *Mims* Court opined that the original jurisdiction of federal courts over federal questions, set forth in 28 USC 1331, still applied and that the state forum mentioned in 47 USC 227(b)(3) was optional, but not mandatory. *Id*. at 381.

The same holds true here. Had Congress intended that plaintiffs' specific Rehabilitation Act claims be brought *exclusively* in the federal court, it was well aware how to do so. For example, 47 USC 227(g)(2) provides "exclusive jurisdiction over [such] actions" in "[t]he district courts of the United States[.]" See *Mims*, 565 US at 380. And "Section 227(g)(2)'s exclusivity prescription reinforce[s] the conclusion that [47 USC 227(b)(3)'s] silence . . . leaves the jurisdictional grant of § 1331 untouched." *Id*. at 380-381 (quotation marks and citation omitted; first alteration in original).

In this case, 42 USC 2000d–7 explicitly states that states are not immune from " suit in Federal court" for a violation of § 504 of the Rehabilitation Act. That provision leaves intact the original jurisdiction of federal courts over federal questions set forth in

28 USC 1331. When read in conjunction with the exception set forth in the Court of Claims Act at MCL 600.6440 (directing that no claim may be filed against the state, its departments, or employees in the Court of Claims when an adequate remedy for his or her claim exists in the federal courts), the presumption of concurrent jurisdiction with the circuit courts is also left intact. And because "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States," the circuit court's concurrent jurisdiction applies. *Burt*, 571 US at 19 (quotation marks and citation omitted). The trial courts thus did not err by denying defendants' motions for summary disposition of plaintiffs' Rehabilitation Act claims based on lack of subject-matter jurisdiction.

Affirmed.

CAVANAGH and SERVITTO, JJ., concurred.

STEPHENS, P.J., did not participate because of her assignment to the Michigan Court of Claims.

SLIS v STATE OF MICHIGAN
A CLEAN CIGARETTE CORPORATION v GOVERNOR

Docket Nos. 351211 and 351212. Submitted April 14, 2020, at Grand Rapids. Decided May 21, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 912 (2020).

In Docket No. 351211, Marc Slis and 906 Vapor brought an action in the Houghton Circuit Court against the state of Michigan and the Department of Health and Human Services (the DHHS), seeking declaratory relief that the state's promulgation of emergency rules prohibiting the sale and distribution of flavored nicotine vaping products in Michigan was invalid. On September 18, 2019, the DHHS promulgated the emergency rules entitled "Protection of Youth from Nicotine Product Addiction" because the DHHS found that Michigan was confronted with a vaping crisis among youth. As required by MCL 24.248(1) of the Administrative Procedures Act (the APA), MCL 24.201 *et seq*., the Governor concurred in the finding of an emergency and in the determination that the public interest required the promulgation of the emergency rules. The rules remained in effect for six months, and on March 11, 2020, the Governor filed a certificate of need for extension of the emergency, extending the rules' effectiveness another six months. Plaintiff Slis owned and operated 906 Vapor, a retail store that sold a variety of vapor products, some of which contained nicotine with nontobacco flavors. Slis filed a motion for preliminary injunction and an emergency ex parte motion for a temporary restraining order (TRO) that would prohibit defendants from enforcing the emergency rules pending a hearing on the motion for preliminary injunction. Slis claimed that his business would suffer an immediate and irreparable injury if the court did not enjoin enforcement of the emergency rules because his business would have to close its doors, terminate its employees, and destroy over 80% of its inventory. The circuit court, Charles R. Goodman, J., denied the ex parte motion for a TRO on the basis of a technical defect, and shortly thereafter the case was transferred to the Court of Claims. Slis filed in the Court of Claims an emergency motion for expedited consideration of a renewed motion for TRO, and the Court of Claims, CYNTHIA D. STEPHENS, J., denied Slis's motion. The Court of Claims also

denied Slis's motion for a preliminary injunction without prejudice, concluding that he had not met the burden of demonstrating an irreparable harm. The Court of Claims then consolidated Slis's suit with Docket No. 351212. Slis sought leave to appeal in the Court of Appeals, which the Court of Appeals, METER, P.J., and GADOLA and SWARTZLE, JJ., denied in an unpublished order entered on October 7, 2019 (Docket No. 350888).

In Docket No. 351212, A Clean Cigarette Corporation (ACC) brought an action against the state, the Governor, and the DHHS in the Court of Claims. ACC, a Michigan-based retailer of flavored vapor products, operated 20 locations throughout the state, employed 53 people, and sold about 2,500 flavored vapor cartridges a month that contained zero nicotine. ACC moved for a TRO and an order to show cause why a preliminary injunction should not issue. ACC alleged that it would suffer irreparable injury if the emergency rules were enforced because enforcement would result in the closure of almost all of ACC's 20 locations. The Court of Claims denied the motion for a TRO and ordered the consolidation of the two lawsuits. ACC also moved for a preliminary injunction. The Court of Claims held a preliminary-injunction hearing, during which all plaintiffs testified that enforcement of the emergency rules would cause them to suffer immediate and irreparable injury because the businesses and business owners would have to close their doors, terminate their employees, and destroy their inventory. Following the hearing, the Court of Claims issued a written opinion and order that enjoined and restrained enforcement of the emergency rules. It found that plaintiffs would suffer irreparable harm if the emergency rules were not enjoined. With respect to whether plaintiffs were likely to succeed on the merits, the Court of Claims noted that plaintiffs had argued that the DHHS had no rulemaking authority on the subject matter. But the Court of Claims found that it did not need to reach that particular issue because it agreed with plaintiffs' argument that the emergency rules were procedurally invalid for the reason that there was no emergency. Therefore, the Court of Claims determined that plaintiffs had demonstrated a likelihood of success on the merits. Balancing the harms to the parties, the Court of Claims ruled that various factors, taken together, supported the issuance of the preliminary injunction. Defendants sought leave to appeal in the Court of Appeals. Defendants also filed a bypass application for leave to appeal in the Supreme Court, and the Supreme Court rejected the application. 505 Mich 943 (2019). In separate unpublished orders entered on December 9, 2019, the Court of Appeals granted leave to appeal limited to the issues raised in the applica-

tions, expedited the appeals, consolidated the two cases, and denied defendants' motion for a stay.

The Court of Appeals *held*:

1. A court must take four factors into consideration when determining whether to issue a preliminary injunction: (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the applicant is likely to prevail on the merits, (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party, and (4) whether the public interest will be harmed if a preliminary injunction is issued. In these cases, the Court of Claims concluded that there was no true emergency that permitted the DHHS and the Governor to promulgate emergency rules under MCL 24.248(1) without a hearing and public participation. MCL 24.248 does not provide for any type of judicial review of an emergency rule promulgated by an agency, but it also has no language prohibiting judicial review. MCL 24.264 provides, in pertinent part, that unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. An agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute, when the rule does not comply with the intent of the Legislature, or when the rule is arbitrary or capricious. A rule may also be procedurally invalid if it was not properly promulgated, e.g., when a required hearing was not conducted. In these cases, MCL 24.264 gave plaintiffs the right to challenge the validity of the emergency rules under the plain and unambiguous language of the statute. However, MCL 24.248 and MCL 24.264 do not provide any standards for reviewing agency fact-finding that occurs in promulgating a rule or in deciding whether to promulgate an emergency rule. Nevertheless, the principle of giving due deference to an agency with regard to fact-finding because of its expertise is well established in civil jurisprudence. Therefore, the separation-of-powers doctrine was invoked to incorporate a due-deference standard with respect to agency fact-finding under MCL 24.248 and MCL 24.264. Accordingly, in the context of a declaratory-judgment action, when a court reviews an agency's decision, concurred in by the Governor, that the preservation of the public health, safety, or welfare requires the promulgation of emergency rules under MCL 24.248(1) absent notice and partici-

pation procedures, the court must give due deference to the agency's expertise and not invade the agency's fact-finding by displacing the agency's choice between two reasonably differing views. However, giving due deference to agency fact-finding does not equate to subservience or complete capitulation that would allow a reviewing court under MCL 24.248 and MCL 24.264 to entirely abdicate its role in determining the validity of an emergency rule.

2. The Court of Claims did not err by finding that plaintiffs had demonstrated a likelihood of success on the merits at this stage of the proceedings with respect to their claim that the emergency rules were procedurally invalid. MCL 24.248(1) provides, in pertinent part, that if an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by MCL 24.241 and MCL 24.242, the agency may dispense with all or part of the procedures. This language allows for the promulgation of emergency rules but only if compliance with APA notice, hearing, and participation procedures will prevent an agency from being able to preserve the public's health, safety, or welfare. The evaluation requires contemplation of evidence showing the effect on the public health, safety, or welfare if enforcement of a proposed rule is delayed during the time frame necessary to comply with notice, hearing, and participation procedures. Evidence of the events or circumstances that would likely transpire during the period of delay needs to be assessed for purposes of determining whether the public health, safety, or welfare would be sufficiently compromised so as to constitute an emergency and justify promulgation and enforcement of emergency rules. The number of individuals whose health, safety, or welfare would be affected during the period of delay and the nature and seriousness of the impact on those individuals would be key factors to consider. In these cases, defendants presented evidence that lent support for a determination that youths' use of e-cigarettes or vapor products is a serious public-health concern and that flavored nicotine vapor products are at the forefront of driving and exacerbating the problem. However, giving due deference to defendants' factual finding that the preservation of the public health, safety, or welfare required the promulgation of emergency rules absent notice and participation procedures, defendants' finding was not reasonable. The case did not present a choice between two reasonably differing views on whether an emergency existed. Defendants did not present evidence indicating, showing, suggesting, or giving an opinion on any of the following: the number of youths who could be expected to start vaping for the first time during the period of delay because flavored nicotine vapor products remained on shelves; the

danger of those first-timers becoming addicted to nicotine solely on the basis of their use of flavored nicotine vapor products during the period of delay; and whether youths already using flavored nicotine vapor products would have a decreased chance of a healthier or addiction-free outcome if there were a period of delay. On the basis of the evidence presented at this stage of the proceedings, the Court of Claims correctly concluded that plaintiffs were likely to succeed on the merits regarding their shared request that the emergency rules be declared invalid.

3. The Court of Claims did not err by finding that plaintiffs had carried their burden of demonstrating irreparable harm. The threat of bankruptcy and the possibility of going out of business can constitute irreparable harm. Additionally, loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute. With respect to ACC, the Court of Claims determined that ACC had presented evidence of loss of goodwill and competitive position in the marketplace that constituted irreparable harm because of the difficulty in calculating damages and because a significant loss of goodwill cannot be compensated by awarding economic damages. The Court of Claims found that the emergency rules effectively banned ACC from using its trade name and branding, caused ACC to lose a significant portion of its sales, resulted in store closings, and began to destroy the business. With respect to Slis, the Court of Claims determined that he had demonstrated irreparable harm because the emergency rules caused Slis to shutter his business, resulted in his customers obtaining flavored vaping products from Wisconsin, and ultimately would lead to the loss of his entire business. Accordingly, the Court of Claims did not clearly err by concluding that plaintiffs would sustain irreparable harm if the emergency rules were not enjoined.

4. The Court of Claims did not clearly err regarding its finding on the balancing of harms. The Court of Claims concluded that the harm that would befall plaintiffs if no preliminary injunction were issued would outweigh the harm that would occur to defendants should a preliminary injunction be issued, especially because defendants had not articulated that they would suffer any harm. The Court of Claims also stated that defendants would not suffer any harm if they were forced to comply with the APA's notice and participation procedures before implementing the rules regulating vapor products.

5. The Court of Claims did not clearly err by finding that the public-interest factor was neutral given that there were compelling public interests on both sides of the issue, and even if there was

error and the factor should have been found in favor of defendants, reversal would still not be warranted considering that the other three factors favored the issuance of a preliminary injunction. Accordingly, the Court of Claims did not abuse its discretion by granting plaintiffs' motions for a preliminary injunction.

Affirmed.

BOONSTRA, J., concurring, fully concurred in the majority opinion but wrote separately to highlight his growing concern about governmental overreach, particularly as it pertains to the promulgation and extension of emergency rules that bypass the APA's notice and participation procedures.

DECLARATORY JUDGMENTS — ADMINISTRATIVE PROCEDURES ACT — JUDICIAL REVIEW OF AN AGENCY'S PROMULGATION OF EMERGENCY RULES WITHOUT FOLLOWING NOTICE AND PARTICIPATION PROCEDURES.

MCL 24.248(1) of the Administrative Procedures Act, MCL 24.201 *et seq*., provides, in pertinent part, that if an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by MCL 24.241 and MCL 24.242, the agency may dispense with all or part of the procedures; in the context of a declaratory-judgment action, when a court reviews an agency's decision, concurred in by the Governor, under MCL 24.248(1) that the preservation of the public health, safety, or welfare requires the promulgation of emergency rules absent notice and participation procedures, the court must give due deference to the agency's expertise and not invade the agency's fact-finding by displacing the agency's choice between two reasonably differing views; giving due deference to agency fact-finding, however, does not equate to subservience or complete capitulation that would allow a reviewing court to entirely abdicate its role in determining the validity of an emergency rule.

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Fraser Trebilcock Davis & Dunlap, PC (by *Thaddeus E. Morgan*, *Aaron Davis*, and *Ryan K. Kauffman*) for A Clean Cigarette Corporation.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Joseph E. Potchen* and *James E. Long*, Assistant Attorneys General, for defendants.

Amici Curiae:

Michael Siegel *in propria persona*.

Kerr, Russell and Weber, PLC (by *Daniel J. Ferris*) for Tylise Ivey, the Public Health and Medical Organizations, Sharon Swindell, and Terrill Bravender.

Nicholas Bagley *in propria persona*.

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

MARKEY, P.J. In these consolidated appeals, defendants appeal by leave granted the opinion and order of the Court of Claims granting plaintiffs' motions for a preliminary injunction. The ruling enjoined enforcement of emergency rules promulgated by defendant the Department of Health and Human Services (the DHHS) pursuant to MCL 24.248(1). In significant part, the emergency rules prohibit the sale and distribution of flavored nicotine vapor products in Michigan. The stated purpose of the emergency rules was to combat a vaping crisis among the youth of our state and protect them from nicotine product addiction. As required by MCL 24.248(1), defendant Governor concurred in the DHHS's finding that it was necessary to promulgate the emergency rules. Plaintiffs commercially sell vapor products that are now banned under the emergency rules, and they filed declaratory-judgment actions against defendants alleging that the emergency rules are invalid. We hold that the DHHS and the Governor are entitled to due deference with regard to the finding of an emergency under MCL 24.248(1), but not complete capitulation, and that the Court of Claims ultimately did not abuse its discretion by issuing the preliminary injunction on the basis of the evidence presented by the parties. Accordingly, we affirm.

I. CONSTITUTIONAL AND STATUTORY FRAMEWORK

Our Constitution states, "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern," and "[t]he legislature shall pass suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51. The Public Health Code, MCL 333.1101 *et seq*., reflects the Legislature's continuing efforts to carry out its duties under the Michigan Constitution. MCL 333.2221(1) provides:

> [T]he [DHHS] shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems to the extent provided by law.

The DHHS may "[e]xercise authority and promulgate rules to safeguard properly the public health[.]" MCL 333.2226(d). And MCL 333.2233(1) similarly provides that "[t]he [DHHS] may promulgate rules necessary or appropriate to implement and carry out the duties or functions vested by law in the department."

The promulgation of administrative rules is governed by Chapter 3 of the Administrative Procedures Act (the APA), MCL 24.201 *et seq*.[1] Generally, "before the adoption of a rule, an agency . . . shall give notice of

[1] A "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207. MCL 24.207(a) through (r) list a

a public hearing and offer a person an opportunity to present data, views, questions, and arguments." MCL 24.241(1). Publication requirements regarding the notice of public hearing are set forth in MCL 24.242. MCL 24.248(1) describes the circumstances in which the normal procedural requirements in promulgating a rule need not be followed, providing, in pertinent part:

> If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by [MCL 24.241 and MCL 24.242] and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by [MCL 24.246] endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by [MCL 24.245] and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule.

II. PROMULGATION OF EMERGENCY RULES

We initially note that pursuant to 2019 PA 18, effective September 2, 2019, the Legislature amended the youth tobacco act (the YTA), MCL 722.641 *et seq*., extending the prohibition of sales of tobacco products to minors to include "vapor products" and "alternative

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number of actions that are excepted from the definition. There is no dispute that the instant cases concern a "rule" promulgated by the DHHS.

nicotine products."[2] Subsequently, on September 18, 2019, the DHHS, relying on the legal authorities recited earlier, promulgated emergency rules entitled "Protection of Youth from Nicotine Product Addiction." 2019 Mich Reg 18 (October 15, 2019), p 7. The DHHS found that Michigan was confronted with a "vaping crisis among youth," necessitating the promulgation of emergency rules to address the crisis. *Id*. The DHHS articulated numerous reasons for its finding, footnoting the sources for all its factual assertions. *Id*. at 7-8. The general premise of the DHHS's position was that "[s]ince 2014, e-cigarettes (also known as vapor products) have been the most commonly used tobacco product among youth in the U.S." *Id*. at 7. The DHHS noted that "[i]n December of 2018, the United States Surgeon General Jerome Adams officially declared e-cigarette use among youth in the United States an epidemic." *Id*. at 8. The DHHS concluded that the "epidemic can . . . be attributed in large part to the appeal of flavored vapor products to youth as well as the advertising and promotional activities by companies that glamorize use of nicotine products nationwide." *Id*.

Under Rule 1(1)(c) of the emergency rules, a "flavored nicotine vapor product" is defined as "any vapor product that contains nicotine and imparts a charac-

[2] MCL 722.641(1) provides that "[a] person shall not sell, give, or furnish a tobacco product, vapor product, or alternative nicotine product to a minor, including, but not limited to, through a vending machine." And MCL 722.642(3)(a) provides that a minor shall not "[p]urchase or attempt to purchase a vapor product or alternative nicotine product." A "vapor product" is statutorily defined, in part, as "a noncombustible product that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine or any other substance, and the use or inhalation of which simulates smoking." MCL 722.644(h).

terizing flavor."[3] And a "characterizing flavor" is defined as "a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, vapor product, or alternative nicotine product, or any byproduct produced thereof." Rule 1(1)(a).[4]

Rule 2 of the emergency rules is the most pertinent provision for purposes of the two lawsuits, and it provides as follows:

> (1) Beginning 14 days after these rules are filed with the secretary of state, a retailer or reseller shall not:
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> (a) Sell, offer for sale, give, transport, or otherwise distribute, nor possess with intent to sell, give, or otherwise distribute a flavored nicotine vapor product.
>
> (b) Use imagery explicitly or implicitly representing a characterizing flavor to sell, offer for sale, give, or otherwise distribute a vapor product.
>
> (2) Beginning 14 days after these rules are filed with the secretary of state, a person shall not transport flavored nicotine vapor products intended for delivery to any retailer or reseller in violation of these rules.

Rule 3 addresses "fraudulent or misleading terms or statements to sell, offer for sale, give, or otherwise distribute vapor products." Rule 3(1). Rule 4 provides that "[b]eginning 14 days after these rules are filed with the secretary of state, the restrictions on advertising set forth at 21 CFR 1140.32 apply with equal force to vapor products. Violations of 21 CFR 1140.32 are violations of

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[3] The emergency rules can be found in Volume 18 of the 2019 Michigan Register, pages 9 and 10. See MCL 24.248(3) ("The emergency rule must be published in the Michigan register . . . .").

[4] The definition continues by indicating that a characterizing flavor "includes, but is not limited to, tastes or aromas relating to food or drink of any sort; menthol; mint; wintergreen; fruit; chocolate; vanilla; honey; candy; cocoa; dessert; alcoholic beverages; herbs; or spices." *Id*.

this rule."[5] Rule 5 states that the rules "apply with equal force to retailers and resellers utilizing online and other remote sales methods that are intended to deliver flavored nicotine vapor products to this state." Rule 6 regulates the placement of advertisements for vapor products in general. A violation of any of the emergency rules constitutes a misdemeanor that is punishable by incarceration "for not more than 6 months, or a fine of not more than $200, or both . . . ." Rule 7(1). Rule 8 provides that "[i]f any rule or subrule of these rules, in whole or in part, is found to be invalid by a court of competent jurisdiction, such decision will not affect the validity of the remaining portion of these rules."[6]

As required by MCL 24.248(1), the Governor concurred in the finding of an emergency and in the determination that the public interest required the promulgation of the emergency rules. The emergency rules were filed with the Secretary of State on September 18, 2019. Consistent with the parameters set forth in MCL 24.248(1), the emergency rules provided that they were to remain in effect for a period of six months. The emergency rules would have expired on March 18, 2020, but on March 11, 2020, the Governor filed a certificate of need for extension of the emergency, extending the effectiveness of the emergency rules another six months until September 18, 2020.[7] See MCL 24.248(1). The certificate of need cited new data and

[5] 21 CFR 1140.32 (2020) concerns format and content requirements for labeling and advertising cigarettes and smokeless tobacco.

[6] The DHHS's findings and the emergency rules are attached as Appendix 1 to this opinion and are incorporated into the opinion.

[7] The certificate of need for extension of the emergency rules, which includes the Governor's findings, is attached to this opinion as Appendix 2 and is incorporated into the opinion. See MRE 202(a) (allowing judicial

surveys that led the Governor to find that the trend of minors using e-cigarettes had "increased over the past year." The Governor also observed:

> The documented intensification of the vaping crisis only confirms what DHHS determined when it, with my concurrence, originally issued the Emergency Rules: to protect the public health and welfare from the emergent and worsening crisis of youth vaping, the Emergency Rules must go into effect immediately. The Emergency Rules' prohibition on flavored vapor products will significantly limit the appeal of vaping to youth, curbing the increase in new youth users.

III. THE LITIGATION

In Docket No. 351211, plaintiff Marc Slis owns and operates plaintiff 906 Vapor, LLC, which is a retail store located in Houghton that sells a variety of vapor products, some of which contain nicotine with nontobacco flavors. We collectively refer to these two plaintiffs as "Slis." On September 25, 2019, Slis filed an extensive complaint against the state and the DHHS in the Houghton Circuit Court, seeking declaratory relief. In that original action, Slis first contended that the emergency rules were ultra vires. Slis also maintained that the emergency rules were invalid because (1) there was no emergency justifying a departure from the procedural safeguards required by the APA; (2) assuming the circumstances warranted a somewhat urgent response, the DHHS could not skip all the APA's procedural safeguards; and (3) assuming a true emergency, the threat only affected a small subgroup of the general public, which was insufficient as a matter of law to trigger the authority to promulgate emer-

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notice of "regulations of . . . agencies of Michigan"); MCR 7.216(A)(4) (providing that this Court may "permit . . . additions to the transcript or record").

gency rules. Finally, Slis alleged that the emergency rules were substantively invalid because they were inconsistent with the legislative intent of the enabling statute and because they were arbitrary and capricious.

Additionally, Slis filed a motion for preliminary injunction and an emergency ex parte motion for a temporary restraining order (TRO) that would prohibit defendants from enforcing the emergency rules pending a hearing on the motion for preliminary injunction. Slis claimed that his business would suffer an immediate and irreparable injury if the court did not enjoin enforcement of the emergency rules because the business would have to close its doors, terminate its employees, and destroy over 80% of its inventory. The circuit court denied the ex parte motion for a TRO on the basis of a technical defect, and shortly thereafter the case was transferred to the Court of Claims. On September 30, 2019, Slis filed in the Court of Claims an emergency motion for expedited consideration of a renewed motion for TRO. Later that day, the Court of Claims denied Slis's motion.

In Docket No. 351212, plaintiff, A Clean Cigarette Corporation (ACC), is a Michigan-based retailer of flavored vapor products. ACC operated 20 locations throughout the state, employed 53 people, and sold about 2,500 flavored vapor cartridges a month that contained zero nicotine. On October 1, 2019, ACC filed a complaint against the state, the Governor, and the DHHS. On the same date, ACC moved for a TRO and an order to show cause why a preliminary injunction should not issue. ACC alleged that it would suffer irreparable injury if the emergency rules were enforced because it would result in the closure of almost all of ACC's 20 locations. On October 2, 2019, the Court of

Claims denied the motion for a TRO and ordered the consolidation of the two lawsuits. On October 4, 2019, ACC moved for a preliminary injunction, asserting:

> These emergency rules give no consideration or mention the impact the ban will have on adult vaping users who have elected to use flavored vapor in order to transition away from smoking cigarettes. Since vaping is already illegal for minors, all that this ban will accomplish is to take the flavored vaping options away from adults. Accordingly, ACC requests injunctive relief to avoid the irreparable harm this ban will cause to its business, employees, businesses like it and the tens-of-thousands of Michigan adults that elect to use flavored vapor products in lieu of combustible tobacco products.

On October 4, 2019, ACC also filed an amended complaint against defendants, alleging four causes of action. ACC alleged an unjustified interference with interstate commerce, federal statutory preemption under 21 USC 387,[8] an uncompensated unconstitutional taking of ACC's property, and violation of the APA.

With respect to Slis's action, on October 1, 2019, the Court of Claims, having rejected issuance of a TRO, heard testimony on the issue whether Slis would suffer irreparable harm if a preliminary injunction did not issue. Slis testified that he purchased 906 Vapor after being a customer of the business for about 1½ years. He had first tried e-cigarettes as a method to stop smoking regular cigarettes and was successful. He was only successful, however, after he tried flavored e-cigarettes. Slis asserted that he had between 200 and 500 customers at any given time. He maintained a number of business documents, including sales records, inventory data, sales receipts, invoices, and tax

[8] Federal law regarding tobacco products is governed by 21 USC 387 *et seq*.

records. Slis testified that approximately 95% of his customers used flavored vapor products. He contended that 906 Vapor would have to close its doors and file for bankruptcy if the emergency rules went into effect. Slis also asserted that if the flavored nicotine vapor products were taken off the shelves for six months, the nicotine would oxidize and change the color of the product.

The Court of Claims denied Slis's motion for a preliminary injunction, concluding that he had "not met the burden of demonstrating an irreparable harm for which there is no adequate remedy at law . . . ." Consistent with its order in the ACC suit, the Court of Claims consolidated Slis's suit with ACC's action. It denied Slis's motion for preliminary injunction without prejudice, stating that "all parties will have the opportunity for additional briefing, testimony, and argument" at a later hearing. In other words, the Court of Claims, given the consolidation, was prepared to entertain a full evidentiary hearing entailing Slis, ACC, and defendants regarding whether a preliminary injunction should issue. Nevertheless, Slis filed an application for leave to appeal, which this Court denied. *Slis v Michigan*, unpublished order of the Court of Appeals, entered October 7, 2019 (Docket No. 350888).

The Court of Claims held the preliminary-injunction hearing on October 8 and 9, 2019. Slis testified that 906 Vapor closed its doors on October 1, 2019, because of the inability to sell flavored vapor products. Slis explained that his average customer was a middle-aged, semi-professional person. Slis claimed that he always verified the ages of all customers by examining their identification and using an age-checker cellular phone application. Slis maintained that his business was dedicated to helping people stop smoking. He

further contended that 80% to 90% of his clients who wanted to quit smoking were ultimately successful. When asked if his customers could travel to Wisconsin or use the Internet to purchase the banned products, Slis testified that they had already begun doing so. Slis opined that if the emergency rules remained in effect for six months, all his product could possibly expire in the interim. He was certain that expiration of his product would occur if the emergency rules were extended for an additional six months, which extension has now come to fruition. Slis also testified that he carried between $15,000 and $20,000 in business debt and $60,000 in personal debt and that 906 Vapor was his sole source of income. According to Slis, if the emergency rules remained in effect, he would have to declare bankruptcy.

Cary Lee testified that he started ACC in 2010 and that it presently had 19 retail stores in Michigan with 53 employees. He maintained that one of his stores had closed because of the emergency rules. Lee indicated that ACC sold flavored vapor products. He started the company after using e-cigarettes to quit smoking in 2010, and he wished to help others overcome their addictions. Lee claimed that it is a real fight to quit smoking and that it is easier to quit when the e-cigarette tastes better. His wife, Ramona Lee, testified that five more ACC stores would close on October 15, 2019, and then probably another five stores would follow if the emergency rules were not overturned. She observed that approximately 50% of ACC's inventory was illegal under the emergency rules.

Ramona Lee further indicated that ACC had 740,000 cartridges, which were worth approximately $3 million, that could not be sold under the emergency rules. She testified that before September 2, 2019, ACC

sold $13,000 to $14,000 of product a day, excluding online sales, but since October 2, 2019, sales had diminished to approximately $9,000 a day. She also explained that 75% of online sales came from customers outside of Michigan, but flavored vapor products had been removed from ACC's website in response to the emergency rules. Dawn Every, an ACC employee, testified that only 2.3% of the company's clients were between the ages of 18 and 25. David Haight, the vice president of ACC's operations, indicated that the amount of product that could not be sold was worth between $2.2 million and $2.5 million. Another ACC employee, Deleasha Trice, testified that using e-cigarettes had improved her health.

Amelia Howard testified that she was a Ph.D. candidate at the University of Waterloo in the Department of Sociology and Legal Studies. Her dissertation was on the historical technology of e-cigarettes, the integration of these products into the marketplace, and the "moral panic" over vaping. The Court of Claims qualified her as an expert regarding whether there existed a situation justifying the emergency rules. She disagreed that there was evidence showing that flavored vapor products were causing an increase in vaping, and she discussed the flaws she perceived in the previous studies on the subject. Howard also talked about the studies cited in support of the emergency rules and the problems with those studies from her perspective. She opined that there was nothing to show that flavors caused vapor usage by minors. Howard attributed youth vapor usage partly to perceptions that it was safer than smoking. She testified that when she reviewed smoking and vaping statistics for Michigan, the state had double the average smoking rate among youth, but the state's vaping rates were half the national average. Howard spoke of the evolution of

flavors in vaping products, which was a response to people who were trying to quit smoking but did not like the taste of the initial tobacco flavorings. After Howard discussed a study showing that the rise of flavored vaping products had led to smoking cessation, defendants conceded that the study had provided a correlation between adults using flavored e-cigarettes and their reduction in the use of combustible cigarettes.

Dr. Joneigh Khaldun testified that she was the Chief Medical Executive and the Chief Deputy Director for Health at the DHHS. She discussed her other experiences with health crises, including those involving the measles, hepatitis A outbreaks, and the opioid epidemic. Dr. Khaldun emphasized that it was important to respond quickly once a health problem is identified. She stated that youth vaping usage impacted general public health. Dr. Khaldun had examined national and state data about the number of youths using vaping products and opined that the high numbers amounted to a public-health emergency. According to Dr. Khaldun, in some counties more than 1/3 of the high school students used vaping products. She testified that there was evidence that many youths used flavors to initiate their vaping experiences.

Dr. Khaldun discussed the recent amendment of the YTA, which we alluded to earlier, that banned the sale of vaping products to individuals under the age of 18. Despite the legislative action, she still believed that the emergency rules were necessary because she had no reason to conclude that the statutory amendment would have any impact. Dr. Khaldun noted that the United States Food and Drug Administration (the FDA) had banned the sale of vaping products to minors in 2016. She reviewed a chart that tracked the percentage of high school students who used vaping products

from November 2013 through March 2019, and it showed that high school students' use continued to rise significantly even after the 2016 ban.

Dr. Khaldun additionally testified that e-cigarettes were not approved by the FDA as a smoking-cessation product. She had not seen definitive evidence that e-cigarettes were effective in stopping the use of tobacco products overall. She further noted that another study showed that tobacco-flavored products were one of the most popular flavors among adult e-cigarette users. When asked whether there would be any harm if the emergency rules were halted, Dr. Khaldun replied that there would indeed be harm because each new day without the ban would allow for the opportunity for a minor to gain access to flavored vapor products.

Dr. Khaldun testified that "[t]he epidemic in the emergency is about youth being addicted to nicotine." She agreed that traditional combustible cigarettes were more harmful to the health of adults and children. But she claimed that there was no evidence about the long-term health effects of e-cigarettes. Dr. Khaldun also noted that the United States Surgeon General had officially declared e-cigarette use among youth as an emergency epidemic in December 2018. She conceded, however, that Michigan did not declare such an emergency until August 30, 2019. Dr. Khaldun acknowledged that one of the studies she cited did not show how many youths who vaped were previously using regular tobacco products.

Following the hearing, the Court of Claims issued an extensive written opinion and order that enjoined and restrained enforcement of the emergency rules. The Court of Claims made the following 16 specific findings of fact.

1. 906 Vapor is no longer a "going concern." Its inventory remains at its retail operation.

2. The business owner, Slis, has considerable business and personal debt such that resumption of business after expiration of the Emergency Order[9] is unlikely.

3. Customers of 906 Vapor have begun purchasing product from out-of-state vendors.

4. [ACC] has shuttered one retail center and is in the process of closing four others.

5. [ACC] had a considerable [I]nternet operation that, like its retail stores, relied on sale of flavored nicotine product.

6. [ACC's] [I]nternet operation has ceased advertising flavored nicotine product.

7. The "A Clean Cigarette" logo and name is posted on its retail operations, uniforms, e-cigarette cartridges and batteries.

8. [The terms] Clean and Cigarette cannot be used together per Rule number 3(2), of the Emergency Order.

9. The shelf life of vaping product whether for open or closed container systems is ten months or less.

10. [ACC] has contractually committed to receive additional product bearing its logo.

11. Neither Plaintiff sold products to minors.

12. E-cigarette users who were patrons of the plaintiffs overwhelmingly use flavored nicotine product.

13. [ACC] has over two million dollars of unusable product.

14. In reaching the conclusion that an emergent danger was posed by e-cigarette use among persons under th[e] age of 18 in Michigan, the [DHHS] cited numerous studies . . . .

15. The [DHHS] considered the passage of Public Act 18 when it recommended the emergency rules.

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[9] This is a reference to the emergency rules.

> 16. The [DHHS] had a basis for its determination that Public Act 18 would not be a significant deterrent to youth e-cigarette use. That basis was derived from the historic data on e-cigarette use in other states which adopted similar legislation to Public Act 18 prior to Michigan.

The Court of Claims next reviewed the factors to be considered in determining whether to issue a preliminary injunction. It found that plaintiffs would suffer irreparable harm if the emergency rules were not enjoined. With respect to whether plaintiffs were likely to succeed on the merits, the Court of Claims noted that plaintiffs had argued that the DHHS had no rulemaking authority on the subject matter. But it found that it did not need to reach that particular issue because it agreed with plaintiffs' argument that the emergency rules were procedurally invalid for the reason that there was no "emergency." Therefore, the Court of Claims determined that plaintiffs had demonstrated a likelihood of success on the merits.[10]

The Court of Claims discussed the difference between an "emergent" problem such as teen vaping and a true emergency that "required" the DHHS to suspend the normal rulemaking process under the APA. It opined that the DHHS was required to do more than simply identify a problem; the DHHS was also required to articulate proper justification to take a shortcut in promulgating rules. The Court of Claims ruled that plaintiffs had the better argument with respect to whether the circumstances mandated the promulgation of the emergency rules pursuant to MCL 24.248. It noted that the sources, information, data, and surveys on which the DHHS had relied were available at the

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[10] The Court of Claims made clear that it was not rendering judgment on the DHHS's policy goals and what it was attempting to achieve.

latest in February 2019, yet the DHHS had waited eight months to take any action. During this time, according to the Court of Claims, the normal APA procedures could have been employed and run their course. The Court of Claims found that the old informational materials, coupled with the DHHS's failure to act promptly, undermined the declaration of an emergency. It rejected the DHHS's explanation for the delay that Dr. Khaldun had only recently been appointed as Chief Medical Executive, because DHHS could still have done something earlier. The Court of Claims ruled that the DHHS could not "create an emergency by way of its own failure to act," finding plaintiffs' citation to federal authority for this proposition persuasive.

Balancing the harms to the parties, the Court of Claims noted that defendants had not argued that they would suffer any harm if the preliminary injunction were issued. With respect to whether the injunction would harm the public, the Court of Claims found that each side had presented a compelling argument. On one hand, were an injunction to be issued, youth could gain access to flavored nicotine vapor products, and there was evidence suggesting that there were risks to youth who used vaping products. On the other hand, plaintiffs had presented evidence to show that there was a real risk of harm to smokers who had used flavored vaping products as a substitute for more harmful combustible tobacco products and that they could go back to those products if flavored vaping products were banned. The Court of Claims ultimately found that the balancing factor did not weigh heavily for either side. It then ruled that the various factors, taken together, supported the issuance of the preliminary injunction.

Defendants sought leave to appeal in this Court on October 25, 2019. They subsequently filed a bypass

application for leave to appeal in the Michigan Supreme Court that was rejected. *Slis v Michigan*, 505 Mich 943 (2019). This Court granted leave to appeal limited to the issues raised in the applications, expedited the appeals, consolidated the two cases, and denied defendants' motion for a stay. *Slis v Michigan*, unpublished order of the Court of Appeals, entered December 9, 2019 (Docket No. 351211); *A Clean Cigarette Corp v Governor*, unpublished order of the Court of Appeals, entered December 9, 2019 (Docket No. 351212).

IV. ANALYSIS

A. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's ruling on a request for a preliminary injunction. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. The factual findings that a trial court makes in the process of deciding whether to grant a preliminary injunction are reviewed for clear error. *Id*. We review associated issues involving statutory interpretation de novo as questions of law. *Id*. We also review de novo the interpretation of a rule or regulation adopted by an agency pursuant to statutory authority. *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). And similarly, this Court reviews de novo constitutional issues. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

B. PRINCIPLES OF STATUTORY INTERPRETATION

This Court's role in construing statutory language is to discern and ascertain the intent of the Legislature,

which may reasonably be inferred from the words in the statute. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. *Id*. When statutory language is clear and unambiguous, we must apply the statute as written. *Id*. A court is not permitted to read anything into an unambiguous statute that is not within the manifest intent of the Legislature. *Id*. Furthermore, this Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature. *Id*. at 212-213.

"Judicial construction of a statute is only permitted when statutory language is ambiguous." *Noll v Ritzer*, 317 Mich App 506, 511; 895 NW2d 192 (2016). A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016). "When faced with two alternative reasonable interpretations of a word in a statute, we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute." *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996).

C. LAW GOVERNING PRELIMINARY INJUNCTIONS IN GENERAL

A preliminary injunction is generally considered a form of equitable relief that has the objective of maintaining the status quo pending a final hearing concerning the parties' rights. *Mich AFSCME Council 25*, 293 Mich App at 145-146. A court must take four factors into consideration when determining if it should grant the extraordinary remedy of a preliminary injunction

to an applicant: (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the applicant is likely to prevail on the merits, (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party, and (4) whether the public interest will be harmed if a preliminary injunction is issued. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 6 n 6; 753 NW2d 595 (2008); *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 225 n 11; 634 NW2d 692 (2001); *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). "[A] preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters*, 482 Mich at 9. "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Id*. The party requesting "injunctive relief has the burden of establishing that a preliminary injunction should be issued . . . ." MCR 3.310(A)(4).

D. REVIEW OF AN AGENCY'S ACTION TO PROMULGATE EMERGENCY RULES UNDER MCL 24.248

The Court of Claims effectively concluded that there was no true emergency as necessary to permit the DHHS and the Governor to proceed under MCL 24.248(1) and promulgate the emergency rules without a hearing and public participation, which are typically required in the process of promulgating a rule. On the basis of this conclusion, the Court of Claims found that plaintiffs were likely to prevail on the merits of their complaints. The likelihood of success on the merits—one of the factors to consider in ruling on a request for a preliminary injunction—was the driving force behind the ruling, and defendants devote the vast majority of their brief to addressing the issue. In examining

whether there was an emergency justifying a suspension of normal rulemaking procedures, the Court of Claims applied de novo review, treating the issue as one of statutory construction. Whether plaintiffs are likely to prevail on the merits can potentially be influenced by the standard or scope of review and the level of deference, if any, that is applicable to the finding by the DHHS and the Governor that the preservation of the public health, safety, or welfare required promulgation of the emergency rules. We shall examine the APA, the Michigan Constitution, and caselaw, primarily this Court's decision in *Mich State AFL-CIO v Secretary of State*, 230 Mich App 1; 583 NW2d 701 (1998), to identify the proper standard for reviewing and assessing the DHHS's actions made in conjunction with the Governor under MCL 24.248(1).[11]

The issue whether the preservation of the public health, safety, or welfare requires promulgation of an emergency rule without having to comply with the normal notice and participation procedures involves, for the most part, a factual inquiry. And it is in regard to this factual inquiry that we search for any applicable standards in judging the factual findings the DHHS made in association with the Governor. This theoretically includes the possibility that the standard is that factual findings are not subject to any judicial review. To the extent that statutory construction of MCL 24.248(1) plays a role in making the determination whether to promulgate an emergency rule, e.g., defining the term "preservation," the matter would generally present a question of law subject to de novo

[11] We are not tasked with making, nor do we make, any conclusive determinations regarding the merits of the lawsuits; rather, our opinion is focused on whether the preliminary injunction was properly issued, and our analysis must be read in that context.

review. *Mich State AFL-CIO*, 230 Mich App at 24.[12] In this case, our review of the emergency rules and the underlying findings does not reveal any express instances of the DHHS or the Governor engaging in statutory interpretation.

1. THE APA

Chapter 6 of the APA, MCL 24.301 *et seq*., provides for judicial review, but this review is only for persons "aggrieved by a final decision or order in a contested case . . . ." MCL 24.301. And a "contested case" is defined as "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). The promulgation of the emergency rules did not entail a contested case; therefore, judicial review under Chapter 6 of the APA, including the provision regarding the scope of review, MCL 24.306, was not applicable. See MCL 24.207(f) (providing that a "rule" does not include "[a] determination, decision, or order in a contested case"); *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 498; 750 NW2d 593 (2008) ("[T]he review of an administrative rule is categorized as involving a non-contested case.").

MCL 24.248 itself does not provide for any type of judicial review of an emergency rule promulgated by an agency, but it also has no language prohibiting

[12] We do note that "[a]n administrative agency's interpretation of a statute that it is obligated to execute is entitled to respectful consideration, but it cannot conflict with the plain meaning of the statute." *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 244; 931 NW2d 571 (2019) (quotation marks and citation omitted).

judicial review. We next consider MCL 24.264, which provides, in pertinent part, as follows:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. . . . This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

We agree with plaintiffs that MCL 24.264 gave them the right to challenge the validity of the emergency rules under the plain and unambiguous language of the statute. See *Mich Ass'n of Home Builders*, 481 Mich at 499 ("MCL 24.264 allows a plaintiff to challenge the validity of a rule in an action for a declaratory judgment."). An agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute, when the rule does not comply with the intent of the Legislature, or when the rule is arbitrary or capricious. *Mich State AFL-CIO*, 230 Mich App at 15.[13] A rule may also be procedurally invalid if it was not properly promulgated, e.g., when a required hearing was not conducted. *Id*. at 25; see also *Goins v Greenfield Jeep*

[13] Our Supreme Court in *Ins Institute of Mich v Comm'r of Fin & Ins Servs*, 486 Mich 370, 385; 785 NW2d 67 (2010), also indicated that courts use a three-part test to determine the validity of a rule: (1) whether the rule is within the subject matter encompassed by the enabling statute; (2) if so, whether the rule complies with the underlying legislative intent; and (3) if the rule meets the first two requirements, whether it is arbitrary or capricious.

Eagle, Inc, 449 Mich 1, 8-10; 534 NW2d 467 (1995) (holding that the failure to comply with a procedural requirement found in a statute will render a purported rule invalid). MCL 24.264 broadly applies to all rules. There is no restrictive language indicating or suggesting that it does not apply to a challenge of "emergency" rules. Were this panel to recognize such an exception or limitation in MCL 24.264, we would be reading language into an unambiguous statute that is not within the manifest intent of the Legislature. *Troy*, 504 Mich at 212.

Furthermore, there is no exclusive procedure or remedy provided in a different statute governing the DHHS with respect to challenging the validity of a rule promulgated by the DHHS. We have scoured the Public Health Code, including Part 22, MCL 333.2201 *et seq*., which encompasses the DHHS's rulemaking authority, and there is no available procedure or remedy in regard to challenging a promulgated rule, nor is there language barring a challenge. We reject any contention that MCL 24.248—the statute authorizing the promulgation of an emergency rule—provides "an exclusive procedure or remedy" as that phrase is used in MCL 24.264. The "exclusive procedure or remedy" language of MCL 24.264 plainly and unambiguously pertains to a procedure or remedy related to challenging the validity of a rule, not just any procedure or remedy. Although MCL 24.248 sets forth the *exclusive procedure* to promulgate an emergency rule, it has no language with regard to allowing or disallowing the challenge of an emergency rule.

Moreover, MCL 24.248 is not a statute specifically governing the DHHS such that it could conceivably constitute an exception to the general applicability of MCL 24.264, which authorizes declaratory-judgment

actions to challenge the promulgation of allegedly invalid rules. MCL 24.248(1) governs the promulgation of emergency rules by any agency or agencies in general; it is not specifically "a statute governing the [DHHS]," MCL 24.264. In our view, MCL 24.264 reveals a general legislative intent to provide an avenue for a party to challenge a rule promulgated by an agency, whether under MCL 24.264 itself or under another statute that governs the agency. If the Legislature does not intend for judicial review of a promulgated rule under certain circumstances or in connection with a particular agency, it could easily accomplish that goal with language to that effect. And we have not been directed to any statutory language that prohibits judicial review of the DHHS's emergency rules. Moreover, as discussed in detail later in this opinion, this Court in *Mich State AFL-CIO*, 230 Mich App at 25, directly held that emergency rules promulgated under MCL 24.248 may be contested in the courts.

MCL 24.264 gives a party access to the courts through an action for declaratory judgment, but it is silent with respect to any standard of review that a trial court should apply in determining whether an agency's rule, emergency or otherwise, is invalid or whether it was invalidly promulgated. MCL 24.264 does not indicate one way or the other whether courts should give any deference to an agency in the course of a declaratory-judgment action. And the statute does not expressly provide that an agency's underlying fact-finding may be challenged in an action.

2. THE MICHIGAN CONSTITUTION

Const 1963, art 6, § 28 provides, in part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

The promulgation of an agency rule does not constitute a decision by the agency that is judicial or quasi-judicial in nature; therefore, Const 1963, art 6, § 28 does not apply to the instant cases.[14]

Defendants raise a constitutional separation-of-powers argument with no citation of supporting precedent that is pertinent and binding. "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. In *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97-98; 754 NW2d 259 (2008), our Supreme Court stated:

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[14] In *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013), this Court explained:

> [N]ot all agencies' actions are taken in a judicial or quasi-judicial capacity. To determine whether an administrative agency's determination is adjudicatory in nature, courts compare the agency's procedures to court procedures to determine whether they are similar. Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents. [Citations omitted.]

> This case implicates the powers, and the boundaries of the powers, of all three branches: the Legislature, the judiciary, and administrative agencies, which are part of the executive branch. . . .
>
> The people of the state of Michigan have divided the powers of their government into three branches: legislative, executive and judicial. Furthermore, no person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.
>
> The legislative power of the State of Michigan is vested in a senate and a house of representatives. Simply put, legislative power is the power to make laws. In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore the Legislature's product and still be true to our responsibilities that give our branch only the judicial power. While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature. [Quotation marks, citations, and brackets omitted.]

The Legislature gave authority to the DHHS to promulgate rules as reflected in MCL 333.2226 and MCL 333.2233 of the Public Health Code, and the Legislature provided the DHHS and other agencies the authority in MCL 24.248(1) to promulgate emergency rules to preserve the public health, safety, or welfare, with the concurrence of the Governor. Because the DHHS, as an agency, is part of the executive branch, Const 1963, art 5, § 2, as is, of course, the Governor, Const 1963, art 5, § 1, the Legislature effectively gave quasi-legislative authority to the executive branch to promulgate emergency rules under the circumstances provided in MCL 24.248(1). But the Legislature, by enacting MCL 24.264, also gave the judiciary the power to issue declaratory judgments with respect to

whether agency rules are valid or invalid, including, as we have held, emergency rules. The exercise of this authority can result in an emergency rule being struck down by a court despite being promulgated by the DHHS and approved by the Governor. Under this structural framework enacted by our Legislature, we cannot conclude that the judiciary improperly encroaches on the province of the executive branch by preliminarily enjoining the enforcement of an emergency rule in a declaratory-judgment action such that there is a separation-of-powers violation. Nevertheless, whether separation of powers requires a standard or scope of review that gives some level of deference to the fact-finding by the DHHS and Governor under MCL 24.248(1) is a separate question that we shall return to later in this opinion.[15]

3. CASELAW

The parties direct much of their attention to this Court's opinion in *Mich State AFL-CIO*, 230 Mich App 1, which is binding precedent. See MCR 7.215(J)(1). In *Mich State AFL-CIO*, the plaintiff labor union initially obtained an injunction banning the enforcement or implementation of a declaratory ruling and interpretive statement issued by the Secretary of State regarding a provision in the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*. *Mich State AFL-CIO*, 230 Mich App at 8-9. The labor union had successfully argued that the Secretary of State's declaratory ruling and interpretive statement did not find statutory support in the MCFA and that the interpretive statement constituted a "rule" that was not properly promulgated under the APA. *Id*. at 9. In

[15] As mentioned earlier, this includes contemplating whether agency fact-finding is entirely unreviewable under any circumstance.

response to the injunction, the Secretary of State proceeded to promulgate emergency rules under MCL 24.248 that essentially mimicked its prior declaratory ruling and interpretive statement construing the relevant MCFA provision. *Id*. at 10-11. The labor union then obtained a preliminary injunction enjoining the Secretary of State's enforcement of the emergency rules. *Id*. at 12. The trial court "concluded that no emergency had existed." *Id*. The trial court also ruled that the emergency rules exceeded the statutory language in the MCFA. *Id*. at 13.

On appeal, this Court affirmed the trial court's ruling, albeit for different reasons. *Id*. at 25. The Court first indicated:

> Rules adopted by an agency in accordance with the APA are legislative rules that have the force and effect of law. In this case, the secretary adopted the emergency rules pursuant to § 48 of the APA. We conclude that the emergency rules are legislative rules that, if valid, have the force and effect of law. [*Id*. at 14-15 (citation omitted).]

The Court then addressed whether the emergency rules were substantively valid, which, as we noted earlier, implicated a three-part test that considers "(1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary or capricious." *Id*. at 15 (quotation marks and citation omitted).[16] After analyzing the issue, the Court held:

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[16] The Court effectively treats this three-part test as the authority for challenging an agency rule; the panel did not refer to or cite MCL 24.264. We find it interesting that the three-part test, when it is traced back to its origin, including through Supreme Court rulings, comes from this Court's opinion in *Chesapeake & Ohio R Co v Mich Pub Serv Comm*, 59 Mich App 88, 98-99; 228 NW2d 843 (1975), which cited *nothing* in support of the test. Therefore, it appears that there is a statutory and a common-law basis to challenge an agency's rule. This does not take

> Accordingly, for purpose only of our preliminary injunction analysis, we conclude that the trial court apparently misjudged the strength of the union's demonstration that it is likely to prevail on the merits of its claim for declaratory relief that the secretary's emergency rules are substantively invalid. However, we emphasize that if and when this matter comes to trial, the actual determination of this claim is for the trial court in the first instance. [*Id*. at 17.]

The Court next addressed whether the trial court erred by finding that no emergency existed. *Id*. The Court cited and reviewed *Mich Petroleum Ass'n v State Fire Safety Bd*, 124 Mich App 187; 333 NW2d 506 (1983), in which this Court affirmed a lower-court decision that rejected an argument that no emergency existed for purposes of emergency rules promulgated under MCL 24.248. *Mich State AFL-CIO*, 230 Mich App at 18. The *Mich State AFL-CIO* panel stated that "it appears that the test adopted by *Michigan Petroleum* was whether the adopting agency lacked a substantial basis for its finding that the public interest required promulgation of the emergency rule" and that "[t]he opinion also seemed to include an abuse of discretion aspect to the test." *Id*. at 19 (quotation marks and citations omitted). The Court in *Mich State AFL-CIO* was "not convinced that the 'substantial basis' or 'abuse of discretion' tests are the appropriate tests." *Id*. at 20. The panel accurately indicated that the "substantial basis" test employed in *Mich Petroleum* was not supported by any citation of authority. *Id*. at 19; *Mich Petroleum*, 124 Mich App at 193-194. We also note that the analysis in *Mich Petroleum* was cursory and that *Mich Petroleum* is not binding precedent. MCR 7.215(J)(1).

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away anything from our reliance on MCL 24.264 in analyzing the separation-of-powers issue and in searching for a standard or scope of review relative to agency fact-finding regarding rule promulgation.

This Court moved on with its analysis and, quoting, in part, the language in MCL 24.248(1), observed as follows:

> An emergency rule is justified if three conditions are satisfied: (1) the agency "finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by section 41 and 42;" (2) the agency "states in the rule the agency's reasons for that finding"; and (3) "the governor concurs in the finding of emergency." [*Mich State AFL-CIO*, 230 Mich App at 21, quoting MCL 24.248(1).]

After examining the definition of "public welfare" in *Black's Law Dictionary* (6th ed), this Court ruled:

> [I]n order to bypass the general rule-making procedural protections contained in the APA, the secretary in this case was required to find that the preservation of the political interests of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class required promulgation of an emergency rule. [*Mich State AFL-CIO*, 230 Mich App at 22 (quotation marks omitted).]

The Court then reviewed the Secretary of State's finding of an emergency, determining that the basis for the finding was the original "injunction that enjoined the enforcement of the secretary's declaratory ruling." *Id*. at 23. But the panel noted that the injunction had only enjoined the Secretary of State from enforcing the declaratory ruling against the labor union and its affiliated organizations. *Id*. The Court pointed out that the Secretary of State could still enforce the declaratory ruling against all other entities subject to the MCFA. *Id*. The Court "fail[ed] to perceive how preservation of the political interests of the whole community is threatened where the secretary is generally free to attempt to enforce its interpretation of . . . the MCFA

except against the limited class of the political committees of the union and its affiliated organizations." *Id*. at 24. Accordingly, the Court concluded that the Secretary of State's emergency finding related only to the advantage of a limited class. *Id*. The panel then ruled:

> A rule is invalid and may be stricken by a court if the agency failed to follow proper procedure. Generally, this principle applies where the agency fails to promulgate a rule in accordance with the APA's notice-and-participation procedures. However, we see no reason why this principle should not apply to emergency rules should the agency fail to follow the procedures and standards enunciated in § 48 of the APA, particularly where these procedures and standards take the place of the general rule-making procedural protections contained in the APA. It thus appears that the secretary's emergency rules are procedurally invalid because the secretary's finding did not meet the statutory threshold imposed by the Legislature. We note that we have treated this issue as an issue of statutory construction, which is a question of law that we review de novo. However, we would arrive at the same conclusion even if the "substantial basis" and "abuse of discretion" tests enunciated in *Michigan Petroleum* are the appropriate tests. [*Id*. at 24-25 (citations omitted).]

Therefore, this Court held that the trial court had not erred by determining that the labor union was likely to prevail on the merits of its claim that the emergency rules were procedurally invalid. *Id*. at 25. The Court ended its opinion with the following summarization:

> [W]e conclude that the trial court apparently misjudged the strength of the union's demonstration that it is likely to prevail on the merits of its claim for declaratory relief that the secretary's emergency rules are substantively invalid. However, we conclude that the trial court did not err in determining that the union is likely to prevail on the merits of its claim for declaratory relief that the emer-

> gency rules are procedurally invalid. No persuasive arguments have been made that the trial court erred in its consideration of the other preliminary injunction factors, and we will not, therefore, second-guess the trial court in this regard. The grant of a preliminary injunction with respect to the emergency rules preserved the status quo pending a final hearing and did not grant any of the parties final relief before a hearing on the merits. Accordingly, we conclude that on the facts of this particular case the trial court did not abuse its discretion in preliminarily enjoining the enforcement of the emergency rules. [*Id.* (citation omitted).]

We first note that *Mich State AFL-CIO* fully supports our earlier determination that emergency rules promulgated under MCL 24.248(1) can be challenged in court and are subject to possible invalidation on the basis of procedural or substantive deficiencies. With respect to conclusively identifying a standard or scope of review of an agency's finding that the surrounding circumstances required promulgation of an emergency rule, *Mich State AFL-CIO* is not of much assistance. The Court was not convinced that a "substantial basis" or an "abuse of discretion" test was the appropriate test, but it did not definitively reject those tests, even determining that it would have reached the same result under both tests. The Court reviewed the issue de novo, treating it as one of statutory construction. And the Court did indeed interpret MCL 24.248(1) as not being applicable when a rule only preserves the welfare of a limited class or an individual and not the welfare of the public at large. It does not appear that there was any factual dispute that the welfare of only a limited class was preserved under the emergency rules. Thus, the Court was not forced to assess a factual finding, resolve a factual dispute, or identify a standard or scope of review relative to a factual finding made by the Secretary of State in the process of

promulgating the emergency rules. The appeal was ultimately decided on the Court's legal interpretation of "public welfare."

4. RESOLUTION — GIVING DEFERENCE TO THE DHHS AND GOVERNOR

Initially, we do agree with defendants that a court's finding that promulgation of emergency rules was not necessary to preserve the health, safety, or welfare of the public is not a finding that the emergency rules are *procedurally* invalid. Defendants fully complied *with the procedures* for promulgating the emergency rules under MCL 24.248. We disagree with this Court's characterization in *Mich State AFL-CIO* that the emergency rules in that case were procedurally invalid; rather, the Court ruled that the factual circumstances, given its construction of MCL 24.248(1), did not justify invocation of emergency rules, which is not a procedural flaw or failure. Regardless, it does not matter what moniker is used in describing an invalid rule; an invalid rule is an invalid rule.

Next, we conclude that agency fact-finding under MCL 24.248(1) related to determining whether the circumstances justify the promulgation of emergency rules is reviewable by a court. Although this Court's decision in *Mich State AFL-CIO* was focused and primarily based on the construction of MCL 24.248(1), the interpretation was ultimately and necessarily applied to the essentially undisputed fact that the emergency rules only benefited a limited class. In other words, the Court held that preservation of the public health, safety, or welfare did not require promulgation of the emergency rules without following the notice and participation safeguards. Furthermore, the language in MCL 24.264 that authorizes declaratory-

judgment actions to challenge the validity of a rule does not place any limits or restrictions *on the legal basis of a challenge*, thereby allowing an argument that erroneous agency fact-finding rendered a rule invalid. This still leaves the question whether any deference should be given to agency fact-finding.

As discussed earlier, MCL 24.248 and MCL 24.264 do not provide any standards for reviewing agency fact-finding that occurs in promulgating a rule or in deciding whether to promulgate an emergency rule. And the standards for reviewing agency fact-finding in MCL 24.306 and Const 1963, art 6, § 28 have no application outside of contested cases and agency decisions that are judicial or quasi-judicial in nature. Promulgating a rule entails neither circumstance. The caselaw that recognizes that deference must be given to fact-finding by administrative agencies links the deferential standard to the evidentiary-review provisions in MCL 24.306 and Const 1963, art 6, § 28. MCL 24.306(1)(d) authorizes a court to set aside an agency's decision when it is "[n]ot supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28, similarly provides that an agency's decisions, findings, rulings, and orders are reviewed, in part, to determine whether they "are supported by competent, material and substantial evidence on the whole record." With respect to both the statutory and constitutional provisions, this Court has emphasized that "[c]ourts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002); see also *Mich Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974); *Monroe v*

State Employees' Retirement Sys, 293 Mich App 594, 607; 809 NW2d 453 (2011); *Lewis v Bridgman Pub Sch (On Remand)*, 279 Mich App 488, 496; 760 NW2d 242 (2008).

This deferential standard, while not expressly set forth in either Const 1963, art 6, § 28 or MCL 24.306, grew out of and is viewed as being part of the "substantial evidence" test found in the Michigan Constitution.[17] See *Detroit Symphony Orchestra*, 393 Mich at 122-124 (reviewing documents concerning the Constitutional Convention in 1962 with respect to the meaning of "substantial evidence" and recognizing that it entails giving due deference to an agency's fact-finding); see also *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) ("When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record."). Accordingly, because MCL 24.248 and MCL 24.264 are not subject to the substantial-evidence test, we cannot extend the due-deference standard to those statutes on the basis of caselaw construing MCL 24.306(1)(d) and Const 1963, art 6, § 28.

Nevertheless, the principle of giving due deference to an agency with regard to fact-finding because of its expertise has become well established in our civil jurisprudence. We note this Court's discussion in *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*,

[17] "Substantial evidence" has been defined as evidence that a reasonable mind would accept as being adequate to support a decision, and it is more than a scintilla but can be substantially less than a preponderance of evidence. *Lewis*, 279 Mich App at 496.

288 Mich App 552, 560-561; 808 NW2d 456 (2010), regarding the nature of administrative agencies:

> Administrative agencies are created by the Legislature as repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field. Administrative agencies possess specialized and expert knowledge to address issues of a regulatory nature. Use of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity. The relationship between the courts and administrative agencies is one of restraint, and courts must exercise caution when called upon to interfere with the jurisdiction of an administrative agency. Judicial restraint tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden on court resources. [Quotation marks, citations, and brackets omitted.]

We now invoke the separation-of-powers doctrine to incorporate a due-deference standard with respect to agency fact-finding under MCL 24.248 and MCL 24.264. We earlier rejected any notion that the separation-of-powers doctrine precludes judicial review *altogether* in regard to a decision by an agency and the Governor to promulgate and enforce an emergency rule under MCL 24.248. We reached this conclusion because the Legislature, which enacted MCL 24.248, also enacted MCL 24.264, which provides for judicial review of the validity of rules in declaratory-judgment actions.[18] But the silence in MCL 24.264, as well as in MCL 24.248, regarding any standard or

[18] We also note that the dissent in *Mich State AFL-CIO* opined that no judicial review was allowed regarding the factual finding of an emergency, which position the majority essentially ignored. *Mich State AFL-CIO*, 230 Mich App at 26-43 (O'CONNELL, J., concurring in part and dissenting in part).

scope of review to apply in judging factual findings by an agency connected to the promulgation of a rule provides an avenue to interject the application of separation-of-powers principles to create a standard that is deferential to the agency's factual findings. If the judiciary is given free rein to ignore factual findings made by an agency in promulgating rules and allowed to impose its own findings, the judiciary effectively tramples on the powers of the executive branch and improperly and effectively engages in quasi-legislative conduct.[19]

Accordingly, in the context of a declaratory-judgment action, when a court reviews an agency's decision, concurred in by the Governor, that the preservation of the public health, safety, or welfare requires the promulgation of emergency rules absent notice and participation procedures, MCL 24.248(1), the court must give due deference to the agency's expertise and not invade the agency's fact-finding by displacing the agency's choice between two reasonably differing views. To be clear, however, giving due deference to agency fact-finding does not equate to subservience or complete capitulation that would allow a reviewing court under MCL 24.248 and MCL 24.264 to entirely abdicate its role in determining the validity of an emergency rule.

E. DISCUSSION

1. LIKELIHOOD OF SUCCESS ON THE MERITS

We hold that even giving due deference to the DHHS and the Governor, we cannot conclude that the Court of

[19] We agree with Professor Don LeDuc's view that the failure "to give deference to the factual conclusions of an agency charged by the Legislature with responsibility to administer a statute and to substitute its judgment for that of the highest official in the executive branch regarding the existence of an emergency are both violative of the Constitution's separation of powers provisions." LeDuc, Michigan Administrative Law, § 4:38, p 244.

Claims erred by finding that plaintiffs had demonstrated a likelihood of success on the merits at this stage of the proceedings with respect to their claim that the emergency rules were procedurally invalid.[20] The gist of defendants' position that emergency rules had to be promulgated is set forth in the introductory paragraph of their brief on appeal:

> Michigan undisputedly faces a youth vaping crisis, and each day that passes, this crisis is causing immediate and lasting harm to the public health of this state. E-cigarette use among high school and middle school students continues to skyrocket at alarming rates. *And kid-friendly flavored vaping products targeted to hook children on nicotine continues to present a grave public health emergency in our state*. Nicotine is highly addictive and negatively impacts the developing brain. Research shows that youth who use such products are significantly more likely to start smoking combustible cigarettes—notwithstanding the documented and well-known negative health consequences associated with the use of cigarettes. [Emphasis added.]

Again, MCL 24.248(1) provides that "[i]f an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by [MCL 24.241 and MCL 24.242] . . . , the agency may dispense with all or part of the procedures . . . ." We construe this language to allow for the promulgation of emergency rules but only if compliance with APA notice, hearing, and participation procedures will prevent an agency from being able to preserve the public's health, safety, or welfare. The evaluation requires contemplation of evidence showing the effect on the public health, safety, or welfare if enforcement of a proposed rule is delayed during the

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[20] But, as noted earlier, we do not believe that "procedural" invalidity is the proper characterization.

time frame necessary to comply with notice, hearing, and participation procedures. Evidence of the events or circumstances that would likely transpire during the period of delay needs to be assessed for purposes of determining whether the public health, safety, or welfare would be sufficiently compromised so as to constitute an emergency and justify promulgation and enforcement of emergency rules. The number of individuals whose health, safety, or welfare would be affected during the period of delay and the nature and seriousness of the impact on those individuals would be key factors to consider.

We think it would be helpful to provide a hypothetical, albeit a very simplistic, generalized example. If a delay in promulgating and enforcing a rule to satisfy APA notice and participation procedures would result in harm to 3% to 5% of the population, *which would otherwise not have occurred without the delay*, but the harm was fairly minor, it would be reasonable to conclude that the preservation of the public health, safety, or welfare would not require promulgation of an "emergency" rule without following procedural safeguards. If that hypothetical is tweaked so that the harm is elevated to likely death, it would be reasonable to conclude that the preservation of the public health, safety, or welfare would require promulgation of an "emergency" rule without following procedural safeguards. If we return to minor harm being involved but with 90% of the population being affected, an "emergency" rule would likely be justified.[21]

In the instant cases, defendants presented evidence that lends support for a determination that use of e-cigarettes or vapor products by minors is an ever-

[21] The percentages used in our hypotheticals are for illustration purposes only.

worsening and serious public-health concern and that flavored nicotine vapor products are at the forefront of driving and exacerbating the problem and leading youths to future nicotine addiction. Prohibiting altogether the sale and distribution of flavored nicotine vapor products would ostensibly curb youth vaping trends to some extent. Plaintiffs countered defendants' evidence with testimony by expert Amelia Howard that called into question the studies on which defendants relied.

Giving due deference to defendants' factual finding that the preservation of the public health, safety, or welfare required the promulgation of emergency rules absent notice and participation procedures, we nonetheless cannot conclude that the finding is reasonable. The case did not present a choice between two reasonably differing views on whether an emergency existed. Defendants did not, in any form or fashion, tailor the evidence or their arguments to the period of delay that would have occurred if notice, hearing, and participation procedures had been undertaken. Defendants did not present evidence indicating, showing, suggesting, or giving an opinion on any of the following: the number of youths who could be expected to start vaping for the first time during the period of delay because flavored nicotine vapor products remained on shelves; the danger of those first-timers becoming addicted to nicotine solely on the basis of their use of flavored nicotine vapor products during the period of delay; and whether youths already using flavored nicotine vapor products would have a decreased chance of a healthier or addiction-free outcome if there were a period of delay.[22] Bluntly stated,

[22] The equation should also involve consideration of the effect, if any, of 2019 PA 18, and whether, if there was no delay, any youths would turn to regular cigarettes.

defendants did not produce evidence that an emergency situation existed *such that a period of delay* would make any relevant difference in preserving the public's health, welfare, or safety. In sum, on the basis of the evidence presented at this stage of the proceedings, we agree with the Court of Claims that plaintiffs are likely to succeed on the merits regarding their shared request that the emergency rules be declared invalid. Defendants will still have the opportunity to attempt to gather the necessary evidence when the merits of plaintiffs' lawsuits are litigated.[23]

2. IRREPARABLE HARM

The Court of Claims found that plaintiffs had carried their burden of demonstrating irreparable harm. With respect to ACC, the Court of Claims determined that ACC had presented evidence of loss of goodwill and competitive position in the marketplace that con-

[23] We do question the reasoning of the Court of Claims that defendants had not shown the existence of an emergency because the studies, reports, and surveys on which they relied were old and stale. The age of the studies, reports, and surveys did not necessarily mean that there was not a present, ongoing emergency, although current information would provide stronger evidence. We note that the Governor cited a 2019 study regarding the continuing increase in youth vaping in her certificate of need for extension of the emergency. Additionally, the Court of Claims, citing federal cases and pointing to the older studies on which defendants originally relied, stated that an agency cannot create an emergency by way of its own failure to act in timely fashion. We reject this approach in applying MCL 24.248(1) and note that the federal rulemaking statute has a general "good cause" requirement with respect to skipping procedural safeguards, 5 USC 553(b)(3)(B), that is not contained in MCL 24.248(1). An unreasonable delay in seeking to promulgate emergency rules does not mean that there is no continuing or worsening emergency. Moreover, if emergency rules are needed, even though they should have been promulgated earlier, the people of our state are entitled to protection and should not be put at risk because the DHHS moved too slowly.

stituted irreparable harm because of the difficulty in calculating damages and because a significant loss of goodwill cannot be compensated by awarding economic damages. The Court of Claims found that the emergency rules effectively banned ACC from using its trade name and branding,[24] caused ACC to lose a significant portion of its sales, resulted in store closings, and began to destroy the business. With respect to Slis, the Court of Claims determined that he had demonstrated irreparable harm because the emergency rules caused Slis to shutter his business, resulted in his customers obtaining flavored vaping products from Wisconsin, and ultimately would lead to the loss of his entire business.

Defendants argue that, in regard to ACC and lost goodwill, the Court of Claims erred on the issue of irreparable harm because ACC did not make a particularized showing that irreparable harm would, in fact, flow from rebranding itself to the extent necessary to comply with the emergency rules. Defendants contend that half of ACC's online sales occur out of state, which is beyond the reach of the emergency rules, and that the emergency rules would only temporarily bar ACC's misleading advertising practices as to the online sales in Michigan. Defendants maintain, therefore, that ACC failed to show that it would have to rebrand itself entirely or that the extent of the required rebranding "would in fact cause loss so certain, pervasively destructive, and incalculable as to be irreparable." With respect to Slis, defendants argue that he failed to show that loss of his business was, in fact, the necessary

[24] Rule 3(1) of the emergency rules bars a retailer from using fraudulent and misleading terms in selling vapor products, and Rule 3(2) defines fraudulent or misleading terms as including, in part, the word "clean."

consequence of the emergency rules. Defendants contend that the emergency rules still left room for Slis to make sales, considering that Slis could sell flavored nicotine vapor products outside of Michigan, that he could still sell tobacco-flavored vapor products and flavored vapor products lacking nicotine in Michigan, and that the emergency rules were only temporary.

In *Thermatool Corp*, 227 Mich App at 377, this Court discussed the irreparable-harm factor, observing:

> In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical. Economic injuries are not irreparable because they can be remedied by damages at law. A relative deterioration of competitive position does not in itself suffice to establish irreparable injury. [Citations omitted.]

In *Atwood Turnkey Drilling, Inc v Petroleo Brasileiro, SA*, 875 F2d 1174, 1179 (CA 5, 1989), the United States Court of Appeals for the Fifth Circuit observed:

> Petrobras directs our attention to cases holding that a preliminary injunction is an inappropriate remedy where the potential harm to the movant is strictly financial. This is true as a general rule but an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business. [Citation omitted.][25]

The threat of bankruptcy and the possibility of going out of business can constitute irreparable harm. *Id*.

As an initial point and as argued by Slis, there is a question whether plaintiffs would have any claim for

[25] Decisions of lower federal courts are not binding on this Court but may be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

monetary damages against the state defendants in light of immunity principles. See *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). We do note that ACC alleged an unconstitutional-takings claim against defendants and seeks $840,500 in just compensation for lost product. But this claim is for loss of product only and not loss of business. The Court of Claims did not speak to the matter, and we decline to resolve the issue because it is unnecessary for us to do so.

With respect to ACC, defendants' arguments only address the goodwill and rebranding issue connected to ACC's having the word "clean" in its name. But the Court of Claims also based its decision on the significant loss of sales, store closings, and the possible collapse of the business, all of which had factual support in the record. "When an appellant fails to dispute the basis of a lower court's ruling, we need not even consider granting the relief being sought by the appellant." *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015). On this basis alone, we can affirm the finding of irreparable harm in regard to ACC.

Moreover, the Court of Claims was correct that a "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer Corp v Scott*, 973 F2d 507, 512 (CA 6, 1992). Whether "the loss of customer goodwill amounts to irreparable harm often depends on the significance of the loss to the plaintiff's overall economic well-being." *Apex Tool Group, LLC v Wessels*, 119 F Supp 3d 599, 610 (ED Mich, 2015) (quotation marks and citation omitted).[26] Defendants argue that there was an evidentiary failure in regard

[26] Although the discussion was not in the context of analyzing the propriety of a preliminary injunction, this Court in *Unibar Maintenance*

to goodwill because ACC did not show any particular harm resulting from the loss of goodwill or that rebranding would not have been successful. Defendants' position, however, demands too much of ACC and is the very reason that loss of goodwill can constitute irreparable harm, i.e., the difficulty in measuring harm. David Haight of ACC testified that their products were branded with the ACC name, that the ACC name had been used for 10 years, including online, and that ACC's customers knew and had become familiar with the ACC name.

With respect to both ACC and Slis, defendants' contention that the harm is only temporary misses the mark given that the emergency rules have now been extended another six months and that the plaintiffs presented evidence indicating that the businesses were in financial distress even under the initial six-month period that the emergency rules were in effect. Furthermore, although defendants maintain that the DHHS has indicated that the emergency rules do not prohibit the sale or transportation of flavored nicotine vapor products to persons outside of Michigan, the rules themselves do not specifically exempt such activity. And even if that is the case, there is no indication that online sales of flavored nicotine vapor products outside of the state would prevent the collapse of the businesses. In regard to Slis, he testified that the

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Servs, Inc v Saigh, 283 Mich App 609, 631; 769 NW2d 911 (2009), touched on the difficulty in proving certain damages:

> [T]he purpose of compensatory damages, which is to make the plaintiff whole, indicates that exemplary damages may be construed as appropriate for injuries to a corporation that cannot be measured or estimated in monetary terms. Clearly, a loss of reputation as a skillful company is unquantifiable and recoverable as exemplary damages, as may be a loss of goodwill, or any damage to other types of company reputation amongst either employees or customers. [Citations omitted.]

emergency rules resulted in a large loss of customers because most of them used flavored nicotine vapor products. He also indicated that his inventory was deteriorating and would definitely expire if an extension of the emergency rules was ordered, which has now occurred. Slis further testified that he would have to close the doors to the business and file for bankruptcy if the emergency rules remained in force. This evidence sufficed to support the Court of Claims' determination that Slis would suffer irreparable harm if a preliminary injunction did not issue.

In sum, the Court of Claims did not clearly err by concluding that both Slis and ACC would sustain irreparable harm if the emergency rules were not enjoined.

3. BALANCING THE HARMS

The Court of Claims concluded that the harm that would befall plaintiffs if no preliminary injunction were issued would outweigh the harm that would occur to defendants should a preliminary injunction be issued. The Court of Claims indicated that plaintiffs had demonstrated a risk of irreparable harm absent a preliminary injunction, which was greater than any risk of harm to defendants with an injunction in place, especially when defendants had not articulated that they would suffer any harm. The Court of Claims also stated that defendants would not suffer any harm if they were forced to comply with the APA's notice and participation procedures before implementing the rules regulating vapor products. The Court of Claims concluded that "the harm to defendants as state entities is neither compelling nor noteworthy."

Defendants essentially argue that a preliminary injunction enjoining enforcement of the emergency

rules harms them by preventing defendants from carrying out their constitutional and statutory duties to protect and preserve the health, safety, and welfare of the people of this state, which in turn results in harm to the people themselves and the state's financial health. The preliminary injunction does not undercut the overall ability of the DHHS to promulgate valid emergency rules that meet the requirements of MCL 24.248(1) or to take other appropriate steps to preserve the public's health, safety, and welfare. Under defendants' rationale, the harm to them would always trump the harm to a party challenging an emergency rule because defendants could claim that an injunction prevents them from protecting the public.[27] Also, the Legislature has already taken some governmental action on the youth vaping "crisis" by amending the YTA. 2019 PA 18. We conclude that the Court of Claims did not clearly err regarding its finding on the balancing of harms.

4. THE PUBLIC INTEREST

The Court of Claims concluded that the public-interest factor favored neither plaintiffs nor defendants, finding compelling public interests on both sides of the issue. On one hand, the Court of Claims explained, an unknown number of minors would likely start using flavored nicotine vapor products. On the other hand, if the emergency rules were enforced, there was evidence that adult users of flavored vapor products would return to using combustible tobacco products, which the Court of Claims characterized as "more harmful" than vapor products.

[27] To the extent that defendants' argument entails consideration of harm to the public, we believe that said consideration pertains to the last factor that we shall examine—impact on the public interest.

Defendants argue that the Court of Claims erred because the evidence was overwhelming regarding the health dangers of nicotine addiction and that youths were starting down the path to nicotine addiction through the use of flavored nicotine vapor products, while plaintiffs' evidence that depriving adults of flavored nicotine vapor products would return many of them to smoking regular cigarettes was anecdotal and statistically unsupported.

Defendants are correct that they presented a plethora of evidence and studies showing the increase in and dangers of youths using flavored nicotine vapor products. As the Court of Claims noted, however, plaintiffs "produced . . . literature citing improved health outcomes for former combustible tobacco users who switch to vaping products." The testimony of plaintiffs' witnesses also supported the view that the end of flavored nicotine vapor products would drive many users back to smoking cigarettes. We cannot conclude that the Court of Claims clearly erred by finding this factor neutral, but even if there was error and the factor should have been found in favor of defendants, reversal would still not be warranted considering that the other three factors favored the issuance of a preliminary injunction.

V. CONCLUSION

We hold that the DHHS and the Governor are entitled to due deference with regard to the finding of an emergency under MCL 24.248(1), but not complete capitulation, and that the Court of Claims ultimately did not abuse its discretion by issuing the preliminary injunction on the basis of the evidence presented by the parties. The likelihood of success on the merits, whether plaintiffs would suffer irreparable harm, and

the balancing of the harms favored the Court of Claims' issuance of the preliminary injunction, even if the factor regarding the public interest did not. We hold that the Court of Claims did not abuse its discretion by granting plaintiffs' motions for a preliminary injunction.[28]

We affirm. Having fully prevailed on appeal, plaintiffs may tax costs under MCR 7.219.

JANSEN and BOONSTRA, JJ., concurred with MARKEY, P.J.

[28] Given our ruling, it is unnecessary to address the other various issues and arguments raised in this consolidated appeal.

Appendix 1

DEPARTMENT OF HEALTH AND HUMAN SERVICES
BUREAU OF HEALTH AND WELLNESS, PUBLIC HEALTH ADMINISTRATION
PROTECTION OF YOUTH FROM NICOTINE PRODUCT ADDICTION
EMERGENCY RULES

Filed with the Secretary of State on September 18, 2019

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

By authority conferred on the Department of Health and Human Services by the sections 2221, 2226, and 2233 of the public health code, 1978 PA 368, MCL 333.2221, 333.2226, and 333.2233, Executive Reorganization Order No. 2015-1, MCL 400.227, and section 48 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.248.

FINDING OF EMERGENCY

For the reasons below, the Michigan Department of Health and Human Services finds that the State of Michigan faces a vaping crisis among youth and recommends the promulgation of emergency rules to address this crisis.

Since 2014, e-cigarettes (also known as vapor products) have been the most commonly used tobacco product among youth in the U.S.[1] Nationwide, e-cigarette use among middle and high school students increased 900% from 2011-2015.[2] From 2017 to 2018, e-cigarette use among youth increased 78% among high school students and 48% among middle school students.[3] The total number of children who are currently using e-cigarettes rose to an astonishing 3.6 million in 2018, 1.5 million more than the previous year alone.[4] From the years 2015-2016 and 2017-2018, counties across Michigan (cross section of 39 reporting) witnessed between a 30% and 118% increase in use among high school students who used an e-cigarette during the past month.[5]

[1] U.S. Surgeon General's Advisory on E-Cigarette Use among Youth, available at https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf
[2] Surgeon General's Advisory see footnote 1; citing Wang TW, Gentzke A, Sharapova S, et al. Tobacco Use Among Middle and High School Students – United States, 2011-2017. MMWR Morbidity and Mortality Weekly Report. 2018;67(22):629-633.
[3] See https://www.fda.gov/tobacco-products/youth-and-tobacco/2018-nyts-data-startling-rise-youth-e-cigarette-use citing the most recent National Youth Tobacco Survey (NYTS) data.
[4] See Footnote 3.
[5] Michigan Profile for Healthy Youth Survey by MDE & MDHHS, 39 County Data from 2015-2016 and 2017-2018 for e-cigarette usage among high schoolers.

September 17, 2019

E-cigarettes use an e-liquid that may contain nicotine, in addition to a combination of flavoring, propylene glycol, vegetable glycerin, and other ingredients.[6] They may also contain toxic chemicals such as formaldehyde, acrolein, acrylonitrile, propylene oxide, crotonaldehyde and acetaldehyde (also found in cigarette smoke), as well as metal particles such as nickel, lead, and chromium, which can be inhaled into the lungs.[7]

The nicotine in e-cigarettes can rewire the brain to crave more of the substance and create a nicotine addiction. Resulting brain changes may have long-lasting effects on attention, learning, and memory.[8] Research has also shown that youth who use e-cigarettes are significantly more likely to start smoking combustible cigarettes despite the well-known, documented, and often deadly health consequences such as lung cancer and heart disease.[9]

In December of 2018, the United States Surgeon General Jerome Adams officially declared e-cigarette use among youth in the United States an epidemic.[10] Dr. Adams issued an advisory on e-cigarette use among youth, noting that action must be promptly taken to protect the health of young people.[11] Dr. Adams was joined by the Secretary of the U.S. Department of Health & Human Services, Alex Azar, who called the historic increase in e-cigarette use by youth, which has outpaced any other substance, an "unprecedented challenge."[12]

According to a recent study, 81% of youth e-cigarette users reported using a flavored e-cigarette at first use.[13] This study concluded that flavored tobacco products may attract young users and serve as "starter products to regular tobacco use." Another study

[6] https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends#references
[7] https://www.fda.gov/tobacco-products/ctp-newsroom/think-e-cigs-cant-harm-teens-health
[8] See footnote 6, referencing Abreu-Villaca, Y., Seidler, F. J., Tate, C. A., & Slotkin, T.A. (2003). Nicotine is a neurotoxin in the adolescent brain: critical periods, patterns of exposure, regional selectivity, and dose thresholds for macromolecular alterations. Brain Res, 979 (1-2), 114-128.
[9] https://www.fda.gov/tobacco-products/ctp-newsroom/think-e-cigs-cant-harm-teens-health; referencing Berry KM, Fetterman JL, Benjamin EJ, Bhatnager A, Barrington-Trimis JL, Leventhal AM, Stokes A. Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in U.S. Youths. JAMA Netw Open. 2019;2(2)e187794. Doi: 10.1001/jamanetworkopen.2018.8894.
[10] https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf
[11] Id.
[12] https://www.hhs.gov/about/leadership/secretary/speeches/2018-speeches/remarks-for-e-cigarette-press-conference.html
[13] Villanti AC, Johnson AL, Ambrose BK, et al. Flavored Tobacco Product Use in Youth and Adults: Findings from the First Wave of the PATH Study (2013-2014). Am J Prev Med. 2017;53(2):139–151. doi:10.1016/j.amepre.2017.01.026. https://www.ncbi.nlm.nih.gov/pubmed/28318902.

revealed that nearly two thirds (63.6%) of current middle and high school tobacco users have used a flavored tobacco product in the past month.[14]

This epidemic can therefore be attributed in large part to the appeal of flavored vapor products to youth as well as the advertising and promotional activities by companies that glamorize use of nicotine products nationwide.

Rule 1. (1) As used in these rules:

(a) "Characterizing flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, vapor product, or alternative nicotine product, or any byproduct produced thereof. This includes, but is not limited to, tastes or aromas relating to food or drink of any sort; menthol; mint; wintergreen; fruit; chocolate; vanilla; honey; candy; cocoa; dessert; alcoholic beverages; herbs; or spices.

(b) "Flavored vapor product" means any vapor product that imparts a characterizing flavor.

(c) "Flavored nicotine vapor product" means any vapor product that contains nicotine and imparts a characterizing flavor.

(d) "Retailer" means any person or entity that operates a business engaging in the sale of tobacco products or vapor products.

(e) "Reseller" means any person who purchases tobacco products or vapor products and intends to distribute such product(s) for resale in the State of Michigan.

(2) The terms defined in the youth tobacco act, 1915 PA 31, MCL 722.641 to 722.645, have the same meaning when used in these rules.

Rule 2. (1) Beginning 14 days after these rules are filed with the secretary of state, a retailer or reseller shall not:

(a) Sell, offer for sale, give, transport, or otherwise distribute, nor possess with intent to sell, give, or otherwise distribute a flavored nicotine vapor product.

(b) Use imagery explicitly or implicitly representing a characterizing flavor to sell, offer for sale, give, or otherwise distribute a vapor product.

(2) Beginning 14 days after these rules are filed with the secretary of state, a person shall not transport flavored nicotine vapor products intended for delivery to any retailer or reseller in violation of these rules.

[14] Dai H. Changes in Flavored Tobacco Product Use Among Current Youth Tobacco Users in the United States, 2014-2017. JAMA Pediatr. Published online January 07, 2019173(3):282–284. doi:10.1001/jamapediatrics.2018.4595.

Rule 3. (1) Beginning 14 days after these rules are filed with the secretary of state, a retailer or reseller shall not use, either directly or indirectly, fraudulent or misleading terms or statements to sell, offer for sale, give, or otherwise distribute vapor products.

(2) As used in this rule, "fraudulent or misleading terms or statements" include those that are likely to induce false or unevidenced beliefs regarding the properties of the vapor products in a substantial portion of the audience. Fraudulent or misleading terms include, but are not limited to, "clean;" "safe;" "harmless;" and "healthy."

(3) This rule does not apply to products for which advertising is exclusively regulated by the Food and Drug Administration.

Rule 4. Beginning 14 days after these rules are filed with the secretary of state, the restrictions on advertising set forth at 21 CFR 1140.32 apply with equal force to vapor products. Violations of 21 CFR 1140.32 are violations of this rule.

Rule 5. These rules apply with equal force to retailers and resellers utilizing online and other remote sales methods that are intended to deliver flavored nicotine vapor products to this state.

Rule 6. (1) Beginning 14 days after these rules are filed with the secretary of state, advertisements for vapor products shall not be placed:

(a) Within 25 feet of the point of sale. Where this cannot be achieved, advertisements must be placed at the greatest possible distance from the point of sale.

(b) Within 25 feet of candy, foodstuff, or soft drinks. Where this cannot be achieved, advertisements must be placed at the greatest possible distance from candy, foodstuff, and soft drinks.

(c) In such a manner that the advertisement can be readily seen by a person standing outside of the building at a distance of 25 feet.

Rule 7. (1) A person who violates any provision of these rules is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months, or a fine of not more than $200, or both, as set forth by section 2261 of the public health code, 1978 PA 368, MCL 333.2261.

(2) Violations of rule 2 are calculated on a per-item and per-transaction basis and may be punished cumulatively.

(3) Violations of rules 3, 4, and 6 are calculated daily, with each 24-hour period during which the violation occurs constituting a separate violation.

Rule 8. If any rule or subrule of these rules, in whole or in part, is found to be invalid by a court of competent jurisdiction, such decision will not affect the validity of the remaining portion of these rules.

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MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

Robert Gordon
Director

Date:

Pursuant to Section 48(1) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.248(1), I hereby concur in the finding of the Department of Health and Human Services that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rules.

Honorable Gretchen Whitmer
Governor

Date: 9|18|19

Appendix 2

DEPARTMENT OF HEALTH AND HUMAN SERVICES

BUREAU OF HEALTH AND WELLNESS, PUBLIC HEALTH ADMINISTRATION

PROTECTION OF YOUTH FROM NICOTINE PRODUCT ADDICTION

EMERGENCY RULES

CERTIFICATE OF NEED FOR EXTENSION OF EMERGENCY

The Department of Health and Human Services has advised me that data released since the promulgation of the Emergency Rules for the Protection of Youth from Nicotine Product Addiction demonstrates that Michigan's youth vaping crisis intensified again in 2019, with multiple studies showing that regular vaping use among minors increased dramatically.

As cited in the Department of Health and Human Services' Emergency Rules, The National Youth Tobacco Survey (NYTS) showed that from 2017-2018, e-cigarette use by youth increased by 78% among high school students and 48% among middle school students. We now know that trend only increased over the past year.[1] The results of the 2019 NYTS revealed that 27.5% of high school students used e-cigarettes regularly,[2] an increase of 32%. And, alarmingly, 10.5% of middle schoolers used e-cigarettes regularly, an increase of 114%.[3] Considering the 48% increase in middle schoolers' use of e-cigarettes in 2018, the rate has tripled in two years.

Among current users of tobacco products, e-cigarettes are the most commonly used flavored tobacco product at an alarmingly increasing rate (68.8% of current e-cigarette users).[4] Data from the 2019 Monitoring the Future Survey of eighth, 10th, and 12th graders also shows high rates of youth e-cigarette use compared to just one year ago, with rates doubling over the past two years.[5]

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[1] https://www.fda.gov/tobacco-products/youth-and-tobacco/2018-nyts-data-startling-rise-youth-e-cigarette-use

[2] "Regularly" means within the past 30 days.

[3] Cullen, K.A., A.S. Gentzke, M.D. Sawdey, "E-cigarette use among youth in the United States," Nov. 5, 2019 JAMA available at https://jamanetwork.com/journals/jama/article-abstract/2755265

[4] Teresa W. Wang, PhD[1]; Andrea S. Gentzke, PhD[1]; MeLisa R. Creamer, PhD[1]; Karen A. Cullen, PhD[2]; Enver Holder-Hayes, MPH[2]; Michael D. Sawdey, PhD[2]; Gabriella M. Anic, PhD[2]; David B. Portnoy, PhD[2]; Sean Hu, DrPH[1]; David M. Homa, PhD[1]; Ahmed Jamal, MBBS[1]; Linda J. Neff, PhD, "Tobacco Product Use and Associated Factors Among Middle and High School Students — United States, 2019." December 6, 2019 CDC Morbidity and Mortality Weekly Report (MMWR), available at https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm

[5] https://www.drugabuse.gov/related-topics/trends-statistics/infographics/monitoring-future-2019-survey-results-vaping

New data released from the University of Michigan to the New England Journal of Medicine also shows significant increases over the past few months in each of the three grade levels surveyed (eighth, 10th, and 12th grade).[6]

The documented intensification of the vaping crisis only confirms what DHHS determined when it, with my concurrence, originally issued the Emergency Rules: to protect the public health and welfare from the emergent and worsening crisis of youth vaping, the Emergency Rules must go into effect immediately. The Emergency Rules' prohibition on flavored vapor products will significantly limit the appeal of vaping to youth, curbing the increase in new youth users. Meanwhile, the Emergency Rules' restrictions on marketing will limit the flow of misinformation about the safety of vaping to youth, which will also curb the growth in youth use. The urgent need for these protections has not flagged since the original issuance of the Emergency Rules; if anything, it, like the crisis itself, has only intensified.

Therefore, pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby certify that it is necessary to extend the Bureau of Health and Wellness, Public Health Administration Emergency Rules, Protection of Youth from Nicotine Product Addiction. The emergency rules were filed with the Secretary of State on March 18, 2020. By requesting the six months extension, the current rules will remain effective until September 18, 2020.

Gretchen Whitmer, Governor

3/11/20
Date

[6] Richard Miech, Ph.D., Lloyd Johnston, Ph.D., Patrick M. O'Malley, Ph.D., Jerald G. Bachman, Ph.D. "Trends in Adolescent Vaping," 2017-2019, N Engl J Med 2019; 381:1490-1491, available at https://www.nejm.org/doi/full/10.1056/NEJMc1910739

BOONSTRA, J. (*concurring*). I fully concur in the majority opinion. I write separately because this case highlights for me a growing concern about governmental overreach, both in this case specifically and also more generally, and because sometimes we as Americans need a wake-up call. This case—particularly in the context of other recent governmental actions—provides one.

Totalitarianism[1] has no place in America. Has it arrived? Well, that's a question for another day. It's not a question that I will endeavor to answer—at least not yet, not in this case. But recent events in Michigan and beyond, which are unfolding by the minute and no doubt will overtake what I am able describe in this opinion, provide a backdrop for our consideration of the question that is presented in this case. I fear that a pattern may be emerging.

So, let's start with the general, and then I will circle back to the specifics of this vaping case and to how the general relates to the specific.

After nearly 250 years, it is easy to take our liberty for granted. We shouldn't. Our Founding Fathers fought and died so that we could be free from tyranny. They knew—and declared—that we are "endowed by [our] Creator"—not by government—"with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[2] It isn't like that everywhere—indeed, historically, despots, tyrants, and monarchs were the rule, not the exception. America became the exception—hence the idea of "American

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[1] "Totalitarian" is defined as "of or relating to a centralized dictatorial form of government requiring complete subservience to the state" or "a person advocating such a system." *Oxford American Dictionary of Current English*, p 859.

[2] Declaration of Independence (1776).

exceptionalism." Upon the founding of the Massachusetts Bay colony in 1630, Governor John Winthrop declared, "[F]or wee must Consider that wee shall be as a Citty upon a Hill, the eies of all people are uppon us[.]"[3] Centuries later, President Ronald Reagan frequently spoke of America as a "shining 'city upon a hill,' " and in his farewell address to the American people described her as "still a beacon, still a magnet for all who must have freedom, for all the Pilgrims from all the lost places who are hurtling through the darkness, toward home."[4]

We live in strange times. Never in our history has virtually all of America been on lockdown. And never before has our government dared to presume that it had the authority to impose such a lockdown upon us. To be fair, we live in the midst of what has been deemed to be a "pandemic"—thanks to COVID-19. We are all naturally fearful of the resulting unknowns.[5] And few doubt,

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[3] Sermon of John Winthrop, *City Upon a Hill* (or, *A Model of Christian Charity*) (1630), available at <http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3918> (accessed April 15, 2020) [https://perma.cc/DY54-9NH3].

[4] See *Transcript of Reagan's Farewell Address to American People*, New York Times (January 12, 1989), available at <https://www.nytimes.com/1989/01/12/news/transcript-of-reagan-s-farewell-address-to-american-people.html> (accessed April 15, 2020) [https://perma.cc/62JD-ELA7].

[5] But keep in mind:

- John Adams once said, "Fear is the foundation of most governments; but is so sordid and brutal a passion, and renders men, in whose breasts it predominates, so stupid, and miserable, that Americans will not be likely to approve of any political institution which is founded on it." See Adams, *Thoughts on Government* (April 1776), available at <http://www.masshist.org/publications/adams-papers/index.php/view/PJA04dg2> (accessed May 2, 2020) [https://perma.cc/25QF-LHHF].
- Since then, entire books have been written about how both tyrannical despots and modern-day politicians have used fear—and a

as a result, that we needed to take measures to protect ourselves and our fellow Americans.[6]

This is not the time or place to judge the appropriateness of the measures that have been taken. This case isn't even about COVID-19. It's about vaping and about the government's (actually, the executive branch of the Michigan state government's) decision to impose emergency rules banning the sale of certain vaping products in Michigan.

But, you might ask, what does COVID-19 have to do with vaping? Well, maybe nothing. Our Governor her-

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culture of fear—to control the masses, to cause people to look to government to protect them, and to consolidate their own power and accomplish their own political objectives. See, e.g., Boyack, *Feardom: How Politicians Exploit Your Emotions and What You Can Do to Stop Them* (Salt Lake City: Libertas Press, 2014), p 8 ("[D]espots and authoritarians have historically studied and utilized [fear] to pursue their goals."); see also Libertas Institute, Book Description for *Feardom: How Politicians Exploit Your Emotions and What You Can Do to Stop Them*, available at <https://perma.cc/34LN-87FA> ("What do history's most notorious despots have in common with many of the flag-waving, patriotic politicians of our day? Both groups rise to power through the exploitation of fear. Sometimes the fear derives from a pre-existing threat. At other times, crises are created or intensified to invoke a sense of panic and anxiety where none previously existed. This pattern is as predictable as it is destructive. The end result is the same: a loss of liberty. Policies that are costly, oppressive, and harmful are supported by people who abandon any interest in freedom or personal responsibility in hopes of feeling safe.").

- Long before modern-day despots learned to use the tool of fear, it was written, "Fear thou not; for I am with thee[.]" *Isaiah* 41:10 (King James). See King James Bible Online, *Isaiah* 41:10 <https://www.kingjamesbibleonline.org/Isaiah-41-10/> (accessed May 2, 2020) [https://perma.cc/7XNX-9GLL].

[6] I would suggest, however, that we as Americans should think long and hard about what our individual responsibilities to protect ourselves and our fellow citizens should be and what the government's proper role should be. Perhaps we can rationally address that which instills fear without relinquishing our liberties.

self has linked the two, however. See, e.g., Shamus, *Whitmer Speculates Vaping Could Cause Young People To Get COVID-19. We Fact Checked It.*, Detroit Free Press (March 24, 2020);[7] Shamus, *Michigan Governor Suggested Possible Link Between Vaping and Coronavirus. What Do Doctors Say?*, USA Today (March 24, 2020).[8]

So, it's worth pondering. And it's worth pondering in the larger context of what is at stake generally when government acts to impose its will upon us—it is, of course, *our very liberty*. That is not something that should ever be taken—or taken away—lightly. That is why core notions of due process are so fundamental to our existence as a nation. That is why we have three separate and coequal branches of government. That is why we have elections and why our elected officials are accountable to us—to "We the People."[9] That is why legislatures enact laws and why it is up to the executive to sign them (or not). And it is why the judiciary defers to the legislature on matters of public policy.

Properly or not, government officials have taken unprecedented measures in the wake of COVID-19. Michigan is no exception. Without question, those measures have seriously impeded the exercise of our basic and fundamental—and often taken for granted—liberties, even, for example, our ability to gather with family members or attend religious services this past Easter, or for a perhaps more trivial but still impactful

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[7] Available at <https://www.freep.com/story/news/health/2020/03/24/coronavirus-vaping-michigan-whitmer-stay-home-order/2899048001/> (accessed April 15, 2020) [https://perma.cc/ZY9F-3XBF].

[8] Available at <https://www.usatoday.com/story/news/health/2020/03/24/coronavirus-vaping-michigan-whitmer-stay-home-order/2908032001/> (accessed April 15, 2020) [https://perma.cc/XZZ7-4ZFM].

[9] US Const, Preamble.

example, our ability to buy paint from the local hardware store.

I do not pass judgment about any of those matters in this opinion.[10] As I said, there may be a time and place for that, but this is not it. I note only that there has been a chorus of increasingly expressed concerns emanating from wide corners of our society. I am not endorsing any particular views in this opinion, and I am sure that there are others who see things differently. At least some of the expressed concerns without question come from reputable sources. And even for those sources you might think are not reputable, the First Amendment has not (at least yet) been abolished, and it applies to all of us. Indeed, it's good that we are expressing our views. We, as a society, ought to be debating these things. That's what we do in a democracy. Particularly when the issues go to the fundamental nature of our rights as a free people.

I highlight some recent publications only to give context to the issue before us in this vaping case. The first one I quote in full.

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[10] I do suggest, however, that these are serious issues that deserve serious scrutiny by all Americans. The state of America today was unthinkable yesterday. The mere suggestion of it would have been cast aside as nonsense, a reactionary conspiracy theory. But here we are. Is America being taken for a test drive? If we bend today to the will of the authoritarians amongst us, what will they dare come for tomorrow? Our guns and churches? And anything else we might cling to? Rahm Emanuel recently reprised his famous line: "Never allow a good crisis go to waste. It's an opportunity to do the things you once thought were impossible." See Emanuel, *Opinion: Let's Make Sure This Crisis Doesn't Go To Waste*, The Washington Post (March 25, 2020), available at <https://www.washingtonpost.com/opinions/2020/03/25/lets-make-sure-this-crisis-doesnt-go-waste/> (accessed May 8, 2020) [https://perma.cc/JS2N-9PBH]. The current crisis has America at a tipping point. Will we demand the liberties that have stood as the very foundation of our nation from its inception? Or will we live under the thumb of autocrats in the hope that they will keep us safe? The world of our children and grandchildren hangs in the balance.

The Wall Street Journal Editorial Board had this to say in an April 13, 2020 editorial entitled *It's Still America, Virus or Not: Draconian Orders and Enforcement will Undermine Public Support for Social Distancing*:

> Americans by and large have willingly obeyed the government's shelter-in-place and social-distancing orders, but *that doesn't seem to be enough for some public officials*. *They're indulging their inner bully* in ways that over time will erode public support for behavior that can reduce the spread of the coronavirus.
>
> *One problem is excessive enforcement*. Some state and local officials tasked with implementing shelter-at-home orders appear either to misunderstand the edicts they are meant to carry out or to suffer from a lack of discernment. Police officers in Brighton, Colo., handcuffed a man for playing with his wife and six-year-old daughter on a nearly empty softball field—though the order police claimed he had violated barred only groups of five or more.
>
> In public parks in Washington, D.C., and elsewhere, police officers are prohibiting locals from sitting on park benches, even if they are alone. In Philadelphia, police officers dragged a man from a public bus for not wearing a mask. He had evidently refused to exit the bus when asked, but the officers' conduct—given the offense—appears excessive.
>
> In their defense these officers are carrying out the orders of elected officials, and in many cases those orders are unclear or worse. In Louisville, Ky., Mayor Greg Fischer prohibited Christian believers from gathering on Easter Sunday—including in "drive-thru" services in which worshippers remained in their vehicles. The mayor's position was neither constitutionally nor epidemiologically sound.
>
> A local congregation sued, arguing the mayor had violated their right to free exercise of religion. Federal Judge Justin Walker, in a cogent decision issued over the weekend, stayed the mayor's hand. President Trump recently nominated Judge Walker to the D.C. Circuit Court of

Appeals, as noted in these columns. His defense of religious liberty won't endear him to Senate Democrats.

Perhaps the most excessive decrees have come from Michigan Gov. Gretchen Whitmer. In addition to shutting down "non-essential" businesses, as many other governors have done, Gov. Whitmer has barred Michiganders from traveling to each other's homes. "All public and private gatherings of any size are prohibited," the Governor explained at a press conference. "People can still leave the house for outdoor activities," she generously allowed, and outdoor activities "are still permitted as long as they're taking place outside of six feet from anyone else."

Michigan state officials also have imposed a series of heavy-handed restrictions, including bans on supposedly "non-essential" sections of supermarkets, which have accordingly been cordoned off. Under Gov. Whitmer's order a Michigander can buy a bag of candy or a lottery ticket, but not a pack of seeds or a can of paint. He can enjoy a boat ride by himself or with his dog—but not if his boat has a motor. *The logic of these seemingly arbitrary distinctions must elude most Americans*.

As these limits on liberty drag on, the courts will be asked with growing frequency to rule on whether mayors and governors have the authority to decide which businesses must shut down and which may remain open, what products the latter may sell, and whether religious believers may be barred from gathering in a parking lot while remaining in their cars. Public-health emergencies give government officials wide latitude. But the First Amendment still bars government from prohibiting the free exercise of religion and still guarantees the right to free assembly.

Government officials would be better advised to govern with a lighter hand. The coronavirus threat isn't going away until we have a vaccine or better treatments, and Americans will have to practice some form of social distancing and self-quarantine for many more months once the government allows the economy to reopen.

> *Decrees like those from the Michigan Governor's office and their capricious enforcement run the risk of encouraging mass civil disobedience that will undermine the point of the orders. Better—for reasons of public health and American constitutionalism—to treat Americans as responsible citizens*. [Editorial Board, *It's Still America, Virus or Not*, The Wall Street Journal (April 13, 2020) (emphasis added).][11]

Surely, by the time this opinion is published, the proliferation of events and news articles will have overtaken what is compiled here by way of example. But at the risk of already being out of date, here are some other early samplings. I won't quote them in full, but I encourage you to read them. See, e.g.:

- Portteus, *The Tyrannical Soul of Gretchen Whitmer*, American Greatness (May 3, 2020) ("The state of Michigan will be governed by Whitmer's unlimited, arbitrary will until she deigns to allow the rule of law to resume. In usurping power, Whitmer merely is revealing her nature, and it is far from unique in our history. . . . Paternal rule, unlimited power exercised by one over another, when applied to adults, under whatever guise, is simply despotic rule—it is tyranny. . . . For Whitmer, it's her way or no way. . . . She has a tyrannical soul, and a tyrannical soul will yield to nothing but superior force. Somehow Whitmer, and others like her, will have to be compelled to respect the rule of law and the rights of the people.").[12]

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[11] Available at <https://www.wsj.com/articles/its-still-america-virus-or-not-11586718091> (accessed April 15, 2020) [https://perma.cc/2XM2-WP8K].

[12] Available at <https://amgreatness.com/2020/05/03/the-tyrannical-soul-of-gretchen-whitmer/> (accessed May 4, 2020) [https://perma.cc/Q6D6-D67G].

- The Detroit News Editorial Board*, Editorial: Lawmakers Must Fight Gov's Power Grab*, The Detroit News (April 30, 2020) ("That's a stunning power grab. Whitmer is declaring she can run the state as she pleases, for as long as she pleases, with no oversight or checks on her power. This affront to democracy must be undone by the courts. . . . From the beginning of her tenure, Whitmer has shown disdain for both the law and regular-order governing, looking for every loophole to avoid dealing with the Legislature. This time, she's taken the state to a very dangerous place. There's no reasonable defense, in a representative democracy, for a governor to strip the legislative branch of its constitutional authority and assume dictatorial powers in perpetuity.").[13]
- Finley, *Opinion: A Dictator in Lansing, Plus a Debt We'll Never Repay*, The Detroit News (April 27, 2020) ("Here's what's changed in Michigan's response to the COVID-19 crisis: Instead of a government that adheres to the state Constitution, it has a governor who has claimed dictatorial authority. . . . [S]he will act unilaterally to give herself total control, with no checks on her actions. This is a dangerous place to be, particularly when no one can say for certain when the crisis will end. She's already abused her powers for political purposes by hiring a firm tightly bound to the Democratic Party to track virus data.").[14]

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[13] Available at <https://www.detroitnews.com/story/opinion/editorials/2020/04/30/editorial-lawmakers-must-fight-govs-power-grab/3056576001/> (accessed May 1, 2020) [https://perma.cc/4A7C-NFJ5].

[14] Available at <https://www.detroitnews.com/story/nletter/2020/04/27/dictator-lansing-plus-debt-never-repay/3031259001/> (accessed April 28, 2020) [https://perma.cc/SW4N-QDSP].

- Gingrich, *Opinion: Coronavirus Crisis Makes Some Leaders Believe They Have God-Like Decision-Making Capacity*, Fox News (April 19, 2020) ("One of the side effects of fighting the coronavirus pandemic has been the effort of some politicians to take power and run amok. Lord Acton was right when he said: 'Power tends to corrupt, and absolute power corrupts absolutely.' The problem isn't leaders taking money, but rather them losing all connection to reality and beginning to believe that they have a god-like capacity to make brilliant decisions for the stupid masses. We are witnessing this effect to a troubling degree amid the coronavirus—especially among the political left, where there is a pattern of people in positions of authority believing they are superior, both intellectually and morally, to the people they are supposed to serve. . . . Michigan's Democratic Gov. Gretchen Whitmer has provided us with a perfect case study of politicians imposing Orwellian measures supposedly to combat the coronavirus.").[15]
- Davidson, *The Coronavirus Is Exposing Little Tyrants All Over the Country*, The Federalist (April 13, 2020) ("The response of some mayors and governors to the coronavirus pandemic in recent days has made it clear they think they have unlimited and arbitrary power over their fellow citizens . . . . Pandemic or not, this stuff has no place in American society. Petty tyranny of the kind these mayors and local officials are scheming is wholly alien to our customs and way

[15] Available at <https://www.foxnews.com/opinion/newt-gingrich-coronavirus-crisis-makes-some-leaders-believe-they-have-god-like-decision-making-capacity> (accessed April 19, 2020) [https://perma.cc/P7NA-KR6E].

of life, and destructive to the social contract on which our nation is built. Thankfully, the Department of Justice has taken notice of this fledgling authoritarian streak among the country's mayors and governors. . . . Now more than ever, we need leaders who don't just care about protecting us from the pandemic, but also care about preserving liberty in a time of crisis."); *id*. (further characterizing the experience in Michigan as "an object lesson in the absurdity and inconsistency of arbitrary power and rule by fiat").[16]

- McCain, *The Worst Governor in America: Gretchen Whitmer Imposes Insane Policies on Michigan*, The American Spectator (April 13, 2020) ("References to Whitmer as a 'dictator' proliferated on social media over the weekend as Michigan residents came to grips with the consequences of the governor's draconian order.").[17]
- Blackmon, *Gretchen Whitmer: A Dangerous Object Lesson for All Americans*, DB Daily Update (April 12, 2020) ("[N]one of those governors and mayors can hold a candle to Michigan's Democrat Governor, Gretchen Whitmer. Whitmer has been such a despot in exercising her nebulous emergency powers during the Wuhan Virus crisis that she is now the subject of an online recall petition that had collected over 80,000 signatures within a few hours of its being issued on Saturday.").[18]

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[16] Available at <https://thefederalist.com/2020/04/13/the-coronavirus-is-exposing-little-tyrants-all-over-the-country/> (accessed April 15, 2020) [https://perma.cc/2S3S-BVWV].

[17] Available at <https://spectator.org/the-worst-governor-in-america/> (accessed April 15, 2020) [https://perma.cc/F2K4-B8JE].

[18] Available at <https://dbdailyupdate.com/index.php/2020/04/12/gretchen-whitmer-a-dangerous-object-lesson-for-all-americans/> (accessed April 15, 2020) [https://perma.cc/M9H5-4C7R].

- Jacques, *Opinion: Whitmer Disses Michigan Biz Community*, The Detroit News (April 11, 2020) ("Whitmer hasn't budged. She would rather be obeyed than compromise.").[19]
- Arama, *MI Dem Gov Wins the Prize for Orwellian Overreach, Banning What Citizens Can Do During Pandemic*, RedState (April 11, 2020) ("Whitmer is earning the reputation through the pandemic, as one of the worst governors for restrictions on civil liberties, without sense behind some of the actions. Whitmer gives new meaning to control and Orwellian regulations.").[20]
- Wu, *AG Barr Calls Coronavirus Restrictions "Draconian," Says They Should Be Reevaluated Next Month*, Ionia Sentinel-Standard (April 9, 2020) (reprinted from USA Today) ("Officials, [Attorney General William] Barr said, should be 'very careful to make sure . . . that the draconian measures that are being adopted are fully justified, and there are not alternative ways of protecting people.' ").[21]
- Lennox, *Opinion: Absent Martial Law, State Must Follow Constitution in Coronavirus Response*, The Detroit News (March 16, 2020)

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[19] Available at <https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2020/04/11/jacques-whitmer-disses-michigan-biz-community/5130279002/> (accessed April 15, 2020) [https://perma.cc/63QZ-MMAB].

[20] Available at <https://www.redstate.com/nick-arama/2020/04/11/mi-dem-gov-wins-the-prize-for-orwellian-overreach-with-her-overreach-on-what-citizens-are-banned-from-doing/> (accessed April 15, 2020) [https://perma.cc/9BDU-R5UP].

[21] Available at <https://www.sentinel-standard.com/zz/news/20200409/ag-barr-calls-coronavirus-restrictions-draconian-says-they-should-be-reevaluated-next-month/> (accessed April 15, 2020) [https://perma.cc/24J2-LDKQ].

> ("Without martial law, the Democratic governor's actions have been seen by some as legally suspect at best and deeply unconstitutional at worst. . . . Where are the civil libertarians, particularly the American Civil Liberties Union? If there were ever a time to affirm the rights and liberties of Michigan residents, it's now.").[22]

A perusing of other publications would reveal further characterizations of government officials as "tyrannical," "Mussolinis," "authoritarian," "dictatorial," and worse. Protests have been held, and calls for impeachment or recall have been heard. And criticisms have been leveled at our executive branch officials from legislators and everyday Michiganders alike. Lawsuits have now been filed.

Back to vaping. On December 18, 2018, United States Surgeon General Vice Admiral Jerome M. Adams released an advisory on e-cigarette use among youth, describing an "epidemic of youth e-cigarette use" and stating that "[w]e must take action now to protect the health of our nation's young people."[23] I have little doubt that the Surgeon General has identified a serious public-health concern that might warrant a governmental response, just as his predecessor identified one in 1964 regarding cigarette smoking generally.[24]

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[22] Available at <https://www.detroitnews.com/story/opinion/2020/03/16/opinion-whitmer-just-declare-martial-law/5058127002/> (accessed April 15, 2020) [https://perma.cc/FW6B-JN6A].

[23] See Office of the Surgeon General, *Surgeon General's Advisory on E-cigarette Use Among Youth* (December 18, 2018), available at <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf> (accessed April 15, 2020) [https://perma.cc/Z9TZ-JUJZ].

[24] According to the United States National Library of Medicine, the 1964 report, which highlighted the serious public-health consequences of

So, what did Michigan do in response to the Surgeon General's 2018 vaping advisory? Did the Legislature enact a law for the Governor's signature? Yes, it did, just as the United States Congress had earlier done in response to the Surgeon General's 1964 advisory.[25] As the majority opinion describes, the Legislature enacted (and the Governor signed) 2019 PA 18, effective September 2, 2019, amending the Youth Tobacco Act, MCL 722.641 *et seq*., and extending the existing prohibition on sales of tobacco products to minors to further prohibit the sale of "vapor products" and "alternative nicotine products" to minors.

But the Legislature had also already done what legislatures near and far now commonly do—it had delegated quasi-legislative authority to an executive agency, in this case the Department of Health and Human Services (the DHHS).[26] See MCL 333.2226(d)

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cigarette smoking, was issued "on January 11, 1964, choosing a Saturday to minimize the effect on the stock market and to maximize coverage in the Sunday papers," and it " 'hit the country like a bombshell. It was front page news and a lead story on every radio and television station in the United States and many abroad.' " See U.S. National Library of Medicine, *The 1964 Report on Smoking and Health, citing Smoking and Health: Report of the Advisory Committee to the Surgeon General*, available at <https://profiles.nlm.nih.gov/spotlight/nn/feature/smoking> (accessed April 15, 2020) [https://perma.cc/6GY2-9JU8].

[25] Congress responded to the Surgeon General's 1964 report by passing the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969.

[26] James Madison, one of the principal authors of the United States Constitution, famously wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison) (Cooke ed, 1961), p 324. Indeed, the administrative state "wields vast power and touches almost every aspect of daily life . . . ." *Free Enterprise Fund v Pub Co Accounting Oversight Bd*, 561 US 477, 499; 130 S Ct 3138; 177 L Ed 2d 706 (2010). As Chief Justice Roberts has observed, "The Framers could hardly have envisioned today's 'vast and

(authorizing the DHHS to "[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department").

So the DHHS took its delegated quasi-legislative authority and promulgated rules that, among other things, banned the sale of flavored nicotine vapor products in Michigan.

Not to worry, right? Surely there must be safeguards to ensure that agencies like the DHHS do not run amok. And, indeed, agency rulemaking is subject to the Administrative Procedures Act (the APA), MCL 24.201 *et seq*. MCL 24.243(1) of the APA provides, generally, that "a rule is not valid unless it is processed in compliance with [MCL 24.266], if applicable, [MCL 24.242], and in substantial compliance with [MCL 24.241(2), (3), (4), and (5)]."[27]

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varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *Arlington v Fed Communications Comm*, 569 US 290, 313; 133 S Ct 1863; 185 L Ed 2d 941 (2013) (Roberts, C.J., dissenting), citing *Free Enterprise Fund*, 561 US at 499. And as Justice David Souter noted of the Framers, "the administrative state with its reams of regulations would leave them rubbing their eyes." *Alden v Maine*, 527 US 706, 807; 119 S Ct 2240; 144 L Ed 2d 636 (1999) (Souter, J., dissenting). See also, e.g., Cooper, *Confronting the Administrative State*, National Affairs (Fall 2015), available at <https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state> (accessed April 15, 2016) [https://perma.cc/FU6K-Y4BP].

[27] MCL 24.241 provides for notice and a public hearing, a "statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule," and a "statement of the manner in which data, views, questions, and arguments may be submitted by a person to the agency . . . ." MCL 24.242 provides requirements for the publication of a notice of public hearing. And MCL 24.266 relates to environmental issues.

But there is a built-in exception within the APA to an agency's obligation to comply with the otherwise-applicable safeguards. MCL 24.248(1) authorizes an agency to promulgate "emergency rules" in certain circumstances. Specifically, it states:

> If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and partici pation procedures required by [MCL 24.241 and MCL 24.242] and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by [MCL 24.246] endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by [MCL 24.245] and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule.

That is how we got to where we are today. The Legislature delegated rulemaking authority to the DHHS, the Legislature authorized the DHHS to promulgate emergency rules under certain circumstances without following the usual safeguards, the DHHS invoked that authority and obtained the concurrence of the Governor (to which the agency itself reported),[28]

[28] I note that the DHHS promulgated the emergency rules on September 18, 2019, and that they went into effect on October 2, 2019, after the Governor gave her consent. However, the New York Times reported on September 4, 2019—before the rules were promulgated—that "Gov. Gretchen Whitmer of Michigan said Wednesday that she would outlaw the sale of flavored e-cigarettes in her state, part of a

and, *voila*, Michigan had banned the sale of flavored e-cigarettes. And on the eve of the scheduled six-month expiration of the emergency rules, the Governor decreed that the emergency rules be extended for an additional six months,[29] i.e., until September 18, 2020.[30]

Now, that isn't how we teach our kids about how laws are made.[31] And it's not what our Founding Fathers envisioned—this is a far cry from that.

So, why was it necessary for the DHHS to act on an "emergency" basis, bypassing the usual notice-and-comment safeguards otherwise mandated by the APA? After all, the Surgeon General's report included specific sections identifying the actions that he believed should be taken by parents, teachers, and health professionals, as well as by states and other governmental actors like the state of Michigan. In a section of the report entitled, "Information for States, Communities, Tribes, and Territories," the Surgeon General provided the following specific recommendations for states like Michigan:

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national crackdown on vaping amid a recent spike in illnesses tied to the products." See Smith, *Amid Vaping Crackdown, Michigan to Ban Sale of Flavored E-Cigarettes*, New York Times (September 4, 2019), available at <https://www.nytimes.com/2019/09/04/us/michigan-vaping.html> (accessed April 15, 2020) [https://perma.cc/6XLW-F3YJ].

[29] MCL 24.248(1) allows such an extension upon the Governor's filing of a certificate of need.

[30] Although the trial court's injunctive order entered on October 15, 2019, the Governor waited until March 11, 2020, to issue her diktat extending the emergency rules for an additional six months, albeit without the DHHS in the interim pursuing normal rulemaking through the still-available procedures of the APA, including its typically mandated notice-and-comment safeguards.

[31] See, e.g., Kids in the House, *How a Bill Becomes a Law* <https://kidsclerk.house.gov/grade-school/lesson.html?intID=17> (accessed April 15, 2020) [https://perma.cc/62F9-MKRH].

Information for States, Communities, Tribes and Territories

- **You have an important role to play in addressing this public health epidemic.**
- Implement evidence-based population-level strategies to reduce e-cigarette use among young people, such as including e-cigarettes in smoke-free indoor air policies, restricting young peoples' access to e-cigarettes in retail settings, licensing retailers, implementing price policies, and developing educational initiatives targeting young people.
- Implement strategies to curb e-cigarette advertising and marketing that are appealing to young people.
- Implement strategies to reduce access to flavored tobacco products by young people. [*Surgeon General's Advisory on E-cigarette Use Among Youth*, p 3.]

Notably, the Surgeon General said *nothing* about a need for emergency bans.

Because the DHHS skipped the usual notice-and-comment procedures, there was no public discussion of the merits or demerits of the proposed rules. And even in the trial court, defendants offered only vague generalities and presented no evidence or rationale for why the circumstances required that the normal rule-making process be abandoned, why the extreme measure of banning *all* flavored nicotine vaping products was necessary, why lesser measures were not adequate, or why the actions outlined by the Surgeon General would not suffice during a limited interim time period during which the usual notice-and-comment procedures could be followed.[32]

[32] Defendants did not, for example, discuss the difference between cartridge-based products favored by youth, such as JUUL, which the Surgeon General stated had experienced a 600% surge in sales in 2016–2017 and had the greatest market share in 2017, as opposed to other flavored vaping products used by adults in order to quit smoking.

The trial court in this case issued a preliminary injunction enjoining the enforcement of the emergency rules. Like the majority, I question some of the trial court's rationale. But, like the majority, I also conclude that defendants have overstepped their authority in this case. Preliminary injunctions should not be granted lightly. But neither should liberty be taken from us lightly.

As the adage goes, "Give them an inch, and they'll take a mile." Amidst the COVID-19 pandemic, that adage has new meaning. It even applies to vaping.

For these additional reasons, I concur.

Defendants also did not discuss why a ban on all flavored products was required or why they were not following the lead of the United States Food and Drug Administration in targeting their enforcement efforts toward cartridge-based flavored vaping products. See U.S. Food and Drug Administration, *FDA Finalizes Enforcement Policy on Unauthorized Flavored Cartridge-Based E-cigarettes that Appeal to Children, Including Fruit and Mint* (January 2, 2020), available at <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children> (accessed April 15, 2020) [https://perma.cc/NYP3-7EHG].

PEOPLE v KENNY

Docket No. 347090. Submitted April 15, 2020, at Grand Rapids. Decided May 21, 2020, at 9:05 a.m.

Defendant was convicted following a jury trial in the Muskegon Circuit Court of first-degree retail fraud, MCL 750.356c. A Walmart employee observed defendant removing a theft-detection device from a $378 television and placing the television in his shopping cart. A loss-prevention employee of the store and a police officer who was called to respond to defendant's suspicious behavior also observed defendant walking toward the exit of the store with the television in his cart. When defendant made eye contact with the employee and the officer, he turned around and went to a checkout lane. Defendant was then detained. The jury convicted defendant of retail fraud but acquitted him of deactivating or removing a theft-detection device, MCL 750.360a.

The Court of Appeals *held*:

1. Although framed as a sufficiency argument, defendant's argument that the evidence was insufficient to establish the offense of retail fraud because there was no evidence that he actually stole the television indirectly challenged the jury instructions. The instructions for retail fraud, set forth in M Crim JI 23.13, stated that the prosecution was required to prove that defendant took property from the store that was offered for sale, that he moved the property, that he intended to steal the property, that the incident happened inside or around the store, and that the price of the property was $200 or more but less than $1,000. Defendant, however, waived any claim of error regarding the instructions by voicing satisfaction with them. An affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions. However, even if defendant had not waived this argument, his instructional-error claim did not support reversal. Defendant's argument was that he did not steal the TV because he never left the store with it. But as used in the retail-fraud statutes (MCL 750.356c(1)(b), MCL 750.356d(1)(b), and MCL 750.356d(4)(b)), the term "steals" means to take and move property with the

intent to steal—elements that were encompassed by the jury instructions given at defendant's trial. The prosecution was not required to prove that defendant exited the store with the TV to establish the crime.

2. Defendant further argued that the evidence was not sufficient to support his conviction because the sale price of the television was less than $1,000. Generally, under MCL 750.356c(1)(b), first-degree retail fraud is committed if the property at issue is offered for sale at a price of $1,000 or more, while under MCL 750.356d(1)(b), second-degree retail fraud is committed if the property is offered for sale at a price of $200 or more but less than $1,000. Under MCL 750.356c(2), however, a person who commits second-degree retail fraud can be adjudged guilty of first-degree retail fraud if the person was previously convicted of first- or second-degree retail fraud. Defendant was previously convicted of first-degree retail fraud; therefore, the evidence was sufficient to support his conviction of first-degree retail fraud in this case because it was premised on his previous conviction, not on the sale price of the television. Defendant also argued that the trial court did not comply with MCL 750.356c(4) when determining the existence of the prior conviction. Although the trial court did not specifically state that it found that defendant had a prior conviction of first-degree retail fraud, defendant affirmed on the record at sentencing that the presentence investigation report correctly reported his criminal history. Given defendant's express concession regarding his criminal record, remand was not required to address any procedural error.

3. The evidence was also sufficient to show that defendant intended to steal the television. Intent may be inferred from minimal circumstantial evidence. Defendant was seen trying to remove a theft-detection device from the television, and when the loss-prevention employee retraced defendant's path through the store, the employee found the manufacturer sticker and price sticker that had been affixed to the television crumpled up on a shelf in an aisle defendant had been in while the television was in his cart. The evidence also established that defendant took the unpaid-for television out of the general sales area and began heading toward the store's exit. He changed direction and went into a cashier's lane after making eye contact with the loss-prevention employee and the police officer. A juror could reasonably infer from defendant's actions inside the store that he intended to steal the television.

4. Defendant argued that the judgment of sentence incorrectly stated that the trial court dismissed the charge of deactivating or removing a theft-detection device, when, in fact, the jury acquitted him of this charge. The judgment-of-sentence form used by the court did not provide for the entry of an acquittal, but only for information regarding convictions and dismissals. Under MCR 6.427(6), a judgment must include the jury's verdict or the finding of guilt by the trial court. The rule further provides that if the defendant was found not guilty or is otherwise entitled to be discharged, the court must enter judgment accordingly. According to this language, when a jury finds a defendant not guilty of a charge, the verdict may be reflected by the entry of a dismissal of the charge in the judgment of sentence.

Affirmed.

STATUTORY INTERPRETATION — RETAIL FRAUD — STEALING.

Under the retail-fraud statutes, MCL 750.356c and MCL 750.356d, a person steals a store's property when he or she takes and moves the property with the intent to steal it, regardless of whether the person removed the property from the store.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

John G. Zevalking for defendant.

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

MARKEY, P.J. Defendant appeals by right his jury trial conviction of first-degree retail fraud, MCL 750.356c. He was sentenced as a third-offense habitual offender, MCL 769.11, to 14 months to 10 years' imprisonment. On appeal, defendant challenges the jury instructions relative to the elements of retail fraud, the sufficiency of the evidence, and the accuracy of the judgment of sentence. We affirm.

The prosecution presented evidence, including surveillance video, that defendant removed the "spider

wrap"[1] from a $378 TV that was on display in a Walmart and then, after placing the TV in a shopping cart, removed a price label from the TV that contained the bar code that a cashier scans upon purchase. Additionally, there was evidence that defendant pushed the cart with the TV past the cash registers and up to a customer service area where he left the cart and TV unattended while he entered the men's restroom. The evidence revealed that after defendant exited the restroom, he retrieved the cart with the TV and headed in the direction of the store's exit. But before exiting and after making eye contact with a Walmart loss-prevention employee and a police officer who had been contacted about defendant's suspicious behavior, defendant turned around and went to a checkout lane. It was then that he was detained.[2] Additional details will be discussed below. Defendant was convicted of first-degree retail fraud by the jury; however, the jury acquitted defendant of deactivating or removing a theft-detection device, MCL 750.360a.

Before addressing defendant's arguments on appeal, and to give proper context to the appellate arguments, we must examine the statutory scheme regarding retail fraud. The retail-fraud statutes punish a person who "steals property of [a] store that is offered for sale." MCL 750.356c(1)(b); MCL 750.356d(1)(b) and (4)(b). In general, first-degree retail fraud is committed if the property at issue "is offered for sale at a price of $1,000.00 or more," MCL 750.356c(1)(b); second-degree retail fraud is committed if the property "is offered for sale at a price

[1] A spider wrap is a theft-detection device that has an alarm that will create a loud beeping noise if the device is tripped or broken in any way.

[2] Defendant was allowed to leave the store but was later charged after authorities reviewed the video footage from the store's surveillance cameras.

of $200.00 or more but less than $1,000.00," MCL 750.356d(1)(b); and third-degree retail fraud is committed if the property "is offered for sale at a price of less than $200.00," MCL 750.356d(4)(b). Here, because the sale price of the TV was $378, the offense falls within the category of second-degree retail fraud. Defendant, however, was charged with first-degree retail fraud because MCL 750.356c(2) provides that when a person commits second-degree retail fraud, he or she can be adjudged guilty of first-degree retail fraud if the person had a prior conviction of first-degree or second-degree retail fraud, and defendant had a prior conviction of first-degree retail fraud. When the defendant has a prior conviction of first- or second-degree retail fraud, the prosecution only has to prove the elements of second-degree retail fraud. The offense then increases to first-degree retail fraud if the trial court, not a jury, finds that the defendant has a prior conviction of retail fraud. MCL 750.356c(4).

The jury was instructed pursuant to M Crim JI 23.13, requiring the prosecution to prove that defendant took property from the store that was offered for sale, that defendant moved the property,[3] that defendant intended to steal the property,[4] that the occurrence happened inside or around the store, and that the price of the property was $200 or more, but less than $1,000.

Defendant first argues that under the plain meaning of the statutory language, the offense of retail fraud

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[3] M Crim JI 23.13(3) provides that any movement suffices and that "[i]t does not matter whether the defendant actually got the property past the cashier or out of the store."

[4] M Crim JI 23.13(4) provides that intent to steal means "that the defendant intended to permanently take the property from the store without the store's consent."

cannot be established with proof that he merely intended to steal the TV; rather, there had to be evidence that he actually stole the TV, which was not shown. As indicated above, MCL 750.356d(1)(b) punishes a person who "steals property," while M Crim JI 23.13 requires proof that a defendant "took some property," "moved the property," and "intended to steal the property." Although defendant frames the matter as a sufficiency argument, he is indirectly challenging the jury instructions on the elements of the crime. Defendant, however, waived any claim of error regarding the instructions by affirmatively voicing satisfaction with the instructions, which necessarily included the instructions on the elements of second-degree retail fraud. An affirmative statement that there are no objections to the jury instructions constitutes express approval of those instructions, thereby waiving appellate review of any claimed error. *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011); *People v Hershey*, 303 Mich App 330, 351; 844 NW2d 127 (2013).

Moreover, reversal is unwarranted even if defendant did not waive an instructional-error claim. The crux of defendant's argument is that he did not "steal" the TV, considering that he "did not take a TV from Walmart — he never left the store with it." This position is in direct contradiction to M Crim JI 23.13(3), which instructs jurors that it is irrelevant whether the defendant removed the property from the store.[5] We conclude that a person "steals" property, as the term "steals" is used in MCL 750.356c(1)(b), MCL 750.356d(1)(b), and MCL 750.356d(4)(b), when he or she takes and moves store property with the intent to steal the property, which elements are encompassed by M Crim JI 23.13. For

[5] We acknowledge that a model instruction need not be given if it does not "accurately state the applicable law." MCR 2.512(D)(2)(b).

example, if a person takes a book from the shelf in a bookstore and moves or places the book inside the person's coat with the intent to steal the book, the person is guilty of stealing, even if the person has not yet left the bookstore. Of course, if a person has not walked past the cash registers or out the door with the property, it may be more difficult to show an intent to steal. Our conclusion is consistent with the definition of the word "steal" found in *Black's Law Dictionary* (9th ed), which provides, "To take (personal property) illegally with the *intent* to keep it unlawfully." (Emphasis added.)[6]

Our ruling is also consistent with *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991), in which this Court, addressing a sufficiency-of-the-evidence argument regarding a conviction of first-degree retail fraud, MCL 750.356c, held:

> In this case, defendant did not merely pick up goods in the sales area of the store. The evidence established that defendant took the merchandise out of the general sales area, past the store's cash registers, and moved to within ten feet of the front exit. When confronted and asked for a receipt, defendant pushed the cart away and ran out the front door and into the parking lot. The groceries in defendant's bags were valued at approximately $150, and defendant had only a few dollars in his possession. We find that such conduct by defendant made his possession adverse to the store.

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[6] In *People v Jones*, 467 Mich 301, 304-305; 651 NW2d 906 (2002), our Supreme Court observed as follows:

> The statute does not define the word [at issue], so we may consult a dictionary to ascertain the meaning of the term. The Legislature requires that "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. Because [the word at issue] is a legal term of art, resort to a legal dictionary to determine its meaning is appropriate. [Citations omitted.]

Accordingly, because it was unnecessary for the prosecution to prove that defendant exited the store with the TV to establish the crime, we reject defendant's argument that the evidence was insufficient to establish that he stole the property where he did not actually leave the store with the TV. Defendant clearly had intended to do so before he realized he had been discovered.

Defendant next contends that there was insufficient evidence to support the conviction because the TV was not for sale in the amount of $1,000 or more as necessary to prove first-degree retail fraud. We reject this argument because, as discussed earlier, defendant was not convicted of first-degree retail fraud on the basis that the sale price of the property was $1,000 or more. Defendant's conviction of first-degree retail fraud was premised on the fact, to which defendant conceded, that he had a prior conviction of first-degree retail fraud.

Defendant next maintains that the trial court did not comply with MCL 750.356c(4), which provides:

> If the prosecuting attorney intends to seek an enhanced sentence based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information a statement listing the prior conviction or convictions. The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> (a) A copy of the judgment of conviction.
>
> (b) A transcript of a prior trial, plea-taking, or sentencing.
>
> (c) Information contained in a presentence report.
>
> (d) The defendant's statement.

Defendant argues that the court did not hold a separate hearing, nor did the court make a determination at the sentencing hearing that defendant had a prior conviction of first-degree retail fraud.

The prosecutor included a statement in the criminal complaint and information listing defendant's prior conviction of first-degree retail fraud, but there was no separate hearing on this issue before the sentencing hearing. At the sentencing, the court gave defendant the opportunity to read the presentence investigation report (PSIR), which referenced the prior conviction of first-degree retail fraud. When defendant was done reviewing the PSIR, the court asked him if he had any additions or corrections. Defendant, in turn, asked the trial court if the court was talking about his criminal record, and the court indicated that it was speaking about everything in the PSIR. Defendant responded, "Everything is right." Although the court did not specifically state that it found the existence of a prior conviction of first-degree retail fraud, we decline to remand the case given defendant's express concession to the court that his criminal record, as set forth in the PSIR, was correct. See MCL 769.26 (procedural error in criminal case does not require reversal unless it would result in a miscarriage of justice).

Defendant next argues that, assuming an intent to steal is an element of the offense, the evidence was insufficient to show that defendant intended to steal the TV. This Court reviews de novo whether there was sufficient evidence to support a conviction. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence—whether direct or circumstantial—in a light most favorable to the pros-

ecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Circumstantial evidence and any reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The prosecution need not negate every reasonable theory of innocence; it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "All conflicts in the evidence must be resolved in favor of the prosecution." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The element of intent may be inferred from circumstantial evidence. *People v Henderson*, 306 Mich App 1, 11; 854 NW2d 234 (2014). Because it can be difficult to prove a defendant's state of mind on issues such as intent, minimal circumstantial evidence suffices to establish a defendant's state of mind. *Id*. A defendant's intent can be gleaned or inferred from his or her actions. *People v Cameron*, 291 Mich App 599, 615; 806 NW2d 371 (2011).

In this case, there was sufficient evidence to show that defendant intended to steal the TV. A Walmart employee witnessed defendant "wiggling and pulling" on the spider-wrap wires in an effort to remove the

wrap. After defendant took the TV and left the electronics area, the spider wrap was found lying on the ground. Further, after police officers arrived and spoke with defendant and then allowed defendant to leave, a loss-prevention employee and the officers watched the surveillance video to see precisely where in the store defendant went. After observing defendant's "path" through the store, the loss-prevention employee retraced defendant's steps and found both the manufacturer sticker and price sticker—which included the clearance tag and bar code needed to purchase the TV—crumpled up on a shelf in one of the aisles that defendant had entered while he had the TV in his cart.

The evidence established that defendant took the TV outside of the general sales area, walked past the cash registers, entered and exited the restroom, and began heading in the direction of the exit doors with the unpaid-for TV with him in his cart. But when he made eye contact with a police officer and the loss-prevention employee, defendant changed direction and maneuvered to a cashier's lane. Additionally, the officer who arrested defendant testified that based on his history with suspects, defendant "didn't have any reason to suspect that anybody was following him or observing him, watching him, anything like that. Until he saw me, I believe that he was going towards the exit of the store." The arresting officer opined that when defendant saw him, defendant "believed that he needed to go back into the store to hide his intent."

A juror could reasonably infer from the evidence described above regarding defendant's actions, conduct, and movements inside the store that he had every intent to steal the TV. Although defendant presented evidence suggesting a different conclusion, e.g., the testimony of his girlfriend about a blank check that she

gave defendant to take into the store to buy a TV, it was for the jury to assess the weight of the evidence and the credibility of defendant's girlfriend. Reversal is unwarranted.

Finally, defendant argues that his judgment of sentence incorrectly provided that the charge of deactivating or removing a theft-detection device was dismissed by the court, when in actuality the jury found defendant not guilty of the charge. The judgment-of-sentence form used by the trial court was approved by the State Court Administrative Office (SCAO) and adopted under MCR 8.103(9). The form does not specifically provide for the entry of an acquittal or a finding of not guilty. Instead, the form only allows for entry of information regarding convictions and dismissals. MCR 6.427, which concerns judgments of sentence, requires a judgment to include "the jury's verdict or the finding of guilt by the court." MCR 6.427(6). This provision appears to concern only guilty verdicts upon which a defendant is sentenced. MCR 6.427 further provides that "[i]f the defendant was found not guilty or for any other reason *is entitled to be discharged*, the court must enter judgment accordingly." (Emphasis added.) On the basis of this language, we conclude that when a jury finds a defendant not guilty of a charge, that verdict may be reflected by the entry of a dismissal of the charge in the judgment of sentence. The SCAO form, which the trial court entered in this case, was thus consistent with the law. Accordingly, there is no need to remand for correction of the judgment of sentence.

We affirm.

JANSEN and BOONSTRA, JJ., concurred with MARKEY, P.J.

FOUNDATION FOR BEHAVIORAL RESOURCES v W E UPJOHN UNEMPLOYMENT TRUSTEE CORPORATION

Docket No. 345415. Submitted April 15, 2020, at Detroit. Decided May 28, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 1000 (2021).

Foundation for Behavioral Resources filed a false-light invasion-of-privacy action in the Kalamazoo Circuit Court against W. E. Upjohn Unemployment Trustee Corporation and Ben Damerow. In 2015, plaintiff bid on a contract to operate a program for Michigan Works for the period 2015 through 2018. Upjohn acted as the administrative and fiscal agent for Michigan Works, Southwest. Plaintiff was the current provider of the program when it submitted the bid. The Michigan Works workforce development board rejected plaintiff's 2015 bid because plaintiff did not meet the minimum bidder score and because, according to Damerow, the Michigan Works director, there had been financial problems with plaintiff during its earlier contract with Michigan Works. Although it was later determined that plaintiff should have received a higher bidder score, defendants refused to award plaintiff the contract because there had been a pattern of poor communication, questionable financial proceedings leading to unacceptable findings, and concerns that plaintiff's proposed budget contained heavy staff and administrative expenses. Plaintiff brought suit, claiming that defendants' denial of its bid was defamatory in that the reasons expressed for the denial placed plaintiff in a false light. Defendants moved for summary disposition. The court, Alexander D. Lipsey, J., granted defendants' motion, reasoning that plaintiff had failed to demonstrate that defendants acted with malice when denying plaintiff's bid and publicly explaining the denial. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

To maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. In addition, the defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be

placed. The plaintiff has the burden of establishing that when the defendant disseminated the information, it was done with actual knowledge or reckless disregard of the truth or falsity of the publicized matter—i.e., that it was disseminated with malice. The element of malice in a false-light invasion-of-privacy claim applies to all plaintiffs, whether the plaintiff is a private figure or a public figure. In this case, the trial court correctly determined that plaintiff, a private figure, needed to establish malice to prove its false-light invasion-of-privacy claim. Because plaintiff failed to present any evidence that defendants acted with malice in connection with the denial of plaintiff's bid, the trial court did not err by granting defendants' motion for summary disposition.

Affirmed.

TORTS — FALSE-LIGHT INVASION OF PRIVACY — ELEMENTS — MALICE.

To maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position; a plaintiff has the burden of establishing that when the defendant disseminated the information, the defendant did so with actual knowledge or reckless disregard of the truth or falsity of the publicized matter—i.e., that the information was disseminated with malice; the element of malice must be proven whether the plaintiff is a private figure or a public figure.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael H. Perry*) for plaintiff.

Garan Lucow Miller, PC (by *Daniel S. Saylor*) for defendants.

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

PER CURIAM. Plaintiff, Foundation for Behavioral Resources, appeals by leave granted[1] the trial court's

[1] *Foundation for Behavioral Resources v W E Upjohn Unemployment*, unpublished order of the Court of Appeals, entered February 4, 2019 (Docket No. 345415).

order granting defendants, W. E. Upjohn Unemployment Trustee Corporation and Ben Damerow, summary disposition on plaintiff's false-light invasion-of-privacy claim under MCR 2.116(C)(10). Plaintiff argues that malice is not an element of false-light invasion of privacy. This appeal is being decided without oral argument under MCR 7.214(E)(1). We disagree with plaintiff's position and therefore affirm.

I. UNDERLYING FACTS

Plaintiff is a nonprofit corporation that was founded in 1972 with the mission of fostering self-reliance. A welfare-to-work program was a major part of plaintiff's business. Plaintiff ran its employment program through Michigan Works; Upjohn operated as the administrative and fiscal agent for Michigan Works, Southwest. In 2015, plaintiff bid on a contract to operate a Partnership, Accountability, Training, Hope (PATH) program for Michigan Works from 2015 to 2018. Plaintiff was the current provider of PATH at the time it submitted its bid. Plaintiff's 2015 bid was rejected.

There were three proposals submitted for the 2015 to 2018 contract: the one from plaintiff and two others. According to the minutes of the Michigan Works workforce development board meeting that considered whether to award the 2015 to 2018 contract, none of the three proposals, including plaintiff's, met the minimum score of 75. The minutes also show that Damerow, who was employed by Upjohn as the Michigan Works director at the time, noted that there were financial problems with plaintiff. Later review, however, determined that plaintiff's information was misscored and that the company should have received a higher score than the minimum threshold score of 75.

Despite this scoring error, defendants refused to grant plaintiff's appeal of the bidding process because there was a pattern of poor communications, questionable financial proceedings leading to findings that were unacceptable, as well as concerns that plaintiff's proposed budget was weighted toward staff and administrative expenses.

Plaintiff then filed a complaint alleging, in relevant part, that because plaintiff's bid was decided on inaccurate information, defendants were liable for false-light invasion of privacy; defendants disagreed. The trial court agreed with defendants, and because plaintiff had presented no evidence of malice, the court granted summary disposition to defendants on that issue. This appeal followed.

II. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition to defendants because malice is not an element of false-light invasion of privacy when the plaintiff, as in this case, is not a public figure. We disagree.

A. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (citation and quotation marks omitted). 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." *Id*. (citation and quotation marks omitted).

B. ANALYSIS

There are four types of invasion-of-privacy claims: "(1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 69; 919 NW2d 439 (2018) (citation and quotation marks omitted). This Court recently addressed false-light invasion-of-privacy claims in *Puetz* and held that

> [i]n order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. [*Id*. (citation and quotation marks omitted).]

"Further, the defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Id*. (citation and quotation marks omitted). Finally, "in order to establish a false-light claim, a plaintiff must establish that when the defendant disseminated the information, it was done with actual knowledge or reckless disregard of the truth or falsity of the publicized matter." *Id*. at 73-74.

Although no Michigan court has *analyzed* whether malice is a required element for a private plaintiff pursuing a false-light claim, our Court has, for at least the last 35 years, articulated malice as an element of such a claim. See, e.g., *Sawabini v Desenberg*, 143 Mich App 373, 381 n 3; 372 NW2d 559 (1985);[2] *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 617-618; 396 NW2d 809 (1986); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986); and *Puetz*, 324 Mich App at 69. So has the Supreme Court. See *Dadd v Mount Hope Church*, 486 Mich 857, 857 (2010) ("The trial court properly instructed the jury on false light invasion of privacy, which included an instruction that 'plaintiff must prove by a preponderance of the evidence that the defendant must have known or acted in reckless disregard of the falsity of the information and the false light in which the plaintiff would be perceived.' "). Many of these cases involved seemingly private plaintiffs, and each stated that such a plaintiff must "establish that when the defendant disseminated the information, it was done with actual knowledge or reckless disregard of the truth or falsity of the publicized matter." *Puetz*, 324 Mich App at 73-74.[3] In other words, the private plaintiff must prove malice. *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632 (1998) (defining malice as knowledge that the "state-

[2] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

[3] Some other decisions have not articulated this element, but that mostly appears to be as a result of the Court simply laying out a general framework for the tort in instances in which the claim failed without regard to the malice issue. See, e.g., *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993).

ment was false or as reckless disregard as to whether the statement was false or not") (citation and quotation marks omitted). See also *Feyz v Mercy Mem Hosp*, 475 Mich 663, 667; 719 NW2d 1 (2006).

We differentiate between a private plaintiff, as here, and a public figure (or limited public figure), as in *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 304; 680 NW2d 915 (2004), only to determine the burden of proof—preponderance of the evidence for a private plaintiff, see M Civ JI 114.06; M Civ JI 8.01, and clear and convincing evidence for a public figure, *Battaglieri*, 261 Mich App at 304. See also *Dadd*, 486 Mich at 857 ("The trial court properly instructed the jury on false light invasion of privacy, which included an instruction that 'plaintiff must prove by a preponderance of the evidence that the defendant must have known or acted in reckless disregard of the falsity of the information and the false light in which the plaintiff would be perceived.' ").

Plaintiff argues that because it is not a public figure, malice is not an element of its cause of action for false-light invasion of privacy. In *Battaglieri*, 261 Mich App at 304, this Court held that malice is an element of false-light invasion of privacy if the plaintiff is a public figure. This holding was based on requirements of the First Amendment and the similarities between defamation and false-light invasion of privacy; the *Battaglieri* Court's holding did not address whether malice was a required element when the plaintiff in a false-light action is not a public figure. See *id*. Because private figures in defamation cases are not required to show malice, it appears that under *Battaglieri,* plaintiff would have a strong argument that when the plaintiff is a nonpublic figure, malice should not be an element of false-light invasion-of-privacy

claims either. See *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 735; 664 NW2d 728 (2003) (holding that private-figure plaintiffs in defamation cases need only prove negligence, not malice). This Court, however, has discussed the elements of false-light invasion of privacy much more recently in *Puetz*.

Puetz did not address whether the plaintiff was a public or a private figure. See *Puetz*, 324 Mich App at 56-80. But, as noted earlier, the *Puetz* Court nevertheless *did* clearly state the elements of false-light invasion of privacy, *id*. at 69-71, 73-76, and in setting forth those elements, did not differentiate between public and private plaintiffs. See *id*. Specifically, when addressing the malice element of false-light invasion of privacy, the *Puetz* Court stated that "in order to establish a false-light claim, *a plaintiff* must establish that when the defendant disseminated the information, it was done with actual knowledge or reckless disregard of the truth or falsity of the publicized matter." *Id*. at 73-74 (emphasis added). We decline to depart from the weight of the longstanding and consistent authority on this matter.[4] Consistently with *Dadd*, *Sawabini*, *Hall*, and *Early Detection Center*, this formulation of the elements of a false-light claim applies to *all plaintiffs*—both public and private figures. See *Puetz*, 324 Mich App at 73-74.

Thus, as established by the *Puetz* Court, malice is an element of false-light invasion of privacy, regardless of whether the plaintiff is a public or private figure. Consequently, the trial court did not err by requiring plaintiff to show that defendants acted with malice.

[4] We do not mean to suggest that the bench and bar might not benefit from a specific analysis into whether there should be any malice requirement for private plaintiffs bringing claims for false-light invasion of privacy, but, particularly in light of *Dadd*, we believe that analysis should come from our Supreme Court.

Plaintiff failed to present any such evidence and, therefore, could not survive defendants' motion for summary disposition.

Plaintiff's entire argument is that this Court should hold that malice is not an element of false-light invasion of privacy. Accordingly, any argument that the trial court erred by granting summary disposition to defendants on plaintiff's false-light invasion-of-privacy claims on other grounds is abandoned. *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015) ("An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority.").

III. CONCLUSION

For the reasons stated, the trial court's order granting summary disposition to defendants is affirmed. Defendants, as the prevailing parties, may tax costs under MCR 7.219.

MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ., concurred.

REDMOND v HELLER

Docket Nos. 347505 and 347558. Submitted March 4, 2020, at Grand Rapids. Decided May 28, 2020, at 9:05 a.m.

Martha Redmond, Arthur McNabb, and the Redmond Funeral Home sued Theresa Heller, Paul Heller, and Dennis L. Wolf in the Kalamazoo Circuit Court in 2017, alleging, *inter alia*, that defendants had wrongfully used the sex offender registry to injure or harass an individual named in the registry, engaged in business defamation, and posted false and defamatory statements on social media that were harmful to plaintiffs and constituted defamation per se. Charles Wolf, the 12-year-old son of Theresa and Dennis, died in 2015. Redmond Funeral Home handled the funeral, and McNabb, an employee of the funeral home, transported Charles's body to the funeral home along with another staffer from the home and assisted in preparing the body for the funeral. McNabb was not present for Charles's visitation or funeral service. At some point after the funeral, Theresa began to investigate every person who had handled Charles's body and learned that McNabb was a convicted sex offender. In 2016, Theresa posted messages on Facebook describing McNabb as a sick pedophile who had raped a boy and served six years in prison and claiming that McNabb possessed violent child pornography. She also claimed that lawyers for Redmond were trying to intimidate her and prevent her from exercising her First Amendment rights. She asked others on Facebook to help her get the word out about McNabb and the funeral home. Paul, Theresa's brother, wrote a blog post in 2016 stating that McNabb was a pedophile and child rapist and questioning whether anything untoward had happened while McNabb was handling Charles's body. In subsequent online posts, Theresa claimed that Charles's friends and family members were exposed to McNabb while attending Charles's funeral. In the spring and summer of 2017, Theresa stated on Facebook that McNabb raped boys that he had chosen from grieving families, that he was continuing to target young boys to abuse, and that he had sodomized his customers' children. In August 2017, plaintiffs sued defendants and asked the trial court to award damages and grant an injunction against further defamatory postings. Dennis counterclaimed against plaintiffs. Theresa moved for summary disposi-

tion, asserting that plaintiffs' claims were barred by the one-year statute of limitations for defamation claims. The trial court, Alexander C. Lipsey, J., denied the motion, concluding that the statute of limitations applied separately to each defamatory statement. The court, however, dismissed plaintiffs' claim against Paul because his statements about plaintiffs were published more than one year before plaintiffs filed their complaint. Plaintiffs later moved for partial summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that they were entitled to a permanent injunction because Theresa's statements were defamatory per se and were harming plaintiffs. The trial court determined that there was a real and imminent danger that Theresa's statements would damage plaintiffs' reputations and that a permanent injunction was appropriate. The court also granted plaintiffs' motion for summary disposition against Dennis, entered a permanent injunction against him, and dismissed his counterclaim given his failure to diligently pursue the claim. Theresa and Dennis appealed.

The Court of Appeals *held*:

1. Plaintiffs argued that because they voluntarily dismissed their claims for damages when the trial court granted their request for injunctive relief, Theresa's challenge to the court's order denying her motion for summary disposition was moot because there were no pending claims to dismiss. However, an injunction is a remedy, not a cause of action, and as such, it must be supported by an underlying, timely claim. The trial court granted plaintiffs' motion for summary disposition and the permanent injunction on the basis of its determination that Theresa had defamed plaintiffs. If the trial court should have dismissed plaintiffs' claims as untimely, as asserted by Theresa in her motion for summary disposition, then reversal of the court's judgment and order would be required. Accordingly, review of the court's order denying summary disposition was not moot.

2. Under MCL 600.5805(11), the period of limitations for a defamation action is one year, and under MCL 600.5827, the claim accrues at the time of the wrong, regardless of the time when damage resulted from the wrong. Theresa argued that the period of limitations for defamatory statements begins to run after the first defamatory statement is made and that repeating the statement does not extend the period of limitations. Plaintiffs asserted that Theresa began a defamatory campaign against them in June 2016, and they pleaded separate, distinct defamatory publications made by Theresa on specific dates. Because the

trial court properly determined that the period of limitations had not run as to plaintiffs' allegations regarding statements made less than a year before the complaint was filed, it did not err by denying Theresa's motion for summary disposition.

3. The information collected for the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is generally confidential and exempt from disclosure except for law enforcement purposes. MCL 28.730(5) provides a person who is registered in accordance with the statute with a cause of action against a person who unlawfully reveals his or her information. However, the statute also requires the Department of State Police to maintain a public website that contains the information listed in MCL 28.728(2) of individuals registered under SORA. The cause of action provided by MCL 28.730(5) does not apply to information disclosed from the public website. Theresa argued that plaintiffs' claim under MCL 28.730(5) should have been dismissed because the information she published about McNabb was from the public website established under SORA. However, plaintiffs claimed that in addition to the information that Theresa obtained from the public website, she also made assertions that were not from the website, including that McNabb was a pedophile who had abused a corpse, that McNabb was actively seeking teenaged boys to victimize, and that Redmond and the Redmond Funeral Home facilitated his activities. To the extent that the postings by Theresa included nonpublic information, plaintiffs could assert a claim under MCL 28.730(5).

4. Plaintiffs argued in their motion for partial summary disposition that there was no genuine issue of material fact that they were entitled to a permanent injunction. Because an injunction is an equitable remedy and not a cause of action, plaintiffs were still required to establish success on the merits of a claim that could support injunctive relief. Plaintiffs identified several statements made by Theresa that they claimed were false and defamatory. In granting plaintiffs' motion for partial summary disposition and concluding that plaintiffs had established this claim as a matter of law, the trial court cited Theresa's statements that she wanted to spread the word about what had happened to her son following his death, that Charles's cousins and friends were exposed to McNabb at Charles's funeral, that McNabb hunted for boys at videogame stores and funeral homes, and that McNabb targeted young boys who liked video games and nice shirts. As to these statements, the trial court properly determined that no reasonable juror could conclude other than that they were defamatory in that they tended to harm plaintiffs'

reputations, lower them in the estimation of the community, and deter third parties from dealing with them. However, Theresa's other statements, although strongly worded, could lead a reasonable fact-finder to find either that they were defamatory or that Theresa was merely expressing her strong belief that a convicted sex offender should not be employed at a funeral home. In other words, a reasonable fact-finder could find that Theresa's other statements were merely hyperbolic, exaggerated commentary. Consequently, there was a question of fact as to whether those statements were defamatory, which precluded the trial court from granting plaintiffs' motion for summary disposition in its entirety. Nevertheless, the statements that a reasonable fact-finder would conclude were defamatory as a matter of law were sufficient to support a more narrowly tailored injunction.

5. The right to freedom of speech is protected by the First Amendment. However, there is a modern trend in some jurisdictions to recognize the ability of trial courts to enjoin speech that a fact-finder has already determined to be defamatory. In this case, whether the injunctions are analyzed according to the modern trend or pursuant to the longstanding general rule prohibiting prior restraints, both injunctions, as written, violate defendants' rights to free speech. Both injunctions cover prospective speech that would be protected under the First Amendment, including Theresa's ability to speak in general terms, using McNabb as an example, about whether persons who have been convicted of criminal sexual conduct should be permitted to work in funeral homes and to make nondefamatory commentary about McNabb or Redmond. Because the injunctions potentially cover much more speech than the specific defamatory statements made by Theresa, they do not survive constitutional scrutiny.

6. Theresa argued that discovery was incomplete and, therefore, that summary disposition was not appropriate because McNabb refused to answer certain questions concerning his 2006 conviction during his deposition. Summary disposition may be appropriate before the conclusion of discovery if there is no fair likelihood that further discovery would yield support for the nonmoving party. Theresa did not claim that further discovery, beyond deposing McNabb, would have a fair likelihood of yielding support for her position, nor did she address the fact that the trial court ruled against her on this issue and denied her motion to compel McNabb to testify. Even when relevant to the claims at issue in a case, the trial court has the authority to order that certain matters may not be inquired into in order to

protect a party from annoyance, embarrassment, oppression, or undue burden or expense. In denying her motion to compel, the trial court found that Theresa's questions regarding McNabb's conduct surrounding his 2006 conviction were not relevant to determining whether her statements about him in 2015 and 2016 were true. By failing to address the trial court's decision on her motion to compel, Theresa abandoned her assertion that the trial court's decision was erroneous. Therefore, discovery with respect to McNabb's testimony was complete, and Theresa has not identified any other basis for concluding that discovery was not sufficiently complete to permit summary disposition.

Affirmed in part and reversed in part, permanent injunctions vacated, and case remanded for further proceedings.

1. LIBEL AND SLANDER — DEFAMATION — LIMITATION OF ACTIONS — DISTINCT PUBLICATIONS.

A defamation claim accrues and the one-year period of limitations begins to run at the time the statement was made; when multiple discrete defamatory statements are made, a single claim of defamation may be premised upon allegations of distinct defamatory publications that occurred within the one-year period of limitations.

2. SEX OFFENDERS REGISTRATION ACT — PUBLIC WEBSITE — PUBLICATION OF NONPUBLIC INFORMATION.

An individual who is required to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., has a civil cause of action against a party who reveals the individual's registration or report in violation of the statute; MCL 28.730(6) stipulates that the cause of action does not apply when a registrant's information is obtained from the public website established under MCL 28.728(2); a person who publishes a statement that includes both information from the public website under SORA and nonpublic information is not protected by the exemption in MCL 28.730(6).

Lewis, Reed & Allen, PC (by *Ronald W. Ryan*) for Martha Redmond, Arthur McNabb, and Redmond Funeral Home.

Varnum LLP (by *John W. Allen*) for Theresa Heller.

Dennis L. Wolf *in propria persona*.

Before: MURRAY, C.J., and METER and K. F. KELLY, JJ.

MURRAY, C.J.

I. INTRODUCTION

In these consolidated appeals involving allegedly defamatory publications, defendants Theresa Heller and Dennis Lewis Wolf separately appeal by right the trial court's judgment in favor of plaintiffs, Martha Redmond, Arthur McNabb, and Redmond Funeral Home. Specifically, after it granted plaintiffs' motion for partial summary disposition, the trial court entered orders enjoining Theresa and Dennis from publishing certain defamatory statements about plaintiffs. We affirm in part and reverse in part the order granting plaintiffs' motion for partial summary disposition, vacate the permanent injunctions, and remand for further proceedings consistent with this opinion.

II. BASIC FACTS

The origins of this case arose from the death of Theresa and Dennis's 12-year-old son, Charles Wolf, in July 2015. The medical examiner's office released Charles's body to McNabb of Redmond Funeral Home on July 28, 2015. McNabb testified that he picked up Charles's body with another staffer from Redmond Funeral Home, Shawn Winfield, and transported it to the funeral home. Redmond, the owner of Redmond Funeral Home, was arranging Charles's funeral with Theresa's parents when Charles's body arrived. Craig Daily embalmed and washed the body, and then McNabb and Winfield dressed and prepared the body for viewing. The visitation and funeral occurred on July 31, 2015. It is undisputed that McNabb was not

present for Charles's visitation or funeral because he was working at a funeral at another location.

After Theresa discovered what she considered to be the "outright lies" involved with the investigation into her son's death, she decided to investigate every name associated with the handling of her son's body. She obtained documents from the coroner's office, discovered that McNabb signed for her son's remains, and subsequently discovered that McNabb was a convicted sex offender. Theresa called Redmond in the fall of 2015 to warn her about McNabb, and according to Theresa, Redmond lied and said that she did not know that McNabb was a sex offender.

Police reports associated with McNabb's conviction show that McNabb met a 15-year-old high school student at a computer game store. McNabb admitted that he purchased items for the teen, and the teen told an investigating officer that McNabb performed oral sex on him. The reports also suggest that McNabb engaged in grooming behavior; specifically, a witness described McNabb as repeatedly hanging out at an Arby's restaurant and interacting with a teen. In 2006, McNabb was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d, and was sentenced to prison.

After his conviction, the Board of Examiners in Mortuary Science (BEMS) revoked McNabb's license in November 2007, but the BEMS reinstated his license in October 2015. At a meeting held in November 2015, Redmond Funeral Home's board of directors appointed McNabb as the funeral director for one of its branch locations.

In June 2016, Theresa e-mailed Redmond, and asked for information about her son's funeral. After receiving a response, she asked for information about the specific time that her son's body arrived at the funeral home,

but according to Redmond, she did not keep records of arrival times. In that same month, Paul Heller—Theresa's brother—posted an Internet blog entry discussing McNabb, implying that there was a conspiracy of sex predators involved with his nephew's body. He wrote that McNabb was a "pedophile" and "child rapist who had kiddie porn on his computer as well, all of which got him sent to prison for six and a half years." He further wrote: "Who is to say that anything untoward happened? Who is to say anything didn't? Where does the benefit of the doubt lie? You decide." He then wrote that McNabb was not one of "WMed's pedophiles," but that he picked up the body, and it was a "strange coincidence" that another man from "WMed" had been accused of sexual misconduct, and his name also appeared on documents associated with Charles's body.

In November 2016, Redmond Funeral Home's lawyer sent Theresa a letter, noting that Theresa had contacted the Paw Paw State Police Post no fewer than 37 times, had been seen driving by the funeral home on several occasions, and had been posting false claims on the Internet. He demanded that she cease and desist all contact with or regarding Redmond Funeral Home. The following month Theresa was again in contact with the Michigan State Police. She wrote to an officer that she had spoken with another local funeral director, who told her that McNabb was the "worst of the worst." That same month she also filed a complaint against Redmond Funeral Home with the Department of Licensing and Regulatory Affairs (LARA).

Theresa also posted messages on Facebook in December 2016, describing McNabb as a "sick pedophile" who owned "violent child porn." She wrote that Redmond's lawyers were trying to intimidate her and prevent her from exercising her First Amendment

rights, and she noted that the funeral home had two locations, one in Kalamazoo and one in Parchment. Theresa also noted that the funeral home catered to Catholic churches, and that she was trying to get the word out "about the pedophile that my poor son's body was alone with for three days at REDMOND FUNERAL HOME IN KALAMAZOO." She also wrote that the "perv is Arthur McNabb who raped a boy in Paw Paw and served six years in prison," and that Redmond had helped McNabb get his license back. Theresa further wrote that it was her "mission" to make sure that no other child's body passed "through this monster's hands." She then posted a link to McNabb's sex offender registry page and asked everyone to get the word out about the funeral home and McNabb. Theresa also identified Redmond's law firm and opined that they did not have any problem "covering up for pedophiles."

Theresa made additional statements against Redmond and McNabb in another post:

> It is Arthur McNabb. This is a danger because he had moved from one small town to another all over [southwest] Michigan before he was caught in Paw Paw at the age of 38. He hunts at fast food places, video gaming stores, and funeral homes. This is thanks to MARTHA REDMOND, who ruined her family name by hiring this pedophile on the cheap. She lied to me, and not only my son but his cousins and all his friends were exposed to this pervert at Charlie's funeral. When Charlie's father and I objected, she lied to us, assaulted Charlie's father, and sicced her brother's law firm, LEWIS REED AND ALLEN, on me. This, after losing my precious little boy.

In March 2017, Theresa filed a complaint against Redmond Funeral Home with the Better Business Bureau.

Throughout the spring and summer of 2017, Theresa continued to post statements about defendants on the Internet. For example, in an April 2017 post to Facebook, Theresa wrote that McNabb "served six years in prison for raping boys he picked from grieving families." In a July 2017 Facebook post, she identified McNabb's home address and stated that his "preferred victims"—present tense—were "young teenage boys." In another post, Theresa stated that the BEMS reinstated McNabb's license because, in its view, his inappropriate relationship had nothing to do with his status as a funeral director. She further commented, "What? He didn't sodomize his customers[']children? Some of your kids were there at Charlie's Funeral. How does that make you feel?" In an August 2017 post, Theresa again warned that McNabb "targets teenage boys who like video games and nice shirts."

By August 2017, plaintiffs had seen enough and sued Theresa, Dennis, and Paul. They alleged that Theresa had engaged in threatening and intimidating behavior, which included driving past the funeral home slowly and posting false messages to social media. McNabb alleged under Count I that each defendant violated MCL 28.730 by using the sex offender registry to injure, harass, or commit a crime against an individual named in the registry. Plaintiffs alleged under Count II that each defendant engaged in business defamation, which harmed their business interests, while under Count III plaintiffs alleged that each defendant invaded each plaintiff's privacy by disseminating information that put them in a false light. Under Count IV, plaintiffs alleged intentional infliction of emotional distress, harassment, stalking, and unconsented contact, which they claimed violated MCL 600.2954 and MCL 750.411h. For Count V, Redmond and McNabb alleged that each defendant posted false

and defamatory statements that amounted to defamation per se and harmed them. In their final claim, Count VI, plaintiffs alleged that each defendant had intentionally caused them emotional distress. Plaintiffs asked the trial court to award damages and equitable relief in the form of an injunction against further defamatory postings.

Plaintiffs also asked the trial court to enter a temporary restraining order and to show cause why a preliminary injunction should not be entered to prohibit defendants from continuing to post false statements. The trial court entered the temporary restraining order on August 29, 2017, and after a brief hearing, a preliminary injunction. The preliminary injunction ordered, in relevant part, that Theresa and Paul were "restrained from speaking, delivering, publishing, emailing or disseminating information in any manner regarding Arthur McNabb's sex offender status, his address and employment status to anyone anywhere."

Theresa quickly moved for summary disposition on the ground that all of the claims against her were barred by the one-year statute of limitations. She noted that plaintiffs alleged that the defamatory statements were part of a "campaign" that began in June and July 2016. Because plaintiffs did not bring suit until August 2017, she argued that all of plaintiffs' claims were untimely. She also argued that Count I had to be dismissed because the cited statute, MCL 28.730, did not apply to defendants, and so plaintiffs failed to state a claim upon which relief could be granted.

The trial court determined that the period of limitations applied separately to each defamatory statement. The court also noted that Theresa had not agreed to dismiss the claim against Paul and, for that reason, it

declined to dismiss the defamation claim against him at that time. It also concluded that there were no grounds for dismissing the claims under MCR 2.116(C)(8), and it denied Theresa's motion.

Plaintiffs subsequently moved to amend their complaint. They alleged that Theresa had made another complaint to LARA containing false statements, and they moved to add a count of abuse of process premised on those false allegations. In the LARA complaint, Theresa referred to McNabb as the "convicted gay pedophile" and alleged that he had "access to my son's body for . . . three days." She further alleged that there was "now another victim" whose identity had been "alleged to state police, a grieving boy that the pedophile had been 'counseling.' " Plaintiffs separately moved to have Theresa show cause why she should not be held in contempt for failing to remove her Facebook posts as directed by the trial court in its preliminary injunctions.

The trial court held a combined hearing on the motions and granted leave to amend the complaint, but was not convinced that Theresa had knowingly violated its order. Accordingly, it did not find her in contempt. Plaintiffs then amended their complaint to include a claim for abuse of process under Count VII.

Plaintiffs subsequently moved for partial summary disposition under MCR 2.116(C)(10). They argued that Theresa's actions went far beyond merely reposting or forwarding information from the sex offender registry—she added that McNabb was a pedophile and described him as putting children at risk and hunting children, implying that he was currently molesting children. Plaintiffs also argued that Theresa falsely stated that the children who attended Charles's funeral were exposed to McNabb, as the undisputed

evidence showed that he was not at the visitation or funeral. She had, in plaintiffs' opinion, sounded an alarm about McNabb which caused him to fear for his safety.

In addition, plaintiffs stated an intention to dismiss their claims for monetary relief should the court agree that there was no genuine issue as to any material fact that they were entitled to a permanent injunction because Theresa's statements were defamatory per se and were harming plaintiffs' goodwill. Because Theresa demonstrated that she would continue to harass plaintiffs by posting false statements along with McNabb's registry information, plaintiffs sought a permanent injunction against her continued harassing behavior.[1]

In response to plaintiffs' motion for partial summary disposition, Theresa argued that plaintiffs failed to identify and show that any of the material facts supporting their claims were undisputed. She also argued that Michigan law established that pedophiles are likely to reoffend and, for that reason, Theresa's statements that McNabb posed a current danger to children were true as a matter of law. Additionally, Theresa argued that summary disposition would be inappropriate because discovery had not been completed, in part because in his deposition McNabb refused to answer 57 questions relating to his 2006 conviction, which gave rise to adverse inferences that created a question of

[1] Paul responded to plaintiffs' motion for summary disposition and moved for summary disposition on his own behalf, arguing that the undisputed evidence showed that he did not engage in any of the behaviors about which plaintiffs complained. Plaintiffs did not oppose the motion, and the trial court entered a stipulated order dismissing the claims against Paul and vacating the preliminary injunction against him.

material fact.[2] Besides that, Theresa argued that her statements could be found to be true. She explained that her statement that McNabb was a pedophile could be found to be true because McNabb was convicted of a sex act with a 15-year-old. Theresa argued, too, that McNabb was a limited-purpose public figure because he was licensed by the state.[3]

In making its decision, the trial court recognized that a statement is not defamatory unless it tended to lower a person's reputation in the community and deterred persons from dealing with that individual. The statement also had to be one that could be reasonably interpreted as a statement of an actual fact. The court agreed that plaintiffs had established a real and imminent danger that Theresa's remarks would damage their reputations. Her comments, the court explained, were "more than just hyperbole" and amounted to harassment. Theresa was not just engaging in advocacy; instead, her statements were harassing plaintiffs over their status and continued operations and were intended to "rally the troops" against McNabb and Redmond for hiring him. Citing Theresa's statement that she wanted to inform the public about what happened to Charles after he died, the court found that this statement showed that Theresa was implying that something had in fact happened to Charles's body when read in context with the next statement about sodomiz-

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[2] Theresa moved to compel discovery based on McNabb's refusal to answer numerous questions at his deposition without the assertion of a valid privilege, but the trial court determined that the details relative to McNabb's 2006 conviction were not relevant and denied the motion to compel.

[3] Dennis also opposed plaintiffs' motion for partial summary disposition, arguing that anything he said was protected, and there were questions of fact regarding an incident at the funeral home when he confronted Redmond.

ing his customers' children. The court concluded that the statements that McNabb "hunts" in various places thanks to Redmond amounted to an assertion that McNabb's behaviors were "ongoing," and that Redmond fostered that behavior, without any substantiation or proof. The court also rejected the notion that the registry could be used to call for others to attack or ostracize a person—it was merely a tool to promote vigilance. The court determined that a permanent injunction against Theresa would be appropriate because the limitations on her were substantially outweighed by the danger of harm to plaintiffs.

As a result, the trial court entered an order granting plaintiffs' motion for partial summary disposition as to Theresa on September 17, 2018,[4] and entered a judgment and permanent injunction against Theresa providing that:

> 1. Defendant Theresa Heller and her representatives and those acting in concert with her are restrained from speaking, delivering, publishing, emailing or disseminating information in any manner regarding Arthur McNabb's sex offender status, his address and employment status to anyone anywhere.
>
> 2. Defendant Theresa Heller and her representatives and those acting in concert with her are hereby enjoined and restrained from defaming, stalking, harassing the Plaintiffs, in any manner whatsoever, including through postings on the internet, as well as through unconsented contact with any of the Plaintiffs.[5]

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[4] After a hearing, the trial court dismissed Dennis's counterclaim on the basis of his lack of participation in the case and failure to appear for his deposition.

[5] The trial court entered an order granting plaintiffs' motion for summary disposition as to Dennis on January 17, 2019, and entered a judgment and permanent injunction against Dennis with the same terms as applied to Theresa.

In February 2019, plaintiffs moved to show cause why Theresa should not be held in contempt of court for posting messages on her Facebook account along with a link to court documents, such as transcripts, that she uploaded to her Google drive account. Theresa labeled the transcripts "Pedophile Deposition" and "Dirty Martha" and wrote that it was a disgrace that this "man can be licensed as a Mortician in Michigan." She closed with "Pure Filth Michigan." Plaintiffs argued that these posts violated the permanent injunction.

At the ensuing hearing on the motion to show cause, the trial court expressed concern that Theresa was going to do "whatever she can to shed a bad light" on plaintiffs, yet in the end the court chose not to find Theresa in contempt.

III. ANALYSIS

A. THERESA'S MOTION FOR SUMMARY DISPOSITION[6]

Theresa argues that the trial court erred when it denied her motion for summary disposition because (1) all of plaintiffs' claims were untimely, (2) MCL 28.730 did not apply to her, (3) her report to LARA was absolutely privileged, and (4) plaintiffs failed to state a claim in their amended complaint.

Generally, to preserve a claim of error for appellate review, the party claiming the error must raise the issue in the trial court. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Here, Theresa preserved her claims of error regarding the trial court's denial of her motion for summary disposition on the grounds

[6] Our decision regarding Theresa's claims and the injunction entered against her apply with equal force to Dennis.

that the claims were untimely and because MCL 28.730 does not apply to her.

Theresa did not, however, at any point move to dismiss plaintiffs' abuse-of-process claim. Although she preserved the argument that the trial court abused its discretion when it granted the motion to amend the complaint to *add* the abuse-of-process claim, she did not preserve the argument that the trial court should have dismissed the new count raised in the amended complaint under MCR 2.116(C)(8) or (C)(10). Although we have the discretion to consider arguments that were not properly preserved for appellate review, we are under no obligation to do so. *Walters*, 481 Mich at 387. Whether to dismiss the abuse-of-process claim should be first addressed in the trial court, where the parties would have the opportunity to develop the record and otherwise litigate the allegations. See *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987).[7]

1. MOOTNESS

As a preliminary matter, plaintiffs argue that this Court should not address Theresa's challenge to the trial court's order denying her motion for summary disposition because any alleged error is moot. See, e.g., *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014) (stating that an issue is moot when an event has occurred that makes it impossible for this Court to grant relief). Specifically, plaintiffs maintain that because they voluntarily dismissed their claims for damages after they obtained injunctive relief, even if this Court were to conclude that the trial

[7] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

court erred when it denied Theresa's motion for summary disposition, this Court could not grant relief because there are no claims left to dismiss.

However, as Theresa correctly notes, an injunction is a remedy, not an independent cause of action. See *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). Because a remedy must be supported by an underlying cause of action, the trial court could not enter an injunction premised on untimely claims. See *id*. at 663-664 (stating that equitable relief was unavailable to the plaintiffs because all their claims had been dismissed). In fact, the trial court granted plaintiffs' motion for summary disposition and entered a judgment providing plaintiffs with injunctive relief after it determined that plaintiffs had established that Theresa defamed them. Consequently, were we to conclude that the trial court should have dismissed plaintiffs' claims, then reversal of the trial court's judgment and order would have to ensue. Review of the trial court's order is not moot.

2. PERIOD OF LIMITATIONS

The Legislature has prohibited a person from bringing "an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within" the applicable period of limitations. MCL 600.5805(1). "The period of limitations is 1 year for an action charging libel or slander." MCL 600.5805(11). A claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

Contrary to Theresa's arguments that the period of limitations for defamatory statements begins to run

after the first defamatory statement, and that merely repeating the defamatory statement does not extend the period of limitations, the Supreme Court long ago recognized that each publication of a libelous or slanderous statement was independently actionable. See *Leonard v Pope*, 27 Mich 145 (1873). In *Leonard*, the Court held that a plaintiff could bring a separate action against a publisher for each printed newspaper containing the allegedly libelous statement delivered to subscribers. *Id*. at 149-150. Since *Leonard*, Michigan courts have continued to recognize that each act amounting to libel or slander could serve as a separate claim subject to a separate period of limitations, or could be joined in one action. See *Grist v Upjohn Co*, 1 Mich App 72, 85; 134 NW2d 358 (1965); *Brewer v Chase*, 121 Mich 526, 529; 80 NW 575 (1899) (agreeing with authorities that state that every repetition is a fresh defamation); see also 2 Restatement Torts, 2d, § 577A, p 208 (stating that normally each of several communications to a third person by the same defamer is a separate publication, but explaining that an aggregate communication is a single publication). But in either case, a plaintiff's proofs and recovery would be limited to those libels or slanders that occurred within one year of the suit. See *Grist*, 1 Mich App at 85 (stating that each slanderous act is a basis for an action, and the statute of limitations runs from the date of each such act).

Theresa's reliance on *Mitan v Campbell*, 474 Mich 21; 706 NW2d 420 (2005), is misplaced. The *Mitan* Court addressed a situation where the defendant allegedly defamed the plaintiff during a television interview that was not broadcast until some days after the interview. *Id*. at 22-23. The plaintiff sued the defendant more than one year after the interview, but within one year of the broadcast. *Id*. at 22-23. The Supreme

Court had to determine whether the period of limitations began with the defamatory statement, or with the subsequent broadcast by a third party; the Court concluded that the original defamatory statement constituted the point in time when the claim accrued. *Id*. at 22. The Court explained that "republication, regardless of whether the republication was intended by the speaker," did not restart the period of limitations. *Id*. at 25. The Court, however, clarified that it was only addressing the defendant's personal liability for a statement under circumstances in which there was evidence that the defendant expected a third party to republish the defamatory statement. *Id*. at 25. The Court did not address those circumstances where the speaker repeated the defamatory statement over time or where the speaker made separate and distinct defamatory statements over time. The sole question before the Court was whether a defendant could be held liable for a third party's republication of the defendant's statement. *Id*. at 25 n 4. Because this case does not involve republication by a third party, *Mitan* does not apply.[8]

Here, plaintiffs asserted that Theresa's defamatory campaign began in June 2016, and they pleaded dis-

[8] Plaintiffs alleged several causes of action that—although supported by the same set of facts—were distinct causes of action. See *Wilkerson v Carlo*, 101 Mich App 629, 631-632; 300 NW2d 658 (1980). For example, this Court has held that the period of limitations for libel and slander does not apply to a claim for false light. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 386; 689 NW2d 145 (2004). Similarly, the one-year period of limitation does not apply to a properly stated claim of intentional infliction of emotional distress, *Campos v Gen Motors Corp*, 71 Mich App 23, 26; 246 NW2d 352 (1976), which plaintiffs alleged in part under Count IV and again under Count VI. For each of those claims, plaintiffs alleged harms that were distinct from the harm caused to their reputations, such as fear, anxiety, and emotional distress. Accordingly, plaintiffs' claims are distinguishable

crete defamatory publications that Theresa made on specific dates. The trial court properly dismissed the one publication that Paul allegedly made more than a year before plaintiffs filed their complaint, but properly allowed the remaining allegations to continue to serve as the basis for the defamation claim because they were published less than a year before the filing of the complaint. The trial court properly applied *Leonard* and *Grist* to allow a single claim of defamation premised on the allegations of distinct defamatory publications that occurred within the one-year period of limitations. Consequently, the court did not err when it denied Theresa's motion for summary disposition[9] under MCR 2.116(C)(7).[10]

3. SORA CLAIM

Persons convicted of certain specified crimes are required to register under the Sex Offenders Registra-

from the claim at issue in *Meyer v Hubbell*, 117 Mich App 699, 704-705; 324 NW2d 139 (1982).

[9] Theresa argues that this Court must conclude that the trial court erred because plaintiffs conceded as much by failing to oppose her argument that the trial court erred. As the appellant, Theresa has the obligation to demonstrate that the trial court erred when it denied her motion. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990) (stating that "the burden is on the appellant to persuade the reviewing court that a mistake has been committed, failing which the appellate court may not overturn the trial court's findings"). And plaintiffs' decision not to offer an argument in support of the trial court's decision does not bind us to a conclusion that the trial court erred. See *Int'l Text-Book Co v Marvin*, 166 Mich 660, 666; 132 NW 437 (1911) ("No argument is made in the brief for the appellee to support the rulings admitting testimony, the charge of the court, or the theory according to which the issue of fact was left with the jury. Nevertheless, we must sustain the judgment if no error occurred at the trial.").

[10] Theresa spends a significant amount of time discussing continuing wrongs. However, the continuing-wrongs doctrine has no application to claims involving discrete and separate tortious acts or omissions. For

tion Act (SORA), MCL 28.721 *et seq*., and to abide by certain conditions. See *People v Tucker*, 312 Mich App 645, 655-659; 879 NW2d 906 (2015) (discussing the history of SORA). The information collected for the registration or report is generally confidential and exempt from disclosure except for law enforcement purposes. See MCL 28.730(1). As a means to enforce this confidentiality, the Legislature made it a misdemeanor to publish "nonpublic information concerning the registration or report," MCL 28.730(4), and provided an individual whose registration or report is revealed in violation of SORA with a cause of action against the person who unlawfully revealed the registration or report. See MCL 28.730(5).

Although registration information was originally confidential, the Legislature has subsequently required the Department of State Police to maintain a public Internet website containing listed information on each individual registered under the act. See MCL 28.728(2), as amended by 2011 PA 18. It also provides that the cause of action provided under MCL 28.730(5) does not apply to information disclosed from the public Internet website required under MCL 28.728(2). MCL 28.730(6).

Theresa argues that the trial court should have dismissed Count I, which alleged a claim under MCL 28.730(5), because her publications included information from the Internet website required under MCL 28.728(2), which exempted her from liability under

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example, this Court has held that a plaintiff can allege a malpractice claim premised on discrete acts or omissions that constitute separate breaches of the duty owed, even when the acts or omissions lead to a single injury, and the claims will each have independent accrual dates. See *Kincaid v Cardwell*, 300 Mich App 513, 525; 834 NW2d 122 (2013). Similarly, as already stated, each defamatory statement can support an independent cause of action with its own accrual date. See *Grist*, 1 Mich App at 85.

MCL 28.730(6). However, Theresa's argument is premised on the notion that plaintiffs' claims are based solely on her publication of information taken from the SORA website. Although plaintiffs did allege that Theresa published information that she took from the SORA website, they repeatedly stated that their claim arose from Theresa's republication of the information from the website along with details that were not part of the website. Specifically, they alleged that Theresa publicly stated that McNabb was a pedophile who abused a corpse and that Redmond and the funeral home facilitated his acts. Plaintiffs also alleged that Theresa publicly accused Redmond of putting children at risk, that Theresa said McNabb currently "hunts at fast food places, video gaming stores, and funeral homes," and that Theresa said his preferred victims were teenaged boys. These allegations involve information—such as the claim that McNabb is presently hunting teenaged boys at a funeral home—that is not provided by the department on the website. See MCL 28.728(2) (listing the information that is to be made public on the website) and MCL 28.728(3) (prohibiting certain information from being on the website). Plaintiffs also alleged that Theresa improperly posted the information from the SORA website on Facebook. To the extent that the alleged postings included nonpublic information, plaintiffs could assert a claim under MCL 28.730(5). Therefore, the trial court did not err when it denied Theresa's motion for summary disposition of Count I because not all of her statements were protected by MCL 28.730(6).

B. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

Plaintiffs moved for partial summary disposition in their favor under MCR 2.116(C)(10). A motion for sum-

mary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The movant must identify the issues as to which it believes that there is no genuine issue of fact and support the motion with evidence—affidavits, depositions, admissions, or other documents—that, if left unrebutted, would demonstrate that the moving party is entitled to judgment as a matter of law. *Id*., citing MCR 2.116(G)(5) and MCR 2.116(C)(10). If the moving party properly supports his or her motion, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009). "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).

This Court reviews de novo (1) a trial court's decision on a motion for summary disposition, *Barnard Mfg*, 285 Mich App at 369; (2) whether the trial court properly applied the constitutional standard for defamation to the undisputed facts, *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 111-112; 793 NW2d 533 (2010); (3) whether the trial court properly interpreted and applied the common law, *Roberts v Salmi*, 308 Mich App 605, 612; 866 NW2d 460 (2014); and (4) whether it properly interpreted and applied any relevant statutes, *Pransky v Falcon Group, Inc*, 311 Mich App 164, 173; 874 NW2d 367 (2015).

1. THE UNDERLYING CLAIM

In their motion for partial summary disposition, plaintiffs argued that there were no questions of mate-

rial fact as to whether they were entitled to a permanent injunction. As discussed above, an injunction is a remedy, not a cause of action. See *Terlecki*, 278 Mich App at 663. To be sure, Michigan courts have recognized that a person may, in certain circumstances, go to a court sitting in equity and establish a right to have another enjoined from carrying out a threatened tort. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 315; 487 NW2d 715 (1992); see also *Nat'l Concessions, Inc v Nat'l Circus Corps*, 347 Mich 335, 339; 79 NW2d 910 (1956) (stating that a court sitting in equity could consider a claim asking for an injunction involving a potential breach of contract when a judgment would be worthless because the defendant was uncollectible). Nevertheless, "[i]n both law and equity, however, there must be a cognizable claim of a substantive interest invaded or threatened." *Adkins*, 440 Mich at 315. Hence, to obtain injunctive relief, plaintiffs first had to establish success on the merits of at least one claim that could support injunctive relief. The underlying claim that the trial court based the injunction upon was defamation.

There was no jury trial because the trial court granted summary disposition on the defamation claim, determining that plaintiffs established their claim for defamation as a matter of law. If the trial court was correct, then it could enter an injunction on that basis prohibiting Theresa from repeating the statements that were adjudicated to be false and defamatory.

As the moving parties, plaintiffs had the burden to show that there was no material factual dispute concerning the elements of their defamation claim, i.e., that (1) Theresa made a false and defamatory statement about plaintiffs, (2) the statement was not privileged

and was communicated to a third party, (3) Theresa published the communication with fault amounting to, at the least, negligence, and (4) the statement was actionable without regard to special harm (defamation per se) or that plaintiffs suffered special harm. See *Smith*, 487 Mich at 113.[11]

In their amended complaint and their motion for summary disposition, plaintiffs identified several statements made by Theresa that they claimed were false and defamatory. In the trial court's decision, it cited the following evidence offered by plaintiffs:

- On April 22, 2017, Theresa stated that she wanted "to spread the word about what happened to Charlie after he left us two summers ago."
- On July 24, 2017, Theresa posted on Facebook that her son's "cousins and all his friends were exposed to this pervert at Charlie's funeral" and "He didn't sodomize his customers['] children? Some of your kids were at Charlie's Funeral. How does that make you feel[.]"

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[11] Theresa argues that plaintiffs must prove actual malice because plaintiffs are limited-purpose public figures. A limited-purpose public figure is a person who has thrust himself or herself to the forefront of a particular public controversy in order to influence the resolution of the issues involved. *Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 774; 295 NW2d 858 (1980). Nothing in the record suggests that plaintiffs voluntarily thrust themselves into any public controversy. Merely holding a state professional license does not transform the license holder into a public figure with regard to any issue involving that profession. *New Franklin Enterprises v Sabo*, 192 Mich App 219, 222; 480 NW2d 326 (1991) (stating that a private person does not become a limited-purpose public figure merely by becoming involved in or associated with matters of public concern). On this record, plaintiffs are private persons and, for that reason, need only prove that Theresa acted negligently when she made the statements at issue. *Deitz v Wometco West Mich TV, Inc*, 160 Mich App 367, 375; 407 NW2d 649 (1987).

- Also on July 24, 2017, Theresa stated that McNabb "hunts at fast food places, video and gaming stores, and funeral homes."
- On August 13, 2017, Wolf wrote that McNabb "targets young teenage boys who like video games and nice shirts" and published the statement on the Internet.

Plaintiffs also set forth specific allegations and evidence about the frequency of these and other statements, Theresa continually contacting the funeral home and police agencies, and other allegedly harassing behavior.

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Smith*, 487 Mich at 113 (quotation marks and citation omitted). Upon review of the evidence submitted to the trial court, we conclude that as to the four statements listed above, no reasonable juror could conclude other than that the statements Theresa and Wolf posted to social media were defamatory. As noted above, Theresa asserted that McNabb "hunts" and "targets" young boys for sexual purposes at fast food places, videogame stores, and funeral homes, with the statements written as if he was currently doing so. Theresa also wrote that McNabb sodomized customers of Redmond Funeral Home, and that young boys at Charlie's funeral and visitation were "exposed" to, and possibly sodomized by, McNabb. Finally, she also indicated that Redmond and Redmond Funeral Home were lying about McNabb, trying to suppress her efforts to get the warning out, and were covering up for a pedophile.

Contrary to Theresa's contention, she did not couch these accusations as opinions and, even if she had, they clearly implied an assertion of fact that could be proven

false. See *Ghanam v Does*, 303 Mich App 522, 545; 845 NW2d 128 (2014). A reasonable fact-finder reading these statements could only conclude that Theresa was asserting that she had knowledge that McNabb was actively and presently hunting for teenaged boys in order to commit criminal sexual conduct, and that he was doing so at Redmond Funeral Home with Redmond's knowledge and support. See *Smith*, 487 Mich at 128 (stating that the dispositive question was whether a reasonable fact-finder could find that the statement implied a defamatory meaning). Accusations of criminal sexual conduct are heinous and amount to defamation per se. *Lakin v Rund*, 318 Mich App 127, 138; 896 NW2d 76 (2016) (stating that an accusation of a crime involving moral turpitude or an infamous punishment are defamatory per se). No reasonable fact-finder could conclude other than that these statements would so harm plaintiffs' reputations so as to lower them in the estimation of the community and deter third persons from associating or dealing with them. *Smith*, 487 Mich at 128.[12]

On appeal, Theresa argues that her statements that McNabb is a pedophile are true because he has a 2006 conviction of criminal sexual conduct involving a 15-year-old boy. She also asserts, as we noted when discussing plaintiffs' SORA claim, that everything she stated came from police reports or the website main-

[12] Contrary to Theresa's argument, a speaker's motive and intent in making a statement are not elements of common-law defamation; rather, plaintiffs needed only to show that Theresa negligently made a false and defamatory statement. See *Mich Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 183; 466 NW2d 717 (1991) (stating that intent is not an element of defamation); *Deitz*, 160 Mich App at 375 (stating that the common-law definition of malice involving ill will or spite no longer applies to defamation claims—the plaintiff need only prove ordinary negligence).

tained under SORA and are therefore true. However, all of the documents Theresa cites describe acts that occurred more than 10 years earlier—none of the reports or documents refers to present activity. As already noted, Theresa's social media posts were not confined to relating details from past events; she explicitly and implicitly asserted that she had actual knowledge that McNabb had continued to violate the law, which was consistent with her belief that sex offenders always reoffend, and that Redmond was facilitating his activities. Indeed, each of the statements at issue relates to present time and was an assertion of supposed fact about plaintiffs' current activities. For that reason, evidence as to what is contained on the registry or in police reports is not evidence creating a material issue of fact that her statements were true.[13]

We recognize, as did the trial court, that not all accusations of criminal conduct amount to an assertion of fact. Some statements may amount to rhetorical hyperbole, imaginative expressions, or exaggerations designed to be offensive. See *Ghanam*, 303 Mich App at 545-546. Such statements must be examined in context to determine whether a reasonable reader might understand that the writer used the terms to express strong disapproval rather than to make an accusation of actual criminal activity. *Id*. at 546-547. As this Court has

[13] In MCL 28.721a, the Legislature stated its determination that "a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." This legislative policy does not provide private citizens with the unfettered right to assume that all convicted sex offenders will reoffend and, on the basis of that assumption, to publicize false accusations of criminal conduct. The same is true of the court decisions that Theresa cites, as they do not stand for the proposition that private persons may make false and defamatory statements about a sex offender's current conduct on the basis of the sex offender's past conduct.

recognized, ordinary consumers of social media generally understand that statements made in online fora are frequently not intended as assertions of fact even when framed as assertions of fact. *Id*.

Except for the statements noted above, the remainder of Theresa's statements were strongly worded and suggested that McNabb posed an imminent danger to children. The nature of the remarks might justify a reasonable fact-finder in finding that Theresa's remarks were defamatory or that Theresa was merely expressing her strong belief that a convicted sex offender should not be employed at a funeral home. In other words, a reasonable fact-finder could find that these remaining statements, which were undoubtedly offensive to ordinary sensibilities, were nevertheless hyperbolic or amounted to exaggerated commentary. Consequently, there was a question of material fact as to whether those statements were defamatory, which precluded the trial court from granting plaintiffs' motion for summary disposition in its entirety. See *Ireland v Edwards*, 230 Mich App 607, 619-620; 584 NW2d 632 (1998) (stating that a trial court may determine that a statement is not capable of defamatory meaning as a matter of law, but may not grant summary disposition on that basis if the statement is capable of a defamatory meaning). In the end, however, it matters little since the four statements analyzed above were defamatory as a matter of law and are sufficient to support a more narrowly tailored injunction.

2. AUTHORITY TO ENJOIN SPEECH

The First Amendment of the United States Constitution prohibits Congress—and now the States[14]—from

[14] The freedom of speech guarantee was made applicable to the states by the Supreme Court in *Gitlow v New York*, 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925).

"abridging the freedom of speech." US Const, Am I. To protect this venerable right, state and federal courts have held that prior restraints on constitutionally protected speech are prohibited. In *TM v MZ (On Remand)*, 326 Mich App 227, 237-238; 926 NW2d 900 (2018), our Court recently articulated the applicable First Amendment rules as follows:

> "The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.' " *Virginia v Black*, 538 US 343, 358; 123 S Ct 1536; 155 L Ed 2d 535 (2003), quoting US Const, Am I. "The United States Supreme Court has held that the federal constitution protects speech over the Internet to the same extent as speech over other media." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256; 833 NW2d 331 (2013), citing *Reno v American Civil Liberties Union*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997). However, the "right to speak freely is not absolute." *Cooley*, 300 Mich App at 256, citing *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942). For example, "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech," and a state may therefore enact laws punishing them. *Beauharnais v Illinois*, 343 US 250, 266; 72 S Ct 725; 96 L Ed 919 (1952).
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> Prohibitions relating to content, however, are few, because of the First Amendment's "bedrock principle" that an idea cannot be prohibited "simply because society finds the idea itself offensive or disagreeable." *Texas v Johnson*, 491 US 397, 414; 109 S Ct 2533; 105 L Ed 2d 342 (1989). "The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed." *RAV v City of Saint Paul, Minnesota*, 505 US 377, 386; 112 S Ct 2538; 120 L Ed 2d 305 (1992). "The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Black*, 538 US at 358-359

> (quotation marks and citation omitted). Thus, the First Amendment does not protect obscenity or defamation, within certain limits. *RAV*, 505 US at 383. "[A] State may punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace," including "fighting words," "inciting or producing imminent lawless action," and "true threat[s]." *Black*, 538 US at 359 (quotation marks and citation omitted). [Alterations in original.]

As the *TM* Court explained, there is a modern trend among some courts that recognize the ability of trial courts to enjoin specific speech that has already been determined by a finder of fact to be defamatory. *TM*, 326 Mich App at 245-246 & n 6, and cases cited therein. See also *McCarthy v Fuller*, 810 F3d 456, 461-462 (CA 7, 2015).[15] Other courts remain steadfast that no exception can be applied consistent with the longstanding prohibition on prior restraints.[16] See, e.g., *McCarthy*, 810 F3d at 464 (Sykes, J., concurring); *Kinney v Barnes*, 443 SW3d 87, 92-99 (Tex, 2014). Here, however, because of the broad language contained in the injunctions, whether we apply the general rule prohibiting prior restraints or the modern

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[15] Most of the cases adopting the modern trend are based upon a conclusion after a trial (bench or jury) that the statements were defamatory. Some courts have said in dicta that even a directed verdict might not suffice, see *Kramer v Thompson*, 947 F2d 666, 679 (CA 3, 1991), while other courts have entered permanent injunctions based upon the grant of summary judgment on a defamation claim when there was no genuine issue of material fact for the jury to decide. See, e.g., *Oakley, Inc v McWilliams*, 890 F Supp 2d 1240, 1242-1243 (CD Cal, 2012), and *American Univ of Antigua College of Med v Woodward*, 837 F Supp 2d 686, 700-702 (ED Mich, 2011). Neither party has raised this line of cases.

[16] "Cases from other jurisdictions are not binding precedent, but we may consider them to the extent this Court finds their legal reasoning persuasive." *Auto Owners Ins Co v Seils*, 310 Mich App 132, 147 n 5; 871 NW2d 530 (2015).

trend recognizing a narrow exception to that general prohibition, both injunctions as written violate defendants' First Amendment rights to free speech.

This is so because both injunctions cover certain speech that would be protected by the First Amendment. For example, Theresa could speak about whether certain criminal sexual conduct convicts should be working in funeral homes by using McNabb as an example, but relaying only the information contained in the public domain, yet be brought into court for potential contempt hearings. Additionally, Theresa could state other nondefamatory commentary about Redmond and McNabb, or engage in other undefined "harassing" behavior, and be subject to censure by the court. In other words, the injunction potentially covers much more than the specific four statements found to be defamatory and therefore does not survive constitutional scrutiny under the general antiprior-restraint law under the First Amendment or under the narrow exception recognized by many courts.[17]

3. INCOMPLETE DISCOVERY

Theresa also devotes a significant portion of her brief on appeal to discussing McNabb's refusal to answer certain questions at his deposition. She complains that he refused to answer the questions without asserting a valid privilege, and she argues that discovery was not sufficiently complete to permit a motion for summary disposition because McNabb failed to answer the questions. She also maintains that his failure to answer the

[17] Consequently, like the *TM* Court, we have no reason to determine whether the modern line of reasoning should be adopted in Michigan. See *TM*, 326 Mich App at 245-246.

questions should give rise to adverse inferences, which create a question of fact as to the truth of Theresa's statements.

Generally, a decision to grant summary disposition is premature if discovery has not been completed. See *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33; 772 NW2d 801 (2009). However, summary disposition may still be appropriate before the conclusion of discovery if there is no fair likelihood that further discovery would yield support for the nonmoving party. *Id*. at 33-34.

In pursuing this argument, Theresa does not argue that further discovery beyond deposing McNabb would have a fair likelihood of yielding support for her position. Instead, she argues that discovery was incomplete because McNabb refused to answer questions about his misconduct from more than a decade before the events at issue. Notably, Theresa does not address the fact that the trial court ruled against her on this issue and denied her motion to compel McNabb to testify.

At McNabb's deposition, Theresa's lawyer repeatedly asked McNabb about sexual misconduct involving the minor or other minors discussed in police reports from more than a decade earlier. For example, he asked McNabb whether he disposed of evidence before police officers interrogated him. He also asked McNabb whether he "sodomized" the "customers at GamePlaza," which was a videogame store identified by officers as a place where McNabb hung out before his conviction. And Theresa's lawyer asked McNabb questions about behaviors that could be considered grooming that were identified in the police reports.

Discovery generally applies only to matters that are "relevant to any party's claims or defenses and propor-

tional to the needs of the case." MCR 2.302(B)(1). Even when relevant to the subject matter involved, the trial court has the authority to provide that "certain matters not be inquired into," MCR 2.302(C)(4), on the ground that the proposed limitation is necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," MCR 2.302(C).

At the hearing on Theresa's motion to compel discovery, the trial court specifically found that the questions about what happened in 2005 and 2006 were not relevant to determining whether Theresa's statements about McNabb's activities in 2015 and 2016 were true. Theresa has not challenged the trial court's exercise of its discretion to bar her from inquiring about the details of the investigation into McNabb's sexual misconduct in 2005. By failing to address the trial court's actual decision on her motion to compel, Theresa abandoned any assertion that the trial court erred when it precluded her from obtaining answers to those questions. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (stating that this Court need not consider granting relief where the appellant failed to dispute the actual basis of the trial court's ruling). Consequently, because the trial court determined that Theresa could not ask those questions, discovery was in fact complete with regard to McNabb's testimony, and Theresa has not identified any other basis for concluding that discovery was not sufficiently complete to permit summary disposition.

IV. CONCLUSION

The trial court's order granting plaintiffs' motion for partial summary disposition is affirmed in part and reversed in part. The permanent injunctions are va-

cated, and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

METER and K. F. KELLY, JJ., concurred with MURRAY, C.J.

ANSELL v DELTA COUNTY PLANNING COMMISSION

Docket No. 345993. Submitted October 2, 2019, at Petoskey. Decided June 4, 2020, at 9:00 a.m.

Earl L. Ansell, Jeanne Ansell, and others (collectively, appellants) appealed in the Delta Circuit Court the decision of the Delta Planning Commission to grant the application of Heritage Sustainable Energy, LLC, and Heritage Garden Wind Farm, LLC, for conditional-use permits to construct 36 wind turbines. Appellants argued that the planning commission granted the applications in error because the applications failed to comply with various provisions of Delta County's Zoning Ordinance No. 76-2. Appellants further argued that they would be adversely affected by violations of the ordinance related to noise, vibrations, light pollution, property values, aesthetics, and environmental concerns. The circuit court, Karl A. Weber, J., dismissed the appeal on the basis that the court lacked jurisdiction to hear the appeal because appellants lacked standing. Further, the court stated that an appeal from a township board of zoning is limited to "aggrieved parties" when no zoning board of appeals exists under relevant caselaw and MCL 125.3605.

The Court of Appeals *held*:

1. The circuit court correctly concluded that appellants were obliged to show that they were aggrieved parties by the zoning decisions of the planning commission in order to invoke judicial review in the circuit court. Under MCL 125.3605 of the Michigan Zoning Enabling Act (ZEA), MCL 125.3101 *et seq*., a party aggrieved by the decision of the zoning board of appeals may appeal in the circuit court of the county in which the property is located. When a township zoning ordinance does not provide for review of a request for a special land-use permit by a zoning board of appeals, the township board's decision is final and is subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28. A plain reading of the ZEA, court rules, and caselaw shows that only an aggrieved party may appeal the final determination of a township zoning board or planning commission, and appellants did not provide any persuasive authority demonstrating otherwise. In order to be considered an aggrieved party for

purposes of obtaining appellate review by the circuit court of a decision under the zoning ordinance, a party must prove that they suffered some special damages not common to other property owners who are similarly situated. Appellants did not establish that they would suffer special damages caused by the planning commission's decision to grant the permit applications or by the proposed wind turbines.

2. Appellants also argued that the wind turbines were expected to produce shadow flickers and noise that would exceed the allowable limits under the relevant ordinance. Because of their proximity to the turbines, appellants argued that the disturbances created by the noise and shadow flickers constituted special damages and allowed recovery under private nuisance law. A zoning ordinance violation is a public nuisance that does not give rise to a right of action by an individual. However, a private individual who can show damages distinct and different from the injury suffered by the public generally may bring an action to abate a public nuisance arising from the violation of a zoning ordinance. Appellants failed to specify that they would clearly experience noise or flicker caused by a particular turbine in excess of the levels allowed by the ordinance. Accordingly, appellants failed to show special damages, beyond what any member of the community might assert, that entitled them to seek recovery to abate any nuisance caused by the turbines.

Affirmed.

1. REAL PROPERTY — ZONING — SPECIAL LAND-USE PERMITS — APPEALS — AGGRIEVED PARTIES.

The Michigan Zoning Enabling Act (ZEA), MCL 125.3101 *et seq*., provides that a party aggrieved by a decision of a zoning board of appeals may appeal in the circuit court of the county in which the property is located; when a township zoning ordinance does not provide for review of a request for a special land-use permit by a zoning board of appeals, the state Constitution, Const 1963, art 6, § 28, provides that the township board's decision is final and is subject to appellate review by the circuit court; however, under the ZEA and other relevant authority, only an aggrieved party may appeal the township board's final determination; an aggrieved party is one who has suffered some special damages not common to other similarly situated property owners.

2. REAL PROPERTY — ZONING — PUBLIC NUISANCE — DAMAGES.

A zoning-ordinance violation is a public nuisance that does not give rise to a right of action by an individual; however, a private

> individual who can show damages distinct and different from the injury suffered by the public generally may bring an action to abate a public nuisance arising from the violation of a zoning ordinance.

Bensinger, Cotant & Menkes, PC (by *William R. Sullivan*), *Benesch Friedlander Coplan & Aronoff* (by *John F. Stock*), and *Topp Law PLC* (by *Susan Hlywa Topp*) for Earl L. Ansell and others.

Kuhn Rogers, PLC (by *Joseph E. Quandt* and *Troy W. Stewart*) for Heritage Sustainable Energy, LLC, and Heritage Garden Wind Farm, LLC.

Bray, Cameron, Larrabee & Clark, PC (by *Jessica Bray*) for the Delta County Planning Commission and Delta County.

Before: STEPHENS, P.J., and SERVITTO and KRAUSE, JJ.

STEPHENS, P.J. Appellants, residents of Delta County, appeal as of right the circuit court order dismissing appellants' challenges to zoning decisions by the Delta County Planning Commission for lack of jurisdiction. We affirm.[1]

I. BACKGROUND

This case arises from appellee Delta County Planning Commission's decision to grant conditional-use

[1] In deciding this appeal, we reject appellees' contention that this Court lacked jurisdiction because appellants filed an appeal by right instead of an application for leave to appeal and the circuit court failed to reach the merits of appellants' appeal. The claim of appeal is taken from a circuit court order dismissing appellants' appeal to that court for lack of jurisdiction. MCR 7.203(A)(1)(a) generally precludes an appeal of right from a final order of a circuit court entered "on appeal from any other court or tribunal." But the appeal in the circuit court in this case involved a decision by appellee Delta County Planning Commission to

permits to appellees Heritage Sustainable Energy and Heritage Garden Wind Farm (Heritage) for the construction of 36 wind turbines[2] on the Garden Peninsula in Delta County.

Heritage submitted applications to the planning commission in October 2017. The planning commission held public hearings on the applications on December 4, 2017; December 12, 2017; January 15, 2018; January 23, 2018; and February 5, 2018. The planning commission announced its decisions in favor of Heritage on January 23, 2018, and February 5, 2018, and the conditional-use permits followed.

Appellants appealed the planning commission's grant of the permit applications in the Delta Circuit Court, filing notices of appeal on February 26, 2018. On September 17, 2018, an appeal hearing was held in the circuit court. Appellants argued that the planning commission had granted the applications in error because the applications failed to comply with multiple provisions of Delta County's Zoning Ordinance No. 76-2.

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grant applications for conditional-use permits for construction of windmills. Accordingly, the appeal in the circuit court was not taken from a court or tribunal because the planning commission is not a court and did not act as a tribunal in issuing the permits in question. See *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86-87; 832 NW2d 288 (2013) (holding that MCR 7.203(A)(1)(a) did not apply where the Department of Environmental Quality did not act as a "tribunal" in issuing permits because the department did not act in a judicial or quasi-judicial capacity). Further, the order appealed from is a final order under MCR 7.202(6)(a)(*i*) because it disposed of all claims at the circuit court level by dismissing the appeal. Finally, the claim of appeal was timely filed within 21 days after entry of the circuit court's order. MCR 7.204(A)(1)(a). As to appellees' indications that appellants are arguing for relief beyond what would be appropriate in the posture of this appeal, those arguments go to the proper disposition of the merits of the appeal, not to whether this Court has jurisdiction over this appeal.

[2] Heritage advises that one of those "36 individual special use permits . . . has been abandoned[.]"

Appellants further argued that residents living in the county were affected by specific violations of the ordinance related to noise, vibrations, light pollution, property values, aesthetics, and environmental concerns. Heritage argued that appellants lacked standing to challenge the planning commission's decision and therefore could not invoke the circuit court's appellate jurisdiction because appellants were not "aggrieved parties" under the Michigan Constitution and court rules. Appellants responded that they were not required to prove they were aggrieved parties because their appeal was from a decision of the planning commission and not the zoning board of appeals. They argued that even if the standing requirement applied, they had an interest in the litigation and would suffer adverse effects from the planning commission's decision.

The circuit court agreed with Heritage that it lacked jurisdiction to hear the appeal because appellants lacked standing. It found that caselaw concerning an appeal from a township board when no appeal to the zoning board of appeals existed and the appellate court rules both explicitly limited the exercise of appellate jurisdiction to aggrieved parties. The court determined that appellants had not established that they were aggrieved parties because they had not shown special damages or a unique harm uncommon to all other property owners. The circuit court dismissed the appeal in its entirety without reaching the merits of appellants' claims regarding the planning commission's grant of Heritage's permit applications. This appeal followed.

II. STANDARD OF REVIEW

Zoning decisions are appealable by right in the circuit court. MCL 125.3605; *Carleton Sportsman's*

Club v Exeter Twp, 217 Mich App 195, 200; 550 NW2d 867 (1996). This Court reviews the circuit court's decision de novo "because the interpretation of the pertinent law and its application to the facts at hand present questions of law." *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009) (citation omitted); see also *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 458-459; 773 NW2d 730 (2009). This includes the circuit court's decision regarding whether its appellate jurisdiction has been properly invoked. See *Olsen v Chikaming Twp*, 325 Mich App 170, 180-181; 924 NW2d 889 (2018).

III. ANALYSIS

The circuit court held that the "aggrieved party" standard, which applies to appeals of decisions of the zoning board of appeals under MCL 125.3605, also applied to appeals of zoning decisions where there was no provision for review by a zoning board of appeals. Whether the same standard applies is an issue of first impression for this Court. We hold that the circuit court correctly concluded that appellants were obliged to show themselves to be parties aggrieved by the zoning decisions below in order to invoke judicial review in the circuit court.

Under the Michigan Zoning Enabling Act (ZEA), MCL 125.3101 *et seq*., "[a] local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens . . . ." MCL 125.3201(1). "A request for approval of a land use or activity shall be approved if the request is in compliance with the standards stated

in the zoning ordinance, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes." MCL 125.3504(3). "A party aggrieved by the decision [of the zoning board of appeals] may appeal to the circuit court for the county in which the property is located as provided under [MCL 125.3606]." MCL 125.3605. The circuit court is then obliged to ensure that the decision at issue comports with applicable law; follows from proper procedure; is supported by competent, material, and substantial evidence on the record; and constitutes a reasonable exercise of discretion. MCL 125.3606(1).

Under the Michigan Court Rules, the circuit court has jurisdiction of an appeal of right filed by an aggrieved party from "a final order or decision of an agency from which an appeal of right to the circuit court is provided by law." MCR 7.103(A)(3). MCR 7.122 "governs appeals to the circuit court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township, or county authorized to enact zoning ordinances." MCR 7.122(A)(1). "[T]he party aggrieved by the determination shall be designated the appellant[.]" MCR 7.122(C)(1)(a). "In an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record." MCR 7.122(G)(2). MCR 7.122(G)(2) substantially mirrors MCL 125.3606(1) and Const 1963, art 6, § 28, which provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the consti-

> tution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . .

In *Carleton Sportsman's Club*, this Court held that "where a township zoning ordinance does not provide for review of a request for special land-use permit by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28." *Carleton Sportsman's Club*, 217 Mich App at 200.

A plain reading of the relevant provisions of the ZEA, our court rules, and caselaw supports the conclusion that only an aggrieved party may appeal the final determination of a township zoning board or planning commission under a zoning ordinance. "Municipalities have no inherent power to regulate land use through zoning." *Olsen*, 325 Mich App at 179. The Legislature granted local units of government this authority through enactment of the ZEA. *Id*. The ZEA provides for the creation of a zoning commission in each municipality, but also allows for the continuation of the exercise of powers by township zoning boards and planning commissions established before the act went into effect. The creation of a planning commission under the act did not also create a requirement for the establishment of a zoning board of appeals. *Nicholas v Charter Twp Bd of Watertown*, 43 Mich App 510, 512; 204 NW2d 365 (1972); MCL 125.3601. Appellants have not provided any persuasive authority explaining why an appeal from a determination under a zoning ordinance from a township board should not be subject to the ZEA requirement that only an "aggrieved" party

has standing to appeal. Appeals from both a township board and a municipal zoning commission planning board are entitled to the same review. See MCR 7.122(G)(2); MCL 125.3606(1); Const 1963, art 6, § 28.

Appellants' reliance on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981), to support a different standard for determination of standing to appeal and jurisdiction to hear an appeal is unavailing. The statute interpreted in that case, MCL 125.585(6), has since been repealed.[3] In its place, the Legislature enacted MCL 125.3605, which adopted the "aggrieved person" threshold. An appeal from the township board was defined by *Carleton Sportsman's Club* as a final decision subject to appellate review by the circuit court. *Carleton Sportsman's Club*, 217 Mich App at 200. MCR 7.103(A)(3) provides that the circuit court's jurisdiction over appeals of final decisions by right is limited to those filed by an aggrieved party. *Carleton*'s language is clear that to invoke the circuit court's jurisdiction, appellants must have been aggrieved parties.

To have the status of "aggrieved party" for purposes of obtaining the circuit court's appellate review of a decision under a zoning ordinance, "a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated." *Olsen*, 325 Mich App at 185 (quotation marks, citation, and brackets omitted). "Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that

[3] See 2006 PA 110, § 702, effective July 1, 2006.

other similarly situated property owners may experience." *Id*. (citation omitted).

The circuit court held that appellants lacked standing to challenge the planning commission's decision to grant Heritage's permit applications because they failed to establish that they suffered special damages or a unique harm not common to other property owners similarly situated. We acknowledge that *Olsen* distinguished between being aggrieved for purposes of appeal and having standing to litigate in the first instance. However, *Olsen* noted that, "[i]n either situation, a party must establish that they have special damages different from those of others within the community." *Olsen*, 325 Mich App at 193; see also *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). In challenging the circuit court's conclusions, appellants here point to their participation in the proceedings below, and their raising concerns over how the proposed wind turbines would affect the environment, public health, property values, and the general aesthetic character of the area. Such concerns, however, do not show that appellants stand to suffer any greater negative impacts from the proposals than do their neighbors or others in the community. Heritage's site map, whose accuracy is not in dispute, illustrates the locations of the proposed wind turbines along with the residences of the various appellants. The map does not bring to light any special proximity of appellants' properties to the proposed turbines, but instead suggests that appellants happen to be residents scattered about the community whose objections to the challenged zoning permits are apparently driven more by concerns of a general nature than by any expected consequences of the operation of the turbines peculiar to themselves.

Appellants also expressed concerns over the noise and "shadow flicker" that the turbines are expected to produce. Appellants assert that the proposed turbines are to be located close enough to their residences that the noise and flicker the turbines generate will exceed what is allowed under the applicable ordinance provisions and thus constitute "special damages" that arise to individual claims for recovery under private nuisance law. A violation of a zoning ordinance constitutes a public nuisance that, by itself, "gives no right of action to an individual and must be abated by the appropriate public officer." *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). However, a private individual who can "show damages of a special character distinct and different from the injury suffered by the public generally" may bring an action to abate a public nuisance arising from the violation of a zoning ordinance. *Id*. Appellants in this case fail to specify who among them will clearly experience such noise or flicker above ordinance levels in connection with a particular proposed turbine. Accordingly, appellants also fail to distinguish themselves in this regard from the unsuccessful appellants in *Olsen* who were "asserting only the complaints of anticipated inconvenience and aesthetic disappointment that any member of the community might assert." *Olsen*, 325 Mich App at 193; see also *id*. at 181, quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006) (stating that in order to be an aggrieved party, " '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' ") (quotation corrected).

Affirmed.

SERVITTO and KRAUSE, JJ., concurred with STEPHENS, P.J.

JEWETT v MESICK CONSOLIDATED SCHOOL DISTRICT

Docket No. 348407. Submitted May 12, 2020, at Lansing. Decided June 4, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 927 (2021).

Randy K. Jewett filed an employment-discrimination action in the Wexford Circuit Court against the Mesick Consolidated School District, alleging that defendant violated MCL 37.1202(1)(b) of the Persons with Disabilities Civil Rights Act (the act), MCL 37.1101 *et seq*., when it discriminated against him on the basis of a disability that was unrelated to his ability to perform his job. In 1992, defendant hired plaintiff as a custodian; plaintiff, who was previously a special education student in the district, had attention deficit hyperactivity disorder (ADHD), an unspecified anxiety disorder, and dyslexia (preventing him from being able to functionally read); plaintiff did not consider himself disabled. Throughout his employment, plaintiff's supervisors and administrators verbally instructed defendant regarding his job duties. In addition, he was given colored charts of where, what, and how to clean. Although plaintiff stated that he understood his duties, school personnel complained about the quality of his work and he was repeatedly disciplined for poor performance by numerous supervisors and district superintendents. According to plaintiff, he performed his job duties as required but had an acrimonious relationship with his supervisor and the supervisor's assistant, resulting in negative job evaluations. In March 2015, plaintiff was suspended after it was determined that he had falsely called in sick to his job. During the suspension, a plan was instituted in which plaintiff was allowed a nondisciplinary period off work to pursue other income options. Plaintiff considered the plan a veiled threat that he should quit. After plaintiff had exhausted his leave time, defendant's superintendent required plaintiff to sign a last-chance agreement as a condition of his employment. Plaintiff specifically had to follow and complete all directives, complete his duties and responsibilities, and be prompt and regular in attendance, as well as follow all oral and written policies, procedures, directives, and instructions communicated from the administration or his supervisor; plaintiff's employment would be terminated if he failed to follow the agreement's provisions.

Plaintiff refused to sign the agreement, resigned, and filed this action, arguing that he was constructively discharged because one of the provisions in the last-chance agreement required him to follow written policies, even though he could not read. Defendant moved for summary disposition. The court, William M. Fagerman, J., granted the motion. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 37.1102(1) provides that the opportunity to obtain employment without discrimination because of a disability is a civil right. In turn, MCL 37.1202(1)(b) prohibits an employer from discharging or otherwise discriminating against an individual with respect to compensation or the terms, conditions, or privileges of employment because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position. To establish a violation of the act, a plaintiff must establish that (1) he or she is disabled as defined by the act, (2) the disability is unrelated to his or her ability to perform the duties of the job, and (3) he or she has been discriminated against in one of the ways delineated in the act. If a plaintiff establishes a prima facie case of employment discrimination, the burden shifts to the defendant to articulate a legitimate business reason for the decision. If a defendant provides a legitimate business reason, the burden returns to the plaintiff to prove that the reason was a pretext. An employer's stated legitimate, nondiscriminatory reasons for firing an employee can be proven as pretext by establishing that (1) the reasons had no basis in fact; (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision; or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. An honest belief, even if ultimately found to be objectively incorrect or improvident, precludes a finding of pretext or bad faith. Constructive discharge is not a cause of action but, rather, a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. Under the "cat's paw" theory, discriminatory animus held by a supervisor with no decision-making authority over the plaintiff can be attributed to the employer if the biased

supervisor's conduct was a proximate cause of the adverse employment action against the plaintiff.

2. Assuming that plaintiff's inability to read and his ADHD diagnosis qualified him as disabled under the act, the ability to read was not relevant to his job. Plaintiff's constructive discharge argument was without merit because his reason for believing he was forced out and refusing to sign the agreement (i.e., his acrimonious relationship with his supervisor and the supervisor's assistant) had nothing to do with the last-chance agreement that required him to follow all oral and written policies; plaintiff had never claimed that he was disabled, and school personnel communicated his job duties to him verbally, graphically, or demonstratively. Accordingly, there was no question of material fact that the agreement would have made plaintiff's working conditions so intolerable as to constitute constructive discharge. While there was a question of fact whether plaintiff's supervisor or the supervisor's assistant made plaintiff's working conditions unnecessarily unpleasant, the cat's-paw theory of liability did not apply because uncontradicted evidence established that those individuals were not involved in the decision-making process related to plaintiff's employment and there was no evidence that their alleged negativity toward plaintiff was based on plaintiff's inability to read. Even if plaintiff could establish that he was constructively discharged, defendant had a legitimate reason for the discharge given plaintiff's extensive disciplinary history, and plaintiff failed to establish that the reasons were a pretext. Accordingly, there was no genuine issue of material fact, and the trial court correctly granted defendant's summary-disposition motion.

Affirmed.

The Mastromarco Firm (by *Victor J. Mastromarco, Jr.*) for plaintiff.

Kluczynski, Girtz & Vogelzang (by *Mark T. Ostrowski* and *Bogomir Rasjic, III*) for defendant.

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

RONAYNE KRAUSE, P.J. In this employment-discrimination action brought under the Persons with

Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., plaintiff, Randy K. Jewett, appeals by right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was hired in 1992 by defendant, the Mesick Consolidated School District (the School), as a custodian. According to a psychological evaluation, plaintiff suffers from attention deficit hyperactivity disorder (ADHD), an unspecified anxiety disorder, a "Reading Disorder," and a "Disorder of Written Expression." Plaintiff contends that he also suffers from dyslexia and hypoglycemia. It is not seriously disputed that plaintiff is unable to read, although plaintiff contends that he has no difficulty understanding, memorizing, and following verbal directions. Plaintiff was a former special education student at the School, and on that basis, he contends that the School was aware of his disabilities when he was hired. Various personnel at the School generally agreed that they understood plaintiff to have difficulty reading and to possibly have ADHD. However, by plaintiff's own admission, he never actually described himself as "disabled"; rather, he only described himself as dyslexic and unable to read.

Throughout plaintiff's employment, his various supervisors and administrators provided plaintiff with verbal instructions regarding his job. Plaintiff was given colored charts of where he was to clean and laminated photographs of what and how to clean; those visual aids were attached to plaintiff's cleaning cart. At least one superintendent personally demonstrated to plaintiff how to perform some of his job duties. Plaintiff

contends that he understood what he was supposed to do, did what he was supposed to do, and consistently worked to the utmost of his ability. Nevertheless, personnel at the School complained about the quality of plaintiff's work for many years. Those complaints included leaving floors and bathrooms dirty, failing to follow directions, and attendance problems. Plaintiff's personnel file reflects an extensive history of disciplinary action, and plaintiff admitted that he was disciplined by numerous supervisors or superintendents. Plaintiff nevertheless disputes that there was anything wrong with his work that was not attributable to other causes.[1] Plaintiff contends that he was accommodated until Scott Akom was promoted to superintendent. However, plaintiff admitted that he was never actually denied any requested accommodations, which consisted of asking people to read things to him.

Notably, Akom's predecessor as superintendent, Michael Corey, personally observed plaintiff's work to be substandard, believed plaintiff willfully disregarded instructions and knowingly shirked his duties when he thought no one would know, and thought that plaintiff performed unacceptable work that plaintiff believed was good enough despite knowing it would not be acceptable to a supervisor. Corey testified that plaintiff's problems followed a consistent pattern of improving for a while after being talked to and plaintiff appearing to understand, only for plaintiff's performance to inevitably fall off again and that

[1] For example, plaintiff described an occasion when he was chastised for failing to wax the floors properly, only for it to be subsequently discovered that the School had received defective floor wax. Plaintiff contended that the reason why there were complaints about bathroom soap dispensers being empty was that the students played with the soap and got it all over the floor. Plaintiff also contended that the floors were not waxed often enough, making it exceedingly difficult to keep them looking shiny.

"nothing was ever resolved." There is no evidence that Akom interfered with the ongoing practice of giving plaintiff verbal and graphic instructions. As noted, plaintiff could not recall anyone ever refusing any request he made for accommodation. There is also no evidence that plaintiff's job required him to be able to read.

Plaintiff places great significance on Akom allegedly denying being told by Corey, when the superintendency was transferred, that plaintiff was disabled; plaintiff claims that this denial conflicts with Corey's testimony and shows bias. Plaintiff both misinterprets two comments and takes them out of context. Corey agreed during his deposition that he had discussions with Akom regarding plaintiff when Akom was Corey's subordinate, most of which concerned plaintiff's performance, but that "there were some discussions about the source of these performance problems, i.e., his disabilities." Corey did not elaborate. Akom testified only that he *did not recall* Corey telling him that plaintiff had any disabilities, which is completely different from claiming that no such conversation occurred. Akom testified that he was not aware that plaintiff suffered from any disabilities, but he also testified that long before he became superintendent, he was fully aware that plaintiff reported having ADHD and dyslexia. Plaintiff testified that he never told anyone at the School that he was disabled, and in fact, plaintiff does not claim to have reported any impediments other than ADHD, hypoglycemia, and an inability to read.[2] Thus, Akom was clearly aware of the

[2] Plaintiff argues that his psychological evaluation reflected extremely low intelligence that the clinical psychologist described as within the clinical definition of "mental retardation." However, plaintiff oversimplifies: plaintiff scored low on several specific measures, but

substance of plaintiff's alleged disability, and plaintiff simply makes too much of either terminology or a completely normal failure to recall every detail of every conversation from years prior.

Plaintiff contends that he had an acrimonious and oppressive relationship with his supervisor, Robert Harris, and with Ron Barron, whom plaintiff regarded as Harris's assistant. Harris did yell at plaintiff on occasion, which he admitted was "not very professional," but when he did yell, "it would be [about plaintiff] not doing his job." Corey testified that he admonished Harris to treat plaintiff with more respect, after which Corey perceived that plaintiff's and Harris's relationship improved. Nevertheless, plaintiff contends that Harris and Barron continued to harass him and make negative and discriminatory comments about him.

In March 2015, plaintiff called in sick to work and was then observed a few hours later at a nearby ski resort.[3] As a consequence of that incident and a list of concerns observed and reported by Tammy Cinco, then the interim elementary principal at the School, Akom imposed on plaintiff a 10-day unpaid suspension. Plaintiff was also informed that despite his claim at a meeting that he performed his duties every night, it was clear to Akom that plaintiff's duties were not being

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plaintiff's abilities to understand verbal statements and solve visually presented problems were in the average range. The psychologist opined that plaintiff's "actual cognitive ability is higher than assessed" and that plaintiff was actually of average intelligence, albeit hampered by his difficulties with attentiveness and concentration. In any event, it does not appear that plaintiff ever claimed low intelligence to the School, and his testimony clearly shows that he did not regard himself as intellectually below average and either did or would have disputed any suggestion to the contrary.

[3] Plaintiff explained that he went there because he had no food at his house, he needed to eat something, and a friend offered to buy him a sandwich at the resort.

completed. During that suspension, Akom, along with plaintiff's union president and the assigned Michigan Education Association (MEA) UniServ director,[4] developed a plan to allow plaintiff a nondisciplinary period off work, during which plaintiff could use his vacation, sick, and personal days to seek other income options, including trying to qualify for retirement disability. Plaintiff regarded the offer as a veiled threat that he should quit.

On July 6, 2015, after plaintiff exhausted his leave time, Akom provided plaintiff with a "last chance agreement" at a meeting as the condition of his continued employment. Akom was the only person at that meeting on behalf of the School. The other attendees were plaintiff, plaintiff's cousin, the cousin's wife, and the MEA UniServ director; the latter three were present to assist plaintiff or represent his interests. The agreement expressly required plaintiff to follow and complete all directives, to fully complete his duties and responsibilities, and to be prompt and regular in attendance. The agreement also provided eight additional provisions, which included that he would be immediately terminated if he failed to meet the conditions of the agreement; that he would be closely monitored and must accept that supervision; that he would be expected to report to work at his scheduled time and be prepared to work; and that he "will follow all oral and written policies, procedures, directives, and instructions communicated from administration and/or the supervisor."

[4] "UniServ" is the term used by the MEA to refer to field staff assigned to work with local school unions or similar entities representing school employees. MEA, *Directories* <https://www.mea.org/directories/>. The MEA director testified that plaintiff told her only that he was dyslexic, and she did not recall learning of any other impediments or disabilities plaintiff might have had. She also testified that she "read most things" to plaintiff.

Plaintiff testified that he understood he could have signed the agreement and that he had not been fired, but he "kn[e]w where it was going." Plaintiff testified that he refused to sign the agreement because he had been working hard and trying to do everything, he did not want to admit to having been negligent at his job, and he believed it was pointless because sooner or later Harris or Barron would "find something." Plaintiff therefore chose to resign rather than sign the agreement.

Plaintiff filed a complaint in circuit court, alleging that defendant's actions were in violation of the PWDCRA. Specifically, plaintiff argued that defendant had violated MCL 37.1202(1)(b) (discharge of or discrimination against individual because of disability unrelated to ability to perform job duties). Defendant moved to dismiss under MCR 2.116(C)(10), and the trial court granted defendant's motion. This appeal followed.

II. STANDARD OF REVIEW

Appellate courts review de novo a trial court's decision on a summary-disposition motion. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Appellate courts review the entire record to determine whether summary disposition was warranted. *Id*. A party is entitled to summary disposition under MCR 2.116(C)(10) when the provided evidence does not establish a genuine issue of material fact. *Id*. at 120. The evidence is reviewed in the light most favorable to the nonmoving party. *Id*. "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Id*. at 121.

III. APPLICABLE LEGAL PRINCIPLES

The PWDCRA states that the opportunity to obtain employment without discrimination because of a disability is a civil right. MCL 37.1102(1). The Michigan Supreme Court has cautioned that although the analysis under the PWDCRA will often be similar to an analysis under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., it should not simply be assumed that the PWDCRA will parallel the ADA. *Peden v Detroit*, 470 Mich 195, 217; 680 NW2d 857 (2004). To prove that a violation of the PWDCRA occurred, a plaintiff must show " '(1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute.' " *Id*. at 204, quoting *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998) (alterations in original). "[L]ike the ADA, the PWDCRA generally protects only against discrimination based on physical or mental disabilities that substantially limit a major life activity of the disabled individual, but that, with or without accommodation, do not prevent the disabled individual from performing the duties of a particular job." *Peden*, 470 Mich at 204.

Plaintiff argues that he was constructively discharged and that any legitimate business reasons defendant could provide for that discharge are pretextual. "[C]onstructive discharge is not in itself a cause of action" but, rather, "a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). A constructive discharge occurs when " 'an employer deliberately makes an employee's working

conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign.' " *Id.*, quoting *Mourad v Auto Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991). A question of fact exists when reasonable people could reach different conclusions as to whether these elements were established. *Vagts*, 204 Mich App at 488.

IV. ANALYSIS

As an initial matter, although the School does not concede that plaintiff is "disabled" within the meaning of the PWDCRA, there is no serious factual dispute that plaintiff cannot read and has ADHD. Furthermore, notwithstanding plaintiff's arguments about whether anyone at the School knew him to be "disabled," it was clearly common knowledge at all relevant times that plaintiff could not read, or at least could not read well. There is no evidence that plaintiff's inability to read had any real relevance to his job. Significantly, the evidence shows that nobody ever refused to read something to plaintiff upon his request, plaintiff never informed the School that he was disabled, and plaintiff never requested any other kind of accommodation. Rather, the evidence shows that personnel at the School took great pains to ensure that plaintiff's job duties were communicated to him verbally, graphically, or demonstratively.

Plaintiff argues that he was constructively discharged because one of the provisions in the last-chance agreement required him to follow "all oral *and written* policies . . . ." (Emphasis added.) However, plaintiff himself testified that the reasons he believed

he was being forced out, and the reasons why he refused to sign the agreement, had nothing to do with that provision. Furthermore, as noted, the evidence overwhelmingly shows that if plaintiff ever needed something read to him, someone would read it. In other words, there is no question of material fact that any written policies, directives, procedures, or instructions given to plaintiff would have been read to him aloud on request. Accordingly, there is no basis for concluding that the single line would make plaintiff's working conditions so intolerable as to constitute constructive discharge. *Vagts*, 204 Mich App at 487.[5]

Plaintiff has presented evidence to establish a question of fact whether Harris or Barron disliked plaintiff personally and made his working conditions unnecessarily unpleasant. Plaintiff therefore asserts that the so-called "cat's paw" doctrine should apply in this case. Under the "cat's paw" theory of employer liability, discriminatory animus held by a supervisor with no decision-making authority over an affected employee can be attributed to the employer if the biased supervisor's conduct is nevertheless a proximate cause of the adverse employment action against the employee. See *Staub v Proctor Hosp*, 562 US 411, 420-422; 131 S Ct

[5] Plaintiff relies on *Miles v Bay City*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2014 (Docket No. 310972), for the proposition that conditioning a person's continued employment on signing a last-chance agreement can constitute an adverse employment action. In *Miles*, the last-chance agreement required the plaintiff to waive his union grievance rights and forbade him to hold any closed-door or one-on-one meetings. This Court concluded that those restrictions "would cause a material loss of benefits" to the plaintiff. *Id*. at 4. In contrast, as noted, plaintiff here chose not to sign the last-chance agreement for reasons totally unrelated to the "written policies" line, and in any event, the evidence overwhelmingly shows that there was no plausible danger of anyone refusing to read aloud anything plaintiff might have needed read.

1186; 179 L Ed 2d 144 (2011). Even if the "cat's paw" doctrine applies in Michigan, it is not relevant here. Akom was adamant that he was the sole decision-maker. Harris and Barron had no input into Akom's decisions, and, in fact, Akom testified that he would have terminated Harris for threatening plaintiff if he knew any such threat occurred. Furthermore, there is no evidence that Harris's and Barron's alleged negativity toward plaintiff was based on plaintiff's inability to read. See *Peden*, 470 Mich at 204. Harris apparently believed plaintiff was not mentally capable of doing his job. Plaintiff's personnel record supports the conclusion that plaintiff was, in fact, not capable of doing his job for reasons not seemingly related to his inability to read.

In any event, even if plaintiff could demonstrate a genuine issue of material fact regarding whether he was constructively discharged, defendant demonstrated that it had a legitimate business reason to take employment action against plaintiff. If a plaintiff establishes a prima facie case of employment discrimination, the burden shifts to the defendant to articulate a legitimate business reason for the decision. *Aho v Dep't of Corrections*, 263 Mich App 281, 289; 688 NW2d 104 (2004). If a defendant provides a legitimate business reason, then the burden returns to the plaintiff to prove that the reason was a pretext. *Id*. A defendant must produce evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001). As noted, plaintiff's personnel file and the testimony of several other employees of the School, including Akom's predecessor as superintendent, reflect that plaintiff had an enduring problem of simply failing to do his work while insisting that he was doing his work, and possibly improving temporar-

ily only to inevitably relapse. Plaintiff had an extensive disciplinary history that, sooner or later, would have warranted termination. These facts provide legitimate business reasons for defendant's taking employment action against plaintiff.[6]

An employer's legitimate, nondiscriminatory reasons for firing an employee can be established as pretext "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Major v Village of Newberry*, 316 Mich App 527, 542; 892 NW2d 402 (2016) (quotation marks and citation omitted). The plaintiff may use direct or indirect evidence, but the plaintiff must establish a causal connection between the discriminatory animus and the adverse employment decision. *Id*.

Plaintiff argues that the negative employment decisions culminating in his subjectively involuntary resignation were pretextual; however, that argument seemingly rests on the above-noted single line in the last-chance agreement, Akom's alleged ignorance of plaintiff's disabilities, and the fact that plaintiff was "accommodated" until Akom ascended to the superin-

[6] Plaintiff relies on *Blalock v Metals Trades, Inc*, 775 F2d 703 (CA 6, 1985), for the proposition that we should infer discriminatory motive from the fact that the School stopped tolerating his poor performance, allegedly abruptly, after many years. In *Blalock*, the employer was purportedly happy with the plaintiff's performance until the plaintiff had a falling-out with a religious leader shared by the employer's principals, and thereafter, the employer ceased being happy with the plaintiff's performance. The facts here are radically different: plaintiff's personnel file shows that the School had been displeased with plaintiff's performance for many years. The School did not abruptly lower its level of tolerance. Accordingly, plaintiff's reliance on *Blalock* is misplaced.

tendency. As discussed: (1) plaintiff chose to resign for reasons completely unrelated to what the School reasonably characterizes as boilerplate language in the agreement, (2) Akom was, in fact, fully aware that plaintiff could not read and had ADHD, (3) plaintiff did not describe himself to the School as "disabled" or suffering from any other limitations, (4) the School never refused any request plaintiff made for accommodation, and (5) plaintiff's personnel file and Corey's testimony show that plaintiff already had a long history of work performance and attendance problems that had been addressed with progressive discipline before Akom became superintendent. Plaintiff has not provided any supporting evidence from which it might be deduced that the timing of Akom becoming superintendent and the offer of the last-chance agreement were anything other than a mere coincidence. See *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (discussing retaliatory discharge).

Plaintiff maintains that he did, in fact, perform all of his duties, and he alleged in his complaint that his performance deficiencies were fabricated. A party's own testimony, standing alone, can be sufficient to establish a genuine question of fact. See *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 613; 292 NW2d 880 (1980); *Kenkel v Stanley Works*, 256 Mich App 548, 558-559; 665 NW2d 490 (2003). A conflict in the evidence may generally only be removed from the trier of fact's consideration if it is based on testimony that is essentially impossible or is irreconcilably contradicted by unassailable and objective record evidence. See *People v Lemmon*, 456 Mich 625, 643-646; 576 NW2d 129 (1998); *Scott v Harris*, 550 US 372, 378-381; 127 S Ct 1769; 167 L Ed 2d 686 (2007). Thus, summary disposition is improper when the resolution of a matter turns on the relative credibility of

witnesses, even if a party cannot submit documentary proof to refute the opposing party's claims. See *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 624-627; 739 NW2d 132 (2007).

Nevertheless, plaintiff admitted that he was regularly disciplined for performance deficiencies, fairly or not, throughout his employment with the School, including under supervisors and administrators who long predated Akom, Harris, and Barron. As noted, plaintiff was also never denied any accommodation that he requested. There may be a genuine question of fact whether plaintiff's performance issues were real. Unfortunately, however, the personnel file, Corey's testimony, and plaintiff's own testimony show that there is no genuine question of fact that the School *believed* plaintiff's performance issues were real and longstanding. An honest belief, even if ultimately found to be objectively incorrect or improvident, precludes a finding of pretext or bad faith. *Robinson v Hawes*, 56 Mich 135, 139-140; 22 NW 222 (1885); *Town v Mich Bell Tel Co*, 455 Mich 688, 703-704; 568 NW2d 64 (1997); see also *Majewski v Automatic Data Processing, Inc*, 274 F3d 1106, 1116-1117 (CA 6, 2001); *Nizami v Pfizer Inc*, 107 F Supp 2d 791, 803-804 (ED Mich, 2000).[7]

V. CONCLUSION

In sum, the School had legitimate reasons for conditioning plaintiff's continued employment on the last-chance agreement, and plaintiff has not established a question of fact that the School's reasoning was pre-

[7] This Court is not bound by decisions of lower federal courts, but Michigan courts often regard federal precedent as instructive and persuasive. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997).

textual. Although plaintiff has established a question of fact whether Harris and Barron held animosity toward him, plaintiff has not established a question of fact that their animosity had anything to do with his inability to read or that their animosity had any causal connection to Akom conditioning plaintiff's continued employment on plaintiff signing the last-chance agreement.

Affirmed.

SERVITTO and REDFORD, JJ., concurred with RONAYNE KRAUSE, P.J.

STUMBO v ROE

Docket No. 353695. Submitted June 3, 2020, at Grand Rapids. Decided June 5, 2020, at 9:00 a.m. Leave to appeal denied 505 Mich 1127 (2020).

Brenda Stumbo and Larry Doe filed an action in the Washtenaw Circuit Court against Heather Jarrell Roe and Karen Lovejoy Roe, seeking a declaration that Heather's candidacy for the position of Ypsilanti Township Clerk was invalid and that her name should be removed from the list of candidates for the August 4, 2020 primary election for that position. In April 2020, Heather filed paperwork to be placed on the primary ballot for the office of township clerk. The paperwork included an affidavit of identity in which she provided certain information required under MCL 168.558 of the Michigan Election Law, MCL 168.1 *et seq*. The affidavit of identity contained Heather's signature and a signature date of April 20, 2020; her affidavit of identity was notarized by a notary public with a notary date of April 21, 2020. The township clerk, then Karen Lovejoy Roe, accepted Heather's affidavit of identity and qualified her as a candidate for the office of township clerk. Plaintiffs filed this action, arguing that Heather was ineligible to be placed on the ballot because Heather's affidavit of identity was facially invalid in that her signature date was different from the notarization date. The court, Carol Kuhnke, J., agreed and ordered Heather's name stricken from the primary-election ballot. Heather appealed.

The Court of Appeals *held*:

MCL 168.558(1) requires that a person filing a nominating petition, qualifying petition, filing fee, or affidavit of candidacy for a township office in any election must file two copies of an affidavit of identity with the officer with whom the petitions, fee, or affidavit is filed. Under MCL 168.558(2), the affidavit of identity must include that the person is a United States citizen and that the person meets the constitutional and statutory qualifications for the office sought. In turn, MCL 168.558(4) requires certain statements regarding fees and an acknowledgment of the penalty for making false statements in the affidavit of identity. While MCL 168.558 does not explicitly or implicitly require a candidate to date the

affidavit of identity, the affidavit-of-identity form prescribed by the Secretary of State instructs candidates to so sign and date the document; the signature-and-date requirement on the Secretary of State form does not have the force of law, and as written, the requirement does not expressly impede the document from being a proper and valid affidavit. Stated differently, while the Secretary of State has authority under MCL 168.31(1)(a) and (c) to advise a candidate to date the affidavit of identity at the time of signing, the Secretary of State may not impose a date requirement not sanctioned by the Legislature or necessary to the establishment of a proper and valid affidavit. MCL 168.558 does not expressly require that the affidavit of identity be signed by the candidate or that the identity of the signatory be attested to by a notary. However, the signature and notarization requirements of MCL 55.285 for notary publics—i.e., that an affidavit must be signed by the affiant in the presence of the notary and that the notary must attest to the identity of the affiant—are implicitly included in the MCL 168.558 affidavit-of-identity requirements; the notary statute does not require a notary to attest to the accuracy of the date affixed to the writing by the affiant, only the signature. In this case, Heather strictly complied with the attestation requirements implicit in MCL 168.558 because a notary witnessed and attested to her signature on April 21, 2020, and the fact that she dated the form outside the presence of the notary or misdated her signature did not render the affidavit invalid. Accordingly, the trial court erred by holding that Heather's affidavit of identity was facially invalid under MCL 168.558 and by ordering her name removed from the primary-election ballot.

Trial court order finding the affidavit of identity facially invalid reversed; trial court order removing Heather's name from the primary-election ballot vacated; case remanded to the trial court for entry of an order directing that Heather's candidacy be certified to the board of election commissioners for placement on the primary-election ballot.

MARKEY, J., dissenting, disagreed with the majority's conclusion that Heather's affidavit of identity was facially valid under MCL 168.558. An affidavit of identity that is defective on its face constitutes a ground to disqualify a candidate from being included on an election ballot. Even without the Secretary of State's attestation requirements, MCL 55.285(5) mandates that an affidavit be signed and dated by the affiant and the notary, and the document required by MCL 168.558 is an affidavit, thereby requiring the signatures and dates of both the affiant and the notary. The affidavit of identity was invalid on its face because Heather dated the document the day before the notary did so,

contrary to the MCL 55.285(5) presence requirement. The majority improperly started down a slippery slope by looking outside the four corners of the affidavit of identity that was facially invalid to consider extrinsic evidence to correct the defect. Judge MARKEY would have affirmed the trial court's order precluding Heather's name from being placed on the primary-election ballot for township clerk.

Roberts & Freatman (by *Ellis B. Freatman III* and *Amy L. Kullenberg*) for Brenda Stumbo and Larry Doe.

Nickelhoff & Widick, PLLC (by *Andrew Nickelhoff*) for Heather J. Roe.

Before: BECKERING, P.J., and MARKEY and BOONSTRA, JJ.

BOONSTRA, J. Our Supreme Court has instructed that a candidate for elected office must strictly comply with the preelection form and content requirements identified in the Michigan Election Law, MCL 168.1 *et seq*., in the absence of any statutory language expressly indicating that substantial compliance with the statute's requirements suffices. *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 594, 600-608, 619; 822 NW2d 159 (2012) (opinion by MARY BETH KELLY, J.); *id*. at 620 (opinion by YOUNG, C.J.); *id*. at 637, 640-641 (opinion by MARKMAN, J.). The failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot. *Berry v Garrett*, 316 Mich App 37, 43-45; 890 NW2d 882 (2016). Relying on *Stand Up For Democracy* and *Berry*, the Washtenaw Circuit Court ordered defendant Heather Jarrell Roe disqualified from placement on the August 4, 2020 primary-election ballot for the office of Ypsilanti Township Clerk. The trial court predicated its disqualification of

Roe's candidacy on the finding that the AOI filed by Roe was "facially defective" because Roe had failed to strictly comply with the attestation instructions issued by the Secretary of State under MCL 168.31. We granted leave[1] to address whether a fatal defect exists in an AOI required by MCL 168.558 when the candidate's signature date differs from the notarization date.[2] We conclude that a fatal defect does not exist under such circumstances. Rather, we hold that as long as the AOI has been signed by the candidate and

[1] Defendant Heather Roe initiated this appeal by filing a claim of appeal. This Court has jurisdiction of an appeal of right filed by an aggrieved party from "[a] final judgment or order of the circuit court . . . as defined in MCR 7.202(6), MCR 7.203(A)(1), or from "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule," MCR 7.203(A)(2). MCR 7.202(6)(a)(i) defines a "final order" in a civil case as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties[.]" The May 29, 2020 order struck Roe's name from the primary-election ballot. It did not resolve any of the other requests for relief set forth in the complaint, however. Because the order did not dispose of all the claims and adjudicate the rights and liabilities of the parties, it is not a final order under MCR 7.202(6)(a)(i). The fact that the May 29, 2020 order contains language indicating that it "is entered pursuant to MCR 2.602 and closes this case" does not control this Court's jurisdiction. *Faircloth v Family Independence Agency*, 232 Mich App 391, 400-401; 591 NW2d 314 (1998). In lieu of dismissing the claim of appeal, we treat the claim of appeal as an application for leave to appeal and grant the application.

[2] The question we address in this opinion is one of law. We have not looked to extrinsic evidence to explain away the obvious facial deficiency in Roe's AOI, as asserted by the dissent. Rather, we looked to the plain and unambiguous language of MCL 168.558 and found no express or implicit requirement that the candidate affiant must date the AOI in the presence of a notary. We do not believe, as the dissent does, that Roe may be held to strict compliance with a dating requirement imposed by the Secretary of State that requires more of the candidate than MCL 168.558 requires. Consequently, whether Roe predated the affidavit or simply misdated the affidavit is wholly irrelevant to a determination whether the affidavit facially complies with the notarization requirement implicitly imposed by MCL 168.558(1).

notarized in a manner allowed under MCL 55.285, the AOI strictly complies with the attestation requirements implicit in MCL 168.558 and the clerk has a legal duty to certify the affiant to the board of election commissioners for placement on the ballot. Accordingly, we reverse the trial court.

I

Roe currently serves as an Ypsilanti Township Trustee. On March 2, 2020, Roe filed the necessary paperwork to be placed on the August 4, 2020 primary ballot as the incumbent candidate for the office of Ypsilanti Township Trustee. On April 21, 2020, however, Roe withdrew her candidacy for that elected office. She immediately thereafter filed paperwork to run for the office of Ypsilanti Township Clerk.

Under MCL 168.558(1) and (2), a candidate filing a nominating petition or a filing fee in lieu of nominating petition must also file an AOI containing the candidate's name, address, and other information useful to establishing the candidate's identity. The Secretary of State provides a form AOI for use by candidates. This form AOI includes a space designated for the candidate's signature. To the immediate right of the signature space is a space designated for the candidate to record the date he or she signed the AOI. The form AOI also provides space for a notary to attest to the identity of the affiant signing the AOI. The AOI filed with the township clerk by Roe bears Roe's signature and a signature date of "04/20/2020." Her AOI was notarized by Brent W. Royal on "the 21st day of April, 2020."[3]

[3] On April 8, 2020, Michigan Governor Gretchen Whitmer issued Executive Order No. 2020-41 in response to the COVID-19 pandemic. The order suspended strict compliance with the rules and procedures under the Michigan Law on Notarial Acts, 2003 PA 238, as amended

The township clerk accepted Roe's AOI for filing and qualified Roe as a candidate for the office of Ypsilanti Township Clerk.

Plaintiffs Brenda Stumbo, the Ypsilanti Township Supervisor, and Larry Doe, the Ypsilanti Township Treasurer, then commenced the underlying proceedings in the Washtenaw Circuit Court, seeking, in part, a declaration that Roe was disqualified from placement on the August 4, 2020 primary-election ballot because Roe had filed a facially improper AOI in that her signature date differed from the notarization date. Plaintiffs also sought an order striking Roe's name from the primary ballot. The trial court granted this requested relief.

II

This appeal involves the application and construction of § 558 of the Michigan Election Law, MCL 168.558. We review de novo issues concerning the application and construction of a statute. *Berry*, 316 Mich App at 41.

This Court's primary task in interpreting and applying a statute "is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460

(MCL 55.261 *et seq*.), to the extent that the act "requires a notary to be in the physical presence of an individual seeking the notary's services . . . ." EO 2020-41, ¶ 3. This executive order authorized the use of "two-way real-time audiovisual technology" that allows for "direct interaction between the individual seeking the notary's services . . . and the notary, wherein each can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization." EO 2020-41, ¶ 5(a). This order was in effect at the time that Royal notarized Roe's AOI. Roe represents that the notarization was accomplished through the use of two-way audiovisual technology in compliance with the executive order. We make no findings regarding the accuracy of Roe's representation.

Mich 230, 236; 596 NW2d 119 (1999). The words of the statute are the most reliable evidence of the Legislature's intent, and this Court must give each word its plain and ordinary meaning. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). "In interpreting the statute at issue, [this Court] consider[s] both the plain meaning of the critical words or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co*, 460 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 166 S Ct 501; 133 L Ed 2d 472 (1995). "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

Section 558(1) requires that a person "filing a nominating petition, qualifying petition, filing fee, or affidavit of candidacy for a . . . township . . . office in any election . . . shall file with the officer with whom the petitions, fee, or affidavit is filed 2 copies of an [AOI]." MCL 168.558(1). Section 558(2) sets forth the required contents of an AOI as follows:

> An [AOI] must contain the candidate's name and residential address; a statement that the candidate is a citizen of the United States; the title of the office sought; a statement that the candidate meets the constitutional and statutory qualifications for the office sought; other information that may be required to satisfy the officer as to the identity of the candidate; and the manner in which the candidate wishes to have his or her name appear on the ballot. If a candidate is using a name that is not a name that he or she was given at birth, the candidate shall include on the [AOI] the candidate's full former name. [MCL 168.558(2).]

Subsection 558(4) also addresses the required contents of an AOI and, in its entirety, reads:

> An [AOI] must include a statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid; and a statement that the candidate acknowledges that making a false statement in the affidavit is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both. If a candidate filed the [AOI] with an officer other than the county clerk or secretary of state, the officer shall immediately forward to the county clerk 1 copy of the [AOI] by first-class mail. The county clerk shall immediately forward 1 copy of the [AOI] for state and federal candidates to the secretary of state by first-class mail. An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, or the name of a candidate who executes an [AOI] that contains a false statement with regard to any information or statement required under this section. [MCL 168.558(4).]

The parties do not dispute that Roe's AOI contains a facially obvious defect. The date that accompanies her signature differs from the date of the notarization. Rather, the parties dispute the import of this defect. The question becomes, then, whether Roe's AOI constitutes a facially proper affidavit for purposes of MCL 168.558 despite the discrepancy between the dates found in the attestation section of the AOI. We conclude the AOI at issue is strictly compliant with the requirements of MCL 168.558.

The plain language of § 558 dictated that candidate Roe reveal a variety of personally identifying information, including her name and address, among other information. MCL 168.558(2). The plain language of

MCL 168.558(2) also required Roe to include in her AOI a statement that she is a citizen of the United States and a statement that she meets the constitutional and statutory qualifications for the office sought. The plain language of MCL 168.558(4) required Roe to include in the AOI a statement that "as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election . . . have been filed or paid[.]" Finally, the plain language of MCL 168.558(4) required Roe to include in the AOI a statement that "the candidate acknowledges that making a false statement in the affidavit is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both." Roe provided all of the requested and required identification information and statements in her completed AOI. In this regard, her AOI strictly complies with the requirements of MCL 168.558(2) and (4).

Oddly, MCL 168.558 contains no express requirement that the affidavit be signed by the candidate or that the identity of the signatory be attested to by a notary. Nevertheless, MCL 168.558(1) does require a candidate for office to file an "affidavit" of identity. An affidavit does not become an affidavit until two essential events occur: (1) the affidavit must be signed by the affiant in the presence of a notary and (2) the notary must then attest to the identity of the affiant. MCL 55.285. See also *People v Sloan*, 450 Mich 160, 177 n 8; 538 NW2d 380 (1995), overruled on other grounds by *People v Hawkins*, 468 Mich 488, 502 (2003); *Rataj v Romulus*, 306 Mich App 735, 755 n 8; 858 NW2d 116 (2014); *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000). Thus, the signature and notarization requirements are implicit in MCL 168.558.

There is no question that Roe signed her AOI. There is also no question that the notarization on the AOI is facially compliant with MCL 55.285(1)(b), (4), and (6)(c), which require a notary to witness and attest to a signature made in the presence of the notary. A review of the AOI shows that notary Brent W. Royal attests in that notarization that Roe signed her AOI before him on April 21, 2020. Therefore, we conclude that Roe strictly complied with the attestation requirement implicit in MCL 168.558.[4] The trial court erred by reaching a contrary conclusion.

The trial court concluded that Roe's AOI was fatally defective because Roe's signature date did not match the notarization date. MCL 168.558 neither expressly nor implicitly imposes a requirement that the candidate must date the affidavit. Rather, the signature date requirement was added by the Secretary of State, to whom the Legislature has delegated the authority to issue instructions for the conduct of elections and to "[p]rescribe and require uniform forms . . . [that] the secretary of state considers advisable for use in the conduct of elections and registrations." MCL 168.31(1)(a) and (e); *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 405; 686 NW2d 287 (2004).

The instructions that accompany the form AOI prescribed by the Secretary of State provide, in pertinent part:

> **5. statements and attestation**
>
> Fill in the circle to indicate you meet the statutory and constitutional requirements for the office sought and are a

[4] Although a signature date that pre-dates the notarization date might call into question the accuracy or veracity of the representations the affiant is making as of "the date of the affidavit," the accuracy of Roe's representations in her AOI is not before this Court.

> citizen. **Read, sign, and date the attestation. The affidavit is not complete until it has been signed and notarized.** [Some emphasis added.]

These instructions do not have the force of law. Moreover, by the plain language of the instructions, the entry of a date by the affiant candidate is not an express impediment to rendering the writing a proper and valid affidavit because while they instruct the person to "[r]ead, sign, and date" the attestation, they also provide that the affidavit is not complete until it has been "signed and notarized," with no mention of the affiant candidate's entry of a date. And MCL 55.285 does not require a notary to attest to the accuracy of the date affixed to the writing by the affiant. Although the Secretary of State may advise a candidate to date the AOI at the time of signing, we cannot conclude that the Secretary of State may create an impediment to the ballot by imposing a date requirement not sanctioned by the Legislature or necessary to the establishment of a proper and valid affidavit.[5]

Holding Roe to strict compliance with the requirements of MCL 168.558, as we must, we conclude, for the reasons stated in this opinion, that Roe filed a facially compliant AOI for purposes of MCL 168.558. Accordingly, the contrary decision of the trial court is reversed, the May 29, 2020 order of the trial court is

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[5] We reiterate that an AOI must be properly notarized and that notarization requires that the notary witness the signature on the date of the notarization. MCL 55.285. Nothing in our opinion diminishes the requirement that a notary must actually witness the affiant candidate's signature. Nor does our opinion preclude a properly advanced challenge to the validity of the notarization. MCL 168.558 provides a clerk with only the authority to certify candidates who complied with the statute. MCL 168.558(4). And, in the present matter, there is no facial defect in Roe's AOI that renders the AOI nonconforming to the requirements of MCL 168.558.

vacated, and this matter is remanded to the trial court for entry of an order directing that Roe's candidacy be certified to the board of election commissioners. We do not retain jurisdiction.

BECKERING, P.J., concurred with BOONSTRA, J.

MARKEY, J. (*dissenting*). Because the affidavit of identity executed by defendant Heather Jarrell Roe (Roe) was facially defective and not in actual compliance with election law, I conclude that the trial court did not err by precluding inclusion of Roe's name on the ballot for the position of Ypsilanti Township Clerk. Ignoring the facial defect in favor of extrinsic evidence that attempts to explain away the defect opens an election-law Pandora's box, creating a danger of abuse and inviting fraud. Accordingly, I respectfully dissent.

We review de novo questions of statutory interpretation. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018). In *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 633-634; 928 NW2d 709 (2018), this Court recited the well-established 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.]

Actual compliance with election laws is required—substantial compliance does not suffice. *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 619; 822 NW2d 159 (2012) (opinion by MARY BETH KELLY, J.); *id*. at 620 (opinion by YOUNG, C.J.); *id*. at 637, 640-641 (opinion by MARKMAN, J.). Under MCL 168.558, Roe was mandated to file an "affidavit of identity" if she wished to be on the ballot for township clerk. And an "affidavit of identity" that is defective on its face constitutes a ground to disqualify a candidate from inclusion on the ballot. *Berry v Garrett*, 316 Mich App 37, 44-45; 890 NW2d 882 (2016). The statute, MCL 168.558, requires the document to be in the form of an "affidavit." For a document to generally qualify as an "affidavit," it must, in part, be confirmed by the oath or affirmation of the party making it and be taken before a person having authority to administer the oath or affirmation. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005).[1] "In all matters where the notary public takes a verification upon oath or affirmation, or witnesses or attests to a signature, the notary public *shall require that the individual sign the record being verified, witnessed, or attested in the presence of the notary public*." MCL 55.285(5) (emphasis added). Even without the attestation requirements promulgated by the Secretary of State and reflected in the standard form, inherent in the production of any "affidavit" is the necessity that it be signed and dated by the affiant and the notary, and the Legislature itself demanded the filing of a document in the form of an "affidavit" under the plain and unambiguous language in MCL 168.558.

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[1] The Michigan Election Law, MCL 168.1 *et seq*., does not define the term "affidavit."

In this case, the notary public attested that the affidavit of identity was "subscribed and sworn" to him on April 21, 2020. Yet Roe indicated in the affidavit of identity that she executed the document on April 20, 2020. On examination of the face of the affidavit of identity, one would conclude that Roe signed the affidavit the day before it was signed by the notary public in contravention of the presence requirement of MCL 55.285(5).[2] Minimally, the dates of affiant Roe's signature and the notary's attestation needed to match in order to make the affidavit of identity valid on its face. The dates were not the same; therefore, the affidavit of identity was defective on its face and was not in the form of a valid affidavit as required by MCL 168.558. In other words, there was no actual compliance with MCL 168.558.

Roe stated in a "declaration" that she signed the affidavit of identity on April 21, 2020, in a drive-through lane at a bank, where she and the notary public "could see and speak with each other through the window and on a television monitor." Roe claimed that she mistakenly wrote down the wrong date. I first highly question whether such circumstances established that Roe executed the affidavit of identity "in the *presence* of the notary public." See MCL 55.285(5) (emphasis added). Regardless, I believe that we improperly start down a dangerous slippery slope when we look outside the four corners of an affidavit of identity that is defective on its face and consider extrinsic evidence to effectively correct the defect and resurrect the affidavit.

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[2] Even assuming that it is proper to consider extrinsic evidence, the e-mail by the notary public did not expressly indicate that Roe signed the affidavit of identity in his presence.

In sum, the affidavit of identity was defective on its face. Thus, the trial court did not err by ruling in favor of plaintiffs. In my view, the case is that simple. Accordingly, I respectfully dissent.[3] In view of the impact of this decision on Michigan election law during this election season, I would urge the Legislature or the Michigan Supreme Court to quickly address and provide clarity on the important issues raised in this appeal.

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[3] I do note that I also have some procedural concerns about this case relative to jurisdiction, ripeness, and standing.

PEOPLE v BARNES

Docket No. 348038. Submitted March 12, 2020, at Detroit. Decided June 11, 2020, at 9:00 a.m. Leave to appeal denied 507 Mich 893 (2021).

Lonnie T. Barnes was convicted following a jury trial in the Wayne Circuit Court of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c); kidnapping, MCL 750.349; and third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b). The complainant, PD, connected with defendant through a chat line and agreed to meet with defendant in person to go sightseeing. Defendant drove PD around the city, parked in a secluded area, and sexually assaulted her after she turned down his request for sex. In addition to PD's testimony, the prosecution presented the testimony of another woman who described a similar attack on her by defendant. The jury convicted defendant of the charged offenses. The court, Lawrence S. Talon, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 42 to 80 years in prison for each conviction, after which he vacated the CSC-III conviction for due-process reasons and at the request of the prosecutor. Defendant appealed. In an unpublished per curiam opinion issued January 9, 2018 (Docket No. 333841), the Court of Appeals (CAMERON, P.J., and SERVITTO and GLEICHER, JJ.), affirmed defendant's convictions but remanded for resentencing because the trial court had misscored Prior Record Variable (PRV) 7, resulting in a reduction in defendant's overall PRV score and necessitating resentencing. On remand, the trial court reassessed defendant's PRV and offense variable (OV) scores and resentenced defendant to 42 to 80 years in prison for each conviction, an upward departure from the guidelines minimum sentence range of 10½ to 35 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 777.33(1)(d), 10 points may be assessed for OV 3 when bodily injury requiring medical treatment occurred to a victim. Bodily injury includes anything that the victim would perceive as some unwanted physically damaging consequence. With respect to sexual assault, the following constitute bodily injury for the purpose of assessing points for OV 3: sexually

transmitted infections, pregnancy, and prophylactic medical treatment (e.g., emergency contraception to prevent pregnancy and prophylactic medication to prevent the contraction of sexually transmitted infections). "Requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment. Given PD's testimony related to the sexual assault, the observations of the treating nurse that PD had two injuries to her genital area, and the prescription of emergency contraception to prevent pregnancy and prophylactic medication to prevent PD from contracting sexually transmitted infections, there was sufficient evidence on the record to support the trial court's conclusion that PD had suffered a bodily injury requiring medical treatment. Therefore, the trial court correctly assessed 10 points for OV 3.

2. Under MCL 777.40(1)(a), 15 points may be assessed for OV 10 if the court finds that the offender exploited a vulnerable victim and engaged in predatory conduct. MCL 777.40(3)(c) provides that a "vulnerable victim" is one who has readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. To determine whether a victim was vulnerable, a court should consider (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. The mere existence of one of the factors does not automatically render the victim vulnerable. Conversely, the absence of the factors does not preclude a finding of vulnerability as long as the evidence shows that the victim was otherwise vulnerable as defined in MCL 777.40(3)(c). Under MCL 777.40(3)(a), "predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization. It does not encompass any preoffense conduct but, rather, only those forms of preoffense conduct that are commonly understood as being predatory in nature—e.g., lying in wait and stalking as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection. "Predatory conduct" is not merely exploiting a vulnerability largely within the victim's own control or exploiting a vulnerability largely outside the victim's control. Instead, it is conduct that itself created or enhanced the vulnerability in the first place. Under the facts of this case, there was sufficient evidence that PD was a vulnerable victim and that defendant's

conduct was predatory in nature, not run-of-the-mill planning to effect a crime. Accordingly, the trial court properly assessed 15 points for OV 10.

3. The proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality. A trial court abuses it discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed. Relevant factors for determining whether a departure sentence is more proportionate than a sentence within the recommended minimum sentence range include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight. Other factors include the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. Trial courts are not required to expressly or explicitly consider mitigating factors at sentencing. Although a sentencing court may not consider conduct of which a defendant was acquitted, it may consider uncharged conduct. In this case, the trial court adequately explained why a minimum sentence of 42 years was more proportionate than a different sentence within the guidelines would have been—specifically, that the guidelines failed to adequately reflect the nature and effects of defendant's crimes, in particular with regard to OV 4 (psychological injury to the victim) because PD still appeared shattered three years after the assault and with regard to OV 13 (continuing pattern of criminal behavior) because the statute did not differentiate between heinous felonies like CSC-I and other felonious acts like home invasion. The court also considered factors not encompassed by the guidelines. The trial court did not err by giving minimal consideration to mitigating factors asserted by defendant. In addition, the trial court properly considered evidence that defendant had committed another, similar sexual assault as justification for the departure because defendant was never charged with that conduct. Given these articulated reasons, the trial court did not abuse its discretion by imposing a sentence outside the guidelines' minimum sentence range.

Affirmed.

SENTENCES — GUIDELINES — OFFENSE VARIABLES — BODILY INJURY.

Ten points may be assessed for Offense Variable (OV) 3 when bodily injury requiring medical treatment occurred to a victim; bodily injury includes anything that the victim would perceive as some

> unwanted physically damaging consequence; with respect to sexual assault, the following constitute bodily injury for the purpose of assessing points for OV 3: sexually transmitted infections, pregnancy, and prophylactic medical treatment (e.g., emergency contraception to prevent pregnancy and prophylactic medication to prevent the contraction of sexually transmitted infections) (MCL 777.33(1)(d)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amy M. Somers*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for defendant.

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

PER CURIAM. Defendant appeals as of right his resentencing for first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c), and kidnapping, MCL 750.349.[1] The trial court resentenced defendant to concurrent terms of 42 to 80 years' imprisonment for each conviction. We affirm.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

The relevant facts were summarized in this Court's previous opinion in this case:

> One evening in May 2013, PD [the victim] decided to search the Internet for social meet-up sites as she had recently moved to Detroit and had no local friends. She

[1] Defendant was also convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b), but the trial court vacated that conviction at his initial sentencing "on double-jeopardy grounds at the request of the prosecutor." *People v Barnes*, unpublished per curiam opinion of the Court of Appeals, issued January 9, 2018 (Docket No. 333841), p 1.

> discovered a telephone "hotline," which she called and then connected with defendant. PD agreed to meet defendant in person because he promised to take her sightseeing. Defendant instead drove PD to a secluded location and propositioned her for sex. When PD declined, defendant sexually assaulted her by forcibly penetrating her both vaginally and anally. Defendant conceded that he *did* have sex with PD (this was conclusively established by DNA evidence), but claimed it was consensual. Because defendant elected not to testify at trial, PD's was the sole account of the evening's events heard by the jury. The prosecution also presented the testimony of another woman, SG, who described a similar attack perpetrated upon her by defendant. [*People v Barnes*, unpublished per curiam opinion of the Court of Appeals, issued January 9, 2018 (Docket No. 333841), p 1.]

After the jury-trial convictions, the trial court sentenced defendant as a fourth-offense habitual offender to 42 to 80 years' imprisonment for each conviction. *Id*. On appeal, a panel of this Court affirmed defendant's convictions but remanded for resentencing because of an error in scoring defendant's prior record variable (PRV) 7 that resulted in "a reduction in defendant's overall PRV score . . . ." *Id*. at 6. At resentencing, the trial court reassessed defendant's PRV and offense variable (OV) scores and then resentenced him to 42 to 80 years' imprisonment for each conviction. Defendant's minimum sentence exceeded the guidelines minimum sentence range of 10½ to 35 years' imprisonment. The trial court explained that it exceeded the guidelines because it found that the guidelines minimum sentence range did not adequately reflect the gravity of defendant's crimes. This appeal followed.

II. SENTENCING GUIDELINES

Defendant contends that the trial court improperly scored OV 3 at 10 points because PD did not suffer a

bodily injury requiring medical attention. He also argues that the trial court improperly assessed OV 10 at 15 points because his preoffense conduct was "run-of-the-mill" planning to effect the crime, not "predatory conduct." We disagree with both arguments.

A trial court's factual findings are reviewed for clear error, and whether those factual findings justify the score imposed is reviewed de novo. *People v Wellman*, 320 Mich App 603, 605; 910 NW2d 304 (2017). A finding is clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Wiley*, 324 Mich App 130, 165; 919 NW2d 802 (2018) (quotation marks and citation omitted). "When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a [presentence investigation report], plea admissions, and testimony presented at a preliminary examination." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). Additionally, the trial court "may rely on reasonable inferences arising from the record evidence" when making its assessment. *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012).

A. OV 3

A trial court may assess 10 points for OV 3 when "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d). Bodily injury encompasses "anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). In the context of sexual assaults, sexually transmitted infections (STIs) and pregnancy are bodily injuries for the purpose of assessing this OV. *Id*. (holding infection as an injury);

People v Cathey, 261 Mich App 506, 513-514; 681 NW2d 661 (2004) (holding pregnancy as an injury). Additionally, under the terms of the statute, " 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3).

The evidence on the record was sufficient for the trial court to infer PD had suffered a bodily injury requiring medical treatment. After the sexual assault, an ambulance transported PD to the hospital where she underwent a forensic medical examination. A specially trained nurse observed two injuries to PD's genital area: a point of tenderness measuring 3 by 1 inches on PD's perineum and a point of tenderness measuring about 1¼ by ½ inches on the area just outside PD's anus. While the nurse could not testify with medical certainty that these injuries were the result of the sexual assault, the injuries were consistent with PD's description of the sexual assault. The nurse also prescribed PD emergency contraception to prevent pregnancy and prophylactic medication to prevent PD from contracting STIs. The nurse further instructed PD to follow up with her primary-care physician for HIV testing. Under these circumstances, the trial court did not clearly err by finding that medical treatment was necessary to address PD's injuries, and therefore its assessment of 10 points for OV 3 was proper.[2]

B. OV 10

Under MCL 777.40(1)(a), a trial court properly assesses 15 points for OV 10 if the court finds that an

[2] Defendant argues that this Court's decision in *People v Armstrong*, 305 Mich App 230; 851 NW2d 856 (2014), should control our analysis. In *Armstrong*, this Court held that the trial court incorrectly assessed 10 points for OV 3 because the record did not support the trial court's

offender (1) exploited a vulnerable victim and (2) engaged in predatory conduct. *People v Huston*, 489 Mich 451, 466; 802 NW2d 261 (2011). A "vulnerable victim" is one who has "readily apparent susceptibility . . . to injury, physical restraint, persuasion or temptation."

finding that the victim's injury necessitated medical treatment. *Id*. at 246. In this case, unlike in *Armstrong*, the testimony of PD and the examining nurse showed that PD needed and received prophylactic medical treatment. Accordingly, defendant's argument is unavailing.

The thrust of defendant's argument is that the prophylactic medical treatment here does not fall under OV 3. While no published case has held that prophylactic treatment for pregnancy or STIs in the context of treating a victim of sexual assault justifies a score of 10 points for OV 3, a long line of unpublished cases has. See *People v Gibson*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2009 (Docket No. 285486), pp 7-8; *People v Atchison*, unpublished per curiam opinion of the Court of Appeals, issued June 29, 2010 (Docket No. 291671), p 3; *People v Whitney*, unpublished per curiam opinion of the Court of Appeals, issued May 15, 2012 (Docket No. 303399), p 2; *People v Fletcher*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2014 (Docket No. 316184), p 2; *People v Brown*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2014 (Docket No. 317066), p 4; *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2018 (Docket No. 335014), p 4; *People v Saunders*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2018 (Docket No. 339629), p 6; *People v Kemp*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2018 (Docket No. 339791), pp 3-4; *People v Maybin*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2018 (Docket No. 335180), pp 7-8.

Further, even if the trial court erred by assessing 10 points for OV 3, PD undoubtedly sustained a bodily injury from the sexual assault—the two points of tenderness in her genital area. This would, at the very least, justify the assessment of 5 points for OV 3. See MCL 777.33(1)(d). Because defendant's challenge to the scoring of OV 10 is without merit (as will be explained), defendant's total OV score would drop from 75 points to 70 points, which would not adjust his minimum sentence range. See MCL 777.62; MCL 777.16y. "Where a sentencing error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

MCL 777.40(3)(c). In *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008), our Supreme Court explained:

> Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious.

The absence of these factors does not preclude a finding of victim vulnerability when determining whether it is appropriate to assess 15 points for predatory conduct so long as the evidence shows that the victim was otherwise vulnerable as defined in MCL 777.40(3)(c). *Id*. at 158 n 11. That said, the mere existence of one of these factors does not automatically render the victim vulnerable. MCL 777.40(2); *Cannon*, 481 Mich at 159.

The circumstances of this case show PD was a vulnerable victim. While PD chose to meet with defendant in person after they spoke on a chat line, PD made this decision because defendant told her that he was also looking for friendship—PD had previously rejected other men who were looking only for a sexual encounter. Defendant was aware both that PD was new to the area and that she was wary of going out because of stories she had heard about crimes committed against young women. Defendant played off these concerns and reassured PD that he could be trusted. As a result, despite her concerns, PD trusted defendant and accepted his offer to go sightseeing. But instead of sightseeing, defendant drove to more and more secluded and isolated parts of the city, and in an alley, defendant sexually assaulted PD. From this evidence,

the trial court inferred that defendant identified PD as vulnerable—because of her unfamiliarity with the city—and isolated her for the purpose of sexually assaulting her. Additionally, the trial court found the difference in size and strength between defendant and PD contributed to PD's vulnerability. On this record, we agree with the trial court's conclusion that PD was a vulnerable victim.

The next question is whether defendant engaged in predatory conduct. "Predatory conduct" means "preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). In *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), our Supreme Court explained that "predatory conduct"

> does not encompass *any* "preoffense conduct," but rather only those forms of "preoffense conduct" that are commonly understood as being "predatory" in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection. [Quotation marks and citation omitted.]

The *Huston* Court explained that "predatory conduct" is neither merely exploiting a vulnerability "largely within the victim's own control" (which is covered by MCL 777.40(1)(c)) nor exploiting a vulnerability "largely outside of the victim's control" (which is covered by MCL 777.40(1)(b)). *Huston*, 489 Mich at 460-461. Rather, "predatory conduct" is conduct that "itself created or enhanced the vulnerability in the first place[.]" *Id*. at 461.

We agree with the trial court that defendant's actions amount to predatory conduct. Defendant asserts that because most sexual assaults do not occur in public, his search for a private area in which to

sexually assault PD was "run-of-the-mill planning to effect a crime . . . ." *Id*. at 462. But this glosses over several aspects of defendant's preoffense conduct. Defendant represented to PD that he was not looking for sex and that she did not need to be afraid of him. These representations were clearly intended to assuage PD's apprehension about meeting defendant in person and to coax PD into trusting him. Defendant was successful, and PD agreed to meet him, despite her concerns. Defendant used PD's trust to have her get into a car with him—alone—and drive to locations of his choosing. Defendant, knowing that PD was unfamiliar with the city, then drove PD to an isolated location and sexually assaulted her. Thus, defendant's preoffense conduct went beyond "run-of-the-mill planning"; defendant built a rapport with PD to gain her trust, then abused that trust to create a situation in which he could use his superior size and strength to sexually assault her. Such conduct is "commonly understood as being 'predatory' in nature," *id*., and therefore, the trial court properly assessed 15 points for OV 10.

III. UPWARD-DEPARTURE SENTENCE

Defendant next challenges the proportionality of his sentence that departed from his guidelines-recommended sentence. Finding no error, we affirm the trial court's sentence.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he relevant question for appellate courts reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality." *People v Dixon-Bey*, 321 Mich App 490, 520; 909 NW2d 458

(2017) (quotation marks and citation omitted). A trial court abuses its discretion "in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed[.]" *People v Steanhouse*, 500 Mich 453, 476; 902 NW2d 327 (2017). In *Dixon-Bey*, 321 Mich App at 525, this Court explained that

> relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight. [Quotation marks and citations omitted.]

Other factors include the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. *Id*. at 525 n 9 (quotation marks and citations omitted).

After reviewing defendant's PRV and OV scores, the trial court determined that defendant's advisory minimum sentence range was 10½ to 35 years (126 to 420 months). The trial court decided to depart from the guidelines range and sentenced defendant to 42 to 80 years' imprisonment. Thus, for defendant's sentence to be reasonable, the trial court must have provided adequate reasons for its seven-year upward-departure sentence. See *Steanhouse*, 500 Mich at 476.

In support of the upward departure, the trial court stated that the guidelines failed to adequately reflect the nature and effects of defendant's crimes. When assessing 10 points for OV 4 (psychological injury to victim) at defendant's original sentencing, the trial court stated that, on the basis of its observations of PD when she testified, she appeared as though "her life had been shattered by what [defendant] did to

her . . . ." During the resentencing hearing, the trial court stated that it did not believe OV 4, even when scored at 10 points, adequately covered PD's psychological injury:

> [PD] testified three years later after the incident. Some people show some signs of healing within that time. She showed no signs of healing. It appeared that she was irreparably broken beyond repair at the time that the Court saw her testify here in court as I described when we were in court the other day.
>
> In my thirty-three years in this courtroom I've never seen a complaining witness, a victim, so obviously shattered as she testified in court as a result of the impact of this crime upon her.

The trial court made a similar assessment concerning the inadequacy of OV 13 (continuing pattern of criminal behavior), expressing concern that the statute did not differentiate between heinous felonies like CSC-I and other felonious acts like home invasion. The trial court also considered factors not encompassed by the guidelines, including defendant's lack of remorse and the minimal likelihood of defendant being rehabilitated. In support of these findings, the trial court noted defendant had gone beyond simply maintaining his innocence and had asserted PD brought the allegations after the two had met for a consensual act of prostitution and defendant had refused to pay PD. This assertion, reasoned the trial court, indicated defendant did not understand the nature or consequences of his actions and was seeking to recast himself as the victim, minimizing his rehabilitation potential and demonstrating his lack of remorse.

In sum, when the trial court departed from the sentencing guidelines, it articulated several reasons why the guidelines failed to provide a proportionate

sentence and why an increase in defendant's sentence was proportional to the circumstances of defendant's crimes. The trial court's reasons for the departure were proper, and they provided an adequate basis for its seven-year upward-departure sentence.

Defendant asserts that the trial court erred because it failed to consider mitigating circumstances and focused solely on punishment and deterrence when imposing sentence. While it is true that the trial court provided a cursory analysis of the mitigating circumstances offered by defendant before stating that the circumstances were not applicable to the circumstances of this case, this does not amount to error. As recently articulated by this Court, "trial courts are not required to expressly or explicitly consider mitigating factors at sentencing." *People v Bailey*, 330 Mich App 41, 63; 944 NW2d 370 (2019). Thus, even the trial court's minimal consideration and rejection of the mitigating factors went beyond what was required.

Defendant also asserts that the trial court failed to properly consider penological goals other than retribution and deterrence in imposing a departure sentence. However, this assertion is not borne out by the record. The trial court acknowledged that the departure sentence served the purpose of punishing defendant and deterring others from committing similar crimes. The trial court stated that defendant's conduct showing that there was a minimal likelihood of rehabilitation also supported the departure from the guidelines range. Finally, the trial court stated it believed incapacitation was "very significant and important for these types of crimes," and the departure sentence was reasonable and proportionate when assessed against this penological goal as well. Therefore, the record does not support defendant's characterization of the trial court's motivations in passing sentence.

Defendant lastly asserts that the trial court, in sentencing defendant, impermissibly relied on evidence of an alleged previous sexual assault committed by defendant, admitted as other-acts evidence at trial. See MRE 404(b)(1). Defendant does not contest the admissibility of the evidence but, rather, asserts that the trial court used the evidence to make an independent finding that defendant had committed the other alleged sexual assault, thereby impermissibly increasing defendant's sentence. This, argues defendant, violated his constitutional right to be considered innocent of a crime until proven guilty and his right to a jury trial. US Const, Ams VI and XIV; Const 1963, art 1, §§ 17 and 20.

Our Supreme Court recently addressed a similar question in *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019). In *Beck*, the trial court increased the defendant's sentence on the basis of its finding, by a preponderance of the evidence, that the defendant had committed the offense of which he had just been acquitted. *Id*. at 612. Our Supreme Court held that this violated a defendant's right to due process, stating "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." *Id*. at 609. However, the due-process violation extended only so far as "acquitted conduct." *Id*. As this Court recently explained, "*Beck* expressly permits trial courts to consider uncharged conduct . . . ." *People v Roberts (On Remand)*, 331 Mich App 680, 688; 954 NW2d 221 (2020). See also *Beck*, 504 Mich at 626 ("When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard.").

In this case, the trial court used evidence that defendant had committed another, similar sexual assault as justification for departing from the sentencing guidelines. The jury made no findings about whether defendant committed this conduct because he was never charged for it. Thus, this other-acts evidence was the type of "uncharged conduct" that "*Beck* expressly permits trial courts to consider . . . ." *Roberts*, 331 Mich App at 688. The trial court indeed considered the other-acts evidence, found it to be true, and concluded that it demonstrated defendant's "attitude towards women and that the sex is a violent act that he engaged in against these women." Because the other-acts evidence relied on by the trial court was not the type of impermissible "acquitted conduct" identified in *Beck*, the trial court did not err by considering this evidence when sentencing defendant.

Affirmed.

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

SWAIN v MORSE

Docket No. 346850. Submitted May 13, 2020, at Detroit. Decided June 11, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 927 (2021).

Renee Swain sued Michael Morse, Mark Zarkin, and Steven Lellis On the Green, LLC (Lelli's) in the Oakland Circuit Court, alleging sexual assault and battery, intentional infliction of emotional distress (IIED), and additional counts following an alleged incident at Lelli's On the Green, a restaurant owned and operated by Zarkin through his company, Lelli's. According to Swain, in April 2017, she was having dinner at the restaurant with friends when Morse approached their table and initiated a conversation. Swain asked Morse to take a "selfie" picture with her, and he agreed to do so. Swain complained of glare and focus issues with her phone, so Morse suggested that they try to take the photo in a different area of the restaurant. According to Swain, after they took the photo, Morse put his arm around her, grabbed and squeezed her left breast through her clothing, and asked, "Is that better?" Swain reported her allegations to the police, and the police informed defendants of the allegations. According to Swain, Zarkin offered to arrange a meeting to discuss what had happened, and Swain agreed to meet with him and Morse. At Swain's request, the police arranged for her to wear a recording device during the meeting. According to the transcript of the recording, Morse apologized to Swain at the meeting, but did not admit or deny touching her breast. Swain gave the recording to the police, and the prosecutor declined to bring charges. Swain then filed a verified complaint against defendants, and the trial court, Phyllis C. McMillen, J., eventually granted summary disposition for Zarkin and Lelli's as to all counts. The court initially granted summary disposition in favor of Morse on Swain's claims of IIED, civil conspiracy, and negligence, but determined that there were questions of fact regarding the sexual-assault claim. The court later dismissed Swain's entire complaint against Morse as a sanction for discovery misconduct. The court found that Swain had lied during her deposition regarding the amount and duration of financial support she had received from a friend, Ken Koza. The court concluded that dismissal was appropriate be-

cause the testimony was material to the case, and Swain had failed to supplement or correct her testimony. Swain appealed.[1]

The Court of Appeals *held*:

1. The trial court abused its discretion by dismissing Swain's complaint as a discovery sanction. Dismissal is a severe sanction that may be predicated on a flagrant or wanton refusal to facilitate discovery, typically involving repeated violations of a court order. In dismissing the complaint, the trial court in this case relied on cases involving violations of orders or court rules and repeated efforts to stall discovery. None of the cases cited by the trial court involved allegations or a finding by the court that a party had lied at their deposition. Swain's deposition testimony did not violate any court rule or order, so sanctions were not authorized by MCR 2.504(B)(1), and the court rules governing depositions provide that sanctions are appropriate only when a person impedes, delays, or frustrates the fair examination of the deponent, or when a deponent fails to follow a court order. Additionally, contrary to the trial court's ruling, deposition testimony is not subject to the duty to supplement discovery responses under MCR 2.302(E).

2. The lack of authority to impose sanctions for untruthful deposition testimony under the court rules raised the question of whether a court may do so under its inherent authority to sanction litigant misconduct. Although trial courts possess the inherent authority to sanction litigants, including the power to dismiss an action, there are few cases of record that would justify dismissal or default in the absence of the violation of a court rule or order. No Michigan caselaw holds that a court's inherent authority extends so far as to dismiss a case on the basis of the court's conclusion that a party lied while testifying at a deposition. Both of the leading cases on a court's inherent authority to sanction litigants, *Maldonado v Ford Motor Co*, 476 Mich 372 (2006), and *Cummings v Wayne Co*, 210 Mich App 249 (1995), concerned serious, blatant misconduct involving "administration of justice" issues that affected the trial court's ability to ensure a fair trial. In contrast, untruthful deposition testimony does not threaten the integrity of the judicial system. Even if dismissal for intentionally false testimony fell within a trial court's authority, the testimony in this case would not have justified that penalty. A trial court must consider several factors before dismissing a case,

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[1] In *Swain v Morse*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2018 (Docket No. 342410), the Court of Appeals resolved a prior interlocutory appeal in favor of Swain.

including: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. In this case, a review of the factors weighed against dismissal. Swain argued that she did not deliberately give false testimony, and there was some support in the record for this assertion. There was no allegation that Swain or her attorneys failed to comply with court orders, and Morse did not allege a history of deliberate delay. Swain's testimony was not related to her prima facie case but, rather, to a defense that was based on motive; therefore, Morse was not substantially prejudiced by the testimony. Swain had no duty to supplement the record, and after the court denied her motion to quash a subpoena for her bank records, there was no need for her to file a supplemental affidavit because the bank records were the best evidence of Koza's deposits. The court's conclusion that a lesser sanction than dismissal would be insufficient to remedy the damage was an abuse of its discretion.

3. A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. Swain alleged that Morse and Zarkin coerced her to withdraw the complaint, but at her deposition, she denied feeling coerced or pressured at the meeting with Morse and Zarkin. Because coercion was the underlying premise of Swain's claim, summary disposition was appropriate given the lack of factual dispute on the matter.

4. In order to establish a claim of IIED, a plaintiff must prove: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is so outrageous and extreme as to go beyond all possible bounds of decency and is regarded as utterly intolerable in a civilized community. The trial court makes the initial determination as to whether the defendant's conduct may reasonably be regarded as sufficiently extreme to permit recovery for an IIED claim. The trial court properly granted summary disposition for Zarkin and Lelli's regarding this issue because they did not have a duty to supervise Morse and there is no evidence that they knew that Morse was going to commit the alleged assault. Zarkin's conduct at the meeting with Swain and Morse also did not support a claim for

IIED. However, community standards regarding sexual misconduct have changed significantly in recent years, and the average member of today's community could find that Morse's alleged conduct was outrageous. Therefore, because reasonable minds could differ regarding the alleged conduct, the trial court erred by granting summary disposition for Morse on plaintiff's IIED claim.

5. The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case, as well as whether reassignment will entail excessive waste or duplication. In this case, the record did not support Swain's claims that the trial court made statements indicating bias in favor of defendants or that the court showed preferential treatment in defendants' favor. Additionally, considering the lengthy history of the case, reassignment would entail excessive and duplicative costs.

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

COURT RULES — SANCTIONS — DISMISSAL — DEPOSITION TESTIMONY.

Dismissal is a severe sanction that may be predicated on a flagrant or wanton refusal to facilitate discovery, typically involving repeated violations of a court order; the court rules governing depositions provide for sanctions only when a person has impeded, delayed, or frustrated the fair examination of a deponent, MCR 2.306(D)(2), or when a deponent has failed to follow a court order, MCR 2.313(B)(1); sanctions are not available under the court rules on the basis of the substance of deposition testimony.

Fieger, Fieger, Kenney & Harrington, PC (by *Sima G. Patel* and *Geoffrey N. Fieger*) for Renee Swain.

Mike Morse Law Firm (by *Stacey L. Heinonen*) and *Deborah Gordon Law* (by *Deborah L. Gordon*) for Michael Morse.

Vandeveer Garzia, PC (by *Anthony J. Kostello* and *Scott K. McCormick*) for Mark Zarkin and Steven Lellis on the Green, LLC.

Before: BECKERING, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM. Plaintiff sued defendant Michael Morse, alleging sexual assault and battery, intentional infliction of emotional distress (IIED), and additional counts arising from an alleged incident at Lelli's On the Green, a restaurant owned and operated by defendant Mark Zarkin through his company, defendant Steven Lellis On the Green, LLC (Lelli's).[1] Plaintiff appeals the trial court's opinion and order dismissing her verified complaint as a discovery sanction for untruthful deposition testimony. She also challenges the trial court's earlier opinions and orders granting summary disposition for Zarkin and Lelli's and partial summary disposition for Morse under MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons stated in this opinion, we affirm the grant of summary disposition to Zarkin and Lelli's but reverse the dismissal of plaintiff's complaint against Morse as a discovery sanction and the grant of summary disposition to Morse on the IIED claim.

I. BACKGROUND

This case stems from plaintiff and Morse's April 6, 2017 meeting at Lelli's. According to plaintiff,[2] she was having dinner with a group of friends when Morse approached the table and initiated conversation. The group then began taking pictures, and plaintiff offered to pose for a photograph with Morse. The photograph was taken by Zarkin, the restaurant's owner and Morse's friend. Later in the evening, plaintiff asked to

[1] For the sake of simplicity, this opinion will refer to both the restaurant and defendant Steven Lellis On the Green, LLC, as "Lelli's."

[2] In reviewing a motion for summary disposition under MCR 2.116(C)(10), we must view the evidence in the light most favorable to plaintiff, the nonmoving party. See *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

take a "selfie" with Morse, and he agreed to do so. Plaintiff testified that she complained about glare and focus issues on her phone and Morse suggested that they go to a different area of the restaurant to take the picture. According to plaintiff, after they took the photograph in this "secluded" area, Morse put his arm around her and grabbed her left breast through her clothing, squeezed it, and asked, "Is that better?" Morse denies that he grabbed or touched plaintiff's breast.

About a week later, plaintiff reported her allegations to the Farmington Hills police, and defendants learned of the accusation through the police. According to plaintiff, one of her friends who was at the dinner told her that Zarkin wanted to arrange a meeting to discuss what had happened. Plaintiff ultimately agreed to meet with Morse at Lelli's on May 6, 2017, and, in response to her request, the police arranged for plaintiff to wear a recording device during the meeting. A transcript of the recording shows that Morse apologized to plaintiff during their meeting, but he never admitted or denied touching her breast. Plaintiff said she forgave Morse and gave him a hug. Plaintiff gave the recording to the police and eventually the prosecutor decided not to bring charges.

On May 15, 2017, plaintiff filed a verified complaint alleging sexual assault and battery against Morse, premises liability against Zarkin and Lelli's, and, as to all defendants, IIED,[3] civil conspiracy, negligence, gross negligence, and wanton and willful misconduct. Immediately, an issue arose regarding the scope of Morse's deposition. Plaintiff sought to depose Morse about other allegations of sexual misconduct against

[3] Plaintiff also claimed negligent infliction of emotional distress but later stipulated to the dismissal of that claim.

him, and Morse sought and obtained a protective order barring plaintiff's counsel from asking Morse questions about acts unrelated to plaintiff. The order did not definitively foreclose discovery or admission of such evidence, in that it allowed plaintiff to submit an offer of proof relating to other-acts evidence. Plaintiff did so, filing a motion captioned, "Motion for Offer of Proof Regarding MRE 404(b)." The motion set forth other allegations of sexual misconduct against Morse, and the trial court denied the motion without prejudice. Plaintiff sought interlocutory appeal of the denial of her motion for 404(b) discovery, and on February 20, 2018, we granted leave.[4] On August 9, 2018, this Court reversed the trial court's denial of plaintiff's motion for discovery of 404(b) evidence, vacated the underlying protective order, and remanded for further proceedings.[5]

We granted a stay of the lower-court proceedings while plaintiff's prior appeal was pending.[6] On remand, the trial court heard oral arguments on defendants' pending motions for summary disposition and sanctions. On November 20, 2018, the trial court issued an opinion and order granting summary disposition of all counts for Zarkin and Lelli's. In a separate opinion and order, the court granted Morse summary disposition of plaintiff's claims for IIED, civil conspiracy, and negligence, but concluded that there were questions of fact precluding summary disposition of plaintiff's claim for sexual assault and that she could

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[4] *Swain v Morse*, unpublished order of the Court of Appeals, entered February 20, 2018 (Docket No. 342410).

[5] *Swain v Morse*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2018 (Docket No. 342410).

[6] *Swain v Morse*, unpublished order of the Court of Appeals, entered March 8, 2018 (Docket No. 342410).

proceed with the claim of gross negligence and willful and wanton misconduct to support a claim of exemplary damages.

However, on December 5, 2018, the trial court issued an opinion and order dismissing plaintiff's entire complaint against Morse as a sanction for discovery misconduct.[7] Defendants' motions seeking sanctions were filed in response to plaintiff's deposition testimony regarding the amount and duration of financial support she had received from her friend Ken Koza. Morse asserts that Koza's financial support is relevant to whether he assaulted plaintiff because the support ceased shortly before plaintiff filed suit and so demonstrates a financial motivation for plaintiff to have fabricated her claim. Morse asserted that plaintiff committed perjury on those matters because she testified that Koza had made deposits of $10,000 into her bank account for only three months, while her bank records showed that she received $10,000 per month from Koza from February 2, 2015 through May 2016. Also, while plaintiff originally estimated that all payments from Koza stopped in March or May 2017, she later testified that she stopped receiving financial support from Koza at the end of 2016, which was inconsistent with her bank records that showed the regular payments did not stop until May 2017 as she originally estimated.

Citing the bank records, the court found that plaintiff "lied under oath" at her deposition. The trial court concluded that plaintiff's false statements warranted dismissal because: (1) they were not the product of mistake or misunderstanding, (2) she did not supple-

[7] On the same day, the court entered an order denying Zarkin and Lelli's motion for sanctions.

ment or correct her deposition testimony, and (3) the statements were material. This appeal followed.

II. DISMISSAL FOR UNTRUTHFUL DEPOSITION TESTIMONY

Plaintiff argues that the trial court abused its discretion by dismissing her complaint against Morse as a discovery sanction. We agree for several reasons.[8] First, plaintiff's deposition testimony did not violate any court rule or order, which typically occurs before the harsh sanction of dismissal is imposed. Second, plaintiff's testimony did not undermine the integrity of the judicial process because defendant was able to obtain contradictory evidence through discovery, and plaintiff's veracity can be addressed at trial through impeachment. Third, though the issue of Koza's financial support is relevant, it is not dispositive and Morse was not substantially prejudiced by plaintiff's testimony.

A. COURT RULES

"Dismissal is a drastic step that should be taken cautiously." *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997). Severe sanctions such as default or dismissal are predicated on a flagrant or wanton refusal to facilitate discovery that typically involves repeated violations of a court order.

[8] We review a trial court's decision regarding discovery sanctions for an abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable outcomes. *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 676-677; 806 NW2d 353 (2011). A trial court's factual findings are reviewed for clear error. *Traxler*, 227 Mich App at 282. "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

See, e.g., *Bass v Combs*, 238 Mich App 16, 26, 34; 604 NW2d 727 (1999) (affirming dismissal when the plaintiff violated "several court orders over a fifteen-month period"), overruled in part on other grounds by *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 627-628; 752 NW2d 37 (2008); *Mink v Masters*, 204 Mich App 242, 244-245; 514 NW2d 235 (1994) (affirming a default judgment when the defendant twice failed to comply with the trial court's order compelling discovery). Cf. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 399; 484 NW2d 718 (1992) (holding that default judgment for failure to respond to interrogatories was an abuse of discretion "in the absence of an order or some other compelling circumstance").

The cases relied on by the trial court involved violations of orders or court rules and repeated efforts to stall discovery. None concerned allegations that a party lied at deposition, let alone a court finding to that effect. For instance, in *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000), the trial court entered a default judgment against the defendant as a sanction for failing to appear for his deposition in violation of a court order compelling his attendance. This Court affirmed, finding that "[t]he record reveals defendant's deliberate noncompliance with court rules and a discovery order in addition to what the trial court evidently viewed as an attempt to mislead the court and disrupt the progression of the lawsuit." *Id*. Similarly, in *LaCourse v Gupta*, 181 Mich App 293, 294-296; 448 NW2d 827 (1989), the plaintiff's case was dismissed after she repeatedly failed to disclose her expert witnesses despite a court order to do so. This Court found that dismissal was warranted because "[t]here were only two weeks left before the scheduled trial date, [and] there was a lengthy history of failure to comply with court rules . . . ." *Id*. at 297.

Unlike those cases, plaintiff's deposition testimony did not violate *any* court rule or order, and so sanctions were not authorized by MCR 2.504(B)(1) for noncompliance with a rule or order. Contrary to the trial court's opinion, deposition testimony is not subject to the duty to supplement discovery responses under MCR 2.302(E). At the time this case was decided, MCR 2.302(E) allowed the imposition of sanctions when a party failed to supplement a response to a "request for discovery" that the party knows was "incorrect when made." See MCR 2.302(E)(1)(b)(*i*) and (2) (2018). But a deposition is *not* a response to a request for discovery. A response to a discovery request is something that is capable of being signed by the attorney. See MCR 2.302(G)(1). Also, the rules refer to responses and depositions as distinct items. See MCR 2.302(H)(1) (2018) ("Unless a particular rule requires filing of discovery materials, requests, *responses*, *depositions*, and other discovery materials may not be filed with the court except as follows[.]") (emphasis added).[9]

The court rules governing depositions provide for sanctions in only one circumstance: "On motion, the court may impose an appropriate sanction—including the reasonable expenses and attorney fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule." MCR 2.306(D)(2). Also, MCR 2.313(B)(1) allows for sanctions based on the deponent's failure to follow a court order, stating, "If a deponent fails to be sworn or to answer a question after being directed to do so by a court in the county or

[9] Consistent with this interpretation, effective January 1, 2020, the rule governing the duty to supplement now expressly applies to initial disclosures and responses to interrogatories, requests for production, and admissions; i.e., it does not apply to depositions. See MCR 2.302(E)(1)(a), as amended June 19, 2019, 504 Mich ci, cix (2019).

district in which the deposition is being taken, the failure may be considered a contempt of that court." Neither rule allows for sanctions based on the substance of the deponent's testimony. That the court rules contemplate sanctions for deposition-related misconduct, but not false testimony, strongly suggests that the Supreme Court does not view sanctions as an appropriate response to false deposition testimony.

The lack of a court rule addressing sanctions for that misconduct is understandable when one considers that there are several existing disincentives for untruthful deposition testimony. First and foremost, a party's credibility can be impeached at trial with deposition testimony. Also, a deponent may be charged with perjury for willfully false testimony on a material fact. See *In re Contempt of Henry*, 282 Mich App 656, 677-678; 765 NW2d 44 (2009). Further, if it is ultimately determined that the complaint lacked evidentiary support other than the plaintiff's false statements, the prevailing party may seek costs and attorney fees under MCL 600.2591(3)(a)(*ii*) for a frivolous action on the grounds that "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true."

B. INHERENT AUTHORITY

The lack of authority to impose sanctions for untruthful deposition testimony under the court rules raises the question of whether a court may do so under its inherent authority to sanction litigant misconduct. "[T]rial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action." *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). "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*. "Because these inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (cleaned up).

There are few cases of record examining the scope of misconduct that would justify dismissal or default in the absence of a court order or rule violation. No Michigan appellate court has held that the court's inherent authority extends so far as to dismiss a case on the basis of the court's conclusion that a party did not tell the truth at deposition. The cases that have provided for an "inherent authority" dismissal differ substantially from the type of misconduct for which the court imposed the ultimate sanction in this case.

The two leading cases on a court's inherent authority to sanction litigant misconduct are *Cummings* and *Maldonado*. In *Cummings*, the plaintiff threatened three of the defendant's witnesses with physical injury and committed acts of vandalism against them. *Cummings*, 210 Mich App at 251. The trial court dismissed the complaint with prejudice, and on appeal, the plaintiff argued that the court lacked authority under court rules and statutes to impose sanctions for the misconduct. *Id*. This Court determined that the trial court had inherent authority to sanction litigant misconduct and affirmed the dismissal:

> We do not believe the trial court's decision to dismiss the action was the result of unrestrained discretion or imprudence. The court clearly acknowledged the harshness of the sanction and balanced it against the gravity of plaintiff's misconduct. The nature of the threats and the actual vandalism committed permanently deprived the

> court of the opportunity to hear the testimony of witnesses who would be able to testify openly and without fear. [*Id*. at 253.]

Like *Cummings*, *Maldonado* also concerned a blatant disregard of the judicial process. In that case, after the trial court ruled that evidence of a prior conviction was inadmissible, the plaintiff and her counsel "engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means." *Maldonado*, 476 Mich at 392. The trial court dismissed the plaintiff's case because "plaintiff and her attorneys repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice." *Id*. at 376. In holding that the trial court did not abuse its inherent authority to impose sanctions, the Supreme Court relied on the continued misconduct of the plaintiff and her counsel even after "[t]he trial court twice explicitly discussed the improper conduct with plaintiff's counsel and warned everyone about the consequences of continuing misconduct." *Id*. at 394. Moreover, counsel's conduct "violated numerous rules of professional conduct." *Id*. at 396. In sum, dismissal was justified because the misconduct tainted the potential jury pool, denied the defendant a fair trial, and "was directly aimed at frustrating the due administration of justice." See *id*. at 398.

Cummings and *Maldonado* concerned serious misconduct that went to the ability of the court to assure a fair trial. Witness intimidation and jury tampering are "administration of justice" issues because they make it impossible for a jury to make a reliable decision. In contrast, untruthful deposition testimony does not

threaten the integrity of the judicial *system*. A witness can be impeached at trial, and the jury can consider whether a witness was lying in making its credibility determination. In fact, the jury's verdict will in many, if not most, cases be an implicit finding that one of the parties has given untruthful testimony. It is therefore doubtful whether dismissal for intentionally false deposition testimony is ever appropriate. Indeed, rather than protecting the judicial process, permitting judges to dismiss cases for false deposition testimony would be a fundamental change and could itself undermine the integrity of the judicial system that has always relied on the fact-finder to make credibility determinations. See, e.g., *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 512; 892 NW2d 467 (2016) ("It is for the trier of fact to assess credibility; a jury may choose to credit or discredit any testimony.").

Even if dismissal for intentionally false testimony could fall within a trial court's inherent authority, the testimony in this case would not justify that penalty. Before dismissing a case, a trial court should consider the following factors:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 507; 536 NW2d 280 (1995).]

A trial court must give "careful consideration to the factors involved and consider[] all of its options in determining what sanction [is] just and proper in the context of the case before it." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 164-165; 792 NW2d 749 (2010)

(quotation marks and citation omitted) (holding that the trial court abused its discretion by barring presentation of witnesses as a sanction for not filing a witness list as required by the scheduling order).

Regarding Factor (1), plaintiff argues that she did not *deliberately* give false testimony.[10] We conclude that the trial court did not clearly err by finding that she did, but her testimony is more ambiguous than the court's opinion suggests. For instance, plaintiff testified that she had difficulty recalling the amount and dates of funds provided by Koza: "I know he put money in my account but I don't know exactly what he did at certain times." Later, however, she was "positive" that Koza did not deposit $10,000 in monthly income to her bank account beginning in February or March 2015, stating, "I'm not denying that he did it maybe for three months, but after that, I—yes, I am denying that." This testimony cannot be squared with the bank records that showed that she received monthly payments of $10,000 from Koza from February 2015 through May 2016. But given that she was testifying nearly two years later in February 2018, it is certainly possible that plaintiff's testimony was due to a faulty memory, as she suggests.[11] The court also found that plaintiff

[10] We decline plaintiff's novel invitation to adopt the standards and caselaw governing judicial misconduct because there is no basis to apply that authority to a discovery-misconduct case. We also reject plaintiff's argument to consider Morse's purported discovery misconduct in determining whether dismissal of her case was an appropriate sanction. Plaintiff has not cited authority in support of her contention that it is appropriate to consider the other party's alleged misconduct in reviewing discovery sanctions. Further, she chose not to appeal the trial court's order denying her motion for sanctions against Morse, so that matter is not before us.

[11] Notably, although the question was directed at $10,000 monthly payments, other questions were directed at a subsequent reduction to $5,000 monthly payments, which plaintiff claimed not to recall. Plain-

had received several additional payments from Koza in 2015—in the amounts of $20,000; $4,000; $22,000; and $15,000 in addition to the $10,000 monthly payments.

As to when Koza stopped being a source of income, plaintiff initially answered: "I think it was May. March or May." Morse concedes that this was a truthful answer because plaintiff's bank records show that Koza's regular deposits stopped in May 2017. But when plaintiff was later asked when Koza's support came to an end, she answered:

> [*Plaintiff*]: Last year. I can't remember exactly—I don't remember.
>
> [*Defense Counsel*]: All right.
>
> [*Plaintiff's Counsel*]: When you say "last year," what year are you talking about? Because—
>
> [*Defense Counsel*]: 2017?
>
> [*Plaintiff*]: I am talking about '17.
>
> And it was—oh, no, no, no. That's—I would have to say '16. November of '16 or December of '16.

It is questionable whether plaintiff intentionally gave the wrong end date for Koza's support considering that she initially provided an accurate answer and later answered, "I can't remember exactly," before changing her answer to November or December 2016. Plaintiff may have been "back peddling" when she changed her answer, as Morse argues, or she may have honestly believed, upon further reflection, that the payments stopped prior to 2017. However, the trial court also found that there was a $3,500 deposit from

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tiff's bank records show that after receiving the monthly $10,000 payments as described above, she received a $5,000 payment on June 29, 2016, and then $5,000 in monthly payments from August 2016 to May 2017, making the concept of monthly payments much harder to forget.

Koza in November 2017, just a few weeks before plaintiff's deposition. While it could be argued that plaintiff's deposition testimony about the end date of the payments was referring to the regular monthly income that she was receiving from Koza—and therefore that the $3,500 deposit in November 2017 was not contradictory—plaintiff does not make that contention. Accordingly, the trial court did not clearly err by finding that plaintiff had intentionally misstated the duration of Koza's support.

That said, the fact that there is some ambiguity and equivocation in plaintiff's answers counsels against dismissal, and it also demonstrates why courts should be hesitant to impose sanctions based upon a finding that a party-deponent intentionally made false statements. Issues of credibility and intent are generally left to the trier of fact. See *Pemberton v Dharmani*, 207 Mich App 522, 529 n 1; 525 NW2d 497 (1994) ("[S]ummary disposition is inappropriate where questions of motive, intention, or other conditions of mind are material issues."); *Goldsmith v Moskowitz*, 74 Mich App 506, 518; 254 NW2d 561 (1977) ("In cases involving state of mind, such as the scienter requirement in fraud, summary judgment will be appropriate in relatively few instances because it will be difficult to foreclose a genuine dispute over this factual question.") (quotation marks and citation omitted).

Vicencio Factors (2) and (5) do not provide any support for dismissal as there has been no allegation that plaintiff or her counsel failed to comply with court orders. Similarly, for Factor (4), Morse has not alleged a history of deliberate delay. Accordingly, those factors weigh against dismissal.

Factor (3) also weighs against dismissal because Morse was not substantially prejudiced by plaintiff's

testimony. Plaintiff's financial condition does not concern her prima facie case but, rather, relates to a defense based on motive. The testimony was material in that it was relevant to this defense, but it nonetheless related to an ancillary matter. More important than materiality, the questioning by Morse's counsel at plainitiff's deposition makes clear that the defense already had accurate information regarding the amount and duration of Koza's payments because the questioning is consistent with plaintiff's bank records. Further, at the time of plaintiff's deposition on January 5, 2018, there was still over a month remaining in discovery. Plaintiff admitted that Koza had deposited funds in her bank account, and defendants had ample time to depose Koza and obtain all the relevant records. Significantly, this is not a case where the plaintiff wholly concealed a material fact and thereby prevented further discovery concerning it. Providing false, even intentionally false, testimony on a known and readily discoverable matter does not hinder the judicial *process* so as to justify dismissal.

Perhaps recognizing the lack of actual prejudice in this case, Morse emphasizes the Supreme Court's statement in *Maldonado* that "[t]he trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct *but also serve as a deterrent to other litigants*." *Maldonado*, 476 Mich at 392 (emphasis added). However, deterrence can be accomplished through a lesser sanction than dismissal. We are also mindful that permitting dismissal or default as a sanction for deposition testimony would invite parties to bait or lead the opposing party into making false or contradictory statements at deposition, a result plainly at odds with the purpose of discovery. See *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995) ("A primary

purpose of discovery is to enhance the reliability of the fact-finding process by eliminating distortions attributable to gamesmanship."). If we were to affirm dismissal in this case, it would open the door for motions to dismiss as a sanction for false deposition testimony in many, if not nearly all, contested cases. Ultimately, the determination of credibility would become one for the court rather than one for the jury and would result in a fundamental change to the judicial process.

Regarding Factor (6), Morse focuses on plaintiff's failure to correct her testimony with a postdeposition affidavit and her attempt to quash the subpoena for her bank records. However, as discussed, plaintiff had no duty to supplement her deposition testimony under MCR 2.302(E). After plaintiff's deposition, Morse served a subpoena on plaintiff's bank and plaintiff brought an emergency motion to quash the subpoena, which the trial court denied. We agree with plaintiff that her motion to quash was not improper and that she had a good-faith argument that the bank records were not relevant to this case. And after the motion was denied, there was no need for plaintiff to file a supplemental affidavit because the bank records were the best evidence of Koza's deposits. Plaintiff was also aware that Morse would be deposing Koza.

As to the last factor, the trial court concluded—without elaboration or discussion of alternative remedies—that a lesser sanction than dismissal "would be insufficient to remedy the damage." For the reasons discussed, we fail to see how Morse was substantially damaged by plaintiff's testimony. Her statements regarding Koza's support were ancillary to her allegations and easily disproved by Morse, i.e., there was little prejudice. Further, her testimony did not threaten the integrity of the judicial process because she can be

impeached at trial. Finally, considering that this was the only instance of misconduct found by the trial court and that plaintiff did not violate any court rule or order, it cannot be said that she flagrantly refused to facilitate discovery. Thus, the hallmarks of the type of misconduct warranting dismissal are not present in this case. For these reasons, the interests of justice would be better served by a lesser sanction than dismissal, and the trial court abused its discretion in concluding otherwise.

III. CIVIL CONSPIRACY

Plaintiff next argues that the trial court erred in granting defendants summary disposition of her civil-conspiracy claim. We disagree.[12]

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992).[13] Plaintiff alleges that Morse and

[12] A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties, and it must view that evidence in the light most favorable to the nonmoving party to determine if a genuine issue of material fact exists. MCR 2.116(G)(5); *Maiden*, 461 Mich at 118-120. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

[13] Liability does not arise from a civil conspiracy alone; "rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patient & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003) (quotation marks and citation omitted). See also *Franks v Franks*, 330 Mich App 69, 113-114; 944 NW2d 388 (2019). In this case, plaintiff does not seek to hold defendants liable for a separate tort under a theory

Zarkin conspired to coerce her into withdrawing her criminal complaint and not pursuing civil litigation. Plaintiff specifically relies on defendants' conduct at the May 6, 2017 meeting where Morse apologized to her and Zarkin commended her for forgiving Morse. Plaintiff claims that defendants' conduct violated MCL 750.122, i.e., the "witness anti-intimidation statute." *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 577; 753 NW2d 265 (2008). The trial court granted summary disposition because it found no evidence of a conspiracy and that defendants' alleged conduct did not violate MCL 750.122.

We disagree with the trial court that plaintiff's deposition testimony indicating her belief that there was not a conspiracy between Morse and Zarkin is dispositive. While plaintiff's testimony was certainly damaging to her claim, she was not given the legal definition of conspiracy (as a jury would be). Further, as a lay witness, plaintiff is not qualified to testify as to the legal effect of Morse and Zarkin's actions. See MRE 701. Viewing the evidence in a light most favorable to plaintiff, there is a question of fact whether Morse and Zarkin acted together to convince plaintiff to withdraw the criminal complaint against Morse. However, plaintiff does not merely allege that Morse and Zarkin sought to convince or encourage her to withdraw the complaint. Rather, she maintains that defendants *coerced* her into doing so. Plaintiff is uniquely qualified to testify whether she felt coerced or pressured at the meeting, and she denied that she did. While coercion is not an element of conspiracy, it is the underlying premise to plaintiff's claim, and so summary disposition was appropriate given the lack of factual dispute on that

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of civil conspiracy but rather seeks relief for a civil conspiracy in and of itself. But defendants did not seek summary disposition on this ground, and we will not address it.

matter. Also, while plaintiff argues that summary disposition was premature because discovery had not been completed, she does not explain how the additional deposition testimony from defendants would support her claims.[14] See *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 724; 909 NW2d 890 (2017).

In addition, the trial court correctly concluded that any conspiracy did not violate MCL 750.122 as alleged. That statute provides in pertinent part:

> (1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
>
> (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) To influence any individual's testimony at a present or future official proceeding.
>
> (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding. [MCL 750.122(1).]

Plaintiff specifically argues that Zarkin offered her something of value and encouraged her to avoid legal process in violation of MCL 750.122(1)(c) by offering her and her family "free dinners" and also by applying "moral pressure." The trial court correctly ruled that merely encouraging someone to not pursue criminal and civil charges does not constitute encouraging someone to avoid "legal process." Statutory language must be interpreted in light of its ordinary meaning and the

[14] Plaintiff twice deposed Morse and had the opportunity to depose Zarkin. After Morse's second deposition, plaintiff filed a motion to continue the deposition and to compel answers to certain questions. The trial court denied the motion as moot following dismissal.

context in which it is used. *Brickey v McCarver*, 323 Mich App 639, 643; 919 NW2d 412 (2018). "The unifying theme among [the] subsections [of MCL 750.122] is an attempt to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding, as defined in subsection 12(a)."[15] *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Multiple sections of the Michigan Penal Code, MCL 750.1 *et seq*., define "legal process" as

> a summons, complaint, pleading, writ, warrant, injunction, notice, subpoena, lien, order, or other document issued or entered by or on behalf of a court or lawful tribunal or lawfully filed with or recorded by a governmental agency that is used as a means of exercising or acquiring jurisdiction over a person or property, to assert or give notice of a legal claim against a person or property, or to direct persons to take or refrain from an action. [MCL 750.368(9)(b); MCL 750.217c(7)(b).]

Viewed in context, the anti-intimidation statute refers to encouraging an individual to avoid service of process for testimony at an official proceeding. Plaintiff cites no authority for her expansive view that this statute makes it a crime merely to encourage an individual to withdraw a criminal complaint or discourage the filing of suit. Accordingly, she fails to establish that Morse and Zarkin were acting in concert to commit an unlawful purpose.

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[15] An "official proceeding" is defined as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." MCL 750.122(12)(a).

IV. IIED

Plaintiff also argues that the trial court erred by granting summary disposition of her claim for IIED. We affirm the grant of summary disposition as to Zarkin and Lelli's but reverse as to Morse.

"To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (quotation marks and citation omitted). "Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003) (quotation marks and citation omitted). "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985) (quotation marks and citation omitted).

The trial court initially determines "whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Hayley*, 262 Mich App at 577. "But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery." *Id*. Plaintiff's IIED claim is primarily based on the alleged sexual touching. She alleges that Morse

grabbing her breast was extreme and outrageous conduct and that Zarkin committed IIED by failing to supervise Morse. The trial court granted summary disposition in favor of Zarkin and Lelli's because they did not have a duty to supervise Morse and there is no evidence they knew that Morse was about to commit the alleged assault. As to Morse, the court concluded that "[e]ven taking Plaintiff's version of the facts as true, a single touch to her breast does not amount to extreme and outrageous conduct."

We agree with the trial court that plaintiff failed to state a claim of IIED against Zarkin and Lelli's. Plaintiff has effectively abandoned her allegation that Zarkin had a duty to supervise Morse by failing to support it with legal authority. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, allowing patrons to take a photograph in a "secluded" area of the restaurant is not extreme and outrageous conduct. Plaintiff also argues that the conduct underlying her civil conspiracy claim supports her IIED claim. As discussed, plaintiff agreed that she was not coerced or pressured at the meeting where Morse apologized to her and Zarkin made remarks commending her for forgiving Morse. Zarkin also indicated at the meeting that it would hurt his restaurant if the allegations became public and that he would provide plaintiff and her family with a free dinner. That is not extreme and outrageous behavior even if the purpose was to dissuade plaintiff from pressing criminal charges. Thus, Morse's and Zarkin's conduct at the meeting does not support an IIED claim.

The remaining question then is whether plaintiff may proceed with a claim of IIED against Morse based on the alleged grabbing and squeezing of her breast. We are not aware of any published opinion addressing

whether an alleged sexual assault involving a single touch to the breast through clothing meets the IIED threshold. Regarding sexual remarks, we have held that a supervisor's proposition of sex to an employee was not sufficiently outrageous to support a claim of IIED. See *Trudeau v Fisher Body Div*, 168 Mich App 14, 20; 423 NW2d 592 (1988). On the other hand, we determined that the circulation of a cartoon depicting the plaintiff and a coworker in a "sexually compromising position" set forth a prima facie case. See *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 338, 342-343; 497 NW2d 585 (1993). And in *Lewis*, 258 Mich App at 197-198, a case involving secretly recorded consensual sexual activity, we held that even though the recordings were not published or distributed, there was a factual question for the jury to resolve as to whether the plaintiffs were entitled to recover on the basis of their IIED claim.

It is safe to say that an unwanted sexual touching is typically regarded as more extreme conduct than sexual remarks or drawings. And while Morse's conduct as described by plaintiff was not as outrageous as secretly recording sex acts, she does allege unwanted sexual contact. Certain factors suggest that the conduct, assuming it occurred, fails to meet the high threshold for IIED. Specifically, the alleged assault was a single outside-the-clothing breast squeeze after Morse took a "selfie" with plaintiff. On the other hand, plaintiff had just met Morse, and they were in a public place with other people nearby. Thus, the conduct, if it occurred, would have been particularly brash and unexpected. We are also mindful that community standards regarding sexual misconduct have changed significantly over the past few years. We therefore conclude that an average member of today's community could find the alleged conduct in this case outrageous.

In sum, we conclude that reasonable minds may differ as to whether the alleged conduct was extreme and outrageous, and therefore the trial court erred by granting Morse summary disposition of plaintiff's IIED claim.

V. REASSIGNMENT ON REMAND

Finally, plaintiff asks that we reassign this case to a different judge on remand. We decline to do so.

"The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). "In deciding whether to remand to a different judge, this Court considers whether the original judge would have difficulty in putting aside previously expressed views or findings, whether reassignment is advisable to preserve the appearance of justice, and whether reassignment will not entail excessive waste or duplication." *In re Bibi Guardianship*, 315 Mich App 323, 337; 890 NW2d 387 (2016) (quotation marks and citation omitted). "A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002).

Plaintiff argues that the trial court made statements indicating a bias in favor of defendants. Most of the statements identified by plaintiff pertain to the timing of discovery. For instance, the trial court stated that it previously bifurcated discovery into a liability phase and a damages phase because, if the alleged assault did not occur, the court wanted to confine the case "before we were going to get far flung and try this to

the press and potentially, you know, destroy reputations and hope that, you know, an action for abuse of process could clean it up afterwards." The court also stated at one point that it wanted to decide whether Zarkin and Lelli's were entitled to summary disposition before any further proceedings "because if in fact they have no business having been in this case, they need to get out before any more damage is done to them." Plaintiff apparently takes issue with the court's concern for defendants' reputations and protecting them from unnecessary "damage." However, the court's decision to consider unnecessary expense and burden to the parties was proper and does not show a bias toward defendants. See MCR 2.302(C) ("[T]he court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .").

Further, we are not persuaded that the trial court showed preferential treatment in favor of defendants. Plaintiff highlights that the court denied her motions for default and sanctions against Morse and asks us to compare those rulings with the court's decision to dismiss her case. But plaintiff did not appeal the denial of her motions, and we therefore see no basis to review the trial court's rulings or the underlying allegations. Further, an adverse ruling is not a sufficient reason for disqualification or reassignment, even if that ruling is later reversed. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Therefore, we are also unpersuaded by plaintiff's arguments relating to the trial court's MRE 404(b) ruling and the court's statements regarding this Court's reversal of that ruling on remand. Moreover, considering the case's lengthy history, we conclude that reassignment would entail excessive and duplicative costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., and FORT HOOD and SHAPIRO, JJ., concurred.

ENBRIDGE ENERGY, LP v STATE OF MICHIGAN

Docket No. 351366. Submitted June 2, 2020, at Lansing. Decided June 11, 2020, at 9:10 a.m.

Enbridge Energy, LP; Enbridge Energy, Inc.; and Enbridge Energy Partners, LP, filed an action in the Court of Claims against the state of Michigan; the Governor; the Mackinac Straits Corridor Authority; the Department of Natural Resources (DNR); and the Department of Environment, Great Lakes, and Energy, seeking a declaration that 2018 PA 359 did not violate Article 4, § 24 of Michigan's 1963 Constitution—the Title-Object Clause—and that certain agreements entered into under the act were valid and enforceable. Plaintiffs owned and operated Line 5, a pipeline that transported petroleum products across the Straits of Mackinac (the Straits) between the Upper and Lower Peninsulas. In 2018, the Legislature enacted Act 359, amending MCL 254.311 *et seq*., and allowing plaintiffs to construct, at their own expense, a tunnel under the Straits; the DNR and the corridor authority issued easements to allow the construction. In 2019, the new Governor questioned the constitutionality of Act 359, and Michigan's Attorney General issued an opinion declaring the act unconstitutional on the basis that it violated the Title-Object Clause. Thereafter, the Governor issued an executive order directing state agencies not to execute the 2018 agreements, and plaintiffs brought suit. Defendants moved for summary disposition of plaintiffs' claims, and plaintiffs opposed the motion. The court, MICHAEL J. KELLY, J., denied defendants' motion for summary disposition and granted summary disposition to plaintiffs under MCR 2.116(I)(2), concluding that certain Act 359 provisions did not violate the Title-Object Clause. Defendants appealed.

The Court of Appeals *held*:

1. The Title-Object Clause provides that no law shall embrace more than one object, which shall be expressed in its title, and that no bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. Three challenges exist under the Title-Object Clause: a title-body challenge, a multiple-object challenge, and a change-of-purpose challenge. The clause

protects against the Legislature passing laws not fully understood, thereby ensuring that both the legislators and the public have proper notice of legislative content and preventing deceit and subterfuge. A title-body challenge asserts that the body of an act exceeds the scope of its title, but the title does not have to serve as an index to all of the provisions of the act. Thus, the goal of the clause is notice, not restriction of legislation. The title does not give fair notice when the subject in the body is so diverse from the subject in the title that they have no necessary connection. Even if not directly mentioned in the title of an act, if the title comprehensively declares a general object or purpose, a provision in the body is not beyond the scope of the act as long as it is germane, auxiliary, or incidental to that general purpose. The Title-Object Clause also makes unconstitutional an act that addresses two different objects. To survive a multiple-object challenge, the entire body of an act must be considered to determine whether the act encompasses more than one object. The multiple-object prohibition does not preclude the Legislature from amending an act to include new legislation that is germane to furthering the act's general purpose.

2. The title of Act 359 states that the act authorizes the bridge authority to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan and to operate a utility tunnel by the bridge authority or the corridor authority. Section 14a(1) of the act, MCL 254.324a(1), allows the bridge authority to acquire, construct, operate, maintain, and manage the utility tunnel, which includes entering into contracts and agreements related to the tunnel. In turn, § 14a(4), MCL 254.324a(4), of the act allows the bridge authority to perform all acts necessary to secure consent from certain governmental authorities relating to the construction and operation of the utility tunnel. Because the title referred to the acquisition and operation of a utility tunnel, neither the legislators nor the public were deprived of fair notice of the content of § 14a(1) and (4), and the subsections did not exceed the scope of the title. Although the Legislature indexed in the title the actions that could be taken with respect to the bridge, it was not dispositive that it did not do so with respect to the tunnel because the title of an act is not required to serve as an index to all of the provisions of the act.

3. Section 14d(1) of Act 359, MCL 254.324d(1), transferred all liabilities, duties, responsibilities, authorities, and powers related to the utility tunnel to the corridor authority board upon the appointment of the members of the corridor authority board. Even though the Legislature transferred the power to operate the

utility tunnel from the bridge authority to the corridor authority, the subject of the body was not so diverse from the subject of the title that it did not provide fair notice of its provisions. In other words, the title provided fair notice that the act created the corridor authority and that it would operate the tunnel, and § 14d(1) did not exceed the scope of the act's title. Section 14d(4)(d) of Act 359, MCL 254.324d(4)(d), requires the corridor authority to enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel if 11 requirements are met, and § 14d(4)(e), MCL 254.324d(4)(e), identifies who will pay for those actions. Because § 14d(4)(d) and (e) provide for who would pay for the construction and operation of the tunnel, they were germane to the act's general purpose of acquiring and operating a tunnel. Section 14d(5), MCL 254.324d(5), provides that the Attorney General must pay for independent legal representation if he or she declines to represent the bridge authority or the corridor authority. The act's general purpose was to acquire and operate a utility tunnel and a provision governing legal representation regarding claims concerning the tunnel was germane to that purpose—that is, the purposes could not be accomplished if an agreement concerning the construction and operation of the tunnel was invalid, enjoined, or not complied with. For these reasons, defendants' title-body challenges to Act 359 were without merit. Defendants' multiple-object challenge was similarly without merit; because the stated purpose of Act 359 was to connect the Upper and Lower Peninsulas of Michigan and both a utility tunnel and a bridge were capable of connecting Michigan's peninsulas, a utility tunnel and a bridge were not unconnected objects and were not so diverse that they had no necessary connection. Defendants' argument that the Court of Claims improperly considered legislative history and public media surrounding Act 539 when deciding the case was unsupported by the record and without merit. The Court of Claims correctly granted summary disposition in favor of plaintiffs because defendant's title-body and multiple-object challenges to Act 359 were without merit.

Affirmed.

CONSTITUTIONAL LAW — TITLE-OBJECT CLAUSE — 2018 PA 359.

Sections 14a(1) and (4) and 14d(1), (4), and (5) of 2018 PA 359 do not violate the Title-Object Clause of the 1963 Michigan Constitution (MCL 254.311 *et seq.*; Const 1963, art 4, § 24).

Dickinson Wright PLLC (by *Peter H. Ellsworth*, *Jeffrey V. Stuckey*, and *Ryan M. Shannon*), *Phillip J. DeRosier*, and *Bursch Law PLLC* (by *John J. Bursch*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *S. Peter Manning*, *Robert P. Reichel*, *Daniel P. Bock*, and *Charles A. Cavanagh*, Assistant Attorneys General, for defendants.

Amici Curiae:

Environmental Law & Sustainability Clinic (by *Oday Salim*) for the National Wildlife Federation.

Hooper Hathaway, PC (by *Bruce T. Wallace*) and *Muth Law, PC* (by *Benjamin M. Muth*) for Great Lakes Business Network.

Rivenoak Law Group, PC (by *Valerie J. M. Brader* and *Catherine T. Dobrowitsky*) for the Small Business Association of Michigan and the Legislature.

Honigman LLP (by *Peter B. Ruddell* and *Daniel L. Stanley*) for the Michigan Manufacturers Association.

Dykema Gossett, PLLC (by *Gary P. Gordon*, *Jason T. Hanselman*, and *Courtney Kissel*) for the Michigan Chamber of Commerce.

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

CAMERON, P.J. Defendants, the state of Michigan; the Governor; the Mackinac Straits Corridor Authority (the Corridor Authority); the Department of Natural Resources; and the Department of Environment, Great Lakes, and Energy, appeal an order issued by the Court of Claims granting summary disposition under

MCR 2.116(I)(2) (opposing party entitled to summary disposition) to plaintiffs, Enbridge Energy, LP; Enbridge Energy, Inc.; and Enbridge Energy Partners, LP, following defendants' motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). Defendants assert on appeal that the Court of Claims improperly granted summary disposition in favor of plaintiffs because 2018 PA 359 (the Act or Act 359), amending MCL 254.311 *et seq*., is unconstitutional in that it violates the Title-Object Clause, Const 1963, art 4, § 24. We disagree with defendants' arguments; therefore, we affirm the Court of Claims' order granting summary disposition in favor of plaintiffs.

I. BACKGROUND

Plaintiffs own and operate Line 5, a pipeline that transports petroleum products. About four miles of Line 5 cross the Straits of Mackinac. In December 2018, Act 359 was enacted and with immediate effect. In a December 2018 agreement with the state, plaintiffs agreed to construct a tunnel crossing under the Straits at their own expense, using an easement issued by the Michigan Department of Natural Resources and the Corridor Authority.

In January 2019, the new Governor raised questions about the constitutionality of Act 359, and the Attorney General subsequently issued an opinion declaring the Act unconstitutional on the basis that it violated the Title-Object Clause of Michigan's 1963 Constitution. The Governor issued an executive order directing state agencies not to implement the December 2018 agreements. In June 2019, plaintiffs filed a complaint, seeking a declaration that Act 359 complied with the Title-Object Clause. The Court of Claims ultimately

agreed with plaintiffs and granted summary disposition in their favor, holding that Act 359 does not violate the Title-Object Clause. This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party may move for summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). 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." This Court reviews de novo issues of constitutional law, *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003), and affords "all possible presumptions" in favor of constitutionality, *Pohutski v Allen Park*, 465 Mich 675, 690; 641 NW2d 219 (2002) (quotation marks and citation omitted).

III. THE TITLE-OBJECT CLAUSE

The Title-Object Clause provides as follows:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

A party may raise three types of challenges under the Title-Object Clause: "(1) a 'title-body' challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge." *People v Kevorkian*, 447 Mich 436, 453; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J.). The purpose of the Title-Object Clause is "to prevent the

Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge." *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 184; 658 NW2d 804 (2002) (quotation marks and citation omitted).

A. TITLE-BODY CHALLENGES

Defendants challenge five specific provisions of Act 359 under the title-body aspect of the Title-Object Clause. We reject each of these challenges because the title of Act 359 provides fair notice of each of the challenged provisions and the provisions are germane to the Act's general purpose.

A title-body challenge is an assertion that the body of an act exceeds the scope of its title. *Wayne Co Bd of Comm'rs*, 253 Mich App at 185. "However, the title of an act is not required to serve as an index to all of the provisions of the act." *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 728; 575 NW2d 63 (1997). "The goal of the clause is notice, not restriction of legislation." *Pohutski*, 465 Mich at 691. A title will only fail to give fair notice if the subject in the body is so diverse from the subject in the title that they have no necessary connection. *People v Cynar*, 252 Mich App 82, 85; 651 NW2d 136 (2002). Even if not directly mentioned in the title of the act, if the title comprehensively declares a general object or purpose, a provision in the body is not beyond the scope of the act as long as it is "germane, auxiliary, or incidental to that general purpose . . . ." *Livonia v Dep't of Social Servs*, 423 Mich 466, 501; 378 NW2d 402 (1985) (quotation marks and citations omitted).

1. SECTION 14a(1) AND (4)[1]

Defendants argue that § 14a(1) and (4) are unconstitutional because they "exceed the scope of what was disclosed in [2018 PA 359's] title." The title of 2018 PA 359 provides, in pertinent part:

> An act authorizing the Mackinac bridge authority to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan, including causeways, tunnels, roads and all useful related equipment and facilities[;] . . . authorizing the authority to enjoy and carry out all powers incident to its corporate objects; . . . authorizing the authority to secure the consent of the United States government to the construction of the bridge and to secure approval of plans, specifications, and location of the bridge; . . . authorizing the state transportation department to operate and maintain the bridge or to contribute to the bridge and enter into leases and agreements in connection with the bridge; . . . authorizing the creation of the Mackinac Straits corridor authority; authorizing the operation of a utility tunnel by the authority or the Mackinac Straits corridor authority; providing for the construction and use of certain buildings; and making an appropriation.

The pertinent parts of § 14a provide as follows:

> (1) The Mackinac bridge authority may acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel. The Mackinac bridge authority shall determine the rates charged for the services offered by the utility tunnel. The Mackinac bridge authority may enter into contracts or agreements necessary to perform its duties and powers under this act, including, but not limited to, leasing the right to use a utility tunnel on terms and for consideration determined by the Mackinac bridge authority. . . .

* * *

[1] MCL 254.324a(1) and (4).

> (4) The Mackinac bridge authority may perform all acts necessary to secure the consent of any department, agency, instrumentality, or officer of the United States government or this state to the construction and operation of a utility tunnel and the charging of fees for its use, and to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and location of the utility tunnel or the fees to be charged for the use of the utility tunnel.

Thus, § 14a(1) allows the Mackinac Bridge Authority to acquire, construct, operate, maintain, and manage the utility tunnel, which includes entering into contracts and agreements related to the tunnel, and § 14a(4) allows the Mackinac Bridge Authority to perform "all acts necessary to secure" consent from certain governmental authorities relating to the construction and operation of the utility tunnel.

Defendants argue that these subsections of the Act exceed the scope of the title because the title only indicates that the Mackinac Bridge Authority will undertake acquiring federal consent and entering into leases regarding *a bridge*. However, as already stated, the goal of the Title-Object Clause is to provide notice, not restriction. *Pohutski*, 465 Mich at 691. The title of Act 359 clearly notifies the reader that the Act "authoriz[es] the Mackinac bridge authority to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan," and "authoriz[es] the operation of a utility tunnel by the authority *or* the Mackinac Straits corridor authority[.]" (Emphasis added.) Securing approval for the location and construction of a tunnel is a necessary part of acquiring a tunnel, and the acts of entering into contracts and agreements, including leases, are clearly related to the operation of a tunnel. Consequently, because the title

specifically refers to the acquisition and operation of a utility tunnel, neither the legislators nor the public were deprived of fair notice of the content of § 14a(1) and (4). Although the Legislature elected to provide an index of actions that could be taken by the Mackinac Bridge Authority with respect to the bridge, it is not dispositive that the Legislature did not do so with respect to the tunnel. See *Ray Twp*, 226 Mich App at 728 ("[T]he title of an act is not required to serve as an index to all of the provisions of the act.").

2. SECTION 14d(1), (4), AND (5)[2]

Next, defendants assert that § 14d(1) of Act 359 exceeds the scope of the title because the subsection transfers duties from the Mackinac Bridge Authority to the Corridor Authority despite the fact that the title does not provide fair notice of this transfer. Section 14d(1) of Act 359 provides:

> All liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a and any money in the straits protection fund shall transfer to the corridor authority board upon the appointment of the members of the corridor authority board under section 14b(2). The transfer of duties, responsibilities, authorities, powers, and money described in this subsection does not require any action by the Mackinac bridge authority or any other entity. The corridor authority board shall exercise its duties independently of the state transportation department and the Mackinac bridge authority.

Thus, in relevant part, § 14d(1) immediately transferred "[a]ll liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a . . . to the corridor authority board upon

[2] MCL 254.324d(1), (4), and (5).

the appointment of the members of the corridor authority board[.]"

Defendants argue that " '[t]his transfer comes without fair notice and is a surprise since" the Act's title only "authori[zes] the Mackinac bridge authority *to acquire . . . a utility tunnel* connecting the Upper and Lower Peninsulas[.]' " (Citation omitted; second and third alterations in original.) We disagree. The title of the Act indicates that the Act creates the Corridor Authority and that the Act authorizes the Corridor Authority to operate the utility tunnel. Activities such as entering into contracts and agreements and acquiring necessary governmental approval are certainly related to, and necessary for, the operation of a utility tunnel. The fact that the Legislature chose to transfer the power to operate the utility tunnel from the Mackinac Bridge Authority to the Corridor Authority does not render the subject of the body so diverse from the subject of the title that it does not provide fair notice of its provisions. To the contrary, the title provides fair notice that the Act creates the Corridor Authority and that it will operate the tunnel. Consequently, we conclude that § 14d(1) does not exceed the scope of the Act's title.

Defendants next argue that § 14d(4) of Act 359 exceeds the scope of the Act's title because, although this section requires the Corridor Authority to enter into an agreement with a private party, the title does not provide fair notice that the Act requires a specific agreement to be made with a private party.

Section 14d(4) of Act 359 requires the Corridor Authority to enter "into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel" if 11 requirements are met. Specifically, it is required that

any agreement "provide[] a mechanism under which all costs of construction, maintenance, operation, and decommissioning of the utility tunnel are borne by a private party and not by the Mackinac Straits corridor authority, its predecessor, or a successor." 2018 PA 359, § 14d(4)(e). Another requirement is that an agreement "provide[] the Mackinac Straits corridor authority with a mechanism to ensure that a utility tunnel is built to sufficient technical specifications and maintained properly . . . ." 2018 PA 359, § 14d(4)(d).

Section 14d(4) of Act 359 does not violate the Title-Object Clause. Subsection (4) provides that the Corridor Authority will ensure that the tunnel is built and maintained properly but that the costs of construction, operation, and maintenance are to be borne by a private party. In other words, § 14d(4)(d) makes the Corridor Authority responsible for overseeing the building and maintaining of the tunnel, and § 14d(4)(e) simply addresses who will pay for it. A provision in an act's body is not beyond the title's scope if it is germane to the title's general purpose, *Livonia*, 423 Mich at 501, and a determination of who will pay for the construction and operation of the tunnel is germane to Act 359's general purpose of acquiring and operating a tunnel. The title of Act 359 provides fair notice that the content of the Act authorizes construction and operation of the tunnel, and the Legislature was not constitutionally required to explicitly state in the Act's title exactly who is responsible for which aspects of construction and maintenance of the utility tunnel. See *Ray Twp*, 226 Mich App at 728.

Defendants also argue that Act 359's title did not provide fair notice that § 14d(5) requires the Attorney General to pay for independent legal representation if

he or she declines to represent the Mackinac Bridge Authority or the Corridor Authority. We disagree.

Section 14d(5) of Act 359 provides that "[i]f the attorney general declines to represent the Mackinac bridge authority or the Mackinac Straits corridor authority in a matter related to the utility tunnel, the attorney general shall provide for the costs of representation by an attorney licensed to practice in this state chosen by the Mackinac bridge authority or the Mackinac Straits corridor authority, as applicable." Section 14d(5) lists several possible claims, including claims regarding the legal validity of, and performance under, the tunnel agreement, as well as claims challenging the approval or denial of permits. 2018 PA 359, § 14d(5)(a) through (g).

As already stated, a provision in an act's body is not beyond the title's scope if it is germane to the title's general purpose. *Livonia*, 423 Mich at 501. In this case, the general purpose of the Act is to acquire and operate a utility tunnel, and the Act's title states that the body "authoriz[es] the Mackinac bridge authority to acquire a bridge and a utility tunnel" and "authoriz[es] the operation of a utility tunnel by the authority or the Mackinac Straits corridor authority[.]" A provision governing legal representation regarding claims concerning the tunnel is germane to the purpose of acquiring and operating the utility tunnel because these purposes cannot be accomplished if an agreement concerning the construction and/or operation of the tunnel is invalid, enjoined, or not complied with. While defendants argue that this sort of provision is unusual, a specific provision does not fail title-body review merely because it is unusual. Because the Act's title provides fair notice that the body includes matters relating to the acquisition and operation of a utility

tunnel and because matters regarding legal representation about the tunnel are not so diverse that they are beyond the scope of the Act's title, we conclude that § 14d(5) does not violate the Title-Object Clause.

3. CONSIDERATION OF EXTRANEOUS MATERIAL

Finally, defendants argue that the Court of Claims improperly considered legislative history and public media surrounding the Act when ruling on this case. While we agree with defendants that it would be improper for a court to consider extraneous material when deciding whether an act violates the Title-Object Clause, defendants' argument is not dispositive because our review of the Court of Claims decision reveals that the Court did not consider legislative history or public media when holding that the challenged provisions of Act 359 do not violate the Title-Object Clause. The Court of Claims stated that

> the contents of Act 359 were well known, as evidenced by the strong policy-based reactions the Act has drawn. But those policy questions are best left to the Legislature. The Court's concern is only with art 4, § 24, regardless of the merits or wisdom—or lack thereof—of PA 359.

Thus, defendants' argument that the Court of Claims improperly considered extraneous material is unsupported.

B. MULTIPLE-OBJECT CHALLENGE

Defendants argue that Act 359 violates the multiple-object prohibition of the Title-Object Clause because it addresses two different objects—a bridge and a utility tunnel. We conclude that a bridge and utility tunnel are not unconnected objects.

The Title-Object Clause precludes " 'bringing together into one bill subjects diverse in their nature, and having no necessary connection . . . .' " *Kevorkian*, 447 Mich at 454 (opinion by CAVANAGH, C.J.), quoting *People ex rel Drake v Mahaney*, 13 Mich 481, 494-495 (1865). The entire body of an act must be considered to determine whether the act encompasses more than one object. *Kevorkian*, 447 Mich at 459 (opinion by CAVANAGH, C.J.). That provisions could have been enacted in separate acts does not mean that an act violates the Title-Object Clause. *Id*. "There is virtually no statute that could not be subdivided and enacted as several bills." *Id*. The multiple-object prohibition does not preclude the Legislature from amending an act to include new legislation that is germane to furthering the act's general purpose. *Gillette Commercial Operations NA & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 440; 878 NW2d 891 (2015).

As an initial matter, defendants assert that we should consider the former act, 1952 PA 214, to determine whether the amended act violates the multiple-object prohibition. We disagree. In a binding opinion, this Court has stated that when reviewing a multiple-object challenge, we do not apply the Title-Object Clause to the previous public act but instead apply it to the amendment. See *People v Loper*, 299 Mich App 451, 470-471; 830 NW2d 836 (2013), overruled in part on other grounds by *People v Lockridge*, 498 Mich 358, 392-395 (2015). Principles of stare decisis also require this Court to reach the same result in a case that presents the same or substantially similar issues presented in a case that another panel of this Court has decided. MCR 7.215(C)(2); *WA Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004). Therefore, we will not consider the former act to resolve this issue.

We conclude that the title of 2018 PA 359 does not address objects so diverse that they have no necessary connection. The Legislature amended the title of 1952 PA 214 to include the word "utility tunnel" as well as the word "bridge." The Act's stated purpose involves "connecting the Upper and Lower Peninsulas of Michigan," and both a utility tunnel and a bridge are structures capable of connecting Michigan's peninsulas. Thus, a utility tunnel and a bridge are not unconnected objects. Furthermore, the Act created the Corridor Authority to carry out the goal of acquiring and operating the utility tunnel. Considering that an act could authorize all things in furtherance of its general purpose without violating the Title-Object Clause, and given the presumption of the Act's constitutionality, we conclude that Act 359 does not fail multiple-object review under the Title-Object Clause. *Pohutski*, 465 Mich at 690-691.

Because we have concluded that Act 359 is not unconstitutional under the Title-Object Clause, we do not need to address defendants' arguments that its provisions are not severable and that it should be retroactively void.

Affirmed.

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

STAVALE v STAVALE

Docket No. 349472. Submitted June 3, 2020, at Grand Rapids. Decided June 11, 2020, at 9:15 a.m.

Candice R. Stavale filed an action in the Kent Circuit Court against her husband, David A. Stavale, seeking a divorce judgment. Plaintiff issued subpoenas to defendant's employer, requesting e-mail messages that defendant had sent to his personal attorney through his employer-provided e-mail address. Defendant moved to quash the subpoenas, asserting that the e-mail messages were not discoverable because of attorney-client privilege. Plaintiff asserted that the privilege did not apply because defendant did not have a reasonable expectation of privacy in the e-mail messages given that the employer's employee handbook stated that employees had no legitimate or reasonable expectation of privacy regarding usage of their employer-provided e-mail addresses. The court, Christina M. Elmore, J., denied defendant's motion to quash, reasoning that the e-mail messages on defendant's work computer were not privileged. Defendant appealed by leave granted.

The Court of Appeals *held*:

There is a difference between the issue of whether a communication is made in a confidential manner such that the attorney-client privilege can attach and the issue of whether an already privileged communication has been voluntarily disclosed to a third party such that attorney-client privilege is waived. In Michigan, the attorney-client privilege attaches to communications made by a client to an attorney acting as a legal advisor and made for the purpose of obtaining legal advice. The attorney-client privilege does not apply unless there is an element of confidentiality when the communication is made, regardless of the client's intent not to disclose the communications to a third party. For that reason, attorney-client privilege does not apply when the party seeking to assert the privilege does not take reasonable precautions to preserve the confidentiality of the communications. The privilege is designed to permit a client to confide in their attorney, knowing that the communications are safe from disclosure. Whether an employee has a reasonable

expectation of privacy in an employer-provided e-mail address or computer system is decided on a case-by-case basis. In making that determination, courts should consider (1) whether the employer maintains a policy with respect to the use of those systems and what that policy entails and (2) whether the employee was ever notified or made aware of the employer's policies and practices with respect to privacy and monitoring of those systems. The two factors are not exhaustive, but ordinarily, other considerations—for example, whether a company actually monitors employee computers and the employee's knowledge of that practice—should not overpower consideration of the two listed factors. In this case, the issue was whether defendant had a reasonable expectation of privacy in his communication to his attorney, not whether defendant's communication constituted a voluntary and intentional disclosure of the information to a third party after the fact. While the employer's employee handbook clearly provided that employees did not have a reasonable expectation of privacy in their employer-provided e-mail addresses, remand was necessary for the trial court to consider whether and to what extent defendant was notified or otherwise made aware of the policy.

Reversed and remanded.

EVIDENCE — ATTORNEY-CLIENT PRIVILEGE — EMPLOYER-PROVIDED E-MAIL ADDRESSES OR COMPUTER SYSTEMS — CONSIDERATIONS.

The attorney-client privilege prevents the disclosure of communications made by a client to an attorney acting as a legal advisor and made for the purpose of obtaining legal advice; attorney-client privilege does not apply when the party seeking to assert the privilege does not take reasonable precautions to preserve the confidentiality of the communications; whether an employee has a reasonable expectation of privacy in an employer-provided e-mail address or computer system is decided on a case-by-case basis; courts should consider (1) whether the employer maintains a policy with respect to the use of those systems and what that policy entails and (2) whether the employee was ever notified or made aware of the employer's policies and practices with respect to privacy and monitoring; the two factors are not exhaustive but other considerations should not, ordinarily, overpower consideration of the two listed factors.

Bolhouse, Hofstee & McLean, PC (by *Michelle M. McLean* and *Matthew F. Burns*) for plaintiff.

Corbet, Shaw, Essad & Bonasso, PLLC (by *Kenneth M. Essad* and *Erika Jost*) for defendant.

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

FORT HOOD, J. In this interlocutory appeal by leave granted,[1] defendant, David A. Stavale, appeals the trial court's order denying defendant's motion to quash subpoenas on the basis of the requested information being protected by the attorney-client privilege. Defendant contends that the trial court erred when it concluded that defendant intentionally and voluntarily disclosed privileged information by communicating with his attorney through his employer-provided e-mail address such that he could not avail himself of the attorney-client privilege. We conclude that the trial court erred in its application of the law, and as matter of first impression, we articulate in this opinion a framework within which the trial court should reconsider this issue on remand.

This is an action for divorce. The particular issue raised on appeal arose when plaintiff, Candace R. Stavale, issued subpoenas to defendant's employer, requesting e-mails that defendant had sent to his personal attorney through his employer-provided e-mail address. Defendant moved to quash the subpoenas on the basis of the attorney-client privilege, and plaintiff responded that the privilege did not apply because, according to the employer's employee handbook, defendant had no reasonable expectation of privacy when he used the employer-provided e-mail address to communicate with his personal attorney.

[1] *Stavale v Stavale*, unpublished order of the Court of Appeals, entered July 24, 2019 (Docket No. 349472).

Although it is not entirely clear from the record whether the trial court was addressing the appropriate legal question, the court ultimately sided with plaintiff. This appeal followed.

As noted, it is not clear from the record whether the trial court denied the motion to quash on the basis of the attorney-client privilege having never attached to the communications at issue, or on the basis of defendant having waived any use of the privilege after it attached. What is clear is that defendant's argument before the trial court and on appeal is that he did not waive the attorney-client privilege because he did not intentionally and voluntarily disclose his privileged e-mails to his employer. However, the Michigan cases defendant relies on to explain his application of waiver involve whether disclosure of *already privileged* information to a third party constituted a waiver of the attorney-client privilege. See *Leibel v Gen Motors Corp*, 250 Mich App 229, 242; 646 NW2d 179 (2002) (analyzing whether a waiver occurred when otherwise privileged information became public as a result of litigation in another court); *Sterling v Keidan*, 162 Mich App 88, 90; 412 NW2d 255 (1987) (examining whether the defendant waived attorney-client privilege when he inadvertently sent an otherwise privileged document to the plaintiff).

Whether a communication is made in a confidential manner such that the attorney-client privilege can attach is not the same issue as whether an already privileged communication has been voluntarily disclosed to a third party such that attorney-client privilege is waived. See *Leibel*, 250 Mich App at 238-242 (separately analyzing application of the attorney-client privilege and waiver of the privilege). The distinction is important because, although related, the standard for

waiving a privilege that already exists is not the same under Michigan law as the standard for applying the privilege in the first place. See *id*. at 236, 240 (noting that attorney-client privilege attaches only to confidential communications between a client and an attorney, and separately noting the circumstances under which a waiver of the privilege may occur after it has attached). The issue in this case is not one of waiver, or at least not the type of waiver analyzed in *Leibel* and *Sterling*. The issue in this case, fundamentally, is whether defendant had a reasonable expectation of privacy in the use of his employer-provided e-mail such that attorney-client privilege attached to the communication between defendant and his counsel in the first place.

"Whether the attorney-client privilege applies to a communication is a question of law that we review de novo." *Nash Estate v Grand Haven*, 321 Mich App 587, 592; 909 NW2d 862 (2017) (quotation marks and citation omitted). In Michigan, "[t]he attorney-client privilege attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice." *Id*. at 593 (quotation marks and citation omitted). "The scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice." *Id*. (quotation marks and citation omitted). See also *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001) (explaining that attorney-client privilege does not apply unless there is an "element of confidentiality"). "The attorney-client privilege is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure." *Nash Estate*, 321 Mich App at 593.

In *Compeau*, there was no element of confidentiality when the defendant spoke to his counsel in the courtroom and a bailiff overheard because the defendant failed to take reasonable precautions to keep the communication confidential, i.e., by quietly whispering or by communicating in writing. *Compeau*, 244 Mich App at 597-598. Recently, in *People v Miller (On Reconsideration)*, unpublished per curiam opinion of the Court of Appeals, issued February 5, 2019 (Docket No. 337460), p 4,[2] we concluded that statements made by a defendant over a jail phone line that the defendant knew to be monitored and recorded were not confidential for the purpose of asserting attorney-client privilege. In both cases, we held that attorney-client privilege did not apply despite the fact that the respective defendants did not necessarily *intend* to disclose their communications to a third party. See *Compeau*, 244 Mich App at 597-598; *Miller*, unpub op at 4.

With respect to the specific facts of this case, however, no Michigan court has addressed how attorney-client privilege applies in cases in which a party uses an employer-provided means of communication to communicate with a personal attorney, the employer reserves the right to monitor that communication, but either the party is not aware of that monitoring or the employer cannot or does not actually monitor as suggested in its policy. The issue has been addressed, however, by several federal and state courts.[3]

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[2] We note that we are not bound by *Miller* pursuant to MCR 7.215(C)(1).

[3] We may look to authority from other jurisdictions for instruction. *Voutsaras Estate v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019) ("Although not binding, authority from other jurisdictions may be considered for its persuasive value."). This is particularly true when issues involving attorney-client privilege have been addressed by federal courts:

The seminal case in the federal system is *In re Asia Global Crossing, Ltd*, 322 BR 247 (Bankr SD NY, 2005). At issue in that case was "whether an employee's use of [a] company e-mail system to communicate with his personal attorney destroy[ed]" attorney-client privilege. *Id*. at 251. After reviewing Fourth Amendment cases and right-of-privacy cases, the court concluded that four factors should be considered in determining an employee's expectation of privacy in the employer's computer files and e-mail:

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies[.] [*Id*. at 257.]

Ultimately, the *Asia Global* court concluded that the company in that case clearly had access to the employee's e-mails contained on the company server and clearly had a policy banning personal use of the employee e-mail system and providing to employees that communications sent through the corporate e-mail server were "not private or secure." *Id*. at 259 (emphasis omitted). However, the court noted that it was unclear whether employees had ever been notified of the policy or of the monitoring of their e-mails and that

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"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn v United States*, 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981). This Court looks to federal precedent for guidance in determining the scope of the attorney-client privilege when a particular issue has been addressed by a federal court. See, e.g., *Leibel*, 250 Mich App at 236-237; *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 619-620; 576 NW2d 709 (1998). [*Nash Estate*, 321 Mich App at 594.]

the court could not conclude "as a matter of law" that employees lacked a reasonable expectation of privacy when they used their corporate e-mails to communicate with their personal attorney. *Id*. at 261.[4]

Asia Global has been "widely adopted" in the federal system as a tool to aid in "the 'reasonable expectation of privacy' determination in the context of email transmitted over and maintained on a company server . . . ." *In re Reserve Fund Securities & Derivative Litigation*, 275 FRD 154, 159-160 & 160 n 2 (SD NY, 2011).[5] Another notable and instructive case comes from a California appellate court.

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[4] As an aside, we note that *Asia Global* and much of its progeny occasionally use the term "waiver" more tangentially than defendant would seek to in this case. Again, defendant uses the term to apply Michigan caselaw that says that defendant needed to take some sort of voluntary and intentional action resulting in the disclosure of already privileged information to a third party in order to be estopped from asserting attorney-client privilege. While related, the test articulated in *Asia Global* is fundamentally about the initial expected confidentiality of a communication or action. See *Asia Global*, 322 BR at 255-258. The *Asia Global* court might say that a party "waived" privilege by communicating with their attorney in a nonconfidential manner, which is comparable to saying that the party lacked a reasonable expectation of privacy such that attorney-client privilege never attached at all. See *id*. at 260-261. This is not the same as the idea that defendant would put forth: that under Michigan law, when the communication is initially made, if the party did not intend for a third party to overhear, the communication will always necessarily be protected by attorney-client privilege unless waived at a later date. As already noted, that idea is not in keeping with our caselaw. See *Compeau*, 244 Mich App at 597-598 (noting that attorney-client privilege did not attach because the defendant failed to take reasonable precautions to keep his communication confidential, even though he undoubtedly did not intend for his statements to be overheard); *Miller*, unpub op at 4 (concluding that attorney-client privilege did not attach because the defendant had reason to know his communications could be monitored, even though he did not intend for the communications to be overheard).

[5] The parties spent a considerable amount of time in the lower-court proceedings discussing *Aventa Learning*, *Inc v K12, Inc*, 830 F Supp 2d

In *Holmes v Petrovich Dev Co, LLC*, 191 Cal App 4th 1047; 119 Cal Rptr 3d 878 (2011), a California appellate court held that attorney-client communications made over the plaintiff's company computer were not privileged.[6] In reaching its conclusion, the court noted that the plaintiff

> used a computer of defendant company to send the e-mails even though (1) she had been told of the company's policy that its computers were to be used only for company

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1083, 1107 (WD Wash, 2011), wherein the United States District Court for the Western District of Washington held that attorney-client privilege did not extend to documents that had been stored on company computers. Defendant contends, somewhat ironically, that *Aventa* is factually distinguishable because it involves whether an action taken subsequent to a communication actually having been made—saving the communication on a company computer—constituted a waiver of privilege. See *id*. at 1106-1108. For plaintiff's purposes, the value of the case is essentially that it is another federal case adopting *Asia Global*'s test for determining the existence of a reasonable expectation of confidentiality when using company-provided computer equipment. Other than being one of many federal examples of the application of the test that came out of *Asia Global*, we do not see the particular import of *Aventa* over any of the other federal cases applying the test.

[6] Cal Evid Code 952 defines "confidential communication between client and lawyer" as

> information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Defendant contends that the existence of this rule means that *Holmes* cannot be instructive in Michigan because Michigan has no corollary rule. Defendant suggests that the rule constitutes a narrower explanation of "confidential communication" than provided for by Michigan law, but we note that nothing about the rule is necessarily inconsistent with Michigan law such that *Holmes* cannot be, at the very least, instructive.

> business and that employees were prohibited from using them to send or receive personal e-mail, (2) she had been warned that the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages . . . at any time," and (3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message." [*Id*. at 1051.]

Notably, it was relevant in *Holmes* that the defendant seeking to prevent the plaintiff from relying on attorney-client privilege was also the employer, and thus "the electronic means used [to communicate] belong[ed] to the defendant" itself. *Id*. at 1068. With that context, the court noted:

> [T]he e-mails sent via company computer under the circumstances of this case were akin to [the plaintiff] consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. [*Id*.]

In any event, apart from the employer also being the defendant in the case, the *Holmes* court analyzed nearly identical factors as in *Asia Global*—without reference to the same—for determining the reasonable expectation that the communication at issue would be confidential.

One potential distinction from *Holmes*, however, is that the court seemed to place more emphasis than *Asia Global* on the language of the employer's policy concerning monitoring as opposed to whether the employer actually, regularly acted on that policy. In *Holmes*, the plaintiff argued—as defendant does in this case—that she had a reasonable expectation of privacy in her company e-mail account because she used a

private password to access her e-mail. *Id*. at 1069. That court concluded, however, that the plaintiff's "belief was unreasonable because she was warned that the company would monitor e-mail to ensure employees were complying with office policy not to use company computers for personal matters, and she was told that she had no expectation of privacy in any messages she sent via the company computer." *Id*.

The plaintiff in *Holmes* also argued—similar to the defendant in this case—that although her employer's policy noted that she had no right of privacy in her company e-mail and that the company could "periodically inspect all e-mail to ensure compliance with its policy against personal use of company computers," the plaintiff nonetheless had a reasonable expectation of privacy "because the 'operational reality' was that there was no [actual] access or auditing of employee's computers." *Id*. at 1069. The *Holmes* court noted, however, that there was, in fact, a company controller who had access to all e-mails sent and received by company computers, and "at no time during her testimony did [the plaintiff] claim she knew for a fact that, contrary to its stated policy, the company never actually monitored computer e-mail." *Id*. at 1070. Most importantly, however, the plaintiff could not overcome the fact that "the company explicitly told employees that they did not have a right to privacy in personal e-mail sent by company computers, . . . and the company never conveyed a conflicting policy." *Id*. at 1071. "Absent a company communication to employees explicitly contradicting the company's warning to them that company computers are monitored to make sure employees are not using them to send personal e-mail, it is immaterial that the 'operational reality' is the company does not actually do so." *Id*.

With those cases in mind, including our own case-law examining circumstances in which confidentiality exists for the purpose of attorney-client privilege, we believe that both *Asia Global* and *Holmes* strike an important balance between an individual's right to privacy, an employer's right to limit that privacy in the workplace under certain circumstances, and the indelible value of the attorney-client privilege to our legal system. We are inclined to follow their lead, with the exception that we prefer the *Holmes* court's emphasis on the employer's policy and the employee's understanding of that policy over whether the employer tended to actually carry out the policy. In determining whether an employee has a reasonable expectation of privacy in an employer-provided e-mail address or computer system, it is relevant to consider (1) whether the employer maintains a policy with respect to the use of those systems and what that policy entails and (2) whether the employee was ever notified or made aware of the employer's policies and practices with respect to computer privacy and monitoring. Obviously, these issues should be decided on a case-by-case basis, and these two factors are not exhaustive. For example, whether a company actually monitors employee computers and the employee's knowledge of the same may be relevant in some cases,[7] but we note that it ordinarily should not overpower considerations of the employer's stated policy and the employee's knowledge of that policy.

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[7] Indeed, in this case, defendant filed an e-mail correspondence between defendant's counsel and a representative of defendant's employer, wherein defendant's employer noted that the "Company ha[d] never accessed [defendant's] work e-mail, and it also has never had a need or desire to do so." Defendant's employer further noted that complying with the subpoena would "require [defendant's] password," which the employer did not have.

In applying these factors to the case at hand, it is clear that defendant's employer maintained an unambiguous policy regarding defendant's use of his employer-provided e-mail. The employee handbook specifically provided:

> The Company's electronic communication and information systems including, but not limited to, computers, related hardware, software and networks as well as internet systems, telephone, voice mail and email systems are Company property provided to employees and are intended for business use. Any personal use must not interfere with performance or operations and must not violate any Company policy or applicable law. ***Users have no legitimate and/or reasonable expectation of privacy regarding system usage.*** As a result, you should not use the Company's electronic communication systems to discuss or correspond about anything personal, particularly sensitive, confidential, or privileged personal communications to outside parties, as the Company reserves the right to monitor all system usage, including such communications.
>
> The Company may access its electronic communications and information systems and obtain the communications within the systems, including past voice mail and e-mail messages, without notice to users of the system, in the ordinary course of business when the Company deems it appropriate to do so. The Company also has the right to and may inspect or monitor without notice any devices employees use to access electronic communications and information systems, including but not limited to computers, laptops, notebooks, tablet computers, or mobile devices. Further, the Company may review Internet usage. The reasons for which the Company may obtain such access include, but are not limited to: maintaining the system, preventing or investigating allegations of system abuse or misuse, assuring compliance with software copyright laws, complying with legal and regulatory requests for information, protecting proprietary information, and ensuring that operations continue appropriately during an employee's absence.

The policy in this case could not be clearer, and to the extent that defendant was made aware of the same, it is sufficient to extinguish any reasonable expectation of privacy defendant might have had.

When an employee is knowingly subject to the type of policy at issue in this case—a policy that unequivocally states and emphasizes that employees "***have no legitimate and/or reasonable expectation of privacy regarding***" usage of their employer-provided e-mail addresses—and unless there is reason to believe that the employee was specifically told to disregard the same or there existed some other extenuating circumstance, employees cannot have a reasonable expectation of privacy in order to assert attorney-client privilege. Use of an employer-provided e-mail to communicate with a personal attorney with knowledge of this policy is not indicative of having taken reasonable precautions to preserve the confidentiality of the communication. See *Campeau*, 244 Mich App at 597 (holding that attorney-client privilege does not apply when the party seeking to assert the privilege does not take reasonable precautions to preserve the confidentiality of the communications).

What is unclear in this case, however, is the extent to which defendant was notified or otherwise made aware of the policy. There appears to have been no inquiry into that issue. And a footnote contained in defendant's brief on appeal, at the very least, suggests the possibility that defendant may never have been asked to read or sign the employee manual that puts forth the relevant policy. See *Mintz v Mark Bartelstein & Assoc, Inc*, 885 F Supp 2d 987 (CD Cal, 2012) (distinguishing *Holmes* by indicating that the plaintiff at issue in *Mintz* may " 'never [have] read the [employment] manual' " at issue and had " 'no recollection of

having signed an acknowledgement' " of the same). (Brackets omitted.) With that in mind, we reverse the trial court's order denying defendant's motion to quash and remand for the trial court to reconsider the issue utilizing the correct legal framework to determine whether defendant had a reasonable expectation of privacy in the use of his employer-provided e-mail.

We note that defendant relies on *Stengart v Loving Care Agency, Inc*, 408 NJ Super 54; 973 A2d 390 (App Div, 2009); *Haynes v Attorney General*, 298 F Supp 2d 1154 (D Kan, 2003); and *United States v Slanina*, 283 F3d 670 (CA 5, 2002), vacated on other grounds 537 US 802 (2002), for the contention that he necessarily did have a reasonable expectation of privacy in his employer-provided e-mail. All of the cases are distinguishable and far less instructive than *Asia Global* and *Holmes*.

First, *Slanina* had to do with the defendant's right to privacy in his own computer equipment as well as computer equipment provided by his employer that had "no connection to the [employer's] intra-office network." *Slanina*, 283 F3d at 672. The United States Court of Appeals for the Fifth Circuit concluded that the defendant had a reasonable expectation of privacy in the equipment because it was located in the defendant's locked office and because he had installed passwords to limit access. *Id*. at 676-677. In reaching its conclusion, however, the court explicitly noted "the absence of a . . . policy placing [the defendant] on notice that his computer usage would be monitored . . . ." *Id*. at 677. Accordingly, the case is of little import.

Next, in *Haynes*, the plaintiff brought a civil action against the Kansas Attorney General for viewing private information contained on the plaintiff's work computer while the plaintiff was an employee in the

Attorney General's office. *Haynes*, 298 F Supp 2d at 1157. In that case, the plaintiff was specifically told by his employer that "his computer had two files: private and public." *Id*. "He was further told that he could put personal information in the private file and that no one would have access to it." *Id*. With that in mind, even in light of the fact that the plaintiff was shown a screen when he logged onto his computer that informed the plaintiff that he did not have an "expectation of privacy in using th[e] system," the United States District Court in Kansas held that the plaintiff had a reasonable expectation of privacy. First, there is no evidence in this case that defendant was given any such conflicting information. Second, and most importantly, by focusing on the policy enacted by the Attorney General and the plaintiff's reasonable confusion with respect to that policy, *Haynes* actually supports the framework we are adopting: in determining whether an employee has a reasonable expectation of privacy on an employer's computer system or on an employer-provided e-mail address, courts should look to the privacy policy enacted by the employer as well as the extent to which the employee was notified or made aware of the policy.

Lastly, in *Stengart*, 408 NJ Super at 74-75, a New Jersey appellate court concluded that e-mails sent from an employee to her attorney through her personal "Yahoo email account," but using an employer-issued laptop, were privileged. Defendant fails to reconcile the use of a personal, web-based e-mail in *Stengart* with the use of a company-provided e-mail address in this case. Moreover, just as in *Haynes*, the reasoning of the New Jersey appellate court was heavily focused on the ambiguity of the company policy at issue. *Id*. at 63-64. The court noted that it was not clear from the policy whether the company reserved the right to intercept communications made from the plaintiff's private,

web-based e-mail address, even when using the company-issued laptop. *Id*. at 63-64. The court noted that "although the matter [was] not free from doubt, there [was] much about the language of the policy that would convey to an objective reader that personal emails, such as those in question, do not become company property when sent on a company computer, and little to suggest that an employee would not retain an expectation of privacy in such emails." *Id*. at 65. Forgetting the factual difference between *Stengart* and this case—which is significant—even in *Stengart*, the principal issue with regard to whether the plaintiff had a reasonable expectation of privacy was the company policy at issue and the plaintiff's understanding of that policy. See *id*. at 60-66.

As already noted, the import of the policy at issue in this case is abundantly clear. The policy unambiguously provided that defendant had no expectation of privacy when using his employer-provided e-mail and that the employer reserved the right to monitor the e-mail without notification to defendant. Thus, the only question is defendant's understanding of that policy at the time the relevant communications were made. Accordingly, on remand, the trial court should give particular focus to whether and to what extent defendant was notified or otherwise made aware of the policy. Again, it should be clear that the issue in this case is whether defendant had a reasonable expectation of privacy in his communication to his attorney. The issue is not whether defendant's communication constituted a voluntary and intentional disclosure of the information to a third party after the fact.[8]

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[8] Defendant briefly asserts, as an alternative issue at the end of his reply brief on appeal, that even to the extent the e-mails at issue are not protected by attorney-client privilege, they are work-product that

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

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

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should be excluded on that ground. When this Court granted defendant's application for leave to appeal, we limited the issues to those raised in his application and supporting brief. *Stavale*, unpub order at 1. Defendant did not raise this issue in his application, nor did he raise the issue in his supporting brief. He raised the issue in a reply brief. Moreover, even assuming defendant had raised the issue in his application, he failed to adequately raise it below and there is no record concerning how the e-mails at issue might have implicated the work-product doctrine in order for this Court to even begin to review the issue. Suffice it to say that we decline to address defendant's reliance on the work-product doctrine.

DEPARTMENT OF TRANSPORTATION v
RIVERVIEW-TRENTON RAILROAD COMPANY
DEPARTMENT OF TRANSPORTATION v
CROWN ENTERPRISES, INC
DEPARTMENT OF TRANSPORTATION v DIBDETROIT, LLC
DEPARTMENT OF TRANSPORTATION v
DETROIT INTERNATIONAL BRIDGE COMPANY

Docket Nos. 345708 and 346105 through 346122. Submitted June 2, 2020, at Detroit. Decided June 18, 2020, at 9:00 a.m. Leave to appeal denied 507 Mich 907 (2021).

The Michigan Department of Transportation (MDOT) brought 20 condemnation actions in the Wayne Circuit Court against the Riverview-Trenton Railroad Company; Crown Enterprises, Inc.; and other entities controlled by Manuel "Matty" Moroun (the Moroun defendants). MDOT also brought suit in these actions against other entities unrelated to the Moroun defendants. MDOT sought to use the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., to acquire land for the construction of a bridge between Detroit and Windsor. Only the Moroun defendants are involved in this appeal. In 2012, the Canadian Minister of Transport, the Windsor-Detroit Bridge Authority (WDBA), the state of Michigan, and the Michigan Strategic Fund entered into a crossing agreement that provided a framework for the project. The agreement provided that Canada would design, construct, operate, and maintain the new crossing, and it specified that Michigan would not provide the funding. The agreement indicated that MDOT would be responsible for acquiring the Michigan land needed for the bridge construction; however, the parties created a reimbursement procedure by which MDOT would spend money out of the state trunk line fund and send invoices to the WDBA, the WDBA would reimburse MDOT through an escrow agent, and MDOT would return the money to the state trunk line fund. The Moroun defendants filed several motions for summary disposition under MCR 2.116(C)(4), (5), (8), and (10), in part on the ground that the Michigan Legislature had included provisions in an appropriations bill that prohibited MDOT from spending any state transportation revenue for planning or construction of this project, which was then known as the Detroit River International Crossing and is now

known as the Gordie Howe International Bridge (GHIB). The Moroun defendants also challenged MDOT's determination of the necessity of condemning their properties for the project under MCL 213.56. MDOT moved for partial summary disposition with respect to the Moroun defendants' challenges to the necessity of the condemnation proceedings. After directing the Moroun defendants to separately identify each of their legal challenges and file each as a separate motion, the court, Robert J. Colombo, Jr., J., ultimately rejected all the Moroun defendants' arguments, granted MDOT's motion for partial summary disposition of the necessity challenges, and upheld the validity of the condemnation proceedings. The court also denied the Moroun defendants' motion for reconsideration. The Court of Appeals granted the Moroun defendants' applications for leave to appeal the orders and consolidated the cases.

The Court of Appeals *held*:

1. The issues that the Moroun defendants raised on appeal were not rendered nonjusticiable by their failure to appeal the circuit court's conclusion that MDOT had the statutory authority to take the properties at issue. According to MDOT, with that challenge having been abandoned, the remaining issues on appeal were only ancillary challenges to the validity of the crossing agreement that should have been raised and decided in a declaratory suit filed in the Court of Claims. However, MDOT presented no clear legal basis to hold that the Moroun defendants' arguments were nonjusticiable. The condemnation actions at issue were brought under the UCPA, which is a procedural statute. MCL 213.56(1) provides that an owner of the property who wants to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed. Under MCL 213.56(2), with respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion. MDOT argued that an "error of law" exists only where the condemning agency lacks legal authority to condemn property for the purpose specified in the complaint. However, the case on which MDOT relied for that proposition stood only for the premise that the claimed legal error in that case—a lack of legal authority to condemn—did not occur; it did not purport to set the scope of what may or may not amount to an error of law under MCL 213.56(2). Further, MCL 213.56(6) appears to contemplate that a party may appeal not only an order upholding or determining public necessity, but also an order upholding the validity of the condemnation proceeding, and the Moroun defendants' appeals

could be viewed as falling into the latter category. Therefore, MDOT did not show that the Moroun defendants' challenges fell outside the scope of what may be decided in this condemnation suit.

2. MDOT did not lack the authority to enter into the crossing agreement when it was executed because of language in 2011 PA 63, Article XVII, Part 2, § 384. In 2011 PA 63, and the following year in 2012 PA 200, Art XVII, Part 2, § 384 prohibited MDOT from expending any state transportation revenue for construction planning or construction of the Detroit River International Crossing or a renamed successor, and it also prohibited MDOT from committing the state to any new contract related to the construction planning or construction of the Detroit River International Crossing or a renamed successor absent specific enabling legislation. There is no dispute that specific enabling legislation was not enacted, and therefore, the prohibitions stated in § 384(1) applied when the crossing agreement was executed. However, the crossing agreement clearly stated that no Michigan funds would be spent on the GHIB project, that Canada assumed financial responsibility for the project, and that any money spent by Michigan would be reimbursed by Canada. Accordingly, the crossing agreement did not run afoul of the prohibition in § 384(1) on spending state revenue. It also did not violate the prohibition on committing the state to a new contract related to the construction planning or construction of the GHIB. Although MDOT and the other Michigan signatories did commit Michigan to the terms of the crossing agreement, the prohibition on committing the state to a contract was part of an appropriations bill. Accordingly, the word "commit" was best understood as prohibiting the execution of a contract that would obligate state funds, which the crossing agreement did not do. Moreover, the requirement in § 384(2) that MDOT report to the state budget director and various legislative entities on activities related to the Detroit River International Crossing clearly contemplated that MDOT would be engaged in some activities concerning the GHIB. Considering all of § 384 as it existed when the crossing agreement was signed, it did not prohibit the crossing agreement as long as no Michigan funds were obligated to be spent. Furthermore, subsequent appropriations bills have explicitly authorized the crossing agreement. Therefore, the Moroun defendants' arguments were without merit.

3. The procedure by which MDOT uses money from the state trunk line fund to pay for the land it condemns for the GHIB and then replaces the money with reimbursements from Canada does not violate MCL 18.1366 or Const 1963, art 9, § 17, which both

prohibit MDOT from spending money without an appropriation. Given the fact that MDOT was reimbursed by Canada for all the money spent on the GHIB, MDOT was not spending money in a manner that required a legislative appropriation. The money spent by MDOT on acquiring land for the GHIB is fully reimbursed by Canada, meaning that what is being spent are Canadian funds, not Michigan funds. Accordingly, no appropriation was necessary.

4. MDOT's use of the state trunk line fund to spend money for condemnation and receive reimbursement proceeds from Canada did not violate MCL 18.1443. As an initial matter, even if the procedures being used to move money from Canada to MDOT were improper, it would be unlikely to render the entire project invalid, which means that the condemnations at issue would remain necessary. Further, the Moroun defendants have not established that the reimbursement procedure is illegal. The argument that placing Canadian reimbursement funds into the state trunk line fund violates MCL 18.1443—which provides, "Except as otherwise provided by law, all money received by the various state agencies for whom appropriations are made by a budget act shall be forwarded to the state treasurer and credited to the state general fund"—ignores the key language "[e]xcept as otherwise provided by law," and the trial court correctly concluded that §§ 384 and 385, as enacted in Art XVII, Part 2 of 2013 PA 59 and subsequent appropriations bills, operate as such an exception. Through these provisions, the Legislature has authorized MDOT to spend money on the GHIB as long as that money is reimbursed by Canada, and nothing in the appropriations language indicated that reimbursement proceeds must go to the general fund. The Legislature has been aware of the reimbursement process for years, but it has not changed the appropriations language to state that reimbursement proceeds should be put in the general fund. Accordingly, the reimbursement procedure did not violate MCL 18.1443.

5. The crossing agreement did not violate Michigan law by allowing Canada to collect tolls on the GHIB. As an initial matter, it was unclear whether this was a challenge to the condemnation action rather than a collateral challenge to the crossing agreement. Regardless, the Moroun defendants did not establish that the tolling provisions of the crossing agreement were invalid. Although the Michigan Legislature had not authorized MDOT or any other administrative agency to impose tolls on the GHIB, the crossing agreement provided that tolls would be collected by Canada for use of the Canadian portion of the GHIB. The fact that, as a practical matter, a traveler would likely be using the entire bridge and not

just the Canadian portion was irrelevant. The tolling arrangement also did not violate the Urban Cooperation Act (UCA), MCL 124.501 *et seq*., which allows public state agencies to exercise jointly with a public agency of Canada "any power, privilege, or authority that the agencies share in common and that each might exercise separately." The fact that MDOT helped create a toll bridge, and that Michigan representatives would be on the board that approves toll rates, did not transform MDOT into a tolling party. Further, MCL 124.505(1) provides that a joint exercise of power under the UCA "shall be made by contract or contracts in the form of an interlocal agreement," and MCL 124.505(1)(a) states that an interlocal agreement may provide for the manner in which the power will be exercised. MCL 124.505(1)(f) allows the parties to create a method or formula for equitably providing for and allocating revenues, including by taxation, assessment, levy, or impost. Given that Canada is paying for the entire project, it was equitable to give Canada the sole power to toll on the bridge. For these reasons, the Moroun defendants did not show that the tolling provisions violated Michigan law.

6. The provisions of the crossing agreement that would require Michigan to pay some costs of the GHIB if Michigan's Legislature ever decides to impose tolls on the bridge do not violate the UCA or impermissibly tie the hands of the Legislature in the future. Apart from the collateral and speculative nature of the Moroun defendants' argument in this regard, the Moroun defendants did not demonstrate any legal problem with the crossing agreement. The crossing agreement does not prohibit the Legislature from imposing a toll in the future; instead, the parties have agreed that if Michigan does decide to impose tolls, Michigan will then become responsible for half of the costs of the bridge, less revenues that have already been collected by Canada. The provisions concerning tolling on the Michigan side of the bridge are valid and consistent with MDOT's authority under the UCA.

7. The GHIB was not a "commercial enterprise" for purposes of MCL 252.52(2), which generally prohibits commercial enterprises on limited-access highways. MCL 252.52(2) states that, apart from vending machines for food, drink, and other articles that MDOT deems appropriate, no other commercial enterprise shall be authorized or conducted within or on a limited-access highway except as otherwise provided in that section. MCL 252.52(3) through (11) provide numerous exceptions, such as the operation of facilities for the sale of articles for export and consumption outside the United States at the Blue Water Bridge and the International Bridge, the distribution of travel-related

information, the use of logo signage within the right-of-way, and the installation of signs identifying nearby hospitals that provide 24-hour emergency care. These types of "commercial enterprises" are generally those that are engaged in the sale or advertising of goods and services. The absence of an exception in MCL 252.52 for the construction and maintenance of a limited-access highway demonstrates that the Legislature has not viewed these activities as the type of "commercial enterprise" that would require an exception under this provision. The fact that tolls will be collected on the GHIB did not change this conclusion, considering that the tolls will only be collected on the Canadian side of the bridge for use of the Canadian portion of the bridge; that no exception was made for toll collection in MCL 252.52, despite the fact that other bridges connecting Michigan to Canada collect tolls and would be considered limited-access highways; and that the tolls will be collected not for a commercial purpose but for the governmental function of constructing and maintaining the bridge.

Affirmed.

STEPHENS, J., did not participate because she recused herself to avoid the appearance of impropriety. During oral argument both attorneys quoted from an opinion she had issued as judge of the Court of Claims involving some of the parties to the instant case on an issue before the court in this appeal. Neither party had cited the Court of Claims opinion in their briefs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Mark J. Zausmer*, *Mischa M. Boardman*, and *Devin Sullivan*, Special Assistant Attorneys General, for the Department of Transportation.

Boies Schiller Flexner LLP (by *Hershel Wancjer*, *Hamish P. M. Hume*, *Samuel Kaplan*, and *James A. Kraehenbuehl*) for Riverview-Trenton Railroad Company, Crown Enterprises, Inc., and others.

Amicus Curiae:

Mark Granzotto, PC (by *Mark Granzotto*) for State Representative Gary Eisen, State Representative John Reilly, and other current and former Michigan legislators.

Before: CAVANAGH, P.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM. In these 19 consolidated appeals,[1] various entities controlled by Manuel "Matty" Moroun (the Moroun entities)[2] appeal by leave granted[3] two orders

[1] *Dep't of Transp v Riverview-Trenton R Co*, unpublished order of the Court of Appeals, entered April 1, 2019 (Docket Nos. 345708 and 346105 through 346122).

[2] These entities include the Riverview-Trenton Railroad Company; Central Transport, LLC; Crown Enterprises, Inc.; DIBDetroit, LLC; and the Detroit International Bridge Company.

[3] *Dep't of Transp v Riverview-Trenton R Co*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 345708); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346105); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346106); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346107); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346108); *Dep't of Transp v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346109); *Dep't of Transp v Crown Enterprises*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346110); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346111); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346112); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346113); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346114); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346115); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346116); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346117); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346118); *Dep't of Transp v Crown Enterprises, Inc*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346119); *Dep't of Transp*

of the circuit court rejecting challenges to the authority of the Michigan Department of Transportation (MDOT) to condemn property for the construction of the Gordie Howe International Bridge (GHIB). We affirm.

I. FACTS

The history of the GHIB extends back nearly two full decades. We need not provide extensive detail to resolve the present matter, so instead we provide a limited summary of the relevant facts, the majority of which involve appropriations bills enacted since 2011 and other litigation involving the GHIB.

MDOT, the Federal Highway Administration (FHA), Transport Canada, and the Ontario Ministry of Transportation formed a partnership in 2001 to investigate the feasibility of constructing a new international bridge connecting Detroit and Windsor, Ontario. See *Latin Americans for Social & Economic Dev v FHA Administrator*, 756 F3d 447, 454 (CA 6, 2014). A lengthy process resulted in the selection in 2009 of Detroit's Delray neighborhood as the preferred location for the site of a new international bridge.[4] *Id*. at 451, 453-461.

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v DIBDetroit, LLC, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346120); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346121); *Dep't of Transp v DIBDetroit, LLC*, unpublished order of the Court of Appeals, entered February 12, 2019 (Docket No. 346122).

[4] The result of this process was the issuance of a Record of Decision (ROD) by the FHA. *Latin Americans*, 756 F3d at 451. The Moroun-owned Detroit International Bridge Company was a plaintiff in *Latin Americans*, a lawsuit that ended with the affirmance of the ROD. *Id*. at 477. The Moroun-owned Canadian Transport Company unsuccessfully sought to have the ROD overturned in the Canadian court system. *Canadian Transit Co v Canada (Minister of Transport)*, 2011 FC 515 (Can). Moroun also sought to challenge MDOT's pursuit of the project in the Court of

In an appropriations bill that took effect on June 21, 2011, our Legislature included the following language as Art XVII, Part 2, § 384 of 2011 PA 63:

> (1) The department shall not expend any state transportation revenue for construction planning or construction of the Detroit River International Crossing or a renamed successor. In addition, except as provided in subsection (3), the department shall not commit the state to any new contract related to the construction planning or construction of the Detroit River International Crossing or a renamed successor unless the legislature has enacted specific enabling legislation to allow for the construction of the Detroit River International Crossing or a renamed successor.
>
> (2) On or before March 31, 2012, the department shall report to the state budget director, the house and senate appropriations subcommittees on transportation, and the house and senate fiscal agencies on department activities related to the Detroit River International Crossing or a renamed successor.
>
> (3) If the legislature enacts specific enabling legislation for the construction of the Detroit River International Crossing or a renamed successor, subsection (1) does not apply once the enabling legislation goes into effect.

Subsequently, a bill that would have authorized the new international bridge died in Michigan's Senate after being rejected by a committee vote in October 2011.[5]

Nonetheless, on June 15, 2012, Her Majesty the Queen in Right of Canada (represented by the

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Claims. That action was likewise unsuccessful. *Detroit Int'l Bridge Co v Dep't of Transp*, unpublished per curiam opinion of the Court of Appeals, issued December 6, 2011 (Docket No. 298276). These lawsuits predated the execution of the Crossing Agreement that is at the core of the present matter.

[5] See Associated Press, *Detroit-Windsor Bridge Fails to Clear Hurdle as Senate Panel Rejects Legislation* (posted October 20, 2011, and updated

Canadian Minister of Transport), the Windsor-Detroit Bridge Authority (WDBA), and the "Michigan Parties" —the state of Michigan, "as represented by its Governor, and by and through" MDOT, and the Michigan Strategic Fund (MSF)—entered into the "Crossing Agreement," which

> provide[d] a framework for a Crossing Authority established by Canada to design, construct, finance, operate and maintain a new International Crossing between Canada and Michigan, under the oversight of a jointly established International Authority with three members appointed by Canada and the Crossing Authority and three members appointed by the Michigan Parties, and with funding approved by Canada, but with no funding by the Michigan Parties. The Michigan Parties are not obligated to pay any of the costs of the new International Crossing.

The "purpose" section of the agreement explains that the purpose of the Crossing Agreement is to "provide a framework for the Crossing Authority" to "design, construct, finance, operate and maintain the International Crossing" and a "US Federal Plaza" "with the assistance as necessary, but not funding by, Michigan[.]"

Under the Crossing Agreement, the Canadian Crossing Authority "shall be responsible for International Crossing Project Activities and shall be responsible for the design, construction, financing, operation and maintenance of the International Crossing . . . ." The Crossing Authority is also given authority to collect tolls. MDOT is responsible for acquiring, through condemnation if necessary, Michigan land needed for construction of the bridge. However, funding for acquiring property comes from Canada through the Crossing Authority. At his deposition,

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January 20, 2019), available at <https://www.mlive.com/politics/2011/10/detroit-windsor_bridge_fails_t.html> (accessed May 13, 2020) [https://perma.cc/P5AT-QQCU].

Myron Frierson, the deputy director of finance administration for MDOT, explained that the parties have created a reimbursement procedure: MDOT and the WDBA agree to a budget for anticipated activities, and the WDBA places funds in escrow; MDOT spends money out of the state trunk line fund and sends invoices to the WDBA; the invoices are approved by the WDBA, the escrow agent disburses funds to MDOT, and those funds are placed in the state trunk line fund.

In its June 26, 2012 appropriations bill, the Legislature reenacted § 384 with its prohibition against MDOT "expend[ing] any state transportation revenue for construction planning or construction of the Detroit River International Crossing or a renamed successor" absent legislative authorization. 2012 PA 200, Art XVII, Part 2, § 384(1) and (3). MDOT was again required to provide quarterly reports to various entities regarding its activities related to the new crossing. 2012 PA 200, Art XVII, Part 2, § 384(2).

But this language was modified in the Legislature's 2013 appropriations bill. Pursuant to 2013 PA 59, Art XVII, Part 2, § 384:

> (1) Except as otherwise provided in subsection (2), the department shall not *obligate the state to expend any state transportation revenue* for construction planning or construction of the Detroit River International Crossing or a renamed successor. In addition, except as provided in subsection (2), the department shall not commit the state to any new contract related to the construction planning or construction of the Detroit River International Crossing or a renamed successor *that would obligate the state to expend any state transportation revenue*. *An expenditure for staff resources used in connection with project activities, which expenditure is subject to full and prompt reimbursement from Canada, shall not be considered an expenditure of state transportation revenue*.

(2) If the legislature enacts specific enabling legislation for the construction of the Detroit River International Crossing or a renamed successor, subsection (1) does not apply once the enabling legislation goes into effect. [Emphasis added.]

The reporting requirement that had been stated in § 384(2) was replaced with the following in § 385:

(1) The department shall submit reports to the state budget director, the speaker of the house, the house minority leader, the senate majority leader, the senate minority leader, the house and senate appropriations subcommittees on transportation, and the house and senate fiscal agencies on department activities related to all nonconstruction or construction planning activities related to the Detroit River International Crossing or a renamed successor. The initial report shall be submitted on or before December 1, 2013 and shall cover the fiscal year ending September 30, 2013.

(2) The initial report shall include, at a minimum, all of the following:

(a) Department costs incurred in the fiscal year ending September 30, 2013, including employee salaries, wages, benefits, travel, and contractual services, and what activities those costs were related to.

(b) Costs of other executive branch agencies incurred in the fiscal year ending September 30, 2013, including employee salaries, wages, benefits, travel, and contractual services, and what activities those costs were related to.

(c) A breakdown of the source of funds used for the activities described in subdivisions (a) and (b).

(d) *A breakdown of reimbursements made by Canada under section 384(1) to the state for expenditures for staff resources used in connection with project activities*.

(e) *A narrative description of the status of the Detroit River International Crossing or a renamed successor, including efforts undertaken to implement provisions of the*

crossing agreement executed June 15, 2012 by representatives of the Canadian government and this state.

(3) After submission of the initial report, a subsequent report shall be submitted on March 1, 2014, June 1, 2014, and September 1, 2014 and shall include the same information described in subsection (2) for the applicable previous fiscal quarter. [2013 PA 59, Art XVII, Part 2, § 385 (emphasis added).]

Other than changing the appropriate dates where needed, and revising the name "Detroit River International Crossing" to "Gordie Howe International Crossing" in 2018, the language of §§ 384 and 385 remained unchanged in each annual appropriations bill until 2019. See 2014 PA 252, Art XVII, Part 2, §§ 384 and 385; 2015 PA 84, Art XVII, Part 2, §§ 384 and 385; 2016 PA 268, Art XVII, Part 2, §§ 384 and 385; 2017 PA 107, Art XVII, Part 2, §§ 384 and 385; 2018 PA 207, Art XVII, Part 2, §§ 384 and 385. In the 2019 appropriations bill, § 384 remains unchanged. 2019 PA 66, Art XVII, Part 2, § 384. Section 385, concerning reporting requirements, has been simplified as follows:

(1) The department shall submit monthly reports to the state budget director, the speaker of the house of representatives, the house of representatives minority leader, the senate majority leader, the senate minority leader, the house and senate appropriations subcommittees on transportation, and the house and senate fiscal agencies on all of the following:

(a) All expenditures by the state related to the Gordie Howe Bridge.

(b) All reimbursements made by Canada under section 384(1) of this part to the state for expenditures for staff resources used in connection with project activities.

(2) The initial report required under subsection (1) shall be submitted on or before December 1, 2019. The

> initial report shall cover the fiscal year ending September 30, 2019. [2019 PA 66, Art XVII, Part 2, § 385.]

The Crossing Agreement has been the subject of prior litigation between MDOT and the Moroun entities. After receiving good-faith offers for the purchase of the properties at issue in the present appeals in December 2016, the Moroun entities filed a lawsuit in the Court of Claims seeking declaratory and injunctive relief. Much the same as in the present appeals, the Moroun entities sought to have the Crossing Agreement declared invalid. This Court affirmed the dismissal of the suit. While this Court held that the Moroun entities had standing to raise their challenges, this Court held that the suit was properly dismissed by the Court of Claims because the Moroun entities failed to file the suit within a year of the date the claim accrued (which this Court determined was in 2012 when the Crossing Agreement was executed) pursuant to MCL 600.6431(1). *Crown Enterprises, Inc v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued May 8, 2018 (Docket No. 340039). The Moroun entities sought to have the Crossing Agreement declared invalid in a lawsuit filed in federal court, but that action was not successful. See *Detroit Int'l Bridge Co v Government of Canada*, 434 US App DC 317; 883 F3d 895 (2018).

The present appeals arise out of condemnation proceedings instituted in 2017 while the Court of Claims matter was pending.[6] The various lower-court cases

[6] The Moroun entities previously sought leave to appeal an order denying their motions to dismiss the condemnation suits, which were brought under MCR 2.116(C)(6) on the basis that the Court of Claims suit precluded litigation of the condemnation suits in Wayne Circuit Court. This Court denied leave to appeal in each of those appeals for failure to persuade the Court of the need for immediate appellate review. See, e.g., *Dep't of Transp v Riverview-Trenton R Co*, unpublished order of the Court of Appeals, entered May 5, 2017 (Docket No. 337664).

were consolidated and argued together. The circuit court directed the Moroun entities to clearly identify each specific legal challenge, filing each as a separate motion. The Moroun entities ultimately identified 18 separate legal challenges, all of which were rejected by the trial court. The Moroun entities argue on appeal that the circuit court was wrong to reject six of these challenges, apparently abandoning the remainder. These challenges were brought pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction), (C)(5) (lack of capacity to sue), (C)(8) (failure to state a claim), and (C)(10) (no material question of fact). All motions also purported to seek rulings regarding necessity pursuant to MCL 213.56, which states, in relevant part:

> (1) Within the time prescribed to responsively plead after service of a complaint, an owner of the property desiring to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed. The hearing shall be held within 30 days after the filing of the motion.
>
> (2) With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.
>
> * * *
>
> (5) The court's determination of a motion to review necessity is a final judgment.
>
> (6) Notwithstanding section 309 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.309 of the Michigan Compiled Laws, an order of the court upholding or determining public necessity or upholding the validity of the condemnation pro-

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The Moroun entities have not challenged the denial of the MCR 2.116(C)(6) motions in the instant appeals.

> ceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.
>
> (7) If a motion to review necessity is not filed as provided in this section, necessity shall be conclusively presumed to exist and the right to have necessity reviewed or further considered is waived.

The first challenge pursued by the Moroun entities on appeal argues that MDOT was not authorized to enter into the Crossing Agreement because such action was prohibited by the first appropriations bill at issue, 2011 PA 63. The second challenge pursued on appeal contends that MDOT has no authority to pay just compensation for land acquired for the GHIB project. The third challenge pursued on appeal argues that MDOT cannot use the state trunk line fund to pay expenses and receive reimbursement from Canada. The fourth challenge pursued on appeal is a claim that the takings are invalid because MDOT lacks authority to collect tolls on the GHIB when it is complete. The fifth challenge raised on appeal claims that certain provisions of the Crossing Agreement concerning toll collection illegally limit the authority of the Legislature to impose tolls on the GHIB in the future. Finally, the sixth challenge raised on appeal argues that the GHIB will be a "commercial enterprise" and that the operation of a commercial enterprise on a limited-access highway is prohibited by MCL 252.52(1), a provision of the limited-access highways act, MCL 252.51 *et seq*.[7]

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[7] An amicus curiae brief has been filed on behalf of the "Michigan Legislators," a group of current and former state legislators who, like the Moroun entities, oppose the GHIB project. As is now required by MCR 7.212(H)(3), the amicus brief indicates "whether counsel for a party authored the brief in whole or in part and whether such counsel or

MDOT argues first that the entire appeal has been rendered nonjusticiable and, second, that the trial court was correct to reject the Moroun entities' challenges. We begin our analysis with a discussion of MDOT's justiciability concern.

II. DISCUSSION

A. JUSTICIABILITY

MDOT argues that the six issues raised on appeal have been rendered nonjusticiable because the Moroun entities have not pursued on appeal a challenge to the circuit court's conclusion that MDOT's authority to take the properties at issue may be derived from the limited-access highways act and the state agencies act, MCL 213.21 *et seq*. According to MDOT, with that challenge having been abandoned, the remaining challenges that have been pursued on appeal do not amount to challenges raising an error of law related to the condemnation of the Moroun entities' land. Thus, according to MDOT, the Moroun entities no longer raise questions that may be decided in a condemnation action pursuant to MCL 213.56(2). Rather, MDOT contends that the issues being pursued on appeal are only ancillary challenges to the validity of the Crossing Agreement that should have been raised and decided in a declaratory suit filed in the Court of Claims. We disagree.

1. ISSUE PRESERVATION AND STANDARD OF REVIEW

We first note that while MDOT raised a similar argument with respect to some of the challenges raised

a party made a monetary contribution intended to fund the preparation or submission of the brief . . . ." The amicus brief discloses that it was authored by the Moroun entities' counsel and that it was also paid for by the Moroun entities.

in the circuit court, it did not claim below that none of the issues raised on appeal could be properly raised in a condemnation suit. Thus, while the issue is preserved in some respects, it is unpreserved in others. See *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). Indeed, to the extent MDOT failed to argue in the trial court that certain challenges were not proper challenges to be raised in a condemnation suit, we could deem MDOT's justiciability challenge waived. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (stating that issues not raised in the trial court are ordinarily deemed waived and will not be reviewed by an appellate court). However, this Court may exercise its inherent authority to review issues that were not raised in the circuit court. *Id*. at 387. MDOT's arguments present purely legal questions for which all the relevant facts have been presented, and to the extent the issue is not preserved, we choose to exercise our inherent authority to address MDOT's argument in full. See *id*.; *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

This issue essentially is a question of statutory interpretation; specifically, it is a question whether the Moroun entities' challenges are challenges that are not properly raised pursuant to MCL 213.56(2). Questions of statutory interpretation are reviewed de novo on appeal. *Riverview v Sibley Limestone*, 270 Mich App 627, 636; 716 NW2d 615 (2006).

2. ANALYSIS

The instant matter consists of several condemnation actions brought by MDOT against the Moroun entities to acquire real property. These suits are brought under the Uniform Condemnation Procedures Act (UCPA),

MCL 213.51 *et seq*. The UCPA "is merely a procedural statute . . . ." *Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 32; 687 NW2d 319 (2004). Pursuant to MCL 213.56(1), "[w]ithin the time prescribed to responsively plead after service of a complaint, an owner of the property desiring to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed." Pursuant to MCL 213.56(2), "With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion." Thus, "pursuant to the statute, the determination of necessity is left not to the courts but to the public agency . . . . The only justiciable challenge following the agency's determination is one based on 'fraud, error of law, or abuse of discretion.' MCL 213.56(2)." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253; 701 NW2d 144 (2005).

MDOT argues that an "error of law" exists only where the condemning agency lacks legal authority to condemn property for the purpose specified in the complaint. MDOT relies on *Novi*, 473 Mich at 253, in which the Court, in a single sentence, stated that because the "plaintiff has the legal authority to condemn this land for a public road, . . . it has not made an error of law." We do not read *Novi* as standing for the premise that a lack of legal authority to condemn is the one and only "error of law" that is cognizable under MCL 213.56(2). In a footnote, the Court explained that the defendants in *Novi* had argued that the condemnation action was "not supported by appropriate enabling legislation." *Novi*, 473 Mich at 253 n 9. The Court rejected that contention. *Id*. Thus, it seems that the only claimed error of law in *Novi* was a lack of

authority to condemn. Given that the Court did not discuss the scope of MCL 213.56(2) in any detail, we read the decision in *Novi* as standing only for the premise that the claimed legal error in that case—a lack of legal authority to condemn—did not occur. The case does not purport to set the scope of what may or may not amount to an error of law under MCL 213.56(2). Therefore, MDOT has not shown that the Moroun entities' challenges fall outside the scope of what may be decided in this condemnation suit.[8]

There is also a substantial gap in MDOT's analysis. MDOT asserts that the appeal is rendered nonjusticiable if the Moroun entities' challenges do not amount to purported errors of law that could be raised under MCL 213.56(2). What MDOT does not do is explain whether only necessity challenges may be made in a condemnation action. In that regard, we note that MCL 213.56(6) appears to contemplate at least two types of challenges, as it describes two types of orders that may be appealed by way of an application for leave to appeal filed in this Court: "an order of the court upholding or determining public necessity *or* upholding the validity of the condemnation proceeding . . . ." MCL 213.56(6) (emphasis added). MDOT has not addressed whether the Moroun entities' appellate chal-

[8] MDOT also relies on *In re Condemnation by the Commonwealth of Pennsylvania for Route 58018*, 31 Pa Commw 275, 280-281; 375 A2d 1364 (1977), which MDOT cites as standing for the premise that the only permitted challenges in a condemnation suit are those that challenge the power or right of the governmental entity to take land or the procedures directly related to the taking. The decision in *Condemnation for Route 58018* addressed what arguments could be made under Pennsylvania's statutory scheme as preliminary objections to a condemnation action. *Id*. What procedures were allowed by Pennsylvania's statutory scheme some 40 years ago would seem to have little relevance to what is permitted by Michigan's current UCPA, and MDOT makes no attempt whatsoever to show that the two schemes are alike.

lenges could be viewed as raising challenges to the validity of the condemnation proceeding. Certainly, the Moroun entities view them as raising such challenges; the Moroun entities allege that the condemnation proceedings are invalid because they seek to acquire land for a project that the Moroun entities believe is illegal.

We also note that when arguing the appeal from the order dismissing the Court of Claims action, in which the Moroun entities sought to raise largely the same substantive challenges that were raised in the circuit court, MDOT represented to this Court that dismissal of the Court of Claims action would have no adverse effect on the Moroun entities because the same issues were—and could be—litigated in this condemnation action. This representation was made repeatedly in MDOT's appellate briefing and again at oral argument.[9]

As this Court explained in *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 489; 822 NW2d 239 (2012):

> The doctrine of judicial estoppel is driven by the important motive of promoting truthfulness and fair dealing in court proceedings. Judicial estoppel differs from such other forms of estoppel as promissory estoppel and equitable estoppel in that judicial estoppel focuses on the relationship between the litigant and the judicial system as a whole, rather than solely on the relationship between the parties. Of utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped. [Quotation marks, citations, and ellipses omitted.]

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[9] It is perhaps most ironic that, while MDOT has argued in this case that the Moroun entities should have raised their challenges in a timely suit for declaratory relief in the Court of Claims, MDOT previously argued to this Court in Docket No. 340039 that such a declaratory suit would be improper because it would encourage time-consuming precondemnation litigation.

Ultimately, judicial estoppel is an equitable doctrine. *Id*. at 479. It is used to preserve the integrity of the courts and to prevent abuse of the system through "cynical gamesmanship." *Id*. at 480 (quotation marks and citations omitted). But it must be applied carefully as, ultimately, use of the doctrine "precludes a contradictory position without examining the truth of either statement." *Id*. (quotation marks and citation omitted). Simply asserting contradictory positions is not enough to invoke the doctrine. *Id*. Rather, and among other elements, there must be some indication that the "court in the earlier proceeding accepted that party's position as true." *Id*. (quotation marks and citation omitted).

We admit that the doctrine does not strictly apply in this case. MDOT has clearly taken contradictory positions, but that is not enough, standing alone, to invoke the doctrine of judicial estoppel. See *id*. It does not appear that this Court accepted as true MDOT's assertion that all of the Moroun entities' challenges could be raised in this condemnation suit. See *Crown Enterprises, Inc*, unpub op at 1-6 (Docket No. 340039). See also *id*. at 6 n 3 ("Given our resolution of this issue, we decline to address . . . plaintiffs' argument that the Court of Claims erred in holding that it did not have jurisdiction to address challenges to the condemnation proceeding."). Given that MDOT has not presented any clear legal basis to hold that the Moroun entities' arguments are nonjusticiable, we need not rely on judicial estoppel to reject MDOT's argument. But it is worth noting that MDOT was clear and unequivocal when it previously informed this Court that the issues raised in this appeal were appropriate issues to be litigated in a condemnation suit.

Having rejected MDOT's justiciability challenge, we now turn to the substantive issues raised by the Moroun entities.

B. VALIDITY OF THE CROSSING AGREEMENT IN LIGHT OF 2011 PA 63

The Moroun entities first argue that the entire Crossing Agreement is void because MDOT lacked authority to enter into the agreement when it was executed. Specifically, the Moroun entities contend that the language of § 384, as enacted by 2011 PA 63, prohibited MDOT from executing the agreement. We disagree.

1. STANDARD OF REVIEW

In condemnation proceedings, the trial court's factual findings are reviewed for clear error and its legal conclusions are reviewed de novo. *Novi*, 473 Mich at 249. Questions of statutory interpretation are reviewed de novo on appeal. *Riverview*, 270 Mich App at 636.

2. ANALYSIS

The question raised in this issue mainly concerns the interpretation of appropriations bills. Of course, the primary goal in interpreting this language is to ascertain the Legislature's intent. *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). Generally, the plain language used by the Legislature is the best indicator of its intent. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). Dictionary definitions are often helpful when the plain meaning of the Legislature's enactment is at issue. *In re Erwin Estate*, 503 Mich 1, 9-10; 921 NW2d 308 (2018). In most cases, the common understanding of a word or phrase is sufficient, but when a word or phrase has acquired a peculiar meaning in the law, it is that more specific understanding that should be consulted. *Id*. at 10. It is also important to read words and phrases in context; i.e., one must consider the plain meaning of a word or phrase,

but one must also be aware of the context and purpose of the legislative enactment. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

Again, in this case, what is at issue are appropriations bills.

> In Black's Law Dictionary (4th ed), p 131, an appropriation in public law is defined as follows:
>
> > The act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense.
>
> [*Bds of Co Rd Comm'rs v Bd of State Canvassers*, 50 Mich App 89, 95; 213 NW2d 298 (1973).]

Stated differently, an appropriation "is the setting aside of a specified sum of money in the state treasury to be used for some governmental expenditure, purchase or expense." OAG, 1999, No. 7,022, p 40, at 40 (June 16, 1999).

In 2011 PA 63, and the following year in 2012 PA 200, § 384 stated:

> (1) The department shall not expend any state transportation revenue for construction planning or construction of the Detroit River International Crossing or a renamed successor. In addition, except as provided in subsection (3), the department shall not commit the state to any new contract related to the construction planning or construction of the Detroit River International Crossing or a renamed successor unless the legislature has enacted specific enabling legislation to allow for the construction of the Detroit River International Crossing or a renamed successor.[10]

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[10] In 2012 PA 200, the Legislature added the phrase "and the department has completed the Gateway project" at the end of Subsection 1; otherwise, the text of this provision is identical to that in 2011 PA 63.

There is no dispute that specific enabling legislation was not enacted, and therefore, the prohibitions stated in § 384(1) applied when the Crossing Agreement was executed.

The first sentence of § 384(1) prohibited MDOT from "expending any state transportation revenue" on the GHIB. The word "expend" is not difficult to understand, particularly considering that it appears in an appropriations bill—the very purpose of which is to control how state funds will be spent. To "expend" means "to pay out." *Merriam-Webster's Collegiate Dictionary* (11th ed). And in the context of governmental revenue, "revenue" is "the yield of sources of income (as taxes) that a political unit (as a nation or state) collects and receives into the treasury for public use." *Merriam-Webster's Collegiate Dictionary* (11th ed). The Crossing Agreement is clear, however, in stating that no Michigan funds will be spent on the GHIB project. Rather, Canada assumed financial responsibility for the project, and any money spent by Michigan is reimbursed by Canada. Thus, while some Michigan funds might be used temporarily, no Michigan funds are ultimately expended under the Crossing Agreement.[11] Michigan's revenue yield is not affected by the GHIB. We thus conclude that the Crossing Agreement does not run afoul of the first sentence of § 384(1).

It is the second sentence's prohibition against "commit[ting] the state to any new contract related to the construction planning or construction" of the GHIB that is more difficult. The Moroun entities read this as prohibiting MDOT from executing any agreement related to the construction or construction planning of the GHIB. MDOT, on the other hand, reads this

[11] There is no dispute that Canada has, in fact, fully reimbursed MDOT.

"boilerplate" language as only prohibiting MDOT from executing a contract that would require Michigan to pay any part of the costs of the GHIB. The question, then, is what it means to "commit the state" to an agreement concerning the "construction planning or construction" of the GHIB.

In the context of a contract, "commit" means to "obligate" or "bind." *Merriam-Webster's Collegiate Dictionary* (11th ed). And certainly, by executing the Crossing Agreement, MDOT and the other Michigan signatories committed Michigan to the terms of the agreement. But the terms of the legislative enactments at issue must be read in the context of what they are—appropriations bills. These enactments are, at the core, bills for the appropriation of state funds. With that context in mind, we, like the trial court, read the word "commit" as prohibiting the execution of a contract that would "obligate" state funds.

Reinforcing this conclusion is the structure of § 384. It is well established that individual sentences must not be read in isolation; rather, they must be read in context with the surrounding language. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). "[C]ontext matters, and thus statutory provisions are to be read as a whole." *Id*. With that in mind, the first sentence of § 384—which clearly prohibits the spending of Michigan funds on the GHIB—is important to understanding the meaning of the second sentence. In context, the first sentence is aimed at prohibiting spending Michigan revenue on the GHIB immediately, and the second sentence prohibits obligating the state to spend Michigan revenue on the GHIB in the future. The Crossing Agreement did neither.

Casting further light on the Legislature's intent is § 384(2). As written in 2011 PA 63, this section created a reporting requirement:

> On or before March 31, 2012, the department shall report to the state budget director, the house and senate appropriations subcommittees on transportation, and the house and senate fiscal agencies on department activities related to the Detroit River International Crossing or a renamed successor. [2011 PA 63, Article XVII, Part 2, § 384(2).]

This provision clearly contemplates that MDOT would be engaged in some activities concerning the GHIB. The existence of this reporting requirement would make little sense if the Legislature's intent was to prohibit MDOT from engaging in any way with Canada regarding the GHIB. If the Legislature intended to completely prohibit MDOT from forming any sort of agreement concerning the construction or construction planning of the GHIB, there would seem to be very little, if anything, for MDOT to report. Looking at all of § 384 as it existed when the Crossing Agreement was signed, we conclude that, so long as no Michigan funds were obligated to be spent, the Crossing Agreement did not violate § 384.

But even presuming there is room to dispute the meaning of § 384(1) as it existed in 2011 PA 63 and 2012 PA 200, subsequent appropriations bills have explicitly authorized the Crossing Agreement. Beginning in 2013, § 384 was amended to read as follows:

> (1) Except as otherwise provided in subsection (2), the department *shall not obligate the state to expend any state transportation revenue* for construction planning or construction of the Detroit River International Crossing or a renamed successor. In addition, except as provided in subsection (2), the department shall not commit the state to any new contract related to the construction planning or construction of the Detroit River International Crossing or a renamed successor *that would obligate the state to expend any state transportation revenue*. An expenditure for staff resources used in connection with project activi-

> ties, which expenditure is subject to full and prompt reimbursement from Canada, shall not be considered an expenditure of state transportation revenue. [2013 PA 59, Art XVII, Part 2, § 384(1) (emphasis added).]

This language extinguishes any reasonable dispute regarding whether the Crossing Agreement is valid. While one might argue that the Legislature's choice of words in 2011 and 2012 was not particularly clear, since 2013, our Legislature has been clear about what MDOT is prohibited from doing: expending state transportation revenue on the GHIB. As explained, no state transportation revenue is being expended on the GHIB project because any money that MDOT spends is promptly reimbursed by Canada. Further buttressing this conclusion is the reporting requirement that was stated in 2013 PA 59, Art XVII, Part 2, § 385. That section required MDOT to submit reports to various offices "on department activities related to all nonconstruction or construction planning activities related to the Detroit River International Crossing or a renamed successor." 2013 PA 59, Art XVII, Part 2, § 385(1). This revised reporting requirement shows that the Legislature was fully aware of MDOT's activities related to the GHIB. Rather than prohibit them, the Legislature required MDOT to keep it informed of those activities. As previously explained, the Legislature reenacted these same provisions every year since 2013.

And under the most recent appropriations bill, § 385 has been amended to simplify the reporting requirements. MDOT is now required to report two categories of information: "All expenditures made by the state related to the Gordie Howe Bridge," and "[a]ll reimbursements made by Canada under section 384(1) of this part to the state for expenditures for staff resources used in connection with project activities." 2019 PA 66, Part 2, § 385(1)(a) and (b). Once again,

rather than limiting MDOT's spending and reimbursement procedure, the Legislature has asked that spending and reimbursements related to the GHIB be reported to various offices. This is, once again, an indication that the Legislature approves of the way that the GHIB project is moving forward, including the way payments for condemned properties are being handled.

Particularly in light of the fact that these legislative statements were made after the Crossing Agreement was signed, one can conclude that the Legislature has affirmatively condoned the Crossing Agreement, including how that agreement is being implemented. The Moroun entities contend that this amounts to the use of legislative silence or acquiescence to interpret the Legislature's words. It is true that the Legislature's silence (generally in the face of judicial decisions) is a disfavored method of statutory interpretation. *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012). Thus, if the Legislature had merely sat silent after the Crossing Agreement was executed, perhaps one would be correct to argue that such silence should not be construed as approval. But this case does not involve silence. Rather, the Legislature has spoken, and spoken annually, since the Crossing Agreement was executed. Every time, the Legislature has made it clear that it is well aware of the Crossing Agreement. It has altered its prior, somewhat vague prohibitory language into language that condones MDOT's participation in the project so long as no state funds are consumed. And the Legislature has continued to direct that it be kept informed of activities related to the GHIB since the Crossing Agreement was executed. With that, this is not a case of legislative acquiescence. It is a case in which the Legislature has condoned

MDOT's activities with regard to the GHIB. The Moroun entities' arguments are without merit.[12]

C. MDOT'S AUTHORITY TO SPEND MONEY TO ACQUIRE PROPERTY

As explained earlier in this opinion, MDOT uses money from the state trunk line fund to pay for the land it condemns for the GHIB. Canada then reimburses MDOT, which places these reimbursement funds back in the state trunk line fund. The Moroun entities argue that this procedure violates MCL 18.1366 and Const 1963, art 9, § 17 because MDOT is spending money without an appropriation. We disagree.[13]

Pursuant to Const 1963, art 9, § 17, "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." And pursuant to MCL 18.1366, "Each state agency . . . shall be financed and maintained by specific appropriations by the legislature from the operating funds of the state, as such funds may be dedicated by law, pursuant to the submission of the state budget." The Moroun entities argue that there has been no appropriation of money for MDOT to acquire land for the GHIB, and therefore, MDOT cannot pay for the property it seeks to acquire in this condemnation action.

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[12] While we do not consider the decision controlling, we note that the Moroun entities also failed to convince the Court of Appeals for the District of Columbia Circuit that the Crossing Agreement was invalid on this basis. See *Detroit Int'l Bridge Co*, 434 US App DC at 322. And given our resolution of the issue, we decline to consider the constitutional issues raised by MDOT. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003) ("[Q]uestions of constitutionality should not be decided if the case may be disposed of on other grounds.").

[13] As stated previously, to the extent we must interpret a statute, our review is de novo. *Riverview*, 270 Mich App at 636. To the extent we must decide any constitutional issues, our review is, likewise, de novo. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003).

Perhaps a threshold issue is whether, given the fact that MDOT is reimbursed by Canada for every penny spent on the GHIB, MDOT is truly spending money such that a legislative appropriation is even necessary. Const 1963, art 9, § 17 requires that all money "paid out" of the state treasury be done pursuant to an appropriation. Consistently with that constitutional requirement, MCL 18.1366 explains that state agencies must be "financed and maintained by specific appropriations by the legislature from the operating funds of the state, as such funds may be dedicated by law, pursuant to the submission of the state budget." In most ordinary circumstances, it is not difficult to understand what this all means: state funds must generally be spent pursuant to appropriations made by law. But this circumstance is different. Ultimately, money spent by MDOT on acquiring land for the GHIB is fully reimbursed by Canada. In that sense, what is being spent are Canadian funds, not Michigan funds. When no Michigan funds are ultimately lost, it is not clear whether an appropriation is even required.

Of guidance is *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996). The questions presented in that case were:

> (1) whether funds generated under a consent judgment entered into by Governor Engler and several Native American tribes in settlement of an action brought under the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., and deposited into the Michigan Strategic Fund (MSF) pursuant to the terms of the settlement agreement, are, under the Appropriations Clause, Const 1963, art 9, § 17, and the Separation of Powers Clause, Const 1963, art 3, § 2, subject to the Legislature's power of appropriation, and (2) whether the MSF has the authority to distribute those funds in the form of a grant to the [City of Detroit Downtown Development Authority] for use in the con-

> struction of a stadium for the Detroit Tigers baseball team. [*Tiger Stadium Fan Club, Inc*, 217 Mich App at 441-442.]

At issue in *Tiger Stadium Fan Club, Inc* was a consent judgment under which several Native American tribes agreed to pay 8% of certain gaming revenues to the MSF and 2% of gaming revenues to local units of government "in the immediate vicinity of each tribal casino." *Id*. at 443. The parties agreed that it was "of no consequence that the funds were never placed in the state treasury or that they were remitted directly to a public corporation. The location of the funds is irrelevant; *the question is whether the character of the funds and the manner in which they were obtained makes them state funds subject to the Appropriations Clause*." *Id*. at 447-448 (emphasis added). This Court explained:

> In the instant case, the revenues are generated by the tribes. The revenues are not paid as a tax or a fee, or pursuant to a legislative act. While the revenues are paid to a public corporation as a result of the Governor's negotiation of a settlement of the federal litigation, the mere act of settling a lawsuit involving the state's obligation to negotiate does not automatically render the revenues subject to appropriation; *the character of the revenues must still be considered*. While a lawsuit was involved, the state did not concede or give away anything in the settlement of the suit. The revenues at issue do not result from the sale, relinquishment, waste, or damage of state assets. They are not paid as rents or royalties collected for the extraction of nonrenewable resources from state-owned lands. MCL 324.1902; MSA 13A.1902; Const 1963, art 9, § 35. The revenues are not designated as a gift or grant to the state. MCL 21.161; MSA 3.671. The revenues are not received as payment of debts or as penalties. MCL 14.33; MSA 3.186. [*Tiger Stadium Fan Club, Inc*, 217 Mich App at 449-450 (emphasis added).]

This Court went on to explain that in negotiating the settlement, "the Governor identified an opportunity to secure revenues to which the state was not entitled, except by virtue of the negotiated settlement, when he entered into an agreement that provided for the gratuitous payment of eight percent of certain gaming revenues to the MSF as long as the tribes' right to conduct these activities remains exclusive." *Id*. at 451. "The state gave nothing in exchange for the payments. The tribes' ability to conduct the gaming activities is a matter of right, not grace." *Id*. As this Court explained:

> We thus conclude that the revenues involved are public funds not subject to appropriation. The Governor's negotiation of the settlement agreement providing for payments to the MSF is akin to his procuring a grant of federal or corporate funds for a specific purpose. In such circumstances, the Governor, acting as a representative of the state, convinces the grant-making authority that it is in its best interest to donate funds to the state for a particular purpose. That the Governor might have sought the funds for a different or broader purpose is of no moment. The terms of the grant or gift control. . . . The state gave up nothing; the tribes perceived that it was in their interest to make, in effect, a continuing grant of eight percent of certain revenues as long as the advantageous status quo—exclusive rights to conduct certain gaming activities—is maintained. The negotiated settlement agreement provides for the payment of those revenues to a fund that is authorized to disburse funds to promote economic development throughout the state, including in areas that might themselves be interested in seeing certain local gaming activity, perhaps persuading the citizens and leaders of those areas that there are benefits to be gained from leaving the exclusive right to conduct this gaming activity with the tribes. In short, the payments were not procured by the Governor in exchange for concessions. Rather, they are the tribes' contribution to the MSF to create an incentive to preserve the status quo.

> The Legislature and the Governor, however, are in no way obligated to preserve the status quo. [*Id*. at 452-453.]

MDOT argues that the present matter similarly involves what are essentially gratuitous payments by Canada. The comparison is by no means perfect. In *Tiger Stadium Fan Club, Inc*, this Court emphasized that Michigan gave up nothing for the payments and that the tribes' contributions only gave Michigan an incentive to maintain the status quo. *Id*. With respect to the GHIB, clearly, the status quo is not being maintained; a brand-new international crossing is to be constructed. But on the other hand, before the Crossing Agreement was executed, Canada was in no way obligated to pay for the construction of an international bridge. One could thus view the matter as involving a gift from Canada, at least to an extent.

But beyond that, ultimately, the focus must be on the character of the revenues. *Id*. at 449. When one looks at the whole picture, one thing is clear: Canada is paying for the bridge. More specifically, through the reimbursement procedure, Canada bears full responsibility for the costs of land acquisition in Michigan. In that sense, it is not Michigan funds, but rather Canadian funds that are being spent on land acquisition. Certainly, no provision of Michigan's Constitution, or any Michigan statute, would require a legislative appropriation before Canadian funds are spent. As was the case in *Tiger Stadium Fan Club, Inc*, the revenues at issue are not generated through taxes, fees, or a legislative act. *Id*. at 449. Rather, the revenues come from Canada. Again, "the character of the revenues must still be considered." *Id*. Canadian funds are simply not subject to appropriation by Michigan's Legislature. Accordingly, no appropriation is necessary under the unique circumstances of this case.

The question then becomes whether the Legislature has nonetheless prohibited MDOT from using money to purchase land. This appears to be the crux of the Moroun entities' argument. The Moroun entities contend that through 2011 PA 63 and subsequent appropriations bills, the Legislature prohibited MDOT from spending any money on the GHIB project, save for money spent on "staff resources" that are fully reimbursed by Canada. This argument lacks merit. Since 2013, the appropriations bills have prohibited MDOT from "obligat[ing] the state to expend any state transportation revenue" on the GHIB project. See, e.g., 2013 PA 59, Art XVII, Part 2, § 384(1). But because all funds used by MDOT to acquire land are reimbursed by Canada, no state transportation revenue is being expended. Rather, Canadian funds are ultimately being used to acquire Michigan land. Thus, the Legislature's prohibition has not been violated.

The Moroun entities argue that this would render the sentence concerning staff expenditures surplusage. See, e.g., 2013 PA 59, Art XVII, Part 2, § 384(1). It is true that this Court should, when possible, avoid construing a statute in such a way that would render any part of the statute surplusage. *Benedict v Dep't of Treasury*, 236 Mich App 559, 567; 601 NW2d 151 (1999). But interpreting § 384(1) as generally allowing expenditures on the GHIB does not render this sentence concerning staff resources surplusage. As MDOT argues, the Legislature may simply have wanted to make clear that a particular category of expenses that are initially paid by MDOT would not be deemed expenditures of state transportation revenue (such that they would require an appropriation) so long as those expenditures are reimbursed by Canada. The language is not limiting; it does not purport to state (as the Moroun entities believe) that this, and only this,

category of expenditures is permitted. Nor would that make much sense. If, as the Moroun entities argue, "staff resources" are limited to the payment of salaries, wages, employee benefits, and the like,[14] the Legislature would in effect be authorizing the use of MDOT's staff for a project that cannot be consummated. Just as statutory language should not be interpreted in a way that renders any portion nugatory, this Court must also avoid interpreting such language in an absurd or illogical way. *Benedict*, 236 Mich App at 567.

Nor is it at all clear that funds spent on land acquisition do not fall within the concept of "staff resources." Section 384(1) has, since 2013, stated, "An expenditure for staff resources used in connection with project activities, which expenditure is subject to full and prompt reimbursement from Canada, shall not be considered an expenditure of state transportation revenue." 2013 PA 59; 2014 PA 252; 2015 PA 84; 2016 PA 268; 2017 PA 107; 2018 PA 207; and 2019 PA 66. According to the Moroun entities, "staff resources" are only staff expenses; i.e., wages, employee benefits, travel costs, and the like. This appears to come from the fact that until recently, § 385(2)(a) and (b) required MDOT to report certain costs, "including employee salaries, wages, benefits, travel, and contractual services, and what activities those costs were related to." See, e.g., 2018 PA 207. But the provisions do not purport to define "staff resources," and in fact, later in the reporting requirements, MDOT is required to report "reimbursements made by Canada . . . for expenditures for staff resources used in connection with project activities." 2018 PA 207, § 385(2)(d). If the

[14] As will be explained, the term "staff resources" is not defined, and it is not at all clear that the term must be limited in the way the Moroun entities argue it should be.

Legislature understood the term "staff resources" to include only "salaries, wages, benefits, travel, and contractual services," its use of these different terms in the same section would be redundant. Rather, the use of different terms would imply that they mean different things. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009). Even if one accepts that MDOT may only expend money on the GHIB for "staff resources," the Moroun entities have not made a persuasive argument that "staff resources" would not encompass land-acquisition costs.

Finally, it is hard to ignore that, since 2013, the Legislature has continually enacted the same language in §§ 384 and 385. That language clearly shows that the Legislature is fully aware of the GHIB. And through the reporting requirements of § 385, MDOT has kept the Legislature fully apprised of the fact that it has been acquiring property for the project and that MDOT is being reimbursed for those expenditures by Canada. Rather than enact any prohibition against this procedure, the Legislature has reenacted the same appropriations language every year. This pattern shows that the Legislature approves of MDOT's activities, including the procedures for acquiring land. While the Moroun entities (and amici curiae) characterize this type of analysis as the use of legislative acquiescence, we disagree. This is simply not a case in which the Legislature has sat silent in the face of a judicial decision. Rather, the Legislature has annually enacted appropriations language that demonstrates awareness and approval of MDOT's activities.

Ultimately, no appropriation is necessary because what is being spent is Canadian revenue, not Michigan revenue. The appropriations language relied on by the

Moroun entities does not prohibit MDOT from purchasing land if MDOT is fully reimbursed by Canada for those expenses. The Legislature has permitted this procedure. Therefore, the Moroun entities fail to demonstrate any reason to question the validity of the condemnations.

D. USE OF THE STATE TRUNK LINE FUND

The Moroun entities next argue that the reimbursement procedure just discussed is illegal because MDOT is using the state trunk line fund to spend money and receive reimbursement proceeds from Canada. We disagree.

We question whether this is a relevant challenge to the condemnations at issue. As explained in Part II(A) of this opinion, we are not persuaded by MDOT's justiciability challenge. But as explained in that part of this opinion, MCL 213.56 appears to contemplate two types of challenges that may be raised: challenges to the determination of necessity and challenges to the validity of the condemnation. The Moroun entities seem to claim that if any aspect of the Crossing Agreement or its implementation is invalid, the entire GHIB project is invalid. According to the Moroun entities, if the entire project is invalid and cannot go forward, then the condemnation is illegal and invalid.

We would tend to agree that if the entire project is invalid, the takings are unnecessary. Accordingly, a challenge that, if successful, would invalidate the entire GHIB project would seem to be a proper one to raise in a condemnation suit. For example, the challenge to the validity of the Crossing Agreement is a proper one to raise in this condemnation suit. Similarly, we believe that the challenge raised in the previous part of this opinion is properly raised in a

condemnation suit. Just compensation is an integral part of the condemnation power; without paying just compensation, land cannot be condemned. Const 1963, art 10, § 2. Thus, the challenge discussed in Part II(C) above—which challenges MDOT's ability to pay just compensation—is appropriately raised in this condemnation suit.

But the present challenge is different. Even if one assumes that the procedures being used to move money from Canada to MDOT are improper, we doubt that would render the entire project invalid. Perhaps MDOT would need to come up with a different way to move money about, but it would seem that the project could go on. So long as the project can move forward, the taking would remain necessary, and the condemnations valid. In other words, we do not believe that this challenge ultimately has relevance to the condemnation suit.

And on the merits, we are not persuaded that the reimbursement procedure is illegal. The Moroun entities first assert that placing Canadian reimbursement funds into the state trunk line fund violates MCL 18.1443, which provides, "Except as otherwise provided by law, all money received by the various state agencies for whom appropriations are made by a budget act shall be forwarded to the state treasurer and credited to the state general fund." MDOT and the trial court agree that the key language is "Except as otherwise provided by law . . . ." MCL 18.1443. MDOT argues, and the trial court concluded, that §§ 384 and 385 operate as just such an exception—one that allows reimbursement proceeds to go directly to MDOT and not into the general fund.

We agree with MDOT and the trial court. As has been discussed before, the Legislature has, through

§§ 384 and 385, authorized MDOT to spend money on the GHIB so long as that money is reimbursed by Canada. Nothing in the appropriations language indicates that reimbursement proceeds should go to the general fund. Rather, all indications are that reimbursement proceeds would go to MDOT. That, in essence, is the point: so long as MDOT's bottom line remains the same, it may go forward with the GHIB. The reimbursement process crafted by MDOT and Canada ensures that no state transportation revenue is expended for the GHIB—exactly as contemplated by §§ 384 and 385.

The Legislature has been aware of this process for years, but has not changed the appropriations language to state that reimbursement proceeds should be placed in the general fund. The Moroun entities and amici curiae argue that this Court should not use legislative silence to interpret the Legislature's intent. But we again point out that the Legislature has not been silent. It has spoken every year, and its words, as found in the various appropriations bills, have condoned MDOT's activities, including the fact that it is reimbursed by Canada for every penny that is spent by MDOT. Accordingly, there is no violation of MCL 18.1443, as another law authorizes MDOT to place reimbursement proceeds from Canada into the state trunk line fund and not the general fund.[15]

E. CANADA'S COLLECTION OF TOLLS

The Moroun entities contend that the Crossing Agreement is illegal because it permits the collection of

[15] The Moroun entities also argue that MDOT is in violation of MCL 18.1366 and Const 1963, art 9, § 17 by "relying on a financing mechanism that depends on funneling Canadian funds to the state trunkline fund, rather than the MDOT [sic] general fund. This is because there is

tolls by Canada. Specifically, the Moroun entities argue that MDOT lacks any statutory authority to agree to build an international toll bridge, as no legislation has authorized MDOT or any other administrative agency to impose tolls on the GHIB. The Moroun entities also argue that the tolling arrangement provided by the Crossing Agreement violates the Urban Cooperation Act (UCA), MCL 124.501 *et seq*. We disagree.

We first note that the trial court did not believe these arguments were proper necessity challenges because a dispute over the authority to toll had no bearing on MDOT's authority to condemn. The Moroun entities assert that the trial court was wrong in this regard because the necessity of a taking depends on the legality of the underlying project. According to the Moroun entities, if the tolling provisions of the Crossing Agreement are invalid, the entire agreement fails. This would in turn mean that the whole GHIB project is itself invalid. And if the entire project is invalid and cannot go forward, then the condemnation is illegal.

The Moroun entities make too many assumptions. If the tolling provisions of the agreement are indeed invalid, it is a significant leap to assume that the entire Crossing Agreement, and thus the entire project, are both illegal and void. Even if one assumes that the tolling provisions that currently exist are invalid, the parties to the Crossing Agreement (mainly Canada, as it has assumed financial responsibility for the project) may be able to devise a different funding mechanism that would allow the GHIB project to move forward. If so, the condemnation action is not invalid and the necessity of the taking still exists. Thus, it is not at all

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no appropriation for spending money received from Canada." As was discussed in Part II(C), there is no need for an appropriation because, ultimately, Canadian funds are being spent, not Michigan funds.

clear that this and other challenges concerning the collection of tolls are proper challenges to be made in this condemnation action. Rather, the Moroun entities appear to be raising collateral challenges to the Crossing Agreement that do not necessarily affect the condemnation itself.

Regardless, we cannot conclude that the tolling provisions of the Crossing Agreement are invalid. The Moroun entities contend that MDOT lacks authority to agree to build an international toll bridge absent approval by the Michigan Legislature because the Michigan Legislature "has never authorized MDOT or any other administrative agency to impose tolls on the GHIB." The Moroun entities have not demonstrated any legal error because tolls are not going to be collected in Michigan or by any Michigan agency. Article X, § 2 of the Crossing Agreement states that the Crossing Authority—the Canadian entity created specifically to design, construct, and maintain the GHIB—is entitled to collect "Canadian Crossing Tolls for payment of costs . . . ." Article X, § 3 states that the "Crossing Authority shall provide the means whereby users accessing the International Crossing from Michigan and returning to Michigan without leaving the International Crossing may do so without paying any Canadian Crossing Tolls." Article X, § 4 states that "[n]o Party may establish or collect tolls, fees or other charges for use of the Michigan Crossing or the Michigan Interchange."

In other words, under the Crossing Agreement, no tolls are to be collected by any Michigan party; tolls will only be collected by Canada. Those tolls will not be collected for use of the Michigan side of the bridge, but for use of the Canadian Crossing—the Canadian portion of the GHIB. Again, what is authorized by the

Crossing Agreement is the collection of "Canadian Crossing Tolls" by the Crossing Authority. The Crossing Agreement defines "Canadian Crossing Tolls" as "all tolls, fees or other charges for use of the Canadian Crossing." The Canadian Crossing is defined as "the bridge, plaza and approach *in Canada* included in the International Crossing Alignment, but not including the Windsor-Essex Parkway." (Emphasis added.) While the approval of the Michigan Legislature might be needed for MDOT to collect tolls in Michigan, Canada does not need the approval of the Michigan Legislature to collect tolls in Canada. For that simple reason, the Moroun entities' argument fails.

The Moroun entities argue that the reality of the situation is that if one pays a toll in Canada, he or she is paying for use of the entire bridge, not only the Canadian half. The average traveler may not understand the intricacies of the Crossing Agreement or the reasons it has been crafted that way, but the fact remains that the parties have agreed not to conduct any tolling on the Michigan portion of the bridge. Use of the Michigan side of the bridge (and indeed, the entire bridge, if one never leaves the Canadian Crossing) is free; tolls are only imposed for use of the Canadian portion of the bridge, and those tolls are only collected by Canada.

The Moroun entities argue that the arrangement does not comply with the UCA. Under MCL 124.504, public agencies of this state can exercise jointly with "a public agency of Canada . . . any power, privilege, or authority that the agencies share in common and that each might exercise separately." The Moroun entities argue that MDOT has no authority to toll on the GHIB, and therefore MDOT cannot agree to the joint exercise of tolling authority with Canada, because both parties

do not share the same power or authority. The argument lacks merit. Again, only Canada is collecting tolls, and it is doing so only on the Canadian portions of the GHIB. There is no joint exercise of powers; there is only the unilateral exercise of power, by Canada, to collect tolls. MCL 124.504 is of no relevance.[16]

The Moroun entities argue that by signing the Crossing Agreement, MDOT has helped create a toll bridge. Further, they note that there will be Michigan representatives on the board that approves toll rates. They then state: "MDOT and the other Michigan parties thus are essential participants in the tolling of the GHIB." The Moroun entities stop there, however, and do not explain what relevance that has. Again, only Canada will be exercising any tolling powers. MDOT may be helping to create a bridge that Canada will be able to toll, but that does not mean that MDOT is a participant in that tolling activity. The Moroun entities fail to explain how Michigan's involvement in the GHIB project transforms MDOT into a tolling party.

The Moroun entities argue that even if only Canada is viewed as exercising the power to toll, the UCA is still violated by the execution of the Crossing Agreement. The Moroun entities argue that the circuit court "never attempts to explain where MDOT gets the power to enter into an agreement with Canada that relies on Canada's power to toll, even if it is considered a unilateral exercise of Canadian power." Regardless of what the circuit court did or did not say, the UCA

[16] And again, we note that the United States Court of Appeals for the District of Columbia Circuit has taken the same position. See *Detroit Int'l Bridge Co*, 883 F3d at 900 (stating that, with regard to the tolling provisions of the Crossing Agreement and MCL 124.504, "[t]hose powers were granted to the Crossing Authority, which is a Canadian entity not subject to the [UCA]'s requirement for Michigan agencies").

authorizes MDOT's actions. Pursuant to MCL 124.505(1), "[a] joint exercise of power pursuant to this act shall be made by contract or contracts in the form of an interlocal agreement . . . ." The "joint exercise of power" in this case is the construction of an international bridge. Funding of that bridge, through the collection of tolls, is an aspect of that agreement. Pursuant to MCL 124.505(1)(a), an interlocal agreement may provide for "the manner in which the power will be exercised." There are a number of provisions of MCL 124.505(1) that allow an interlocal agreement to contain provisions regarding funding and allocation of costs. For example, MCL 124.505(1)(f) allows the parties to create a "method or formula for equitably providing for and allocating revenues, including . . . any other form of taxation, assessment, levy, or impost . . . ." Given that Canada is paying for the entire project, it is entirely equitable to give Canada the sole power to toll on the bridge. This is not the joint exercise of power, but rather part of the manner in which Michigan and Canada will jointly exercise their respective powers to construct a bridge, as set forth in the interlocal agreement.

The Moroun entities' argument essentially asks that every term of an interlocal agreement consists of powers that each entity could exercise alone. That makes little sense. For example, in MCL 124.505(1)(j), the UCA states that an interlocal agreement may provide for the "acquisition, ownership, . . . or sale of real or personal property." Certainly, Michigan has no power of its own to sell Canadian land, and vice versa. Nor would Canada have the authority to acquire Michigan land by condemnation. Thus, under the Moroun entities' arguments, an interlocal agreement could not contain provisions authorizing Michigan to acquire or sell Michigan land because Canada could

not exercise that same power, and vice versa. This all goes to show that the financing mechanism at issue in this case—tolling—must be viewed not as its own "joint exercise" of power, but rather as a term of an agreement explaining how the parties' joint exercise of power will be conducted. For these reasons, the Moroun entities have not shown that the tolling provisions are illegal.

F. RESTRICTING THE LEGISLATURE

As we will explain in more detail, the Crossing Agreement contains provisions that would require Michigan to pay some costs of the GHIB should Michigan's Legislature decide to impose tolls on the bridge in the future. The Moroun entities contend that these provisions are not permitted by the UCA and would tie the hands of the Legislature in the future. We disagree.

Once again, we question whether this is a proper challenge to the condemnation of the Moroun entities' property. It would seem that even if the Moroun entities are correct, this would not undermine the entire GHIB project. At most, one provision of the Crossing Agreement might be invalid and might require some renegotiation of the agreement. But that would not necessarily undermine the entire GHIB project, and would thus not render the taking unnecessary or the condemnation invalid. Again, this seems to be a collateral challenge that has no real relevance to the condemnation action.

This challenge is even further afield than some of the prior challenges because it relies on a circumstance that has not, and may never, come to fruition. Ultimately, the question in this case is whether the condemnation is valid *now*. The Moroun entities offer no evidence that Michigan has any intent to impose tolls on the GHIB. Given that the Moroun entities' argu-

ment concerns a future contingency that may never occur, we question how the issue could be properly raised in this condemnation suit. Presently, the Crossing Agreement prohibits collecting tolls on the Michigan side of the bridge, which is entirely consistent with both MDOT's and the Moroun entities' understanding of the law; all agree that absent legislative authorization, there can be no tolling by MDOT or any other Michigan agency on the Michigan side of the bridge. Thus, as of this moment, there is no legal problem. A problem would only potentially arise if the Legislature decides that it would like to toll on the bridge in the future. That possibility would not seem to undermine the validity of the taking in the present moment.

But regardless, we will address the merits of the argument. And on the merits, the Moroun entities have not demonstrated any legal problem with the Crossing Agreement. The Moroun entities claim that the agreement prohibits the Legislature from imposing a toll in the future. It does not. The Crossing Agreement does state that no party is permitted to "establish or collect tolls, fees or other charges for use of the Michigan Crossing or the Michigan Interchange." That provision simply recognizes that currently, the Michigan Legislature has not authorized tolling on the Michigan portion of the bridge.

As to what may be done in the future, the parties have created provisions planning ahead in the event the Legislature decides to collect tolls. In that event, the parties have agreed that Michigan will become responsible for half of the costs of the bridge, less revenues that have already been collected by Canada. Further, such tolls would be collected by the WDBA. Again, pursuant to the UCA, an interlocal agreement may contain provisions that prescribe methods for equitably allocating revenues. MCL 124.505(1)(f). That

is what the parties to the Crossing Agreement have done. We conclude that the provisions concerning tolling on the Michigan side of the bridge are valid and consistent with MDOT's authority under the UCA.

G. DOES THE GHIB VIOLATE MCL 252.52?

All agree that the GHIB will be a limited-access highway, and pursuant to MCL 252.52, commercial enterprises are generally banned from limited-access highways (although there are many exceptions). The Moroun entities argue that the GHIB will be a commercial enterprise because it will be "a toll bridge that will be operated by a for-profit private concessionaire requiring drivers to pay tolls in exchange for the right to cross the bridge." We disagree.

As with other tolling-related challenges, we question the relevance of this particular issue in the context of a condemnation suit. Again, even if the GHIB cannot operate as a toll bridge, that would not necessarily undermine the entire project; some other funding mechanism may be possible, and thus, the taking could still be necessary. But regardless, we address the issue on the merits.

Pursuant to Article II of the Crossing Agreement, titled "Purpose," the purpose of the Crossing Agreement is

> to provide a framework for the Crossing Authority established by Canada to, with the assistance as necessary, but not funding by, Michigan:
>
> (a) design, construct, finance, operate and maintain the International Crossing through the life cycle of the International Crossing and design, construct and finance the Michigan Interchange prior to the International Crossing Opening Date, under the oversight of the International Authority established by this Agreement with three mem-

> bers appointed by Canada and the Crossing Authority and three members appointed by the Michigan Parties, with funding as approved by Canada, through one or more Public-Private Agreements with one or more private sector Concessionaires procured through one or more competitive procurement processes; and
>
> (b) design, construct, finance and/or maintain the US Federal Plaza, with the agreement and funding as approved by US Federal Agencies and with any funding as approved by Canada, through one or more US Federal Plaza Public-Private Agreements with one or more private sector Concessionaires procured through one or more competitive procurement processes;
>
> in order to facilitate international trade and the efficient movement of legitimate goods and travelers between Canada and the United States of America; support the economies of Ontario and Canada and Michigan and the United States of America; and benefit the communities in and around Detroit and in and around Windsor.

At her deposition, Linda Hurdle, the Chief Operating Officer of the WDBA, explained that the winning bidder will, in all likelihood, include an amount in their bid that represents the bidder's profit. Along with designing and constructing the bridge, the private concessionaire will also maintain and operate the bridge in the future, and will be paid by Canada for those services as well. As part of the agreement with the concessionaire, the WDBA will continue to pay the concessionaire an agreed-upon amount at regular intervals for "operation [and] maintenance, as well as capital repayment." The concessionaire will collect tolls, but it will remit the entire amount collected to the WDBA. The concessionaire's profit will not depend on the amount of tolls collected.[17]

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[17] Since the record was developed and the matter was decided in the trial court, the private concessionaire has been selected.

We conclude that this is not a "commercial enterprise" prohibited by MCL 252.52(2). The statute does not define a "commercial enterprise." But there are some obvious cues to be taken from the surrounding statutory text. The provision at issue, MCL 252.52(2), states:

> The state transportation department shall allow only the installation of vending machines at selected sites on the limited access highway system to dispense food, drink, and other articles that the state transportation department determines appropriate. The state transportation department shall allow only the installation of vending machines at selected travel information centers. Following a 2-year trial period the state transportation department shall use its discretion with the advice of the commission for the blind to allow only vending machines at other locations on the limited access highway system. The vending machines shall be operated solely by the commission for the blind, which is designated as the state licensing agency under section 2(a)(5) of chapter 638, 49 Stat. 1559, 20 U.S.C. 107a. *Except as otherwise provided in this section, no other commercial enterprise shall be authorized or conducted within or on property acquired for or designated as a limited access highway*. The commission for the blind shall require evidence of liability insurance and monitor compliance as it pertains to only vending machines in the designated areas, holding harmless the state transportation department. [Emphasis added.]

Numerous exceptions to the prohibition against commercial activities on limited-access highways are carved out in the sections that follow, but none specifically exempts tolling on any structure. See MCL 252.52(3) through (11). These include such activities as the operation of facilities "for the sale of only those articles which are for export and consumption outside the United States" at the Blue Water Bridge and the International Bridge in Sault Ste. Marie, MCL 252.52(3) and (4); the

operation of customs brokering facilities at those locations, MCL 252.52(5); the distribution of free travel-related information at rest areas, MCL 252.52(7); the "installation, operation, and maintenance of commercial or noncommercial electronic devices and related structures . . . [that] are intended to assist in providing travel related information to motorists who subscribe to travel related information services, the public, or the state transportation department," MCL 252.52(9); the "use of logo signage within the right-of-way of limited access highways," MCL 252.52(10); and signs identifying nearby hospitals that provide 24-hour emergency care, MCL 252.52(11).

Looking at MCL 252.52(2), it seems fairly obvious that the types of "commercial enterprises" at issue are generally those that are engaged in the sale or advertising of goods and services. One thing is clear: no exception is made for the alleged "commercial" activity of construction and maintenance of a limited-access highway. The reason for that is obvious. The Legislature has simply not viewed the construction and maintenance of a roadway as a type of "commercial enterprise" that would require an exception under MCL 252.52.

Nor do we view the fact that tolls will be collected on the GHIB as all that important. For one, those tolls will be collected on the Canadian side of the bridge. As was explained previously, those tolls are not collected for use of the entire bridge, but for use of the Canadian portion of the bridge. A Michigan statute prohibiting a commercial enterprise in any particular area would seem entirely irrelevant; Michigan cannot regulate the use of Canadian land. And again, even presuming that MCL 252.52 could be applied in this instance, the Legislature apparently does not view tolling as a commercial activity. No exception is made for tolling

under MCL 252.52, despite the fact that other bridges (namely the Blue Water Bridge and International Bridge) collect tolls and would be considered limited-access highways. Beyond that, it is clear that the tolling that will be conducted is not "commercial." Tolls will be collected by the WDBA to pay for the cost of constructing the bridge and its ongoing maintenance. The purpose of building the bridge in the first place is not commercial; i.e., neither Canada nor Michigan intends to operate the bridge as any sort of a business. Rather, it is a governmental function. Cf. *Goodhue v Dep't of Transp*, 319 Mich App 526; 904 NW2d 203 (2017) (holding that for purposes of MCL 691.1413, the proprietary-function exception to governmental immunity, operation of the Blue Water Bridge, which is funded primarily by tolls, was not a proprietary function; tolls were collected so that the bridge could be operated on a self-sustaining basis). While this case does not involve the proprietary-function exception to governmental immunity, the underlying theme is the same: collecting tolls to pay for the construction and maintenance of a public bridge does not transform that bridge into a commercial enterprise.

Affirmed.

CAVANAGH, P.J., and M. J. KELLY, JJ., concurred.

STEPHENS, J., did not participate because she recused herself to avoid the appearance of impropriety. During oral argument both attorneys quoted from an opinion she had issued as judge of the Court of Claims involving some of the parties to the instant case on an issue before the court in this appeal. Neither party had cited the Court of Claims opinion in their briefs.

SHERMAN v CITY OF ST JOSEPH

Docket No. 348333. Submitted June 3, 2020, at Grand Rapids. Decided June 18, 2020, at 9:05 a.m.

William Sherman, Christopher Wellin, and the Fairways at Harbor Shores Association filed an action in the Berrien Circuit Court against the cities of St. Joseph and Benton Harbor, seeking a declaration that the intergovernmental conditional transfer of property by agreement entered into by the cities under 1984 PA 425 (Act 425); MCL 124.21 *et seq*., violated the City Income Tax Act (CITA), MCL 141.501 *et seq*., and MCL 168. 492 of the Michigan Election Law, MCL 168.1 *et seq*. In 2005, St. Joseph and Benton Harbor entered into an agreement under Act 425 in which St. Joseph conditionally transferred property within its city limits to Benton Harbor for a period of 20 years. According to the involved cities, the agreement was intended to allow the property to qualify for economic incentives to facilitate the property's redevelopment for residential and commercial purposes. The Act 425 agreement provided that (1) the property was still subject to St. Joseph's zoning ordinances and municipal services, (2) all residents of the property were residents of both St. Joseph and Benton Harbor for purposes of library and park privileges in either community, (3) individuals residing on the conditionally transferred property would continue to vote in St. Joseph, and (4) residents residing on the conditionally transferred property had to pay taxes to Benton Harbor for the duration of the agreement. A site-condominium project was developed on the conditionally transferred property. Sherman and Wellin purchased parcels on the property, and Fairways at Harbor Shores Association was the homeowners' association for the condominium project. In 2017, Benton Harbor's registered electors passed a tax initiative that required businesses and residents to pay a 1% tax on their income. Under the Act 425 agreement, the individual plaintiffs were not allowed to vote on the Benton Harbor tax initiative but were subject to the tax because they were considered residents for taxing purposes. Plaintiffs argued that because they were entitled to be registered electors of Benton Harbor but were excluded from voting in that city's election, forcing plaintiffs to pay the 1% income tax violated the CITA because the tax was not approved by all of the qualified

registered electors of Benton Harbor. Plaintiffs and defendants moved for summary disposition. The court, Dennis M. Wiley, J., granted summary disposition in favor of defendants, concluding that the Act 425 agreement did not violate the CITA or the Michigan Election Law. Plaintiffs appealed.

The Court of Appeals *held*:

MCL 124.22(1) provides that two or more local units of government may conditionally transfer property for a period of not more than 50 years for the purpose of an economic development project and that the conditional transfer of property is controlled by a written contract agreed to by the affected local units. Under Act 425, the agreement must contain specific provisions detailing which governmental unit has jurisdiction over the transferred area and how revenues will be shared. Specifically, under MCL 124.28, unless the contract specifically provides otherwise, the conditionally transferred property is, for the term of the contract and for all purposes, under the jurisdiction of the local unit to which the property is transferred. In addition, MCL 124.26(g) provides that the agreement may contain any other necessary and proper matters agreed upon by the participating local units. MCL 141.502a(b) provides that for a city to impose an excise tax on income under the CITA, the tax must be approved by the qualified and registered electors of the city. In turn, under MCL 168.492 of the Michigan Election Law, each individual who is a citizen of the United States, not less than 17½ years of age, a resident of this state, and a resident of the township or city is entitled to register as an elector in the township or city in which he or she resides. In this case, although the property was conditionally transferred from St. Joseph to Benton Harbor, in accordance with Act 425, the agreement otherwise provided that the property remained under the jurisdiction of St. Joseph, not Benton Harbor, with regard to voting rights. Thus, Act 425 expressly allowed St. Joseph to retain in that city the voting rights of the individuals who resided on the conditionally transferred property, and because the agreement conformed with Act 425, the retention did not violate the CITA. Plaintiffs did not challenge the constitutionality or validity of the election results. Plaintiffs received benefits from the Act 425 agreement and voted in St. Joseph elections under the premise that their long-term interests would be better served by voting in St. Joseph, the community to which the property would return when the agreement expired. The registered electors of Benton Harbor—which did not include the individual plaintiffs—approved the 1% tax on residents, and as residents of Benton Harbor for purposes of

taxation, plaintiffs were subject to that tax under the terms of the Act 425 agreement. Accordingly, the trial court correctly granted summary disposition in favor of defendants.

Affirmed.

Foster, Swift, Collins & Smith, PC (by *Laura J. Genovich*) for plaintiffs.

Laurie L. Wightman Schmidt for the city of St. Joseph.

Bloom Sluggett, PC (by *Christian K. Mullett*, *Jeffrey V. H. Sluggett*, and *Amy R. Jonker*) for the city of Benton Harbor.

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

SWARTZLE, J. The individual plaintiffs in this lawsuit vote in St. Joseph elections but are subject to Benton Harbor taxes. This unusual arrangement is a temporary one and arises under defendants' conditional transfer-of-property agreement. Plaintiffs do not take issue with their right to vote in St. Joseph elections, but they do contend that, because they cannot vote in Benton Harbor elections, they cannot be subject to Benton Harbor taxes. We conclude otherwise and hold that defendants' agreement is consistent with Michigan's conditional transfer-of-property law and that the agreement does not otherwise violate the state's tax or election laws. For these reasons and as more fully explained below, we affirm summary disposition in favor of defendants.

I. BACKGROUND

This case involves an agreement under the Intergovernmental Conditional Transfer of Property by Con-

tract Act, MCL 124.21 *et seq*. Because the statute was first enacted by 1984 PA 425, intergovernmental agreements under its authority are commonly referred to as "Act 425" agreements. The underlying purpose of an Act 425 agreement is to enable a local unit of government to facilitate an economic development project. See MCL 124.22(1); MCL 124.21(a).

In 2005, the cities of St. Joseph and Benton Harbor entered into an Act 425 agreement in which they agreed to the conditional transfer of property located within the boundaries of St. Joseph to Benton Harbor for a period of 20 years. According to St. Joseph and Benton Harbor, the conditionally transferred property was principally composed of former industrial sites with environmental contamination, and the agreement was intended to allow the property to qualify for economic incentives, such as those available under the Brownfield Redevelopment Financing Act, MCL 125.2651 *et seq*., to facilitate the property's redevelopment for residential and commercial purposes.

Under the terms of the Act 425 agreement, the zoning ordinances of St. Joseph continued to apply to the conditionally transferred property, and St. Joseph continued to provide municipal services, e.g., water, sanitary sewer, law enforcement, fire protection, fire-code administration and enforcement, construction-code administration and enforcement, and property-maintenance-code enforcement, to the property. Furthermore, the agreement provided that the conditionally transferred property would be treated as if it were within the jurisdictional limits of St. Joseph for the purpose of applying and enforcing all ordinances, rules, and regulations. Any residents of the conditionally transferred property would be "considered residents of both Benton Harbor and St. Joseph for purposes of library and park privileges in either community."

The current dispute centers on provisions of the agreement addressing taxation and voting. Under the agreement, individuals residing on the conditionally transferred property were entitled to continue voting in St. Joseph but were required to pay taxes to Benton Harbor for the duration of the agreement. Specifically, the agreement provides in relevant part:

> 2.2 Effect of Transfer. Except as otherwise specifically provided in this Agreement, the Conditionally Transferred Property shall, for all purposes, be within the jurisdiction of Benton Harbor and St. Joseph shall have no further jurisdiction over that property.
>
> * * *
>
> (d) Taxes. For the purposes of all taxation, including, without limitation, *ad valorem* real and personal property taxes, income taxes, hotel/motel tax, etc., the Conditionally Transferred Property shall be considered as being within the jurisdictional limits of Benton Harbor. . . .
>
> * * *
>
> (f) Voting. Any persons residing on the Conditionally Transferred Property shall be entitled to vote on the same basis as all other persons residing within the legal limits of St. Joseph. The parties recognize that because at the termination of this Agreement, the Conditionally Transferred Property will once again lie within St. Joseph's jurisdictional limits, the long-term interests of those registered electors who may reside on the Conditionally Transferred Property will likely be to have input into St. Joseph electoral matters. In addition, St. Joseph will be adopting, implementing and enforcing the ordinances and policies, including utility policies, affecting the Conditionally Transferred Property during the term of this Agreement. The parties therefore determined that, on balance, the interests of those registered electors who may reside on the Conditionally Transferred Property are more likely

> advanced by providing they are electors in St. Joseph during the term of this Agreement. If a court of competent jurisdiction determines that the voting rights of the registered electors residing on the Conditionally Transferred Property should be different than as provided in this provision, this provision shall be revised in accordance with such court's opinion and order and the order and the remainder of this Agreement shall be unaffected by such court's determination.

The agreement further contains detailed provisions regarding the sharing of revenues between the local units of government, including ad valorem property taxes, state and federal revenue sharing, and Act 51[1] funds.

After the agreement went into effect, a site-condominium project was developed on the conditionally transferred property. Plaintiffs William Sherman and Christopher Wellin purchased parcels on the property, and plaintiff Fairways at Harbor Shores Association was created as the homeowners' association affiliated with the site-condominium project, including the individual plaintiffs' parcels.

In 2017, Benton Harbor placed a tax initiative on the ballot for approval by the registered electors of the city. Under the Act 425 agreement, plaintiffs could not vote on the income-tax question because they were deemed electors of St. Joseph, not Benton Harbor, and yet, they would be subject to any approved tax because they were deemed residents of Benton Harbor for purposes of taxation. The Benton Harbor electors approved the income-tax question by a narrow margin. Accordingly, beginning in January 2018, Benton Harbor's income tax requires businesses and residents (including the individual plaintiffs) to pay a 1% tax on their income.

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[1] 1951 PA 51, as amended; MCL 247.651 *et seq*.

Plaintiffs sued six months after the income tax became effective. They contend that they are not subject to the income tax because the provisions of the Act 425 agreement that split their voting and taxing rights violated the City Income Tax Act (CITA), MCL 141.501 *et seq*. In essence, because they were not permitted to vote on the income-tax question, they are not required to pay income tax to Benton Harbor, according to plaintiffs. The trial court granted summary disposition in favor of defendants, and this appeal followed.

II. ANALYSIS

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 500 Mich 362, 372; 902 NW2d 293 (2017). "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." *Id*. Furthermore, statutory interpretation is a question of law, which we also review de novo. *Id*. at 372-373.

As an initial matter, plaintiffs argue that the trial court erred because it granted summary disposition to defendants on the ground that plaintiffs waived their claim. Our review of the record indicates that the trial court's grant of summary disposition to defendants was not based on waiver. The trial court's statements regarding any delay in the filing of this lawsuit or dilatory conduct by plaintiffs were merely dicta. Therefore, plaintiffs are not entitled to relief on this ground.

Moving to plaintiffs' primary argument, they maintain that the provisions in the Act 425 agreement regarding taxing and voting violate the CITA. They adamantly assert that they are not making a constitu-

tional claim but, rather, a statutory one, i.e., a violation of the CITA. Relatedly, plaintiffs do not challenge the results of the election. Accordingly, we focus on the language found in Act 425, the CITA, and the relevant provisions of the Act 425 agreement, and we do not consider any constitutional claim or challenge to the election.

Act 425 provides that two or more local units of government "may conditionally transfer property for a period of not more than 50 years for the purpose of an economic development project." MCL 124.22(1). This conditional transfer of property "shall be controlled by a written contract agreed to by the affected local units." *Id*. A contract under this act must provide, at a minimum, for the following:

> (a) The length of the contract.
>
> (b) Specific authorization for the sharing of taxes and any other revenues designated by the local units. The manner and extent to which the taxes and other revenues are shared shall be specifically provided for in the contract.
>
> (c) Methods by which a participating local unit may enforce the contract including, but not limited to, return of the transferred area to the local unit from which the area was transferred before the expiration date of the contract.
>
> (d) Which local unit has jurisdiction over the transferred area upon the expiration, termination, or nonrenewal of the contract. [MCL 124.27.]

Additional provisions may be set forth in the agreement, including "[a]ny other necessary and proper matters agreed upon by the participating local units." MCL 124.26(g). "Unless the contract specifically provides otherwise," the conditionally transferred property "is, for the term of the contract and for all

purposes, under the jurisdiction of the local unit to which the property is transferred." MCL 124.28.

As for the CITA, it provides, in pertinent part:

> Beginning January 1, 1995, a city shall not impose an excise tax on income under this act unless at least 1 of the following applies:
>
> * * *
>
> (b) The imposition of an excise tax on income under this act is approved by the qualified and registered electors of the city. [MCL 141.502a.]

Plaintiffs contend that the meaning of "qualified and registered electors of the city" in the CITA is further informed by § 492 of the Michigan Election Law, which provides:

> Each individual who has the following qualifications of an elector is entitled to register as an elector in the township or city in which he or she resides. The individual must be a citizen of the United States; not less than 17-1/2 years of age; a resident of this state; and a resident of the township or city. [MCL 168.492.]

With these statutory provisions in hand, plaintiffs make a four-fold argument. First, under Act 425, they were residents of Benton Harbor because the property was conditionally transferred to that city. Second, it follows therefore that they were entitled to be registered electors of Benton Harbor under Michigan election law. Third, a tax cannot be imposed under the CITA unless approved by the qualified and registered electors of Benton Harbor. Fourth, plaintiffs were precluded under the Act 425 agreement from voting in Benton Harbor elections. Therefore, because they were entitled to be registered electors of Benton Harbor but were excluded from voting in that city's elections, forcing plaintiffs to

pay the 1% residential income tax would violate the CITA because the tax was not approved by all of the qualified and registered electors of Benton Harbor. Put simply, no right to vote in Benton Harbor, no application of 1% tax on their income, under plaintiffs' reading of the relevant statutes and agreement.

While creative, we reject this reading. Act 425 authorizes local units of government to transfer property conditionally, by contract, for the purpose of an economic development project. MCL 124.22(1). The statute provides that an agreement between local units of government may address "[a]ny other necessary and proper matters agreed upon by the participating local units." MCL 124.26(g). The statute further states, "Unless the contract specifically *provides otherwise*," the conditionally transferred property "is, for the term of the contract and for all purposes, under the jurisdiction of the local unit to which the property is transferred." MCL 124.28 (emphasis added). Here, although the property was conditionally transferred from St. Joseph to Benton Harbor (and, ordinarily, residents of the property would have been able to vote in the latter's elections during the duration of an agreement), the Act 425 agreement "*provides otherwise*" with respect to voting rights. *Id*. (emphasis added). As recounted earlier, the agreement specifically provides that the conditionally transferred property remains under the jurisdiction of St. Joseph, not Benton Harbor, for purposes of voting rights. This provision in the agreement that "provides otherwise" is precisely the type of circumstance envisioned under Act 425.

As for the CITA, plaintiffs do not argue that the election results were generally invalid or unconstitutional, nor do they argue that the "qualified and registered electors of" Benton Harbor failed to approve

the tax. MCL 141.502a. Plaintiffs do not even argue that the outcome of the election would have been different if they had been permitted to vote in it. Rather, their argument is simply that because they were not permitted to vote on the tax, they cannot be forced to pay the tax. While not without rhetorical force, the argument lacks legal persuasion. Under the CITA, the application of a tax to an individual is not conditioned on whether that individual had the opportunity to vote on the tax—it is, rather, whether the tax was approved by the qualified and registered electors of the city. *Id*. And it is uncontested that Benton Harbor's 1% income tax on residents was so approved.

III. CONCLUSION

Plaintiff taxpayers purchased their property long after defendants executed the Act 425 agreement at issue here. Plaintiffs were on plain notice that, if they purchased the subject property and chose to live there, they would not be able to vote in Benton Harbor elections but would be subject to any tax on residents approved by that city. Plaintiffs have received the benefits that flowed from the Act 425 agreement (e.g., water, sewer, law enforcement, and fire-protection services), and they have been able to vote in St. Joseph elections under the premise that their long-term interests will be better served by voting in the community to which they will return when the agreement expires. Act 425 contemplates these types of trade-offs, and the specific trade-off here—vote in St. Joseph but subject to Benton Harbor taxes—does not violate Act 425, the CITA, or Michigan election law. In sum, having received the benefits under the Act 425 agreement, plaintiffs cannot avoid the lawful obligations clearly spelled out in that agreement.

Affirmed. Defendants, having prevailed in full, may tax costs under MCR 7.219(F).

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

PEOPLE v SPAULDING

Docket No. 348500. Submitted June 9, 2020, at Lansing. Decided June 25, 2020, at 9:00 a.m.

Brenton T. Spaulding was convicted following a jury trial in the Kalamazoo Circuit Court of aggravated stalking, MCL 750.411i, in connection with three communications he had with the victim, AA, in 2017. Defendant and AA were in a relationship from 2013 to 2015. The three communications to AA from defendant that formed the basis of the stalking charge included (1) a letter from him while he was in jail, (2) a voicemail message, and (3) a text message; defendant professed his love for AA in the communications and stated that he wanted to meet with her in order to pay back money he owed her. AA testified that the communications terrified and frightened her. To establish that AA's fear was reasonable, the prosecution sought to admit other-acts evidence under MRE 404(b) regarding four prior incidents in which defendant assaulted AA—one in 2013, two in 2015, and one in 2017, the latter of which resulted in his arrest and immediately preceded the three communications at issue. Defendant objected, but the court, Pamela L. Lightvoet, J., admitted the other-acts evidence. To further help the jury understand AA's reaction to the three 2017 communications, the prosecution proffered an expert who testified, without objection, about domestic violence and the effect such violence has on its victims. The jury convicted defendant as charged. Defendant appealed.

The Court of Appeals *held*:

1. MRE 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove a propensity to commit such acts. The rule permits the admission of any logically relevant evidence of other acts, even if that evidence also reflects on a defendant's character, so long as the evidence is not relevant solely to the defendant's character or criminal propensity. If requested, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper noncharacter purposes. Other-acts evidence may be excluded under MRE 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Under

MRE 401, evidence is relevant if it affects the likelihood that any fact of consequence is true, and all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. Other-acts evidence may be admissible without regard to MRE 404(b) if the other acts are so intertwined with the charged offense that they directly prove the charged offense or their presentation is necessary to comprehend the context of the charged offense. Other-acts evidence is also admissible to fill what would otherwise be a chronological and conceptual void regarding the events for the fact-finder. To establish the offense of aggravated stalking, M Crim JI 17.25 provides that the prosecution must establish, in part, that (1) the defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact with the victim; (2) the victim felt terrorized, frightened, intimidated, threatened, harassed, or molested; and (3) the defendant's conduct would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. In this case, the three communications in 2017 that formed the basis of the aggravated-stalking charge were not explicitly threatening. The other-acts evidence was necessary to establish why a reasonable person would have felt frightened by defendant's conduct under the circumstances. In addition, the prior acts of domestic violence were direct evidence of the aggravated stalking because it was those acts that made the 2017 communications a crime. Although the evidence was prejudicial to defendant, its probative value was not substantially outweighed by any unfair prejudice. Accordingly, the trial court did not abuse its discretion by admitting the other-acts evidence.

2. A defendant has the right to a properly instructed jury. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the facts support them. Jury instructions do not create error if they fairly present the issues for trial and sufficiently protect the defendant's rights. In this case, the jury was instructed that defendant was not on trial for the prior acts of domestic violence; that it had to find that defendant actually committed those acts before they could consider those acts in relation to the aggravated-stalking charge for which he was on trial; that the jury was not permitted to convict defendant solely on the basis of other bad conduct or convictions; and that the evidence had to convince the jury beyond a reasonable doubt that the defendant committed the alleged crime or find him not guilty. Although the instructions were imperfect in that they slightly deviated from the standard language of M Crim JI 3.4, M Crim JI 4.11, and M Crim JI 4.11a, they fairly presented the issues for trial and sufficiently protected the defendant's rights. Therefore, although defendant waived this

issue by expressly approving the jury instructions, there was no clear error in the trial court's instructions.

3. Effective assistance of counsel is presumed, and a defendant has the burden of establishing that trial counsel was not effective. A defendant must show that counsel's performance was objectively unreasonable and that counsel's deficient performance is reasonably likely to have affected the outcome of the proceedings. Defendant asserted that he was denied effective assistance when trial counsel (1) failed to determine whether defendant knowingly exercised his right to remain silent, (2) failed to request a hearing to contest the admissibility of the expert's testimony, and (3) failed to seek a jury instruction on the jury's limited use of other-acts evidence. There was nothing in the record to suggest that defendant had not acquiesced in the decision that he not testify, and there was no evidence that the outcome would have been different if he had. The expert's testimony regarding domestic abuse and the effect of such abuse on victims was relevant in that it offered an explanation for AA's counterintuitive behavior during and after her relationship with defendant. Counsel had no ground to request a hearing regarding the expert's qualifications or her testimony because expert testimony was admissible to explain that behavior with no need to analyze the scientific reliability of the information. The jury instructions regarding prior acts fairly presented the issues for trial and sufficiently protected defendant's rights. Because defendant's assertions were without merit, he failed to establish that he was denied effective assistance of counsel.

Affirmed.

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

John W. Ujlaky for defendant.

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

RONAYNE KRAUSE, J. A jury convicted defendant of aggravated stalking, MCL 750.411i. Defendant's conviction arose out of a course of conduct involving three

communications he made in late 2017 to the victim, AA. Defendant and AA had been in a dating relationship from 2013 to 2015, and defendant owed a substantial debt to AA, in part because AA had bailed defendant out of jail twice. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 3 to 10 years in prison. Defendant now appeals his conviction as of right. We affirm.

I. BACKGROUND

As already noted, defendant and AA were in a dating relationship between 2013 and 2015. The victim explained that defendant lived at her residence during that time, although "he was in and out of jail a lot." After the relationship ended, she "avoided him as much as possible but he kept coming around and doing weird things and banging on [her] windows at night and just stalking me." Those "weird things" included leaving "strange objects in [her] yard, stuffed animals and such" and arranging things into "pyramids." AA also explained that defendant had previously "hurt" her. Relevant to this appeal, she described four previous incidents from 2013, 2015, and 2017, involving defendant.

In December 2013, defendant came over to AA's residence seeking to "get rid of the people on the couch." There were no people on the couch, nor was anyone else in the residence. Defendant also put Christmas ornaments in the sink, put on AA's pink bathrobe, took the shower curtain out, asked AA to help him build a bonfire, wielded a baseball bat with a "look in his eyes," and informed AA that "Jesus Christ told him to smack [her]." Defendant proceeded to "smack" AA in her face with an open hand, whereupon AA called 911. One of the responding police officers described AA as visibly upset, and she described defendant as very erratic, speaking in

nonsensical terms, and talking about how he was told what to do by Jesus. The responding officer who transported defendant to jail on that occasion testified that during the trip, defendant stated that he had hit AA because "she had hit him first and that sometimes you have to slap a ho." Defendant compared AA to Satan and stated that AA was not able to control herself. AA explained that she stayed with defendant after the incident because defendant was very charismatic and apologetic and would tell AA constantly how much he cared about her. AA also explained that she got into the relationship with defendant shortly after her father had committed suicide, and defendant reminded her of her father in some ways.

The next incident to which AA testified occurred in March 2015, when she brought food to defendant at a house where defendant was working as a contractor. She explained that they both drank some alcohol and initially were having a good time. AA denied drinking enough to become intoxicated, but defendant drank considerably more, to the point AA believed he was intoxicated. Defendant started to become angry, apparently at first because the person for whom he was working opined that defendant was doing the work improperly. At some point, AA told defendant that she "was concerned about his drinking and that it's gonna kill him eventually"; however, defendant "just drank more." Defendant also accused AA of taking his wallet and dumped out the contents of her backpack. When AA tried to leave, defendant grabbed her by her hair and dragged her halfway down the stairs into the basement while she struggled to escape. Defendant's leg got caught in the process, causing AA to "tumble[] to the bottom and hit [her] face on the cement." AA testified that a portion of her hair was ripped out, her scalp and hands were bleeding, and she had scrapes and bruises

everywhere from the incident. She testified that by the time of trial, she "still ha[d] a big bump" on her forehead from hitting the concrete.

AA stated that when she got up from the fall, she grabbed her backpack, left the house, and called the police. AA explained that she remained in the relationship with defendant afterward because defendant was very emotional and told her that he was madly in love with her and that he was going to start taking his meds and quit drinking. Defendant also told AA that he was getting a check on the third of the month and that he would pay her the money he owed her then.

In May 2015, defendant showed up at AA's residence, screaming through the door. AA stated that she shouted back through the closed, locked door that she wanted defendant to leave. Defendant tried to enter through the back door but was unable to do so. Defendant then went to the front door, broke the glass, and entered AA's home. AA stated that she was shaking and scared. Defendant then picked up a shard of glass, held it to AA's neck, and told her, "I'm gonna kill you now." Defendant did not carry out this threat or actually cut AA, but AA was nevertheless frightened. Defendant eventually let AA go, after which she called the police. Defendant stayed in AA's home until the police arrived. Responding officers described AA as frantic, scared, and very timid. A neighbor testified that AA was very shaken, very stressed out, and seemed scared. AA said that she remained with defendant after this incident because defendant was remorseful, told her that he loved her, and wanted to get married. Defendant also said that he would pay back the money that he owed her.

The final prior incident to which AA testified occurred on May 22, 2017. AA stated that defendant

began banging on her door, she shouted to him to leave her alone or she would call the police, and minutes later defendant was in the bushes in her front yard next to her living room window. AA stated that defendant had a big wooden staff with a dead cat on it, and he went around her house banging on all of her windows. AA stated that defendant made her feel afraid and that she called the police. A responding officer testified that AA was very distraught, shaking, and very nervous. As a consequence of the May 22, 2017 incident, defendant was arrested for, charged with, and convicted of stalking.

As noted, during their relationship, defendant accrued considerable debt to AA. AA explained that she "got him out of jail twice for drunk drivings [sic] which were $5,000 each, as well as giving him [her] credit card and he ran it up all the way." Defendant promised to pay her back for the bail bonds and credit-card debt. On May 31, 2017, while defendant was incarcerated for the May 22, 2017 incident, AA wrote a letter to defendant at the jail, requesting payment of a portion of that debt. The letter has not been provided to us, but AA read it to the jury as follows:

> I just got done donating plasma to pay your credit card bill. My arm hurts, I'm weak. I—if you could pay $6,000 for the two times I got you out of jail, I will not pursue you with court hearings, otherwise you'll be going to jail for stalking and trespassing. Why would you put a dead cat skull on my window and bang it around? I broke up with Myron or he would have beat you up. You need help. I will continue to pray for you. I really wanted to get married and live on a lake, a pontoon and a Doberman dog. You didn't just fuck up your life, you fucked up mine for four years. A bad man you are. I wish you were a better man like I deserve. [AA].

AA admitted that she did not say so explicitly, but she explained that she expected defendant to either send her the money or have someone else deliver it to her.

The first of defendant's actions upon which his current conviction is based occurred on October 26, 2017, when AA received a letter from defendant while defendant was in jail. AA explained that she did not open the letter because it brought back all the negative times that she and defendant had shared together and that receiving the letter made her feel afraid. Instead, AA contacted the police. AA turned the unopened letter over to the police, who verified that it had been sent by defendant from jail.

Next, AA received a voice mail from defendant on November 12, 2017. In the voice mail, defendant stated that he was madly in love with AA and that he wanted to pay her back the money that he owed her. Defendant wanted AA to meet him at the Circle K.[1] He told her that she could call him back if she wished to and that if she did not wish to have defendant contact her anymore, he would not. Further, defendant stated that he had no ill feelings toward AA, that he was not stalking her, and that he loved her. AA testified that the voice mail made her feel frightened because she thought that defendant was going to come and hurt her again. On the basis of this fear, AA contacted the police. The responding officer described AA as nervous, anxious, distraught, upset, and concerned—not smiling, happy, or giddy. The officer confirmed that defendant identified himself as the caller in the voice mail.

AA then sought a personal protection order (PPO) against defendant because she felt afraid. The parties stipulated that the PPO was signed by the judge on November 13, 2017, but it was not served on defendant until December 7, 2017. On December 6, 2017, defendant sent AA a text message, asking her to meet him at

[1] The Circle K is a store that was located down the street from AA's residence.

the Circle K so he could give her the money that he owed to pay her credit card. AA said that when she received defendant's text message, she was frightened because he was contacting her in violation of the PPO she had in place against him, it was his way of hurting her again, and he had hurt her many times in the past. When AA received defendant's text message, she immediately called the police. The responding officer described AA as "a little timid . . . , almost afraid." The officer also noted that AA "had stated multiple times while [the officer] was there that [defendant] had been coming around her house and contacting her and she didn't want, she was even afraid to report the other instances to [the] police." As noted, AA explained that at that point, defendant had recently gotten out of jail and done "weird things" in her yard. She observed defendant seemingly attempting to make a cross (which fell over) out of bricks and stones, and "then he put stuffed animals around it."

Although AA believed defendant was in violation of the PPO, defendant was not actually served until the next day. AA conceded that defendant did not explicitly state any physical threats or otherwise indicate that he was going to harm her or come to her house. Rather, AA stated, the voice mail and text message she received from defendant were along the lines of, "I love you, I miss you, and I want to pay you money back." However, AA noted that after each of the previous incidents during their relationship, defendant would also say he was sorry, describe how he felt positively about her, and discuss repaying her and stopping drinking.

Constance Black-Pond, a licensed social worker and a licensed professional counselor with extensive training in victimology and trauma, was qualified without

objection "as an expert in domestic violence and its effect on the victims of domestic violence." Black-Pond explained that domestic violence was generally about needing control and power over another person and possibly also their family, environment, and resources. She further explained that the violence and controlling behavior itself tended to be progressive and would escalate—generally starting with irritability and ending with physical violence or other severe conduct. Offenders generally followed up with a "honeymoon stage" by expressing a great deal of regret and love and making promises of improvement or seeking help, again to keep the victim from leaving. Ultimately, the offender would return to more direct violence and control. Black-Pond noted that these cycles might occur at varying rates from hours to months, and they might even be "blurry" or overlap. Offenders would generally become even more dangerous and aggressive whenever it appeared that their method of control was no longer working, such as a victim obtaining a protective order or making clear steps to leave. Offenders generally also posed a danger to anyone else related to their victim, such as the victim's children, and to anyone who might try to intercede or help the victim.

Black-Pond explained that it was "extremely common" for people in relationships involving domestic violence to remain with the abuser for "multiple reasons." For example, many victims remained in such relationships because they believed it would harm their children more to leave than to stay. Victims might not know what to do or where to go because by then their relationships with anyone other than the abuser have been degraded and they might not be capable of financial independence; furthermore, victims generally had some awareness that efforts to leave could result in them being killed or seriously harmed more than

they would be otherwise. Victims might also believe they could control the relationship to some degree, and the "honeymoon phases" tended to be extremely enjoyable and hope-inducing. Abusers generally are very skilled at knowing, and preying upon, their victims' particular emotional needs and vulnerabilities. Finally, victims might have their self-esteem destroyed to the point of believing they deserved the abuse.

Black-Pond finally explained that what defense counsel called "battered woman's syndrome" was aligned with post-traumatic stress disorder.[2] She also explained that one survival mechanism for abuse, so that a victim could do things like take care of their children without being overwhelmed and terrified, was to distort their beliefs to "minimize" how bad the situation is. There was no real difference between adult and child victims of abuse because they both "often find themselves in a hypervigilant state where they are always expecting something to happen and that is a natural response to chronic violence." She observed that this was an adaptive defense mechanism to keep a dangerous situation seemingly manageable.

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[2] This has also been referred to as "battered spouse syndrome." See *People v Wilson*, 194 Mich App 599, 600-604; 487 NW2d 822 (1992). However, the better term would actually be "battered *partner* syndrome." See *State v Cook*, 131 Wash App 845, 847, 852-853; 129 P3d 834 (2006) (emphasis added), overruled in part on other grounds by *State v Magers*, 164 Wash 2d 174, 185-186; 189 P3d 126 (2008) (holding that prior acts of domestic violence are admissible to enable the jury to assess both a victim's state of mind and general credibility). Although out-of-state cases are not binding, they may be persuasive. See, e.g., *People v Christel*, 449 Mich 578, 588 n 15; 537 NW2d 194 (1995) (relying on Oklahoma precedent to hold that, consistent with Black-Pond's testimony, "battered woman syndrome is a subcategory of posttraumatic stress disorder"). Because abusive conduct and victimization are neither gender-specific nor exclusive to married couples, the broader term "battered partner syndrome" used by the Court of Appeals of Washington is the most appropriate.

Although abusers are "often . . . very aware of the weaknesses or vulnerabilities or the needs of the victim" and would manipulatively target those needs, victims might or might not have any awareness or understanding of the manipulation.

II. ADMISSION OF OTHER-ACTS EVIDENCE

Defendant first argues that the trial court abused its discretion by allowing the admission of AA's testimony regarding the four prior incidents because this other-acts evidence was more prejudicial than probative under MRE 404(b). We disagree.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

We review de novo as a question of law whether evidence is admissible under a rule or statute, but we review for an abuse of discretion the trial court's ultimate decision whether to admit the evidence. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). An evidentiary error is only grounds for reversal if the record reveals that the error was more likely than not outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

"MRE 404 governs the admissibility of other-acts evidence. The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts." *Denson*, 500 Mich at 397. Thus, MRE 404(b) is a rule of inclusion, meaning it permits the admission of any logically relevant evidence "*even if* it also reflects on a defendant's character," so long as the evidence is not "relevant *solely* to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010). However, "upon request,

the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes." *Id*. at 616.

Any such evidence is also subject to exclusion under MRE 403 if the probative value of that evidence is " 'substantially outweighed by the danger of unfair prejudice.' " *Mardlin*, 487 Mich at 616, quoting MRE 403. Evidence is relevant if it affects the likelihood that any fact of consequence is true. MRE 401. "It is well established in Michigan that all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Any relevant evidence will intrinsically be prejudicial to some extent; "unfair" prejudice exists when extraneous circumstances like shock, jury bias, sympathy, or anger pose a risk that the jury will give the evidence weight disproportionate to its rational, probative value. See *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005).

Other-acts evidence may be admissible without regard to MRE 404(b) if the other acts are so intertwined with the charged offense that they directly prove the charged offense or their presentation is necessary to comprehend the context of the charged offense. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996); *People v Jackson*, 498 Mich 246, 263-265; 869 NW2d 253 (2015). Such evidence is also admissible to fill what would otherwise be "a chronological and conceptual void regarding the events" to the finder of fact. *People v Starr*, 457 Mich 490, 500-502; 577 NW2d 673 (1998) (quotation marks omitted).

B. ANALYSIS

The other-acts evidence in this matter, consisting of AA's description of the four incidents in 2013, 2015,

and 2017, was properly admitted. Defendant was charged with aggravated stalking, which required the prosecution to establish, in part, that the defendant "committed two or more willful, separate, and noncontinuous acts of unconsented contact" with AA; that AA felt "terrorized, frightened, intimidated, threatened, harassed, or molested"; and that defendant's conduct "would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." M Crim JI 17.25; MCL 750.411i(1). Evidence of the aggravated-stalking charge—i.e., defendant's three communications—did not *explicitly* convey any threats. It was impossible to comprehend the *significance of* those communications without an understanding of the history of the relationship between AA and defendant. Without knowing that history, the communications would have been innocuous. The prior incidents were critical to understand why a reasonable person would have felt (and AA did feel) scared by defendant's conduct under the circumstances.[3] Furthermore, it is clear that defendant's prior acts of domestic violence were direct evidence of his aggra-

[3] The "reasonable person" or objective "reasonableness" standard generally calls for consideration of the circumstances or situation. See, e.g., *People v Wright*, 89 Mich 70, 86; 50 NW 792 (1891); *Moning v Alfono*, 400 Mich 425, 435-436; 254 NW2d 759 (1977); *People v Hanna*, 459 Mich 1005 (1999); *People v Riddle*, 467 Mich 116, 129-130; 649 NW2d 30 (2002). The terms "reasonable individual" and "reasonable person" are essentially synonymous and have been treated by this Court as interchangeable. See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 547; 775 NW2d 857 (2009); *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 208 Mich App 248, 265; 527 NW2d 533 (1994). As we discuss, in cases like this, the history of interactions between an abuser and victim is so intertwined with the charged offense that the history must constitute part of the "circumstances." Thus, the "reasonable individual" in the jury instruction is a reference to the familiar and venerable standard of a reasonable person similarly situated to the victim.

vated stalking: it was literally his own prior misconduct that *made* the communications at issue a crime.

The evidence of defendant's prior conduct does speak about his character. However, because it was introduced for a proper purpose and was relevant, the fact that it could *also* give rise to inferences about defendant's character does not require its exclusion. The evidence had probative value, and we find no indication that the jury would have found it sufficiently shocking to decide the case on the basis of improper considerations. Therefore, we cannot find any danger that the evidence unfairly prejudiced defendant, much less that its probative value would be *substantially* outweighed by any such danger. MRE 403.

Accordingly, the trial court did not abuse its discretion when it admitted the other-acts evidence concerning the events that occurred in 2013, 2015, and 2017. This evidence was admitted for its relevance in proving defendant's connection to aggravated stalking; it did not rely on an improper "character-to-conduct inference." *Jackson*, 498 Mich at 275-276.

III. INSTRUCTIONAL ERROR

Defendant argues that the trial court erred by failing to instruct the jury on the limited use of other-acts evidence, thereby depriving defendant of a fair trial. We disagree.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Generally, "[t]his Court reviews de novo claims of instructional error." *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). However, unpreserved claims of instructional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460

Mich 750, 764-765; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, citation, and brackets omitted). A party's explicit and express approval of jury instructions as given waives any error and precludes appellate review. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

A defendant has the right to "a properly instructed jury . . . ." *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995). "[T]he trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *Id*. at 80. Jury instructions are reviewed "in their entirety to determine if there is error requiring reversal." *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Thus, "[e]ven if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id*.

B. ANALYSIS

In this case, in pertinent part, the trial court instructed the jury as follows:

> The prosecution has introduced evidence of claimed acts of domestic violence by the defendant for which he is not on trial. There is also evidence in Exhibits 1, 2 and 3 that the defendant has been convicted of crimes in the past for which he is not on trial. Before you may consider such alleged acts or convictions as evidence against the defendant, you must first find that the defendant actually committed such acts. If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed aggravated stalking for which he is now on trial.
>
> You must not convict the defendant here solely because you think he is guilty of other bad conduct or convictions. The evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

Defense counsel did express approval of these instructions and, indeed, helped create them. Nevertheless, we will consider this issue because, as we discuss later in this opinion, defendant raises a challenge to counsel's efficacy partly on this basis and, in any event, we would find no error warranting reversal even if this issue had been fully preserved.

The instructions cautioned the jurors that defendant was not on trial for the other acts of domestic violence and that they must find that defendant actually committed those other acts before they could consider them in relation to the aggravated-stalking charge for which he was then on trial. Additionally, the trial court reiterated that the jury was not permitted to convict defendant solely on the basis of "other bad conduct or convictions" and that the evidence had to convince the jury "beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty." These instructions might have been somewhat imperfect, deviating slightly from the standard language of M Crim JI 4.11a (other acts of domestic

violence), by including language from M Crim JI 3.4 (impeachment by prior conviction), stating that "[t]here is also evidence in Exhibits 1, 2 and 3 that the defendant has been convicted of crimes in the past for which he is not on trial." Defendant argues that the instructions should have included at least some portions of M Crim JI 4.11 (limiting consideration of evidence of other offenses) by stating that the jury was not permitted to use the other acts to conclude that defendant was a bad person or had a propensity to commit crimes. However, as discussed, evidence of defendant's other acts was critical, *direct* evidence of defendant's commission of aggravated stalking.

Therefore, the instructions as given "fairly presented the issues for trial and sufficiently protected the defendant's rights." *Canales*, 243 Mich App at 574. Accordingly, despite the slight deviation from the standard jury instructions, we would find no clear error in the trial court's instructions even if this issue had been fully and properly preserved.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel provided ineffective assistance by (1) failing to determine that defendant knowingly exercised his right to remain silent, (2) failing to request a *Daubert*[4] hearing to contest the admissibility of Black-Pond's testimony, and (3) failing to seek a jury instruction on the jury's limited use of other-acts evidence. We disagree.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and

[4] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Constitutional questions of law are reviewed de novo, while findings of fact are reviewed for clear error. *Id*. This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Hoang*, 328 Mich App 45, 63; 935 NW2d 396 (2019). Counsel is presumed to have been effective, and a defendant has the burden of establishing that counsel was not effective. *People v Anderson*, 322 Mich App 622, 628; 912 NW2d 607 (2018). Thus, defendant must show that counsel's performance was objectively unreasonable and that counsel's deficient performance is reasonably likely to have affected the outcome of the proceedings. *Id*., citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

B. RIGHT TO NOT TESTIFY

Defendant argues that defense counsel never informed him of the aspects of testifying or exercising his right to remain silent and that he would have gladly testified about his innocence had he been given the opportunity. Defendant contends that because there is no indication on the record that he either knowingly exercised his right to remain silent or had discussed it with trial counsel, this bolsters his claim.

A criminal defendant has a constitutional right to testify in his own defense. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id*. If a defendant "expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection."

People v Simmons, 140 Mich App 681, 685; 364 NW2d 783 (1985).[5] However, if a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *Id*. (quotation marks and citation omitted). Furthermore, "there is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify[.]" *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

The record contains no evidence that trial counsel advised or instructed defendant not to testify, precluded defendant from testifying, or verified whether defendant wished to testify. Defendant has not provided us with any offer of proof as to what his testimony might have been. However, he does argue that he would at least have been able to tell "his side of the story," which has significant intrinsic value to anyone. Nevertheless, the deprivation of a criminal defendant's right to testify is not structural, so it is subject to harmless-error analysis. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535-538; 560 NW2d 651 (1996). Defendant provides no basis for even suspecting that the outcome *might* have been different if he had testified. Furthermore, the right *not* to testify is self-executing; in contrast, the right *to* testify must be affirmatively claimed. *Simmons*, 140 Mich App at 684-685. Simply failing to express a wish to testify, if there was an opportunity to do so, is sufficient to "acquiesce" in trial counsel's decision not to call a defendant to the stand. *Id*. at 685. Defendant made no interjection when counsel rested, nor did he mention any desire to testify during his allocution at sentencing.

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[5] Although published opinions of this Court decided before November 1, 1990, are not strictly binding, MCR 7.215(J)(1), they are nevertheless precedential, MCR 7.215(C)(2), and they are thus afforded significantly more deference than would be given to unpublished cases. *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019).

Clearly, even if not required, the wiser practice might have been for counsel to make a record of asking defendant whether he wished to testify. Nevertheless, this record suggests that defendant acquiesced in not testifying, and in any event, there is simply nothing to suggest that the outcome might have differed if he had testified. We cannot find that defendant received ineffective assistance of counsel on this basis.

C. FAILURE TO REQUEST A *DAUBERT* HEARING

Defendant contends that defense counsel was ineffective for failing to request a *Daubert* hearing and for consenting to the admissibility of the prosecution's expert witness, Black-Pond. We disagree.

Generally, expert testimony is not admissible unless the trial court first determines that the expert's theories, methodology, and underlying data are reliable under MRE 702, which in turn, incorporates the standards of reliability that the United States Supreme Court established in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-781; 685 NW2d 391 (2004). The trial court is not tasked with determining whether the proposed expert's evidence is true or universally accepted. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). The evidence must also have some rational benefit to the trier of fact's ability to resolve a fact at issue in the matter. *Daubert*, 509 US at 591-592. A "*Daubert* hearing" is simply an evidentiary hearing under MRE 702 and MCL 600.2955 specifically to make the threshold determination "that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science." *Chapin*, 274 Mich App at 139.

The gravamen of defendant's argument appears to be that Black-Pond's testimony and expertise regarding domestic violence and how victims and abusers tend to act and react was irrelevant to defendant's charge of *stalking*, but the jury would have nevertheless regarded her testimony as devastating to the defense. As discussed earlier, defendant's stalking was inextricably intertwined with his history of abusive behavior toward AA. *Sholl*, 453 Mich at 742; *Jackson*, 498 Mich at 263-265. Furthermore, defendant raises no serious challenge to Black-Pond's qualifications and expertise, nor do we think he could, and it is well-established that battered-partner syndrome "is from a recognized discipline." *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995), citing *People v Wilson*, 194 Mich App 599, 603; 487 NW2d 822 (1992).[6] It has also long been recognized that the behavior of victims of varying kinds of trauma often appears irrational and confusing to most people; and expert testimony is admissible and appropriate to explain that behavior with no need to engage in an analysis of scientific reliability. *People v Beckley*, 434 Mich 691, 715-716, 719-721; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.); *id*. at 734 (BOYLE, J., concurring); *Christel*, 449 Mich at 590-591; *People v Peterson*, 450 Mich 349, 369; 537 NW2d 857 (1995).

Consequently, counsel would have had no grounds for requesting a *Daubert* hearing into the scientific reliability of Black-Pond's testimony. Furthermore, Black-Pond's testimony was relevant and necessary because an understanding of the psychological and practical dynamics between abusers and victims cannot be presumed to be common knowledge. As a consequence, jurors might naturally question why a victim

[6] See also note 2 of this opinion.

would remain with an abuser. In turn, they might then also question the victim's credibility or draw inaccurate conclusions about the victim's motives or intentions. Credibility of a witness is almost always at issue, and, thus, evidence bearing on that credibility is always relevant. *People v Lyons*, 51 Mich 215, 216; 16 NW 380 (1883); *In re Dearmon*, 303 Mich App 684, 696-697; 847 NW2d 514 (2014). Black-Pond's expert testimony offered an explanation for why AA's counterintuitive behavior both during and after her relationship with defendant was, in fact, normal and expected for a victim of abuse.[7] Any request for a *Daubert* hearing would have been meritless, and the failure to request one cannot, therefore, be a basis for finding counsel ineffective. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Additionally, defense counsel's failure to object may have been based on trial strategy. During cross-examination, defense counsel brought up the topic of battered-partner syndrome and elicited Black-Pond's agreement that abuse victims "often find themselves in a hypervigilant state where they are always expecting something to happen . . . ." During closing argument, defense counsel directly conceded that AA clearly had suffered emotional distress but pointed out that the jury instruction that would be given, M Crim JI 17.25(3) and (5), explicitly required "that the contact would cause a *reasonable individual* to suffer emotional distress" or feel afraid. (Emphasis added.) Coun-

[7] We note that Black-Pond did *not* render any opinion, implicitly or explicitly, regarding whether AA actually had been abused or defendant had actually committed any abuse, nor did she in any way vouch for AA's credibility. Her testimony was properly limited to discussing certain relevant aspects of victim-abuser dynamics in general. Furthermore, reference to "syndrome" evidence was brought up by defense counsel. See *People v Thorpe*, 504 Mich 230, 254-259; 934 NW2d 693 (2019).

sel observed that defendant was not a likable person and had done many inappropriate and "despicable" things but that the case was simply about a letter, a voice mail, and a text message that would not be particularly troubling to a reasonable person. This is neither an unsound trial strategy nor an unreasonably calculated risk, even though it did not succeed. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001); *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994).[8]

We therefore conclude that trial counsel did not render ineffective assistance by acquiescing in BlackPool's expertise and in the admission of her expert testimony.

D. FAILURE TO SEEK LIMITING JURY INSTRUCTION

Defendant finally argues that the jury instruction given regarding defendant's prior convictions and the other-acts evidence was sufficiently erroneous so as to deprive defendant of a fair trial. We disagree. As we have already discussed, we find no error in the instructions as given. Therefore, defendant cannot show that the outcome of the proceedings would have been different if counsel had requested a "better" jury instruction. Consequently, because defendant failed to establish prejudice, we cannot find counsel ineffective on this basis. See *Anderson*, 322 Mich App at 628.

V. CONCLUSION

We recognize that the instructions given to the jury could conceivably have been better, and trial counsel might have been wiser to confirm on the record

[8] For the reasons discussed in note 3, however, this argument is somewhat less legally sound than it was tactically sound.

whether defendant wished to testify. However, the instructions fairly presented the law and issues to the jury, and defendant cannot establish any prejudice from his failure to testify. In all other respects, defendant has not established error by the trial court and trial counsel rendered effective assistance in a very difficult case.

Affirmed.

BORRELLO, P.J., and RIORDAN, J., concurred with RONAYNE KRAUSE, J.

PEOPLE v CARLSON

Docket No. 344674. Submitted June 9, 2020, at Lansing. Decided June 25, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 868 (2021).

Daniel S. Carlson was convicted following a jury trial in the Mecosta Circuit Court of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(c). Carlson was the manager of a resort in Mecosta County, and the victim attended a party at the resort in 2016. After the party, when the victim was so intoxicated that she could not speak, move, or feel, Carlson digitally penetrated her vagina. The trial court, Kimberly L. Booher, J., sentenced defendant to serve 5 to 15 years in prison. Defendant appealed his sentence.

The Court of Appeals *held*:

1. Under MCL 777.40(1)(a), 15 points should be assessed for Offense Variable (OV) 10 if predatory conduct was involved. Predatory conduct is defined as preoffense conduct directed at a victim for the primary purpose of victimization. In *People v Cannon*, 481 Mich 152 (2008), the Michigan Supreme Court held that in determining whether 15 points should be assessed for OV 10, the sentencing court should consider (1) whether the offender engaged in conduct before the commission of the offense, (2) whether the conduct was directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, and (3) whether victimization was the offender's primary purpose for engaging in the preoffense conduct. In this case, there was ample evidence that the victim was intoxicated at the time of the incident and therefore had a readily apparent susceptibility to injury. Testimony indicated that defendant's preoffense conduct included lingering around the condominium at the resort where the victim and her fiancé were staying with two other friends and looking at the victim when she was in the shower before the assault. A reasonable inference from the evidence was that victimization was defendant's primary purpose for engaging in the preoffense conduct.

2. Twenty-five points should be assessed under OV 13, MCL 777.43(1)(c), if the offense was part of a pattern of felonious

criminal activity involving three or more crimes against a person. The trial court in this case assessed 25 points for OV 13 on the basis of additional charges that were pending against defendant and testimony regarding a sexual touching in Mount Pleasant for which defendant had not been charged. Defendant argued that the uncharged incident in Mount Pleasant should not have been used by the court in scoring OV 13. The Mount Pleasant incident was described during a pretrial hearing regarding other-acts evidence and was adequate to show by a preponderance of the evidence that defendant committed fourth-degree criminal sexual assault (CSC-IV) against the alleged victim. While MCL 750.520e(2) provides that CSC-IV is a misdemeanor, the Code of Criminal Procedure, MCL 760.1 *et seq*., which encompasses the sentencing guidelines, defines a felony for purposes of the act as a violation of penal law for which an offender may be punished by imprisonment for more than one year. Because CSC-IV is punishable by up to two years in prison, the trial court properly relied on the Mount Pleasant incident in assessing 25 points for OV 13.

3. The trial court assessed 10 points for OV 9, finding that defendant had placed the victim's friend, who had attended the party at the resort with the victim, in danger of physical injury when he committed CSC-III against the victim. The victim's friend was also intoxicated after the party. Defendant approached her when she was vomiting in the bathroom, wearing only her underwear, and tried to steer her into an unoccupied bedroom. The court properly relied on the fact that the victim's friend was staying in the same condominium unit where the assault occurred and that the victim's friend had an inappropriate encounter with defendant in assessing 10 points for OV 9.

4. In reviewing a sentence for reasonableness, the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the recommended guidelines minimum sentence range. The sentencing court must consider the offender's background and the nature of the offense and whether the guidelines adequately encompassed relevant factors. The court in this case departed from the guidelines in part because it found that defendant should have "known better" in light of his educational background and career as an attorney, that defendant displayed a lack of remorse and an "arrogance" following the offense, and because defendant had referred to the victim as evil. In context, the court's comment regarding defendant's educational background meant that as a lawyer, defendant had a knowledge of the law and was subject to professional standards of conduct and care. Although defendant asserts that the

court's reliance on his background was not an objective and verifiable basis for departure, the former requirement that a judge cite an objective and verifiable basis for departure was tied to the requirement that substantial and compelling reasons had to be given for departure, and courts are no longer required to articulate substantial and compelling reasons to impose a sentence above the guidelines minimum sentence range. Defendant also challenged the court's finding regarding his lack of remorse. A lack of remorse may be considered at sentencing, but a court may not base a sentence on a defendant's failure to admit guilt. It was not clearly erroneous for the trial court in this case to conclude that defendant was not remorseful in light of his comments about the victim. Moreover, there was no evidence that the court attempted to persuade defendant to admit guilt, nor was there the appearance that defendant's sentence would have been less severe if he had admitted guilt. Therefore, there was no evidence in the record that the trial court's sentence was improperly influenced by defendant's failure to admit guilt.

Affirmed.

RONAYNE KRAUSE, J., concurring, agreed with the majority that the trial court's sentence was proper but was concerned by the subtle distinction between a sentencing court's proper consideration of a defendant's lack of remorse and the improper consideration of a defendant's refusal to admit guilt. Judge RONAYNE KRAUSE argued that in a case involving a credibility contest, the distinction between refusing to show remorse and refusing to admit guilt may be nonexistent. However, there was no such concern in the instant case. The trial court properly based its sentence on defendant's affirmatively expressed arrogance and refusal to take responsibility for his actions, not on his refusal to admit guilt.

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

Carole M. Stanyar for defendant.

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM. Following a jury trial, defendant was convicted of third-degree criminal sexual conduct

(CSC-III), MCL 750.520d(1)(c) (penetration of a physically helpless person), and sentenced to 5 to 15 years of imprisonment. Defendant appeals by right and challenges only his sentence. We affirm.

I. FACTS

Defendant was a member of the State Bar of Michigan and was a manager of the Tullymore Resort in Mecosta County prior to his conviction in this matter. The victim, AA, knew defendant through her career in real estate and attended a Halloween party at the resort in 2016. In the hours after that party, defendant digitally penetrated the victim's vagina while she was so intoxicated that she could not speak, move, or feel.

II. ANALYSIS

Defendant argues that Offense Variable (OV) 9, OV 10, and OV 13 were improperly scored and that the trial court imposed an unreasonable and disproportionate sentence when it departed from the guidelines range. We disagree.

A. STANDARDS OF REVIEW

"Under the sentencing guidelines, a trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Thompson*, 314 Mich App 703, 708; 887 NW2d 650 (2016). We review de novo whether the facts as found were adequate to satisfy the statutory scoring conditions. *Id*. A trial court's findings of fact are clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. *People v Armstrong*, 305 Mich App 230, 237; 851 NW2d 856 (2014). A sentence departing

from the guidelines range is reviewed for reasonableness. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017) (quotation marks omitted).

B. OFFENSE VARIABLE 10

Defendant argues that the trial court improperly assessed 15 points for OV 10 because no predatory conduct was involved. We disagree.

MCL 777.40(1)(a) provides that 15 points should be assessed for OV 10 if "[p]redatory conduct was involved[.]"[1] "Predatory conduct" is defined as "preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). In *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008), our Supreme Court set forth the following framework for determining whether 15 points should be assessed for OV 10:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

[1] MCL 777.40 was amended by 2018 PA 652, effective March 28, 2019. The amendment does not affect the language at issue here.

There was ample evidence that AA was extremely intoxicated on the evening of the party, and therefore, she had a "readily apparent susceptibility to injury[.]" *Id*. In addition, testimony indicated that defendant, late into the night, lingered around the condominium units where AA and her now-husband, JO, were staying.[2] This lingering was preoffense conduct. *Id*. And a reasonable inference from the summary of JO's interview in the presentence-investigation report (PSIR) is that defendant was looking at AA in the shower, naked, before the assault. See *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015) ("When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination."); see also *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012) ("The trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable."), aff'd 495 Mich 33 (2014). This "naked gazing"

[2] Multiple witnesses testified that defendant had engaged in similar late-night "lingering" during an all-women's golf outing that took place at the resort earlier in the month.

Additionally, defendant's other actions and conduct on the night of the Halloween party are indicative of predation. AA testified that defendant said that he would let her and her friends stay in a Tullymore condominium for free. The presentence-investigation report (PSIR) stated that defendant had "a key to every door at Tullymore" and that defendant bought drinks for AA, JO, MF, and MF's husband (JF), which all four believed may have been drugged because they all became extremely and unusually inebriated. The PSIR indicated that AA, MF, and JF vomited that night, and all four complained of feeling like "zombies" the next day, even though they had consumed no more alcohol than others at the party who were not in ill health the next morning. However, the trial court concluded that there was no evidence that defendant had drugged AA or any of her friends and limited its analysis to defendant's other conduct, including lingering in the condominium unit after he should have left and waiting for an opportunity to be alone with AA or MF.

was further preoffense conduct. A further reasonable inference from all the evidence as a whole was that victimization was defendant's primary purpose for engaging in the preoffense conduct. *Cannon*, 481 Mich at 162. Thus, all the *Cannon* factors were satisfied.

In *People v Huston*, 489 Mich 451, 461-462; 802 NW2d 261 (2011), the Court stated that predatory conduct for purposes of OV 10 involves the creation or enhancement of a victim's vulnerability and involves something more than "run-of-the-mill planning," such as lying in wait or stalking. The evidence in this case indicated that defendant was, in practical effect, "lying in wait" to target a drunken woman—either AA or her friend, MF, who was staying upstairs from AA and JO and explained that defendant engaged in an inappropriate encounter with her while she was intoxicated and barely dressed.[3] This conduct is analogous to that of the defendant in *Huston* who was hiding in a parking lot looking for someone to rob. *Id*. at 463. Accordingly, there is no basis for overturning the 15-point score for OV 10.

C. OFFENSE VARIABLE 13

Defendant also argues that the trial court improperly assessed 25 points for OV 13 because there was insufficient evidence of three crimes against a person to establish a pattern of felonious activity. We disagree.

OV 13 deals with a "continuing pattern of criminal behavior." MCL 777.43(1). MCL 777.43(1)(c) provides

[3] MF testified that she was very drunk and was wearing only her underwear when she passed out in the upstairs bathroom. She awoke when defendant picked her up and tried to steer her toward a bedroom other than the bedroom MF was sharing with JF. Defendant let go of MF when JF woke up and told MF to come to bed. JF testified that MF had gotten sick that night, and he remembered seeing defendant by the bed while MF was in her underwear.

for a score of 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

The court assessed 25 points for OV 13, stating that there were additional pending charges against defendant and evidence of a sexual touching in Mount Pleasant for which defendant had not been charged. Defendant does not contest that there was sufficient evidence of two crimes against a person based on the offense against AA and the charges filed in connection with another alleged victim. Rather, defendant argues that the Mount Pleasant incident mentioned by the trial court, which did not result in any charges, could not properly be used to support the court's 25-point score.

The Mount Pleasant incident was described during a pretrial hearing regarding other-acts evidence. A woman, AV, testified that in 2016 or 2017, she encountered defendant at a nightclub in Mount Pleasant. AV testified that she asked defendant about obtaining a job and he intentionally touched her vagina over her jeans. AV said that she did not want the touching.

AV's testimony was adequate to show, at least by a preponderance of the evidence, that defendant committed fourth-degree criminal sexual conduct (CSC-IV) against her by engaging in sexual contact with her through the element of surprise. MCL 750.520e(1)(b)(*v*); MCL 750.520a(q). Defendant contends that even if a crime occurred against AV, it would only be a misdemeanor and not pertinent for the scoring of OV 13. It is true that MCL 750.520e(2) states that CSC-IV "is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both."

However, the sentencing guidelines are part of the Code of Criminal Procedure, MCL 760.1 *et seq*. MCL 761.1(f) defines "felony" for purposes of that act as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." Because CSC-IV is punishable by up to two years of imprisonment, the Mount Pleasant incident was felonious criminal activity for purposes of scoring the sentencing guidelines, and the trial court properly relied on the Mount Pleasant incident in scoring OV 13.[4]

D. OFFENSE VARIABLE 9

Defendant further argues that the trial court improperly assessed 10 points for OV 9 because defendant did not place MF in danger of physical injury when he committed CSC-III against AA. We disagree.

MCL 777.39(1)(c) states, in pertinent part, that a score of 10 points is appropriate for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury . . . ." Each person who was placed in danger of physical injury is to be counted as a victim. MCL 777.39(2)(a). At sentencing, defense counsel argued that at the time of the assault on AA, nobody else was present in the room and therefore nobody else was placed in danger of any injury. The trial court assessed 10 points for the variable, stating that MF was placed in danger of injury while in the bathroom vomiting.

In *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008), the Supreme Court stated, "[W]hen scoring OV 9, only people placed in danger of injury or loss of

[4] Defendant contends that the trial court did not find that the crime actually took place. However, that finding is implicit in the trial court's ruling.

life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." As an example, the *Sargent* Court referred to a robbery during which "other individuals present at the scene of the robbery . . . were placed in danger of injury or loss of life." *Id.* at 350-351 n 2. The Court concluded that an additional sexual assault allegedly committed by the defendant did not lead to a conviction and "did not arise out of the same transaction as the abuse of the complainant" and that OV 9 should, therefore, have been scored at zero points. *Id.* at 351.

However, in *People v Waclawski*, 286 Mich App 634, 684; 780 NW2d 321 (2009), this Court upheld the assessment of 10 points for OV 9 by concluding that the testimony led to the reasonable inference "that . . . other boys were sleeping [at the defendant's home] while [the] defendant was [sexually] assaulting his chosen victim." We stated that the record supported "the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed." *Id.* In this case, MF was staying in the same condominium unit where the assault occurred, and defendant had an inappropriate encounter with her there. Therefore, *Waclawski* supports the trial court's scoring for OV 9.

Defendant contends that the trial court only relied on MF's vomiting as the "injury" in scoring OV 9 and that this vomiting was entirely separate from the sexual assault of AA. The court referred to MF's vomiting and said that defendant was present in the bathroom while this was occurring. It appears the court's reasoning was that, given defendant's predatory predilection, his mere presence placed MF in danger given that she was highly intoxicated.[5]

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[5] In scoring OV 9, the trial court again declined to weigh any evidence that defendant had drugged AA and her three friends. Instead, the trial

Moreover, even if the trial court incorrectly scored OV 9, a deduction of the points assessed for this variable would not change defendant's guidelines range. Defendant received 65 OV points, placing him in cell A-V of the sentencing grid; if the 10 points for OV 9 were deducted from defendant's OV total, he would remain in the same cell, with the same guidelines range of 24 to 40 months. MCL 777.63. Therefore, resentencing would not be required even if the court erred in scoring OV 9.

E. REASONABLENESS OF SENTENCE

The guidelines produced a range for the minimum sentence of 24 to 40 months. The trial court imposed a sentence of 60 months to 15 years in prison, exceeding the guidelines range by 20 months.

Although the guidelines are merely advisory, they are highly relevant and must be considered at sentencing. *Steanhouse*, 500 Mich at 474-475. The key test in reviewing a sentence is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range. *Id*. The sentencing court must take into account the background of the offender and the nature of the offense. *People v Walden*, 319 Mich App 344, 352; 901 NW2d 142 (2017). In determining proportionality, a court is allowed to consider whether certain factors were not adequately encompassed by the guidelines or were not encompassed by the guidelines at all. *Id*. at 352-353.

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court based its score on MF's testimony that defendant was in the bathroom while she was vomiting. Defendant's presence while MF was highly intoxicated placed her in danger of physical injury given defendant's sexual assault of AA that night under similar circumstances.

At sentencing, the court spoke of the many hours it had spent presiding over and reviewing the case. The court stated that defendant, given his educational background, "should've known better." It stated that defendant, in a recorded telephone call from jail, had referred to AA as " 'evil,' " and that defendant displayed "an arrogance[.]" The court said: "[Defendant] doesn't say anything about being remorseful. He says 'She is so evil.' " The court stated that defendant was sorry about what he did to his family but never said that he was sorry "for what happened in this case." The court stated, "So based on that, I do not believe that the guidelines adequately reflect an appropriate sentence in this case."

Defendant argues that his educational background and career as a lawyer made him less likely to reoffend and therefore was an improper reason for the court to depart from the guidelines range. But the court mentioned defendant's background in the context of stating that he "should've known better." We take this to mean that defendant, as a lawyer, had knowledge of the law and was knowledgeable of, and subject to, professional standards of conduct and care. Defendant argues that the trial court's reference to his background was not an "objective and verifiable" basis for departure. However, the prior requirement for "objective and verifiable" reasons for departing from the guidelines was tied to the requirement for "substantial and compelling" reasons for departure, see *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012), and courts are no longer required to articulate "substantial and compelling" reasons to impose a sentence above the advisory guidelines range, *Walden*, 319 Mich App at 351.

Defendant also argues that the court's reference to a lack of remorse was improper because defendant did

express remorse. At sentencing, defendant's counsel said that defendant, while maintaining his innocence because he did "not believe that there was conduct in the way that the verdict defined," had "remorse that [AA's] life has had some disruption." Defense counsel also said that defendant had "extreme remorse" for how any of his actions affected various people, including AA.

A sentencing court may not base a sentence, even in part, on a defendant's failure to admit guilt, *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007), but a lack of remorse can be considered at sentencing, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, we focus on three factors: "(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *Dobek*, 274 Mich App at 104 (quotation marks and citation omitted).

It is true that defendant's attorney expressed remorse on behalf of defendant, but the trial court emphasized defendant's "arrogance" in calling AA evil even when he knew he was being recorded during a telephone call from jail. Thus, it was not clearly erroneous for the trial court to conclude that defendant was not remorseful about AA's situation, despite counsel's assertions to the contrary.[6] While defendant maintained his innocence, there is no evidence that the trial court attempted to persuade defendant to admit guilt. There was no appearance that if defendant had admit-

[6] The court emphasized that when defendant saw the PSIR, he did not express any remorse but instead referred to AA as evil.

ted guilt, he would have received a lesser sentence, and reviewing the comments as a whole, it is clear that the trial court focused on the fact that defendant seemed to have no empathy toward AA.

Given that the departure was relatively small,[7] the trial court "adequately explain[ed] why" the sentence it imposed was "more proportionate than a different sentence within the guidelines would have been." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017). Defendant contends that the sentence was not proportionate to the circumstances surrounding the offense and the offender because the sexual assault and the offender were not among the worst for CSC-III cases in general. But defendant's minimum sentence is not exceptionally long, and defendant, a member of the bar, penetrated an extremely intoxicated woman and later referred to her as evil. The trial court did not abuse its discretion in imposing defendant's sentence.

III. CONCLUSION

Defendant has not demonstrated that the trial court improperly scored OV 9, OV 10, or OV 13, or that the trial court imposed an unreasonable and disproportionate sentence when it departed from the guidelines range. Accordingly, we affirm.

BORRELLO, P.J., and RIORDAN, J., concurred.

RONAYNE KRAUSE, J. (*concurring*). I concur with the well-reasoned and thoughtful majority opinion of my colleagues, little of which calls for repeating. I write

[7] Defendant relies on the guidelines range that he believes was appropriate, i.e., 12 to 20 months, as opposed to the 24-to-40-month range which the trial court properly calculated, to support his argument that his sentence is disproportionately long.

separately only because I am troubled by the subtle distinctions between basing a sentence on a defendant's lack of remorse and basing a sentence on a defendant's refusal to admit guilt. On this record, I agree with the majority that the trial court's sentence was proper, but I respectfully believe the issue is less straightforward, and the applicable precedent provides unclear guidance. For the reasons below, I concur.

As the majority observes, a lack of remorse is a "legitimate consideration[] in determining a sentence." *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995), citing *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987) (opinion by ARCHER, J.). However, the sentencing "court cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892, 892; 282 NW2d 920 (1977). I note that a majority of the justices in *Wesley* found the distinction between maintaining one's innocence and displaying no remorse to be a fine one, if not illusory. See *Wesley*, 428 Mich at 720-725 (BRICKLEY, J., concurring, joined by LEVIN, J.); *id*. at 726-727 (CAVANAGH, J., concurring, joined by BOYLE, J.). Criminal defendants have an absolute right to maintain their innocence notwithstanding a conviction and irrespective of how much or how strong the evidence of their guilt. It would be irrational to express remorse for something that a person contends they did not do. Therefore, I share that concern.

Nevertheless, merely referring to a defendant's lack of remorse does not establish that a sentencing court actually based its sentence on a defendant's refusal to admit guilt. *Wesley*, 428 Mich at 713, 716, 718-719 (opinion by ARCHER, J., joined by GRIFFIN, J.); *id*. at 719 n 1 (BRICKLEY, J., concurring, joined by LEVIN, J.); *id*. at 726 (CAVANAGH, J., concurring, joined by BOYLE, J.); *id*.

at 727-728 (RILEY, C.J., concurring). Importantly for this case, it is entirely proper for a trial court to rely on a defendant's refusal to acknowledge the consequences of his or her admitted conduct, even if that admitted conduct would not be sufficient for a conviction. *Id*. at 714-717 (opinion by ARCHER, J., joined by GRIFFIN, J.); *id*. at 725 (BRICKLEY, J., concurring, joined by LEVIN, J.). Furthermore, this Court has adopted the *Wesley* lead opinion's approach for evaluating whether a " 'sentence was likely to have been *improperly* influenced by the defendant's persistence in his innocence.' " *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007), quoting *Wesley*, 428 Mich at 713 (opinion by ARCHER, J., joined by GRIFFIN, J.) (emphasis added). Three factors to be considered are the defendant's maintenance of his or her innocence, whether the trial court attempted to elicit an admission of guilt, and whether it appears that an admission of guilt would have resulted in a more lenient sentence. *Dobek*, 274 Mich App at 104.

Defendant's attorney expressed remorse on defendant's behalf during allocution. The trial court noted, however, that it rang somewhat hollow: defendant expressed remorse that the victim's "life has had some disruption," but he was equally, if not more, remorseful for the effect of the case on his family and his law firm. Furthermore, the trial court reasonably relied on the arrogant and disrespectful attitude displayed by defendant during a telephone call from jail, despite defendant's knowledge that the call was being recorded. The trial court observed that defendant admitted he made some "bad choices" but nevertheless engaged in "victim bashing" by referring to the victim as "evil" and mocking her. The trial court's only other remark about defendant's lack of "remorse" was, in context, simply highlighting defendant's openly belittling and vengeful commentary about the victim and defendant's sarcas-

tic reference to "traumatic experience." Finally, the trial court properly made no attempt to procure an admission of guilt, nor did it suggest or imply that defendant would have received a lesser sentence if he had admitted guilt.

I believe the distinction between refusing to show remorse and refusing to admit guilt may be entirely nonexistent in a case turning solely on a credibility contest. However, no such concern is present in this case. Defendant's guilt was established in part by objective DNA evidence. Therefore, it would not have been unreasonable for the trial court to take defendant's guilt as sufficiently presumed to obviate any need "to tip-toe through the metaphysical distinctions required" to distinguish a lack of remorse from an assertion of innocence. See *Wesley*, 428 Mich at 727 (CAVANAGH, J., concurring, joined by BOYLE, J.). Ultimately, it is clear from the record, the transcript of the sentencing when read in full, and the recording of defendant's call from jail that the trial court did not base its sentence on defendant's refusal to admit guilt. Rather, the trial court based its sentence on defendant's affirmatively expressed arrogance, mockery, hostility, and refusal to take meaningful responsibility for conduct that was either admitted or beyond any reasonable dispute.

I am concerned by the test laid out in *Dobek* because I do not believe it accounts for the practical reality that in many cases, especially those turning solely on a credibility contest, there is literally no distinction between refusing to admit guilt and failing to show remorse. As noted, it appears that a majority of the justices in *Wesley* shared that concern. Nevertheless, affirmative expressions of disdain, belligerence, or disregard go beyond merely failing to show remorse, so

they may be relied on by a sentencing court without implicating a defendant's right to maintain his or her innocence. Therefore, as this case illustrates, it is important to analyze a sentencing court's remarks for their substance and in context, not for catchwords. A sentencing court's mere reference to a defendant's lack of remorse is not per se evidence that the court based its sentence on the defendant's maintenance of his or her innocence.

For the reasons above, I concur with the majority and conclude that the trial court did not improperly base defendant's sentence on his maintenance of his innocence. I concur with the majority's opinion and affirmance in all other respects.

TOTAL QUALITY, INC v FEWLESS

Docket No. 346409. Submitted June 3, 2020, at Grand Rapids. Decided July 9, 2020, at 9:00 a.m. Leave to appeal denied 507 Mich 899 (2021).

Total Quality, Inc. (TQI) filed an action in the Mecosta Circuit Court against Terry L. Fewless, Nathan Fewless, and Quality Life Science Logistics, LLC (Quality Life), alleging that Terry and Nathan breached the nonsolicitation clause of their employment agreements with TQI and that all defendants tortiously interfered with TQI's business relationship with certain customers. Quality Life counterclaimed, asserting a claim of business defamation against TQI. In 1992, Terry founded TQI, a transportation logistics company. In 2008, Terry and Nathan sold their interests in TQI to a third party but then purchased a minority interest in TQI. Terry and Nathan signed employment agreements with the new owner and continued to work at TQI. The agreement included a nonsolicitation clause, which prohibited Terry and Nathan from inducing any TQI employees to leave the company; from hiring any person who had been a TQI employee at any time in the preceding 12 months; and from soliciting or servicing any TQI customer, supplier, distributor, or other business relation in an attempt to induce that business relation to cease doing business with TQI or otherwise interfere with that business relation's relationship with TQI. The terms of the agreement remained in effect during the employment period and for two years after the period expired. Terry and Nathan became at-will employees in March 2014 when their employment agreements expired, and Terry resigned his position in October 2014, while Nathan resigned in April 2015. During the period between the resignations of Terry and Nathan, Terry and Kris Fewless formed Quality Life, and by June 2015, Terry and Nathan co-owned the company; three individuals who had been affiliated with TQI ultimately began working for Quality Life. Pfizer, who was an existing customer of TQI, e-mailed a request for proposal (RFP) regarding shipping lanes to Terry. Quality Life submitted a bid for the work with Pfizer and was awarded some of the work that had previously been provided by TQI to Pfizer. TQI filed this action, and the parties filed cross-motions for summary disposition. In relevant part, the court, Scott F. Hill-Kennedy, J., denied defen-

dants' motion for summary disposition of the breach-of-contract and tortious-interference claims. The court concluded that there were genuine issues of material fact regarding whether Terry and Nathan violated the nonsolicitation clauses of their employment agreements and, in turn, whether defendants' actions constituted tortious interference with TQI's business relationship with Pfizer and other companies. Defendants filed an interlocutory application for leave to appeal. In an unpublished order entered September 15, 2017, the Court of Appeals denied the application (Docket No. 337982). Following a bench trial, the trial court found that Terry and Nathan had violated the nonsolicitation clause of their employment agreements by affirmatively taking steps to procure the business from Pfizer by setting up a competing business, by going through the Pfizer qualification process, and by preparing and submitting a bid for lanes that they knew were being serviced by TQI. On those factual findings, the court concluded that Terry and Nathan breached their employment agreements and that defendants tortiously interfered with TQI's business relationship with Pfizer; the court entered judgment in favor of TCI in the amount of $550,663. Defendants appealed.

The Court of Appeals *held*:

1. To establish a breach of contract, a party must show that (1) there was a contract, (2) the other party breached the contract, and (3) the party asserting the breach of contract suffered damages as a result of the breach. With regard to a nonsolicitation clause in an employment agreement, the term "solicit" means to make petition to or to seek to obtain by persuasion, entreaty, or formal application; the term "solicit" can encompass a party responding to an RFP from a customer of the party's former employer. Noncompete clauses and nonsolicitation clauses are not the same. MCL 445.774a(1), which applies to noncompete clauses, provides that an employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. The statute does not apply to nonsolicitation clauses. Under the nonsolicitation agreement in this case, Terry and Nathan could not directly or indirectly call on, solicit, or service any customer, supplier, distributor, or other business relation of TQI in order to induce or attempt to induce such person to cease doing business with TQI, or in any way directly or indirectly interfere with the relationship between any

such customer, supplier, distributor, or other business relation and TQI. Given the dictionary definition of the undefined term "solicit"—to make petition to or to seek to obtain by persuasion, entreaty, or formal application—the record established that Terry and Nathan solicited business from Pfizer when they responded to Pfizer's RFP with a bid to service the lanes. Viewed in a light most favorable to TQI, Quality Life did not merely accept business from Pfizer but, instead, responded to the RFP and submitted a bid for lanes that defendants knew were serviced by TQI. Accordingly, there was sufficient evidence to establish a question of fact whether Terry and Nathan solicited TQI's customers. Even if MCL 445.774a(1) applied to the nonsolicitation clause, the two-year duration was reasonable, the scope of the agreement was reasonable, and it allowed defendants to compete with TQI as long as they did not solicit TQI's customers, employees, or business relationships. Similarly, the evidence established a question of fact whether Terry and Nathan responded to the RFP in an attempt to induce Pfizer to cease doing business with TQI or to interfere with TQI's relationship with Pfizer. Further, defendants' argument related to the tortious-interference claim was dependent on their claim that Nathan and Terry did not violate the nonsolicitation clause, thereby tying the breach-of-contract claim to the tortious-interference claim. Therefore, the trial court did not abuse its discretion by denying defendants' motion for summary disposition of TQI's breach-of-contract and tortious-interference-with-a-business-relationship claims.

2. Following a bench trial, the trial court did not clearly err by finding that Terry and Nathan violated the nonsolicitation clause by submitting a response to an RFP from TQI's customer and that by doing so, Terry and Nathan interfered with TQI's relationship with Pfizer. Even though Pfizer opened up bidding for lanes serviced by TQI to other logistics companies, Quality Life was awarded lanes of business that otherwise would have probably gone back to TQI. Thus, TQI established that Nathan and Terry breached the nonsolicitation clause of their employment agreements.

3. To establish a claim of tortious interference with a business relationship, a plaintiff must establish (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. In this case, defendant only challenged the trial court's finding regarding the third element, intentional

interference. Although there were two bidders in addition to TQI and Quality Life and there was no assurance that TQI would have been awarded the business had Quality Life not submitted a response, the trial court did not clearly err by finding that defendants knew that their action of submitting a response to the RFP was substantially certain to interfere with the business relationship between TQI and Pfizer. The relevant inquiry was defendants' intent, not whether TQI was assured to be awarded the business. By submitting bids on all lanes included in the RFP, Quality Life intended for Pfizer to award some, if not all, of the lanes to Quality Life. Accordingly, the trial court did not clearly err by finding that defendants' actions were substantially certain to interfere with the business relationship between TQI and Pfizer.

Affirmed.

Jackson Lewis PC (by *Timothy J. Ryan*, *Katherine J. Van Dyke*, and *Linda L. Ryan*) for plaintiff.

Fraser Trebilcock Davis & Dunlap, PC (by *Graham K. Crabtree* and *Thaddeus E. Morgan*) for defendants.

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

FORT HOOD, J. Defendants, Terry L. Fewless (Terry) and Nathan Fewless (Nathan), and defendant/counterplaintiff, Quality Life Science Logistics, LLC (QLSL),[1] appeal as of right the trial court's October 30, 2018 judgment in favor of plaintiff/counterdefendant, Total Quality, Inc. (TQI), on its claims of breach of contract and tortious interference with a business relationship. Defendants also challenge an earlier denial of their motion for summary disposition.[2] Because genuine

[1] When appropriate, "defendants" will refer to all three defendants collectively.

[2] This Court previously denied defendants' interlocutory application for leave to appeal the denial of the motion for summary disposition with respect to the claims. *Total Quality Inc v Fewless*, unpublished order of

issues of material fact existed, the trial court properly denied defendants' motion for summary disposition. Moreover, the trial court's disputed factual findings following the bench trial were not clearly erroneous. We therefore affirm.

I. FACTUAL BACKGROUND

This is an action arising from alleged breaches of a nonsolicitation clause contained in employment agreements. The parties do not dispute the following facts as recounted in the trial court's opinion and order adjudicating cross-motions for summary disposition filed in this matter. The opinion provides:

> TQI was founded in 1992 by Terry Fewless. It is a transportation logistics company that provides truckload, less-than-truckload, and cold-chain logistics services to pharmaceutical, biopharmaceutical, and generic drug manufacturers, distributors, and wholesalers in the United States, Canada, and Mexico. Through a series of transactions, Terry Fewless, Nathan Fewless, and Kris Fewless sold their interest in TQI to Thayer Group in 2008 and thereafter purchased a minority share of stock in TQI, and Terry and Nathan each signed an Employment Agreement that enabled them to continue working at TQI. Both of these agreements contained a paragraph related to "non-solicitation." The specific language of these clauses is laid out in more detail below, but they generally forbade Terry and Nathan from inducing any TQI employee to leave the company, from hiring any person who had been a TQI employee at any time in the preceding 12 months, or from soliciting or servicing any TQI customer, supplier, distributor, or other business relation in an attempt to induce that business relation to cease doing business with TQI or otherwise interfere with that business relation's relationship with TQI. The non-solicitation clause re-

the Court of Appeals, entered September 15, 2017 (Docket No. 337982).

mained in effect during the "Employment Period" and for two years after that Period's expiration.

Terry and Nathan continued to work at TQI after they signed the employment agreements. The "Initial Term[s]" of these agreements ran from March 7, 2008, until March 7, 2013, and the agreements automatically renewed for one-year terms after the expiration of the Initial Term—each one-year term constituting a "Renewal Term." In 2013, near the time of the expiration of the Initial Term, Forward Air, Inc., purchased TQI for $66 million. Each Employment Agreement entered a Renewal Term, and Terry and Nathan continued to work for TQI under their employment agreements. On January 31, 2014, however, Terry sent notice to TQI of his intent not to renew his Employment Agreement. On February 3, 2014, TQI sent notice to Terry and Nathan indicating that it intended not to renew their employment agreements. Consequently, the employment agreements expired on March 8, 2014. Thereafter, Terry and Nathan continued as at-will employees.

Terry resigned his position at TQI on October 31, 2014, and Nathan resigned on April 10, 2015. Thereafter, on February 9, 2015, QLSL was formed by Terry and Kris Fewless. Terry stated that it had no purpose at the time and that he did not plan to have anything to do with QLSL. After Nathan retired from TQI in April 2015, an operating agreement was executed regarding QLSL. This June 2015 operating agreement reflected that Kris and Nathan each possessed a 50% ownership interest in QLSL. While Terry ostensibly had no active role in QLSL after its initial formation, Nathan and Terry attended a healthcare-industry conference in October 2015, which also included as attendees representatives from TQI customers, such as Pfizer.

Between May and August of 2015, QLSL began to involve other personnel in its operations. Three of these individuals—Amy Hebert, Joel Dykens, and Steve Milam—had been affiliated with TQI in some fashion before and during 2015. Ms. Hebert was an employee of TQI, and she resigned from her position there to take time off, get married, relax, and plan to possibly work at an RV park

owned by Kris and Nathan. After matters with the RV park were delayed, she became involved with QLSL's operations around May or June 2015. Mr. Dykens dealt with sales, finances, and reporting at TQI. He became involved with QLSL in August 2015. Mr. Milam was an independent contractor for TQI, and he had a client relationship with Actavis in which he helped place Actavis cold-storage transportation business. Actavis has done business with both TQI and QLSL. Notably, Mr. Milam contacted Terry Fewless in a June 26, 2015, email and asked whether Mr. Milam should pursue business with Par Pharmaceutical Companies, Inc., or whether he should wait until July 1, 2015, when he officially ended his relationship with TQI. All three individuals were affiliated with QLSL as independent contractors, but Hebert and Dykens became W-2 employees in June 2016. Ms. Hebert is the Senior Director of Customer Operations for QLSL, and Mr. Dykens is the Vice-President of Business Development for QLSL.

QLSL services three customers that have previously been customers of TQI—Pfizer, Perrigo, and Actavis. Actavis is a "client" of Mr. Milam and became a customer of QLSL through him. Perrigo became a customer of QLSL through Ms. Hebert when she contacted Perrigo and subsequently submitted rates to Perrigo on behalf of QLSL, Pfizer became a customer of QLSL in a more indirect manner. A representative of Pfizer emailed Terry about a request for proposal[3] ("RFP"). Terry forwarded the email to Nathan and Ms. Hebert. QLSL then submitted a bid for work with Pfizer. Ms. Hebert testified that she recognized some of the lanes that were awarded to QLSL from her previous work with TQI. But for these three customers, there is no argument that QLSL obtained other customers of TQI in a manner that violated the non-solicitation clause.

TQI brought this action, eventually filing an amended complaint against defendants, alleging, in relevant

[3] Nathan testified that "RFP" stands for "request for price" and is essentially a request for a bid.

part, that Terry and Nathan breached the nonsolicitation clause of their employment agreements by hiring Herbert, Dykens, and Milam and by soliciting or servicing TQI's customers during the employment period covered by the nonsolicitation clause. It also alleged a claim of tortious interference with business relations against all defendants.[4] The parties moved for summary disposition, which the trial court considered under MCR 2.116(C)(10) (no genuine issue of material fact).

The pertinent provisions of the agreements state:

> THIS EMPLOYMENT AGREEMENT (this "Agreement") is made as of March 7, 2008 . . . .
>
> * * *
>
> 1. Employment. The Company [TQI] shall employ the Executive, and the Executive hereby accepts employment with [TQI], upon the terms and conditions set forth in this Agreement for the period beginning on the date hereof (the "Effective Date") and ending as provided in Section 4 hereof (the "Employment Period").
>
> * * *
>
> 4. Employment Period; Termination; Severance Pay.
>
> (a) The Employment Period shall commence on the Effective Date and shall continue (i) until and including the fifth anniversary of the Effective Date (the "Initial Term"), unless earlier terminated pursuant to the Executive's resignation or death or the Executive's inability to perform the essential duties, responsibilities, and functions of the Executive's position with [TQI] as a result of any mental or physical disability or incapacity . . . ; or

[4] QLSL filed a counterclaim alleging business defamation against plaintiff. The trial court's grant of summary disposition of the counterclaim in favor of TQI is not at issue in this appeal.

> (ii) until the Board determines in its sole discretion that termination of the Executive's employment with or without Cause is in the best interests of [TQI]. After the expiration of the Initial Term, this Agreement shall automatically renew for one-year periods (each a "Renewal Term") (with the first such period commencing on March 7, 2013) unless either party gives written notice of its intention not to allow the Agreement to automatically renew . . . .
>
> * * *
>
> 7. Non-Solicitation. During the Employment period and continuing for two years thereafter, the Executive shall not directly or indirectly through another Person, (i) directly or indirectly induce or attempt to induce any employee of [TQI] to leave the employ of [TQI], or in any way interfere with the relationship between [TQI] and any such employee (provided, that any general solicitation through magazines, trade journals, newspapers, or other publications shall not constitute a violation of this clause (i)); (ii) hire any Person who was an employee of [TQI] at any time during the twelve-month period immediately prior to the date on which such hiring would take place; or (iii) directly or indirectly call on, solicit, or service any customer, supplier, distributor, or other business relation of [TQI] in order to induce or attempt to induce such Person to cease doing business with [TQI], or in any way directly or indirectly interfere with the relationship between any such customer, supplier, distributor, or other business relation and [TQI] (including making any disparaging statements about any member of [TQI]).

As relevant to this appeal, the trial court considered defendants' motion for summary disposition of TQI's claims that (1) Nathan violated the third provision of the nonsolicitation clause when, acting through QLSL, he serviced Perrigo, Actavis, and Pfizer and hired Milam as an independent contractor and (2) that Terry violated the third provision of the nonsolicitation clause by forming QLSL, by receiving and forwarding

to Nathan and Hebert an August 4, 2015 e-mail from Pfizer with respect to an RFP, and by involving himself in Milam's hiring. Defendants argued that Terry and Nathan did not violate the third provision of the nonsolicitation clause and that TQI attempted to apply it as if it were a noncompete clause rather than a nonsolicitation clause. They also argued that the reference to inducing a person "to cease doing business with" TQI required a cessation of all of that person's business with TQI, not just part of it.

In reading the third provision of the nonsolicitation clause, the court found that the clause is violated only "where the calling on, soliciting, or servicing of a business relation of TQI occurs for the purpose of inducing that business relation to cease doing business with TQI." It found that "[t]he intent of the provision is to prohibit Nathan and Terry from actively disrupting TQI's relationship with its customers so that those customers would take the business it does with TQI elsewhere, whether a percentage of the business or the business in its entirety." The court determined that a genuine issue of material fact existed with respect to whether Nathan, operating through QLSL, violated the third provision of the nonsolicitation clause with regard to Pfizer, Perrigo, and Actavis and whether Terry, through Milam, violated the provision with regard to Actavis.

Defendants also moved for summary disposition of TQI's claim of tortious interference with a business relationship. They based this argument on their position that there was no violation of the nonsolicitation clause. In light of its findings of the existence of a question of fact regarding the claims that defendants breached the nonsolicitation clause, the court denied defendants' motion for summary disposition in this regard.

The case proceeded to a bench trial on TQI's claims that Terry and Nathan had improperly solicited business in violation of their employment agreements by presenting bids for Pfizer's[5] shipping lanes in response to the RFP from Pfizer in August 2015, and that in doing so they tortiously interfered with TQI's existing business relationship with Pfizer.

Following the presentation of proofs, the trial court issued a detailed ruling from the bench. The trial court's lengthy ruling provides a thorough and accurate recitation of the testimony and the exhibits admitted at trial. In sum, the trial court found that Terry and Nathan had violated the "solicit or service" provisions of their employment agreements. In so holding, the trial court found that Terry and Nathan had taken affirmative steps to procure the business from Pfizer by setting up the competing business, by going through the Pfizer qualification process, and by preparing and submitting a bid for lanes that they knew were being serviced by TQI. The court determined that TQI had suffered damages from the breach of contract in the amount of $550,663.

In a written opinion dated September 25, 2018, after consideration of posttrial briefing, the trial court found that QLSL had tortiously interfered with TQI's business relationship with Pfizer but determined that its interference did not cause TQI to incur any damages beyond the $550,663 previously awarded on TQI's breach-of-contract claim against Terry and Nathan. On October 30, 2018, the trial court entered a final judgment, awarding damages in the amount of $550,663

[5] Because the trial court found after the bench trial that TQI had not proved that Terry and Nathan had improperly solicited business in violation of their employment agreements with respect to Actavis and Perrigo, we discuss the claims only as they relate to Pfizer.

against all defendants, jointly and severally, in accordance with its findings stated on the record at the conclusion of the bench trial on August 10, 2018, and its additional findings stated in its September 25, 2018 opinion and order.

II. SUMMARY DISPOSITION

We first address defendants' contention that the trial court erred when it denied their motion for summary disposition with respect to both the breach-of-contract claim and the tortious-interference-with-a-business-relationship claim.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). A motion brought 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 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). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). To the extent that resolution of this issue requires inter-

pretation of the parties' employment contract, questions of contract interpretation are also reviewed de novo. *White v Taylor Distrib Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010).

A. BREACH OF CONTRACT

Defendants contend that the trial court erred by finding that issues of material fact existed with respect to TQI's claim that Terry and Nathan violated the third provision of the nonsolicitation clause. We disagree.

The third provision of the nonsolicitation agreement provides that Terry and Nathan may not

> directly or indirectly call on, solicit, or service any customer, supplier, distributor, or other business relation of [TQI] in order to induce or attempt to induce such Person to cease doing business with [TQI], or in any way directly or indirectly interfere with the relationship between any such customer, supplier, distributor, or other business relation and [TQI] (including making any disparaging statements about any member of [TQI]).

Defendants contend that unlike a noncompete clause, this nonsolicitation clause did not preclude them from responding to requests initiated by customers. They assert that it prohibited only solicitation that was engaged in with the intention of inducing or attempting to induce a person to cease doing business with TQI or interfere with the relationship between that person/customer and TQI. According to defendants, TQI and the trial court erroneously construed the provision as a noncompete clause by finding that a violation of the nonsolicitation clause could occur based on a response to an unsolicited customer-initiated request if the customer had a business relationship with TQI and the response resulted in any loss of TQI's business. Defendants maintain that the

contractual language defined the prohibited solicitation of customers in narrow terms and did not contain any language prohibiting Terry and Nathan from conducting business in competition with TQI without any intent to induce its customers to cease doing business with TQI or interfere with its customer relations. They maintain that "the evidence . . . did not provide any legally sufficient support for a finding that Terry or Nathan had engaged in any such conduct falling within the legitimate scope of the contractual language and its intended purpose."

A party claiming breach of contract must show "(1) that there was a contract, (2) that the other party breached the contract, and (3) that the party asserting breach of contract suffered damages as a result of the breach." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 601; 865 NW2d 915 (2014). The primary goal of contract construction is to give effect to the parties' intent. *Jay Chevrolet, Inc v Dedvukaj*, 310 Mich App 733, 735; 874 NW2d 146 (2015). To achieve this goal, the Court must read the contract language, giving it its plain and ordinary meaning. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016). When the language of the contract is unambiguous, the contract must be interpreted and enforced as written. *Id*. When the contract language is subject to multiple interpretations, it is considered ambiguous. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003). "Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language." *Id*.

First, defendants argue that a reasonable trier of fact could not find evidence sufficient to establish that Terry and Nathan breached the employment agree-

ment by calling on, soliciting, or servicing TQI's customers. They contend that they did not "call on" or "solicit" TQI's customers because they did not initiate the contact with Pfizer but, rather, responded to the RFP initiated by Pfizer.

The third provision of the employment agreement does not define the term "solicit." This Court may consult a dictionary to determine the plain and ordinary meaning of the term. *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the term "solicit" as "to make petition to[.]" Alternatively, *The American Heritage Dictionary of the English Language* (4th ed) defines "solicit" as "[t]o seek to obtain by persuasion, entreaty, or formal application[.]" The record evidence substantiates that Terry and Nathan "made a petition to" Pfizer, TQI's customer, to award QLSL business when they responded to Pfizer's RFP with a bid to service the lanes. Alternatively, the record evidence substantiates that Terry and Nathan sought to be awarded Pfizer business by "formal application" when they responded to Pfizer's RFP with a bid to service the lanes. It appears irrelevant that Pfizer sent the RFP to QLSL and prompted QLSL's response because the nonsolicitation clause prohibits Terry and Nathan from soliciting TQI's customers, which they did by affirmative action by submitting a bid to service Pfizer's lanes, at least when the evidence is viewed in the light most favorable to TQI.

Relying on foreign authority, defendants argue that no violation of a nonsolicitation agreement occurs when the customer initiates the contact and that merely accepting business from a customer does not constitute a violation of a nonsolicitation clause. Defendants rely on *Slicex, Inc v Aeroflex Colorado Springs, Inc*, unpub-

lished opinion of the United States District Court for the Central Division of Utah, issued July 25, 2006 (Case No. 2:04-CV-615-TS), p 4. The issue in that case was whether a nonsolicitation clause in a consulting contract had been violated by hiring the plaintiff's employees. *Id*. at 2. The court found that in order for the defendant to solicit or take away the plaintiff's employees, the defendant must have taken "a specific, directed action to hire away one of" the plaintiff's employees. *Id*. at 7. Defendants also cite *Akron Pest Control v Radar Exterminating Co, Inc*, 216 Ga App 495; 455 SE2d 601 (1995). In that case, Sellers, a stockholder in Active Pest Control, which subsequently merged into Radar Exterminating Company, Inc., entered into a nondisclosure/nonsolicitation agreement with Radar in which he agreed " 'not to solicit, either directly or indirectly any current or past customers or current employees' " of Radar. *Id*. at 496. Sellers thereafter established his own company, Akron Pest Control. It was undisputed that Akron did business with former Radar clients, and it was also undisputed that Sellers in no way sought out former Radar customers. *Id*. Radar brought suit, alleging that Sellers was guilty of breach of contract. Radar took "the position that the nondisclosure language could be understood by the parties to mean that . . . Sellers would refuse and, in fact, turn away pest control business if contacted by any customers [subject to the agreement] and refuse to hire and, in fact, turn away employees of [Radar] as of the date of the stock sale if they came to him looking for employment." *Id*. (emphasis omitted). The court refused such a broad reading of the nonsolicitation clause. The court held that in order for Sellers to violate the nonsolicitation agreement, it would require some affirmative action on his part. "Merely *accepting* business that Sellers was forbidden

otherwise to seek out for a period of time does not in any sense constitute a solicitation of that business." *Id*. at 497.

Neither of these cases appears to support defendants' argument in this case, given that defendants did not merely accept business from Pfizer but, rather, responded to an RFP from Pfizer and submitted a bid for lanes that defendants knew were being serviced by TQI before the RFP. QLSL would not have been awarded any business, however, had it not submitted bids in response to Pfizer's RFP. TQI cites *FCE Benefit Administrators, Inc v George Washington Univ*, 209 F Supp 2d 232 (D DC, 2003). In that case, the defendant, an insurance agent, had signed an "Agent Fee Agreement" with the plaintiff, a corporation that designed and administered health insurance benefit plans. *Id*. at 234. The plaintiff alleged that the defendant breached the agreement, which prohibited the defendant from diverting, soliciting, or disclosing information about any of the plaintiff's existing customers, by taking away a client from the plaintiff. *Id*. Though it was undisputed that the clients had initiated the contact with the defendant, the court held that the defendant violated the nonsolicitation clause because she assumed an active role in the client's decision-making process. *Id*. at 239-240.

Even if this Court were to determine that merely accepting business from a customer who initiates contact does not constitute solicitation, the evidence in this case indicates that Terry and Nathan assumed an active role in Pfizer's decision-making process by submitting bids in response to the RFP. The evidence was sufficient to create an issue of fact with respect to whether Terry and Nathan solicited TQI's customer, Pfizer.

Defendants argue that if the response to the RFP was a form of solicitation, there was no basis for a

reasonable trier of fact to conclude that the response was made in order to induce or attempt to induce Pfizer to cease doing business with TQI or to interfere with TQI's relationship with Pfizer. The trial court addressed this argument as follows:

> Defendants also argue that the phrase "cease doing business" must mean *all* business between TQI and the customer. For example, Defendants state that, "The RFP [to QLSL] did not relate to all of Pfizer's business; rather it related only to a limited number of lanes that Pfizer sought to open up to competition among its various carriers." However, a plain reading of the phrase "cease doing business" suggests that Nathan and Terry were barred from undermining TQI's business relationship with its customers, no matter whether the target was a small or large portion of the business TQI and its customers did together. The intent of the provision is to provide Nathan and Terry from actively disrupting TQI's relationship with its customers so that those customers would take the business it does with TQI elsewhere, whether a percentage of the business or the business in its entirety.
>
> In light of the above reasoning, it is clear that there is a genuine issue of material fact as to whether Nathan and Terry violated the third provision of the non-solicitation clause. [Alteration in original.]

Defendants' argument that there was no evidence to support the trial court's finding is undermined, in part, by a statement made by Nathan in his affidavit. Nathan stated that the August 2015 RFP sent to Terry by Pfizer was sent to a number of companies "because [Pfizer] was unsatisfied with the services that [TQI] was providing with regard to other lanes." This statement suggests that defendants saw an opportunity to obtain this particular business in the hope of obtaining future business from Pfizer with the result of drawing business away from TQI and interfering with TQI's relationship with Pfizer. The evidence supports the

finding by the trial court that there existed a genuine issue of material fact regarding whether Terry and Nathan responded to the RFP in an attempt to induce Pfizer to cease doing business with TQI or to interfere with TQI's relationship with Pfizer.

Defendants' final argument—that the third provision of the nonsolicitation agreement runs afoul of MCL 445.774a(1)—is misplaced. MCL 445.774a(1), which concerns agreements not to compete, provides as follows: "An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business." The provision at issue in this case is a nonsolicitation agreement, and defendants have not cited authority in support of the contention that nonsolicitation agreements are subject to MCL 445.774a(1). The provision at issue does not prevent defendants from engaging in "a particular line of business" as defendants suggest. Indeed, there is no dispute that QLSL may compete with TQI in the general business of brokering carriers. TQI concedes that defendants are able to compete with TQI as long as they "stay away from TQI's customers, employees, and business relationship[s]" with those customers and employees. Rather, the nonsolicitation provision at issue prevents defendants from soliciting or servicing "any customer, supplier, distributor, or other business relation of [TQI] in order to induce or attempt to induce such Person to cease doing business with [TQI], or in any way directly or indirectly interfere with the relationship between any such customer, supplier, distributor, or other business relation and [TQI] . . . ."

Even assuming that the nonsolicitation clause is subject to MCL 445.774a(1), "noncompetition agreements are . . . only enforceable to the extent they are reasonable." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507; 741 NW2d 539 (2007). The reasonableness requirement is embodied in MCL 445.774a(1), which is the codification of Michigan common-law rules regarding the enforceability of noncompetition agreements. *St Clair Med, PC v Borgiel*, 270 Mich App 260, 265-266; 715 NW2d 914 (2006). Accordingly,

> "[a] restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable. Additionally, a restrictive covenant must be reasonable as between the parties, and it must not be specially injurious to the public.
>
> Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." [*Coates*, 276 Mich App at 506-507, quoting *St Clair Med*, 270 Mich App at 266.]

Defendants argue that TQI did not have a reasonable competitive business interest. However, employers have legitimate business interests in restricting former employees from soliciting their customers. The scope of the activity prohibited is reasonable and allows defendants to compete with TQI as long as they do not solicit TQI's customers, employees, and business relationships. Additionally, the two-year duration of the provision was reasonable. Defendants' statutory argument is without merit.

B. TORTIOUS INTERFERENCE

Defendants next contend that TQI's claim of tortious interference with a business relationship, which was dependent upon Terry and Nathan's alleged violation of the nonsolicitation clause, should have been dismissed because Terry and Nathan did not violate the nonsolicitation clause. We disagree.

This is the same argument that defendants presented in the trial court. The trial court noted that defendants' argument was that "'TQI's claim 'is based entirely on TQI's erroneous contention that Terry and Nathan somehow violated the non-solicitation clause.' They conclude, 'Because there was no violation of the non-solicitation clause, there was no improper interference with any TQI contract.' " The court also noted that "[t]here is little in the way of argument on either side regarding this claim—except that the claim is inextricably tied to the breach of contract claim." The court opined as follows:

> In this case, the tortious interference with a business relationship claim relies on the outcome of the breach of contract claim. If a reasonable finder of fact concludes that Nathan, through QLSL, at least attempted to induce Pfizer, Perrigo, or Actavis to cease doing business with TQI, then that reasonable finder of fact could also conclude that there was tortious interference with a business relationship. Likewise, if the fact-finder determines that Terry at least attempted to induce Mr. Milam and Actavis to cease doing business with TQI, then that fact-finder could also determine that there was tortious interference with a business relationship. Therefore, the motions for summary disposition regarding the tortious interference with a business relationship claim are denied to the extent of the circumstances related to the breach of contract scenarios noted in this paragraph. As to all other scenarios, the motion for summary disposition regarding tortious interference is granted.

In light of our conclusion regarding the breach-of-contract issue—that the court properly determined that a question of fact existed regarding the violation of the third provision of the nonsolicitation clause—we also conclude that the trial court properly determined that a genuine issue of material fact existed with respect to the tortious-interference-with-a-business-relationship claim.

III. BENCH TRIAL

We next address defendants' contention that the trial court's findings after trial were clearly erroneous. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. "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).

A. BREACH OF CONTRACT

Defendants' argument with respect to the trial court's findings on the breach-of-contract issue mirrors their argument with respect to summary disposition. They assert that the evidence at trial did not support a finding that Terry and Nathan violated the third provision of the nonsolicitation clause by responding to Pfizer's RFP and obtaining a portion of the Pfizer business that was put out for bid. We disagree.

After thoroughly summarizing the testimony presented at trial, the trial court opined, in relevant part:

> I recited some facts. I think it really boils down to does submitting a bid in response to an RFP constitute solicitation on the behalf of Nathan and/or Terry Fewless. . . .

> So, does it require here that I rule the plain reading of the contract language, paragraph 7, that an affirmative first step must be taken by Terry and Nathan Fewless to approach Pfizer to have that constitute solicitation. Or, if they actively respond to an opportunity they've learned of through Pfizer, could that also constitute solicitation when they've put forth an effort to bid on business and try and secure business. And I think the testimony shows that at least some of the lanes they were aware, not all, but they were aware that at least some of the lanes were lanes that had previously been serviced by TQI.
>
> I find here that the non-solicitation, paragraph 7, has been violated by Nathan and Terry Fewless. And I find it because I do find the act of preparing the bid, working to secure the business, getting certified and approved by Pfizer, responding to this general notice that there's an RFP out there, I think that's sufficient to constitute solicitation. I think the accumulated behavior is that affirmative strong step to try and secure business that may have been the business—we have to figure that out still—of TQI.
>
> So I do find that paragraph 7 was violated in that regard as to the Pfizer business.

The court also noted:

> I am not unmindful . . . that a traditional non-solicitation clause might be easily viewed as one where that defendant goes out and tries to grab that business affirmatively; does something to start the process. And I didn't find that distinctly to be the case here. There was some inferences about how maybe Mr. Fewless [sic] got his address or whatever, but not enough to suggest they had really taken the first step, the defendants. But, I thought they took a first step to get their name back to this general RFP request that it looked like they were really anxious or soliciting the business, and that that seems to run afoul of that general meaning of that section. And I do believe in reading the contract as it's written. It just seems to me that that's still soliciting if you put a bunch of paperwork together and you get certified and you work hard to get some business from somebody. That's contrary to the interest of the plaintiff.

> But what I'm recognizing . . . is that it could be a close call, so maybe that's your appeal issue for what it's worth. But I'm not ignorant of that fact. But it just seems like it fit slightly on the side of solicitation and I treat it as such.

After reiterating that Nathan and Terry "violated the non-solicitation provision by looking to secure some of these lanes," the trial court thoroughly discussed the manner in which Pfizer awarded the lanes included in the RFP and then determined that Nathan and Terry's violation interfered with TQI's business relationship with Pfizer. The court found that despite the fact that Pfizer opened up bidding for TQI lanes to other logistics companies, QLSL took lanes of business that otherwise likely would have gone back to TQI.

For the same reasons that the trial court did not err by denying summary disposition with respect to this issue, we are not left with a definite and firm conviction that a mistake was made at trial. The trial court's finding that Terry and Nathan breached their employment agreements by submitting a response to an RFP from TQI's customer, Pfizer, and its finding that by doing so Terry and Nathan interfered with TQI's relationship with Pfizer, were not clearly erroneous.

B. TORTIOUS INTERFERENCE

We lastly conclude that the trial court did not clearly err by finding that defendants knew that their action of submitting a response to the RFP was substantially certain to interfere with the business relationship between TQI and Pfizer.

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the

defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012). Defendants' sole argument is that the trial court's finding with respect to the third element—that QLSL "knew that its actions [in responding to the RFP] were substantially certain to interfere with the business relationship or expectancy between [TQI] and Pfizer" and "chose to ignore that substantial certainty"—was clearly erroneous.

The trial court found that "[b]ased upon the [c]ourt's factual finding at trial regarding the elements of breach of contract, or more particularly the breach of the non-solicitation agreement by Nathan and Terry Fewless, the elements of the tortious interference claim against [QLSL], except for intent, are readily satisfied . . . [.]" With respect to the element of intentional interference—the element that defendants challenge on appeal—the trial court stated in its opinion:

> Part d [the element of intentional interference], above, considers the intent of [QLSL] when it solicited Pfizer business performed by [TQI] and that likely would continue with [TQI] in the absence of this solicitation. [QLSL] offered [*Auburn Sales, Inc v Cypros Trading & Shipping, Inc*, 898 F3d 710 (CA 6, 2018)] in support of its argument that at trial [TQI] did not establish the element of intent by a preponderance of the evidence.
>
> The definition section of the standard jury instruction for tortious interference with a business relationship, M Civ JI 126.03(b), defines "intent" to include when "defendant acted knowing that his or her conduct was certain or substantially certain to cause interference with plaintiff's business relationship or expectancy." *Auburn*, [898 F3d at 717,] cites this instruction. . . .
>
> * * *

> Consistent with that meaning, [QLSL] at a minimum knew that its actions were substantially certain to interfere with the business relationship or expectancy between [QLSL] and Pfizer. Bidding on Pfizer lanes previously serviced by [TQI] in breach of the non-solicitation agreement between QLSL's CEO and Owner Nathan Fewless and Pfizer left little doubt that if the bids were successful if would cost [TQI] business it otherwise expected to receive from Pfizer. So whether or not [QLSL] set out to expressly or directly tortiously interfere is immaterial in that it knew that its intended behavior made interference with [TQI's] business relationship with Pfizer substantially certain, and it chose to ignore that substantial certainty.

Defendants' sole argument is that the finding of "substantial certainty" was clearly erroneous because there were two bidders in addition to TQI and QLSL and there was no assurance that TQI would have been awarded the business had QLSL not submitted a response. Defendants do not expand on this argument. Nonetheless, the relevant inquiry focuses on defendants' intent, not on whether TQI was "assured" to be awarded the business. By submitting bids on all lanes in response to the RFP, QLSL intended for Pfizer to award it at least some, if not all, of the lanes. The trial court's finding that defendants knew that their action of submitting a response to the RFP was substantially certain to interfere with the business relationship between TQI and Pfizer was not clearly erroneous.

Affirmed.

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

PEOPLE v BARBER (ON REMAND)

Docket No. 339452. Submitted January 17, 2020, at Lansing. Decided July 9, 2020, at 9:05 a.m.

Defendant was convicted following a jury trial in the Berrien Circuit Court, Angela M. Pasula, J., of assault by strangulation, MCL 750.84(1)(b); third-degree fleeing and eluding, MCL 257.602a(3); assaulting and obstructing a police officer causing a bodily injury requiring medical attention, MCL 750.81d(2); attempting to disarm a police officer, MCL 750.479b(2); receiving and possessing a stolen vehicle, MCL 750.535(7); and assault with intent to commit great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a). Defendant appealed his convictions and sentences in the Court of Appeals, which affirmed in an unpublished, per curiam opinion. In its unpublished opinion, the Court of Appeals held that defendant's conviction of both assault by strangulation and AWIGBH did not violate the constitutional protection against double jeopardy because each offense required proof of an element that the other did not. Defendant sought leave to appeal in the Michigan Supreme Court, which, in lieu of granting leave to appeal, vacated the part of the Court of Appeals opinion that discussed double jeopardy because it did not address defendant's argument that the Legislature did not intend for a single act to result in convictions for both AWIGBH and assault by strangulation. The Supreme Court remanded to the Court of Appeals for reconsideration in light of *People v Miller*, 498 Mich 13 (2015). 505 Mich 937 (2019).

On remand, the Court of Appeals *held*:

The Double Jeopardy Clauses of the United States and Michigan Constitutions prohibit a person from twice being placed in jeopardy for the same offense. The double-jeopardy prohibition protects individuals in three ways: (1) it protects against a second prosecution for the same offense after acquittal, (2) it protects against a second prosecution for the same offense after conviction, and (3) it protects against multiple punishments for the same offense. In this case, defendant contended that his convictions of and sentences for AWIGBH and assault by strangulation arising from a single incident of assault violated the multiple-punishments strand of the double-

jeopardy prohibition. When the Legislature specifically authorizes multiple punishments under two statutes, the multiple-punishments strand is not violated. If the Legislature's intent regarding the permissibility of multiple punishments is not clear from the statute, then the courts must apply the "abstract legal elements" test to determine the legislative intent. The first criterion in determining legislative intent is the specific language of the statute. MCL 750.84(1) does not expressly address multiple punishments for AWIGBH and assault by strangulation. Although the language of the statute suggests that Subsections (1)(a) and (1)(b) are alternative means of committing the same offense, Subsection (1) does not expressly address situations in which a single act constitutes both types of assaults. However, reading the statute as a whole, it is significant that Subsection (3) expressly allows multiple convictions and punishments when the same conduct violates MCL 750.84(1) and some other criminal statute. The fact that the Legislature expressly authorized multiple punishments for a violation of MCL 750.84(1) and any other statutory violation demonstrates that it did not intend to permit multiple punishments when the same conduct violates both Subsections (1)(a) and (1)(b). Interpreting MCL 750.84(1) as permitting multiple punishments would render the specific authorization for multiple punishments in MCL 750.84(3) surplusage. Therefore, defendant's convictions of assault by strangulation and AWIGBH for the same conduct violated the double-jeopardy prohibition, even though the court imposed concurrent sentences for those convictions.

Remanded to the trial court for modification of the judgment of conviction and sentence to specify that defendant was convicted of one count under MCL 750.84(1), supported by two theories: AWIGBH, MCL 750.84(1)(a), and assault by strangulation, MCL 750.84(1)(b).

CONSTITUTIONAL LAW — DOUBLE JEOPARDY CLAUSE — MULTIPLE PUNISHMENTS — ASSAULT WITH INTENT TO DO GREAT BODILY HARM — ASSAULT BY STRANGULATION.

The Double Jeopardy Clauses of the United States Constitution, US Const, Am V, and Michigan Constitution, Const 1963, art 1, § 15, prohibit a person from being twice placed in jeopardy for the same offense; the double-jeopardy prohibition precludes a defendant from being convicted under MCL 750.84(1) of both assault with intent to do great bodily harm and assault by strangulation arising from a single incident.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Steve Pierangeli*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

F. Mark Hugger for defendant.

ON REMAND

Before: BECKERING, P.J., MURRAY, C.J., and FORT HOOD, J.

PER CURIAM. This appeal arises from defendant's jury trial convictions of assault by strangulation, MCL 750.84(1)(b); third-degree fleeing and eluding, MCL 257.602a(3); assaulting and obstructing a police officer causing a bodily injury requiring medical attention, MCL 750.81d(2); attempting to disarm a police officer, MCL 750.479b(2); receiving and possessing a stolen vehicle, MCL 750.535(7); and assault with intent to commit great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a). The trial court sentenced defendant to 10 to 15 years in prison for the assault-by-strangulation conviction, 60 to 90 months for the third-degree fleeing-and-eluding conviction, 24 to 36 months for the attempting-to-disarm-a-police-officer conviction, 60 to 90 months for the receiving-and-possessing-a-stolen-vehicle conviction, 10 to 15 years for the AWIGBH conviction, and a consecutive sentence of 48 to 72 months for the assaulting-and-obstructing-a-police-officer-causing-a-bodily-injury-requiring-medical-attention conviction. The sole issue on remand is whether double jeopardy precludes defendant's conviction of both assault by strangulation and AWIGBH arising from a single incident of assault. For the reasons explained below, we conclude that it does.

I. FACTUAL AND PROCEDURAL BACKGROUND

In its November 27, 2018 unpublished per curiam opinion, this Court summarized the underlying facts as follows:

> On February 20, 2017, Michigan State Police Trooper Garry Guild observed Barber driving a motorcycle, which was later determined to be stolen, on US-31 at a speed of 92 miles per hour. When Trooper Guild turned on his emergency lights to make a traffic stop, Barber looked back at the police cruiser, put on his turn signal, moved into the right lane, pulled onto the shoulder of the highway, and slowed to approximately 60 miles per hour. Barber did not stop, however, and he quickly accelerated back onto the highway. Trooper Guild notified police dispatchers that the motorcyclist was fleeing from a traffic stop, and the trooper activated his siren in addition to his emergency lights. Barber twice drove onto exit ramps as if leaving the highway, but he veered back toward the highway and continued his flight from the state police trooper. Barber ultimately lost control of the motorcycle and crashed in the grass next to the highway, throwing Barber several feet from the motorcycle onto the ground.
>
> Trooper Guild got out of his vehicle, pulled his firearm out of its holster, and yelled at Barber to stay back and get down on the ground. Barber failed to comply with the trooper's commands. Instead, Barber got up off the ground and staggered toward the trooper. Trooper Guild was concerned that Barber had a weapon and that Barber might have been injured. Because the trooper did not see anything in Barber's hands, he determined that Barber did not have a weapon and decided to holster his firearm. Barber advanced toward Trooper Guild so quickly that the trooper did not have a chance to fully holster the firearm.
>
> Trooper Guild put out his left hand and pushed Barber away from him. Barber fell backward, and the two men fell on the ground. Trooper Guild attempted to handcuff Barber, who continued to struggle with the trooper. At some point during the scuffle, the trooper's firearm ended

up on the ground. While the trooper was struggling to handcuff the noncompliant Barber, a vehicle pulled off the side of the highway, and an occupant of that vehicle threw a soda bottle at Trooper Guild. An individual, later identified as Barber's brother, Travis Wise, got out of the car and attempted to push the trooper off of Barber. Wise then wrapped his arm around the trooper's neck, choked him, violently pulled him back several feet, and yelled at Barber to run. Trooper Guild felt his breathing getting heavy and heard himself struggling to breathe while he fought to maintain an airway. Barber began to run, but he returned to where Wise was still choking the trooper. Barber then reached toward the trooper's firearm holster on the right side of his utility belt and began tugging at the holster. Trooper Guild instinctively put his hand down to try to prevent removal of the firearm from the holster. At that moment, Trooper Guild did not know that his firearm was not in its holster. While the trooper struggled to breathe, he believed that he was balancing the risk of being choked to death against the risk of being shot to death with his own firearm. Trooper Guild testified that Barber punched him twice in the jaw, causing him to feel stunned. Trooper Guild believed that he was going to lose consciousness in a matter of seconds, and he thought he was going to die.

At that point, two bystanders pulled Wise off of the trooper and held him to the ground. While the bystanders fought with Wise, Trooper Guild tased Barber before he was able to handcuff him. The trooper retrieved his firearm that had fallen on the ground several feet from where he struggled with Barber. While the trooper took Barber to the patrol cruiser, Barber continued to struggle, attempting to pull away and run away. After Barber was placed in the backseat of the patrol cruiser, he opened the rear door and started running away. One of the bystanders ran after Barber and recaptured him. Barber was finally secured in a second police officer's cruiser. [*People v Barber*, unpublished per curiam opinion of the Court of Appeals, issued November 27, 2018 (Docket No. 339452), pp 1-2, vacated in part and remanded by *People v Barber*, 505 Mich 937 (2019).]

This Court affirmed defendant's convictions and sentences. *Barber*, unpub op at 1. It concluded that the trial court did not err by denying defendant's motion for a directed verdict, that defendant waived his right to challenge the manner in which voir dire was conducted, and that the trial court did not abuse its discretion by imposing an upward departure and consecutive sentences. *Id*. at 2-7. In Part III of the opinion, which is relevant on remand, this Court concluded that defendant's convictions for assault by strangulation and AWIGBH did not violate the constitutional protection against double jeopardy because each offense requires proof of an element that the other does not. *Id*. at 4-5.

On February 4, 2019, defendant applied for leave to appeal in the Michigan Supreme Court. On December 23, 2019, the Supreme Court vacated Part III of this Court's opinion because it "did not address the defendant's argument that the Legislature did not intend for a single act to result in convictions for both assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), and assault by strangulation, MCL 750.84(1)(b)." *Barber*, 505 Mich at 937. The Supreme Court remanded to this Court for reconsideration in light of *People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015), and denied leave to appeal in all other respects. *Barber*, 505 Mich at 937.

II. STANDARD OF REVIEW

Because defendant raised his double-jeopardy challenge for the first time on appeal, it is not preserved for appellate review. "However, a double jeopardy issue presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court."

People v McGee, 280 Mich App 680, 682; 761 NW2d 743 (2008). We review defendant's unpreserved claim for plain error affecting his substantial rights.

III. ANALYSIS

Defendant argues that the Legislature did not intend that a single act of strangulation that is also sufficient to prove AWIGBH should result in two separate convictions under MCL 750.84. According to defendant, the plain language of the statute provides that a person can violate it *either* by strangulation *or* by other means. Therefore, the Court should vacate defendant's conviction of AWIGBH while allowing the conviction of assault by strangulation to stand.

The Double Jeopardy Clauses of the United States Constitution and the Michigan Constitution prohibit a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004). "The prohibition against double jeopardy protects individuals in three ways: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Miller*, 498 Mich at 17 (quotation marks and citation omitted). This case involves the "multiple punishments" strand of the prohibition against double jeopardy. See *id*. Where the Legislature specifically authorizes cumulative punishment under two statutes, the multiple-punishments strand is not violated. *Id*. at 18. "Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the

multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial." *Id*.

In *Miller*, our Supreme Court held that "when considering whether two offenses are the 'same offense' in the context of the multiple punishments strand of double jeopardy," courts "must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent." *Id*. at 19 (citation omitted). If the legislative intent is not clear, then courts must apply the "abstract legal elements" test to determine the legislative intent. *Id*.

At issue in *Miller* was whether double jeopardy precluded conviction of both operating while intoxicated (OWI) under MCL 257.625(1) and operating while intoxicated causing a serious impairment of a body function of another person (OWI-injury) under MCL 257.625(5) based on a single intoxicated driving incident. *Miller*, 498 Mich at 20. The Court concluded that, although the statutory provisions at issue were silent regarding multiple punishments, the specific authorization for multiple punishments found in another subsection of the statute led to the conclusion that the Legislature did not intend to permit multiple punishments for OWI and OWI-injury offenses arising from the same incident. *Id*. at 23-24.

The first criterion in determining legislative intent is the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning it plainly expressed. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Thus, to determine whether double jeopardy precludes defendant's conviction of

both assault by strangulation and AWIGBH arising from a single incident, it is necessary to first consider the language of the statutory provisions at issue. MCL 750.84(1) provides:

> A person who does either of the following is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both:
>
> (a) Assaults another person with intent to do great bodily harm, less than the crime of murder.
>
> (b) Assaults another person by strangulation or suffocation.

The plain language of this subsection does not expressly address multiple punishments for AWIGBH and assault by strangulation. On the one hand, the statute provides that a person who "does *either* of the following is guilty of a felony . . . ." Used as a pronoun, "either" means "the one or the other"; for example, "take [either] of the two routes." *Merriam-Webster's Collegiate Dictionary* (11th ed). Given that definition, MCL 750.84(1) provides that anyone who either (a) assaults another with intent to do great bodily harm or (b) assaults another person by strangulation or suffocation is guilty of *a felony*, thus suggesting that Subsections (1)(a) and (1)(b) are alternative means of committing the same, single offense, i.e., "a felony."

On the other hand, the statute does not expressly address situations in which a single act constitutes *both* types of assaults. The prosecution asserts that the Legislature's use of the word "either" does not show an intent to list alternative means of committing the same offense. The prosecution identifies other statutes that it contends provide alternative means of committing an offense, and observes that those statutes set forth alternative means of committing a specified crime, not simply "a felony," as in MCL 750.84. For example,

MCL 750.110a(4) provides, in relevant part, "A person is guilty of home invasion in the third degree if the person does either of the following[.]" The implication seems to be that when the Legislature intends a statute to provide alternative means of committing a crime, it specifies the crime, rather than broadly describing it as "a felony." This argument is made less persuasive by the fact that use of the phrase "a felony" in MCL 750.84 is necessary because the two types of assault listed in this statute have different names. By contrast, the types of home invasion listed in MCL 750.110a(4) are all called third-degree home invasion. The fact that AWIGBH and assault by strangulation have different names does not clearly demonstrate the Legislature's intent to allow the same conduct to give rise to cumulative punishment under Subsections (1)(a) and (1)(b) rather than to identify two alternative ways one could be guilty of a single felony.

The prosecution argues that its position is strengthened by the legislative history of MCL 750.84. Again, we disagree. The 2012 amendment of the statute, as introduced in the Senate, provided as follows:

> A person who assaults another with intent to do great bodily harm, less than the crime of murder, including, but not limited to, assaulting another by strangulation or suffocation, is guilty of a felony punishable by imprisonment in the state prison not more than 10 years or by fine of not more than $5,000.00, or both. As used in this section, "strangulation or suffocation" means intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. [2011 SB 848.]

Thus, the original language of the bill suggests that assault by strangulation would have been considered a type, or subcategory, of AWIGBH. However, Legislators rejected this language in favor of language that makes

clear that an assault by strangulation is not necessarily a subcategory of AWIGBH. Contrary to the prosecution's argument, the rejection of the Senate's original language does not show a clear intent to allow for multiple punishments.

Read in isolation, MCL 750.84(1) is not clear as to legislative intent regarding multiple punishments. However, reading the statute as a whole, see *Miller*, 498 Mich at 23, it is significant that Subsection (3) of the statute provides, "This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section," MCL 750.84(3). Thus, Subsection (3) expressly allows multiple convictions and punishments when the same conduct violates MCL 750.84(1) and some other criminal statute. The fact that the Legislature expressly authorized multiple punishments for "the violation of [Subsection (3)]" and any other statutory violations demonstrates that the Legislature did not intend to permit multiple punishments for violations of MCL 750.84(1)(a) and (b). If the Legislature had intended to allow multiple punishments for violations of both Subsections (1)(a) and (1)(b) arising out of the same conduct, it clearly knew how to do so. See *Miller*, 498 Mich at 24-25. Additionally, to interpret MCL 750.84(1) as permitting multiple punishments for violations of its subsections would render the specific authorization in MCL 750.84(3) surplusage. See *Miller*, 498 Mich at 25.

We conclude that MCL 750.84 reflects the Legislature's intent that a person is guilty of a felony if he or she commits either AWIGBH or an assault by strangulation or suffocation. Although the statute does not permit "a trial court to cumulatively punish a defendant for both offenses in a single trial,"

Miller, 498 Mich at 18, it does allow a trial court to punish a defendant for a violation of MCL 750.84 together with any other violation of law arising out of the same conduct. Therefore, defendant's convictions of assault by strangulation and AWIGBH for the same conduct violated the double-jeopardy prohibition. This is true even though the trial court imposed concurrent sentences for these convictions. See *id*. at 26 n 34. To remedy the double-jeopardy violation in this case, in which the penalties are the same, we remand to the trial court to modify the judgment of conviction and sentence to specify that defendant was convicted of one count under MCL 750.84(1), supported by two theories: AWIGBH, MCL 750.84(1)(a), and assault by strangulation, MCL 750.84(1)(b). See *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). The balance of defendant's judgment of conviction and sentence shall remain the same.

Remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., MURRAY, C.J., and FORT HOOD, J., concurred.

HAYDAW v FARM BUREAU INSURANCE COMPANY

Docket No. 345516. Submitted December 4, 2019, at Detroit. Decided July 9, 2020, at 9:10 a.m. Leave to appeal denied 507 Mich 959 (2021).

Nael Haydaw filed suit against Farm Bureau Insurance Company in the Wayne Circuit Court alleging that defendant had wrongfully withheld personal protection insurance (PIP) benefits that plaintiff was entitled to under his insurance policy with defendant and under the no-fault act, MCL 500.3101 *et seq*. Plaintiff was involved in a motor vehicle accident and claimed that he sustained injuries to his back, neck, and shoulders. At his deposition, plaintiff testified through an interpreter that before the accident, he had seen his primary-care doctor to receive treatment for "flu, that's it," and had been prescribed flu medication. After discovery was completed, defendant moved for summary disposition on the ground that plaintiff had made false statements regarding his medical history. Defendant asserted that plaintiff's medical records showed that he had complained of back, neck, and shoulder pain in the years before the accident and had been prescribed pain medication. Defendant argued that plaintiff had falsely represented at the deposition and during two insurance medical examinations that he did not have back, neck, or shoulder problems before the accident and that defendant was therefore entitled to summary disposition on the basis of the insurance policy's fraud provision. That provision provided that the policy would be void if, whether before or after a loss, the insured intentionally concealed or misrepresented any material fact or circumstance, engaged in fraudulent conduct, or made false statements relating to the insurance or to a loss to which the insurance applied. The trial court, John A. Murphy, J., found that plaintiff made false statements at his deposition and that defendant was therefore entitled to summary disposition under the policy's fraud provision.

The Court of Appeals *held*:

False statements made by an insured party during litigation brought by the insured after the insured's no-fault claim was denied cannot be used to void the no-fault policy under its fraud provision. It is the general rule in the vast majority of jurisdictions that have addressed the issue that fraud or false-swearing clauses

in insurance policies do not apply to statements made during litigation. After an action is filed, determining truth or falsehood is a matter for the fact-finder. If a party has intentionally testified falsely, it is the responsibility of the court to determine whether any sanction is appropriate. Moreover, once an insurer fails to timely pay a claim and a suit is filed, the parties' duties of disclosure are governed by the rules of civil procedure, not the insurance policy. Additionally, statements made during litigation cannot satisfy the elements for voiding a policy on the basis of postloss fraud because in order to constitute a material misrepresentation, a statement must have been made with the intention that the insurer would act upon it. An insured makes statements during discovery with the intention that the trier of fact, not the insurer, will act on them. Finally, a ruling that a fraud or false-swearing clause applies to statements made during litigation would implicate the first-breach rule. Under that rule, if the insurer is the first to breach the contract by denying a claim, it may not defend a lawsuit on the basis that the insured subsequently failed to adhere to the contract. Pursuant to the first-breach rule, summary disposition on the basis of false statements during litigation would not be warranted until it was determined that the denial of the claim had not already breached the contract.

Reversed and remanded.

INSURANCE LAW — NO-FAULT POLICIES — FRAUD PROVISIONS — FALSE STATEMENTS MADE DURING DISCOVERY.

When an insurer has denied a claim and an action has been filed by the insured, false statements made by the insured during discovery are not grounds to void a no-fault insurance policy; once suit has been filed, the parties are adversaries in litigation and what constitutes truth and what constitutes falsehood are matters for the fact-finder to determine; during discovery, the parties' duties of disclosure are governed by the rules of civil procedure, not the insurance policy.

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Kopka Pinkus Dolin PC (by *Steven M. Couch* and *Mark L. Dolin*) for Farm Bureau Insurance Company.

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

SHAPIRO, J. After finding that plaintiff made false statements at his deposition, the trial court granted defendant summary disposition pursuant to the fraud provision in the insurance policy issued to plaintiff by defendant. We hold that fraud provisions in no-fault insurance policies do not provide grounds for rescission based upon false statements made by the insured during first-party litigation. Accordingly, we reverse and remand for further proceedings.

I

This case arises out of a motor vehicle accident in which plaintiff claims to have sustained injuries to his back, neck, and shoulders. Defendant is plaintiff's no-fault insurer. In October 2016, plaintiff filed the instant lawsuit alleging that defendant wrongfully withheld personal protection insurance (PIP) benefits that plaintiff was entitled to under his insurance policy and the no-fault act, MCL 500.3101 *et seq*. In February 2017, plaintiff signed litigation authorizations to release all of his medical records, and he was deposed in April 2017. English is not plaintiff's first language, and he testified through an interpreter. Plaintiff also underwent two insurance medical examinations in April 2017 and May 2017, respectively. Plaintiff communicated with the physicians via an interpreter.

After discovery was completed, defendant moved for summary disposition on the ground that plaintiff made false statements during discovery regarding his medical history. Plaintiff's medical records showed intermittent complaints of back, neck, and shoulder pain and that, at times, he had been prescribed pain medication in the years preceding the accident. Given that history, defendant asserted that plaintiff testified falsely at his deposition when he said that he saw his primary-care

physician for "[f]lu, that's it," before the accident and that he was prescribed flu medication.[1] Defendant also maintained that plaintiff falsely represented in the medical examinations that he did not have problems with his back, neck, or shoulders before the accident. Defendant argued that it was entitled to summary disposition under the policy's fraud provision[2] and *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014).

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[1] The pertinent exchange is as follows:

Q. Prior to this accident have you ever hurt yourself or injured yourself in any way?

A. You mean before the accident?

Q. Yes.

A. No.

Q. Before the accident did you have a doctor that you used to go to?

A. Yes.

Q. Who is that doctor?

A. Nabeel Toma.

Q. And what did you go to Nabeel Toma for before the accident?

A. Flu, that's it.

* * *

Q. Were you prescribed any medications before this accident happened?

A. Something, like, normal, like flu or something like that.

[2] The provision states:

The entire policy will be void if, whether before or after a loss, you, any family member, or any insured under this policy has:

1. Intentionally concealed or misrepresented any material fact or circumstance;

2. engaged in fraudulent conduct; or

3. made false statements;

In response, plaintiff argued that he testified truthfully at the deposition because his last two doctor visits before the accident were to address the flu and his understanding of the question was that it referred to the doctor visits immediately before the accident. Plaintiff further argued that he had disclosed his medical records before the deposition and therefore defendant was aware of his medical history. Plaintiff also argued that if he did make inaccurate statements at his deposition, this went to his credibility, which should be determined by the trier of fact. Plaintiff also questioned the accuracy of the medical-examination reports, considering that he was communicating through an interpreter.

After hearing oral argument, the trial court found that plaintiff made false statements at his deposition and granted summary disposition on the basis of the policy's fraud provision.

II

This case requires us to confront a question not previously addressed in a published opinion from this Court. That is, whether statements made during litigation after the insured's claim is denied constitute grounds to void the policy under a fraud provision. Consistent with the vast majority of courts that have addressed this issue, we hold that such provisions do not apply to statements made during the course of litigation.[3]

> relating to this insurance or to a loss to which this insurance applies.

While we do not decide the case on this basis, we see no basis for a finding that plaintiff "intentionally concealed or misrepresented" his medical history given that he voluntarily released all his medical records.

[3] We review de novo a grant of summary disposition. See *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). In this

Our research indicates that this issue was first addressed in *Ins Cos v Weides*, 81 US 375, 382-383; 20 L Ed 894; 14 Wall 375 (1871), in which the United States Supreme Court held that testimony at trial does not implicate an insurance policy's fraud or false-swearing clause:

> Nor was there error in denying the defendants' third and fourth prayers. It is true the policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. But it does not inevitably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs under oath in their proofs of loss, and their statements when testifying at the trial that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants. It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken. *It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent*. [Emphasis added.]

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case, defendant moved for summary disposition under MCR 2.116(C)(10), which is properly granted 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." We also review de novo the construction of an insurance contract. *Gurski v Motorists Mut Ins Co*, 321 Mich App 657, 665; 910 NW2d 385 (2017). The parties submitted court-ordered supplemental briefs addressing "whether the fraud provision in the no-fault policy applies to false statements made in the course of litigation, i.e., after a complaint alleging a breach of contract has been filed." *Haydaw v Farm Bureau Ins Co*, unpublished order of the Court of Appeals, entered March 27, 2020 (Docket No. 345516).

In what has become a leading authority on this issue, in *American Paint Serv, Inc v Home Ins Co of New York*, 246 F2d 91 (CA 3, 1957), the Third Circuit Court of Appeals followed the Supreme Court in holding that trial testimony could not be relied upon by the insurer to show that fraud had occurred. The Third Circuit provided the following rationale for its holding:

> Trial testimony in a case where fraud and false swearing is in issue serves to establish the truth or falsity of the preliminary proofs and the materiality and wilfulness of any false proofs. The fraud and false swearing clause is one beneficial to the insurer and it reasonably extends to protect the insurer during the period of settlement or adjustment of the claim. *When settlement fails and suit is filed, the parties no longer deal on the non-adversary level required by the fraud and false swearing clause. If the insurer denies liability and compels the insured to bring suit, the rights of the parties are fixed as of that time for it is assumed that the insurer, in good faith, then has sound reasons based upon the terms of the policy for denying the claim of the insured. To permit the insurer to await the testimony at trial to create a further ground for escape from its contractual obligation is inconsistent with the function the trial normally serves. It is at the trial that the insurer must display, not manufacture, its case.* Certainly the courts do not condone perjury by an insured, and appropriate criminal action against such a perjurer is always available. [*Id.* at 94 (emphasis added).]

The vast majority of the courts that have addressed this issue have followed suit,[4] and it is now considered

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[4] See *Rego v Connecticut Ins Placement Facility*, 219 Conn 339, 350-351; 593 A2d 491 (1991); *Dodson Aviation, Inc v Rollins, Burdick, Hunter of Kansas, Inc*, 15 Kan App 2d 314, 325; 807 P2d 1319 (1991); *Ocean-Clear, Inc v Continental Cas Co*, 94 App Div 2d 717, 718; 462 NYS2d 251 (1983); *Mercantile Trust Co v New York Underwriters Ins Co*, 376 F2d 502, 504 n 2 (CA 7, 1967); *Ichthys, Inc v Guarantee Ins Co*, 249 Cal App 2d 555, 557-558; 57 Cal Rptr 734 (1967); *Tarzian v West Bend Mut Fire Ins Co*, 74 Ill App 2d 314, 321-323; 221 NE2d 293 (1966); *Home*

a general rule that statements made during litigation do not implicate a fraud or false-swearing clause. See, e.g., *Dodson Aviation, Inc v Rollins, Burdick, Hunter of Kansas, Inc*, 15 Kan App 2d 314, 325; 807 P2d 1319 (1991) ("The overwhelming majority of jurisdictions hold that only false statements made before legal proceedings have begun can serve to void an insurance policy."); *Ocean-Clear, Inc v Continental Cas Co*, 94 App Div 2d 717, 718; 462 NYS2d 251 (1983) ("[I]t is generally accepted that fraud arising after the commencement of an action on a policy does not void the policy.") (citations omitted). That rule has been applied to preclude an insurer from asserting fraud or false swearing on the basis of the insured's deposition testimony. See *Mercantile Trust Co v New York Underwriters Ins Co*, 376 F2d 502, 504 n 2 (CA 7, 1967); *Third Nat'l Bank v Yorkshire Ins Co*, 218 Mo App 660, 669-670; 267 SW 445 (1924).

We find these authorities persuasive and adopt their reasoning.[5] False statements made during discovery do

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Ins Co v Cohen, 357 SW2d 674, 676-677 (Ky App, 1962); *Royal Ins Co, Ltd v Story*, 34 Ala App 363, 367-368; 40 So 2d 719 (1949); *American Alliance Ins Co v Pyle*, 62 Ga App 156, 164-165; 8 SE2d 154 (1940); *Third Nat'l Bank v Yorkshire Ins Co*, 218 Mo App 660, 669-670; 267 SW 445 (1924); *Deitz v Providence Washington Ins Co*, 33 W Va 526, 547; 11 SE 50 (1890). A handful of contrary authorities are identified in 64 ALR2d 962. One of those cases was expressly overruled. See *World Fire & Marine Ins Co v Tapp*, 279 Ky 423; 130 SW2d 848 (1939), overruled by *Cohen*, 357 SW2d 674. Most of the cases concern fire insurance policies, but the type of policy had no bearing on the decision. The underlying reasoning, as first articulated in *Weides*, 81 US 375, and *American Paint Service*, 246 F2d 91, applies with equal force to fraud clauses in no-fault insurance policies.

[5] Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value. *Estate of Voutsaras v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019). Defendant refers us to unpublished opinions from this Court that affirmed dismissals based solely on misrepresentations made by the insured during the course of litigation. See *Parker v Farm Bureau Gen Ins Co of Mich*,

not provide grounds to void the policy because, by that time, the claim has been denied and the parties are adversaries in litigation. Once suit is brought, what is truth and what is false are matters for a jury or a judge acting as fact-finder. And if it can be shown that a party intentionally testified falsely, it is up to the court to determine what, if any, sanction is proper. Indeed, defendant is essentially seeking dismissal of plaintiff's claim on the basis of alleged discovery misconduct. Given that questions of credibility and intent are generally left to the trier of fact, "[i]t is . . . doubtful whether dismissal for intentionally false deposition testimony is ever appropriate." *Swain v Morse*, 332 Mich App 510, 524; 957 NW2d 396 (2020). In any event, it is up to the trial court to determine whether a drastic sanction such as dismissal is warranted for discovery misconduct, including untruthful deposition testimony. To be clear, once an insurer fails to timely pay a claim and suit is filed, the parties' duties of disclosure are governed by the rules of civil procedure, not the insurance policy.[6]

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unpublished per curiam opinion of the Court of Appeals, issued May 23, 2019 (Docket No. 343289); *Sabados v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued February 12, 2019 (Docket No. 342088); *Thomas v Frankenmuth Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued July 12, 2016 (Docket No. 326744). Unpublished opinions are also not binding authority but may be persuasive or instructive. MCR 7.215(C)(1); *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017). However, unlike the out-of-state caselaw we rely on, the unpublished opinions cited by defendant addressed only whether the plaintiffs' statements were false and did not analyze whether the policies' fraud clauses could be read to apply to statements made during the course of litigation.

[6] This does not mean that insureds are free to stonewall the insurer prior to litigation or sue prematurely. The fact remains that the insured is not entitled to benefits unless he or she has provided reasonable proof under the no-fault act.

For similar reasons, statements made during litigation are by their nature incapable of satisfying the elements for voiding a policy on the basis of postloss fraud. In order to obtain that relief, the material misrepresentation must have been made with "the intention that the insurer would act upon it." *Bahri*, 308 Mich App at 424-425.[7] Yet an insured's statements during discovery are made with the intention that the trier of fact, not the insurer, will act on them. To the extent that the insurer acts on those statements, it is through counsel for purposes of litigation strategy rather than processing the claim under the policy's terms.

We are also mindful that allowing insurers to void a policy for false statements made during litigation would create a perverse incentive. For example, an insurer with full knowledge of the insured's medical history could seek to bait or lead the insured into making an inaccurate statement at deposition and then seek summary disposition on those grounds. Such tactics are directly at odds with the purpose of discovery.[8] See

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[7] The following elements must be met to void a policy on the basis of an intentional material misrepresentation:

> (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. [*Bahri*, 308 Mich App at 424-425 (quotation marks and citation omitted).]

[8] We also question, but need not decide, whether plaintiff's deposition testimony and statements at the medical examinations are protected by the privilege of witness immunity, which the Supreme Court has summarized as follows:

> Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. *Falsity or malice on the part of the witness does not abrogate the privilege*. The privilege

People v Burwick, 450 Mich 281, 298; 537 NW2d 813 (1995) ("A primary purpose of discovery is to enhance the reliability of the fact-finding process *by eliminating distortions attributable to gamesmanship*.") (emphasis added). At the same time, our holding does not prevent defendant from presenting plaintiff's allegedly false statements to the jury for purposes of undermining plaintiff's credibility. Nor does it negate the other "disincentives for untruthful deposition testimony." See *Swain*, 332 Mich App at 521.

Finally, we note that a contrary ruling—that a fraud or misrepresentation clause applies to statements made during the course of litigation—would implicate the first-breach rule. That is, if the insurer, by the denial of the claim, was first to breach the contract, it may not defend on the grounds that the plaintiff subsequently failed to adhere to the contract. "An insurance policy is a contractual agreement between the insured and the insurer." *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019). "The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. . . . [This] rule only applies when

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> should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [*Maiden v Rozwood*, 461 Mich 109, 134; 597 NW2d 817 (1999) (citations omitted; emphasis added).]

Statements made at depositions and insurance medical examinations occur during the course of judicial proceedings because these events are discovery mechanisms governed by court rules. See MCR 2.303 through MCR 2.308; MCR 2.311. See also *Kowalski v Boliker*, 893 F3d 987, 1000 (CA 7, 2018) ("The scope of [witness] immunity is broadly construed to include preparation of testimony, testimony at pretrial proceedings, depositions, and affidavits.") (citations omitted). If plaintiff's statements are privileged, we are skeptical that defendant may rely on them to void the policy.

the initial breach is substantial." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (quotation marks and citations omitted). Defendant has refused to provide PIP benefits despite the existence of the policy. If the denial is unjustified, it is clearly a substantial breach that would relieve plaintiff of his contractual duties under the policy. Accordingly, summary disposition on the basis of false statements would not be warranted unless and until it is determined that the denial of the claim did not breach the contract.

For the reasons discussed, however, we are convinced that statements made during the course of litigation do not implicate an insurance policy's fraud or misrepresentation clause and that such a clause may not be relied on by the insurer to justify a denial of benefits.[9] Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and CAVANAGH, J., concurred with SHAPIRO, J.

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[9] Given our ruling that plaintiff's statements made in the course of litigation are not grounds to void the policy even if intentionally false, it is not necessary for us to decide whether the trial court erred in finding intentional misrepresentation.