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LEAGUE OF WOMEN VOTERS OF MICHIGAN v SECRETARY OF STATE

Docket No. 353654. Submitted June 18, 2020, at Lansing. Decided July 14, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 886 (2020).

The League of Women Voters of Michigan, Deborah Bunkley, and others filed a mandamus action in the Court of Appeals against the Secretary of State, asserting that certain statutory provisions related to absentee voting conflicted with Const 1963, art 2, § 4 (as amended by the voters' approval of Proposal 3 in 2018) and requesting that the Court direct defendant to implement certain procedures regarding the processing of absent-voter ballots. Thereafter, the Legislature enacted 2018 PA 603, which amended certain provisions of the Michigan Election Law, MCL 168.1 *et seq*. 2018 PA 603 left intact the statutory requirements under MCL 168.764a and MCL 168.720 that to be counted, absent-voter ballots had to be received by the appropriate clerk by 8:00 p.m. on election day. Plaintiffs challenged those requirements as unconstitutional in light of Article 2, § 4(1)(g); challenged as unconstitutional that clerks are not required to provide return postage for an absent-voter ballot; asserted that the received-by deadline violated the Purity of Election Clause of Const 1963, art 2, § 4, the Freedom of Speech and Assembly Clauses of Const 1963, art 1, §§ 3 and 5, the Equal Protection Clause of Const 1963, art 1, § 2, and the Right to Vote Clause of Const 1963, art 2, § 4(1)(a); and alleged that some city and township clerks had failed to immediately upon receipt of an absent-voter application mail an absent-voter ballot to the voter as required by MCL 168.761(1), which action in turn violated Const 1963, art 2, § 4(1)(g).

In an opinion by SAWYER, P.J., and an opinion by RIORDAN, J., the Court of Appeals *held*:

1. To obtain the remedy of a writ of mandamus, a plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might

achieve the same result. A writ of mandamus is inappropriate if the act sought to be performed involves judgment or the exercise of discretion.

2. As amended by Proposal 3, Article 2, § 4(1)(g), grants all Michigan voters the constitutional right to vote an absent-voter ballot during the 40 days before an election without stating a reason and the right to choose whether the ballot is applied for, received, and submitted in person or by mail. In addition, under Article 2, § 4(1), all rights set forth in Subsection (1) are self-executing and the subsection must be liberally construed in favor of voters' rights in order to effectuate its purposes. It is the job of the Legislature, not the judiciary, to make policy decisions regarding absentee voting and the deadline for counting ballots. In accordance with that responsibility, MCL 168.764a instructs absent voters that their ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day and that an absent-voter ballot will not be counted if it is received by the clerk or assistant of the clerk after the polls close on that day; under MCL 168.720, the polls close at 8:00 p.m. on election day. The right to vote by absent-voter ballot without giving a reason in the 40 days before an election and the right to choose whether to submit the ballot in person or by mail, read together, do not require that ballots mailed by election day be counted regardless of when the ballot is received. The received-by deadline does not effectively preclude a voter from completing the process of voting by absent-voter ballot during the 40-day period before an election, and the 8:00 p.m. received-by deadline set forth in MCL 168.764a does not, therefore, violate Article 2, § 4. In addition, the Secretary of State is not required under Article 2, § 4 to provide prepaid return postage for absentee ballots; requiring voters to supply their own postage is not a severe restriction on the right to vote by absent-voter ballot when there is no requirement that such ballots be mailed. In this case, because MCL 168.764a did not violate Article 2, § 4—i.e., neither the received-by deadline nor the lack of prepaid return postage violated the constitutional provision—plaintiffs were not entitled to the relief requested and mandamus was not warranted. Because defendant had already directed local clerks to comply with the statutes regarding the processing of absent-voter ballot applications, plaintiffs were not entitled to mandamus concerning their allegation that one-third of local clerks had failed to immediately process those application within the 40-day period before an election in violation of MCL 168.761(1); further, plaintiffs had failed to identify the clerks who had allegedly not complied, and it was not the Court's job to seek out that information. To the

extent that defendant conceded that the existing statutory scheme violated Article 2, § 4, the concession was not binding on the Court and did not resolve the dispute.

Request for mandamus denied.

SAWYER, P.J., stated that the summary statement of purpose that appeared on the ballot and the language of Article 2, § 4, as amended, did not create an expectation or understanding by the ratifiers that an absent-voter ballot could be received after election day and still be counted; indeed, neither the statement of purpose nor the amendatory language contained language regarding when the ballot must be mailed or when it must be received. Any deadline for counting ballots was arbitrary, and when mailing an absent-voter ballot, the voter assumed the risk that the ballot would not arrive by the deadline. Although by its terms Article 2, § 4 was self-executing, the provision did not preclude the Legislature from imposing a deadline when the language amended by Proposal 3 did not contain language related to deadlines and the deadline did not curtail or unduly burden voters from voting absentee. The deadline also did not violate the Purity of Elections Clause or the Free Speech and Assembly Clauses of the Michigan Constitution.

RIORDAN, J., concurring, agreed with the lead opinion that the received-by deadline and the lack of prepaid return postage did not violate Article 2, § 4 but wrote separately to further explain why it would have been an abuse of discretion to grant mandamus. Plaintiffs failed to submit any evidence that the common understanding of the people at the time Proposal 3 was ratified included an understanding that the right to vote by absent-voter ballot was absolute regardless of its timing. Consequently, plaintiffs failed to meets their burden of showing that the existing received-by deadline severely infringed the right to vote. Moreover, granting the relief requested would have usurped the role of the Legislature, supplanted the will of the electorate when it adopted Proposal 3, and diluted the votes that complied with the received-by deadline.

GLEICHER, J., concurring in part and dissenting in part, agreed with the lead opinion that Michigan's Constitution did not require local clerks to provide prepaid return postage for absent-voter ballots but disagreed with the opinion's conclusion that the received-by deadline did not violate Article 2, § 4(1)(g) of the Constitution. The lead opinion's underlying premise was fundamentally incorrect because while the constitutional provision allowed voters to submit the absent-voter ballots by mail, it also granted the right to have their votes counted. The common

understanding of the people at the time they ratified Proposal 3—as indicated by the instruction in § 4(1) that the subsection must be liberally construed in favor of voters' rights in order to effectuate its purposes—was that the right to vote necessarily embodied the right to have one's vote counted. Analyzing the clear language of Proposal 3, not the ballot summary, voters have a right to vote by mail and to have their vote counted if they mail their ballots to the clerk during the 40 days before an election, and that right is self-executing; thus, the received-by deadline would disenfranchise thousands of voters who complied with the voting rules. The deadline for counting absent-voter ballots should correspond to the deadline for the Board of State Canvassers to complete the canvass and announce the result of the election. The received-by deadline unduly burdened the constitutional right to vote by mail, and defendant had a duty as a constitutional officer not to enforce the deadline. Judge GLEICHER would have granted plaintiffs' motion for mandamus and ordered defendant to instruct clerks that timely mailed absent-voter ballots received after the close of the polls and before the date of the canvass had to be counted.

1. ELECTIONS — RIGHT TO VOTE — ABSENT-VOTER BALLOTS — RECEIVED-BY DEADLINE.

Under Michigan's Constitution, electors qualified to vote in Michigan have the right to vote an absent-voter ballot during the 40 days before an election without stating a reason and the right to choose whether the ballot is applied for, received, and submitted in person or by mail; the statutory requirement that to be counted, an absent-voter ballot must be received by the appropriate clerk by 8:00 p.m. on election day does not violate the constitutional provision granting the right to vote by absent-voter ballot (Const 1963, art 4, § 4(1)(g); MCL 168.764a; MCL 168.720).

2. ELECTIONS — ABSENT-VOTER BALLOTS — RETURN POSTAGE FOR MAILING ABSENT-VOTER BALLOTS.

Under Michigan's Constitution, electors qualified to vote in Michigan have the right to vote an absent-voter ballot during the 40 days before an election without stating a reason and the right to choose whether the ballot is applied for, received, and submitted in person or by mail; requiring voters to pay the postage to return absent-voter ballots does not violate the constitutional provision granting the right to vote by absent-voter ballot (Const 1963, art 4, § 4(1)(g)).

Arnold & Porter Kaye Scholer LLP (by *R. Stanton Jones*, *Elisabeth S. Theodore*, *Daniel F. Jacobson*, *Kolya D. Glick*, and *Samuel F. Callahan*), the American Civil Liberties Union (by *Theresa J. Lee* and *Dale E. Ho*), *Goodman Acker, PC* (by *Mark Brewer*), and the American Civil Liberties Union Fund of Michigan (by *Daniel S. Korobkin* and *Sharon Dolente*) for the League of Women Voters of Michigan.

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

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

SAWYER, P.J. Plaintiffs filed this complaint for mandamus seeking an order of this Court directing defendant to implement certain procedures regarding the processing of absent-voter ballots. After reviewing the parties' briefs and hearing oral argument, we are not persuaded that plaintiffs are entitled to relief, and we deny the writ for mandamus.

Plaintiff League of Women Voters of Michigan is a statewide organization with an interest in voting rights. The individual plaintiffs[1] are League members and registered voters residing in Michigan. Defendant, the Secretary of State, is "the chief election officer of the state" with "supervisory control over local election officials in the performance of their duties under the provisions of" the Michigan Election Law, MCL 168.1 *et seq*. MCL 168.21. Defendant must "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b).

[1] Deborah Bunkley, Elizabeth Cushman, and Susan Smith.

In November 2018, Michigan voters approved Proposal 3, which granted all Michigan voters the constitutional right to vote by absent-voter ballot without stating a reason.[2] That right was incorporated into Const 1963, art 2, § 4, which addresses the place and manner of elections. Const 1963, art 2, § 4, as amended, states, in relevant part, as follows:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (a) The right, once registered, to vote a secret ballot in all elections.
>
> * * *
>
> (g) The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. During that time, election officials authorized to issue absent voter ballots shall be available in at least one (1) location to issue and receive absent voter ballots during the election officials' regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election. Those election officials shall have the authority to make absent voter ballots available for voting in person at additional times and places beyond what is required herein.
>
> * * *
>
> All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes.

[2] Before the passage of Proposal 3 in 2018, state election law required voters to indicate one of six reasons for voting by absent-voter ballot. MCL 168.759.

> Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.
>
> (2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

In light of the voters' approval of Proposal 3 and the amendment of Const 1963, art 2, § 4, the Michigan Legislature enacted 2018 PA 603, which amended certain provisions of the Michigan Election Law.[3] Plaintiffs, however, contend that some of the Election Law's absent-voter provisions have not been amended to conform with Const 1963, art 2, § 4, as amended. Plaintiffs filed a three-count complaint for mandamus, challenging the statutory requirement that absent-voter ballots be received by 8:00 p.m. on election day and the statutory requirement that voters pay the postage to return an absent-voter ballot. Plaintiffs also allege that the received-by deadline violates the Purity of Elections Clause set forth in Const 1963, art 2, § 4, the Freedom of Speech and Assembly Clauses set forth in Const 1963, art 1, §§ 3 and 5, the Equal Protection Clause set forth in Const 1963, art 1, § 2, and the Right

[3] We note that it appears the Legislature is continuing to consider these issues. See, e.g., 2020 HB 5807, which, if passed as introduced, would address some of the issues presented in this case.

to Vote Clause set forth in Const 1963, art 2, § 4(1)(a). Further, plaintiffs allege that some city and township clerks fail to adhere to the requirement set forth in MCL 168.761(1) that the clerk "immediately" upon receipt of an absent-voter application mail an absent-voter ballot to the voter and that they fail to adhere to the requirement set forth in Const 1963, art 2, § 4(1)(g) guaranteeing voters the right to vote by absent-voter ballot in the 40 days before an election.

"[M]andamus is the proper remedy for a party seeking to compel election officials to carry out their duties." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 583; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018). "To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014). "A clear legal right is a right clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 249; 896 NW2d 485 (2016) (quotation marks and citation omitted). "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016) (quotation marks and citation omitted). A writ of mandamus is inappropriate if the act sought to be performed involves judgment or the exercise of discretion. *Hanlin v Saugatuck Twp*, 299

Mich App 233, 248; 829 NW2d 335 (2013). The plaintiff has the burden of demonstrating entitlement "to the extraordinary remedy of a writ of mandamus." *Citizens Protecting Michigan's Constitution*, 324 Mich App at 584.

The most significant issue presented in this case is Count I of plaintiffs' complaint: whether the statutory requirement that absent-voter ballots be received by the local election clerk by 8:00 p.m. on election day violates Const 1963, art 2, § 4. We conclude that it does not. But before analyzing this question, we must address plaintiffs' position that defendant has conceded that the "received by" rule is unconstitutional. We read defendant's brief as agreeing with plaintiffs that the received-by-election-day requirement does violate Const 1963, art 2, § 4, but with some reservations. After advancing a construction of Proposal 3 that largely agrees with plaintiffs' position on this point, defendant then states:

> The larger issue, and arguably the highest hurdle to this construction of § 4(1)(g), is the absence of language regarding when an [absent-voter] ballot voted by mail by election day must be received by an election official in order to be counted. This silence could be viewed as evidence that the construction advanced above is faulty. The better interpretation, however, is that the drafters left space within the Constitution in which the Legislature can act through supplemental legislation. But the Legislature has not yet done so, and the only recourse at this time is to consult existing statutory provisions for guidance.

Moreover, at oral argument, defendant's attorney certainly seemed to agree with plaintiffs that the received-by-election-day requirement violates the Constitution as amended by Proposal 3. But we do not view the concession by defendant as resolving the issue.

We recognize the ability, indeed the desirability, of parties in a lawsuit to resolve their differences among themselves without the unnecessary intervention of the courts. But it is one thing for parties in a particular action to reach an agreement that only affects those parties in that action. It is yet another thing to allow parties to reach an agreement that would affect the entire state by means of an agreement as to the proper interpretation of a statute or the Constitution that will be applied generally. This, ultimately, is the province of the courts. Indeed, as Chief Justice Marshall wrote long ago in *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803), "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each."

Chief Justice Marshall expounded on this in further detail:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.
>
> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. [*Id*. at 176-177.]

While Chief Justice Marshall was addressing a case in which Congress exceeded the limits of its powers in enacting legislation, we find guidance here when we are faced with the powers of an executive-branch official exercising executive power. That is, we posit that just as a legislative body cannot legitimately enact a statute that is repugnant to the Constitution, nor can an executive-branch official effectively declare a properly enacted law to be void by simply conceding the point in litigation. To vest that power in an official would effectively grant that official the power to amend the Constitution itself. And just as Chief Justice Marshall rejected the ability of a legislative body to amend the Constitution by an ordinary act, we must reject the

ability of an executive-branch official to do the same.[4] When a dispute arises regarding whether a properly enacted statute violates the Constitution, that dispute must be resolved by the courts, not by a single individual within the executive branch.[5]

For these reasons, to the extent that defendant concedes that the existing statutory scheme violates the Michigan Constitution in light of Proposal 3, we reject the idea that this resolves this dispute or is binding on this Court. While we give defendant's position due consideration, we are not bound by it. Rather, we must now continue to our own analysis regarding whether the existing received-by-election-day rule is now contrary to Const 1963, art 2, § 4. We conclude that it is not.

Plaintiffs assert that the statutory requirement that absent-voter ballots be received by 8:00 p.m. on election day violates Const 1963, art 2, § 4(1)(g), which guarantees voters the right to vote by absent-voter ballot "during the forty (40) days before an election" and the right "to choose whether the absent voter ballot is applied for, received and submitted in person or by

[4] This is not to say that neither the Legislature nor the executive branch have a role to play in interpreting the Constitution. It is certainly contemplated that the Legislature would consider the Constitution whenever it enacts a statute and reject those that it finds to be repugnant to the Constitution. That is, we would expect the Legislature to exercise constitutional self-restraint. Similarly, we would think it a duty of a Governor to reject (i.e., veto) a bill passed by the Legislature if the Governor is convinced that the bill violates the Constitution.

[5] There is, of course, a role for the Legislature and the Governor to play in resolving such a dispute if they choose to do so by repealing or amending the statute at issue. But if such action is taken, while it would resolve the dispute, it would not resolve the question of the constitutionality of the prior enactment. And more importantly to the present dispute, it is not dependent on the actions of a single member of the executive branch.

mail." Plaintiffs assert that the provision requires that any absent-voter ballot submitted by mail in the 40 days before an election must be counted even if it is received after 8:00 p.m. on election day. Plaintiffs rely on the self-executing provision of Const 1963, art 2, § 4(1), which states, in relevant part:

> All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes.

Plaintiffs contend that self-executing constitutional provisions are judicially enforceable without further legislation. Defendant argues that plaintiffs have not demonstrated a clear legal right to the performance of the act sought but also argues that declining to count ballots received after the deadline of 8:00 p.m. on election day appears to violate Const 1963, art 2, § 4.

The 8:00 p.m. received-by deadline set forth in MCL 168.764a[6] states, in relevant part, as follows:

> The following instructions for an absent voter shall be included with each ballot or set of ballots furnished an absent voter:
>
> * * *

[6] Although plaintiffs argue that the 8:00 p.m. received-by deadline contravenes Const 1963, art 2, § 4, they do not identify the specific statutory language that they assert is unconstitutional. It appears that plaintiffs challenge the language set forth in MCL 168.764a, the provision providing general instructions for absent voters. MCL 168.759b also requires that absent-voter ballots "be returned to the clerk in time to be delivered to the polls prior to 8 p.m. on election day," but that provision pertains to emergency absent-voter applications submitted after the absent-voter application deadline because of physical disability or a voter's absence from the city or township because of sickness or death in the voter's family. It does not appear that plaintiffs challenge that provision because they made no mention of it in their brief. For all practical purposes, however, plaintiffs' arguments would apply to either provision.

> Step 6. The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.

MCL 168.720 provides that the polls close at 8:00 p.m. The question presented is whether the amended language in Const 1963, art 2, § 4(1)(g) renders the 8:00 p.m. received-by deadline unconstitutional. When interpreting constitutional provisions, this Court applies two rules of interpretation. *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014). "First, the interpretation should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Id*. (quotation marks and citation omitted).[7] "Words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate." *In re Burnett Estate*, 300 Mich App 489, 497-498; 834 NW2d 93 (2013). Every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Second, the interpretation should consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Makowski*, 495 Mich at 472-473 (quotation marks, citation, and brackets omitted).

Plaintiffs and defendant interpret the first sentence of Const 1963, art 2, § 4(1)(g) as requiring that ballots

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[7] The principle of looking to the meaning that "reasonable minds, the great mass of people themselves, would give it," *Makowski*, 495 Mich at 472, is deeply rooted in Michigan jurisprudence, going back to a treatise by Justice COOLEY. See Cooley, Constitutional Limitations (6th ed), p 81.

mailed by election day be counted. The provision guarantees voters "[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(1)(g). Thus, it grants voters the right to vote by absent-voter ballot without giving a reason in the 40 days before an election *and* the right to choose whether to submit the ballot in person or by mail. But we do not share plaintiffs' view that these two clauses, when read together, render the received-by rule unconstitutional.

As stated in *Makowski*, 495 Mich at 472, we must consider what the "great mass of people" would have understood Proposal 3 to mean when they adopted it. (Quotation marks and citation omitted.) There are two primary sources to guide us. First, the summary "statement of purpose" that actually appeared on the ballot and, second, the actual language of the constitutional amendment. We turn first to the ballot summary.

Const 1963, art 12, § 2 states that a ballot used to amend the Constitution by petition of registered voters "shall contain a statement of the purpose of the proposed amendment . . . ." The ballot at issue provided the following statement regarding Proposal 3's purpose:

Proposal 18-3

A proposal to authorize automatic and Election Day voter registration, no-reason absentee voting, and straight ticket voting; and add current legal requirements for military and overseas voting and postelection audits to the Michigan Constitution

This proposed constitutional amendment would allow a United States citizen who is qualified to vote in Michigan to:

- Become automatically registered to vote when applying for, updating or renewing a driver's license or state-issued personal identification card, unless the person declines.
- Simultaneously register to vote with proof of residency and obtain a ballot during the 2-week period prior to an election, up to and including Election Day.
- Obtain an absent voter ballot without providing a reason.
- Cast a straight-ticket vote for all candidates of a particular political party when voting in a partisan general election.

Should this proposal be adopted?

[ ] YES

[ ] NO[8]

Only the third bullet point addresses absentee voting. And that bullet point only addresses the right to vote by absent-voter ballot without providing a reason.[9] Not only does it not address a deadline by which the absent-voter ballot must be received by the election clerk, it does not even address creating a right to submit that ballot by mail. Accordingly, a voter whose

[8] Proposal 18-3, Official Ballot Wording Approved by Board of State Canvassers September 7, 2018 <https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-3_632053_7.pdf> (accessed June 18, 2020) [https://perma.cc/3G6Y-FN9Y].

[9] Similarly, that is the only portion of the absent-voter rules that appears in the bold-faced header in the ballot language.

knowledge of the proposal was limited to reading the "statement of purpose" that appeared on the ballot would not have understood it to have a created a constitutional right to vote that ballot by mail, much less when it must be received by.

Of course, a more conscientious voter who took the time to read all the language of the proposed constitutional amendment would understand that it incorporated provisions regarding absentee voting beyond not having to provide a reason for doing so. But this, too, falls short of creating an expectation or understanding by the voters that they could mail the ballot on election day and have it counted even though it would be received after election day. The language of the amendment itself is devoid of any provision regarding when the ballot must be mailed by or when it must be received. Those issues are simply unaddressed. But the amendment is not completely devoid of references to when the local election officials must accept those ballots:

> The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. *During that time, election officials authorized to issue absent voter ballots shall be available in at least one (1) location to issue and receive absent voter ballots during the election officials' regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election*. Those election officials shall have the authority to make absent voter ballots available for voting in person at additional times and places beyond what is required herein. [Const 1963, art 2, § 4(1)(g) (emphasis added).]

While the emphasized language does not create any specific deadline by which ballots must be received, it is

suggestive that election officials are only obligated to be available during regular business hours, plus some additional hours on the weekend immediately preceding the election. While this would not necessarily preclude a belief that ballots mailed on or before election day but received after the polls closed would not be counted, it would suggest to voters that there would be some limitations on when election officials would be obligated to accept, and therefore count, ballots. And it certainly does not create an expectation that a ballot mailed on election day will be counted.

In short, while the language of the amendment would not necessarily disabuse a voter of a belief that an absent-voter ballot mailed on election day but received thereafter would be counted, the language also does not lead to a belief that such a ballot would be counted. Thus, we cannot conclude that "the great mass of people" understood the amendment as setting the deadline for casting an absent-voter ballot based upon the time it is mailed rather than the time that it is received.

We similarly reject the argument that the statutory requirement that an absent-voter ballot be received by election officials before the close of the polls on election day impairs the right of a voter to choose to submit their absent-voter ballot by mail. They certainly possess that right. And, while Proposal 3 creates a 40-day period during which a voter has the ability to receive and cast an absent-voter ballot, that does not mean that the requirement that a ballot must be received by the time the polls close impairs a voter's ability to mail in their absent-voter ballot.[10] We acknowledge that it

[10] One of the issues presented in this case, which will be addressed later, deals with an allegation that not all local elections clerks make absent-voter ballots available at the beginning of the 40-day period. This, however, presents a different question.

does affect when an absent voter must mail their ballot so that it arrives by the deadline. But the fact that a voter must act sooner when they choose to mail in their ballot rather than deliver it does not deprive them of the choice; rather, it merely affects how and when that choice must be exercised.

Moreover, any deadline has an arbitrary nature to it and different policy considerations behind it. Even plaintiffs' suggestion that we rule that ballots postmarked on or before election day must be counted if received by election officials within the six-day period following election day, while having a valid policy consideration behind it,[11] is also ultimately arbitrary. Additionally, any deadline by which a ballot must be received creates the possibility that some votes will not be counted. Articles in the media occasionally appear about letters that are delivered years, even decades, after they are mailed.[12] While these are extreme, and undoubtedly rare, examples, they illustrate that when choosing to submit an absent-voter ballot by mail, one assumes the risk that the ballot will not arrive by the deadline (any deadline), or even arrive at all.

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[11] The six-day deadline coincides with the date by which local clerks must determine whether to count any provisional ballots. MCL 168.813. A provisional ballot is one cast on election day by a voter who does not appear on the registration rolls for the polling place at which the voter appears, and it must thereafter be determined if the voter was, in fact, eligible to vote. MCL 168.523a.

[12] See, e.g., Wilson, *Long-lost Letter: Postal Service Delivers 81-year-old Christmas Card to Billings Woman*, Billings Gazette (May 27, 2019), available at <https://billingsgazette.com/news/local/long-lost-letter-postal-service-delivers-81-year-old-christmas-card-to-billings-woman/article_4fac4ebd-88d1-5768-85f6-c7f9c5fe452a.html> (accessed June 18, 2020) [https://perma.cc/RQM9-TGD4]. And actually, in this case, the letter never was actually delivered to the intended recipient or their heir because the article indicates that it was returned to sender (or, actually, the sender's heir, because the sender had died 50 years previously).

Certainly, the later the received-by deadline, the greater the likelihood is that a ballot will arrive in time to be counted. But ultimately, any deadline carries with it the possibility that voters will be disenfranchised because their ballots will arrive too late to be counted.[13] Obviously, though, there must be a deadline—at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision. And we follow the view that courts should typically defer to the Legislature in making policy decisions. There are many competing considerations—what deadline gives a fair opportunity for all persons to vote on an equal basis, what deadline allows for votes to be counted in a timely manner (and what is considered timely), what other deadlines in the process may need to be changed as well, to name just a few. These are considerations best resolved by reflective legislative consideration, not by judicial fiat.[14] The courts' role is limited to ensuring that the deadline chosen by the Legislature does not effectively preclude the ability of a voter to submit their absent-voter ballot at any point during the 40 days before an election.[15]

Plaintiffs argue that the provision in Proposal 3 that grants the right to vote by absent-voter ballot without providing a reason and to submit that ballot by mail,

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[13] For that matter, even in-person voting carries a deadline—to present oneself by the time the polls close. There are likely cases in which a voter arrives after the polls close, for whatever reason, and is unable to cast their ballot.

[14] Plaintiffs assert that it is "manageable" to implement a "sent-by-election-day deadline" rather than a "received-by-election-day deadline," even pointing to 11 states that do so. This would certainly be relevant to the Legislature if it chooses to address this issue. But it does not compel this Court to grant plaintiffs' requested relief.

[15] For example, if the Legislature were to set the deadline 45 days before the election, such a provision would clearly violate § 4(1)(g).

and to do so anytime during the 40 days before an election, requires that a voter be able to mark that ballot and deposit it in the mail anytime during that 40-day period, including on election day. Again, the relevant passage reads, "The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(1)(g). While this provision does not define the word "vote," plaintiffs looks to a number of sections within the election statute that use the word "vote" in a context that suggests a meaning of marking a ballot.[16] Plaintiffs argue that to interpret the word "vote" in § 4(1)(g) as requiring the delivery of the ballot to election officials would render these statutes "nonsensical" and "metaphysically impossible" because the context of the use of the word "vote" in those statutes requires it to mean "marking a ballot" or similar usage. We are not persuaded by plaintiffs' argument.

We reject the idea that the word "vote" must necessarily be given the exact same meaning under both § 4(1)(g) and the various statutory provisions cited by plaintiffs. "Vote" has many different meanings, both as a noun and a verb.[17] But more to the point, even accepting plaintiffs' argument that "vote" means something akin to "marking the absentee ballot," it does not change the outcome. Voting is not the single act of

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[16] See MCL 168.764a, MCL 168.759a(6), MCL 168.759a(13), MCL 168.932(i), and MCL 168.931(m).

[17] See, e.g., *Merriam-Webster's Collegiate Dictionary* (11th ed), which provides over a dozen different definitions for the word "vote," none of which specifically refers to "marking a ballot" or similar language. The closest definitions are "the act or process of voting" and "a method of voting[.]" *Id*.

marking a ballot, but the entire process.[18] Indeed, ultimately, plaintiffs' argument is self-defeating. If we accept plaintiffs' argument that the plain text employs "the commonsense meaning that a person 'votes' an absentee ballot when she fills it out," then we would necessarily have to conclude that all that is guaranteed under Proposal 3 is the right to fill out an absent-voter ballot, not to have it counted. Such a conclusion would be absurd. Accordingly, "vote" must refer to the entire process of voting, which in the context of absentee voting, starts with requesting an application to apply for an absent-voter ballot and continues to the delivery of the completed ballot to the appropriate election officials.

This then brings us back to our previous discussion. There must be a deadline for the submission of the completed ballot to election officials. And the deadline under existing law does not effectively preclude a voter from completing the process of voting by absent-voter ballot during the 40 days before the election.[19]

We turn next to plaintiffs' argument that the statutory requirement that absent-voter ballots be received by the close of the polls, even if previously constitutional, became unconstitutional because "the legisla-

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[18] See the definition referred to in note 17 of this opinion.

[19] As a side note, there is an inherent flaw in plaintiffs' argument that ballots must be counted if mailed on election day, even if received thereafter. The plain text of § 4(1)(g) guarantees the right "to vote an absent voter ballot . . . during the forty (40) days *before* an election[.]" (Emphasis added.) Even if we were to accept plaintiffs' constrained definition of "vote" and the argument that that definition compels the counting of ballots received after the polls close, that analysis would require that the mailed-in ballots be postmarked the day *before* election day; those postmarked *on* election day would not meet the statutory requirement. That is, § 4(1)(g), by its terms, does not guarantee a right to vote by absent-voter ballot *on* election day, only during the 40 days *before* election day.

ture may not act to impose additional obligations on a self-executing constitutional provision." *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971) (quotation marks and citations omitted). In that case, the Michigan Supreme Court found violative of the state Constitution a statutory provision that initiative petitions must be submitted at least ten days before the start of a legislative session. The *Wolverine Golf Club* Court, 384 Mich at 466, reasoned:

> As pointed out by Judge LESINSKI in the opinion below [*Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 725; 180 NW2d 820 (1970)]:
>
> > It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. [*Soutar v St Clair Co Election Comm*, 334 Mich 258; 54 NW2d 425 (1952); *Hamilton v Secretary of State*, 227 Mich 111, 125; 198 NW 843 (1924)]:
> >
> > The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon.
>
> Whether we view the ten-day-filing requirement in an historical context or as a question of constitutional conflict, the conclusion is the same—the requirement restricts the utilization of the initiative petition and lacks any current reason for so doing. [Quotation marks omitted.]

While Proposal 3, by its express terms, is self-executing, we reject plaintiffs' argument that that precludes the Legislature from applying a deadline by which absent-voter ballots must be received. As already discussed at length, a deadline is necessary. Indeed, even plaintiffs tacitly admit the necessity of a deadline by proposing a deadline of their own. And

while the drafters of Proposal 3 could easily have included a deadline by which ballots must be received, they did not do so. Certainly, the drafters would have been aware of the existing requirement that ballots be received by the close of polls on election day, yet they chose not to include a provision altering this deadline in their proposal. Presumably, the drafters were content to leave this decision to the Legislature. Indeed, Const 1963, art 2, § 4(2) provides that "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections . . . and to provide for a system of voter registration and absentee voting."

Thus, the question under *Wolverine Golf Club* becomes whether the current deadline curtails absentee voting, places an undue burden on absent voters, or places an undue burden on those submitting their absent-voter ballot by mail. We conclude that it does not. While a voter may submit their absent-voter ballot by mail, they are not required to do so. They may personally deliver the ballot in person to the city or township clerk, they may have an immediate family member deliver the ballot, or they may request that the local clerk pick up the ballot. MCL 168.764a. And, of course, a voter may still mail in their ballot, though with the need to do so sufficiently in advance of election day to maximize the likelihood that it will be delivered by election day. And a voter is provided with a 40-day period in which to do so.

Plaintiffs next argue that the received-by deadline violates the Purity of Elections Clause set forth in Const 1963, art 2, § 4(2). We disagree. The Purity of Elections Clause states that "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard

against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." *Id*. "The phrase 'purity of elections' does not have a single precise meaning. However, it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm*, 305 Mich App 649, 676; 854 NW2d 489 (2014) (quotation marks and citation omitted).

> The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts: first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm. [*Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007) (quotation marks and citations omitted).]

Plaintiffs argue that the received-by deadline violates the Purity of Elections Clause because it permits two similarly situated individuals to mail their absent-voter ballots on the same day, but because of differences in mail-processing speeds, one voter's ballot may be timely received and counted and the other voter's ballot may not be timely received and, accordingly, not counted. Plaintiffs also assert that enforcing the received-by deadline results in an impermissible differentiation between absent voters whose ballots are not counted because they were not received by 8:00 p.m. on election day and voters whose ballots are counted because the voters were standing in line to vote at the polls at 8:00 p.m. when the polls closed. MCL 168.720 provides that "[e]very qualified elector present and in line at the polls at the hour prescribed for the closing therefore shall be allowed to vote." Further, plaintiffs argue that the received-by deadline subverts "the will of the voters who adopted Proposal 3" and that the Purity of Elec-

tions Clause requires that ballots mailed by election day be counted.

Defendant correctly argues that the received-by deadline is facially nondiscriminatory and applies equally to all voters who choose to submit absent-voter ballots by mail. Although mail may be processed more expeditiously in some areas and less expeditiously in others, the Legislature has opted to impose a received-by deadline rather than a mailed-by deadline for absent-voter ballots. That determination was a policy decision, and the Purity of Elections Clause grants the Legislature the authority to provide for a system of absentee voting. Plaintiffs essentially ask this Court to implement a policy different from that chosen by the Legislature. Because the Purity of Elections Clause requires the Legislature to make policy determinations, this Court does not have the authority to do so. Moreover, mandamus relief is inappropriate if the act sought to be performed involves judgment or the exercise of discretion. *Hanlin*, 299 Mich App at 248.

Plaintiffs next contend that the received-by deadline violates the Free Speech and Assembly Clauses[20] set forth in Const 1963, art 1, §§ 3 and 5, the Equal Protection Clause set forth in Const 1963, art 1, § 2, and the Right to Vote Clause set forth in Const 1963, art 2, § 4(1)(a). Const 1963, art 1, § 3, guarantees the people of Michigan "the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances." Const 1963, art 1, § 5, provides that "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to

[20] Plaintiffs fail to articulate how the received-by deadline implicates the constitutional right to peaceably assemble.

restrain or abridge the liberty of speech or of the press." Const 1963, art 1, § 2 states that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." Finally, Const 1963, art 2, § 4(1)(a) guarantees Michigan citizens "[t]he right, once registered, to vote a secret ballot in all elections."

Plaintiffs contend that the received-by deadline is facially unconstitutional because not counting an absent-voter's ballot denies the voter their right to vote and to free speech. They argue that the deadline particularly burdens the speech of late-deciding voters. They also argue that ballots mailed on the same day could be delivered to the city or township clerk on different days, resulting in some ballots being counted and others not being counted solely because of differing mail delivery times in violation of voters' equal-protection rights.

Plaintiffs assert that laws that severely burden protected political expression or differentiate between individuals with respect to fundamental rights are subject to strict scrutiny. In *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 35; 740 NW2d 444 (2007), however, our Supreme Court held that "the Michigan Constitution does not compel that every election regulation be reviewed under strict scrutiny." The Court recognized that in *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992), the United States Supreme Court "rejected the notion that every election law must be evaluated under strict scrutiny analysis." *In re Request for Advisory Opinion*, 479 Mich at 20-21. The Court stated that the *Burdick* Court "recognized that

'to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.' " *Id*. at 21, quoting *Burdick*, 504 US at 433. Accordingly, the Court "adopt[ed] the 'flexible test' articulated in *Burdick* when resolving an equal protection challenge to an election law under the Michigan Constitution." *In re Request for Advisory Opinion*, 479 Mich at 35. This Court has also applied the "flexible test" in the context of a First Amendment challenge to an election law. See *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 681-683; 662 NW2d 804 (2003).

A statute is presumed constitutional, and the burden of proving otherwise rests with the party challenging the statute's constitutionality. *In re Request for Advisory Opinion*, 479 Mich at 11. "A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the act would be valid." *Id*. (quotation marks, citations, and brackets omitted). "[S]tates have a compelling interest in preserving the integrity of their election processes[.]" *Id*. at 19. "In order to protect that compelling interest, a state may enact generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process[.]" *Id*. at 19-20 (quotation marks and citation omitted).

> In sum, while a citizen's right to vote is fundamental, this right is not unfettered. It competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise, including ensuring that lawful voters not have their votes diluted. *Id*. at 20.

Our Supreme Court articulated the *Burdick* test as follows:

> [T]he first step in determining whether an election law contravenes the constitution is to determine the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. [*Id*. at 21-22.]

Moreover, the Court recognized that every election regulation "imposes to some degree a burden on an elector." *Id*. at 22.

In *In re Request for Advisory Opinion*, 479 Mich at 36, the Court held that the requirement that a voter provide photo identification before being provided a ballot did "not impose a severe burden on the right to vote" and imposed "only a reasonable, nondiscriminatory restriction" that furthered the state's "compelling regulatory interest in preventing voter fraud" and enforced the Purity of Elections Clause set forth in Const 1963, art 2, § 4(2). Similarly, the received-by deadline for absent-voter ballots does not impose a severe restriction on the right to vote and is a reasonable, nondiscriminatory provision that "protect[s] the integrity and reliability of the electoral process itself." See *Anderson v Celebrezze*, 460 US 780, 788 n 9; 103 S Ct 1564; 75 L Ed 2d 547 (1983). This is particularly true considering that a voter is not required to mail their absent-voter ballot. Rather, the voter or an immediate family member may deliver the ballot in person to the city or township clerk or, if requested, the clerk must pick up the ballot or send an election

assistant to pick up the ballot. MCL 168.764a. Accordingly, the received-by deadline is not unconstitutional.

Plaintiffs next argue that the failure of local clerks to immediately process absent-voter-ballot applications within 40 days of an election violates Const 1963, art 2, § 4(1)(g). Initially, we note that the concept that a local clerk must "immediately" issue an absent-voter ballot is found in the provisions of MCL 168.761(1), which provides that a clerk must immediately forward a ballot upon receipt of the application or, if ballots are not yet available, as soon as the ballots are received. Defendant states in her brief that she has, in fact, advised local clerks to issue ballots within 24 hours of receipt of the application. While 24 hours is not literally "immediately" upon receipt, neither is it feasible, as defendant points out, to actually issue a ballot immediately upon receipt of the application given that the application must be verified and the ballot prepared for mailing, as well as the fact that there may be a backlog of requests that must be processed.

Plaintiffs allege that in the March 2020 presidential primary, some 402 townships failed to start mailing absent-voter ballots by the beginning of the 40-day period. They also refer to "some election clerks" in "prior elections" who did not permit voters to cast their absent-voter ballots within the 40-day period. Even accepting these factual allegations as true, we fail to see what mandamus relief this Court can provide in the instant action. Defendant asserts that she has discharged her legal duty to, in essence, direct local clerks to comply with the law. Given the lack of evidence to the contrary, we accept defendant at her word. If a local election clerk has ignored or otherwise failed to comply with defendant's directions and the law, it would require a mandamus action against those

clerks to force their compliance. But none of those clerks is before us, so we cannot at this time grant relief.

Finally, plaintiffs argue that requiring absent voters to pay the return postage to mail an absent-voter ballot violates "[t]he right, once registered, to vote a secret ballot in all elections," set forth in Const 1963, art 2, § 4(1)(a), and the right to choose whether to submit an absent-voter ballot by mail set forth in Const 1963, art 2, § 4(1)(g).

Applying the *Burdick* test previously discussed, requiring absent voters to pay for return postage does not impose a severe restriction on the right to vote. Rather, it is a reasonable, minimal, and nondiscriminatory restriction. Notably, Const 1963, art 2, § 4(1)(g), provides voters the right *to choose* to submit an absent-voter ballot by mail. It does not require that voters be permitted to submit absent-voter ballots at no cost. Every election regulation "imposes to some degree a burden on an elector." *In re Request for Advisory Opinion*, 479 Mich at 22. Considering the various options for submitting an absent-voter ballot, the requirement that a voter pay return postage is minimal.[21] To the extent that the cost of return postage may pose a financial hardship, the voter or an immediate family member may deliver the ballot in person or, if requested, the city or township clerk must pick up the ballot or send an election assistant to pick up the ballot. MCL 168.764a.

For these reasons, we conclude that plaintiffs have failed to establish their entitlement to mandamus

[21] Indeed, even the voter who chooses to vote in person will likely bear the cost of transportation to the polling place, except for those who live within walking distance.

relief, and the complaint for a writ of mandamus is denied. Defendant may tax costs.

RIORDAN, J. (*concurring*). I concur with the lead opinion. I write separately to further explain that although it is within the province of this Court to grant the extraordinary remedy of mandamus relief when merited, to do so in this instance would be an abuse of discretion. *LeRoux v Secretary of State*, 465 Mich 594, 606; 640 NW2d 849 (2002); *O'Connell v Dir of Elections*, 316 Mich App 91, 100; 891 NW2d 240 (2016); *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016).

COUNT I

I agree with the lead opinion that Const 1963, art 2, § 4(1)(g) requires ballots postmarked by election day to be counted but that the provision does not render unconstitutional the 8:00 p.m. received-by deadline set forth in MCL 168.764a. See also MCL 168.720 (stating that polls are open until 8:00 p.m. on election day). If an absent-voter ballot is not received before the close of the polls on election day, even under Proposal 3, which was overwhelmingly approved by Michigan voters in 2018, the ballot cannot be counted regardless of the date displayed in the postmark. *Lantz v Southfield City Clerk*, 245 Mich App 621, 626; 628 NW2d 583 (2001).

This conclusion is consistent with the objective of constitutional interpretation, which is to determine the text's original meaning to the ratifiers (here, the people of the state of Michigan), at the time of ratification. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61; 921 NW2d 247 (2018). Therefore, the issue in this matter must be interpreted using the common understanding of the

people at the time of ratification—a pursuit which involves applying the ordinary meaning of each term used at the time of ratification, unless technical, legal terms are used. *Paquin v St Ignace*, 504 Mich 124, 129-130; 934 NW2d 650 (2019). Also applicable in this case is a secondary rule of state constitutional interpretation, which states that "wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 406; 185 NW2d 9 (1971).

There is no question that the people, by a very large majority, voted for and chose the option of voting by mail. Nor is there any dispute that "voting" is a process that necessarily includes having one's vote counted. See *Reynolds v Sims*, 377 US 533, 554; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (explaining that the fundamental right to vote encompasses the right to have those votes actually counted); *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964); *Kramer v Union Free Sch Dist No 15*, 395 US 621, 626; 89 S Ct 1886; 23 L Ed 2d 583 (1969). However, the right to vote is not absolute and limitations placed on it are not per se unconstitutional. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16, 20; 740 NW2d 444 (2007) (stating that a citizen's right to vote is fundamental, but that the right is not unfettered; "[i]t competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise").

Article 2, § 4(1)(g) provides for a registered voter "[t]he right . . . to vote an absent voter ballot without giving a reason, during the forty (40) days before an

election, *and* the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." (Emphasis added.) The parties submit no evidence whatsoever to support their assertion that when the voters adopted the amendment in 2018, they did so with the common understanding that the right to vote was absolute regardless of its timing, or even that it encompassed a right to have absent-voter ballots counted after the statutory received-by deadline of 8:00 p.m. on election day. *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 376-77; 630 NW2d 297 (2001) (YOUNG, J., concurring) ("Those who suggest that the meaning to be given a provision of our constitution varies from a natural reading of the constitutional text bear the burden of providing the evidence that the ratifiers subscribed to such an alternative construction. Otherwise, the constitution becomes no more than a Rorschach exercise in which judges project and impose their personal views of what the constitution *should have said*.").[1] There is no evidence that the voters were unaware of the existing received-by deadline or that they were unaware that the right to vote has never been recognized as completely unfettered by

[1] To ascertain the common understanding of a constitutional provision, the Court may also consider the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished by it, but the process of ascertaining the understanding of the framers should not be confused with the process of ascertaining the understanding of the ratifiers. *Traverse City Sch Dist*, 384 Mich at 405. The ballot summary of Proposal 3 provides a statement of purpose regarding the drafters' intent and offers some insight into the circumstances surrounding the referendum. However, it does not necessarily reflect the intent of the ratifiers and, thus, it is not particularly helpful in discerning their common understanding in relation to the received-by deadline. Nor is it within the province of the judicial branch to insert that purpose now.

this Court—or by any higher court, or by any controlling authority or political branches of government anywhere in this state or this country.[2]

In the absence of any evidence that the ratifiers intended to expand the right to vote beyond its historically understood and accepted bounds and transform it into an absolute right, I cannot conclude that the existing received-by deadline is unconstitutional under the adopted language in Proposal 3, particularly when our rules of construction dictate otherwise. *Traverse City Sch Dist*, 384 Mich at 406 (stating that "wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does"). Even the most liberal construction of the provision does not compel a different result when there is no evidence that the purpose of the provision was to create an unfettered and absolute right to absentee voting. Const 1963, Art 2, § 4(1) (stating that the provisions in the subsection "shall be liberally construed in favor of voters' rights *in order to effectuate its purposes*") (emphasis added).

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[2] Conceptually, voting has evolved from a political right or privilege, to a natural right, and now to a civic duty. See *Yick Wo v Hopkins*, 118 US 356; 6 S Ct 1064; 30 L Ed 220 (1886) (recognizing that the right to vote is "a privilege merely conceded by society"); *Wesberry*, 376 US at 17 (decided in 1964 and stating that persons qualified to vote have a constitutional right to have their vote counted); *Russell v Lundergan-Grimes*, 784 F3d 1037, 1052 (CA 6, 2015), citing *Crawford v Marion Co Election Bd*, 553 US 181, 203; 128 S Ct 1610; 170 L Ed 2d 574 (2008) (plurality opinion), for the proposition that citizens cannot demand as a constitutional entitlement an environment in which fulfilling the civic duty of voting is effortless. To the extent that "the right to vote" is a legal term of art, the caselaw at the time of ratification does not support an interpretation that the right to vote is unfettered, much less that the right to vote absentee is unfettered. *In re Request for Advisory Opinion*, 479 Mich at 20; *McDonald v Bd of Election Comm'rs of Chicago*, 394 US 802, 807; 89 S Ct 1404; 22 L Ed 2d 739 (1969).

In 2018, the voters adopted the initiative *as written*. At that time, the drafters could have included an alternative received-by deadline in the ballot initiative but, from the plain language of the initiative, decided not to do so. Since the time of the initiative's passage, the political process has had every opportunity to supplement the amendment that was passed. Eighteen months after the initiative was approved, a bill was introduced in the Legislature to address some of these issues, but nothing further has been done to enact the legislation advocated by plaintiffs, and seemingly, by defendant.[3] While the Legislature may yet act to address these issues in advance of the general election, this Court cannot command it do so. As we have previously stated:

> "We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch. As has been long recognized, when a court confronts a constitutional challenge it must determine the controversy stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics." [*Hammel v Speaker of House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012), quoting *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999).]

Nor can we short-circuit the political process and disregard the separation of powers by "revis[ing], amend[ing], deconstruct[ing], or ignor[ing]" the existing

[3] As the lead opinion notes, 2020 HB 5807, introduced May 20, 2020, would address some of the issues raised.

statutory received-by deadline[4] merely because the parties agree it should be so. This Court must determine *independently* the meaning of constitutional terms, and it is not bound by the interpretation of another branch of government—let alone by a stipulation of the parties who brought this case and controversy before us. *Council of Organizations & Others for Ed about Parochiaid v Governor*, 216 Mich App 126, 131; 548 NW2d 909 (1996) (stating that this Court is not bound by another branch's interpretation of constitutional provisions but must determine independently the meaning of constitutional terms); *Mack v Detroit*, 467 Mich 186, 209; 649 NW2d 47 (2002) ("[N]o one can seriously question the right of this Court to set forth the law as clearly as it can, irrespective of whether the parties assist the Court in fulfilling its constitutional function. The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions.").

The statutory received-by deadline is presumed constitutional, and the burden of proving otherwise rests with the party challenging the statute's constitutionality. *In re Request for Advisory Opinion*, 479 Mich at 11. At first glance, it is difficult to discern which party carries the burden in this case because it seems that defendant, the Secretary of State, concedes the issue and leaves it to this Court to select a new received-by deadline. However, ultimately, it is plaintiffs'[5] burden to show that the existing received-by deadline poses a

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[4] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008) (quotation marks and citation omitted).

[5] League of Women Voters of Michigan, Deborah Bunkley, Elizabeth Cushman, and Susan Smith.

severe infringement of the right to vote—and it is a burden that they have failed to meet. *Id*. at 36.

Plaintiffs recite a parade of horribles that may result from our refusal to grant mandamus relief. However, those outcomes are speculative. Accordingly, plaintiffs have not carried their burden. See *Purcell v Gonzalez*, 549 US 1, 6; 127 S Ct 5; 166 L Ed 2d 1 (2006) (Stevens, J., concurring) (stating that it was prudent to allow an election to proceed without enjoining certain statutory provisions when factual issues remained unresolved because, given the importance of the constitutional issues, the matter should be resolved on the "basis of historical facts rather than speculation"). Moreover, this Court cannot, and this concurrence certainly does not, rest its decision on whether or not mandamus relief might impact the outcome of the upcoming presidential election. To do so would serve a number of evils and would be an abdication of our duty as an independent judiciary. Assuming we know the minds of the voters,[6] which is an impossibility, and disregarding the other important issues on the upcoming ballots in this state, this Court cannot put its heavy thumb on the delicate scales of democracy. To do so would usurp the role of the Legislature, supplant the will of the electorate when it adopted Proposal 3 as written, and dilute the votes that comply with the received-by statute. *In re Request for Advisory Opinion*, 479 Mich at 43 (stating that the right to vote enshrined in Article 2, § 4 includes the assurance that one's vote will not be diluted by votes cast illegitimately). Doing so also would place this Court above the coequal branches of

[6] One would need to assume that absent voters are predisposed to vote for one candidate or another. But see Thompson et al, *Universal Vote-by-Mail Has No Impact on Partisan Turnout or Vote Share*, 117 PNAS 25 (2020) (concluding that contrary to popular claims, empirical evidence indicates that voting by mail does not favor any party over another).

our state government and would delegitimize the election on a national scale by debasing the legitimate votes cast in our sister states. *Reynolds*, 377 US at 555 (stating that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

This Court is not unaware, or unsympathetic, to the very real and serious plight of voters during the ongoing COVID-19 pandemic. Voters cannot be expected to exercise their right to vote at their own peril—or to risk the health of their fellow community members in order to have their votes counted. However, the method of addressing these issues requires the exercise of discretion, the marshaling and allocation of resources, and the confrontation of thorny policy issues—tasks that are appropriately performed by the Legislature. The people of this state, in their right to self-governance, tasked the Legislature with the constitutional duty to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration *and absentee voting*." Const 1963, Art 2, § 4(2) (emphasis added). For this Court to appropriate that task would be an improper infringement, and it would jeopardize the people's right to self-governance. We must leave the issue in the capable hands of the Legislature and the Executive, which have the constitutional authority, resources, and access to the best practices throughout the country from which to craft solutions.[7] Therefore, I agree with the lead opin-

[7] It appears the Legislature has already taken steps to address many issues surrounding the upcoming general election. In addition to 2020 HB 5807, discussed earlier, the Legislature is also considering 2020 SB 909,

ion that mandamus relief is not warranted. *McLeod v State Bd of Canvassers*, 304 Mich 120, 125; 7 NW2d 240 (1942) (stating that mandamus should not issue

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which proposes to eliminate in-person voting at precincts and convert elections entirely to mail-in voting; 2020 SB 756, which proposes that clerks in cities or townships with more than a certain number of active registered electors could allow election inspectors appointed to an absent-voter counting board to work in shifts; and 2020 SB 757, which proposes to permit clerks to preprocess absentee ballots ahead of election day.

In addition, the Legislature may look to the best practices of other states. Five states allow elections to be conducted entirely by mail. Oregon began doing so in 2000, Washington in 2005, Utah in 2013, Colorado in 2014, and Hawaii more recently in the 2020 primary. See Colo Rev Stat 1-5-401; Haw Rev Stat 11-101; Or Rev Stat 254.465; Utah Code Ann 20A-3a-202; Wash Rev Code 29A40-010. Washington D.C. plus 29 states, including Michigan, permit "no-excuse" absentee voting in federal elections; 16 states permit "excuse-only" absentee voting, and most states statutorily require absent-voter ballots to be received by election day. See National Conference of State Legislatures (NCSL), *VOPP: Table 18: States With All-Mail Elections* <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-18-states-with-all-mail-elections.aspx> [https://perma.cc/YHE9-KCZ3]; NCSL, *VOPP: Table 1: States with No-Excuse Absentee Voting* <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> [https://perma.cc/H9AS-Q5RL]; Hernandez, *All-Mail Elections* <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections635457869.aspx> [https://perma.cc/KHU2-6JDZ].

Notably, Colorado, which has a received-by deadline of 7:00 p.m. on election day, has been hailed as the model for voting by mail. To be counted, all envelopes containing absent-voter ballots must be in the hands of the designated election official or an election judge for the local government not later than 7:00 p.m. on election day. Colo Rev Stat 1-7.5-107(4)(b)(II); Leonhardt, *An Election Day Success*, New York Times (July 1, 2020) (discussing Colorado's model approach to voting by mail).

During the COVID-19 pandemic, most states are creating solutions to address the same issues raised by the parties in this lawsuit, and other democratic countries have conducted elections with mixed results. See, e.g., Mays, *Vernon Town Meeting Goes Digital, Includes Drive-Up Vote*, NBC Connecticut News (March 25, 2020), available at <https://www.nbcconnecticut.com/news/local/vernon-town-meeting-goes-digital-includes-drive-up-vote/2245233/> [https://perma.cc/882S-6KUZ] (discussing 55 votes cast by residents regarding the town's lease pay-

when the party seeking it has an adequate remedy at law); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008) (noting that the party seeking a writ of mandamus must establish that the party (1) has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result).

COUNT II

I agree with the lead opinion that mandamus relief is inappropriate regarding plaintiffs' allegation that, by their estimate, roughly one-third of all local clerks have failed to immediately process absent-voter ballot applications within 40 days of an election in violation of MCL 168.761(1).

"Michigan's elections system is administered by 1,603 county and local election officials making it one of the most decentralized elections systems in the nation."[8] There is nothing in the record identifying

ments); The Economist, *Why Voting Online Is Not the Way to Hold an Election in a Pandemic* (April 28, 2020) <https://www.economist.com/international/2020/04/27/why-voting-online-is-not-the-way-to-hold-an-election-in-a-pandemic> (posted April 28, 2020) (accessed July 6, 2020) [https://perma.cc/WYE7-PB5N]; Gunia, *South Korea Is Voting in the Middle of Coronavirus. Here's What U.S. Could Learn About Its Efforts to Protect Voters*, Time, <https://time.com/5818931/south-korea-elections-coronavirus/> (posted April 13, 2020) (accessed July 6, 2020) [https://perma.cc/FKV6-YDBG]; Tharoor, *Coronavirus Kills Its First Democracy*, Washington Post (March 31, 2020). Additionally, the Legislature could choose to adopt the same received-by deadline that it employs for uniformed-services and overseas voters. MCL 168.795a(16). See also the Uniformed and Overseas Citizens Absentee Voting Act, 52 USC 20301 *et seq*.

[8] Michigan Bureau of Elections, *Election Officials' Manual* (February 2019), p 1, available at <https://www.michigan.gov/documents/sos/

which clerks this Court should direct defendant to instruct, and it is not our job to seek out that information or to substantiate plaintiffs' allegations. That burden lies with plaintiffs, *In re Request for Advisory Opinion*, 479 Mich at 11, and it requires more specificity than a rough estimate of the number of possible offenders, see *Nat'l Bank of Detroit v State Land Office Bd*, 300 Mich 240, 250; 1 NW2d 525 (1942) ("Where none but specific relief will do justice, specific relief should be granted if practicable. And where a right is single and specific it usually is practicable.") (quotation marks and citations omitted). Thus, mandamus relief is not appropriate here.

COUNT III

I agree with the lead opinion that prepaid return postage for absentee ballots is not required under our state Constitution.[9] However, I do not find particularly persuasive defendant's argument that a voter's minimal burden of paying postage is outweighed by the state's important interest in its finances and that defendant suffers from reduced resources because of the economic downturn resulting from the pandemic. Defendant requested and received $12 million in federal funds for election administration under the Help

I_Structure_of_MI_Elections_System_265982_7.pdf> (accessed July 6, 2020) [https://perma.cc/U3PK-UFKH].

[9] Although plaintiffs argue that MCL 168.761(1) compels local clerks to immediately process absent-voter ballot applications, see the discussion of Count II earlier in this opinion, this statute is not cited in their argument regarding prepaid postage even though it directs clerks to forward absent-voter ballots "by mail, postage prepaid," or by personal delivery under certain circumstances. Plaintiffs raise the issue of prepaid postage only as a constitutional challenge under Article 2, § 4, and thus, this Court considers only the constitutional dimension of this issue.

America Vote Act (HAVA) plus $2.4 million in matching state funds and used some portion of that money to prepay postage for absent-voter ballots in the May 5, 2020 primary election.[10] Defendant also requested and received an additional $11.3 million under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and $2.3 million in matching state funds for election administration costs associated with the pandemic.[11] I am unaware of any federal or state statute that prohibits defendant from allocating a portion of those funds for prepaid postage. Rather, defendant suggests that her failure to include the expense of prepaid return postage in her funding requests now precludes her from allocating money for this expenditure.[12]

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[10] See US Election Assistance Commission, *2020 HAVA Funds* <https://www.eac.gov/payments-and-grants/2020-hava-funds> (accessed July 7, 2020) [https://perma.cc/BT9H-LBJL]; Executive Order No. 2020-27 (permitting the Secretary of State to "assist local clerks, county clerks, and election administrators with: the mailing of absent voter ballot applications with a postage-prepaid, pre-addressed return envelope to each registered voter within any jurisdiction conducting a May 5, 2020 election; the preparation of postage-prepaid absent voter ballot return envelopes"; and other measures); Secretary of State, *Secretary of State to Mail Absent Voter Ballot Applications to All May 5 Voters* <https://www.michigan.gov/sos/0,4670,7-127-93094-522761—,00.html> (posted March 23, 2020) (accessed July 7, 2020) [https://perma.cc/Z5SL-8HU6].

[11] See US Election Assistance Commission, *2020 CARES Act Grants* <https://www.eac.gov/payments-and-grants/2020-cares-act-grants> (accessed July 7, 2020) [https://perma.cc/DG3M-B7AJ].

[12] The parties have not estimated the total cost for providing prepaid postage. However, it seems the United States Postal Service offers some reasonably affordable packages. See United States Postal Service, *Facilitating the Processing and Delivery of Return Ballots from Voters Using Prepaid Postage* <https://about.usps.com/gov-services/election-mail/prepaid-reply-mail-info.htm> (accessed July 7, 2020) [https://perma.cc/FA48-MLKW]. Additionally, a number of precincts already provide return postage for absent-voter ballots. See Mauger, *One of Michigan's Largest Cities Makes Absentee Voting Easier for November* (June 28, 2020) <https://www.detroitnews.com/story/news/politics/2020/06/28/sterling-

Although I do find defendant's argument persuasive, I nonetheless agree with the lead opinion's conclusion that requiring voters to supply their own stamps is not a severe restriction when there is no requirement that absent voters mail their ballots. Instead the voter or an immediate family member may deliver the ballot in person or, if requested, the city or township clerk must pick up the ballot or send an election assistant to pick up the ballot. MCL 168.764a. In light of these options, I cannot conclude that plaintiff is entitled to mandamus relief on this issue.

Accordingly, I concur with the lead opinion.

GLEICHER, J. (*concurring in part and dissenting in part*). "All political power is inherent in the people." Const 1963, art 1, § 1. Before November 2018, Michigan's Constitution afforded the people only rudimentary protection of their right to exercise their political power as voters. Article 2 contained 10 sections describing the formal prerequisites for voting and delineating the procedural framework governing elections. But our Constitution lacked an affirmative declaration of specific voting rights.

That changed when the people overwhelmingly approved Proposal 3, a constitutional amendment establishing the following substantive voting rights:

- To vote a secret ballot;
- To vote an absent-voter ballot without giving a reason;
- To vote an absent-voter ballot during the forty (40) days before an election;

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heights-absentee-voting-easier/3263222001/> (posted June 28, 2020) (accessed July 7, 2020) (discussing Sterling Height's decision to provide prepaid postage and Detroit's longstanding policy of doing the same) [https://perma.cc/VY6W-KNXQ].

- To apply for and receive an absent-voter ballot in person or by mail; and
- To submit an absent-voter ballot in person or by mail.

Here are the relevant words the people approved:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (a) The right, once registered, to vote a secret ballot in all elections.
>
> * * *
>
> (g) The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. [Const 1963, art 2, § 4.]

My colleagues hold that despite the clear and unambiguous language of Proposal 3 establishing a right to vote by mail, an absent voter who mails his or her ballot has no constitutional right to have that ballot counted if the ballot arrives after election day. This holding contravenes the language of the Constitution and the intent of the voters. I respectfully dissent.

I

The central issue presented is whether Article 2, § 4 compels defendant, the Secretary of State, to count mailed ballots that arrive after 8:00 p.m. on election day. A trio of Michigan laws enacted before Proposal 3's passage, read together, prevent the Secretary of State from counting absent-voter ballots that arrive in the clerk's office after the close of the polls. MCL 168.764b(1) states, "An absent voter ballot must be

delivered to the clerk only as authorized in the instructions for an absent voter provided in section 764a." MCL 168.764a sets out step-by-step "INSTRUCTIONS FOR AN ABSENT VOTER." "Step 6" provides: "The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or an authorized assistant of the clerk after the close of the polls on election day will not be counted." And MCL 168.765 instructs, "If a marked absent voter ballot is received by the clerk after the close of the polls, the clerk shall plainly mark the envelope with the time and date of receipt and shall file the envelope in his or her office." MCL 168.765(4).[1] Plaintiffs[2] contend that this statutory framework cannot be reconciled with the right to vote by mail enshrined in Article 2, § 4. They seek an order of mandamus compelling the Secretary of State to count properly voted, timely mailed absent-voter ballots regardless of when they arrive in the clerk's office.

My colleagues find no conflict between these existing election laws and the constitutional guarantee of a right to vote by mail. The lead opinion declares that despite full compliance with all absentee-voting rules, absent voters must simply "assume[] the risk" that a mailed ballot won't arrive in time to be counted. Specifically acknowledging that voters now have the right to "submit" their ballots by mail, the lead opinion illogically terminates the right at that moment, negating the constitutional language the people approved.

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[1] MCL 168.765a(6), as enacted by 2020 PA 95, effective June 23, 2020, requires that absent-voter ballots received by the clerk *before* the close of the polls must be delivered "to the absent voter counting boards" established pursuant to the same public act.

[2] League of Women Voters of Michigan, Deborah Bunkley, Elizabeth Cushman, and Susan Smith.

A

City and township election clerks are authorized to mail absent-voter ballots to voters until 5:00 p.m. on the Friday before a Tuesday election. MCL 168.759(1). Evidence presented to this Court substantiates that most first-class mail is delivered within two to five days. Assume a voter's timely application for an absent-voter ballot arrives at the clerk's office on the Thursday or Friday before an election and that the clerk mails the ballot on Friday.[3] A ballot mailed to a voter on a Friday is unlikely to land in the voter's hands before the following Monday. Assume further that the voter immediately fills in the ballot and places it in the mail. That ballot will not arrive in the clerk's office until after election day. And depending on the efficiencies of the United States Postal Service, even ballots mailed to the clerk on the Thursday, Friday, or Saturday before an election may not arrive until *after* election day. These scenarios are not far-fetched. According to data supplied by the Secretary of State, during the May 2020 primary election, 3,307 absent-voter ballots (1.75% of those cast) arrived too late to be counted.[4] Voters who followed all the rules were nevertheless disenfranchised.

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[3] MCL 168.761(1) provides that upon receipt of a valid application for an absent-voter ballot, "the clerk immediately" must mail the absent-voter ballot. At the time of the events underlying this matter, the Election Officials' Manual published by the Michigan Bureau of Elections states: "A request for an absentee ballot must be processed immediately. It is recommended that the ballot be issued within 24 hours of the receipt of the application."

[4] Plaintiffs' proofs reveal that in the March 2020 primary election, more than 150,000 voters requested an absent-voter ballot during the week before the election. The number of absent voters increased substantially in the May 2020 election, undoubtedly due in part to the Covid-19 crisis and voters' fear of infection from standing in voting lines. Failing to count even a relatively small number of late-arriving absent-voter ballots can

Plaintiffs assert that Michigan's current election laws unconstitutionally constrain the Secretary of State from counting properly mailed absent-voter ballots that arrive after the close of the polls on election day. They seek an order of mandamus compelling the Secretary to perform her clear legal duty to direct the counting of such votes. The lead opinion lays out a smorgasbord of reasons for rejecting plaintiffs' arguments, all boiling down to one fundamentally incorrect premise: that Article 2, § 4 allows voters the right to "cast" their ballots by mail, to "submit" their ballots by mail, and to "mail" their ballots but does not grant them the right to have their votes *counted*.

B

"[T]here is no more constitutionally significant event than when the wielders of all political power . . . choose to exercise their extraordinary authority to directly approve or disapprove of an amendment" to our state's Constitution. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018) (cleaned up).[5] In ascertaining the meaning of an amendment's words, we are guided by "the rule of 'common understanding' " described by Justice COOLEY. *Traverse City Sch Dist v Attorney General*, 384

make all the difference. President Trump's margin in the 2016 presidential election was only 10,704 votes in Michigan. If 45% of eligible voters vote by absent-voter ballot in November 2020 and 1.75% of those votes are not counted because they arrive after the close of the polls on election day, more than 41,000 absent voters will be disenfranchised.

[5] 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 has been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

Mich 390, 405; 185 NW2d 9 (1971). The words the voters selected and approved, Justice COOLEY instructed, point the truest course to constitutional meaning. *Id*. Ultimately, " 'the intent to be arrived at is that of the people[.]' " *Id*., quoting Cooley, Constitutional Limitations (1st ed), p 66 (emphasis omitted). We locate meaning "by applying each term's plain meaning at the time of ratification." *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 67-68; 748 NW2d 524 (2008).

The words added by Proposal 3 are not difficult to parse. Voters now have the right to "vote" by mail. What did the voters understand voting by mail to mean? By enlarging the right to vote to include voting by a mailed ballot, the people dictated that the votes of absent voters would be *counted*. A right to vote by mail is a hollow right indeed if one's mailed vote is thrown in a wastebasket or placed in a file. See MCL 168.765.

"The right to vote has always received a preferred place in our constitutional system. The importance of this right can hardly be overemphasized. It is the basic protection that we have in insuring that our government will truly be representative of all of its citizens." *Mich State UAW Community Action Program Council v Secretary of State*, 387 Mich 506, 514; 198 NW2d 385 (1972). The meaning of the phrase "to vote" is deeply engrafted in our state and federal jurisprudence. Voting encompasses more than merely checking boxes on a form or pulling levers in a booth. "To vote" means to express a personal political preference *and to have that preference counted*. Voting is "a fundamental political right because [it is] preservative of all rights." *Yick Wo v Hopkins*, 118 US 356, 370-371; 6 S Ct 1064; 30 L Ed 220 (1886). Voting achieves this sacred place in our democratic pantheon because every vote matters. And

that was the common understanding of the people who added specific language establishing specific voting rights to Article 2.

A court may discern constitutional meaning by reviewing the existing legal framework surrounding a new provision. See *People v Nutt*, 469 Mich 565, 567; 677 NW2d 1 (2004). Even a cursory review of the preexisting law surrounding voting confirms that the common understanding of the term "to vote" necessarily incorporates the right to have one's vote counted. Long ago, our own Justice COOLEY recognized in a concurring statement the "right" of "the electors . . . to have their votes counted and allowed in the general result." *People ex rel Dickinson v Sackett*, 14 Mich 320, 331 (1866) (COOLEY, J., concurring). One hundred years ago, our Supreme Court endeavored to protect "the constitutional right of every voter to vote for every officer to be elected and to have his vote so counted as to have equal value and potentiality with the vote of every other elector who votes." *Wattles ex rel Johnson v Upjohn*, 211 Mich 514, 533-534; 179 NW 335 (1920).

The United States Supreme Court has consistently acknowledged that "the right to have one's vote counted has the same dignity as the right to put a ballot in a box." *Gray v Sanders*, 372 US 368, 380; 83 S Ct 801; 9 L Ed 2d 821 (1963) (cleaned up). In *Reynolds v Sims*, 377 US 533, 555; 84 S Ct 1362; 12 L Ed 2d 506 (1964), a foundational voting-rights case, the Supreme Court again highlighted the indisputable principle that "[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." (Cleaned up.) More recently, in *Wisconsin v City of New York*, 517 US 1, 12; 116 S Ct 1091; 134 L Ed 2d 167

(1996), the Supreme Court again referenced the "fundamental right . . . to have one's vote counted[.]"

But we do not need to consult the caselaw to discern the meaning of "to vote." We stand in long lines at polling places, too often in inclement weather and sometimes sacrificing our wages and our health, because we know that "[a]ll political power is inherent in the people." Const 1963, art 1, § 1. We vote to make a difference in our national, state, or local governance, or to demonstrate our satisfaction with the status quo. We vote to select our leaders, to directly enact or repeal our laws, or to change our Constitution. We vote because we understand that voting is the key to a healthy democracy, that voting empowers "[w]e the people." US Const, Preamble. We vote because we have taken to heart that every vote counts.

The people who amended our Constitution in 2018 understood that the right to vote necessarily embodies the right to have one's vote counted. "The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake Co v Rollins*, 130 US 662, 671; 9 S Ct 651; 32 L Ed 1060 (1889). And any possible doubt about what the people intended by empowering mailed voting is dispelled by Subsection (1) of Article 2, § 4, assiduously ignored by my colleagues, instructing that "[t]his subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes."

II

Const 1963, art 2, § 4(1)(g), as amended, grants registered voters the right "to vote an absent voter ballot without giving a reason, during the forty (40) days before an election[.]" The amendment additionally

grants to registered voters "the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." *Id*. These are simple words. We do not need a dictionary to understand any of them. In everyday parlance, the amendment says that registered voters can apply for and receive their ballots through the mail. After filling out their ballots, voters can mail their ballots back to the clerk.

This case should be easy. Because voters have a right to vote by mail if they mail their ballots to the clerk during the 40 days before an election, they have the right to have their votes counted when those votes arrive in the clerk's office. This interpretation squares with the historical and legal meaning of voting. It corresponds with the voters' intent.

Remarkably, in the middle of its meandering analysis of Article 2, § 4, the lead opinion essentially acknowledges that I am right. As to the voters' right to "submit" a ballot by mail, the lead opinion opines, "They certainly possess that right." The lead opinion declaims that it "would be absurd" to believe that "all that is guaranteed under Proposal 3 is the right to fill out an absentee ballot, not to have it counted"; the concurrence agrees that voting "necessarily includes" counting cast ballots. The lead opinion even goes so far as to say that any vote-counting deadline "chosen by the Legislature" may not "effectively preclude the ability of a voter to submit their absentee ballot at any point during the 40 days before an election." I wholeheartedly agree with these propositions. And yet the lead opinion manages to talk itself into the "absurd" position it emphatically disdains. My colleague accomplishes this extraordinary turn-around by violating the first principle of constitutional interpretation. Rather than engaging the text, my colleague endeavors to read out of Article 2, § 4 the actual words ratified by the

people. Instead, the lead opinion divines constitutional meaning from a "ballot summary."

The ballot summary at the heart of the lead opinion's "common understanding" analysis was approved by the Board of State Canvassers. According to the lead opinion, it does not "address" the right to vote by mail or the deadline for counting votes, omissions that the lead opinion somehow construes as proof that there is *no* right to vote by mail and that the people could not have cared less about "deadlines." In the lead opinion's view, the ballot summary "suggest[s] to voters that there would be some limitations on when election officials would be obligated to accept, and therefore count, ballots." This is an astonishing proposition for two reasons.

First, the lead opinion does not explain why it finds constitutional meaning in a ballot summary rather than the plain language of the constitutional text the people overwhelmingly approved. Unless the constitutional language under consideration is ambiguous or susceptible to many different interpretations, courts are forbidden from considering extraneous evidentiary sources. See *Nat'l Pride At Work, Inc*, 481 Mich at 80 ("When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited[.]"). The words at issue here are not ambiguous, and the ballot summary is utterly irrelevant. "Our obligation is to give the words of our Constitution a reasonable interpretation consistent with the plain meaning understood by the ratifiers. Text that may require reasonable effort to parse is not for that reason ambiguous." *Co Rd Ass'n of Mich v Governor*, 474 Mich 11, 17; 705 NW2d 680 (2005) (cleaned up).

Second, the notion that a ballot summary trumps the words of the Constitution boggles the mind. The

lead opinion makes no effort to explain why we should regard a ballot summary as a tool for depriving citizens of specifically enumerated rights they voted to approve. Ballot summaries cannot displace or override enacted words. And make no mistake, the rights to vote absentee and to vote by mail are specifically enumerated and easily understood.

Next, stating the obvious, the lead opinion declares that the voters "certainly possess" the right to "*submit* their absentee ballot[s] by mail," (emphasis added), as well as "to receive and cast" their ballots during the 40 days before an election. The lead opinion defines "the entire process of voting" as beginning by "requesting an application to apply for an absentee ballot" but ending with "the delivery of the completed ballot to the appropriate election officials." In an abrupt analytical shift, the lead opinion announces that *counting* an absent-voter's vote is constitutionally irrelevant. And so it must be to justify upholding a deadline disenfranchising thousands of voters who conduct themselves in strict conformity with all voting rules.

Rather than engaging with the actual words the people added to our Constitution, my colleagues instead confer "deadlines" with constitutional magnitude, elevating their importance to that of the right to vote itself. "[T]here must be a deadline—at some point, the ballots must be counted and a winner declared," the lead opinion inveighs. That deadline is up to the Legislature, we are admonished, and "[t]he courts' role is limited to ensuring that the deadline chosen by the Legislature does not effectively preclude the ability of a voter to submit their absentee ballot at any point during the 40 days before an election." Instead of critically examining the legality of the deadline at the heart of this case, my colleagues suggest that voters

just forgo exercising their right to vote by mail if they want their votes counted and content themselves with the knowledge that the Legislature is working on it.

Of course there must be a "deadline" for counting votes. And there *is* a deadline that permits the Secretary to count absent-voter ballots mailed before election day but arriving after. MCL 168.842(1) requires the Board of State Canvassers to "complete the canvass and announce their determination" of the result of a general election "not later than the fortieth day after the election." The canvass deadline for primary elections is 20 days. MCL 168.581. The Secretary has offered no reason that the canvass deadlines should not correspond to the deadline for counting timely mailed absent-voter ballots.[6]

Our task is not to mindlessly enforce a deadline solely because the Legislature selected it. Rather, we must evaluate whether the Secretary is empowered to enforce a deadline that prevents counting a substantial number of properly mailed ballots, thereby contravening Article 2, § 4. The lead opinion spills considerable ink in its paean to judicial review and the concurrence scolds on the same subject,[7] yet both conveniently forget the central lesson of *Marbury v Madison*, 5 US

[6] It also bears mention that Michigan has a statutory "mailbox rule" applicable to overseas and "uniformed services" votes that operates to extend the deadline for counting absent-voter ballots that arrive after the polls close if the clerk failed to "transmit" the ballot more than 45 days before an election. See MCL 168.759a(5) and (16).

[7] Reaffirming that this Court is not bound by a concession made by the Secretary's counsel at argument does not require a review of *Marbury v Madison*, 5 US 137; 2 L Ed 60 (1803). And despite counsel's concession corresponding to my position, if the Secretary intended to throw in the towel and admit defeat she would not have actively pursued a defense in this case. Undoubtedly the Secretary and her counsel were aware of this Court's holding in *Lantz v Southfield City Clerk*, 245 Mich App 621, 626; 628 NW2d 583 (2001), that an absent-voter ballot that does not reach

137; 2 L Ed 60 (1803): "[A] statute apparently governing a dispute cannot be applied by judges . . . when such an application of the statute would conflict with the Constitution." *Younger v Harris*, 401 US 37, 52; 91 S Ct 746; 27 L Ed 2d 669 (1971). This case is about whether statutory deadlines stand in the way of the exercise of fundamental constitutional rights. If the statutory deadline conflicts with the exercise of a constitutional right, the Secretary has a duty as a constitutional officer to refrain from enforcing the deadline.

The concurring opinion argues that "there is no evidence that the purpose of the [amendment] was to create an unfettered and absolute right to absentee voting." This is a peculiar statement given that the amendment manifestly *does* create an explicit right for registered voters to vote by mail during the 40 days before an election. Here are the unambiguously stated rights the people ratified: "The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(1)(g). It is hard to imagine plainer or more direct language.

Because the right is not "absolute" or "unfettered," the concurrence propounds, it is up to the Legislature to determine its boundaries. Platitudes aside, the pertinent inquiry focuses on whether a statute or regulation burdens the constitutionally protected right to vote by mail. While the Legislature may enact laws regulating voting, the laws may not prevent a voter

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the clerk before the close of the polls on election day "cannot be counted irrespective of the date displayed in the postmark." Capitulation was not an option.

from voting "or unnecessarily . . . hinder or impair his privilege." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 17; 740 NW2d 444 (2007) (cleaned up). "[T]he Legislature may regulate, but cannot *destroy*, the enjoyment of the elective franchise." *Id*. at 18 (cleaned up). On its face, a deadline preventing properly cast absent-voter ballots from being counted destroys the rights the people adopted by ratifying Proposal 3.

When considering a voting-regulation challenge under the Due Process or Equal Protection Clauses of the federal Constitution, a court must "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Crawford v Marion Co Election Bd*, 553 US 181, 190; 128 S Ct 1610; 170 L Ed 2d 574 (2008) (opinion by Stevens, J.) (cleaned up). Here, plaintiffs' claims rest on a more straightforward argument: the deadline directly violates Michigan's Constitution because it requires the rejection of properly cast ballots. My colleagues ignore this argument and instead recite that the deadline does not "severe[ly] infringe" or "effectively preclude" the right to vote. Although I disagree with these conclusions, placing them in a cognizable legal framework mandates consideration of whether the state has come forward with some reason that the election-day deadline for counting mailed ballots is necessary to "preserve the purity of elections" or to "guard against abuses of the electoral franchise." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 17-18. The state has not done so here—and neither have the lead opinion nor the concurrence. What is the plausible basis for a deadline that disenfranchises thousands of voters who cast absent-voter ballots in perfect concordance with all the rules? Proclaiming

"there must be a deadline" hardly qualifies as a justification for the actual deadline under consideration. Simply put, neither of my colleagues have put forward a single state interest served by failing to count ballots that arrive the day after an election, or the day after that.

The lead opinion's discourse on a voter's "choice" is equally ill-founded. Despite recognizing that Michigan voters now have a constitutional right to vote by mail, the lead opinion reduces the right to a quotidian choice. "[W]hen choosing to submit an absentee ballot by mail," the lead opinion lectures, "one assumes the risk that the ballot will not arrive by the deadline . . . ."[8] I am unaware of any legal principle supporting that a constitutional right may be dimmed or ignored simply because there is an alternate method available for exercising it. We assume the risk that a route we choose to drive may have potholes or that the bag of potatoes we select at the grocery may include some rotten ones. Constitutional rights are not a game of "gotcha," penalizing with a possible forfeit those who exercise them properly. Citizens may now vote by mail. They may also vote in person. The two rights are constitutionally coequal. Just as the Legislature may not unnecessarily burden one, it may not unnecessarily burden the other.

Moreover, the amendment approved by the people provides that "[a]ll rights set forth in this subsection shall be self-executing." Const 1963, art 2, § 4(1). A self-executing constitutional provision " 'supplies a suf-

[8] Ironically, the lead opinion adopts this rule after recounting the story of a letter that remained undelivered to the intended recipient for 81 years. Apparently, the lead opinion has no quarrel with the notion that voters must meekly surrender their constitutional rights to the vicissitudes of the United States Postal Service.

ficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced[.]' " *Thompson v Secretary of State*, 192 Mich 512, 520; 159 NW 65 (1916), quoting Cooley, Constitutional Limitations (7th ed), p 121. This means that "[l]egislation is not imperatively necessary to give it effect." *Hamilton v Deland*, 227 Mich 111, 115; 198 NW 843 (1924). While legislation "in aid" of a constitutional provision or designed to "better protect" the provision may be enacted, " 'all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' " *Id*. at 116-117, quoting Cooley (7th ed), p 122. Legislation that "curtail[s]" or places "undue burdens" on a self-executing constitutional right is prohibited. *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 725; 180 NW2d 820 (1970), aff'd *Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392 (1971).

The provisions added to Const 1963, art 2 clearly grant voters a specific right to vote by mail and declare the right to be self-executing. The right to vote by mail and to have one's vote counted are not abstract concepts requiring further legislative explication or definition. Accordingly, legislation is not required to accomplish the will of the people, and legislation that "curtails" or unduly burdens the right cannot be enforced. *Wolverine Golf Club*, 24 Mich App at 725.

III

"The primary purpose of the writ of mandamus is to enforce duties created by law[.]" *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 667; 425 NW2d 80 (1988). A writ may issue "if the plaintiffs prove they have a clear legal right to the performance

of [a] specific duty" and "that the defendant has a clear legal duty to perform" a specific act. *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999) (cleaned up). Those requirements are met here.

"[A] clear legal right is . . . founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 519; 866 NW2d 817 (2014) (cleaned up). As discussed, an absent voter's right to have her vote counted is readily inferable as a matter of law. Indeed, as the lead opinion concedes, it would be "absurd" to think otherwise. Absent voters who meet the requirements for voting, follow the rules, and mail their ballots before the deadline have a constitutional right to have their votes counted. Lest there be any doubt, Article 2, § 4(1) itself provides, "This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes." The Secretary, too, is bound by this commandment.

I would grant the motion for mandamus and order the Secretary to instruct the clerks that timely mailed absent-voter ballots that arrive after the close of the polls and before the date of the canvass must be counted.[9]

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[9] I take no position on the additional issues raised by plaintiffs, as the first constitutional issue they raise is dispositive. I concur with the lead opinion in result only that the Constitution does not require local clerks to provide return postage for absent-voter ballots.

SKAATES v KAYSER

Docket No. 346487. Submitted March 3, 2020, at Grand Rapids. Decided July 16, 2020, at 9:00 a.m.

Carla E. Skaates filed for divorce in the Marquette Circuit Court against her then-husband Nathan Kayser. The parties began living together in 2003 and married in 2012. Before the wedding, the parties spent more than a year negotiating the terms of a prenuptial agreement. However, the agreement was not executed until one month after the wedding. In addition to describing the parties' rights regarding their individual and marital property, the agreement also included a cooling-off provision, which required the parties to wait for a period of four months before filing for divorce and to attend a minimum of three joint marriage counseling sessions during the four-month period. Plaintiff filed for divorce in October 2016 without waiting for four months or attending any marriage counseling sessions, and she subsequently moved to enforce the postnuptial agreement. Defendant opposed the motion to enforce and asked the trial court to void the agreement as contrary to public policy and because he claimed that he had signed it under duress. He also argued that plaintiff could not seek to enforce the agreement because she had materially breached it by failing to abide by the terms of the cooling-off provision before filing for divorce. The trial court, Karl A. Weber, J., granted plaintiff's motion to enforce the agreement and later denied defendant's motion for reconsideration and entered a judgment of divorce that was consistent with the postnuptial agreement. Defendant appealed.

The Court of Appeals *held*:

1. A happily married couple that is living together and not contemplating divorce may not enter into a contract that anticipates and encourages a future separation or divorce. Allowing such agreements would encourage separation or divorce, which would be contrary to public policy. However, postnuptial agreements are not invalid per se, and even those between happily married couples living together and not contemplating divorce may be enforceable because such agreements may be intended to promote harmonious marital relations and to keep the marriage

together. In the present case, the stated purpose of the parties' agreement was to define and clarify their respective rights in each other's individual property and in any jointly owned property at the end of the marriage, whether it should end by divorce or death. Nothing in the agreement suggested that it was created in contemplation of a future divorce or separation; rather, the agreement contained terms that were supportive of the marriage, such as the creation of a joint marital checking account and the cooling-off provision. In addition, contrary to defendant's assertions, the agreement was not invalid on the basis that its property division made it more attractive for plaintiff to divorce him than to stay married. In fact, plaintiff transferred several significant premarital property interests to defendant via the agreement, while defendant was to keep as separate property his bank and retirement accounts and other financial items. As the trial court concluded, because the postnuptial agreement addressed the disposition of property at death or in case of divorce, allowed the parties to pursue their marriage in a manner most likely to allow it to flourish, and was not otherwise inequitable in its terms, it was not contrary to public policy.

2. A contract may be deemed unenforceable if it was signed under duress. A party demonstrates duress by showing that they were illegally compelled or coerced to act by fear of serious injury to their person, reputation, or fortune. However, the fear of financial ruin alone is not sufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully. In support of his duress argument, defendant in this case claimed that the latest draft of the agreement was sent to him on his wedding day when he felt stressed and distracted. However, defendant did not sign the postnuptial agreement on the day of the wedding, but rather an agreement to incorporate various corrections and changes into the final draft of the postnuptial agreement. The postnuptial agreement was not executed until after the wedding, when the distractions had dissipated. Additionally, the record supported the trial court's finding that the parties negotiated the agreement for several months before it was signed, while represented by separate, independent counsel. Defendant's belief that his failure to sign the final agreement would result in divorce, leaving him homeless, uninsured, and lacking income, was not sufficient to establish economic duress; he was required to show that plaintiff applied economic coercion *unlawfully*.

3. The trial court properly rejected defendant's argument that plaintiff materially breached the agreement by failing to follow

the terms of the cooling-off provision before filing for divorce. Michigan law prohibits a party who first breaches a contract from maintaining an action against the other party to the contract for his or her subsequent breach or failure to perform. However, this rule is qualified by the requirement that the initial breach must be material. One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit that he or she reasonably expected to receive. Plaintiff acknowledged that she had failed to wait for four months or attend joint counseling sessions before filing for divorce, but the parties agreed that they had eventually attended counseling together for several months, and plaintiff did not actively pursue the divorce during this period. Further, defendant testified that plaintiff was genuine in her attempts to save the marriage and in attending counseling. The evidence supported a finding that although plaintiff failed to strictly follow the terms of the agreement, her breach was not material because her subsequent actions largely cured the breach. In this way, defendant received the benefit that he could reasonably expect: a period of time to attempt to reconcile with plaintiff and avoid divorce.

4. When entering into a marital agreement, the parties have a duty to disclose their assets to the other party. Defendant claimed that plaintiff did not disclose gold coins that she received from her mother and later sold. However, plaintiff testified that she showed the coins to defendant on the day that she received them in 2007, and defendant did not offer any contrary testimony. Therefore, the undisputed evidence was that plaintiff disclosed the existence of the gold coins before the parties entered into the postnuptial agreement.

5. Parties to a marital agreement may not, through the terms of the agreement, prohibit the trial court from exercising its equitable powers under MCL 552.23(1) and MCL 552.401. These statutes also do not give parties the right to petition for invasion of separate assets; rather, they simply empower the circuit court. Defendant argued that the trial court should have determined the valuation of the parties' various properties in order to properly analyze whether an invasion of plaintiff's separate property was warranted in order to ensure an equitable division of property. However, defendant did not possess a statutory right to invade plaintiff's separate property; rather, the trial court had authority to do so if equity demanded it. The record showed that the court had a valuation of the parties' assets. Although defendant challenged the valuations, he did not support his challenges with documentation or evidence, nor did he demonstrate how any

inaccuracies would result in an inequitable distribution. The trial court's decision to enforce the agreement was not erroneous on the basis of this issue.

6. Michigan follows the American rule, which provides that attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract. In divorce actions, attorney fees are permitted by statute or court rule. Under MCR 3.206(D)(2)(a), a party may obtain attorney fees by alleging facts sufficient to show that the party is not able to bear the expense of the action and that the other party is able to pay. Defendant argued that he was not able to pay his legal fees and had exhausted his savings. However, defendant did not offer any evidence outlining the details of his attorney fees, such as hourly rate or number of hours worked. Because defendant bore the burden of submitting sufficient facts to justify an award of attorney fees, the trial court did not abuse its discretion by determining that defendant failed to satisfy his burden.

Affirmed.

1. FAMILY LAW — DIVORCE — POSTNUPTIAL AGREEMENTS — ENFORCEABILITY.

A happily married couple that is living together and not contemplating divorce may not enter into an enforceable contract that anticipates and encourages a future separation or divorce; however, an agreement between a married couple that seeks to promote harmonious marital relations is enforceable even if the agreement addresses property rights in the event of divorce.

2. FAMILY LAW — DIVORCE — POSTNUPTIAL AGREEMENTS — INVASION OF SEPARATE ASSETS.

The trial court may use its equitable powers under MCL 552.23(1) and MCL 552.401 to award separate property to the parties in order to reach an equitable result, but the parties themselves do not have any rights under these statutes to petition the court for invasion of separate assets that is distinct from their right to petition for divorce; the parties to a divorce cannot, through a postnuptial agreement, force a trial court to order a property settlement that is not equitable.

Laurie S. Longo for Carla E. Skaates.

Scott Bassett for Nathan Kayser.

Before: MURRAY, C.J., and METER and K. F. KELLY, JJ.

MURRAY, C.J. Defendant appeals by right a judgment of divorce and an order determining that a postnuptial agreement was enforceable. We affirm.

I. BACKGROUND[1]

The parties met and began cohabiting in 2003. Plaintiff is a dentist who operates her own practice, while defendant has engaged in a number of business ventures and occupied various positions over his life. Beginning in 2006, after plaintiff purchased her own dental practice, defendant began working as the practice's business manager.[2]

In 2011, plaintiff and defendant began discussing marriage. The parties had lived together for years, but each had their own separate businesses and assets. Thus, leading up to their 2012 marriage, the parties negotiated the terms of what was to be a prenuptial agreement. Plaintiff and defendant e-mailed back and forth, and discussed an agreement for approximately 16 months before its execution.

Although the agreement was supposed to be a prenuptial agreement, it turned into a postnuptial agreement because of time constraints. In other words, despite working on it for 16 months and agreeing to the major provisions, the agreement was not signed prior to the marriage. Plaintiff testified that after they were married, defendant indicated that he was not going to sign the agreement, which

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[1] These facts are taken from the evidentiary hearing held on the validity of the postnuptial agreement.

[2] The parties disputed defendant's role in this position as well as his role in acquiring the practice. However, there was no dispute that plaintiff utilized an outside company that specialized in the sale and purchase of dental practices or that plaintiff financed the acquisition entirely with her own funds.

greatly frustrated her. Nonetheless, after reviewing the document and obtaining advice from separate legal counsel, the agreement was eventually executed on September 19, 2012, approximately one month after the wedding.

The parties set forth the purpose of the agreement at its outset:

> The parties want to define and clarify their respective rights in each other's property and in any jointly owned property they now own or might accumulate after today and to avoid interests that, except as provided by this agreement, they might otherwise acquire in each other's property as a consequence of their marriage relationship.

The parties agreed that plaintiff's preexisting dental practice would remain plaintiff's individual property and, if divorce occurred, that she would be awarded the asset completely. On the other hand, if plaintiff died before defendant, then he was permitted to sell the practice and retain the proceeds. Before the marriage, plaintiff created a limited-liability company (LLC) that owned the building in which the dental practice operated. Through the agreement, plaintiff transferred to defendant a 25% ownership interest in this company and the building was designated a marital asset. If divorce occurred, the property would be divided according to the parties' ownership interests, with plaintiff having the option to buy out defendant's interest. As with the dental practice, if either party died before the other, the survivor would have 100% ownership. For his part, defendant owned before the marriage "3D Heli-Hub, LLC,"[3] which under the agreement would continue to be defendant's individual property; if divorce occurred,

[3] 3D Heli-Hub, LLC, was a hobby store that defendant had opened and operated for a number of years.

he would solely be awarded the company. If defendant died before plaintiff, then she could sell the company and retain the proceeds.

The parties had equal ownership of "Lady Lab-Coats, LLC,"[4] and the parties agreed that if divorce occurred, the company would be divided equally, with plaintiff having the option to buy out defendant's interest. Again, if one party died before the other, then the survivor would have 100% ownership. The agreement also provided that plaintiff would transfer to defendant a 50% interest in the marital home and, if divorce occurred, the parties would divide the property based on their ownership interests at the time of the divorce, with plaintiff having the option to buy out defendant's interest. As with the other property referred to in the agreement, if one party died before the other, then the survivor would receive 100% ownership.

As to each of their respective bank, investment, and retirement accounts, as well as life insurance policies, annuities, and other similar assets, the parties agreed that they would remain separate property and would not be subject to division if divorce occurred. Similarly, the parties agreed that any inheritances would be separate property, and that defendant would remain a beneficiary of two of plaintiff's life insurance policies, so long as the parties remained married, "at a level equal to or greater than forty percent" as long as the policies were in effect.

Additionally, the agreement provided that the parties would dissolve their tenancy in common in camp property and, in its place, would create a tenancy by

[4] Lady Lab-Coats, LLC, was a corporation created to pursue plaintiff's idea about making a more "feminine version" of the traditional "white lab coat," but the venture "never really went too far."

the entireties between them. Each party would have equal ownership, and it would be marital property. If divorce occurred, defendant would have the option to buy out plaintiff's interest.[5] All other property not mentioned in the agreement was to remain separate property with neither party having a claim to the other's property.

Importantly, the parties agreed on a "cooling off" provision, a procedure to be used when contemplating divorce. Specifically, if one party desired to file for divorce, the parties agreed to wait for four months before doing so. In this way, the parties had a "cooling off" period to work out marital issues. Consistent with that goal, the parties also agreed to attend a minimum of three joint marital counseling sessions during this period.

In October 2016, plaintiff filed for divorce without waiting for four months and before attending any counseling sessions. Plaintiff subsequently filed a motion to enforce the agreement. Defendant opposed the motion and asked the court to void the agreement, arguing that (1) the agreement went against public policy because it was made in contemplation of a future divorce and left plaintiff in a more attractive financial position in the event of a divorce; (2) he signed the agreement under duress, which resulted from uneven bargaining power, financial pressures, and a threat of divorce; (3) plaintiff materially breached the agree-

[5] The agreement also addressed day-to-day financial issues. For example, the parties agreed to create a joint marital checking account by January 2014, which would be "used for all routine household expenses." The parties agreed to contribute "an amount as mutually agreed each year" by using their respective financial statuses to determine their respective contributions. According to the agreement, the parties intended "to share household expenses that are derived for their mutual benefit."

ment by failing to follow the cooling-off provision, which prevented her from now seeking to enforce the agreement; and (4) plaintiff failed to fully disclose her assets, specifically certain gold coins that plaintiff had possessed and sold. The trial court conducted an evidentiary hearing on the issue of enforceability, where the parties presented their own testimony and offered exhibits into evidence.

The trial court issued a written decision granting plaintiff's motion. In its opinion, the trial court noted that the parties had discussed the terms of the agreement for a period of 16 months and that each party had been represented by counsel throughout this period, up to the agreement's execution. The trial court stated that although the parties had "contemplated" that the agreement would be a prenuptial agreement, it "evolved into a postnuptial agreement" because the parties married six weeks before the agreement was executed.

Recognizing that postnuptial agreements were not unenforceable per se and were acceptable if they "intended to promote harmonious marital relations and keep the marriage together," the trial court found that the agreement was the type of postnuptial agreement that was acceptable under Michigan law, reasoning in part that

> [n]othing in the agreement itself or the record suggests that the parties contemplated a separation in the near future when they signed the agreement. On the contrary, the agreement was made in large part to fulfill the desire of the parties to define and clarify their respective rights in each other's property and in any jointly held property that they owned prior to the execution of the Marital Agreement or thereafter acquired.

The trial court further concluded that the agreement did not leave one of the parties in a far more favorable position were they to abandon the marriage, but that overall the agreement favored defendant in light of the short duration of the marriage. In sum, the trial court found that the agreement was "relatively balanced and does not incentivize divorce."

With respect to defendant's duress argument, the trial court found that the parties had discussed the agreement for 16 months, that the last-minute e-mail on the wedding day included changes that the parties had previously been discussing, that defendant conceded that he had understood and voluntarily signed the agreement, and that the parties had each consulted independent counsel before signing the agreement. As a result, the trial court found that defendant was not under duress that would void the agreement.

Additionally, the trial court rejected defendant's material-breach argument, finding that although plaintiff had "technically violate[d] this provision," the agreement did not provide any remedy for a breach and that plaintiff had cured any breach because "after the breach was pointed out to [her,] . . . she took no further steps to proceed with the divorce proceeding and engaged in 5 or 6 marriage counseling sessions."[6]

Defendant filed a motion for reconsideration, which the trial court denied, and after another hearing, the court entered a judgment of divorce that was consistent with the agreement.

Before this Court, defendant challenges both the trial court's decision on the enforceability of the agreement

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[6] The trial court did not address defendant's arguments on the alleged nondisclosure of the gold coins.

and the judgment of divorce as it relates to the invasion of separate assets and attorney fees.

II. ANALYSIS

A. THE AGREEMENT'S ENFORCEABILITY

1. STANDARDS OF REVIEW

Since postnuptial and other marital agreements are contracts, we are guided by contract principles in reviewing the agreement. See *Hodge v Parks*, 303 Mich App 552, 558; 844 NW2d 189 (2014); *Lentz v Lentz*, 271 Mich App 465, 471-472 & n 3; 721 NW2d 861 (2006). Accordingly, we review de novo the trial court's interpretation of a contract as well as its ruling on legal questions that affect the contract's validity. *Hodge*, 303 Mich App at 558. However, we review for clear error any factual findings made by the trial court. *Id*.

2. PUBLIC POLICY

Defendant argues that the agreement was unenforceable because it was contrary to public policy. As defendant notes, the general rule is that "a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce." *Id*. (quotation marks and citation omitted). To allow such agreements "would encourage separation or divorce, which is not an appropriate public policy." *Id*., citing *Randall v Randall*, 37 Mich 563, 571 (1877). One way a postnuptial agreement encourages separation or divorce is if the terms are "calculated to leave [one party] in a much more favorable position to abandon the marriage." *Hodge*, 303 Mich App at 558 (quotation marks and citation omitted; alteration in original).

Despite this general prohibition against postnuptial agreements, we have recognized that they " 'are not invalid *per se*,' because some postnuptial agreements may be intended to promote harmonious marital relations and keep the marriage together." *Id*. at 558-559 (citation omitted). Such agreements do not implicate the public-policy concerns of *Randall*. *Id*. at 559. Accordingly, if the agreement in question "seeks to promote marriage by keeping a husband and wife together, Michigan courts may enforce the agreement if it is equitable to do so." *Id*.

According to defendant, there are essentially three types of postnuptial agreements that have been upheld by Michigan courts: (1) the parties are separated or a divorce action is pending and the parties seek to reconcile their marriage; (2) the parties are separated or a divorce action is pending and the parties agree to settlement terms to be entered into a divorce judgment in the near future; and (3) where the married couple is not separated, but the couple enters into an agreement to determine property rights upon the death of one of the spouses. What is not typically upheld in Michigan courts, according to defendant, is a postnuptial agreement entered into by a married couple that is not separated and which establishes each respective spouse's rights in the event of divorce. This latter prohibition, according to defendant, exists because of the longstanding Michigan public policy against enforcing postnuptial agreements that promote divorce.

For the most part, we have no disagreement with the general legal propositions argued by defendant. After all, a reconciliation-type agreement was upheld in *Hodge*, 303 Mich App at 560, while in *Lentz*, 271 Mich App at 467, 473, we upheld a separation-type

agreement between spouses who were no longer living together. And postnuptial agreements between married parties that address inheritance issues upon a spouse's death have been upheld. *Rockwell v Estate of Rockwell*, 24 Mich App 593, 597-598, 600-601; 180 NW2d 498 (1970); *In re Highgate Estate*, 133 Mich App 32, 36; 348 NW2d 31 (1984). But we do disagree with the proposition that *all* postnuptial agreements made by happily married couples living together (i.e., not separated or otherwise contemplating divorce) that address property rights in the event of divorce are invalid as a matter of law. Indeed, in *Ransford v Yens*, 374 Mich 110; 132 NW2d 150 (1965), an equally divided Supreme Court upheld a provision similar to that entered into by the parties here.

In *Ransford*, the parties entered into an agreement three years after their marriage that set forth their respective rights to property. *Id*. at 110-111 (opinion by KELLY, J., for affirmance). As in this case, the parties in *Ransford* had separately accumulated property prior to the marriage. *Id*. at 111. The written agreement not only determined their respective rights to existing property, but it also indicated that if the parties subsequently discontinued living together as husband and wife, each party would be responsible to support themselves, and neither would be entitled to any interest in the other spouse's property. *Id*. at 112. After entering into the agreement, the couple continued to live together as husband and wife, but separated eight months before the husband's death. *Id*. at 112-113.

In the ensuing estate matter in the probate court, the wife sought a widow's allowance from her husband's estate, a request that was opposed by the estate administrator on the basis of the postnuptial agree-

ment. *Id*. at 113. The probate court held that the wife was entitled to the widow's allowance because "the agreement, having been made when the parties were not separated and not contemplating separation, was void as against public policy." *Id*. On appeal, the circuit court reversed, holding that the overall context of the agreement's language revealed that it was not made in contemplation or in furtherance of a divorce, but was made in part to resolve an existing dispute and in part to resolve any potential future property disputes. *Id*. at 113-114.

On appeal to the Supreme Court, the wife argued that the agreement was void under *Day v Chamberlain*, 223 Mich 278; 193 NW 824 (1923). *Ransford*, 374 Mich at 114 (opinion by KELLY, J., for affirmance). Four justices of the Court concluded otherwise, stating that the language of the agreement showed that it was in furtherance of the marriage relation because it set forth their respective rights and obligations, which was important to the parties and their marital harmony:

> The parties to the instant agreement expressly stated they were agreeing to 'continue to live together as husband and wife,' and there is nothing in the agreement that shows it was 'calculated to favor a separation,' or that it was drawn to 'provide for a separation of the parties and a breaking up of the marriage.' Instead of coming to such a conclusion, it is more logical to state that the parties now before this Court entered into said agreement with the hopes that the marital journey they had commenced as rather elderly people would continue on without discord if they eliminated the only dispute or problem they faced, namely: The eventual disposition of property owned severally at the time of marriage as well as that acquired jointly during the marriage. [*Id*. at 116.]

We agree with the opinion written by Justice KELLY in *Ransford*, and find that it is the most applicable case

to resolving the validity of the parties' agreement.[7] And, it is an example of a postnuptial agreement upheld by the Supreme Court when it was entered into by a married couple that was living together, while setting forth their respective rights and obligations as to existing property and future obligations should a divorce or separation occur. See also *Rockwell*, 24 Mich App at 598-599 (recognizing that the *Ransford* Court affirmed the trial court's enforcement of the postnuptial agreement made while the parties were married and which contained some provisions addressing the possibility of divorce).

Turning back to the parties' agreement, the parties initially acknowledge their mutual desire "to *define and clarify their respective rights* in each other's property and in any jointly owned property they now own or might accumulate after today and to avoid interests that, except as provided by this agreement, they might otherwise acquire in each other's property as a consequence of their marriage relationship." (Emphasis added.) This description is important in understanding its purpose and the parties' intent, as the plain language demonstrates that its purpose was merely to define and clarify the parties' rights during the marriage and at the end of the marriage, whether it ends by divorce or death. Nothing in the agreement suggests that it was created in contemplation of a future separation or divorce. In fact, the agreement contains terms to help support the marriage. For example, one provision speaks to the creation of a joint marital checking account, the purpose of which is to fund joint expenses

[7] Eight justices sat on the *Ransford* Court, and an evenly decided decision is not precedent. *Corp & Securities Comm v McLouth Steel Corp*, 7 Mich App 410, 412; 151 NW2d 905 (1967). But Justice KELLY's opinion in *Ransford* nevertheless contains persuasive reasoning.

during the marriage. In this way, the parties could easily pay for joint expenses while still retaining their separate bank accounts, thereby eliminating a potentially acrimonious issue and promoting a harmonious marriage.

To this same point, the agreement also contains a "cooling off" provision, which required the parties to wait for four months and to attend joint marital counseling before filing for divorce. This provision likewise reflects the parties' desire to refrain from making hasty decisions and to take affirmative steps to preserve the marriage if possible. We therefore reject defendant's contention that the agreement was created to encourage, or was made in contemplation of, divorce, rather than for the harmonious continuation of the marriage.

Postnuptial agreements that make it more financially attractive for a party to divorce are viewed as encouraging divorce and have been invalidated on that basis. See *Hodge*, 303 Mich App at 558; *Rockwell*, 24 Mich App at 597-599. But we reject defendant's contention that this agreement's division of property made it more attractive for plaintiff to divorce him. In fact, as the trial court recognized, the evidence leads to the opposite conclusion. Under the agreement, plaintiff transferred a portion of several significant premarital interests to defendant, including a 25% ownership interest in her dental practice building, a 50% interest in the marital home (which plaintiff purchased prior to the marriage with her own funds), and an immediate 50% interest in the camp property, which plaintiff had, again, purchased entirely with her own funds. Moreover, defendant's various bank, investment, and retirement accounts, as well as his financial items, remained separate property and under his complete control. The

trial court found that the division was equitable, especially in light of the marriage's short duration, and in light of the evidence presented, this determination was not clearly erroneous.

We also think it important that the parties discussed and negotiated the agreement for 16 months, and most of that time was prior to the marriage. It was undisputed before the trial court that the agreement was supposed to be a prenuptial agreement and that it became a postnuptial one only because time constraints prevented earlier finalization.[8] Accordingly, we agree with the trial court that this was not an agreement that contemplated a future divorce; nor was it an agreement that encouraged divorce. Instead, the agreement reveals that the parties clearly wished to be married and remain married, and the agreement was meant to help facilitate this.

The language of the agreement, coupled with the trial court's findings, is what takes this case out of the *Randall* line of cases. In *Randall* and subsequent decisions, the Court ruled that agreements "*calculated to favor* a separation which has not yet taken place will not be supported" by the common law. *Randall*, 37 Mich at 571 (emphasis added).[9] Here, the trial court did not clearly err in its findings that the agreement was not "calculated to favor" separation or divorce, but was meant to do just the opposite, taking this case outside the holding of *Randall*. Likewise, the *Day* Court struck down an agreement because the "hus-

[8] Evidence showed that defendant, in fact, requested that the agreement get wrapped up after the marriage, as it would reduce any associated stress with completing it by that deadline.

[9] It is worth pointing out that the Legislature has not spoken on the policy of postnuptial agreements, and so this issue remains one of common law for the courts.

band and wife were living and cohabiting together at the time [of signing the separation agreement] and continued so to do for nearly two months thereafter." *Day*, 223 Mich at 281. And, unlike in *Wright v Wright*, 279 Mich App 291, 297; 761 NW2d 443 (2008), where we affirmed the trial court's finding that the terms of a postnuptial agreement significantly favored one spouse over the other (thus encouraging separation), here the trial court's findings supported the opposite conclusion.

Based on the trial court's findings, though living together, the parties' agreement was not in contemplation of them separating or divorcing. As the trial court concluded, because the postnuptial agreement addressed the disposition of property at death or in case of divorce and otherwise allowed the parties to pursue their marriage in a manner most likely to allow it to flourish, and was not otherwise inequitable in its terms, it was not contrary to public policy.

3. DURESS

Defendant next contends that the trial court erred by determining that he did not sign the agreement under duress.

"A contract may be deemed unenforceable if it was executed under duress." *Allard v Allard*, 308 Mich App 536, 551; 867 NW2d 866 (2014), rev'd in part on other grounds 499 Mich 932 (2016). To successfully demonstrate duress, a party must show "that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Allard*, 308 Mich App at 551 (quotation marks and citations omitted). "[T]he fear of financial ruin alone" does not demonstrate "economic duress; it must also be

established that the person applying the coercion acted unlawfully." *Id*. (quotation marks and citation omitted).

Defendant advanced no allegations or evidence that he was *illegally* compelled or coerced to enter the agreement by fear of serious injury to his person, reputation, or fortune. To support his duress argument, defendant testified that on the day of the marriage, he was stressed, distracted, and felt "ambushed" because the latest draft of the agreement was sent to him that day. This set of circumstances is much less severe than those in *Allard*, where the defendant was first presented with the antenuptial agreement 10 days before the wedding and she signed the agreement on the day of the wedding under pressure that the wedding would be called off and large sums of money would be lost from canceling the wedding. *Allard*, 308 Mich App at 552-553. Additionally, the defendant did not consult with separate counsel. *Id*. at 540. Here, the agreement was not executed on the same day as the marriage; it was executed *after* the marriage and after the distractions and stresses had passed. Additionally, as the trial court found, there had been months of negotiation and discussion about the major terms of the agreement, with separate independent counsel being consulted throughout. And what defendant signed on the day of the marriage was not the agreement itself, but merely his agreement to incorporate various corrections and changes into the final draft. The trial court also found that defendant admitted that he was not forced to sign the agreement, which is supported by the record.

Finally, although defendant claimed that he believed that if he did not sign the final agreement he would be "homeless, unemployed, uninsured, and without any income," a fear of financial ruin cannot, by

itself, establish economic duress. *Allard*, 308 Mich App at 551. Defendant must show that plaintiff applied this economic coercion *unlawfully*, *id*., which he failed to demonstrate.

4. MATERIAL BREACH

Defendant also challenges the trial court's ruling that plaintiff did not materially breach the agreement by failing to follow the cooling-off provision before filing for divorce. We conclude that the trial court correctly analyzed the issue under the facts and terms of the agreement.

Under Michigan law, "one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (quotation marks and citation omitted). This general rule is qualified, however, by the requirement that the "initial breach is *substantial*." *Id*. (emphasis added). "One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

Although plaintiff acknowledged that she did not wait four months or attend joint marital counseling before filing for divorce, as the trial court recognized, both parties testified that they did eventually attend counseling together for a period of several months. In fact, plaintiff paid for the counseling, and plaintiff did not actively pursue the divorce until after counseling concluded unsuccessfully. And defendant testified that plaintiff was genuine in attending counseling and trying to save the marriage. This evidence supported the trial court's determination that, although plaintiff

did not strictly follow the agreement's terms, the breach was not substantial because her subsequent actions largely cured the breach. We similarly agree that any breach was not substantial given that defendant received the benefit that he could reasonably be expected to receive: a period of time in which the parties could attempt to reconcile their marriage and avoid divorce. See *Holtzlander*, 182 Mich App at 722.

5. FAILURE TO DISCLOSE ASSETS

We likewise reject defendant's argument that the agreement was unenforceable because plaintiff failed to fully disclose her assets, specifically, a number of gold coins that she received from her mother in 2007 and later sold. When entering into a marital agreement, the parties have a duty to disclose their assets to the other party. See *In re Benker Estate*, 416 Mich 681, 689-691; 331 NW2d 193 (1982). At the evidentiary hearing, plaintiff testified that she showed defendant the gold coins on the same day that she received them and explained to him that the coins were to be distributed to herself and her siblings. Defendant did not offer any contrary testimony. Thus, the undisputed evidence was that defendant was aware of the gold coins before entering into the agreement. See *In re Oversmith's Estate*, 340 Mich 104, 106; 64 NW2d 678 (1954).

B. INVASION OF SEPARATE ASSETS

1. STANDARDS OF REVIEW

We review the trial court's factual findings on the division of marital property for clear error. *Hodge*, 303 Mich App at 554. Clear error occurs "when this Court is left with the definite and firm conviction that a mis-

take has been made." *Id*. at 555 (quotation marks and citation omitted). "If the trial court's findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). Given that the trial court's "dispositional ruling is an exercise of discretion[,] . . . the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). Questions of law are reviewed de novo. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010).

2. DISCUSSION

On this issue, defendant argues that the trial court was unable to determine if the property division was equitable without first determining the valuation of various properties. He contends that this valuation was necessary for the trial court to properly analyze whether an invasion of plaintiff's separate property was warranted.

The trial court may utilize its equitable powers under MCL 552.23(1) and MCL 552.401 to award separate property to the parties in order to reach an equitable result. In *Allard v Allard (On Remand)*, 318 Mich App 583, 601; 899 NW2d 420 (2017), we held that "to the extent that parties attempt, by contract, to bind the equitable authority granted to a circuit court under MCL 552.23(1) and MCL 552.401, any such agreement is necessarily void as against both statute and the public policy codified by our Legislature." More specifically, we stated that "the parties to a divorce cannot, through antenuptial agreement, compel a court of equity to order a property settle-

ment that is *in*equitable." *Id*. In other words, parties may not, through a marital agreement, prohibit the trial court from exercising its equitable powers under these statutes. *Id*. at 602-603. We reasoned that under the plain statutory language, "the Legislature intends circuit courts, when ordering a property division in a divorce matter, to have equitable discretion to invade separate assets if doing so is necessary to achieve equity." *Id*. at 600-601. These two statutes do not give "parties to a divorce any statutory right to *petition* for invasion of separate assets—at least none that is distinct from the parties' right to petition for divorce in the first instance. Rather, the statutes simply empower the circuit court." *Id*. at 601. Hence, "parties have no discernible rights to waive under MCL 552.23(1) and MCL 552.401." *Id*.

Defendant misreads and mischaracterizes our *Allard* decision. He does not possess a statutory right to invade plaintiff's separate property; rather, the trial court possesses the authority to do so if equity demands it. That is why the *Allard* Court held that parties cannot through a marital agreement *force* a trial court to order a property settlement that is *not equitable*. See *id*. Our holding presupposed an inequitable agreement; otherwise, there would be no issue in dividing the property through that agreement's terms. Here, because the trial court found that the agreement's distribution of the property was fair and equitable, it properly ruled that *Allard* was inapplicable.

Additionally, the record demonstrates that the trial court already possessed a valuation of the properties and assets. Although defendant challenged the appraisals for some of the real property, this was based on his own belief that the appraisals were "wrong." He

submitted no further documentation or evidence and failed to demonstrate *how* these inaccuracies would result in an inequitable distribution, i.e., that the inaccuracies would result in his receiving an inequitable amount of property and assets. The trial court did not err.

C. ATTORNEY FEES

Lastly, we reject defendant's contentions that he was entitled to attorney fees.

1. STANDARDS OF REVIEW

In a divorce action, this Court reviews for an abuse of discretion an award of attorney fees. *Loutts v Loutts (After Remand)*, 309 Mich App 203, 215-216; 871 NW2d 298 (2015). The trial court's factual findings are reviewed for clear error, while issues of law are reviewed de novo. *Id*. at 216.

2. DISCUSSION

Michigan follows the "American Rule," which states that "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). In a divorce action, attorney fees are permitted by statute and court rule. *Id*. MCR 3.206(D)(1) states:

> A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

MCR 3.206(D)(2) provides two ways for a party in a divorce action to obtain attorney fees, only one of which

is relevant to this appeal: the party requesting attorney fees "must allege facts sufficient to show that" he or she "is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay[.]" MCR 3.206(D)(2)(a).[10]

MCR 3.206(D)(2)(a) has been interpreted "to require an award of attorney fees in a divorce action 'only as necessary to enable a party to prosecute or defend a suit.' " *Loutts*, 309 Mich App at 216 (citations omitted). "[A] party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Id*. (quotation marks and citations omitted). The trial court must "give 'special consideration to the specific financial situations of the parties and the equities involved.' " *Id*. at 218 (citation omitted).

In his trial brief, defendant argued that because plaintiff had terminated his employment, he was "unable to pay the costs associated with this litigation" and had "accumulated legal debt in excess of $15,000." At the final divorce hearing, defendant indicated that he had exhausted his "retirement savings" and his "regular savings" and had "inadequate income to meet even the most basics needs." However, defendant failed to offer any evidence outlining the details of his attorney fees, such as hourly rate, number of hours worked, and the experience level of his attorney. This is in contrast to *Woodington*, in which the plaintiff submitted relevant documentation to support her request for attorney fees. See *Woodington*, 288 Mich App at 371. Defendant bore the burden of submitting *sufficient* facts to justify the award, see *id*. at 370, and the trial

[10] Defendant's request related entirely to MCR 3.206(D)(2)(a), making (2)(b) inapplicable.

court did not abuse its discretion by determining that defendant failed to satisfy his burden.

Affirmed.

METER and K. F. KELLY, JJ., concurred with MURRAY, C.J.

PHYSIATRY AND REHAB ASSOCIATES v WESTFIELD INSURANCE COMPANY

Docket No. 349465. Submitted April 7, 2020, at Detroit. Decided April 23, 2020. Approved for publication July 16, 2020, at 9:05 a.m.

Plaintiff Physiatry and Rehab Associates filed a third-party action in the Oakland Circuit Court in Mohammed Alhalemi's suit against defendant Westfield Insurance Company. Alhalemi filed the action seeking payment of personal protection insurance (PIP) benefits under a no-fault insurance policy with defendant after Alhalemi was involved in a motor vehicle accident. After filing his action against defendant, but before the resolution of his claim, Alhalemi executed an assignment of benefits to plaintiff on March 22, 2018. On June 6, 2018, Alhalemi settled his action against defendant for $45,000. As part of the settlement, Alhalemi agreed to pay any medical bills from the settlement funds and to release defendant from all past, present, and future claims for benefits arising out of the accident. The trial court, Denise Langford Morris, J., dismissed the third-party complaint, finding that pursuant to the settlement agreement, Alhalemi had released defendant from any and all past, present, and future claims for no-fault benefits arising from the accident. The court also found that there was no evidence that defendant had been notified of plaintiff's claim or was provided with the assignment of benefits before the date of the settlement agreement. Plaintiff appealed.

The Court of Appeals *held*:

1. There was no evidence that defendant was aware of plaintiff's claims under the assignment or that the assignment was delivered to defendant before it had reached a settlement with Alhalemi. Further, plaintiff's argument that the release only applied to the claims asserted in Alhalemi's action against defendant was refuted by the language of the settlement. While the settlement may have arisen from the claims Alhalemi made in his action against defendant, the settlement clearly and unambiguously released defendant from all past, present, and future claims. Moreover, Alhalemi agreed in the settlement to pay all

unpaid medical expenses from the settlement funds. Therefore, the trial court properly dismissed plaintiff's claim.

2. Plaintiff's claim was barred by MCL 500.3112. The statute provides that payment in good faith of PIP benefits by an insurer to a person it believes is entitled to them discharges the insurer's liability regarding the payments unless the insurer has been notified in writing of another person's claim. Under the statute, plaintiff would have to have provided defendant with a copy of the assignment before defendant entered into the settlement agreement with Alhalemi in order to have a valid claim. Because there was no evidence that defendant was ever provided with the assignment, the statute barred plaintiff's claim.

Affirmed.

Bashore Green Law Group (by *Ian N. Coote* and *Kevin S. Green*) for Physiatry and Rehab Associates.

Garan Lucow Miller, PC (by *Christian C. Huffman*) for Westfield Insurance Company.

Michigan Auto Law (by *Christopher C. Hunter*) for Mohammed Alhalemi.

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM. Plaintiff Physiatry and Rehab Associates (plaintiff) appeals from an order of the circuit court granting summary disposition in favor of defendant Westfield Insurance Company pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

According to plaintiff, it provided medical services to Mohammed Alhalemi, defendant's insured under a no-fault insurance policy, following a motor vehicle accident. On March 22, 2018, Alhalemi executed an assignment of benefits in favor of plaintiff. Before this, however, Alhalemi filed an action against defendant for the payment of personal protection insurance (PIP) benefits under the insurance policy. This action was

ultimately settled for $45,000. This settlement was the result of a facilitation agreement entered into on June 6, 2018, and provided in pertinent part as follows:

> It is hereby agreed between plaintiff(s) and defendant(s) that the following accurately sets forth the entire terms and conditions of a settlement of all claims put forward in the above captioned matter:
>
> IT IS AGREED THAT plaintiff(s) shall execute the necessary release waiving all past, present and future no-fault benefits.
>
> * * *
>
> IT IS AGREED THAT the following additional terms and conditions shall apply to this settlement[:] that plaintiff will pay all liens, if any, and all medicals [sic] bill [sic] from the settlement. Plaintiff will hold harmless and indemnify the defendant from all medical providers.

The following day, Alhalemi executed a release which provided in pertinent part as follows:

> FOR THE SOLE CONSIDERATION of FORTY-FIVE THOUSAND DOLLARS ($45,000.00), the receipt and sufficiency whereof is hereby acknowledged, MOHAMMED AL HALEMI [sic], the undersigned, hereby releases and discharges WESTFIELD INSURANCE COMPANY . . . from *any and all past, present, and future claims and demands* for no-fault personal protection insurance benefits arising out of a motor vehicle accident which occurred on or about May 1, 2017, including as follows:
>
> (1) *All past, present, and future* claims for allowable expenses as provided for in MCL 500.3107(1)(a)[.]
>
> * * *
>
> *The undersigned further agrees to defend, indemnify, and hold harmless Westfield Insurance Company for any claims, demands, causes of action*, etc., *related to any* liens, *unpaid medical expenses*, or other collateral benefits

> incurred, *and the undersigned further acknowledges full responsibility to pay any such* liens, *expenses*, and/or benefits, *including, but not limited to, those asserted by* Medicare, Medicaid, or *any medical care provider*.
>
> This release contains the ENTIRE AGREEMENT between the parties hereto as it pertains to the undersigned's claim for no-fault automobile personal protection insurance benefits arising out of the May 1, 2017, motor vehicle accident, and the terms of this release are contractual and not a mere recital. [Emphasis added.]

The trial court dismissed plaintiff's complaint, reasoning as follows:

> The Court finds that the Facilitation Agreement entered into by Alhalemi on June 6, 2018, included a provision that Alhalemi would execute the necessary release waiving all past, present and future no-fault benefits and that he would pay all liens and all medical bills from the settlement and would hold harmless and indemnify Westfield Insurance from all medical providers. The Release was executed on June 7, 2018 and released Westfield Insurance from liability from any and all past, present and future claims and demands for no-fault personal protection insurance benefits arising out of the May 2017 vehicle accident. The Court finds that summary disposition is appropriate as to the 3rd Party Complaint and pursuant to the term of the Release, Alhalemi must defend, and hold harmless Westfield against the underlying Complaint. The Court also finds that Defendant Westfield is entitled to dismissal of the Complaint because Plaintiffs have failed to show that Westfield had been notified in writing of their claim or assignment prior to the settlement.

We review the trial court's decision de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We review the proffered evidence in the light most favorable to the nonmoving party to determine if a genuine issue of material fact exists. *Id*. at 120.

We agree with the trial court's assessment. Although plaintiff asserts that defendant was aware of its claims, it points to no evidence to support that assertion. Indeed, the primary thrust of plaintiff's argument is that the facilitation agreement and release do not apply to the instant claims because they were not explicitly part of Alhalemi's litigation against defendant. Plaintiff seems to be asserting two conflicting positions: that defendant was not put on notice of the claims, yet at the same time was aware of the claims. But in any event, plaintiff does not point to any evidence that a copy of the assignment was delivered to defendant before the settlement of Alhalemi's claim.

Returning to plaintiff's principal argument, plaintiff suggests that the release only applies to those specific claims that Alhalemi included in the underlying litigation; to the extent that the agreement and release applied to all of Alhalemi's claims against defendant, the inclusion of these claims created an ambiguity. We disagree. While the settlement may have arisen out of the claims made in the litigation, i.e., a claim for PIP benefits, it clearly and unambiguously released defendant from all claims, past, present, and future. Moreover, Alhalemi explicitly agreed to pay all unpaid medical expenses from the settlement. As the trial court concluded, there is no way to read the release in any other manner.

Furthermore, we agree with both the trial court and defendant that plaintiff's claim is barred by MCL 500.3112, which provides in part as follows:

> Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person.

In other words, plaintiff would have to have provided defendant with a copy of the assignment of benefits *before* defendant entered into the settlement agreement with Alhalemi. There is no indication that this happened. See *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 210; 895 NW2d 490 (2017) ("[The second] sentence [of MCL 500.3112] allows a no-fault insurer to discharge its liability through payment to or for the benefit of a person it believes is entitled to benefits, as long as the payment is made in good faith and the insurer has not been previously 'notified in writing of the claim of some other person.' ").

In sum, Alhalemi agreed in the settlement to release all past, present, and future claims that he had against defendant and to pay all medical bills arising from the accident with the settlement funds. Moreover, plaintiff points us to no evidence that a written copy of the assignment was ever provided to defendant before the settlement agreement was entered into. Accordingly, defendant was properly granted summary disposition.

Affirmed. Defendant may tax costs.

SAWYER, P.J., and LETICA and REDFORD, JJ., concurred.

PROMOTE THE VOTE v SECRETARY OF STATE
PRIORITIES USA v SECRETARY OF STATE

Docket Nos. 353977 and 354096. Submitted July 8, 2020, at Lansing. Decided July 20, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 888 (2020).

In Docket No. 353977, Promote the Vote (PTV) brought an action in the Court of Claims against the Secretary of State, and in Docket No. 354096, Priorities USA and Rise, Inc. (collectively, the Priorities USA plaintiffs) also brought an action in the Court of Claims against the Secretary of State. PTV and the Priorities USA plaintiffs asserted that the Legislature's definition of "proof of residency" in MCL 168.497 and the requirement that some voters be issued a challenged ballot unduly burdened the self-executing provisions in Const 1963, art 2, § 4. Additionally, PTV and the Priorities USA plaintiffs argued that the definition violated the Equal Protection Clause of the Michigan Constitution by burdening the right to vote and by treating similarly situated voters differently: those who registered to vote within the 14-day period before an election but who could not show proof of residency with a current Michigan driver's license or personal identification card were issued a challenged ballot. According to the Priorities USA plaintiffs, following the passage of Proposal 3—a 2018 ballot proposal to amend Michigan's Constitution—the Secretary began to automatically register to vote those who conducted business with her regarding a driver's license or personal identification card if they were at least 17½ years of age (the AVR Policy); the Priorities USA plaintiffs asserted that the AVR Policy burdened and curtailed the right in Const 1963, art 2, § 4(1)(d). The Legislature moved to intervene, and the Court of Claims granted the motion and consolidated the cases. The Legislature and the Secretary moved for summary disposition. PTV also moved for summary disposition. The Priority USA plaintiffs moved for a preliminary injunction. The Court of Claims, CHRISTOPHER M. MURRAY, C.J., granted the Legislature's and the Secretary's motions for summary disposition, denied PTV's motion for summary disposition, and denied the Priority USA plaintiffs' motion for a preliminary injunction. The Court of Claims held that while the Legislature may not enact laws that impose additional burdens on self-executing

constitutional provisions, it may enact laws that supplement those provisions, such as laws that provide clarity and safeguard against abuses. Because the phrase "proof of residency" was undefined in Const 1963, art 2, § 4 and the residence of a voter is essential for voting purposes, the Legislature properly supplemented the constitutional provision when it defined the phrase. The Court of Claims rejected the argument that the AVR Policy unduly burdened and curtailed the rights in Const 1963, art 2, § 4 because the AVR Policy was not a policy but rather a restatement of state law, specifically MCL 168.493a and MCL 168.492, and was consistent with the right of electors qualified to vote being entitled to automatically register to vote when doing business with the Secretary of State. The Court of Claims further held that the right to vote is not absolute but that the United States Supreme Court has held that citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. Therefore, the Court of Claims held that the Legislature's definition of "proof of residency" in MCL 168.497 was a reasonable, nondiscriminatory restriction given the wide variety of documents that constituted acceptable ways to establish proof of residency. Furthermore, the Court of Claims rejected the Priorities USA plaintiffs' suggestion that younger voters would be most harmed by MCL 168.497. Finally, the Court of Claims rejected the argument that the requirement in MCL 168.497(5) that challenged ballots be issued to those who register to vote in the 14-day period without providing a current Michigan driver's license or personal identification card violates equal protection. Accordingly, the Court of Claims granted summary disposition in favor of the Legislature and the Secretary and dismissed the complaints with prejudice. PTV and the Priorities USA plaintiffs appealed. The Court of Claims consolidated the cases and ordered that the appeals be decided without oral argument.

The Court of Appeals *held*:

1. An individual does not have an absolute constitutional right to vote; the individual must first be a qualified elector who has registered to vote. Furthermore, states have the power to impose voter qualifications and to regulate access to the franchise in other ways. Although the Michigan Constitution expressly provides for the right to vote in Const 1963, art 2, § 4(1), certain requirements must be met before an individual can exercise his or her fundamental political right to vote. Despite the Court of Claims' quotation of caselaw predating the passage of Proposal 3, the court's opinion recognized the constitutionally protected status of the right to vote. Accordingly, there was no error requiring reversal.

2. The rights in Const 1963, art 2, § 4(1) are self-executing. While the Legislature may not impose additional obligations on a self-executing constitutional provision, it may enact laws that supplement a self-executing constitutional provision. Statutes that supplement a self-executing constitutional provision may not curtail the constitutional rights or place any undue burdens on them and must be in harmony with the spirit of the Michigan Constitution; their object must be to further the exercise of constitutional rights and make them more available. Under Const 1963, art 2, § 4(1)(f), a person who seeks to register to vote beginning on the 14th day before that election and continuing through the day of that election must submit a completed voter registration application and provide proof of residency. MCL 168.497(2) requires an individual who applies to register to vote in the 14-day period to provide proof of residency; therefore, this is not an additional requirement. In MCL 168.497(2) to (5), the Legislature defined "proof of residency." Because there is no definition of "proof of residency" in Const 1963, art 2, § 4(1), the Legislature's definition of "proof of residency" is a law that supplements the constitutional provision. A definition of "proof of residency" makes definite what documents an individual must bring to register to vote in the 14-day period and creates a uniform standard in each of Michigan's voting jurisdictions. Furthermore, the Legislature has the constitutional authority under Const 1963, art 2, § 4(2) to enact laws to preserve the purity of elections, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. Accordingly, a legislative definition of "proof of residency" that makes definite what documents can be used as proof of residency was in harmony with the Legislature's obligations under the Michigan Constitution concerning the administration of elections and furthers the exercise of voter registration in the 14-day period. Additionally, the Legislature's definition of "proof of residency" does not unduly burden the right to register to vote in the 14-day period; the definition allows a person to register to vote in the 14-day period with a broad array of common, ordinary types of documents that are available to persons of all voting ages. Accordingly, the definition of "proof of residency" in MCL 168.497 was a proper supplement to Const 1963, art 2, § 4(1)(f).

3. A challenged ballot is either a regular ballot or an absent-voter ballot that is marked (and the mark subsequently concealed) with the number corresponding to the voter's poll list number. Notably, a challenged ballot is entered and tabulated with all the other ballots that are cast. Furthermore, a challenged

ballot is a secret ballot. Under MCL 168.747, in a contested election, a challenged ballot may be inspected, but it may only be inspected if the person consents, the person has been convicted of falsely swearing in such ballot, or if it has been determined that such person was an unqualified elector at the time of casting the ballot. Because the right to a secret ballot is not absolute, the fact that a challenged ballot may be inspected in a contested election does not mean that it is not a secret ballot. Accordingly, the challenged-ballot procedure in MCL 168.497(5) did not violate Const 1963, art 2, § 4(1).

4. An individual is not an elector qualified to vote in Michigan—and entitled to the rights listed in Const 1963, art 2, § 4(1)—until the individual reaches 18 years of age. MCL 168.492 provides that 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 17½ years of age, a resident of this state, and a resident of the township or city. The Secretary's AVR Policy—which allows those who are 17½ years of age or older to be automatically registered to vote as a result of conducting business with the Secretary regarding a driver's license or personal identification card—is consistent with MCL 168.492. Accordingly, the AVR Policy did not unduly burden the rights in Const 1963, art 2, § 4(1).

5. The test outlined in *Burdick v Takushi*, 504 US 428 (1992), is used to resolve an equal-protection challenge to an election law under the Michigan Constitution. Under the *Burdick* test, the first step in determining whether an election law contravenes the Constitution is to determine the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be narrowly drawn to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. Each inquiry is fact-specific and depends on the circumstances. In this case, the Legislature's definition of "proof of residency" did not impose a severe burden on the right to vote. Because Const 1963, art 2, § 4(1) does not define "proof of residency," the Legislature provided a definition in MCL 168.497, and the Legislature's definition allows individuals to provide proof of residency with a broad array of ordinary, common documents that are available to persons of all voting ages. Furthermore, an individual can regis-

ter to vote in several ways, and it is not unreasonable to expect an individual who wishes to vote in an election, but who is not registered to vote or who has moved since registering to vote, to make inquiries or conduct research—in advance of the election—regarding how to register to vote. In doing so, an individual can learn the different options for registering to vote and the documents that are needed for each method. These inquiries are not a severe or substantial burden. Accordingly, the Legislature's definition of "proof of residency" in MCL 168.497 constituted a reasonable, nondiscriminatory restriction that applies to all individuals who seek to register to vote in the 14-day period. Furthermore, the definition was warranted by the state's regulatory interests in ensuring that fraudulent voting does not dilute the votes of lawful voters. Finally, the fact that a person might have to wait in a long line to be issued a challenged ballot amounted to an inconvenience but did not rise to the level of a severe burden. MCL 168.497 did not violate the Equal Protection Clause of the Michigan Constitution.

Affirmed.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, agreed with the majority's outcome regarding the Secretary's AVR Policy but believed that much of the majority's discussion of the law regarding the issues in this case was either unnecessary or predicated on outdated law. The Court of Claims did not err when it expressed a nuanced understanding of the right to vote in Michigan but clearly erred in its understanding of the nature of that nuance. Notably, for the first time in Michigan's history, the changes enacted by Proposal 3 expressly made the Legislature's right and obligation to "preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting" subject to any other provisions in the Constitution. Therefore, caselaw relying on the unconditional grant of authority provided in outdated versions of Const 1963, art 2, § 4 and its predecessors was highly suspect. There is still no absolute right to vote in Michigan, and the Legislature is still not absolutely precluded from imposing regulations on voting and registration; however, the significance of Proposal 3 is that the Legislature's power to do so has been severely curtailed. The addition of "[e]xcept as otherwise provided in this constitution" simultaneously with a mandate to construe the newly enacted rights "liberally . . . in favor of voters' rights in order to effectuate its purposes" unambiguously subjects any regulations or restrictions imposed by the Legislature to a higher degree of scrutiny. The Court of Claims and

the majority fundamentally erred by failing to recognize that the historic deference given to the Legislature in this context is no longer appropriate or permissible. With regard to the proof-of-residency requirement, Judge RONAYNE KRAUSE agreed with plaintiffs that the requirements set forth in MCL 168.497 were unconstitutionally restrictive and violated Const 1963, art 2, § 4. "Proof of residency" has acquired a well-established legal meaning and is not synonymous with "proof of identity." The Secretary requires individuals to present proof of identity and proof of residency for other purposes, and for those purposes the Secretary draws a clear distinction between proof of identity and proof of residency; none of the documents accepted as proof of residency includes any need for a photograph. And in Michigan caselaw individuals have shown proof of residency without providing photographic identification. In drafting MCL 168.497, the Legislature invaded the rights conferred by the Constitution by defining "proof of residency" such that individuals are actually required to prove identity instead. Judge RONAYNE KRAUSE disagreed with the majority's characterization of the kinds of documents listed in MCL 168.497(3)(a) to (c) and (4)(a) to (c) as "common, ordinary types of documents that are available to persons of all voting ages." While the listed documents are commonly available to certain classes of the population, the Legislature's list works as a clear disenfranchisement of persons based on economic status. Accordingly, Judge RONAYNE KRAUSE would have held that MCL 168.497 is facially violative of the Constitution because it unambiguously establishes a proof-of-identity requirement in plain violation of the established meaning of "proof of residency" and in equally plain violation of the constitutional mandate to liberally construe Const 1963, art 2, § 4(1) in favor of voters' rights.

ELECTIONS — VOTER REGISTRATION — WORDS AND PHRASES — "PROOF OF RESIDENCY" REQUIREMENT.

While the Legislature may not impose additional obligations on a self-executing constitutional provision, it may enact laws that supplement a self-executing constitutional provision; under Const 1963, art 2, § 4(1)(f), a person who seeks to register to vote beginning on the 14th day before that election and continuing through the day of that election must submit a completed voter registration application and provide proof of residency; MCL 168.497(2) to (5) defines "proof of residency"; because there is no definition of "proof of residency" in Const 1963, art 2, § 4(1), the Legislature's definition of "proof of residency" is a law that properly supplements the constitutional provision.

Cummings & Cummings Law Group, PLLC (by *Mary Ellen Gurewitz* and *Sheila Cummings*) for Promote the Vote.

Perkins Coie LLP (by *Marc E. Elias*, *Jacki L. Anderson*, *Jyoti Jasrasaria*, *Kevin J. Hamilton*, and *Amanda J. Beane*) and *Sarah S. Prescott* for Priorities USA and Rise, Inc.

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

Bush Seyferth PLLC (by *Patrick G. Seyferth*, *Michael K. Steinberger*, and *Frankie Dame*) for the Senate and House of Representatives.

Before: METER, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

METER, P.J. In Docket No. 353977, plaintiff, Promote the Vote (PTV), appeals by right a June 24, 2020 order entered by the Court of Claims. In Docket No. 354096, plaintiffs, Priorities USA and Rise, Inc. (collectively, the Priorities USA plaintiffs), also appeal by right the June 24, 2020 order. The Court of Claims order denied PTV's motion for summary disposition, as well as the Priorities USA plaintiffs' motion for a preliminary injunction, and granted the motions for summary disposition of the Secretary of State (the Secretary) and the Senate and House of Representatives (collectively, the Legislature). This Court consolidated the two cases and ordered that the appeals would be decided without oral argument. *Promote the Vote v Secretary of State*, unpublished order of the Court of

Appeals, entered July 8, 2020 (Docket Nos. 353977 and 354096).

Priorities USA is a "voter-centric progressive advocacy and service organization" that spends resources, including in the state of Michigan, to register young individuals to vote. Rise, Inc., is a "nonprofit organization that runs statewide advocacy and voter mobilization programs" in Michigan and California, as well as on a number of campuses throughout the country. Part of its mission is to increase voting access for college students. PTV is "a ballot question committee" that drafted the language of Proposal 3, a 2018 ballot proposal to amend Michigan's Constitution, collected more than 400,000 signatures in order to get the proposal placed on the ballot, and led the campaign for the proposal's passage.

On appeal, PTV and the Priorities USA plaintiffs argue that the proof-of-residency requirements in MCL 168.497(2) to (4), the challenged-ballot procedure in MCL 168.497(5), and the Secretary's automatic voter-registration policy unduly burden the rights in Const 1963, art 2, § 4(1) and are therefore unconstitutional. PTV and the Priorities USA plaintiffs also argue that MCL 168.497 violates the Equal Protection Clause of the Michigan Constitution. For the reasons discussed in this opinion, we affirm.

I. LEGAL BACKGROUND

In the 2018 general election, Michigan voters approved Proposal 3, which made changes to Michigan's election law. Specifically, Proposal 3 amended Const 1963, art 2, § 4. The article now provides:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(a) The right, once registered, to vote a secret ballot in all elections.

* * *

(d) The right to be automatically registered to vote as a result of conducting business with the secretary of state regarding a driver's license or personal identification card, unless the person declines such registration.

(e) The right to register to vote for an election by mailing a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications.

(f) The right to register to vote for an election by (1) appearing in person and submitting a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications, or (2) beginning on the fourteenth (14th) day before that election and continuing through the day of that election, appearing in person, submitting a completed voter registration application and providing proof of residency to an election official responsible for maintaining custody of the registration file where the person resides, or their deputies.[1] Persons registered in accordance with subsection (1)(f) shall be immediately eligible to receive a regular or absent voter ballot.

* * *

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof

[1] We will refer to the period "beginning on the fourteenth (14th) day before that election and continuing through the day of that election" as the "14-day period."

shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstances, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.

(2) Except as otherwise provided in this constitution or in the constitution or laws of the United States[,] the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.[2]

Following the 2018 general election, the Legislature enacted 2018 PA 603, which amended MCL 168.497. The first five provisions of MCL 168.497 now provide:

(1) An individual who is not registered to vote but possesses the qualifications of an elector as provided in [MCL 168.492] may apply for registration to the clerk of the county, township, or city in which he or she resides in

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[2] Before the passage of Proposal 3, Const 1963, art 2, § 4 consisted of one paragraph, which was very similar to the current paragraph in § 4(2). It provided:

The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

person, during the clerk's regular business hours, or by mail or online until the fifteenth day before an election.

(2) An individual who is not registered to vote but possesses the qualifications of an elector as provided in [MCL 168.492] or an individual who is not registered to vote in the city or township in which he or she is registering to vote may apply for registration in person at the city or township clerk's office of the city or township in which he or she resides from the fourteenth day before an election and continuing through the day of the election. An individual who applies to register to vote under this subsection must provide to the city or township clerk proof of residency in that city or township. For purposes of this subsection, "proof of residency" includes, subject to subsection (3), any of the following:

(a) An operator's or chauffeur's license issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or an enhanced driver license issued under the enhanced driver license and enhanced official state personal identification act, 2008 PA 23, MCL 28.301 to 28.308.

(b) An official state personal identification card issued under 1972 PA 222, MCL 28.291 to 28.300, or an enhanced official state personal identification card issued under the enhanced driver license and enhanced official state personal identification card act, 2008 PA 23, MCL 28.301 to 28.308.[3]

(3) If an applicant for voter registration under subsection (2) does not have proof of residency as that term is

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[3] A person registering to vote in the 14-day period does not provide proof of residency simply by presenting a Michigan driver's license or personal identification card. Because the individual "must provide to the city or township clerk proof of residency in that city or township," the Michigan driver's license or personal identification card must include an address located in either the city or township. Both the Priorities USA plaintiffs and the Secretary read MCL 168.497(2) in the same manner. We will refer to a Michigan driver's license or personal identification card that can establish proof of residency under MCL 168.497(2) as a "current Michigan driver's license or personal identification card."

defined in subsection (2), the applicant may provide as his or her proof of residency any other form of identification for election purposes as that term is defined in [MCL 168.2] and 1 of the following documents that contains the applicant's name and current residence address:

(a) A current utility bill.

(b) A current bank statement.

(c) A current paycheck, government check, or other government document.

(4) If an applicant for voter registration under subsection (2) does not have identification for election purposes, the applicant may register to vote if he or she signs an affidavit indicating that the applicant does not have identification for election purposes and the applicant provides 1 of the following documents that contains the applicant's name and current residence address:

(a) A current utility bill.

(b) A current bank statement.

(c) A current paycheck, government check, or other government document.

(5) Immediately after approving a voter registration application, the city or township clerk shall provide to the individual registering to vote a voter registration receipt that is in a form as approved by the secretary of state. If an individual registers to vote in person 14 days or less before an election or registers to vote on election day, and that applicant registers to vote under subsection (3) or (4), the ballot of that elector must be prepared as a challenged ballot as provided in [MCL 168.727] and must be counted as any other ballot is counted unless determined otherwise by a court of law under [MCL 168.747 or MCL 168.748] or any other applicable law.

MCL 168.2(k) defines "identification for election purposes" as the following: "[a]n operator's or chauffeur's license issued under the Michigan vehicle code . . . or an enhanced driver license issued under the enhanced driver license and enhanced official state personal iden-

tification card act"; "[a]n official state personal identification card . . . or an enhanced official state personal identification card issued under the enhanced driver license and enhanced official state personal identification card act"; a current operator's or chauffeur's license issued by another state; a current state personal identification card issued by another state; a current state government-issued photo identification card; a current United States passport or federal government-issued photo identification card; a current military photo identification card; a current tribal photo identification card; or "[a] current student photo identification card issued by a high school in this state, an institution of higher education in this state described in section 4, 5, or 6 of article VIII of the state constitution of 1963, a junior college or community college established under section 7 of article VIII of the state constitution of 1963, or another accredited degree[-] or certificate[-]granting college or university, junior college, or community college located in this state."

An election inspector must identify, as provided in MCL 168.745 and MCL 168.746, a challenged ballot. MCL 168.727(2)(a).[4] Under MCL 168.745, the election

[4] Any voter may be challenged under MCL 168.727. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 14 n 24; 740 NW2d 444 (2007). Under MCL 168.727(1), "[a]n election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct . . . ." "A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that [the] individual is not a registered elector in that precinct." *Id*. Additionally, "[a]n election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot." *Id*. These challenges shall not be made indiscrimi-

inspectors "shall cause to be plainly endorsed on said ballot, with pencil, before depositing the same in the ballot box, the number corresponding to the number placed after such voter's name on the poll lists without opening the same[.]" To prevent the identification of challenged ballots, the election inspectors "shall cause to be securely attached to said ballot, with mucilage or other adhesive substance, a slip or piece of blank paper of the same color and appearance, as nearly as may be, as the paper of the ballot, in such manner as to cover and wholly conceal said endorsement but not to injure or deface the same[.]" MCL 168.746.

MCL 168.747 provides:

> In case of a contested election, on the trial thereof before any court of competent jurisdiction, it shall be competent for either party to the cause to have produced in court the ballot boxes, ballots and poll books used at the election out of which the cause has arisen, and to introduce evidence proving or tending to prove that any person named on such poll lists was an unqualified voter at the election aforesaid, and that the ballot of such person was received. On such trial, the correspondence of the number endorsed on a ballot as herein provided with the number of the ballot placed opposite the name of any person on the poll lists shall be received as prima facie proof that such ballot was cast by such person: Provided, That the ballot of no person shall be inspected or identified under the provisions of this chapter unless such person shall consent

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nately or without good cause. MCL 168.727(3). If a person attempting to vote is challenged, the person shall be sworn by one of the election inspectors to truthfully answer the questions asked of the person concerning the person's qualifications as an elector. MCL 168.729. If the person's answers to the questions show that the person is a qualified elector in the precinct, the person "shall be entitled to receive a ballot and vote." *Id*. The person's ballot shall be marked as required by MCL 168.745 and MCL 168.746, but it is counted as a regular ballot. MCL 168.727(2)(a); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 14 n 24.

> thereto in writing, or unless such person has been convicted of falsely swearing in such ballot, or unless the fact that such person was an unqualified elector at the time of casting such ballot has been determined.[5]

See also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 14 n 24; 740 NW2d 444 (2007) ("The ballot cast by a challenged voter is marked (and the mark subsequently concealed) with a number corresponding to the voter's poll list number, and is counted as a regular ballot. MCL 168.745; MCL 168.746. The marked ballot becomes relevant only in the event of litigation surrounding a contested election, where the challenged voter's qualifications to vote are disputed.").

According to the Priorities USA plaintiffs, following the passage of Proposal 3, the Secretary began to

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[5] MCL 168.748 provides:

> After issue joined in any case of contested election, either party to the cause may present a petition to the court before which the said cause is to be tried, setting forth among other things that the petitioner has good reason to believe and does believe that 1 or more voters at the election out of which the cause has arisen, naming him or them, and stating his or their place of residence, were unqualified to vote at such election; that he believes the same can be established by competent testimony; that the ballot or ballots of such voter or voters were received after being challenged, as provided by law; and praying that the court may try and determine the question of the qualification of such voter or voters at said election, which petition shall be verified by the oath of the petitioner or some other person acquainted with the facts, and thereupon the court shall direct an issue to be framed, within a time to be fixed therefor, for the purpose of determining the question of the qualifications of the voter or voters named in said petition to vote at said election; and such issue shall stand for trial as in other cases, and the verdict of the jury or judgment of the court upon such issue so made shall be received, upon the trial of the principal issue in said cause, as conclusive evidence to establish or to disprove the said qualifications of said voter or voters.

automatically register to vote those who conducted business with her regarding a driver's license or personal identification card if they were at least 17½ years of age (the AVR Policy). To support this claim, the Priorities USA plaintiffs provide a press release from the Secretary that announced that she had instituted automatic voter registration.[6] But the press release says nothing about automatic voter registration only applying to those who are at least 17½ years of age. However, the Secretary does not dispute the Priorities USA plaintiffs' claim.

II. PROCEDURAL HISTORY

On November 22, 2019, Priorities USA filed suit against the Secretary in the Court of Claims. An amended complaint was filed on January 21, 2020, by the Priorities USA plaintiffs. On January 6, 2020, PTV filed suit against the Secretary in the Court of Claims. PTV's complaint and the Priorities USA plaintiffs' amended complaint both advanced similar allegations. PTV and the Priorities USA plaintiffs asserted that the Legislature's proof-of-residency definition in MCL 168.497 and the requirement that some voters be issued a challenge ballot unduly burdened the self-executing provisions in Const 1963, art 2, § 4. Additionally, PTV and the Priorities USA plaintiffs argued that the proof-of-residency definition violated the Equal Protection Clause of the Michigan Constitution by burdening the right to vote and by treating similarly situated voters differently: those who registered

[6] Office of the Secretary of State, *Secretary Benson Announces Modernized Voter Registration on National Voter Registration Day* (September 24, 2019) <https://www.michigan.gov/sos/0,4670,7-127-1640_9150-508246—,00.html> (accessed July 14, 2020) [https://perma.cc/M9ZK-6LRD].

to vote within the 14-day period but who could not show proof of residency with a current Michigan driver's license or personal identification card were issued a challenged ballot. The Priorities USA plaintiffs finally asserted that the Secretary's AVR Policy burdened and curtailed the right in Const 1963, art 2, § 4(1)(d).

Following the consolidation of the two cases and the Legislature's intervention, the Legislature moved for summary disposition under MCR 2.116(C)(10).[7] The Legislature argued that the proof-of-residency amendment in MCL 168.497 was a constitutional exercise of its power to preserve the purity of elections, guard against abuses of the elective franchise, and provide for a system of voter registration and absentee balloting. The Legislature further argued that the Michigan Constitution, following the passage of Proposal 3, did not define "proof of residency," which essentially required the Legislature to exercise its constitutional powers to define the phrase. The Legislature asserted that the definition of "proof of residency" did not violate the Equal Protection Clause because the statute provided reasonable, nondiscriminatory restrictions; thus, it was subject to only rational-basis review, and the state's interest in preventing voter fraud justified the restrictions. Finally, the Legislature argued that the AVR Policy was consistent with Const 1963, art 2, § 4 because the right to be automatically registered to vote only applies to those who are entitled to register to vote, namely, individuals who are 17½ years of age or older.

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[7] The Court of Claims granted the Legislature's motion to intervene in Court of Claims Docket No. 19-000191-MZ, and the Priorities USA plaintiffs do not challenge that order on appeal.

The Secretary also moved for summary disposition under MCR 2.116(C)(10). Regarding the AVR Policy, the Secretary was automatically registering individuals to vote pursuant to the Michigan Constitution and statute, not a policy. The Secretary also argued that the definition of "proof of residency" did not impose an unconstitutional burden on the right to vote because the Legislature properly supplemented Const 1963, art 2, § 4. Furthermore, an individual can register to vote in the 14-day period by signing an affidavit that the individual does not have a form of identification for election purposes and by presenting a document from a broad array of documents listed in the statute. Relatedly, an individual whose ballot must be marked as a challenged ballot casts either a regular ballot or an absent-voter ballot. The ballot is merely marked so that it can later be identified if an election is contested. A challenged ballot does not require the individual to reveal the content of the ballot. Individuals who cannot produce a current Michigan driver's license or personal identification card and are required to vote a challenged ballot are not denied equal protection. Individuals who must vote a challenged ballot are not similarly situated to individuals who have a current Michigan driver's license or personal identification card. The use of alternative—and sometimes less objective—forms of proof of residency reasonably warrants additional procedural requirements.

In PTV's motion for summary disposition under MCR 2.116(C)(10), PTV argued that MCL 168.497 imposed additional obligations on the self-executing rights of Const 1963, art 2, § 4. The term "residence" is generally understood as the place where a person lives. In MCL 168.497, the Legislature defined "proof of residency" to mean more than simply proof of where one lives. It defined "proof of residency" to include proof

of identity, i.e., a driver's license or personal identification card. Although MCL 168.497 did not require a person registering to vote in the 14-day period to provide a current Michigan driver's license or personal identification card, the Legislature narrowly limited the documents that it would accept as proof of residency, which curtailed and burdened the rights guaranteed by Const 1963, art 2, § 4. Additionally, under MCL 168.497, only those who provide a current Michigan driver's license or personal identification card receive a regular or absent-voter ballot. All others receive a challenged ballot, which is not a regular or absent-voter ballot and which is also not a secret ballot.

PTV also argued that MCL 168.497 failed to provide equal protection of the law. The statute creates three classes of voters: (1) those who present a current Michigan driver's license or personal identification card and are allowed to vote a regular or absent-voter ballot; (2) those who submit other proof of identity, or who execute an affidavit attesting that they do not possess any of the acceptable forms of proof of identity, with one of a limited number of documents establishing residency and are required to vote a challenged ballot, and (3) those who do not have one of the limited number of documents establishing residency and are not allowed to vote. According to PTV, MCL 168.497 imposed a severe burden on the rights of the voters in the second class. Those voters had to vote a challenged ballot, which required extra time by the clerk's office and, in turn, required the voters to wait longer. PTV further argued that MCL 168.497 imposed a severe burden on the rights of the voters in the third class because these voters were deprived of their right to vote and there was no compelling state interest justifying the deprivation.

The Priorities USA plaintiffs moved for a preliminary injunction, attaching three affidavits from two students at the University of Michigan and one student at Michigan State University that detailed their difficulties in registering to vote in the 14-day period. The Priorities USA plaintiffs also attached a report from Michael E. Herron, Ph.D., which detailed the results from two surveys he commissioned. In the first survey, approximately 2,000 Michigan residents who were eligible to vote and planned to vote in 2020 were asked about whether they had the documents listed in MCL 168.497. According to Herron, approximately 1.6% of the participants answered that they did not have documentation that would satisfy the requirements of MCL 168.497, and 1.6% of citizens of voting age in Michigan is 159,320 individuals. According to Herron, the survey also showed that approximately 6% of the participants who were younger than 25 years of age lacked documentation that would satisfy the requirements of MCL 168.497. The participants in the second survey were students at Michigan colleges or universities. According to Herron, of the students who were United States citizens and not registered to vote in Michigan, approximately 16.9% of them did not have documentation that would satisfy the requirements of MCL 168.497. Herron believed that approximately 15,514 of the college and university students in Michigan would not be able to provide proof of residency under MCL 168.497. Herron also reviewed records the Secretary provided that indicated that, in the five elections following the passage of Proposal 3, 264 individuals (94 of whom were 21 years of age or younger) were not able to register in the 14-day period for the upcoming election because they lacked proof of residency.

On June 24, 2020, the Court of Claims issued an opinion and order granting the Legislature's and the Secretary's motions for summary disposition, denying PTV's motion for summary disposition, and denying the Priorities USA plaintiffs' motion for a preliminary injunction. The Court of Claims first addressed the claim that the amendments of Const 1963, art 2, § 4, following the passage of Proposal 3, were "self-executing" and that the requirements of MCL 168.497(2) to (5) were unconstitutional because they unduly restricted the new rights recognized in the Michigan Constitution. The Court of Claims held that while the Legislature may not enact laws that impose additional burdens on self-executing constitutional provisions, it may enact laws that supplement those provisions, such as laws that provide clarity and safeguard against abuses. Because the phrase "proof of residency" was undefined in Const 1963, art 2, § 4 and the residence of a voter is essential for voting purposes, the Legislature properly supplemented the constitutional provision when it defined the phrase.

Next, the Court of Claims rejected the argument that the AVR Policy unduly burdened and curtailed the rights in Const 1963, art 2, § 4. The AVR Policy was not a policy but "rather a restatement of state law, specifically MCL 168.493a and MCL 168.492, and is consistent with the right of 'electors qualified to vote' being entitled to automatically register to vote when doing business with the secretary of state offices." Further, the Michigan Constitution defines an elector qualified to vote as any resident who has reached the age of 18, and a qualified voter may be automatically registered to vote as a result of conducting business with the Secretary of State. The Court of Claims stated that under MCL 168.492, an elector qualified to vote is someone 17½ years of age or older, "and nowhere does

the Constitution grant individuals under the age of [17½] the right to be automatically registered when conducting business with the secretary of state."

The Court of Claims then addressed whether MCL 168.497 placed an unconstitutional burden on voters. The court noted that, although the right to vote was not enumerated in either the federal or state Constitutions, the United States Supreme Court has held that citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. Furthermore, the court held, the right to vote is not absolute. A state has the power to impose voter qualifications and to regulate access to the franchise in many different ways. The court rejected the argument that the Legislature's definition of "proof of residency" in MCL 168.497 placed a severe burden on the constitutional right to register to vote in the 14-day period. The statute imposed some burden on voters—the statute requires an individual to bring to the election office or polling place some form of proof of residency. But the Court of Claims held that this was a reasonable, nondiscriminatory restriction given the wide variety of documents that constituted acceptable ways to establish proof of residency. Additionally, if a voter did not have an acceptable proof of residency in the form of a driver's license or a personal identification card, "that person may vote with a challenged ballot that is counted that day, the same as all other ballots," so long as the voter produces one of the acceptable forms of proof of residency.

The Court of Claims also rejected the Priorities USA plaintiffs' suggestion that younger voters will be most harmed by MCL 168.497. First, because it was a facial challenge to MCL 168.497, there could not be a focus on any possible effects on a discrete population; the focus

must be on the voting population as a whole. Second, the argument "overlook[ed] the broad range of documents that suffice under the statute, the majority of which are readily available to college students, and the fact that registration can be accomplished over the internet, something 'younger voters' are surely able to utilize." Third, the argument gave no credence to the young voters' ability to understand and follow clear voter-registration procedures.

Finally, the Court of Claims rejected the argument that the requirement in MCL 168.497(5) that challenged ballots be issued to those who register to vote in the 14-day period without providing a current Michigan driver's license or personal identification card violates equal protection because it denied those voters the right to a secret ballot. The court reasoned that challenged ballots were treated the same as any other ballot on election day. "[D]espite [the challenged ballot] being marked on the outside as challenged, upon presentment of identification, the voter was eligible to receive, and did receive, a regular ballot," which complied with Const 1963, art 2, § 4(1)(f). To the extent that any burden was placed on a voter's right, it was minimal. A challenged ballot was a secret ballot because it was counted in the same way as a normal ballot, and the contents were not revealed to the public. The Court of Claims explained:

> It is only in the event of a contested election, where the challenged ballot is at issue, that the ballot may be inspected or identified; however, this inspection may only occur with either: the voter's written consent; or only *after* the individual has been convicted of falsely swearing the ballot; or the voter was deemed to be unqualified. MCL 168.474. Therefore, the only way for the vote to be revealed—absent express written consent—is under court order and even then, only in two limited circumstances that require a prior determination of falsehood. This is not

> a severe burden, and it places no burden on the voter at the time of voting, nor does it impact the tabulation of those particular votes cast on election day.
>
> In contrast, the state has an interest in ensuring the integrity of ballots should it be needed. This specific interest is properly served by this regulation, as in the event of suspected voter fraud, the court may reveal the identity of the voter and a determination can be made. Overall, the burden imposed on voters' rights is minimal, and the legislation is within the scope of the state's interest in preserving the purity of elections.

Thus, the Court of Claims granted summary disposition in favor of the Legislature and the Secretary and dismissed the complaints with prejudice. This appeal follows.

III. DISCUSSION

On appeal in Docket No. 353977, PTV argues that the Court of Claims erred by concluding that there is no constitutional right to vote; that MCL 168.497 impermissibly imposed additional obligations on the self-executing provisions of Const 1963, art 2, § 4(1)(a) and § 4(1)(f); and that the requirement of issuing a challenged ballot was burdensome, unconstitutional, and served no legitimate state interest. In Docket No. 354096, the Priorities USA plaintiffs similarly argue that the Court of Claims erred by concluding that MCL 168.497 did not violate the self-executing provisions of Const 1963, art 1, § 2 and art 2, § 4; that the AVR Policy did not violate the self-executing provision of Const 1963, art 2, § 4; and that they were entitled to a preliminary injunction. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ellison v Dep't of*

State, 320 Mich App 169, 175; 906 NW2d 221 (2017). Summary disposition is proper under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, 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."

This Court also reviews de novo questions of constitutional law. *Bonner v Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014). "A statute challenged on a constitutional basis is 'clothed in a presumption of constitutionality,' and the burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) (quotation marks and citation omitted).

A challenge to the constitutionality of a statute is either a facial challenge or an as-applied challenge. *Bonner*, 495 Mich at 223 nn 26-27; *In re Request for Advisory Opinion*, 479 Mich at 11 & n 20. "A facial challenge is a claim that the law is invalid *in toto*—and therefore incapable of any valid application," whereas an as-applied challenge "considers the specific application of a facially valid law to individual facts." *In re Request for Advisory Opinion*, 479 Mich at 11 & n 20 (quotation marks and citation omitted). The challenges to MCL 168.497 are facial challenges. PTV and the Priorities USA plaintiffs are asking that MCL 168.497(2) to (5) be declared unconstitutional in all circumstances. They do not claim that the statute is unconstitutional only when applied in a specific circumstance.

"A party challenging the facial constitutionality of [a statute] 'faces an extremely rigorous standard.' " *Bonner*, 495 Mich at 223 (citation omitted). A plaintiff

"must establish that no set of circumstances exists under which the act would be valid," and "[t]he fact that the . . . act might operate unconstitutionally under some conceivable set of circumstances is insufficient" to render the act invalid. *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997) (quotation marks, brackets, and citation omitted). Indeed, "if any state of facts reasonably can be conceived that would sustain [a legislative act], the existence of the state of facts at the time the law was enacted must be assumed." *Id*. (quotation marks, brackets, and citation omitted). "[B]ecause facial attacks, by their nature, are not dependent on the facts surrounding any particular decision, the specific facts surrounding plaintiffs' claim are inapposite." *Bonner*, 495 Mich at 223.

B. CONSTITUTIONAL RIGHT TO VOTE

PTV and the Priorities USA plaintiffs argue that the Court of Claims erred by stating that the right to vote was not expressly enumerated in the Michigan Constitution. Before addressing this argument, we find it necessary to detail the history of the right to vote.

In the Court of Claims opinion and order, the court stated that "the right to vote is not enumerated in either the federal or state constitutions . . . ." Although there are numerous provisions in the United States Constitution that prevent states from discriminating against specific groups by taking away their right to vote, there is no specific enumeration of the right to vote. See *San Antonio Indep Sch Dist v Rodriguez*, 411 US 1, 35 n 78; 93 S Ct 1278; 36 L Ed 2d 16 (1973) ("[T]he right to vote, per se, is not a constitutionally protected right . . . ."). For example, the Fifteenth Amendment states, "The right of citizens of the United

States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." US Const, Am XV. Nearly identical language is used in the Nineteenth and Twenty-Sixth Amendments, which prohibit denying or abridging the right to vote on the basis of gender or age, respectively. See US Const, Ams XIX and XXVI.

Despite the lack of a positive right to vote, the United States Supreme Court, "[i]n decision after decision, . . . has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972). Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964). However, "[t]his equal right to vote is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." *Dunn*, 405 US at 336 (quotation marks and citation omitted).

Following the passage of Proposal 3 in Michigan, this state's Constitution now reads, "Every citizen of the Unites States who is an elector qualified to vote in Michigan shall have the following rights: (a) The right, once registered, to vote a secret ballot in all elections." Const 1963, art 2, § 4(1)(a). Although decided before the passage of Proposal 3 and the relevant amendment of our state's Constitution, our Supreme Court stated in *In re Request for Advisory Opinion*, 479 Mich at 16, that "the right to vote is an implicit fundamental political right that is preserva-

tive of all rights." (Quotation marks and citation omitted.) Our Supreme Court continued, "However, '[t]his equal right to vote is not absolute . . . .' " *Id.*, quoting *Dunn*, 405 US at 336 (quotation marks omitted; alteration in original).

PTV and the Priorities USA plaintiffs assert that Const 1963, art 2, § 4(1)(a) provides a constitutional right to vote. This section unambiguously provides that a qualified citizen has the "right, once registered, to vote a secret ballot in all elections." Const 1963, art 2, § 4(1)(a). However, this section does not provide that an individual has an absolute constitutional right to vote; the individual must first be a qualified elector who has registered to vote. *Id*. Although the Michigan Constitution now expressly provides for the right to vote, certain requirements must be met before an individual can exercise his or her fundamental political right to vote. Despite the Court of Claims' quotation of caselaw predating the passage of Proposal 3, the court's opinion recognized the constitutionally protected status of the right to vote. Thus, there is no error requiring reversal.

C. SELF-EXECUTING CONSTITUTIONAL PROVISIONS

PTV and the Priorities USA plaintiffs argue that the Legislature's definition of "proof of residency" in MCL 168.497 and the requirement in MCL 168.497(5) that a challenged ballot be issued to anyone who registers to vote in the 14-day period without providing a current Michigan driver's license or personal identification card unduly burden the rights in Const 1963, art 2, § 4(1)(f). They claim that because the rights in Const 1963, art 2, § 4(1) are self-executing rights, the statutory provisions are unconstitutional. The Priorities USA plaintiffs also argue that the

Secretary's AVR Policy unduly burdens the right in Const 1963, art 2, § 4(1)(d). We disagree.

There is no dispute among the parties that the rights in Const 1963, art 2, § 4(1) are self-executing. "A constitutional provision is deemed self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced . . . ." *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 178; 952 NW2d 491 (2020) (quotation marks and citation omitted). While the Legislature may not impose additional obligations on a self-executing constitutional provision, *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971); *Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 98; 463 NW2d 461 (1990), it may enact laws that supplement a self-executing constitutional provision, see *Wolverine Golf Club*, 384 Mich at 466. Statutes that supplement a self-executing constitutional provision may not curtail the constitutional rights or place any undue burdens on them. See *id*.; *Durant*, 186 Mich App at 98. Additionally, the statutes must be in harmony with the spirit of the Michigan Constitution, and their object must be to further the exercise of the constitutional rights and make them more available. *League of Women Voters of Mich*, 331 Mich App at 179. Statutes that supplement a self-executing provision may be desirable "by way of providing a more specific and convenient remedy and facilitating the carrying into effect or execution of the rights secured, making every step definite, and safeguarding the same so as to prevent abuses." *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 730; 180 NW2d 820 (1970) (opinion by LESINSKI, C.J.) (quotation marks and citation omitted), aff'd 384 Mich 461 (1971).

1. PROOF OF RESIDENCY

Under Const 1963, art 2, § 4(1)(f), a person who seeks to register to vote "beginning on the fourteenth (14th) day before that election and continuing through the day of that election" must submit "a completed voter registration application" and provide "proof of residency . . . ." A person's residence, for purposes of Michigan election law, is the "place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence . . . that place at which the person resides the greater part of the time shall be his or her official residence . . . ." MCL 168.11(1). An individual may only vote in the township or city in which the individual resides. See MCL 168.491; MCL 168.492. Because an individual may only vote in the township where he or she resides, the individual's residence dictates which candidates and proposals the individual may vote for.

MCL 168.497(2) requires an individual who applies to register to vote in the 14-day period to provide proof of residency. This is not an additional requirement; Const 1963, art 2, § 4(1)(f) specifically provides that a person who registers to vote in the 14-day period must provide proof of residency. In MCL 168.497(2) to (5), the Legislature defined "proof of residency." Because there is no definition of "proof of residency" in Const 1963, art 2, § 4(1), the Legislature's definition of "proof of residency" is a law that supplements the constitutional provision.

A definition from the Legislature of "proof of residency" was desirable. *Wolverine Golf Club*, 24 Mich App at 730 (opinion by LESINSKI, C.J.). Absent a statutory definition of "proof of residency," confusion and disorder could arise during the 14-day period and on election day

itself. Any person who wanted to register to vote in the 14-day period would be left to wonder what documents would be accepted as proof of residency. Each city or township clerk would have to make his or her own determination regarding what is acceptable proof of residency. Under these individualized determinations, the documents that would be accepted as proof of residency could be different in each of Michigan's cities and townships. Consequently, a definition of "proof of residency" makes definite what documents an individual must bring to register to vote in the 14-day period and creates a uniform standard in each of Michigan's voting jurisdictions. *Id*. Furthermore, the Legislature has the constitutional authority under Const 1963, art 2, § 4(2) to enact laws to preserve the purity of elections,[8] to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. Accordingly, a legislative definition of "proof of residency," which makes definite what documents can be used as proof of residency, is in harmony with the Legislature's obligations under the Michigan Constitution concerning the administration of elections and furthers the exercise of voter registration in the 14-day period. *League of Women Voters of Mich*, 331 Mich App at 179.

Additionally, even though the Priorities USA plaintiffs have presented evidence that the Legislature's definition of "proof of residency" in MCL 168.497 has prevented, and may prevent, individuals who are qualified to vote from registering in the 14-day period, the Legislature's definition of "proof of residency" does

[8] "The phrase 'purity of elections' does not have a single precise meaning. However, it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm*, 305 Mich App 649, 676; 854 NW2d 489 (2014) (quotation marks and citation omitted).

not unduly burden the right to register to vote in the 14-day period. Under MCL 168.497, a person provides proof of residency if the person presents: (1) a current Michigan driver's license or personal identification card, MCL 168.497(2); (2) "any other form of identification for election purposes," which includes driver's licenses and personal identification cards issued by other states and student photo identification cards, see MCL 168.2(k), along with a current utility bill, a current bank statement, or a current paycheck, government check, or other government document, MCL 168.497(3); or (3) an affidavit indicating that the individual does not have "identification for election purposes" and a current utility bill, a current bank statement, or a current paycheck, government check, or other government document, MCL 168.497(4).

The Legislature's definition of "proof of residency" allows a person to register to vote in the 14-day period with a broad array of common, ordinary types of documents that are available to persons of all voting ages. The Legislature did not provide a narrow list of documents that individuals who register to vote in the 14-day period must present as proof of residency. Moreover, Const 1963, art 2, § 4(1)(f) requires an individual to provide proof of residency when registering to vote in the 14-day period, and MCL 168.497(2) to (4) define what documents are acceptable to fulfill that constitutional requirement. Because the Legislature's definition does not unduly burden the right to register to vote in the 14-day period, the definition is a proper supplement to Const 1963, art 2, § 4(1)(f).

2. CHALLENGED BALLOTS

We reject the claims of PVT and the Priorities USA plaintiffs that MCL 168.497(5), which requires that a

challenged ballot be issued to anyone who registers to vote in the 14-day period without providing a current Michigan driver's license or personal identification card, unduly burdens the rights in Const 1963, art 2, § 4(1)(a) and (f). Under Const 1963, art 2, § 4(1)(f), a person who registers to vote in accordance with that subsection "shall be immediately eligible to receive a regular or absent voter ballot." Under Const 1963, art 2, § 4(1)(a), a voter is entitled to "a secret ballot."

Michigan election law defines a "regular ballot" as "a ballot that is issued to a voter on election day at a polling place location." MCL 168.3(h). An "absent voter ballot" is "a ballot that is issued to a voter through the absentee voter process." MCL 168.2(b). A challenged ballot is not a third type of ballot. Rather, a challenged ballot is either a regular ballot or an absent-voter ballot that is marked (and the mark subsequently concealed) with the number corresponding to the voter's poll list number. See MCL 168.745; MCL 168.746; MCL 168.761(6); *In re Request for Advisory Opinion*, 479 Mich at 14 n 24. Notably, a challenged ballot is entered and tabulated with all the other ballots that are cast. See MCL 168.497(5); *In re Request for Advisory Opinion*, 479 Mich at 14 n 24.

Furthermore, a challenged ballot is a secret ballot. Generally, a secret ballot is one that prevents anyone else from knowing how the individual voted. See *Helme v Bd of Election Comm'rs of Lenawee Co*, 149 Mich 390, 391-393; 113 NW 6 (1907); *People v Cicott*, 16 Mich 283, 297 (1868), overruled in part on other grounds by *Petrie v Curtis*, 387 Mich 436 (1972). The mark on a challenged ballot, either before or after it is concealed, does not indicate to anyone how the individual voted. Long before Proposal 3 was passed, the Supreme Court recognized that Const 1963, art 2, § 4 provided a right to a

secret ballot. *Belcher v Mayor of Ann Arbor*, 402 Mich 132, 134; 262 NW2d 1 (1978). This right is not absolute; upon a showing that the voter acted fraudulently, the right can be abrogated. *Id*. ("We hold that a citizen's right to a secret ballot in all elections as guaranteed by Const 1963, art 2, § 4, cannot be so abrogated in the absence of a showing that the voter acted fraudulently."). In a contested election, a challenged ballot may be inspected. See MCL 168.747. But, it may only be inspected if the person consents, the person has been convicted of falsely swearing in such ballot, or if it has been determined that such person was an unqualified elector at the time of casting the ballot. *Id*. Because the right to a secret ballot is not absolute, the fact that a challenged ballot may be inspected in a contested election, MCL 168.747, does not mean that it is not a secret ballot.

3. AVR POLICY

The Secretary's AVR Policy does not unduly burden the right in Const 1963, art 2, § 4(1)(d). Under Const 1963, art 2, § 4(1), "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have [certain] rights[.]" In other words, the rights listed in Const 1963, art 2, § 4(1), including "[t]he right to be automatically registered to vote as a result of conducting business with the secretary of state regarding a driver's license or personal identification card," Const 1963, art 2, § 4(1)(d), are rights of any "citizen of the United States who is an elector qualified to vote in Michigan . . . ." An individual is not an elector qualified to vote in Michigan—and entitled to the rights listed in Const 1963, art 2, § 4(1)—until the individual reaches 18 years of age. See US Const, Am XXVI; Const 1963, art 2, § 1; *In re Request for Advisory Opinion*, 479 Mich at 47 n 1 (CAVANAGH, J., dissenting).

The AVR Policy, which allows those who are 17½ years of age or older to be automatically registered to vote as a result of conducting business with the Secretary regarding a driver's license or personal identification card, is consistent with MCL 168.492. The statute 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 17-½ years of age; a resident of this state; and a resident of the township or city. [MCL 168.492.]

Because a person under the age of 18 is not an elector qualified to vote in Michigan, and because the AVR Policy is consistent with MCL 168.492, which allows an individual who is not less than 17½ years of age to register to vote, the argument that the AVR Policy unduly burdens the right in Const 1963, art 2, § 4(1)(d) is without merit.

D. EQUAL PROTECTION

PTV and the Priorities USA plaintiffs argue that MCL 168.497 violates the Equal Protection Clause of the Michigan Constitution. Const 1963, art 1, § 2 provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." The Equal Protection Clause of the Michigan Constitution is coextensive with the Equal Protection Clause of the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Equal protection applies when a state either classifies voters in disparate ways or

places undue restrictions on the right to vote. *Obama for America v Husted*, 697 F3d 423, 428 (CA 6, 2012).

The Priorities USA plaintiffs argue that MCL 168.497(5) violates equal protection because it treats similarly situated voters differently. According to them, although Const 1963, art 2, § 4(1)(f) guarantees that all individuals who register to vote in the 14-day period shall receive a regular or absent-voter ballot, under MCL 168.497(5), only those who submit a current Michigan driver's license or personal identification card as their proof of residency receive a regular or absent-voter ballot. PTV similarly argues that many people who register to vote in the 14-day period are denied the right to receive a regular or absent-voter ballot. The basis for these arguments is that a challenged ballot does not constitute a regular or absent-voter ballot. But, as previously discussed, a challenged ballot is a regular or absent-voter ballot. As also laid out previously, a challenged ballot does not lose its character as a secret ballot unless the election is contested. Regardless of how an individual provides proof of residency, as defined in MCL 168.497, the individual receives a regular or absent-voter ballot that is also a secret ballot. Similarly situated voters are not treated differently under MCL 168.497(5).

The Priorities USA plaintiffs argue that the Legislature's definition of "proof of residency" in MCL 168.497 severely burdens the right to vote because it has, and will, disenfranchise hundreds, if not thousands, of individuals in Michigan who are qualified to vote. According to the Priorities USA plaintiffs, strict scrutiny should be applied to the definition.

Every election law, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself,

inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v Celebrezze*, 460 US 780, 788; 103 S Ct 1564; 75 L Ed 2d 547 (1983).[9] Consequently, subjecting every voting regulation to strict scrutiny, thereby requiring that the regulation be narrowly tailored to advance a compelling state interest, would tie the hands of states seeking to assure that elections are operated equitably and efficiently. *Burdick v Takushi*, 504 US 428, 433; 112 S Ct 2059; 119 L Ed 2d 245 (1992). In *Burdick*, the United States Supreme Court held that "a more flexible standard" applies:

> A court considering a challenge to a state election law must weigh the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance

[9] Regardless of whether the right to vote, following the passage of Proposal 3, is now an expressly enumerated right in the Michigan Constitution, the United States Supreme Court has recognized that the right to vote is a " 'a fundamental political right' " that "is preservative of other basic civil and political rights . . . ." *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (citation omitted). A citizen has "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 US at 336. The right to vote, however, is not absolute; a state has the power to impose voter qualifications and to regulate access to the franchise in other ways. *Id.*; see also Const 1963, art 2, § 4(2).

> a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. [*Id*. at 434 (citations omitted).]

See also *In re Request for Advisory Opinion*, 479 Mich at 21-22 (opinion of the Court), in which our Supreme Court, after quoting these two paragraphs, stated:

> Thus, the first step in determining whether an election law contravenes the constitution is to determine the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. The United States Supreme Court has stressed that each inquiry is fact and circumstance specific, because "[n]o bright line separates permissible election-related regulation from unconstitutional infringements . . . ." [Citation omitted.]

In resolving an equal-protection challenge to an election law under the Michigan Constitution, this Court applies the *Burdick* test. *Id*. at 35.

The Legislature's definition of "proof of residency" does not impose a severe burden on the right to vote. Because Const 1963, art 2, § 4(1) does not define "proof of residency," the Legislature provided a definition in MCL 168.497, and the Legislature's definition allows individuals to provide proof of residency with a broad array of ordinary, common documents that are available to persons of all voting ages. The Priorities USA plaintiffs have presented evidence that there are individuals

who are qualified to vote and who could not provide proof of residency, as defined in MCL 168.497, in the 14-day period leading up to the March 2020 presidential primary.

However, in arguing that the Legislature's definition of "proof of residency" has, and will, disenfranchise these individuals, the Priorities USA plaintiffs fail to recognize that an individual can register to vote in several ways. An individual can register to vote by mailing a completed voter-registration application on or before the 15th day before the election. Const 1963, art 2, § 4(1)(e). An individual can register to vote by appearing in person and submitting a completed voter-registration application on or before the 15th day before the election. Const 1963, art 2, § 4(1)(f). See also MCL 168.497(1) (allowing an individual to register to vote in person, by mail, or online until the 15th day before the election). Additionally, an individual can register to vote in the 14-day period by appearing in person, submitting a completed voter-registration application, and providing proof of residency. Const 1963, art 2, § 4(1)(f).

The Priorities USA plaintiffs make no claim that any person who is unable to provide proof of residency, as defined in MCL 168.497, in the 14-day period would not be able to register to vote on or before the 15th day before the election. Notably, election days are set by the Michigan Constitution and by statute. See Const 1963, art 2, § 5; MCL 168.641. Consequently, one should not be uninformed regarding when an election is to be held. Furthermore, it is not unreasonable to expect an individual who wishes to vote in an election, but who is not registered to vote or who has moved since registering to vote, to make inquiries or conduct research—in advance of the election—regarding how to register to

vote. In doing so, an individual can learn the different options for registering to vote and the documents that are needed for each method. These inquiries are not a severe or substantial burden. Cf. *Crawford v Marion Co Election Bd*, 553 US 181, 198; 128 S Ct 1610; 170 L Ed 2d 574 (2008) (opinion by Stevens, J.) (indicating that the inconvenience for those who need a photo identification to vote by gathering the required documents, making a trip to the bureau of motor vehicles, and posing for a photograph does not qualify as a substantial burden); *id*. at 205 (Scalia, J., concurring in the judgment) (stating that burdens are severe if they go beyond the merely inconvenient and that "[o]rdinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe"). Furthermore, while the Priorities USA plaintiffs claim that the Legislature's definition of "proof of residency" is narrow, they make no claim that a more expansive list of specific documents, such as those which the Secretary allows to constitute proof of residency when one applies for a driver's license or personal identification card,[10] would allow a significant number of individuals who cannot provide proof of residency, as defined by MCL 168.497, to provide it.

The Legislature's definition of "proof of residency" in MCL 168.497 is a reasonable, nondiscriminatory restriction that applies to all individuals who seek to register to vote in the 14-day period. See *In re Request for Advisory Opinion*, 479 Mich at 25. It does not, therefore, violate equal protection of the law.

Furthermore, the Legislature's definition of "proof of residency" is warranted by the state's regulatory inter-

[10] These documents include a credit-card bill; bank statement; Michigan school transcript; mortgage, lease, or rental agreement; insurance policy; and vehicle title and registration. See Michigan Secretary of State, *Driver's License or ID Requirements*, SOS-428 (revised June 2020).

ests. *Id*. at 22. The Legislature has constitutional authority to enact laws to preserve the purity of elections, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. Const 1963, art 2, § 4(2). These obligations include ensuring that fraudulent voting does not dilute the votes of lawful voters. *In re Request for Advisory Opinion*, 479 Mich at 19-20 (opinion of the Court). Because a person's residence dictates the candidates and proposals for which the person may vote, see MCL 168.492, the Legislature has an interest in ensuring that only residents of a city or township vote in that city or township. By defining "proof of residency," a phrase undefined by Const 1963, art 2, § 4(1), the Legislature has enacted a statute that helps to preserve the purity of elections and aids in providing for a system of voter registration. The clerks of Michigan's cities and townships, as well as those qualified to vote in Michigan, now know what documents are needed to establish proof of residency in the 14-day period.

Furthermore, the Legislature's definition of "proof of residency" is a reasonable means to prevent voter fraud. By defining "proof of residency" as requiring either a current Michigan driver's license or personal identification card or a utility bill, bank statement, paycheck, government check, or other government document with the person's name and current address, the Legislature has required the person to provide a document—created by a neutral, detached third party—that connects the person with their place of residence.

We reject the Priorities USA plaintiffs' claim that voter fraud does not justify the Legislature's definition of "proof of residency" because voter fraud is not a problem in Michigan and there is no reason to believe that voter fraud would be more prevalent during the

14-day period than in any preceding period. Recall that it is the Michigan Constitution that requires different treatment of persons who register to vote in person on or before the 15th day before the election and those who register in the 14-day period. See Const 1963, art 2, § 4(1)(f).[11] Additionally, the Legislature was not required to wait until there was proven voter fraud during the 14-day period before it could enact a definition of "proof of residency." See *In re Request for Advisory Opinion*, 479 Mich at 26-27 (opinion of the Court), in which the Supreme Court rejected the argument that the state's interest in preventing in-person voter fraud was illusory because there was no significant evidence of such fraud:

> [T]here is no requirement that the Legislature "prove" that significant in-person voter fraud exists before it may permissibly act to prevent it. The United States Supreme Court has explicitly stated that "elaborate, empirical verification of the weightiness of the State's asserted justifications" is *not required*. Rather, a state is permitted to take prophylactic action to respond to potential electoral problems:

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[11] "[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law." *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). Under Const 1963, art 2, § 4(1)(f), when a person registers to vote in person, the documents that the person must present to the election official depend on when the person registers to vote. If the person registers to vote on or before the 15th day before the election, the person must submit "a completed voter registration application." *Id*. But if the person registers to vote during the 14-day period, the person must submit "a completed voter registration application" and provide "proof of residency." *Id*. Consequently, it is apparent that the voters who enacted Proposal 3 intended that those who register to vote in the 14-day period must provide more documents than those who register to vote on or before the 15th day before the election—in addition to submitting a completed voter-registration application, they must also provide proof of residency.

> To require States to prove actual [harm] as a predicate to the imposition of reasonable . . . restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.
>
> Therefore, the state is not required to provide *any* proof, much less "significant proof," of in-person voter fraud before it may permissibly take steps to prevent it. [Citations omitted; second and third alterations in original.]

We also reject the Priorities USA plaintiffs' claim that the Legislature's definition of "proof of residency" was not justified because other statutes adequately prevent voter fraud. They point to MCL 168.933, which provides that "[a] person who makes a false affidavit or swears falsely while under oath . . . for the purpose of securing registration, for the purpose of voting at an election . . . is guilty of perjury." In *In re Request for Advisory Opinion*, 479 Mich at 28 n 69 (opinion of the Court), the Supreme Court rejected a similar argument that the picture identification requirement of MCL 168.523(1) was not justified because there were statutes that imposed criminal penalties for those who impersonated another for voting purposes. It explained:

> [T]hat Michigan criminalizes in-person voter fraud does not address Michigan's undisputed interest in *preventing* fraud in the first instance, nor do criminal sanctions provide a means of *detecting* fraud. Moreover, it is unclear how the imposition of criminal penalties could remedy the harm

> inflicted on our electoral system by a fraudulently cast ballot. [*Id*.]

Accordingly, MCL 168.933 does not dispel the Legislature's interest in preventing voter fraud during the 14-day period.

Finally, PTV, in arguing that MCL 168.497 violates equal protection, focuses on the burden that is caused by the actual issuance of challenged ballots. According to PTV, because it takes longer for a challenged ballot to be issued, which results in longer lines, the requirement that challenged ballots be issued to those who register in the 14-day period without a current Michigan driver's license or personal identification card burdens the right to vote.

The burden of long lines, which results in people having to wait longer to register to vote, is not a severe burden. Long lines are certainly an inconvenience, but a burden must go beyond mere inconvenience to be severe. *Crawford*, 553 US at 205 (Scalia, J., concurring in the judgment). Additionally, the burden is justified by the state's interest in preventing voter fraud. See *In re Request for Advisory Opinion*, 479 Mich at 19-20 (opinion of the Court). The challenged ballot provides a procedure, in a contested election, to identify a ballot that was cast by someone who engaged in voter fraud. See MCL 168.747; *Belcher*, 402 Mich 132. It was reasonable for the Legislature to conclude that it was less likely that those persons who register to vote in the 14-day period with a current Michigan driver's license or identification card would be committing fraud than those who register without one. Those who register to vote with a current Michigan driver's license or personal identification card have a government-issued identification that contains their picture and their current address. But someone who registers to vote by providing

"any other form of identification for election purposes" may have picture identification with a noncurrent address, such as a driver's license or personal identification card issued by another state, or no address for the person, such as a student photo identification card, and someone who registers to vote by submitting an affidavit that he or she does not have "identification for election purposes" simply provides no photo identification at all.

IV. RESPONSE TO THE DISSENT

Our dissenting colleague concedes that the Legislature was within its rights to establish what constitutes "proof of residency" within the 14-day period. Indeed, the dissent states that the Legislature "can and should" provide guidance as to what is acceptable proof of residency. By making this concession, our colleague must also acknowledge that the legislative choice reflected in MCL 168.497 represents a considered policy judgment of the political branches of our government. That policy judgment is one with which our dissenting colleague clearly disagrees. Indeed, our colleague states that she might have upheld the statute had the Legislature enacted a definition of "proof of residency" more in line with what she considers to be its "well-understood meaning."[12] But in our view, it is not part of

[12] The dissent lays out the list of documents the Secretary of State accepts as proof of residency when seeking to obtain a driver's license or personal identification card; that list is more expansive than the list in MCL 168.497. First, given the Legislature's duty to preserve the purity of elections and to ensure that the votes of qualified electors are not unfairly diluted, the Legislature was within its rights to require a higher standard of proof of residency for voting purposes than for driving purposes. As to the dissent's argument that the list the Legislature chose discriminates on the basis of income, we note that the more expansive list the dissent appears to prefer includes items such as

the judicial role to second-guess the Legislature's policy judgment in this regard, so long as what has been enacted does not run afoul of the Constitution. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 149; 644 NW2d 715 (2002) ("It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret—not to rewrite—the law."). We have laid out in painstaking detail why the statutory enactments at issue in this case are well within constitutional bounds.

Finally, the dissent posits that there is a well-accepted meaning of the term "proof of residency." If so, why should the Legislature have need of defining the term, as the dissent concedes that it "can and should" have done? More fundamentally, we disagree that the Legislature has substituted "proof of identity" for "proof of residency." In the context of this statute, a state of Michigan driver's license or personal identification card is being used not as proof of identity, but as proof of residency. Indeed, the Legislature considers it to be the highest and best proof of residency given that a prospective voter need not supply any other documentation within the 14-day period so long as the voter presents either of those documents reflecting an address within the voting jurisdiction.

V. CONCLUSION

We affirm the June 24, 2020 opinion and order of the Court of Claims. The Secretary and the Legisla-

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utility bills, bank statements, mortgages, pay stubs, life insurance policies, and other documents that presume a certain economic status. This appears unavoidable in any scheme designed to establish a person's residency.

ture were entitled to summary disposition. The Legislature's definition of "proof of residency" in MCL 168.497 and the requirement in MCL 168.497(5) that a challenged ballot be issued to any person who registers to vote in the 14-day period without providing a current Michigan driver's license or personal identification card do not unduly burden any of the rights in Const 1963, art 2, § 4(1)(a) and (f). The Secretary's AVR Policy also does not unduly burden the right in Const 1963, art 2, § 4(1)(d). Additionally, the Legislature's definition of "proof of residency" in MCL 168.497 and the requirement in MCL 168.497(5) concerning the issuance of challenged ballots do not violate equal protection.

Affirmed.

GADOLA, J., concurred with METER, P.J.

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*). I respectfully concur in part and dissent in part. At its essence, the gravamen of plaintiffs' claims is two-fold: first, portions of MCL 168.497 impermissibly restrict rights guaranteed by Const 1963, art 2, § 4; and secondly, the Secretary of State should be automatically registering everyone who ever transacted with the Secretary of State at any age. I agree with my colleagues' recitation of the law governing our standard of review. I further take no issue with my colleagues' recitation of the procedural background of this matter. Finally, I agree with the outcome reached by the majority regarding the Secretary of State's automatic voter registration policy. However, I believe that this matter is much simpler and more straightforward than does the majority and that much of the law and

discussion the majority provides, while thoughtful, is either unnecessary or predicated on outdated law.[1]

I. RIGHT TO VOTE

Plaintiffs first argue that the Court of Claims erred by holding that there is no right to vote in Michigan. If that had been the holding of the Court of Claims, it unambiguously would have been wrong. "All political power is inherent in the people." Const 1835, art 1, § 1; Const 1908, art 2, § 1; Const 1963, art 1, § 1. Indeed, the entire point of the American Revolution was a lack of representation by the people in their government. Const 1963, art 2, § 4(1) mandates that it must "be liberally construed in favor of voters' rights . . . ." In fact, it specifically provides that electors qualified and registered to vote have a right "to vote a secret ballot in all elections." Const 1963, art 2, § 4(1)(a). However, the Court of Claims was, for better or for worse, correct to state that there is no *absolute* right to vote. Const 1963, art 2, § 1 specifically conditions the right to vote on "except as otherwise provided in this constitution." 52 USC § 10101(a)(1) of the Voting Rights Act conditions the right to vote on being "otherwise qualified by law." Whether such a policy is wise or just, incarcerated persons convicted of crimes may not vote. MCL 168.758b. The Court of Claims did not err when it expressed a more nuanced understanding of the right to vote in Michigan.

However, it is critical to review the constitutional provision at issue in this matter because the Court of

[1] Although I maintain that the Legislature does not have standing to participate in this matter, *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 168-175; 952 NW2d 491 (2020), I take no exception under the circumstances to considering the Legislature's arguments as if they had been presented to this Court in an amicus brief.

Claims clearly erred in its understanding of the *nature* of that nuance. Currently, Const 1963, art 2, § 4 provides, in relevant part, as follows:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (a) The right, once registered, to vote a secret ballot in all elections.
>
> * * *
>
> (d) The right to be automatically registered to vote as a result of conducting business with the secretary of state regarding a driver's license or personal identification card, unless the person declines such registration.
>
> (e) The right to register to vote for an election by mailing a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications.
>
> (f) The right to register to vote for an election by (1) appearing in person and submitting a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications, or (2) beginning on the fourteenth (14th) day before that election and continuing through the day of that election, appearing in person, submitting a completed voter registration application and providing proof of residency to an election official responsible for maintaining custody of the registration file where the person resides, or their deputies. Persons registered in accordance with subsection (1)(f) shall be immediately eligible to receive a regular or absent voter ballot.
>
> * * *
>
> All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes.

> Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.
>
> (2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Subsection (2) preserves some, *but not all*, of the language found in Const 1963, art 2, § 4 *before* it was amended by Proposal 3. Former Const 1963, art 2, § 4 provided, in relevant part:

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

Similarly, former Const 1850, art 7, § 6 and Const 1908, art 3, § 8 both provided, in part, that "[l]aws [may or shall] be passed to preserve the purity of elections and guard against abuses of the elective franchise."

Notably, for the first time in Michigan's history, the changes enacted by Proposal 3 now *expressly* make the Legislature's right and obligation to "preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to

provide for a system of voter registration and absentee voting" subject to any other provisions in the Constitution. It is well established that the Legislature may impose some regulations on voting and registration. However, caselaw relying on the unconditional grant of authority provided in *outdated* versions of Const 1963, art 2, § 4 and its predecessors is now highly suspect. See *Todd v Bd of Election Comm'rs*, 104 Mich 474, 481-483; 64 NW 496 (1895) (reviewing "the power of the legislature to pass acts to maintain the purity of elections, which is expressly conferred upon them by Const. [1850] art. 7, § 6"); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16-18, 34-36; 740 NW2d 444 (2007) (discussing the balance between the right to vote and the Legislature's responsibility under *former* Const 1963, art 2, § 4).

To be clear: there is still no *absolute* right to vote in Michigan, and the Legislature is still not *absolutely* precluded from imposing regulations on voting and registration. However, the obvious significance of Proposal 3 is that the Legislature's power to do so has been severely curtailed. The addition of "[e]xcept as otherwise provided in this constitution" simultaneously with a mandate to construe the newly enacted rights "liberally . . . in favor of voters' rights in order to effectuate its purposes" unambiguously subjects any regulations or restrictions imposed by the Legislature to a higher degree of scrutiny. The Court of Claims and the majority fundamentally err by failing to recognize that the historic deference given to the Legislature in this context is no longer appropriate or permissible.

II. AUTOMATIC REGISTRATION AT ANY AGE

I respectfully concur with my colleagues' conclusion that the Secretary of State's "automatic voter registra-

tion" (AVR) policy is not unconstitutional, albeit on the basis of somewhat different reasoning.

The rights conferred by Const 1963, art 2, § 4 are only enjoyed by citizens who are "elector[s] qualified to vote in Michigan." As the majority observes, this excludes any person under the age of 18. Const 1963, art 2, § 1; US Const, Am XXVI, § 1. Therefore, any person under the age of 18 has no right to be automatically registered to vote. Pursuant to MCL 168.492, a person may nevertheless register to vote at the age of 17½. Clearly, the Secretary of State would not even be permitted to register a person to vote if that person has not attained the age of 17½.

It appears that plaintiffs believe the phrase "as a result of conducting business" in Const 1963, art 2, § 4(1)(d) should be construed as meaning an *eventual* consequence of *having ever* had any transaction with the Secretary of State. Thus, the Secretary of State would be obligated to scour its records, find anyone who is not registered to vote, monitor for any of those persons attaining the age of 17½, and then register those persons without notice. In contrast, the Secretary of State clearly regards the phrase as meaning a *direct* result of any particular *discrete* transaction. First, the Secretary of State's interpretation is clearly reasonable. See *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568-570; 566 NW2d 208 (1997). Importantly, the Constitution and MCL 168.492 unambiguously establish that persons under the age of 17½ and over the age of 17½ are not similarly situated for purposes of voter registration; consequently, the Secretary of State's AVR policy cannot constitute a violation of equal protection on that basis. See *Crego v Coleman*, 463 Mich 248, 258-259, 273; 615 NW2d 218 (2000).

Furthermore, the Secretary of State's AVR policy, as apparently currently implemented,[2] provides persons with the option of *not* registering. In other words, it provides persons with notice and with a choice. There is actually a right to *not* vote. *Mich State UAW Community Action Program Council v Austin*, 387 Mich 506, 515; 198 NW2d 385 (1972). There might be some reason why a particular person would wish to decline registration. Plaintiffs' construction would, in effect, require the Secretary of State to engage in efforts that might not even be technologically feasible but—critically—would result in registering people without particularized notice and potentially against their will. As a consequence, I find plaintiffs' construction unreasonable. Therefore, I concur with the majority that the AVR policy, at least as described in the press release, does not unduly burden the right to vote found in Const 1963, art 2, § 4(1)(d).

III. PROOF-OF-RESIDENCY REQUIREMENT

As an initial matter, Const 1963, art 2, § 4(1)(f) specifically requires that persons seeking to register to vote within 14 days of an election must provide "proof of residency." To the extent plaintiffs' arguments could be understood as suggesting that persons need not provide anything, such an argument would clearly not be cognizable. At a minimum, plaintiffs would need to argue that the Michigan Constitution violates, for example, the Voting Rights Act, 52 USC 10101 *et seq*.,

[2] As the majority notes, the evidence of the Secretary of State's AVR policy comes from a press release: Office of the Secretary of State, *Secretary Benson Announces Modernized Voter Registration on National Voter Registration Day* (September 24, 2019) <https://www.michigan.gov/sos/0,4670,7-127-1640_9150-508246—,00.html> (accessed July 14, 2020) [https://perma.cc/M9ZK-6LRD].

or a provision of the United States Constitution. I am troubled that plaintiffs do not present an argument that I find understandable for what *should* qualify as adequate "proof of residency" under Const 1963, art 2, § 4(1)(f). Furthermore, I agree with the majority that it is proper for the Legislature to enact some kind of definitional guidance for what qualifies as "proof of residency." Nevertheless, I agree with plaintiffs that the requirements set forth in MCL 168.497 are unconstitutionally restrictive and violate Const 1963, art 2, § 4.

Courts interpret constitutions and statutes in the same manner. *People v Tyler*, 7 Mich 161, 253-254 (1859). As noted, the Constitution expressly requires "proof of residency," but it does not define the term. "Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). However, an undefined term that has a particular common-law meaning, or a particular legal meaning that is well established in that context, will be afforded that particular meaning. MCL 8.3a; *United States v Turley*, 352 US 407, 411; 77 S Ct 397; 1 L Ed 2d 430 (1957); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008).

As it happens, "proof of residency" *has* acquired a well-established legal meaning. Courts have upheld residency as proved by a deed, see *Lacey v Davis*, 4 Mich 140, 150 (1856); delivery of mail to a person at his or her address, see *People v Brake*, 208 Mich App 233, 237-240; 527 NW2d 56 (1994); *Look v Sills*, 368 Mich 692, 694; 118 NW2d 702 (1962); *People v Hardiman*, 466 Mich 417, 423; 646 NW2d 158 (2002); by oath or testimony, see *People v Johnson*, 81 Mich 573, 576; 45 NW 1119 (1890); cf. *White v White*, 242 Mich 555,

556-557; 219 NW 593 (1928); or even simply appearing in person "and advising the authorities of where" he or she lives, see *People v Dowdy*, 489 Mich 373, 386; 802 NW2d 239 (2011). The Secretary of State draws a clear distinction between proof of identity and proof of residency, and *none* of the documents accepted as proof of residency includes any need for a photograph.[3] The Secretary of State accepts any two of the following as proof of residency:

> Utility bill or credit card bill issued within the last 90 days (Electronic copies are accepted)
>
> Account statement from a bank or other financial institution issued within the last 90 days (Electronic copies are accepted)
>
> Michigan high school, college or university report cards or transcripts
>
> Mortgage, lease or rental agreement (Lease and rental agreements must include landlord's telephone number)
>
> Pay stub or earnings statement issued with the name and address of the employee
>
> Life, health, auto or home insurance policy
>
> Federal, state or local government documents, such as receipts, licenses or assessments
>
> Michigan title and registration (Registration must show current residential address)

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[3] The Secretary of State's guidance ostensibly pertains to driver's licenses or state identification cards. Notably, however, this guidance is the primary result on numerous Internet search engines when searching for "proof of residency" in Michigan. Although the Secretary of State does not legally speak on behalf of Michigan, its guidance is clearly widely relied on and familiar to essentially everyone, and it is consistent with the caselaw establishing the meaning of "proof of residence." Furthermore, there is no constitutional right to a driver's license, so imposing a more stringent requirement to vote—which *is* a right—would make little sense.

> Other documents containing your name and address may be accepted with manager approval [Michigan Secretary of State, *Applying For a License or ID Card?*, SOS-428 (revised June 2020) (formatting altered).][4]

Once residence is established, it is considered to remain so until changed, *Campbell v White*, 22 Mich 178, 197-199 (1871), and "the determination of domicile or residence is essentially a question of intent which is to be decided after careful consideration of relevant facts and circumstances," *Grable v Detroit*, 48 Mich App 368, 373; 210 NW2d 379 (1973).

To reiterate: the Legislature clearly can and should provide legislative guidance as to what constitutes "proof of residency." Leaving the term undefined, even in light of its well-established meaning, could easily result in the same kind of mischief once caused by voter literacy tests: when a precondition to voting is left *wholly* to the discretion of local individuals, the result could easily be intentionally or unintentionally biased implementation. Furthermore, consistent with Const 1963, art 2, § 4(2), it is entirely reasonable to require "proof of residency" to entail *some* kind of documentation created by a reasonably neutral party (e.g., a financial institution, a school, a governmental entity, or possibly a commercial entity). To the extent plaintiffs argue that MCL 168.497 is unconstitutional purely because it provides implementation guidance to election officials as to what will suffice for "proof of residency," I disagree.

Nevertheless, it is clear from the well-established meaning of "proof of residency" that the term is *not* meant to be synonymous with "proof of identity." Again

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[4] Available at <https://www.michigan.gov/documents/DE40_032001_20459_7.pdf> [https://perma.cc/ZTL5-ECVD].

turning to the Secretary of State for guidance, proof of *identity* is distinct from proof of *residency*; and proof of identity may be established with a marriage license, divorce decree, United States court order for a change of name, military discharge separation document, or various forms of photographic identification. See SOS-428. Under MCL 168.497, however, "proof of residency" is, in effect, *defined as proof of identity*. MCL 168.497(2) states that proof of residency may be shown through a driver's license or state identification card—that is, under the statute, proof of residency may be shown through photographic identification. Yet, under our caselaw and the Secretary of State's guidance, while photographic identification may be used to prove identity, it is not necessary to prove residency. In the alternative, MCL 168.497(3) literally requires the individual to *prove residency by proving identity* under MCL 168.2(k) (defining "identification for election purposes"). In other words, the Legislature has not actually provided guidance as to what constitutes "proof of residency." Rather, the Legislature has invaded the rights conferred by the Constitution by substituting the requirements for proving identity. There is no level of deference that permits the Legislature to arbitrarily and radically rewrite the Constitution by defining the constitutional term in a way that doesn't comport with its established legal meaning; this is especially true in light of the plain constitutional dictate that Const 1963, art 2, § 4(1) must be construed in favor of voters' rights.

I recognize that the Legislature permits applicants to partially obviate the requirement of providing proof of identity under MCL 168.2(k) by signing an affidavit. MCL 168.497(4). This is perhaps a good start, but as written, it is not a solution to the problem, especially in light of the second sentence of MCL 168.497(5), which

requires issuance of a challenged ballot instead of a regular ballot.[5] If an applicant provides "proof of residency" as required by Const 1963, art 2, § 4(1)(f), then they are entitled to register to vote and must be given a proper ballot. Issuing a challenged ballot instead, as a matter of course—rather than because "the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct," MCL 168.727(1)—violates the elector's rights.[6]

Importantly, I disagree with the majority's characterization of the kinds of documents listed in MCL 168.497(3)(a) to (c) and (4)(a) to (c) as "common, ordinary types of documents that are available to persons of all voting ages." Not everyone owns a residence such that they would have a utility bill; not everyone has an account with any financial institution, let alone a bank; and especially in light of the current COVID-19 crisis and its secondary effects, it is increasingly common for people to have neither a current paycheck nor a government check. Furthermore, "current" is undefined, unlike in the list provided by the Secretary of State. Although "other government document" might suffice, it is vague, and its inclusion along with two forms of paychecks suggests, under the doctrine of *ejusdem generis*, an equally improperly limited range of possibilities for what might be included. The alternatives the Legislature provides in MCL 168.497(4) are little more than practically unhelpful symbolic gestures, at least as MCL 168.497 is written as a whole. It is true

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[5] The second sentence of MCL 168.497(5) also applies to MCL 168.497(3). However, as discussed, MCL 168.497(3) unconstitutionally requires proof of identity rather than proof of residency, so the significance of comparing Subsection (5) to Subsection (3) is irrelevant.

[6] Conversely, if the applicant does not provide proof of residency, then nevertheless permitting the applicant to vote using a challenged ballot actually confers *greater* rights than afforded by the Constitution.

that those documents are commonly available to certain classes of the population, but as a consequence, the Legislature's list works as a clear disenfranchisement of persons based on economic status.[7]

Put another way, the Legislature certainly may provide a definition of "proof of residency." It certainly may provide that "proof of residency" requires some kind of documentation. However, "proof of residency" has a well-understood meaning at least in general terms, and the Legislature may not drastically depart from that meaning when supplying more precise implementation details. The documents the Legislature requires might, or might not, be "the highest and best proof of residency," as the majority characterizes them. However, the Constitution, pursuant to the expressed will of the people, demands far more latitude. As noted, the revisions to Const 1963, art 2, § 4 now make the Legislature's duty "to preserve the purity of elections" subordinate to the rights enumerated in Const 1963, art 2, § 4(1), including an express requirement that those rights be construed liberally in favor of voters' rights.

My point, which I respectfully believe the majority misunderstands, is not that requiring proof of identity is unwise. Rather, it is that proof of identity is qualitatively different from proof of residency, and as a consequence, the Legislature is unconstitutionally bur-

[7] The majority observes that the Secretary of State's list also includes documents that presume a certain economic status and posits that some degree of economic discrimination may be "unavoidable in any scheme designed to establish a person's residency." I do not disagree with either observation. However, proof of residency is required by the Constitution; proof of identity is not. I understand the question before us to be whether the Legislature is violating a right guaranteed by the Constitution by requiring applicants to submit more burdensome documentation than is already constitutionally required.

dening the right to register to vote on supplying proof of *residency*. Had the Legislature provided guidance that actually resembles the well-understood meaning of "proof of residency," I would likely agree that this Court would be compelled to uphold it as within the bounds of reasonableness.[8] Instead, the Legislature has unambiguously provided a definition of "proof of *identity*," a much more restrictive and stringent concept, and substituted that definition in place of "proof of residency." This clearly violates Const 1963, art 2, § 4(1).[9] Any further analysis would simply be much sound and fury, signifying nothing. Because MCL 168.497 is facially violative of the Constitution, I decline to engage in philosophy.

IV. CONCLUSION

I concur with the majority in upholding the Secretary of State's AVR policy because I find it to be a reasonable interpretation of Const 1963, art 2, § 4(1)(d), and the alternatives would either be unreasonable or would, in fact, violate individuals' rights. I would hold that the Legislature may and should provide guidance to explain specifically what would suffice for "proof of residency" under Const 1963, art 2, § 4(1)(f), including some kind of

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[8] I respectfully disagree with the majority's implication that because it was proper for the Legislature to provide some kind of guidance, whatever guidance actually provided must, *ipso facto*, be proper under the Constitution.

[9] I wholeheartedly agree with the majority that this Court should not "second-guess the wisdom of a legislative policy choice[.]" *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 149; 644 NW2d 715 (2002). However, it is well established that the courts are explicitly charged with evaluating whether a particular legislative act is permitted by the Constitution. *Marbury v Madison*, 5 US (1 Cranch) 137, 177-180; 2 L Ed 60 (1803); *Green v Graves*, 1 Doug 351, 352 (Mich, 1844); *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

documentation requirement. However, I conclude that MCL 168.497 is unconstitutional on its face because it unambiguously establishes a proof-of-*identity* requirement in plain violation of the established meaning of "proof of residency" and in equally plain violation of the constitutional mandate to "liberally construe[]" the rights enumerated in Const 1963, art 2, § 4(1) "in favor of voters' rights in order to effectuate its purposes." The purpose of Const 1963, art 2, § 4(1) is to maximize enfranchisement of persons qualified to vote; MCL 168.497 as written achieves the opposite. I would therefore reverse to the extent the Court of Claims upheld MCL 168.497.

MAPLE MANOR REHAB CENTER, LLC v DEPARTMENT OF TREASURY

Docket No. 349168. Submitted July 8, 2020, at Detroit. Decided July 23, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 947 (2021).

Maple Manor Rehab Center, LLC, and Maple Manor Rehab Center of Novi, Inc., brought an action in the Court of Claims against the Department of Treasury (Treasury) and the Department of Human Services (the DHHS), seeking a refund of an alleged overpayment of the Quality Assurance Assessment (QAA) tax imposed under MCL 333.20161. Treasury moved for summary disposition under MCR 2.116(C)(4) and (C)(8), asserting that it lacked authority to hear and decide plaintiffs' petition for a refund. Plaintiffs were postacute care facilities that were subject to the QAA because they participated in the state's Medicare program. The QAA is collected to secure matching federal funds and is assessed based on the total number of days of patient care that a nursing home or hospital long-term care unit gives to non-Medicare patients. Providers submit annual Medicare reports to the DHHS, which calculates their QAA liability. In October 2017, plaintiffs discovered a clerical error in their annual reporting for 2015, 2016, and 2017 that had resulted in overpayment of QAA tax. Plaintiffs notified the DHHS of the error in December 2017 and asked it to correct the reports. The DHHS acknowledged the error and corrected it prospectively, but did not refund the overpayment. According to the DHHS, because the error was reported outside of the audit period, only a prospective adjustment could be made. Plaintiffs did not seek judicial review of the DHHS's denial of relief, but instead petitioned Treasury for a refund of their QAA overpayments for 2015, 2016, and 2017. Treasury denied plaintiffs' request in an October 2018 letter, noting that it did not have jurisdiction in the matter because the QAA is not administered under the Revenue Act, MCL 205.1 *et seq*., so the act's refund provision, MCL 205.30, was not applicable. Plaintiffs then filed their complaint in the Court of Claims, alleging that Treasury violated MCL 205.30 by refusing to process their petition for a refund and later arguing that the QAA is a tax that is subject to the Revenue Act. Treasury moved for summary disposition, and the Court of Claims, COLLEEN A. O'BRIEN, J., granted summary disposition for Treasury, agreeing

with its assertion that it had no authority to administer the QAA because the Public Health Code, MCL 333.20101 *et seq*., did not expressly provide that the Revenue Act was applicable. The court concluded that the QAA is not subject to the refund procedures of the Revenue Act because Treasury had not plainly been given authority over the administration and enforcement of the QAA by the Legislature.

The Court of Appeals *held*:

1. The Court of Claims lacked subject-matter jurisdiction in this case because Treasury did not issue an adverse decision with respect to plaintiffs' petition for a refund. In fact, Treasury did not issue any decision on plaintiffs' petition; rather, the DHHS issued two letters denying plaintiffs' request for a refund. When plaintiffs petitioned Treasury after being denied a refund by the DHHS, Treasury merely *notified* plaintiffs that it did not have the authority to issue a QAA refund. Therefore, the DHHS, not Treasury, made the decision that aggrieved plaintiffs by denying them a refund of their QAA payments. Because plaintiffs did not receive an adverse decision from Treasury, the Revenue Act did not confer subject-matter jurisdiction on the Court of Claims, so summary disposition under MCR 2.116(C)(4) was proper.

2. Plaintiffs argued that the QAA is a tax subject to the refund provision of the Revenue Act, MCL 205.30, because MCL 205.20 provides that all taxes are subject to the procedures of administration, audit, assessment, interest, penalty, and appeal provided in MCL 205.21 to MCL 205.30. According to plaintiffs, the QAA is subject to the Revenue Act because no authority specifically provides that it is not. However, this reading was overly simplistic and read portions of MCL 333.20161 and the Revenue Act in a vacuum; well-established rules of statutory construction required the statutes to be read together as a harmonious whole to accurately discern the Legislature's intent. MCL 333.20161 provides for the assessment and collection of the QAA, for penalties for nonpayment, that the QAA be deposited into a fund held by Treasury, and for the referral of unpaid amounts to Treasury for collection. MCL 333.20161(11)(e) also requires compliance with federal law in administering and enforcing the QAA. MCL 333.20161 refers to Treasury only in a limited capacity as a depository for QAA funds, MCL 333.20161(10), and as a collection agent upon referral, MCL 333.20161(11)(f). The Revenue Act gives Treasury express authority to administer and enforce certain enumerated tax provisions, but MCL 333.20161 is not among those enumerated provisions. Additionally, unlike MCL 333.20161, there is no requirement within the Revenue Act that

its procedures comply with federal law. Reading these statutory schemes together in order to give force and effect to each and in a manner to avoid conflict compels the conclusion that the Revenue Act and MCL 333.20161 operate separately. Therefore, the QAA is not subject to the Revenue Act except as specifically provided by the Legislature in MCL 333.20161. Further, to the extent that statutes that are *in pari materia* are in conflict and cannot be reconciled, the more specific statute controls. In this context, the Revenue Act is a statutory scheme that is generally applicable to all taxes, while MCL 333.20161 is a specific, comprehensive, federally compliant scheme applicable only to the QAA. Under these circumstances, the statute specific to the QAA, MCL 333.20161, is controlling.

Affirmed.

STATUTORY INTERPRETATION — MCL 333.20161 — QUALITY ASSURANCE ASSESSMENT — ENFORCEMENT AND ADMINISTRATION.

The Revenue Act, MCL 205.1 *et seq*., gives the Department of Treasury the authority to administer and enforce certain enumerated tax statutes, but applying the Revenue Act to the Public Health Code's Quality Assurance Assessment (the QAA) set forth in MCL 333.20161 would render administration of the QAA inconsistent with federal law; reading the statutes together in order to give force and effect to each and to avoid conflict compels the conclusion that the QAA is not subject to the Revenue Act, except insofar as the Legislature has specifically provided a limited role for the Department of Treasury.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Genevieve T. Fischré*, Assistant Attorney General, for the Department of Treasury.

Rolf Goffman Martin Lang LLP (by *Christopher G. Kuhn*) for Maple Manor Rehab Center, LLC, and Maple Manor Rehab Center of Novi, Inc.

Before: FORT HOOD, P.J., and JANSEN and TUKEL, JJ.

PER CURIAM. In this case involving the alleged overpayment of the Medicaid Long-Term Care Quality Assurance Assessment (QAA) tax, MCL 333.20161, under Michigan's Medicare program, plaintiffs Maple

Manor Rehab Center, LLC (the Wayne facility) and Maple Manor Rehab Center of Novi, Inc. (the Novi facility) appeal as of right the Court of Claims' opinion and order granting summary disposition in favor of defendant Department of Treasury under MCR 2.116(C)(4) and (C)(8) on the basis that the Treasury lacks authority to hear and decide plaintiffs' refund petition for the alleged QAA overpayment. On appeal, this Court is asked to decide whether the procedures for processing a petition for refund under the Revenue Act, MCL 205.1 *et seq*., are applicable to a request for a refund for overpayment of the QAA tax. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are postacute care facilities that partake in Michigan's Medicare program and therefore are subject to the QAA. The QAA is collected in order to secure matching federal funds: MCL 333.20161 and 42 CFR 433.68 provide that the QAA and matching federal funds are to "be used to finance Medicaid nursing home reimbursement payments." MCL 333.20161(11)(a). Collection of the QAA, along with matching federal funds, allows for greater Medicaid reimbursements to nursing homes through the Quality Assurance Supplement (QAS) Medicaid payment. MCL 333.20161(11)(a). The QAA is assessed on the basis of the total number of days of patient care that a nursing home or hospital long-term care unit gives to non-Medicare patients. MCL 333.20161(11)(b). The QAA excludes from assessment the days of care given to residents in assisted living beds and the days of care given to Medicare beneficiaries. See MCL 333.20161(11)(b). To determine the amount due, providers submit annual Medicare cost reports to the Michigan Department of Health and Human Services (DHHS), which then calculates the facilities' QAA liabil-

ity. For the years at issue, 2015, 2016, and 2017, plaintiffs timely remitted monthly QAA payments to the DHHS.

MCL 333.20161 vests authority in the DHHS to implement and administer the QAA. Specifically, the DHHS has the authority to implement policies and procedures and to impose penalties for nonpayment. MCL 333.20171; MCL 333.20172; MCL 333.20161(11)(f). Additionally, the DHHS must administer the QAA in accordance with federal law and regulations and is required to seek annual approval from the Centers for Medicare and Medicaid Services (CMS), a federal agency within the United States Department of Health and Human Services. MCL 333.20161(11)(c); MCL 333.20161(11)(e); 42 CFR 433.68(e).

As aptly explained by the Court of Claims:

> The QAA rates charged to all providers under MCL 333.20161 are dependent upon information provided in each individual provider's cost reports. As averred by John Donaldson, a director of the Long-Term Care Reimbursement and Audit Division within [the] DHHS, "any changes to an individual provider's cost reports would impact the tax rates for all providers in the state of Michigan to ensure adequate funding for the QAS program . . . ." [The] DHHS sends written notice to each provider of the provider's upcoming QAA tax. The rates are based on information contained in the prior year's cost reports. According to the notices issued by [the] DHHS in the instant case, an entity has "10 calendar days from the date of this notice to notify [the DHHS] in writing of a disagreement with the total number of non-Medicare days of care rendered indicated above. Failure to respond within this 10[-]day time period will result in any changes being made on a prospective basis only." [Emphasis omitted.]

In the Court of Claims, the DHHS submitted documentary evidence to explain that the time period to re-

spond to the DHHS's assessment is limited to 10 days because the amount of federal money received is dependent on statewide QAA information. Any change to an individual provider's QAA amounts affects the rates for all providers in Michigan. Additionally, the DHHS is required to obtain an annual waiver from CMS to impose the QAA, and the DHHS must have final and accurate information at the time it seeks that waiver. Accordingly, in administering the QAA, the DHHS only gives prospective effect to late QAA challenges.

Turning to the instant matter, in October 2017, plaintiffs discovered a clerical error in their annual reporting of QAAs to the DHHS, which had resulted in an overpayment. Specifically, the Wayne facility had included the days of care for residents in assisted living and for Medicare patients in 2015, 2016, and 2017, resulting in an overpayment of $227,419. The Novi facility made the same mistake in 2016 and 2017, resulting in an overpayment of $237,438. In December 2017, plaintiffs' counsel sent a letter to the DHHS explaining the errors in the cost reports for the years at issue and asking the DHHS to correct the non-Medicare days that plaintiffs had erroneously reported.

In a January 2018 letter, the DHHS acknowledged the mistake and corrected it on a prospective basis, but did not refund any of the overpayments. The DHHS reasoned that the error was reported outside the audit period and, therefore, only a prospective adjustment could be made. Plaintiffs did not seek judicial review of the denial of the relief requested from the DHHS. Rather, in September 2018, plaintiffs petitioned Treasury, seeking a refund of their QAA overpayments per MCL 205.30 for fiscal years 2015, 2016, and 2017. In their petition, plaintiffs correctly noted that Treasury

holds the QAA funds under MCL 333.20161(11)(g) and that the DHHS had not disputed plaintiffs' mistakes and resultant overpayments of QAAs. In a letter dated October 19, 2018, Treasury denied plaintiffs' request, explaining:

> Please be advised that the Department of Treasury has no jurisdiction in this matter and will not process or take action to review Maple Manor's petition. The Quality Assurance Assessment which is the subject of Maple Manor's Petition is not administered under the Revenue Act, and MCL 205.30 does not apply.

Following Treasury's refusal to issue a refund, plaintiffs filed a complaint in the Court of Claims alleging that Treasury had violated MCL 205.30 by refusing to process plaintiffs' petition for a refund.[1] In lieu of answering the complaint, Treasury moved for summary disposition arguing that it did not have authority to issue plaintiffs a refund for overpayment of their QAAs for the relevant tax years. It explained that the Revenue Act only applies to the Treasury's decisions that result from its administration of laws that it has the authority to administer. Because Treasury does not administer the QAA, and because whether a party is entitled to relief from a wrongly assessed QAA is a decision of the DHHS, Treasury argued that it had not made a decision appealable under the Revenue Act.

[1] Plaintiffs also named the DHHS in their complaint and alleged that the DHHS and Treasury were unjustly enriched as a result of plaintiffs' overpayment of QAAs and the subsequent failure to issue a refund. The Court of Claims summarily dismissed this claim against both the DHHS and Treasury, reasoning that MCL 600.6431(1) required plaintiffs to provide a signed, verified notice of intent to defendants or to file their claim with the Court of Claims within one year of the accrual of their unjust-enrichment claim. Plaintiffs failed to do so, and therefore their unjust-enrichment claim was untimely and dismissal was required under MCR 2.116(C)(7). As noted, plaintiffs did not pursue judicial review of the DHHS's decision to deny plaintiffs' request for a refund.

Further, Treasury noted that it was merely a custodian of the QAA funds and that plaintiffs' claim was an improper collateral attack on the DHHS's prior decision. In response, plaintiffs argued that the QAA *is* a "tax" subject to the Revenue Act, and because the Revenue Act's procedures apply to all taxes, the Act's procedures applied here.

The Court of Claims granted Treasury's motion for summary disposition without oral argument. Court of Claims LCR 2.119(E)(3). In its written opinion and order, the Court of Claims first noted that the Revenue Act's procedures apply to all taxes unless otherwise provided. Unlike other tax statutes that specifically state that the Revenue Act is applicable, Treasury has no express authority to administer the QAA because it has no authority to administer the Public Health Code in which MCL 333.20161 is found. The Court of Claims then examined "whether the QAA, by virtue of being a 'tax' is subject to the refund procedures of the Revenue Act by way of MCL 205.20, or whether the role played by [the] DHHS in the administration and enforcement of the tax compel a different result." Relying on the plain language of MCL 333.20161, the Court of Claims concluded:

> [T]he QAA is not subject to the Revenue Code's refund procedures because Treasury has plainly not been given authority over the administration and enforcement of the QAA tax. The unambiguous language of MCL 333.20161 places responsibility for all aspects of administering the tax squarely with [the] DHHS, not with Treasury. This is exemplified by MCL 333.20161(f), which declares that if a nursing home fails to pay the required QAA tax, [the] DHHS may, at its discretion, "refer for collection to the department of treasury past due amounts consistent with" MCL 205.13. Stated otherwise, Treasury's involvement in the QAA is limited—aside from the state treasury serving as repository [for] QAA funds—and it is invoked only

> upon [the] DHHS's referring a specific matter to Treasury. The limited role of Treasury under MCL 333.20161 stands in contrast to Treasury's involvement over other tax matters that are otherwise within its authority and over which it need not be invited to act by another agency. See, e.g., MCL 205.1.

As additional support, the Court of Claims noted that MCL 333.20161 requires the DHHS to comply with federal law, while no such requirement applies to Treasury, meaning that to grant Treasury authority over the QAA would create the potential that the DHHS may run afoul of federal law. Accordingly, the Court of Claims concluded that Treasury lacked authority to hear and decide plaintiffs' refund petition and granted summary disposition in its favor under MCR 2.116(C)(4) and (C)(8). This appeal followed.

II. STANDARD OF REVIEW

Summary disposition is proper under MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." Whether a lower court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *In re Tuscola Co Treasurer*, 317 Mich App 688, 694; 895 NW2d 569 (2016). "[A lower] court's decision on a motion for summary disposition based on MCR 2.116(C)(4) [is reviewed] de novo to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact." *Southfield Ed Ass'n v Southfield Pub Sch Bd of Ed*, 320 Mich App 353, 373; 909 NW2d 1 (2017) (quotation marks and citation omitted).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. "A motion under MCR 2.116(C)(8) may be granted only where the claims al-

leged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citation omitted). The court considers only the pleadings, and it considers them in a light most favorable to the nonmoving party, accepting as true all well-pleaded factual allegations. *Id*. Again, review is de novo. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009).

Additionally, questions of statutory interpretation are reviewed de novo. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

III. ANALYSIS

On appeal, plaintiffs maintain that the QAA is a tax subject to the credit and refund provisions set forth in MCL 205.30 and that Treasury erred by refusing to process their refund petition for overpayment of QAAs for tax years 2015, 2016, and 2017. We disagree and conclude that the Court of Claims lacked subject-matter jurisdiction because Treasury did not issue an adverse decision with respect to plaintiffs' petition for a refund. Further, the QAA "tax" is not subject to the refund provision, MCL 205.30, so as to render Treasury's refusal to process a refund an appealable decision conferring jurisdiction on the Court of Claims.

Although plaintiffs frame the issue on appeal as whether the Court of Claims erred by finding that the Revenue Act does not apply to the QAA, implicit in their argument is a presumption that Treasury's response to plaintiffs' petition was an appealable decision under the Revenue Act. Indeed, the questions of whether the Revenue Act's refund provision applies to

the QAA and whether Treasury has the authority to decide a petition for refund of the QAA are effectively one and the same. To this end, plaintiffs posit that Treasury's response—its letter refusing to process the claim for lack of authority to do so—was an appealable determination that conferred jurisdiction on the Court of Claims. We disagree.

Contrary to plaintiffs' characterization of the record, Treasury did not issue a decision on plaintiffs' petition for a refund. Instead, *the DHHS* issued two prior letters denying plaintiffs' request for a QAA refund. Later, upon receipt of plaintiffs' petition for a refund, Treasury sent plaintiffs a letter noting that it did not have the authority to issue a QAA refund and informing plaintiffs that it had referred the matter to the DHHS. Under MCL 205.22(1), "[a] taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to . . . the court of claims within 90 days after the assessment, decision, or order." The record shows that, the DHHS, not the Department of Treasury, made the decision that aggrieved plaintiffs by denying them a refund of their QAA payments. Plaintiffs never received an adverse decision from Treasury and, therefore, the Revenue Act did not confer subject-matter jurisdiction on the Court of Claims. Dismissal for lack of subject-matter jurisdiction under MCR 2.116(C)(4) was proper.[2]

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[2] In concluding that the QAA is not subject to the Revenue Act's appellate procedures and granting the motion under MCR 2.116(C)(4), the Court of Claims relied on *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557; 884 NW2d 799 (2015). In that case, the plaintiff sued Treasury regarding the Michigan Film Office's denial of a tax credit. *Id.* at 560-562. On appeal, this Court affirmed the Court of Claims' decision that it lacked subject-matter jurisdiction over the matter because Treasury had not issued an adverse assessment, decision, or order;

In an apparent attempt to bootstrap subject-matter jurisdiction onto the Court of Claims, plaintiffs claim that Treasury's letter effectively operated as a denial of a refund because the Revenue Act's refund provision, MCL 205.30, applies to the QAA. According to plaintiffs, the Court of Claims erred by concluding that the QAA is not subject to MCL 205.30 and by granting summary disposition under MCR 2.116(C)(4) and (8). In support, plaintiffs rely on the language in MCL 333.20161 defining the QAA as a "tax" and MCL 205.20, which provides:

> Unless otherwise provided by specific authority in a taxing statute administered by the department, all taxes shall be subject to the procedures of administration, audit, assessment, interest, penalty, and appeal provided in sections 21 to 30.

By plaintiffs' logic, because no specific authority provides that the QAA is not subject to the Revenue Act, the QAA is subject to the procedures for administration, audit, assessment, interest, penalties, and appeal in MCL 205.21 through MCL 205.30.

Plaintiffs' argument raises an issue of statutory interpretation. When construing the meaning of statutory language, this Court's goal is to discern the Legislature's intent. *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009). The best and most reliable indicator of that intent, and therefore the starting point for analysis, is the plain language used. *Id*. This Court must view the

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rather, the Michigan Film Office had issued the adverse decision. *Id*. at 566. Plaintiffs here assert that *Teddy 23* is distinguishable because, unlike in that case, plaintiffs are appealing Treasury's refusal to issue a refund, which is an adverse decision. In attempting to distinguish *Teddy 23*, however, plaintiffs rely on the same mischaracterization of the record that we have already rejected. The Court of Claims did not err by analogizing this matter to *Teddy 23*.

statutory language in context, considering "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (quotation marks and citation omitted). Further, "[s]tatutes [relating to the same subject are] *in pari materia* . . . [and] should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each . . . ." *Rathbun v State*, 284 Mich 521, 544; 280 NW 35 (1938) (quotation marks and citation omitted). If two "statutes lend themselves to a construction that avoids conflict, that construction should control." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

Plaintiffs' reading of the applicable statutes is too simplistic. It is true that MCL 333.20161(14) defines QAA as a "tax," and absent exception in a tax statute administered by Treasury, MCL 205.20 directs that "all taxes" are subject to the Revenue Act. Plaintiffs also correctly assert that MCL 333.20161 contains no language expressly stating that the QAA is not subject to the Revenue Act. However, the lack of such an exemption is not definitive. This is because the statutory schemes must be read together as a harmonious whole to accurately discern the Legislature's intent. *Rathbun*, 284 Mich at 544; *Webb*, 458 Mich at 274. Contrary to this well-established rule of construction, plaintiffs' analysis selectively reads MCL 333.20161(14) and MCL 205.20 in a vacuum to support plaintiffs' preferred result. Explanation of these statutory schemes as a whole is therefore necessary to discern the Legislature's intent.

MCL 333.20161 clearly vests the DHHS with the authority to assess and collect the QAA, MCL 333.20161(1)(g) and (11); assess penalties for nonpay-

ment, MCL 333.20161(11)(f); deposit QAA taxes in a fund held by Treasury, MCL 333.20161(10); and refer for collection to Treasury unpaid amounts, consistent with MCL 205.13 and MCL 333.20161(11)(f). In carrying out these duties, the DHHS is bound to comply with federal law. MCL 333.20161(11)(e). Consequently, the DHHS, in administering all aspects of the QAA, including audits and refunds, must undertake federally compliant procedures. Of further note, MCL 333.20161 refers to Treasury in a limited capacity, as a depository for the QAA funds and as a collection agent subject to the DHHS's authorization. MCL 333.20161(10) and (11)(f).

The Revenue Act, on the other hand, gives Treasury express authority to administer and enforce certain enumerated tax statutes. MCL 333.20161 is not one of those enumerated statutory provisions. MCL 205.13(1). The act further provides that procedures for assessment, collection, audits, penalties, interest, and refunds, MCL 205.21 through MCL 205.30, are applicable to "all taxes" unless otherwise provided for in a tax statute administered by Treasury, MCL 205.20. Unlike MCL 333.20161, there is no requirement that the Revenue Act's procedures comply with federal law.

Superficially, a conflict appears to exist within these schemes: the Revenue Acts grants Treasury the authority to administer *all taxes*, unless an exception exists, while the QAA is defined as a tax and no exception exempts it from the Revenue Act. However, applying the Revenue Act to the QAA would render administration of the QAA inconsistent with federal law and inconsistent with the explicit requirements found in MCL 333.20161; specifically, the requirement that the DHHS, not Treasury, administer and enforce the QAA. Yet, reading these schemes together in order to give force and effect to each, and in a manner to

avoid conflict, compels the conclusion that these statutes operate separately. Accordingly, we conclude that the QAA is not subject to the Revenue Act except where the Legislature has specifically provided a limited role for Treasury.

Additional support for this conclusion can be found in the principle of statutory construction that "[t]o the extent that statutes that are *in pari materia* are unavoidably in conflict and cannot be reconciled, the more specific statute controls." *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of Fin & Ins Regulation*, 287 Mich App 326, 334; 788 NW2d 842 (2010). Here, the Revenue Act provides a statutory scheme generally applicable to all taxes, while MCL 333.20161 provides a specific, comprehensive, federally compliant scheme applicable only to the QAA. Under these circumstances, the statute specific to the QAA is an exception to the Revenue Act, so MCL 333.20161 controls the process for obtaining a refund. *People v Arnold*, 502 Mich 438, 472; 918 NW2d 164 (2018) ("When a general intention is expressed, and also a particular intention, which is incompatible with the general one, the particular intention shall be considered an exception to the general one.") (quotation marks and citation omitted). Indeed, the Legislature, in enacting MCL 333.20161, is presumed to have known the laws relating to the same subject (here the Revenue Act), to have considered the effect of MCL 333.20161 and its relation to the Revenue Act, and to have intentionally drafted MCL 333.20161 in a comprehensive and detailed manner in order to supersede application of the Revenue Act's provisions to the administration of the QAA. See *People v Feezel*, 486 Mich 184, 211; 783 NW2d 67 (2010) (noting that the Legislature is presumed to know the law); cf. *People v Idziak*, 484 Mich 549, 569; 773 NW2d 616 (2009)

(noting that comprehensive, specific, and detailed legislation supersedes the common law pertaining to the same subject). Consequently, it must be assumed that the clear intent of the Legislature in drafting MCL 333.20161 was to leave no room for application of MCL 205.30 (or for the Revenue Act generally, except where specifically provided) to the administration of the QAA.

Moreover, as the Court of Claims recognized, had the Legislature intended for the Revenue Act to apply to the QAA, it could have specifically stated so, as it has done in other statutes. See, for example, MCL 205.433(1) (indicating that the Revenue Act applies to the administration of the Tobacco Products Tax Act); MCL 208.80(1) (providing that the now-repealed Single Business Tax Act (SBTA) is subject to administration under the Revenue Act). The clear expression in other tax statutes that the Revenue Act applies, and the absence of such language in MCL 333.20161, further supports our conclusion that the Legislature did not intend for the Revenue Act to apply to the QAA. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) ("[A] general principle of statutory construction is the doctrine of *expressio unius est exclusio alterius*, which means the express mention of one thing implies the exclusion of another.") (quotation marks and citation omitted). By this same logic, that the Legislature expressly gave Treasury a limited role as a depository and collection agent implies that the Legislature did not intend to grant Treasury the expansive powers it possesses under the Revenue Act with respect to the QAA.

On appeal, plaintiffs identify several purported errors in the Court of Claims' analysis. Plaintiffs first argue that the Court of Claims did not rely on the statutory schemes' plain language or any legal author-

ity, but, rather, relied on its "own subjective theory" of how the statutes should operate. However, our review of the Court of Claims' opinion and order shows that it did rely on the plain language of the statutory schemes and not its own policy preferences. After examining both statutory schemes, the court found that the DHHS had broad authority over administering the QAA and that Treasury's authority under the Revenue Act with respect to the QAA was limited. The record plainly belies plaintiffs' assertion.

Plaintiffs also argue that the Court of Claims erred by relying on *K & W Wholesale, LLC v Dep't of Treasury*, 318 Mich App 605; 899 NW2d 432 (2017), and *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678; 741 NW2d 579 (2007), because neither case supported the court's conclusion that "a 'tax' is not subject to the Revenue Code's provisions simply by virtue of being a 'tax.' " However, plaintiffs fail to appreciate that the Court of Claims relied on these cases to illustrate those statutes in which, unlike in MCL 333.20161, the Legislature has expressly bestowed authority on Treasury for taxing schemes outside the Revenue Act by specifically stating that the Revenue Act applies. See *K & W Wholesale, LLC*, 318 Mich App at 613 (noting that the Tobacco Products Tax Act provides that "[t]he tax imposed by this act shall be administered by the revenue commissioner pursuant to" the Revenue Act unless a conflict exists, in which case the Tobacco Tax Products Act will control) (quotation marks and citation omitted); *Tyson Foods, Inc*, 276 Mich App at 684-685 (indicating that the SBTA provides that administration of the single business tax is governed by the Revenue Act). The Legislature did not provide a similar pronouncement with respect to the QAA.

Plaintiffs have failed to provide a persuasive interpretation of the relevant statutory schemes at issue that would lead us to conclude that the refund provision of the Revenue Act applies to the QAA. Accordingly, we cannot conclude that Treasury had authority to issue a decision with respect to plaintiffs' petition for refund. Absent an adverse decision from Treasury, the Court of Claims lacked subject-matter jurisdiction and summary disposition was required under MCR 2.116(C)(4) and (C)(8).

Affirmed.

FORT HOOD, P.J., and JANSEN and TUKEL, JJ., concurred.

In re WILLIAMS, Minor

Docket No. 351081. Submitted April 14, 2020, at Detroit. Decided June 18, 2020. Approved for publication July 23, 2020, at 9:05 a.m.

Petitioner, the Department of Health and Human Services, petitioned the Genesee Circuit Court, Family Division, for removal of respondent's child, LZW, from respondent's care. The court had previously removed respondent's younger child from respondent's care. In July 2019, an incident of domestic violence occurred at LZW's paternal grandmother's home involving LZW's father, who picked up, choked, and shook LZW. Although LZW did not have any marks or bruising, EMS transported her to the hospital out of caution. There was no dispute that respondent was not present for the assault. Respondent arrived at the hospital after being notified of the incident and took LZW back to her residence before medical staff formally discharged LZW. The next day, respondent signed a Child Protective Services safety plan, agreeing to take LZW back to the hospital that day. Respondent did not take the child back to the hospital but instead scheduled an appointment with a primary-care physician at a later date. The hearing referee found respondent's conduct concerning but opted to leave LZW in respondent's care until the hearing. The caseworker confirmed that respondent had taken LZW to her primary-care physician as scheduled. At the pretrial hearing, the caseworker explained that respondent's younger child was in foster care for medical neglect and that respondent's failure to promptly bring LZW to a doctor showed that LZW should also be placed in foster care. Petitioner agreed. Respondent's counsel pointed out that respondent was not present during LZW's assault, did not live with LZW's father, and believed that LZW had been seen by a nurse before respondent took LZW home from the hospital. Respondent's counsel further argued that respondent's other child was much younger and had significant medical issues, whereas LZW was older and was safe with respondent. The court inquired into whether both children could be placed in the same home, and the caseworker responded in the affirmative. The court, Michael J. Theile, J., entered an order placing LZW in foster care and directing reasonable efforts for reunification to continue. Respondent appealed.

The Court of Appeals *held*:

1. The rights to notice and a hearing are due-process rights extended to a parent when a legal adjustment of the constitutionally protected relationship between a parent and a child is made. In this case, respondent argued that she did not have a meaningful opportunity to be heard or to present a defense because no party requested removal until after the pretrial hearing was concluded and no formal motion for removal was filed. However, the lack of these formalities was not dispositive; respondent was aware that investigations were continuing into her fitness as a parent as to both children. Accordingly, respondent was on notice that LZW's placement was subject to ongoing review and reconsideration at any time, including at the pretrial hearing. Respondent was not deprived of due process because she was not specifically told, in so many words, that a request would be made at the hearing to change LZW's placement.

2. MCR 3.965(C)(1) governs pretrial placement and explicitly requires, in relevant part, that the court shall receive evidence, unless waived, to establish that the criteria for placement set forth in MCR 3.965(C)(2) are present. MCR 3.965(C)(1) further provides that the respondent shall be given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence. In this case, at pretrial, no witnesses were sworn, no evidence was offered, and no cross-examination was conducted. Arguably, respondent was denied a meaningful opportunity to respond and offer proofs as required under MCR 3.965(C)(1); however, if MCR 3.965(C)(1) was violated, the error was harmless. An error does not require reversal if it was not decisive to the outcome of the case. Respondent's counsel provided substantive facts to the trial court. Therefore, respondent was provided with essentially the same opportunity as the foster-care worker to present information to the court. Respondent provided no offer of proof or other explanation of what evidence she might have sought to introduce, what questions she might have put to the caseworker, or what difference either might have made. Therefore, even if the trial court violated MCR 3.965(C)(1), respondent has failed to articulate how she suffered any prejudice as a result. Because there is nothing in the record or in respondent's brief to suggest that the outcome of the proceeding would have differed, any violation of MCR 3.965(C)(1) was harmless and cannot be a basis for reversal.

3. MCL 712A.13a(9) and MCR 3.965(C)(2) list factors for a court to consider before placing a child into foster care. When a statute or court rule requires factual findings as to an enumer-

ated list of factors, the trial court must make a record of its findings as to each and every factor sufficient for an appellate court to conduct a meaningful review. In this case, the court only considered and made findings as to two of the five factors listed in MCL 712A.13a(9) and MCR 3.965(C)(2). The court made minimal but adequate findings that custody of LZW with respondent presented a substantial risk of harm to LZW and that continuing LZW's residency with respondent was contrary to LZW's welfare; however, the court did not appear to consider whether removal of LZW was the only available option to keep LZW safe, nor did it appear to consider whether any efforts had been made to keep LZW in respondent's care. Furthermore, the trial court did not appear to consider whether LZW's removal might be more emotionally traumatic to her than keeping her in respondent's care. Accordingly, the trial court clearly erred by failing to make the factual findings required by law before removing LZW from respondent's care.

Trial court order removing LZW from respondent's care reversed; case remanded.

The University of Michigan Law School Child Welfare Appellate Clinic (by *Vivek S. Sankaran*) and *I'Lanta M. Robbins* for respondent.

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

RONAYNE KRAUSE, J. In this interlocutory appeal, respondent-mother appeals by right, pursuant to MCR 3.993(A)(1), the trial court's order continuing the placement of the minor child, LZW, with the Department of Health and Human Services (DHHS). The trial court removed LZW from respondent's care largely on the basis of the court's prior removal of respondent's other child, who is not at issue in this appeal. We reject respondent's contention that she did not receive adequate notice of the possibility of removal, and respondent fails to articulate how she was prejudiced by the trial court's failure to afford her a greater opportunity to present evidence. However, the trial court erred by

failing to make the factual findings required by law before removing LZW from respondent's care. We therefore reverse the trial court's orders removing LZW from respondent's care and continuing LZW's placement with DHHS, and we remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1).

I. FACTUAL BACKGROUND

On July 21, 2019, police received a report of domestic violence at the home of LZW's paternal grandmother. The child's father was apparently intoxicated and angry that the occupants did not let him inside the house quickly enough when he knocked on the door. LZW's father began yelling and picked up, choked, and shook LZW, who was four years old at the time. Although LZW did not have any marks or bruising, EMS transported her to the hospital out of caution. There is no dispute that respondent was not present for the assault.

Respondent arrived at the hospital after being notified of the incident. Importantly, respondent took LZW back to her residence before LZW was formally discharged by medical staff. However, respondent's counsel explained to the trial court that according to respondent, a nurse had seen LZW before they left. Furthermore, respondent had prior negative experiences with that particular hospital involving respondent's other child. Although the nature of those negative experiences is unclear from the record,[1]

[1] Respondent's counsel explained that, specifically, respondent "had some significant disagreements with that hospital about when parents were there and when parents weren't there and whether things were reported or not."

respondent's counsel found it unsurprising that respondent preferred to take LZW to her primary-care physician instead of leaving her at that particular hospital.

The next day, respondent signed a Child Protective Services safety plan in which she agreed to take LZW back to the hospital that day. However, on the date of the hearing on August 2, 2019, respondent had not yet taken LZW to the hospital or a doctor, but she had scheduled an appointment for August 5, 2019. The hearing referee found respondent's conduct concerning but opted to adjourn the hearing until August 5 and leave LZW in respondent's care in the meantime. At the August 5 hearing, the caseworker confirmed that respondent had taken LZW to her primary-care physician earlier that day as scheduled. Petitioner and the guardian ad litem (GAL) did not object to LZW being left with respondent at that point. The referee agreed that respondent fulfilled the requirement imposed on her to keep LZW in her care and ordered that LZW remain with respondent.

At the pretrial hearing on August 20, 2019, the circuit court judge took a no-contest plea from LZW's father, set a trial date for respondent, and then stated that placement of LZW with respondent would continue. Although not reflected in the transcript of the proceedings, the videorecording of that hearing shows that the trial court then called the next case on its docket for that morning, seemingly concluding the matter for the moment. After a 23-second gap not shown in the video, the foster-care worker addressed the trial court—respondent's case apparently having been recalled in the meantime. The worker explained that respondent's other, younger child was already in foster care for medical neglect and that respondent

was in "minimal compliance" in the other child's case. The worker believed that respondent's failure to promptly bring LZW to a doctor showed that LZW should also be placed in foster care. Petitioner concurred with the worker, opining that it would make sense for the children to be together. The GAL also concurred with the worker, admitting that she had not seen LZW in respondent's home but was "very familiar with" the other child's file and the allegations regarding LZW.

Respondent's counsel pointed out that respondent was not present during LZW's assault, does not live with LZW's father, and believed that LZW had been seen by a nurse prior to respondent taking LZW home from the hospital. Respondent pointed out that the other child was much younger and "had some significant medical issues at the hospital," whereas LZW was older and was safe with respondent. She asserted that concerns regarding the other child were not a legal basis for removing LZW and, given the differences between the children's situations, not relevant to LZW. Counsel emphasized that respondent had complied with the requirement to take LZW to a doctor, who determined that "there were no marks, there were no bruises, the child was fine."

The trial court inquired into whether both children could be placed in the same home, and the DHHS caseworker responded in the affirmative. The trial court then ruled:

> It's not the fact that there's another child in foster care; it's the fact that very poor judgment was used with this child by removing the child from the hospital prior to the formal process of discharge. And I—I will agree that placement in foster care is appropriate at this point.

The court entered an order placing LZW in foster care and directing reasonable efforts for reunification to continue. This appeal followed.[2]

II. STANDARDS OF REVIEW

"Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). The interpretation and application of statutes and court rules are also reviewed de novo. *Id*. at 404. This Court reviews a trial court's factual determinations for clear error. *In re LaFrance Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014). Clear error requires that the reviewing court be "left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). Even if an error occurred, this Court will not disturb the trial court's order unless it would be "inconsistent with substantial justice" to permit the order to stand. MCR 2.613(A); *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002). To the extent the record is unclear whether respondent properly preserved any particular argument, in light of the interests involved and the lack of any responsive briefing by petitioner or the GAL, we choose to treat respondent's arguments as preserved. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

[2] Respondent moved for reconsideration, and the trial court apparently denied the motion. Although the lower-court register of actions contains entries that might plausibly reflect that denial, and although we have no reason to doubt that the trial court denied respondent's motion, the record lacks any direct mention of the outcome of that motion or any order from the trial court resolving that motion.

III. NOTICE

Respondent first argues that the trial court violated her due-process rights by failing to provide her with adequate notice of a potential removal, thereby depriving her of a meaningful opportunity to be heard. We disagree.

"It is well established that parents have a significant interest in the companionship, care, custody, and management of their children." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). This interest is an element of liberty and protected by due process. *Id*. "[T]his interest persists [even if] they are not model parents and even if they have lost temporary custody of their child to the State." *In re Rood*, 483 Mich 73, 121; 763 NW2d 587 (2009) (quotation marks, citation, and emphasis omitted). The rights to notice and a hearing are due-process rights extended to the parent "when a legal adjustment of this constitutionally protected relationship is made . . . ." *In re Kozak*, 92 Mich App 579, 582; 285 NW2d 378 (1979).

Respondent essentially argues that no party requested removal until after the pretrial hearing was concluded and that no formal motion for removal was filed; therefore, she maintains that she did not have a meaningful opportunity to be heard and to present a defense. We do not find the lack of those formalities dispositive. Respondent's counsel had already attended two hearings in which the issue of LZW's placement was in dispute. Respondent was aware that investigations were continuing into her fitness as a parent as to both children, as well as the fact that the other child was already in foster care. Although the referee continued LZW's placement at both prior hearings, the transcripts clearly show that LZW's placement was conditional and interim. Accordingly, respon-

dent was on notice that LZW's placement was subject to ongoing review and reconsideration at any time, including at the pretrial hearing. Indeed, respondent had already argued against removal at the prior hearings, so respondent was not unprepared. Respondent was not deprived of due process because she was not specifically told, in so many words, that a request would be made at the hearing to change LZW's placement.[3]

IV. RIGHT TO PRESENT EVIDENCE

Respondent next argues that the trial court failed to receive any evidence, swear in any witnesses, or allow for cross-examination of any witnesses as required under MCR 3.965(C)(1). We find that any error was harmless and not a basis for reversal.

MCR 3.965(C)(1) governs pretrial placement and explicitly requires, in relevant part, that

> the court shall receive evidence, unless waived, to establish that the criteria for placement set forth in subrule 3.965(C)(2) are present. The respondent shall be given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence.

At pretrial, no witnesses were sworn, no evidence was offered, and no cross-examination was conducted. As respondent points out, the foster-care worker provided substantive facts to the trial court despite not being sworn as a witness. The foster-care worker was not cross-examined, and the trial court did not take any

[3] Respondent relies on two cases from the United States Supreme Court that are distinguishable because in those cases, the responding parties genuinely had not been provided with prior notice. Cf. *Lankford v Idaho*, 500 US 110; 111 S Ct 1723; 114 L Ed 2d 173 (1991); *Sniadach v Family Fin Corp*, 395 US 337; 89 S Ct 1820; 23 L Ed 2d 349 (1969).

evidence from respondent. Arguably, respondent was denied a meaningful opportunity to respond and offer proofs as required under MCR 3.965(C)(1).

However, if MCR 3.965(C)(1) was violated, the error was harmless. An error does not require reversal if it was not decisive to the outcome of the case. See *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 529; 730 NW2d 481 (2007). Notably, respondent's counsel *also* provided substantive facts to the trial court (and of course was not sworn as a witness), in particular the fact that when respondent took LZW to the doctor, the doctor concluded that LZW was "fine." Thus, respondent was provided with essentially the same opportunity as the foster-care worker to present information to the court. Even more significantly, none of the facts presented by the foster-care worker was disputed, surprising, or in doubt. Respondent argues that she could have submitted records from the doctor, but she does not explain how any such records would have added to the fact that the child was "fine." Indeed, the trial court apparently accepted at face value that LZW was unharmed, focusing instead on respondent's judgment. Respondent makes no offer of proof as to what specific further evidence could have been admitted or how it could have helped her position.

The only apparent factual dispute was whether any medical professional (i.e., a nurse) saw LZW before respondent took her home from the hospital. The facts that respondent (1) complied with the requirement of taking LZW to a doctor but (2) did not do so in a timely manner were undisputed and already known to the trial court. Similarly, the trial court was aware of the allegations regarding respondent's other child because that child's removal was included in the petition. Respondent provided no offer of proof or other expla-

nation of what evidence she might have sought to introduce, what questions she might have put to the caseworker, or what difference either might have made. Therefore, even if the trial court violated MCR 3.965(C)(1), respondent has failed to articulate how she suffered any prejudice as a result. Because there is nothing in the record or in respondent's brief to suggest that the outcome of the proceeding would have differed, any violation of MCR 3.965(C)(1) was harmless and cannot be a basis for reversal. See MCR 2.613(A); *In re TC*, 251 Mich App at 371.

V. GROUNDS FOR PRETRIAL REMOVAL

Finally, respondent argues that the trial court failed to establish all the grounds for pretrial removal of LZW under MCL 712A.13a(9) and MCR 3.965(C)(2). We agree.

The trial court ordered placement of LZW into foster care pursuant to MCL 712A.13a(9) and MCR 3.965(C)(2), which both provide as follows:

> The court may order placement of the child into foster care if the court finds all of the following:
>
> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.
>
> (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

> (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.

The "preponderance of the evidence" standard applies to "cases where the court is merely assuming jurisdiction over the child and not terminating the parent's rights in that child." *In re Martin*, 167 Mich App 715, 725; 423 NW2d 327 (1988). A trial court is generally not obligated to articulate extensive findings regarding every conceivable detail. See *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007), citing MCR 2.517(A)(2). However, when a statute or court rule requires factual findings as to an enumerated list of factors, the trial court must make a record of its findings as to each and every factor sufficient for this Court to conduct a meaningful review. *Id*.

The record shows that the trial court found continued custody of LZW with respondent to present a substantial risk of harm to the child pursuant to MCR 3.965(C)(2)(a) and MCL 712A.13a(9)(a) and possibly also pursuant to MCR 3.965(C)(2)(c) and MCL 712A.13a(9)(c). We have some doubts about that finding. Notably, respondent's two children are very differently situated in age and health conditions. The record does not reflect that DHHS had any concerns about medical neglect or any other issues regarding LZW prior to the single instance of premature removal from the hospital. The facts that respondent prematurely removed LZW from the hospital and did not take LZW to a doctor until August 5 were not new facts to the trial court as of the pretrial hearing. Nevertheless, the trial court's finding that respondent displayed poor judgment is certainly supported by the evidence. For purposes of resolving this appeal, we accept that the trial court made minimal but adequate findings that custody of LZW with respondent presented a substantial risk of

harm to LZW and that continuing LZW's residency with respondent was contrary to LZW's welfare. MCR 3.965(C)(2)(a) and (c); MCL 712A.13a(9)(a) and (c).

The trial court erred because it failed to make any findings regarding Factors (b) and (d), and its findings, if any, as to Factor (e) are ambiguous and incomplete. The trial court did not appear to consider whether removal of LZW was the only available option to keep LZW safe, nor did it appear to consider whether any efforts had been made to keep LZW in respondent's care. Furthermore, the trial court did not appear to consider whether LZW's removal might be more emotionally traumatic to her than keeping her in respondent's care. Although *not* removing a child from an unfit parent can also be hazardous to the child's health, it is well recognized as public policy that separation of children from parents should be avoided if reasonably feasible. See, e.g., *In re Marin*, 198 Mich App 560, 564-565; 499 NW2d 400 (1993); *In re Miller*, 433 Mich 331, 346; 445 NW2d 161 (1989). Furthermore, "the decision to remove a child can substantially affect the balance of the child protective proceedings even when the initial concerns are eventually determined to have been overstated." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 470; 861 NW2d 303 (2014).

The Legislature clearly recognized the gravity of any temporary placement in foster care by requiring courts to consider numerous factors prior to pretrial placement. MCR 3.965(C)(2) and MCL 712A.13a(9) explicitly require that the trial court find *all* the factors prior to removing a child from a parent's care. The trial court did not do so. Furthermore, the trial court did not make any apparent efforts to prevent the need for removal of LZW even though respondent fulfilled the condition the court required for respondent to main-

tain custody. Therefore, the trial court clearly erred, and the order was " 'inconsistent with substantial justice,' " *In re TC*, 251 Mich App at 371 (citation omitted), because the trial court ignored the mandates in MCR 3.965(C)(2) and MCL 712A.13a(9).

VI. CONCLUSION

Respondent was not deprived of adequate notice prior to LZW's removal, and any violation of respondent's right to engage in cross-examination or to proffer evidence was harmless. However, because the trial court failed to make the factual findings required by law prior to removal, the trial court erred and its order of removal of LZW from respondent's care is reversed. If, after remand, any party again seeks removal of LZW, the trial court must make findings on the record as to *all* the factors enumerated in MCR 3.965(C)(2) and MCL 712A.13a(9). In so doing, the trial court may and should consider up-to-date information. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

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

MURRAY, C.J., and TUKEL, J., concurred with RONAYNE KRAUSE, J.

WEST v DEPARTMENT OF NATURAL RESOURCES

Docket No. 348452. Submitted July 7, 2020, at Detroit. Decided August 6, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 1028 (2022).

Randy and Audrey West brought an action in the Court of Claims against the Department of Natural Resources (the DNR) and two of its conservation officers, alleging, in relevant part, that under MCL 691.1405, the motor-vehicle exception of the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*., the DNR was liable for plaintiffs' alleged injuries. Plaintiffs, a father and daughter, were driving a snowmobile on Pinney Bridge Road when they allegedly encountered the conservation officers, who were driving snowmobiles on the same road in the wrong direction while acting in the course of their employment with the DNR. Plaintiffs asserted that they were forced to swerve off the road. As a result, plaintiffs' snowmobile crashed, the daughter was thrown into a nearby river, and the father was pinned underneath the snowmobile. Plaintiffs brought this action, and defendants moved for summary disposition under MCR 2.116(C)(7), arguing that because snowmobiles are not motor vehicles, defendants were entitled to summary disposition by means of the DNR's immunity. The Court of Claims, STEPHEN L. BORRELLO, J., considered the motion without oral argument and issued a written opinion and order denying the DNR's motion for summary disposition. The court reasoned that snowmobiles were similar to cars, tractors, and mowers and thus constituted "motor vehicles" for purposes of MCL 691.1405. The court further noted that the snowmobiles in question were being driven on a public roadway by the DNR's employees as part of their duties as DNR officers. Accordingly, the court held that defendants were not entitled to summary disposition. Defendants appealed.

The Court of Appeals *held*:

Under MCL 691.1407(1) of the GTLA, governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1405 is a statutory exception to governmental immunity and provides, in relevant part, that governmental agencies remain liable for

bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency of a motor vehicle of which the governmental agency is owner. MCL 691.1405 does not define "motor vehicle." However, in *Stanton v Battle Creek*, 466 Mich 611 (2002), the Supreme Court defined "motor vehicle" for purposes of the motor-vehicle exception as an automobile, truck, bus, or similar motor-driven conveyance. In addition, a court must consider whether the conveyance at issue was designed for operation on or alongside the roadway. In this case, there was no dispute that snowmobiles are motor-driven. The issue was whether snowmobiles were more like tractors and excavators, which the Supreme Court has held to be motor vehicles that trigger the motor-vehicle exception, or more like golf carts and forklifts, which would not trigger the exception. Snowmobiles are physically capable of operating on roads and are capable of traveling extended distances like tractors and cars, in contrast to more limited machinery like golf carts and forklifts. Furthermore, snowmobiles are intended to operate alongside the roadway and sometimes on the roadway itself. The fact that the DNR listed Pinney Bridge Road as a designated snowmobile trail was not dispositive; even presuming that Pinney Bridge Road was not traversable by vehicles other than snowmobiles, the record did not establish that a designated snowmobile trail is necessarily not a roadway. Although the Michigan Vehicle Code, MCL 257.1 *et seq*., is not binding, a snowmobile would constitute a vehicle and a snowmobile trail would constitute a roadway under its definitions. The physical characteristics, the design, and the expected use of snowmobiles revealed them to be "similar motor-driven conveyances" that triggered the motor-vehicle exception. Because the snowmobiles owned by the DNR and operated by its conservation officers in the course of their governmental duties were motor-driven conveyances that could be expected to be operated, under certain circumstances, on or alongside a roadway, the Court of Claims correctly held that snowmobiles qualified as motor vehicles under MCL 691.1405.

Affirmed.

RIORDAN, P.J., dissenting, would have reversed and remanded because the trial court only considered the actual use of the snowmobiles at issue when determining whether snowmobiles were "motor vehicles" for purposes of MCL 691.1405 and failed to consider the additional relevant factors of the snowmobiles' physical attributes and intended use or purpose. There are numerous characteristics that make the snowmobiles in this instance dissimilar from a car, truck, or bus, including the fact that snowmobiles have skis and a treaded track for propulsion

instead of wheels. Further, snowmobiles lack the airbags, restraints, and complex safety mechanisms that are required by law in cars, trucks, and buses to prevent and reduce injuries in the event of a collision. Unlike cars, buses, and trucks, snowmobiles also generally cannot traverse ground that is not covered by snow or ice. Moreover, the majority ignored the record evidence demonstrating that at the time of the crash, the collision occurred on a groomed snowmobile trail that was not open to cars, trucks, or buses, or even capable of being traversed by those vehicles. Accordingly, Judge RIORDAN would have reversed and remanded for the trial court to consider these additional relevant factors that were omitted from its analysis.

GOVERNMENTAL IMMUNITY — GOVERNMENT TORT LIABILITY ACT — MOTOR-VEHICLE EXCEPTION — WORDS AND PHRASES — "MOTOR VEHICLE" — SNOWMOBILES.

Under MCL 691.1407(1) of the governmental tort liability act, MCL 691.1401 *et seq*., governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions; MCL 691.1405 is a statutory exception to governmental immunity and provides, in relevant part, that governmental agencies remain liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency of a motor vehicle of which the governmental agency is owner; a snowmobile is a motor vehicle for purposes of MCL 691.1405.

Marko Law, PLLC (by *Jonathan R. Marko*) for plaintiffs.

Ann M. Sherman, Deputy Solicitor General, and *Andrew J. Jurgensen*, Assistant Attorney General, for defendants.

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. In this personal-injury action, defendants, the Department of Natural Resources (the DNR) and two of its conservation officers, appeal as of right the order of the Court of Claims denying the DNR's motion for summary disposition premised on

governmental immunity. The only issue in this appeal is whether the DNR-owned snowmobiles involved in the accident underlying this case met the definition of "motor vehicle" for purposes of the exception to governmental immunity set forth in MCL 691.1405 of the governmental tort liability act, MCL 691.1401 *et seq*. The trial court ruled that they did and thus denied the motion. For the reasons discussed in this opinion, we affirm.

I. FACTS

Plaintiffs, a father and daughter, were driving a snowmobile on Pinney Bridge Road in Chestonia Township when they allegedly encountered the defendant conservation officers, acting in the course of their employment with the DNR, driving DNR-owned snowmobiles on the same road in the wrong direction. Although defendants primarily attempt to characterize Pinney Bridge Road as a mere snowmobile trail, as opposed to a roadway proper, they also describe it as "an unpaved, country road." Plaintiffs assert that they were forced to swerve off the road. As a result, plaintiffs' snowmobile crashed, the daughter was thrown into a nearby river, and the father was pinned underneath the snowmobile.

Plaintiffs commenced this action in the Court of Claims, arguing, in relevant part, that under MCL 691.1405, the DNR was liable for plaintiffs' alleged injuries on the ground that the injuries were caused by motor vehicles owned by the DNR and operated by its employees in the course of their employment. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing, in relevant part, that snowmobiles are not motor vehicles, so MCL 691.1405 did not defeat the DNR's immunity.

The Court of Claims considered the motion without oral argument, and it issued a written opinion and order denying the DNR's motion for summary disposition. The court analyzed several cases that held that vehicles other than cars or trucks, such as tractors and mowers, constituted "motor vehicles" for purposes of MCL 691.1405. Reasoning that snowmobiles were similar to such conveyances, and noting that the ones in question were being driven on a public roadway by the DNR's employees "to assist them in their duties," the Court of Claims ruled that the snowmobiles in this case were motor vehicles triggering the exception to governmental immunity under MCL 691.1405. This appeal followed.

II. ANALYSIS

A trial court's decisions on motions for summary disposition and on questions of statutory interpretation are reviewed de novo. See *McCahan v Brennan*, 492 Mich 730, 735-736; 822 NW2d 747 (2012). So long as issues are brought to the trial court's attention, they are preserved for our review irrespective of whether the trial court rules on—or even recognizes—them. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We may address questions of law when "the facts necessary for [their] resolution have been presented." See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). We note that defendants chose to file a motion for summary disposition in lieu of an answer and before discovery occurred, and thus any insufficiency in the record would make summary disposition at least premature. See *Hoffman v Warden*, 184 Mich App 328, 337; 457 NW2d 367 (1990).

Under MCL 691.1407(1) of the governmental tort liability act, governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. "It is well established that governmental immunity is not an affirmative defense, but is instead a characteristic of government." *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015), citing *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). It is a plaintiff's burden to plead and prove facts establishing an exception to governmental immunity. *Fairley*, 497 Mich at 298, 300; *Mack*, 467 Mich at 198. "The Legislature has provided six exceptions to this broad grant of immunity, which courts must narrowly construe." *Yono v Dep't of Transp*, 499 Mich 636, 646; 885 NW2d 445 (2016) (quotation marks and citation omitted).

One such statutory exception is the so-called motor-vehicle exception, which provides that governmental agencies remain "liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405.

MCL 691.1405 does not define "motor vehicle." The Michigan Vehicle Code, MCL 257.1 *et seq*., provides a definition of both "owner," MCL 257.37, and "motor vehicle," MCL 257.33. However, our Supreme Court has explained that MCL 691.1405 only refers to the Vehicle Code's definition of "owner," and it does *not* rely on the Vehicle Code's definition of "motor vehicle." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). Reasoning that the rule requiring narrow construction of statutory exceptions to immunity called for "a narrow definition to the undefined term 'motor vehicle,' " the Court held that "motor vehicle" for pur-

poses of the motor-vehicle exception is " 'an automobile, truck, bus, or similar motor-driven conveyance.' " *Id*. at 618, quoting *Random House Webster's College Dictionary* (2001). The Court concluded that forklifts do not meet the definition of "motor vehicle" because a forklift is a piece of industrial equipment not similar to a car, truck, or bus. *Id*. As our dissenting colleague aptly notes, it has proved difficult to apply the concept of a "similar motor-driven conveyance," but courts may not rely on the easily applied definition in MCL 257.33, so courts have generally considered a proposed motor vehicle's physical characteristics, design and intended use, and actual use.

The Court expanded that analysis in its order in *Overall v Howard*, 480 Mich 896 (2007), in which it reversed this Court's unpublished decision holding that a golf cart met the definition of "motor vehicle" and expressly adopted the contrary reasoning of the partial dissent. Supreme Court orders are binding precedent "to the extent they can theoretically be understood, even if doing so requires one to seek out other opinions . . . ." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018). Accordingly, the reasoning in the unpublished partial dissent from this Court is now binding precedent, expanding on *Stanton*'s "similar motor-driven conveyance" analysis to include consideration of whether the conveyances at issue were designed for operation on or along the roadway:

> [T]he vehicles at issue in [other cases applying MCL 691.1405] were motor-vehicle-like conveyances that were designed for operation on or alongside the roadway, and each of these conveyances generally resembled an automobile or truck. In contrast, the forklift at issue in *Stanton* was not similar to an automobile, bus, or truck, and was not designed for operation on or alongside the

> roadway. [*Overall v Howard*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 2007 (Docket No. 274588) (JANSEN, J., concurring in part and dissenting in part), p 1.]

The dissent, and thus our Supreme Court, held that a golf cart, like a forklift, is not intended to be operated on or alongside a roadway. *Id*. at 2.

This Court has held that such conveyances as a Gradall hydraulic excavator, *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274, 278; 705 NW2d 136 (2005), aff'd 480 Mich 75 (2008), a "broom tractor" and a "tractor mower" performing roadside maintenance, *Regan v Washtenaw Co Bd of Co Rd Comm'rs (On Remand)*, 257 Mich App 39, 47-48; 667 NW2d 57 (2003), and a tractor pulling a wagon with passengers for hayrides, *Yoches v Dearborn*, 320 Mich App 461, 474; 904 NW2d 887 (2017), are "motor vehicles" for purposes of MCL 691.1405. In the latter case, this Court rejected the municipal defendant's argument that tractors and hay wagons were most typically found on farms and not roadways, emphasizing that "binding caselaw is quite clear that the 'primary function' of a vehicle does not control the analysis . . . ." *Yoches*, 320 Mich App at 474. We note that it is a matter of common, everyday experience in farming and rural communities that tractors *are* commonly, if perhaps seasonally and not necessarily daily, found on roadways.

There is no dispute that snowmobiles are motor-driven. There is also no contention that snowmobiles are automobiles, trucks, or buses. The question is whether snowmobiles are "similar motor-driven conveyances." Applying the principles outlined earlier, we must consider whether a snowmobile is more like a tractor or an excavator, which would make it a motor

vehicle triggering the immunity exception, or more like a golf cart or forklift, which would not. There is no doubt that snowmobiles are physically capable of operating on roads; moreover, they are capable of traveling extended distances like tractors, the excavator at issue in *Wesche*, and conventional automobiles—and in contrast to much more limited machinery like golf carts and forklifts. Thus, snowmobiles are physically more analogous to automobiles than not.[1]

Defendants argue that snowmobiles neither typically, nor usually legally, travel on public roadways as part of normal operations. However, as noted, a conveyance's primary intended purpose does not determine whether it is a motor vehicle for purposes of the motor-vehicle exception to governmental immunity. Similarly, defendants argue that snowmobiles are not meant to operate on public roadways. We are doubtful that this is accurate.[2] In any event, whether snowmobiles are intended

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[1] We agree with our dissenting colleague's observation that snowmobiles generally lack many of the safety features now legally mandated in automobiles, but given the facts (1) that tractors also generally lack many of those safety features and (2) that most modern "complex safety systems" like airbags and seatbelts were not mandatory or not even available when MCL 691.1405 was enacted in 1964, we find complex safety features an irrelevant distinction. In contrast, our dissenting colleague also observes that snowmobiles typically use skis and treads instead of tires. We agree that this is a noteworthy distinction, but we think it less important than the transportational similarities between snowmobiles and automobiles.

[2] We also note that there is considerable state-by-state variation as to whether or when snowmobiles may be driven on roads. See American Council of Snowmobile Associations, *Snowmobiling State Laws and Rules* <http://www.snowmobilers.org/snowmobiling-laws-and-rules.aspx> (accessed August 6, 2020) [https://perma.cc/J9XR-ASBN]. This implies that, as with tractors, snowmobiles might be more or less commonly found on roadways depending on region and season. Defendants rely on *McDaniel v Allstate Ins Co*, 145 Mich App 603, 608; 378 NW2d 488 (1985), which observed that under a now-repealed part of the Motor Vehicle Code,

to operate *on* roadways ignores a critical part of the requisite analysis. As discussed in the now precedential partial dissent from this Court's opinion in *Overall*, the question is whether the conveyance is intended to operate on *or alongside* the roadway.

Defendants cite MCL 324.82119(1), which prohibits the use of snowmobiles on public highways, but which also sets forth exceptions. Some of those exceptions only permit snowmobiles to cross roads. However, under MCL 324.82119(1)(a) and (b), snowmobiles are explicitly permitted to travel within highway rights-of-way unless explicitly and specifically prohibited by the DNR or the Michigan Department of Transportation. Thus, snowmobiles are clearly expected to operate *alongside* roadways. Under Subsection (1)(c), snowmobiles may operate on the roadway itself in order to cross bridges or culverts; and under Subsection (1)(h), they may be operated on roadways for special events. Finally, Subsection (1)(f) specifically permits snowmobiles to be operated on the shoulders of roads under some circumstances, with the obvious expectation that such use will actually occur. Clearly, therefore, snowmobiles are capable of more than incidental operation on roadways. Conversely, the golf cart operating near a concession stand at a football game in *Overall* might be physically capable of driving on a road, but golf carts are either specifically designed *not* to be used on roads or are designed as merely a convenient alternative to walking.[3]

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snowmobiles were, by definition, "not designed for primary use on public highways." (Citing former MCL 257.1501(e).) This holding in *McDaniel* is clearly no longer applicable, and in any event, given the practical realities, we seriously doubt snowmobile manufacturers do not design snowmobiles for use on public highways. As discussed, a conveyance's primary use is not controlling.

[3] See Wikipedia, *Golf Cart* <https://en.wikipedia.org/wiki/Golf_cart> (accessed August 6, 2020) [https://perma.cc/H9RU-KXTK].

Defendants finally argue that Pinney Bridge Road is not, in fact, a road, because it is listed as a "Designated Snowmobile Trail" by the Department of Natural Resources. We do not think that this designation is dispositive. We are unaware of any evidence, nor have defendants cited any evidence, that Pinney Bridge Road is *never* accessible to automobiles. The low-quality scanned images attached to defendants' motion are of no value to this question. Insofar as we can determine, defendants rely solely on Pinney Bridge Road having been designated as a snowmobile trail. Notably, MCL 324.82119(1)(f) provides that "a highway in a county road system" may, under some circumstances, be "designated and marked for snowmobile use . . . ." This includes roads that are actually snowplowed and, therefore, implicitly accessible to conventional automobile traffic. Even presuming that Pinney Bridge Road was, in fact, either de facto or de jure not traversable by any vehicles other than snowmobiles, the record does not establish that a "designated snowmobile trail" is necessarily not a roadway.

Furthermore, we note that under the Vehicle Code, a " '[r]oadway' means that portion of a highway improved, designed, or ordinarily used for vehicular travel." MCL 257.55. A "vehicle" includes "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway . . . ." MCL 257.79. Although the Vehicle Code may not be binding, we do not think it irrelevant that a snowmobile would certainly constitute a "vehicle" and thus a snowmobile trail would constitute a "roadway" under the Vehicle Code's definitions.[4] Furthermore, automo-

[4] Further suggesting that the Vehicle Code is not irrelevant, our Supreme Court has explained that "because snowmobiles, albeit under limited circumstances, may be operated on highways," it is proper to

biles are not uncommonly used off-road, and many of them are capable of some degree of off-road usage with no aftermarket modifications. In any event, MCL 691.1405 requires a motor vehicle to be operated, but not necessarily on a roadway. Thus, how a proposed motor vehicle is being used at the time of the injury is one of several relevant considerations when determining whether it is a "motor vehicle." Even if Pinney Bridge Road is not a "roadway," that fact would be relevant but not dispositive.[5] We think it far more relevant that, at the time of the injury, the snowmobiles were being used for a combination of transportational and recreational purposes more akin to automobiles—albeit, perhaps, off-road automobiles—than limited equipment like a golf cart or forklift. Irrespective of whether Pinney Bridge Road was a public roadway, we would find that the physical, design, and expected-use characteristics of snowmobiles reveal them to be "similar motor-driven conveyances."

Because the snowmobiles owned by the DNR and operated by its conservation officers in the course of their governmental duties were motor-driven conveyances that could be expected to be operated, under certain circumstances, on or alongside a roadway, we agree with plaintiffs and the Court of Claims that the snowmobiles qualified as motor vehicles for purposes of the motor-vehicle exception to governmental immunity

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charge a person under the provision of the Vehicle Code that penalizes a person for operating a snowmobile on a highway while intoxicated. *People v Rogers*, 438 Mich 602, 607-608; 475 NW2d 717 (1991). Our Supreme Court thus explicitly recognized that snowmobiles do operate on roadways, which indirectly supports the conclusion that they are motor vehicles.

[5] We agree with our dissenting colleague that the trial court erred by considering only the actual use of the snowmobiles at the time of the injury.

under MCL 691.1405. We respectfully disagree with our dissenting colleague that our analysis ignores any of the requisite factors or considerations, and we find nothing in the record to suggest that further fact-finding in the trial court would alter our conclusion.

Affirmed.

SHAPIRO, J., concurred with RONAYNE KRAUSE, J.

RIORDAN, P.J. (*dissenting*). I respectfully dissent. The trial court erred when it considered only the actual use of the snowmobiles at issue when determining whether MCL 691.1405, the motor-vehicle exception to the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*., bars plaintiffs' lawsuit. I would reverse and remand for the trial court to consider the additional relevant factors that were omitted from its analysis.

The GTLA does not define "motor vehicle," but our Supreme Court has interpreted the common, ordinary meaning to be "an automobile, truck, bus, or similar motor-driven conveyance." *Stanton v Battle Creek*, 466 Mich 611, 617-618; 647 NW2d 508 (2002) (holding that a forklift is not a motor vehicle because it is a piece of industrial construction equipment) (quotation marks and citation omitted). Subsequently, this Court has struggled to make heads or tails of what the term "similar motor-driven conveyance" includes[1] and has

[1] The Supreme Court has not elaborated on the definition but has found in one case that the exception did not apply when a plaintiff was injured by a bus parked in a maintenance facility because the vehicle was not being "operated" when the injury occurred. *Chandler v Muskegon Co*, 467 Mich 315, 322; 652 NW2d 224 (2002). See also *Overall v Howard*, 480 Mich 896 (2007) (an order reversing for the reasons stated in the dissent) (*Overall II*); *Overall v Howard*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 2007 (Docket No. 274588) (*Overall I*) (JANSEN, J., concurring in part and dissenting in part) (concluding that a

focused generally on some combination of the following three factors: physical attributes,[2] intended use or purpose,[3] and actual use of the conveyance at the time of injury.[4]

In this case, the trial court considered only the actual use of the snowmobiles at the time of injury. Although the "primary function" of a vehicle is not the controlling factor,[5] the intended use or purpose and physical characteristics are relevant factors[6] that the trial court failed to consider in this case.

The majority considers those relevant factors but reaches a questionable conclusion. As defendant argues on appeal, there are numerous characteristics that

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golf cart driven near a concession stand at a high school football game was not a motor vehicle because, in terms of its design and physical attributes, it more closely resembled a forklift than the conveyances in other cases).

[2] *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274, 278; 705 NW2d 136 (2005), aff'd 480 Mich 75 (2008) (holding that a Gradall, a wheeled, hydraulic excavator, generally resembles a truck, moves like a truck, and qualifies as a motor vehicle and additionally noting that the Gradall was being driven like a truck on a public roadway when the injury occurred); *Overall I* (JANSEN, J., concurring in part and dissenting in part), unpub op at 1 (focusing on whether a golf cart was designed for operation on or alongside a roadway).

[3] *Regan v Washtenaw Co Bd of Co Rd Comm'rs (On Remand)*, 257 Mich App 39, 47-51; 667 NW2d 57 (2003) (holding that a broom tractor and a tractor mower were motor vehicles because both are "invariably connected to the roadways").

[4] See *Wesche*, 267 Mich App at 278 (noting that the Gradall was being driven like a truck on a public roadway when the injury occurred); *Yoches v Dearborn*, 320 Mich App 461, 474-475; 904 NW2d 887 (2017) (holding that a tractor pulling a hay wagon used for hayrides was a motor vehicle because it was carrying passengers on a roadway when the injury occurred).

[5] *Wesche*, 267 Mich App at 277-278; *Regan*, 257 Mich App at 47-48.

[6] See *Overall I* (JANSEN, J., concurring in part and dissenting in part), unpub op at 1 (considering a golf cart's physical attributes and intended use).

make the snowmobiles in this instance dissimilar from a car, truck, or bus. For example, from the record we know that snowmobiles have skis and a treaded track for propulsion instead of wheels like cars, trucks, and buses. Further, snowmobiles lack the airbags, restraints, and complex safety mechanisms that are required by law in cars, trucks, and buses to prevent and reduce injuries in the event of a collision.[7] Unlike cars, buses, and trucks, snowmobiles also generally cannot traverse ground that is not covered by snow or ice.

[7] The majority notes that certain complex safety systems were not mandatory or available in 1964 when MCL 691.1405 was enacted. However, our Supreme Court in *Stanton*, 466 Mich at 617-618, interpreted the relevant term "motor vehicle" by consulting *Random House Webster's College Dictionary* (2001), which it preferred over *The American Heritage Dictionary* (2d college ed) (published in 1982). Thus, the Supreme Court in *Stanton* did not interpret the term according to its 1964 definition, nor has any subsequent binding decision expressly or impliedly held that a "similar motor-driven conveyance" must be similar to the cars, trucks, and buses of 1964. Therefore, I disagree with the majority opinion's implication that any comparison should be limited in such a fashion—particularly when it is questionable how closely the cars, trucks, and buses of today, or of the near future, resemble their 1964 ancestors. Moreover, even if the majority opinion is correct on this point, I cannot conclude that the snowmobiles in this case are sufficiently similar to the cars, buses, and trucks of 1964 to meet that standard.

The majority also relies on *People v Rogers*, 438 Mich 602; 475 NW2d 717 (1991), for the proposition that our Supreme Court has implicitly deemed snowmobiles to be motor vehicles. That case required the Court to consider whether the defendant could be prosecuted under two different sections of the Michigan Vehicle Code, MCL 257.1 *et seq*., for operating a snowmobile on a public highway while intoxicated. Notably, the Vehicle Code defines "vehicle" as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices exclusively moved by human power or used exclusively upon stationary rails or tracks and excepting a mobile home . . . .' " *Id*. at 605, quoting MCL 257.79, as amended by 1978 PA 568. That definition is much broader than the definition of "motor vehicle" set forth in *Stanton*. Moreover, there is no indication from the Supreme Court in *Stanton* or *Rogers* that the definition of "vehicle" in the Vehicle Code is properly applied in cases involving the GTLA.

Additionally, the majority takes judicial notice of defendants' map indicating that the area where the collision occurred is a designated snowmobile trail. The majority further takes judicial notice that the county considers the trail to be a "scenic drive" and then concludes that the trail was a public roadway at the time of the accident because there is no evidence that the trail was limited only to use by snowmobiles. However, the majority ignores the record evidence demonstrating that at the time of the accident, the collision occurred on a groomed snowmobile trail that was not open to cars, trucks, or buses or even capable of being traversed by those vehicles. In doing so, the majority expands the record on appeal to create a factual dispute and then weighs the evidence to resolve that dispute. Although we review de novo whether plaintiffs' claim is barred under MCR 2.116(C)(7), summary disposition is only appropriate when there is no factual dispute. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

Therefore, I would remand this matter to the trial court to consider the factors listed in this dissent and, by extension, the relevant facts it omitted from its analysis.

DUCKWORTH v CHEROKEE INSURANCE COMPANY

Docket No. 347865. Submitted July 7, 2020, at Detroit. Decided August 6, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 962 (2021).

James Duckworth brought an action in the Wayne Circuit Court against Cherokee Insurance Company, seeking personal protection insurance (PIP) benefits for injuries he suffered while driving a truck owned by Speed Express, LLC, which had contracted with plaintiff to haul and deliver goods on its behalf. Cherokee, which was Speed Express's no-fault insurer, denied the claim on the grounds that plaintiff was an independent contractor of Speed Express and not its employee for purposes of MCL 500.3114(3), which allows an employee who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by his or her employer to receive PIP benefits from the insurer of the furnished vehicle. Cherokee moved for summary disposition on the grounds that Progressive Marathon Insurance Company, plaintiff's personal no-fault insurer, was first in priority to pay PIP benefits. Plaintiff then brought an action against Progressive. The trial court, Lita M. Popke, J., denied Progressive's request to consolidate the case against it with the case against Cherokee. After a hearing on plaintiff's claim against Cherokee, the court agreed that plaintiff was not an employee of Speed Express under the economic-reality test and therefore ruled that Progressive was first in priority pursuant to MCL 500.3114(1). The trial court also found that Cherokee had prejudiced plaintiff's possible recovery by leading plaintiff to believe it did not need to file a claim against Progressive. As a result, the court ruled that a portion of plaintiff's claim against Progressive was barred by the one-year-back rule found in MCL 500.3145. The trial court ordered plaintiff to pursue Cherokee for PIP benefits from December 9, 2013, the date of the crash, to May 14, 2014, the date on which plaintiff filed its claim against Progressive. Plaintiff was further ordered to separately pursue his claim against Progressive for PIP benefits from May 14, 2014 forward. Progressive and Cherokee appealed. After the cases were consolidated, the Court of Appeals, JANSEN, P.J., and FORT HOOD and RIORDAN, JJ., held that the trial court had denied Progressive due process by adjudicating priority in a case to which

Progressive was not a party, and it remanded the matter to the trial court to consolidate the cases and allow full argument on the priority issue. *Duckworth v Cherokee Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued January 16, 2018 (Docket Nos. 334353 and 335241). The Court of Appeals also addressed Cherokee and Progressive's dispute regarding the interaction of *Adanalic v Harco Nat Ins Co*, 309 Mich App 173 (2015), which held that MCL 500.3114(3) did not require a truck's insurer to cover the plaintiff's PIP claim when the plaintiff was not an employee under the economic-reality test, and *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84 (1996), which held that a "self-employed person" is an employee for purposes of MCL 500.3114(3) and so may claim PIP coverage from the insurer of the truck. The Court of Appeals disagreed with Progressive's position that the cases were irreconcilable, reasoning that the cases established a two-step inquiry for determining whether MCL 500.3114(3) applies: first, under *Adanalic*, a trial court must apply the economic-reality test when evaluating whether an injured party was an employee or an independent contractor for purposes of the no-fault act; if the injured party is deemed to be an independent contractor, the trial court must then determine under *Celina* whether the injured party was self-employed—i.e., acting on behalf of their business—at the time they were injured. If either inquiry is answered affirmatively, then the injured party is an employee for purposes of MCL 500.3114(3) and is entitled to benefits from the insurer of the truck. On remand, the trial court ruled that plaintiff was an independent contractor as to Speed Express under the economic-reality test and was not self-employed because he had not established a business entity such as a corporation or partnership that could in turn employ him. Accordingly, the court ruled that MCL 500.3114(3) did not apply and that Progressive was first in priority as plaintiff's personal insurer. The court entered a final judgment barring plaintiff from recovering PIP benefits in the amount of $43,628.48 for the period of December 9, 2013, through May 14, 2014, pursuant to the one-year-back rule. Progressive appealed.

The Court of Appeals *held*:

1. When determining the priority of insurers liable for no-fault PIP benefits, courts must examine MCL 500.3114. Under MCL 500.3114(1), a person seeking no-fault benefits must generally look first to his or her own insurer, unless one of the exceptions in MCL 500.3114(2), (3), or (5) applies. MCL 500.3114(3) provides, in pertinent part, that an employee who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive PIP

benefits from the insurer of the furnished vehicle. To determine whether the injured party was an employee for purposes of MCL 500.3114(3), courts apply the economic-reality test, which includes four general factors: (1) control of the worker's duties, (2) payment of wages, (3) right to hire, fire and discipline, and (4) the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. No one of these factors is controlling, and other factors may be considered as each individual case requires. *McKissic v Bodine*, 42 Mich App 203, 208-209 (1972), set forth a more comprehensive list of eight factors for determining the nature of the existing relationship between a given employer and employee: (1) what liability, if any, the employer incurs in the event of the termination of the relationship at will, (2) whether the work being performed is an integral part of the employer's business that contributes to the accomplishment of a common objective, (3) whether the position or job is of such a nature that the employee primarily depends upon the emolument to pay their living expenses, (4) whether the employee furnishes their own equipment and materials, (5) whether the individual seeking employment holds themselves out to the public as being ready and able to perform tasks of a given nature, (6) whether the work or the undertaking in question is customarily performed by an individual as an independent contractor, (7) the extent to which the employer has control over the employee, along with payment of wages, maintenance of discipline, and the right to engage or discharge employees, and (8) which of these factors should be given more weight in order to favorably effectuate the objectives of the statute. Given that the Supreme Court has cited *McKissic* with approval and used its eight factors, that there is substantial overlap between the two tests, and that the *McKissic* factors are particularly applicable when the nature of the employment relationship is at issue, the *McKissic* factors should be considered as well as the *Adanalic* factors when determining whether a worker is an employee or independent contractor under the no-fault act.

2. The trial court erred by determining that plaintiff was not an employee under MCL 500.3114(3). Considering the four *Adanalic* factors (which overlap with the first, second, and seventh *McKissic* factors), first, the record established that Speed Express had significant control over plaintiff's duties, including the guidelines he was to follow, the loads he was to haul, and the route he was to take. Second, regarding the payment of wages, plaintiff was paid by mileage and biweekly. While the payment by mileage

might indicate an independent-contractor relationship, the bi-weekly payment, as opposed to payment by the job, was typical of an employee-employer relationship. Although plaintiff received a 1099 form at the end of the year and was responsible for all tax payments, which supported a finding that plaintiff was an independent contractor, this was only one factor, and the fact that Speed Express characterized plaintiff as a "subcontractor" was relevant but not dispositive. Third, Speed Express retained the right to hire, fire, and discipline plaintiff, and plaintiff was required to complete new-hire paperwork and submit to both an initial drug test and continuing random drug tests, which indicated an employee-employer relationship. Fourth, the work plaintiff performed as a truck driver was an integral part of Speed Express's trucking business. Consideration of the *McKissic* factors not encompassed by the four general factors also weighed in favor of the conclusion that plaintiff should be considered an employee. Speed Express was plaintiff's sole source of income, and he did not furnish his own equipment or hold himself out to the public as being available to drive trucks. Accordingly, the third, fourth, and fifth *McKissic* factors indicated an employee-employer relationship. Under the eighth *McKissic* factor, the objectives of MCL 500.3114(3) would be effectuated by ruling that plaintiff was an employee, thus making Cherokee first in priority, because Cherokee accepted the risks associated with Speed Express's trucking business, which furthered the Legislature's decision to make the insurer of business vehicle higher in priority than the worker's personal insurer when the business vehicle is involved in the accident. This case was distinguishable from *Adanalic*, in which the employer had substantially less control over its injured employee than Speed Express had over plaintiff. Because the economic-reality test showed that an employee-employer relationship existed between plaintiff and Speed Express for purposes of the no-fault act, under MCL 500.3114(3), Cherokee was first in priority to pay PIP benefits to plaintiff.

Reversed and remanded for further proceedings.

RIORDAN, P.J., concurring, agreed with the majority's application of the four-factor test from *Adanalic* and with its conclusion that plaintiff was an employee rather than an independent contractor. However, he would have ended the analysis there rather than apply the additional factors set forth in *McKissic* because the *Adanalic* factors were sufficient to resolve the issue in this case. He stated that if the Court of Appeals intends to incorporate the *McKissic* factors into the no-fault legal framework, it should do so clearly in a holding where the application of the *McKissic* factors

was outcome-determinative rather than addressing the issue in dictum.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — PRIORITY OF INSURERS — EMPLOYEES — ECONOMIC-REALITY TEST.

MCL 500.3114(3) provides that an employee who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive personal protection insurance benefits from the insurer of the furnished vehicle; to determine whether the injured party was an employee for purposes of MCL 500.3114(3), courts apply the economic-reality test; the factors to be considered under that test include: (1) control of the worker's duties, (2) payment of wages, (3) right to hire, fire and discipline, and (4) the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal; but that list of factors is nonexclusive and other factors may be considered as the case requires, and when determining whether a worker is an employee or independent contractor under the no-fault act, courts should also consider the eight factors set forth in *McKissic v Bodine*, 42 Mich App 203, 208-209 (1972), which are (1) what liability, if any, the employer incurs in the event of the termination of the relationship at will, (2) whether the work being performed is an integral part of the employer's business that contributes to the accomplishment of a common objective, (3) whether the position or job is of such a nature that the employee primarily depends upon the emolument to pay their living expenses, (4) whether the employee furnishes their own equipment and materials, (5) whether the individual seeking employment holds themselves out to the public as being ready and able to perform tasks of a given nature, (6) whether the work or the undertaking in question is customarily performed by an individual as an independent contractor, (7) the extent to which the employer has control over the employee, along with payment of wages, maintenance of discipline, and the right to engage or discharge employees, and (8) which of these factors should be given more weight in order to favorably effectuate the objectives of the statute.

Richard D. Wilson and *Darren M. Cooper* for Cherokee Insurance Company.

Lincoln G. Herweyer for Progressive Marathon Insurance Company.

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM. Plaintiff James Duckworth was injured on December 9, 2013, when he lost control of the truck he was driving. The truck was owned by Speed Express, LLC, which had contracted with plaintiff to haul and deliver goods on its behalf. Plaintiff sought personal protection insurance (PIP) benefits from Speed Express's no-fault insurer, defendant Cherokee Insurance Company. Cherokee denied the claim on the grounds that plaintiff was an independent contractor of Speed Express and not its employee for purposes of MCL 500.3114(3). The trial court agreed that plaintiff was not an employee of Speed Express under the economic-reality test and therefore ruled that defendant Progressive Marathon Insurance Company, plaintiff's personal no-fault insurer, was first in priority pursuant to MCL 500.3114(1). Progressive appeals the trial court's priority determination. We reverse and remand for further proceedings.[1]

I. FACTS AND PROCEDURAL HISTORY

We previously summarized the underlying facts of this case:

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[1] We review de novo a trial court's grant of summary disposition. *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). Because the trial court considered evidence outside the pleadings in making its ruling, MCR 2.116(C)(10) is the applicable subrule. See *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 776; 910 NW2d 666 (2017). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509.

The parties dispute whether the trial court's ruling under the economic-reality test presents a question of fact or law. There is conflicting authority on this issue. See, e.g., *Nezdropa v Wayne Co*, 152 Mich App 451, 466; 394 NW2d 440 (1986). However, even if the economic-reality test presents a question of fact, courts may resolve factual questions at the summary-disposition stage when reasonable minds could not disagree on

> Plaintiff's claims arise out of a motor vehicle accident that occurred on December 9, 2013. Plaintiff had contracted with Speed Express, LCC (Speed Express) (a nonparty to this action) to drive various loads of cargo for delivery. On December 9, 2013, plaintiff was driving a tractor truck, owned by Speed Express, through the State of Arkansas, when he lost control of the tractor truck. The cargo in the tractor-trailer shifted, causing the tractor truck to overturn and trapping plaintiff inside. Plaintiff sustained serious physical injuries in the accident, for which he was hospitalized. [*Duckworth v Cherokee Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued January 16, 2018 (Docket Nos. 334353 and 335241) (*Duckworth I*), p 3.][2]

As noted, plaintiff sought PIP benefits from Cherokee, the no-fault insurer of the tractor truck involved in the accident. Cherokee denied payment of the claim and plaintiff brought suit. Cherokee moved for summary disposition on the grounds that Progressive, plaintiff's personal no-fault insurer, was first in priority to pay PIP benefits. Cherokee argued that it did not have priority under MCL 500.3114(3) because plaintiff was an independent contractor rather than an employee of Speed Express. On May 15, 2014, plaintiff filed suit against Progressive, and the trial court denied Progressive's request to consolidate the cases. In the case involving Cherokee, the trial court deter-

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the conclusion. See, e.g., *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). See also *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) ("A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence."). For the reasons stated in this opinion, we conclude that reasonable minds could not differ that plaintiff was an employee for purposes of MCL 500.3114(3) when the relevant factors of the economic-reality test are considered and correctly analyzed.

[2] *Duckworth I* also contained a summary of the case's procedural history. *Duckworth I*, unpub op at 3-4. An abbreviated version of that history is presented in this opinion.

mined that MCL 500.3114(3) did not apply because plaintiff was Speed Express's independent contractor.

In *Duckworth I*, we held that the trial court had denied Progressive due process by adjudicating priority in a case to which Progressive was not a party, and we remanded to the trial court to consolidate the cases and allow full argument on the priority issue. *Duckworth I*, unpub op at 4-5, 7. We also addressed Cherokee and Progressive's dispute regarding the interaction of *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173; 870 NW2d 731 (2015), and *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996). In *Adanalic*, this Court affirmed the trial court's ruling that MCL 500.3114(3) did not require the truck's insurer to cover the PIP claim because the plaintiff was not an employee under the economic-reality test. *Adanalic*, 309 Mich App at 190-191. However, in *Celina*, the Supreme Court held that a "self-employed person" is an employee for purposes of MCL 500.3114(3) and so may claim coverage from the insurer of the truck. *Celina*, 452 Mich at 89.

Progressive argued that *Adanalic* could not be reconciled with *Celina* because independent contractors are necessarily self-employed. We disagreed that the cases were irreconcilable, reasoning that the cases established a two-step inquiry for determining whether MCL 500.3114(3) applies. First, "[u]nder *Adanalic*, a trial court must apply the economic reality test when evaluating whether an injured party was an employee or an independent contractor for purposes of the no-fault act." *Duckworth I*, unpub op at 6. Second, "if an injured party is deemed to be an independent contractor under the economic reality test," then the next inquiry under *Celina* is "whether the injured party was self-employed, i.e., acting on behalf of his or her business, at the time they were injured." *Id*. If either inquiry is answered

affirmatively, then the worker is an "employee" for purposes of MCL 500.3114(3) and is entitled to benefits from the insurer of the truck.

On remand, the trial court first ruled that plaintiff was an independent contractor for Speed Express under the economic-reality test. Next, the court concluded that plaintiff was not self-employed because he had not established a business entity such as a corporation or partnership that could in turn employ him. Accordingly, the court held that MCL 500.3114(3) did not apply and Progressive was first in priority as plaintiff's personal insurer. The court entered a final judgment barring plaintiff from recovering PIP benefits in the amount of $43,628.48 for the period of December 9, 2013 through May 14, 2014, pursuant to the one-year-back rule. Progressive appealed.

II. ANALYSIS

Progressive argues that the trial court erred by concluding on remand that (1) plaintiff was not a Speed Express employee under the economic-reality test and (2) even if plaintiff was an independent contractor, he was necessarily self-employed and acting on behalf of his own business. Because we conclude that plaintiff was an employee of Speed Express under the economic-reality test, we need not address the trial court's finding that he was not self-employed.[3]

A. DEFINING THE ECONOMIC-REALITY TEST

"When determining the priority of insurers liable for no-fault PIP benefits, courts must examine MCL

[3] We note, however, that the trial court erred by concluding that in order to be considered self-employed for purposes of the no-fault act, a driver must have created a corporation or some other business entity of

500.3114." *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 254; 819 NW2d 68 (2012). "Under MCL 500.3114(1), a person seeking no-fault benefits must generally look first to his or her own insurer, unless one of the exceptions in MCL 500.3114(2), (3), or (5) applies." *Turner v Farmers Ins Exch*, 327 Mich App 481, 493-494; 934 NW2d 81 (2019). MCL 500.3114(3) provides in pertinent part:

> An employee . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

As an initial matter, the parties dispute what factors may be considered in applying the economic-reality test. In *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 619-620; 335 NW2d 106 (1983), we adopted the economic-reality test to determine when the injured party was an employee for purposes of MCL 500.3114(3). We stated that the factors to be considered under that test "*include*: (a) control of the worker's duties, (b) payment of wages, (c) right to hire, fire and discipline, and (d) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id*. at 623 (emphasis added). We recited the same nonexhaustive factors in *Adanalic*, 309 Mich App at 191. While we have routinely cited these four general factors, we have also recognized that "[n]o single factor is controlling and, indeed, the list of

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which he or she is an employee. In the no-fault context, a driver, as an individual, can be his or her own employee and need not establish an entity regardless of the existence of a separate business. See *Celina*, 452 Mich at 90 (explaining that while individuals cannot have a "contract for hire" with themselves for purposes of workers compensation, "[t]he no-fault statute has no such restrictive definition of 'employee.' ").

factors is nonexclusive and other factors may be considered as each individual case requires." *Rakowski v Sarb*, 269 Mich App 619, 625; 713 NW2d 787 (2006). See also *Chilingirian v City of Fraser*, 194 Mich App 65, 69; 486 NW2d 347 (1992) ("The economic reality test looks to the totality of the circumstances surrounding the work performed.").

In *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972), a worker's compensation case, this Court discerned from caselaw a more comprehensive list of eight factors "for determining the nature of the existing relationship between a given employer and employee":

> First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?
>
> Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
>
> Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expenses?
>
> Fourth, does the employee furnish his own equipment and materials?
>
> Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?
>
> Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?
>
> Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.
>
> Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute.

The Supreme Court has cited *McKissic* with approval, see *Askew v Macomber*, 398 Mich 212, 217 n 7; 247 NW2d 288 (1976), and most recently applied the eight factors, rather than merely four, in *Coblentz v Novi*, 475 Mich 558, 578-580; 719 NW2d 73 (2006), to determine whether the defendant city's attorney was an employee or independent contractor for purposes of the Freedom of Information Act, MCL 15.231 *et seq*.

Progressive argues for consideration of the *McKissic* factors, while Cherokee maintains that we are confined to the four more general factors. This Court has recognized the varying formulations of the economic-reality test and concluded that "[t]he tests are basically the same and each provides a rational framework." *Williams v Cleveland Cliffs Iron Co*, 190 Mich App 624, 627; 476 NW2d 414 (1991). Indeed, there is substantial overlap between the two tests, which share common origins in worker's compensation cases.[4] At the same time, the *McKissic* factors are particularly applicable when the nature of the relationship is at issue, i.e., whether the worker is an employee or an independent contractor. *McKissic*, 42 Mich App at 208. We have always recognized that the four factors discussed in *Parham* and *Adanalic* are not exhaustive, and the *McKissic* factors are consistent with those set forth in *Adanalic* and provide additional clarity. And both the four-factor and the eight-factor tests have been applied by the Supreme Court. Accordingly, we conclude that the *McKissic* factors should be considered as well as those noted in *Adanalic* when determining whether a

[4] In reciting the four general factors, *Parham*, 124 Mich App at 623, cited *Askew*, 398 Mich 212, and *Wells v Firestone Tire & Rubber Co*, 97 Mich App 790; 296 NW2d 174 (1980), both worker's compensation cases. Notably, *Askew* relied, in part, on *McKissic*. See *Askew*, 398 Mich at 219 n 10.

worker is an employee or independent contractor under the no-fault act.[5]

B. APPLYING THE ECONOMIC-REALITY TEST

In applying the economic-reality test to this case, we will first analyze the four *Adanalic* factors, which overlap with the first, second, and seventh *McKissic* factors.

The record establishes that Speed Express had significant control over plaintiff's duties. The written agreement between plaintiff and Speed Express required him to follow "all guidelines" outlined in the "Driver Handbook." In addition, plaintiff testified that Speed Express required him to take a specific route when hauling freight. Plaintiff had some discretion; the agreement states that the "[d]river will be held responsible for fuel consumed for out of route miles" and "[o]ut of route is defined as any difference in mileage over 10% of the paid miles for the load assignment the driver is dispatched on." However, the phrase "out of route" itself establishes that plaintiff was supposed to follow Speed Express's directions. Further, plaintiff did not believe that he could refuse a load and assumed that Speed Express would terminate the relationship if he did, a reasonable belief considering that he had possession of a truck and trailer owned by Speed Express.[6] In fact, the agreement refers to "load

[5] Contrary to Cherokee's argument, consideration of the *McKissic* factors is not barred by the law-of-the-case doctrine. In the prior appeal, the parties were arguing whether the economic-reality test applied, not what it consisted of. And *Duckworth I* merely quoted the *Adanalic* language indicating that the determination of a plaintiff's employment status " 'include[s]' " consideration of the four factors. *Duckworth I*, unpub op at 6, quoting *Adanalic*, 309 Mich App at 191.

[6] Plaintiff testified that after he signed the agreement with Speed Express he took the truck and trailer to his home.

assignment[*s*]," not offers. The control factor weighs heavily in favor of finding that plaintiff was a Speed Express employee.

Next, regarding the payment of wages, plaintiff was paid by mileage and biweekly. The payment by mileage, rather than by the hour, perhaps indicates an independent-contractor relationship, but the biweekly payment, as opposed to payment by the job, is typical of an employee-employer relationship. As for income tax records, plaintiff received a 1099 form at the end of the year and was responsible for all tax payments. While this supports a finding that plaintiff was an independent contractor, see, e.g., *Adanalic*, 309 Mich App at 193, it is only one factor. Further, the 1099 tax form merely stems from Speed Express's characterization of plaintiff as a "subcontractor" in the agreement, which is relevant but not dispositive. See *Kidder v Miller-Davis Co*, 455 Mich 25, 46; 564 NW2d 872 (1997).

The third factor concerns Speed Express's right to hire, fire, and discipline plaintiff. The main point is that if the worker can be "fired" without having any legal recourse, i.e., a breach-of-contract claim, then it is likely the worker is an employee, not an independent contractor who would have such rights. See *McKissic*, 42 Mich App at 208 ("[W]hat liability, if any, does the employer incur in the event of the termination of the relationship at will?"). In this case, the agreement does not specify a term of employment or refer to termination. This indicates an at-will employee relationship that could be terminated for any reason. Also, it appears that Speed Express retained the right to discipline plaintiff because the agreement stated that plaintiff was to comply with all "corrective actions and fines outlined in [the Driver Handbook]." Further, plaintiff was required to complete "new hire paper-

work" and pass a drug test before he could drive for Speed Express. He also was required to submit to random drug tests as requested. These requirements are all indicative of an employee-employer relationship, and therefore the third factor supports a finding that plaintiff was an employee.

Under the fourth factor, the question is not whether the particular worker is integral to the business but instead whether the *type of work* is integral to the business. See, e.g., *Morin v Dep't of Social Servs*, 174 Mich App 718, 723; 436 NW2d 729 (1989). Indeed, the second *McKissic* factor makes clear that the focus is on the work, not the worker: "[I]s *the work being performed* an integral part of the employer's business which contributes to the accomplishment of a common objective?" *McKissic*, 42 Mich App at 208 (emphasis added). Here, Speed Express was operating a trucking business. Plaintiff's work as a truck driver was therefore integral to the business.

Consideration of the *McKissic* factors not encompassed by the four general factors also weighs in favor of the conclusion that plaintiff should be considered an employee. Speed Express was plaintiff's sole source of income; i.e., he relied on the job for "payment of his living expenses[.]" *Id*. at 208. Plaintiff did not "furnish his own equipment and materials" or hold himself out to the public as being available to drive trucks. *Id*. Accordingly, the third, fourth, and fifth *McKissic* factors indicate an employee-employer relationship.[7]

Further, under the eighth *McKissic* factor, the objectives of MCL 500.3114(3) would be effectuated by

[7] As to the sixth *McKissic* factor, there is no record evidence indicating whether this type of work is typically done by independent contractors or employees. Further, the employer's unilateral characterization of the relationship is not controlling.

ruling that plaintiff was an employee, thus making Cherokee first in priority. As this Court reasoned in *State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114; 283 NW2d 661 (1979), "A company issuing insurance covering a motor vehicle to be used in a [MCL 500.3114(2) or (3)] situation will know in advance the scope of the risk it is insuring." Cherokee accepted the risks associated with Speed Express's trucking business, and so holding it liable furthers the Legislature's decision to make the insurer of the business vehicle higher in priority than the worker's personal insurer when the business vehicle is involved in the accident. See also *Celina*, 452 Mich at 89 ("The cases interpreting [MCL 500.3114(3)] have given it a broad reading designed to allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance.").[8]

In arguing that plaintiff should be considered an independent contractor, Cherokee contends that this case is on all fours with *Adanalic*, 309 Mich App 173. In that case, the plaintiff, Adanalic, was injured in Indiana while unloading a pallet from a disabled box truck onto a semi-trailer. Adanalic had been hired by DIS Transportation to pick up, haul, and deliver various loads. *Id*. at 177. Adanalic owned the truck but was

[8] Cherokee's reliance on *Mathis v Interstate Motor Freight Sys*, 408 Mich 164; 289 NW2d 708 (1980), is not persuasive. In that case, the Supreme Court held that employees were not precluded by the Worker's Disability Compensation Act from obtaining PIP benefits under MCL 500.3114(3). *Id*. at 175. Cherokee argues that the purpose of MCL 500.3114(3) is to allow employees to recover no-fault benefits in addition to worker's compensation benefits. However, a statute can serve multiple purposes. In the context of a priority dispute, the relevant purpose to consider pertains to the Legislature's decision to make the employer's insurer liable instead of the employee's personal insurer for accidents involving the business vehicle.

leasing it to DIS; a third party owned and leased the trailer to DIS. *Id*. at 177 n 1. Both the truck and the semi-trailer were insured by Harco National Insurance Company under a policy that included Michigan no-fault coverage. The policy was issued to DIS. Michigan Millers Mutual Insurance Company was Adanalic's personal no-fault insurer. *Id*. at 177. On appeal, the primary issues were whether Adanalic's claims for PIP benefits were barred by the parked-vehicle exception and the workers' compensation exclusion. *Id*. at 179-190. We affirmed the trial court's ruling that the claim was not barred and that Adanalic was entitled to PIP benefits. While Adanalic took no position on which carrier was first in priority, Michigan Millers asserted that Adanalic was an employee of DIS, and so, pursuant to MCL 500.3114(3), the insurer of the vehicle was first in priority rather than Michigan Millers. The trial court concluded that Adanalic was an independent contractor of DIS under the economic-reality test, and we affirmed. *Id*. at 190-194.[9]

Contrary to Cherokee's argument, DIS had substantially less control over Adanalic than Speed Express had over plaintiff. Adanalic had a "contractual right to refuse any load offered by DIS" and the "right to determine the means of hauling any load he accepted . . . ." *Id*. at 193 (emphasis omitted). In contrast, plaintiff had no such rights and his contract imposed additional requirements not found in *Adanalic*, such as mandatory compliance with a driver handbook and random drug tests. In addition, "Adanalic was also free to hire his own employees who would be responsible to

[9] In *Adanalic*, the trial court did not go on to address whether Adanalic was self-employed under *Celina*, 452 Mich 84, and so entitled to coverage under MCL 500.3114(3) on that basis. We did not address that issue because it was not raised or argued by any party.

him, not DIS . . . ." *Id*. at 194. In this case, plaintiff did not have his own employees, and there is nothing to suggest that he could have hired workers that would have been responsible to him rather than Speed Express. In sum, Adanalic had a significant amount of control over his work, which strongly indicates an independent-contractor relationship. In contrast, plaintiff had limited discretion in performing his work and he was required to comply with the company's handbook and random drug tests, both of which are hallmarks of an employee-employer relationship. The fundamental differences between these work relationships support the conclusion that a different result is warranted here.

When all the relevant factors are considered, the economic-reality test clearly shows that an employee-employer relationship existed between plaintiff and Speed Express for purposes of the no-fault act. Accordingly, the trial court erred by determining that plaintiff was not an employee under MCL 500.3114(3). Because that subsection applies, Cherokee is first in priority to pay PIP benefits to plaintiff.

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

SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

RIORDAN, P.J. (*concurring*). I concur with the majority opinion's de novo application of the four-factor test from *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173, 190-191; 870 NW2d 731 (2015), and the conclusion that plaintiff was an employee rather than an independent contractor, as the trial court held on remand. However, I would end the analysis there rather than apply the

additional factors set forth in *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972)—a nonbinding case involving a claim for worker's compensation.[1]

In our prior opinion, we disagreed with Progressive Marathon Insurance Company that *Adanalic* and *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996), were irreconcilable, and we interpreted the cases as providing a two-step framework. First, "[u]nder *Adanalic*, a trial court must apply the economic reality test when evaluating whether an injured party was an employee or an independent contractor for purposes of the no-fault act." *Duckworth v Cherokee Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 2018 (Docket Nos. 334353 and 335241), p 6. Second, per *Celina*, "if an injured party is deemed to be an independent contractor under the economic reality test, the next relevant inquiry becomes whether the injured party was self-employed, i.e., acting on behalf of his or her business, at the time they were injured." *Duckworth*, unpub op at 6.

I agree with the majority's conclusion that only the first step is required in this case because, under the *Adanalic* factors, plaintiff was a Speed Express employee. The *Adanalic* factors are not exhaustive, *Buckley v Prof Plaza Clinic Corp*, 281 Mich App 224, 235; 761 NW2d 284 (2008), and our Supreme Court has not limited the *McKissic* factors to only workers' compensation cases, see *Coblentz v Novi*, 475 Mich 558, 578; 719 NW2d 73 (2006) (considering whether attorney

[1] Cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1); they nevertheless can be considered persuasive authority, *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 444 n 4; 773 NW2d 29 (2009).

fees were recoverable in an action involving the Freedom of Information Act, MCL 15.231 *et seq*.). However, there is no binding caselaw that requires consideration of the *McKissic* factors in the no-fault context, and I decline to do so in this instance where the *Adanalic* factors are sufficient to resolve the issue. If this Court intends to incorporate the *McKissic* factors into the no-fault legal framework, it should do so clearly in a holding where the application of the *McKissic* factors is outcome-determinative, rather than addressing the issue in dictum as the majority opinion does here.

I concur with the majority opinion in all other respects.

GLASKER-DAVIS v AUVENSHINE

Docket No. 345238. Submitted February 4, 2020, at Detroit. Decided August 13, 2020, at 9:00 a.m.

Thomasina Glasker-Davis filed an action in the Wayne Circuit Court against Meemic Insurance Company for first-party benefits related to a car crash she was involved in with Meemic's insured, Daman S. Auvenshine. Plaintiff claimed compensation for several months of replacement-care services she had received from her daughter following the crash. In her complaint, plaintiff stated that her daughter provided services to her on a daily basis, but at her deposition, plaintiff testified that her daughter had only provided daily services for a brief period and thereafter helped her two or three times a week. On the basis of this discrepancy, Meemic moved for summary disposition on the ground of fraud, citing the fraud provision in its policy. Following a hearing, the the court, Daniel A. Hathaway, J., granted summary disposition for Meemic, ruling that plaintiff had provided material and intentional misrepresentations to Meemic when she claimed that her daughter had provided daily services. Plaintiff moved for reconsideration, asserting that Meemic had not properly pleaded fraud as an affirmative defense. The court denied plaintiff's motion, concluding that no palpable error had occurred because no rational trier of fact could find that plaintiff had not committed fraud. Plaintiff appealed.

The Court of Appeals *held*:

The function of a pleading is to give sufficient notice to the opposing party to permit them to take a responsive position. Although affirmative defenses are not pleadings under the court rules, they are analogous to pleadings and serve essentially the same functional purpose. Further, affirmative defenses have long been understood to be something that must be stated in a party's responsive pleading. However, Michigan's procedural rules recognize that it may not be possible to plead an affirmative defense with particularity at the commencement of a case; therefore, a party may move to amend its affirmative defenses at any time, and leave to do so should be granted by the court unless it would prejudice the other party. Therefore, a laundry list of affirmative

defenses, including those of questionable relevance, is not necessary and does not provide the opposing party with any meaningful way to respond. Moreover, the affirmative defense of fraud is an exception to the general notice-pleading requirements of MCL 2.111(F)(3)(a) and requires significantly more detailed allegations. Under MCR 2.112(B)(1), the circumstances that constitute fraud must be stated with particularity. Meemic stated vaguely in its affirmative defenses that plaintiff provided it with information at some point that was incorrect or inconsistent in some way. This was insufficient. Summary disposition was therefore inappropriate because Meemic did not adequately plead the affirmative defense of fraud.

Reversed and remanded for further proceedings.

Mike Morse Law Firm (by *Stacey L. Heinonen*, *Marc Mendelson*, and *Paul E. Wheatley*) for Thomasina Glasker-Davis.

Plunkett Cooney (by *Mary Massaron*) for Meemic Insurance Company.

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

RONAYNE KRAUSE, P.J. Plaintiff, Thomasina Glasker-Davis, appeals by right the trial court's order granting summary disposition in favor of defendant Meemic Insurance Company (Meemic). Plaintiff was injured in an automobile accident. Plaintiff alleged a claim of negligence against Daman Steven Auvenshine, the driver of the other vehicle, and a claim for first-party benefits against Meemic, plaintiff's no-fault insurance provider. Specifically, plaintiff claimed she was entitled to compensation for several months of replacement-care services she received *daily* from her daughter. At her deposition, however, plaintiff testified that her daughter had performed services daily for a brief period and thereafter only came over *two to three times a week*. On the basis of that discrepancy, Meemic moved for sum-

mary disposition on the ground of fraud. The trial court granted summary disposition, and Auvenshine was then dismissed by stipulation. Because we agree with plaintiff that Meemic failed to properly raise fraud in its affirmative defenses, we reverse and remand for further proceedings.

I. BACKGROUND

For purposes of this appeal, the underlying facts in this matter are not seriously disputed. On June 17, 2016, plaintiff was driving her car in Detroit when Auvenshine backed his car out onto the road and crashed into plaintiff's car. Plaintiff was injured in the crash. Meemic had issued a policy of no-fault insurance under which plaintiff was covered. Plaintiff did not make any claims for wage loss or attendant-care services, but rather only for household assistance or replacement-care services, which were referred to in the record as "the chores." The record shows that plaintiff, through counsel, submitted to Meemic "Household Services Statements" purporting to show that her daughter, Alicia Glasker, had cleaned plaintiff's kitchen, washed the dishes, and cooked almost every day[1] from July 1, 2016 through September 30, 2017. In her complaint, plaintiff contended that Meemic refused to make payments for those services. Meemic's answer to the complaint consisted almost entirely of boilerplate denials or disavowals of knowledge as to the allegations. Meemic also filed a forty-six-paragraph list of affirmative defenses, most of which are also boilerplate. One of those affirmative defenses stated in full,

[1] No services were claimed for September 27, 2016. The forms also reflect that Alicia occasionally did plaintiff's laundry.

"The Plaintiff has given false and/or conflicting information to Defendant, thus, are [sic] fraudulent in nature."

At plaintiff's deposition, she testified that she had not kept track of when Alicia performed the chores or rendered assistance. Rather, Alicia kept track on pieces of paper that plaintiff would review and sign. We note that the Household Services Statements actually appear to be signed by Alicia, not by plaintiff, and all of the other writing on the forms appears to be from the same hand. Plaintiff testified that as of the date of her deposition, in August 2017, Alicia was coming over to help plaintiff approximately twice a week. Plaintiff believed that Alicia came over more often in 2016 because plaintiff was suffering much more pain at the time. Plaintiff stated that Alicia had come over on a daily basis when plaintiff was first injured. However, for at least some portion of 2016, Alicia came over "[m]aybe three times a week." Plaintiff emphasized that she relied on the forms Alicia filled out to determine when Alicia performed services. The record suggests that plaintiff may have suffered some memory deficits, caused by the accident, plaintiff's blood pressure, or both. However, we cannot find any other details of the nature or extent of those deficits in the record.

Meemic moved for summary disposition on the basis of the fraud provision in its policy. That provision apparently[2] stated in relevant part that the "entire Policy is void if any insured person has intentionally concealed or misrepresented any material fact or cir-

[2] Insofar as we can find, Meemic has never provided more than the first 16 pages of its insurance policy, and the policy's table of contents indicates that the fraud provision is on page 22. Nevertheless, the parties agree that the policy contains the quoted language.

cumstance relating to . . . any claim made under it." Meemic argued that in light of plaintiff's deposition testimony that Alicia had performed services at most three times a week, the Household Services Statements and plaintiff's claim seeking payment for daily services constituted fraud under the policy. Plaintiff recognized that her claims for daily replacement household services conflicted with her deposition testimony. However, plaintiff argued that the policy's fraud provision required *intentional* misrepresentations, and there were outstanding factual questions whether plaintiff had intentionally provided conflicting or inaccurate information, especially because Alicia had not been deposed. Plaintiff further argued that Meemic had not properly raised fraud in its affirmative defenses, because a mere reference to fraud did not constitute pleading with particularity as required by the court rules.

The trial court held a motion hearing, during which the parties argued consistently with their briefs regarding whether plaintiff had intentionally misrepresented any material facts within the meaning of the insurance policy. During the hearing, neither the parties nor the trial court mentioned plaintiff's contention that Meemic had waived any fraud defense. The trial court ruled from the bench that it found plaintiff to have unequivocally testified that Alicia "never" provided services more than three times a week. It also found that plaintiff's testimony established that she had reviewed all the statements provided by Alicia, so plaintiff would have known the statements were incorrect; therefore, plaintiff necessarily provided material and intentional misrepresentations to Meemic. The trial court concluded that no "reasonabl[e] trier of fact could conclude other than that there was a material and intentional

misrepresentation made by the Plaintiff," so it granted summary disposition in Meemic's favor.

Plaintiff moved for reconsideration, reiterating her position that Meemic had not properly raised its fraud affirmative defense, and reminding the court that plaintiff had included the waiver argument in her response to Meemic's motion for summary disposition. She argued that Meemic's late assertion of fraud after the close of discovery precluded plaintiff from deposing Alicia, thereby prejudicing her. The trial court entered an order denying reconsideration, repeating that no palpable error occurred because no rational trier of fact could find that plaintiff had not committed fraud. The trial court's order denying reconsideration did not mention waiver of the fraud affirmative defense. Plaintiff and Auvenshine stipulated to Auvenshine's dismissal and to the entry of a final order closing the case. This appeal followed.

II. ISSUE PRESERVATION

It is sometimes erroneously believed that an issue must be raised in *and* decided by the trial court for that issue to be preserved for appeal. See, e.g., *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, our Supreme Court has unequivocally explained that "[parties] should not be punished for the omission of the trial court," and it squarely rejected "the proposition that issues undecided by the trial court are not preserved for appeal." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Rather, issue preservation requirements only impose a general prohibition against raising an issue for the first time on appeal. *Id*. Consistently with that principle, a party also need not preserve an objection to "a finding or decision" made by

the trial court, MCR 2.517(A)(7), or, at least under some circumstances, to other acts or omissions undertaken sua sponte by a court. See *In re Gach*, 315 Mich App 83, 97; 889 NW2d 707 (2016). Furthermore, so long as the issue itself is not novel, a party is generally free to make a more sophisticated or fully developed argument on appeal than was made in the trial court. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). This Court also has the power to consider an issue when necessary, even if unpreserved or not properly presented. *Id*.; *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002).

Here, plaintiff specifically and extensively argued in response to Meemic's motion for summary disposition that Meemic had waived the affirmative defense of fraud. Although waiver was not discussed during oral argument at the motion hearing, a party need only bring the issue to the court's attention—whether orally or in a brief or both. See *Steward*, 251 Mich App at 551 n 6. Plaintiff's briefing of the issue unambiguously raised the issue. "The purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 737; 832 NW2d 401 (2013) (quotation marks, citation, and alteration omitted). Plaintiff clearly did everything reasonable to bring this issue to the trial court's attention. Cf. *Fraser Twp v Haney (On Remand)*, 331 Mich App 96, 98-99; 951 NW2d 97 (2020) (*Fraser II*) (stating that because the plaintiff permitted an unraised affirmative defense to be tried by implied consent, the plaintiff waived any argument that the defendant had waived that affirmative defense). The trial court—not plaintiff—erred by failing to address this issue. It is therefore preserved for this appeal.

III. STANDARD OF REVIEW

"This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Id*. at 5. This Court also reviews de novo the interpretation of statutes, court rules, and legal doctrines. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "Moreover, questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Our review of the sufficiency of the pleadings under either MCR 2.116(C)(8) (failure to state a claim) or 2.116(C)(9) (failure to state a defense) is de novo. *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 487-488; 892 NW2d 467 (2016). By analogy, we conclude that we also review de novo the sufficiency of any assertions of affirmative defenses. This Court will affirm a correct outcome even if the trial court erred in its reasoning. *Kirl v Zinner*, 274 Mich 331, 336; 264 NW 391 (1936).

IV. FRAUD AFFIRMATIVE DEFENSE

Michigan is "a traditional notice-pleading jurisdiction" with "a relatively low bar" for the sufficiency of initial allegations, particularly because parties generally will not yet have the benefit of discovery. *Tomasik*

v Michigan, 327 Mich App 660, 677-678; 935 NW2d 369 (2019). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposing party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Affirmative defenses are not "pleadings" under the court rules. *McCracken v Detroit*, 291 Mich App 522, 526-528; 806 NW2d 337 (2011). Nevertheless, affirmative defenses have long been understood to be something that must be "pled." See *Robinson v Emmet Co Rd Comm*, 72 Mich App 623, 639; 251 NW2d 90 (1976). Furthermore, the court rules provide that affirmative defenses may be amended pursuant to the same process as pleadings and are to be included within a pleading. MCR 2.111(F)(3), citing MCR 2.118; *Southeast Mich Surgical Hosp, LLC v Allstate Ins Co*, 316 Mich App 657, 663; 892 NW2d 434 (2016), lv den in part and remanded in part on other grounds 503 Mich 1004 (2019). Therefore, affirmative defenses are highly analogous to pleadings, and we conclude that they serve essentially the same functional purpose.

Michigan's procedural rules recognize and account for the fact that it may not be possible to plead fraud, or indeed anything else, with particularity at the commencement of a case. A party may move to amend its affirmative defenses at any time, and leave should be granted freely unless doing so would prejudice the other party. *Southeast Mich Surgical Hosp*, 316 Mich App at 663; *Stanke*, 200 Mich App at 320-321. Under MCR 2.118(C)(1), amendments to conform to the evidence "may be made on motion of a party at any time, even after judgment." See *Fraser Twp v Haney*, 327 Mich App 1, 6-9; 932 NW2d 239 (2019) (*Fraser I*), vacated 504 Mich 968 (2019), and reaffirmed on remand by *Fraser II*, 331 Mich App at 100. MCR 2.111(F)(3) is stated in the

alternative: "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed *or as amended* in accordance with MCR 2.118." (Emphasis added.) "Prejudice" within the meaning of MCR 2.118(C)(2) does not mean the opposing party might lose on the merits or might incur some additional costs; rather, it means the opposing party would suffer an inability to respond that the party would not otherwise have suffered if the affirmative defense had been validly raised earlier. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004); *Southeast Mich Surgical Hosp*, 316 Mich App at 663-664; *Stanke*, 200 Mich App at 321-322.

Thus, a defending party is not required to inundate a plaintiff with a laundry list of every conceivable affirmative defense from the outset, irrespective of whether there is reason to believe any of the defenses might ultimately be supportable. MCR 1.109(E)(5)(b); see also *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 213; 850 NW2d 667 (2013), rev'd in part on other grounds[3] 498 Mich 68 (2015). Rather, a defending party may, and should, amend its affirmative defenses on an ongoing basis as supported by the actual evidence discovered in a matter. Shoehorning every conceivable possibility, appropriate or not, into a first responsive pleading lest it be lost forever is not only unnecessary, but also inappropriate, unhelpful, and essentially contrary to the purpose of pleading.

We therefore agree with plaintiff that even under ordinary notice-pleading requirements, merely enumerating "[a] laundry list of affirmative defenses gives the plaintiff no more notice, in the context of an

[3] On appeal, our Supreme Court expressly declined to address any affirmative-defense issues. See *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 87-89; 869 NW2d 213 (2015).

affirmative defense, than a statement that 'I deny I'm liable', gives in the context of an ordinary defense." *Woodruff v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 27, 2014 (Docket No. 314093), p 5, citing *Stanke*, 200 Mich App at 318.[4] We find *Woodruff* persuasive in the absence of binding authority on point: a tome of disconnected boilerplate affirmative defenses, many of questionable relevance, does not provide the opposing party with any meaningful way to respond. Furthermore, it is difficult to understand how doing so could possibly be considered the result of a "reasonable inquiry," "well grounded in fact," or "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." MCR 1.109(E)(5)(b). In any event, the affirmative defense of fraud, see MCR 2.111(F)(3)(a), is a notable exception to the general notice-pleading requirements and requires significantly more detailed and stringent allegations.

A defense premised on an alleged violation of an antifraud provision in an insurance policy constitutes an affirmative fraud defense. *Baker v Marshall*, 323 Mich App 590, 597-598; 919 NW2d 407 (2018). "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." MCR 2.112(B)(1). Thus, it is insufficient simply to state that a plaintiff's conduct was fraudulent. *Southeast Mich Surgical Hosp*, 316 Mich App 663.

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[4] Unpublished opinions of this Court are not binding under the "first-out rule," see MCR 7.215(J)(1), and are not precedential under the rule of stare decisis, MCR 7.215(C)(1), so their use is disfavored. *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 772 n 7; 887 NW2d 635 (2016). However, the reasoning in an unpublished opinion may be adopted as persuasive. See, e.g., *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners Inc*, 492 Mich 40, 50-52; 821 NW2d 1 (2012). We adopt *Woodruff*'s persuasive reasoning here.

Meemic accurately points out that it went beyond merely stating that plaintiff committed fraud. However, Meemic still only vaguely stated that plaintiff had provided Meemic with some unidentified information, at an unidentified time, that was incorrect or inconsistent in an unidentified way. Meemic argues that some of its other affirmative-defense allegations provide adequate context to render its fraud claim sufficient. However, as with the fraud allegation, few[5] of those other allegations set forth any facts or circumstances with particularity, and they only barely rise to the level of "something more specific than" mere citations. See *Stanke*, 200 Mich App at 318.

Consequently, it is obvious that Meemic's affirmative defenses did not adequately raise the affirmative defense of fraud. The trial court erred by granting summary disposition in Meemic's favor on the basis of fraud under the present procedural posture of this matter. We need not address any of the other arguments presented on appeal, and we express no opinion whatsoever as to any factual questions in this matter.

The order granting summary disposition in Meemic's favor is reversed, and this matter is remanded to the trial court for further proceedings. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(A).

K. F. KELLY and TUKEL, JJ., concurred with RONAYNE KRAUSE, P.J.

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[5] Meemic did specifically assert, in a separate allegation, that plaintiff's attendant-care and household-services claims were not reasonably necessary and were barred by the three-year limitations period. However, this assertion is difficult to read as alleging fraud, or even alleging that the care and services never occurred.

POWELL-MURPHY v REVITALIZING AUTO COMMUNITIES ENVIRONMENTAL RESPONSE TRUST

Docket No. 348690. Submitted August 5, 2020, at Detroit. Decided August 13, 2020, at 9:05 a.m.

Jill Powell-Murphy, Gail Banovic, Bonita Norfleet, Demetrious Kennerly, Sharon Roane, and Miroslaw Fietko brought a putative class action on behalf of workers at the United States Postal Service (the USPS) Metroplex Processing and Distribution Center in Pontiac, Michigan (the Metroplex facility) in the Oakland Circuit Court against Revitalizing Auto Communities Environmental Response Trust (RACER Trust) and RACER Properties, LLC, alleging that plaintiffs suffered various physical ailments as a result of exposure to toxic chemicals, including methane gas and volatile organic compounds (VOCs), while working at the Metroplex facility. The property on which the Metroplex facility was built was previously used by General Motors Corporation as a foundry, for manufacturing operations, and for the storage of hazardous materials. In 2004, General Motors leased the property to the USPS, and the USPS built the Metroplex facility on the property. The lease between General Motors and the USPS is governed by a Master Agreement, under which General Motors retained responsibility for cleaning up, monitoring, and remediating environmental contamination on the property, including known and unknown environmental conditions that existed at the time the Master Agreement was executed. General Motors retained an access easement over the property to conduct environmental cleanup and remediation. After General Motors filed for bankruptcy in 2009, Motors Liquidation Company became the owner of the property and was to handle any existing and prior environmental liability claims. In 2011, the United States Bankruptcy Court established the RACER Trust in an effort to remediate properties formerly owned by General Motors that had environmental contamination. The Motors Liquidation Trust, formerly known as General Motors Corporation, quitclaimed all rights and interest in the property to defendant RACER Properties, LLC, a subsidiary of the RACER Trust. Plaintiffs alleged that the Metroplex facility was built on land containing pools filled with Light Non-Aqueous Phase Liquid (LNAPL). According

to plaintiffs, such liquids do not absorb into the water below, and anaerobic decomposition of the LNAPLs results in the generation of methane and other toxic gases. Plaintiffs brought this action, and the trial court entered an initial scheduling order with a discovery cutoff date of May 24, 2019. However, the parties stipulated to the entry of an amended scheduling order providing that discovery for class-certification purposes would be completed by September 13, 2019, with non-class-certification discovery completed by August 31, 2020, and dispositive motions filed by September 30, 2020. On December 28, 2018, in lieu of answering the complaint, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they did not owe a duty of care to plaintiffs and that plaintiffs could not establish that defendants were the cause of plaintiffs' alleged injuries. Plaintiffs responded, arguing that discovery had not yet been completed and that, in any event, plaintiffs had presented sufficient evidence of defendants' duty of care and causation to withstand summary disposition. The trial court, Denise Langford Morris, J., held a hearing on defendants' motion and issued a written opinion and order granting defendants' motion for summary disposition, concluding that defendants were not responsible for the air conditions in the Metroplex facility and that plaintiffs had not presented evidence of causation to avoid summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

1. To establish a prima facie case of negligence, a plaintiff must satisfy the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. With regard to the duty of care, in this case, the Master Agreement provided that the property was subject to a corrective-action agreement between the United States Environmental Protection Agency and General Motors concerning the remediation of environmental conditions on the property. The Master Agreement placed the responsibility on General Motors (and thus, by assignment, on defendants) to "undertake cleanup, remediation, investigation, sampling, monitoring, inspection, evaluation, construction, installation, operation and maintenance of any remedial systems installed at, in, or on the Property, or other actions" required to remediate "Environmental Conditions" on the property, known or unknown, that existed or were caused by operations on the property prior to its lease to the USPS. The Master Agreement's definition of "Environmental Conditions" included "[a]ny contamination in, at, or of the soils, surface waters, or groundwater

at the Property, including any abandoned underground storage tanks or other discrete containers which may contain or formerly contained chemicals or waste materials . . . .” The Master Agreement also gave General Motors the right to access the property in order to complete any necessary remediation efforts. Plaintiffs alleged that they were injured as a result of the contamination of the property’s soil by LNAPLs, which broke down into methane and other toxic gases. Accordingly, the terms of the Master Agreement supported the conclusion that defendants owed a duty of care to those injured by environmental conditions on the property. Defendants’ argument that the Master Agreement placed the responsibility for the “working conditions” in the facility on the USPS was unpersuasive because that provision of the Master Agreement carved out an exception for preexisting environmental conditions on the property. Therefore, the trial court erred to the extent it determined that defendants owed no duty of care to plaintiffs.

2. The causation element of a negligence claim encompasses both factual cause and proximate cause. Factual cause generally requires showing that but for the defendant’s actions, the plaintiff’s injury would not have occurred. Proximate cause, by contrast, normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences. While factual causation may be established with circumstantial evidence, the evidence must support reasonable inferences of causation, not mere speculation. To provide circumstantial evidence that permits a reasonable inference of causation, a plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred; the mere possibility of causation is insufficient to survive summary disposition. Toxic-tort cases require consideration of both general causation and specific causation; however, prior to this case, there existed no binding caselaw in Michigan on this subject. Accordingly, the rationale articulated by Chief Justice MARKMAN in his concurring statement in *Lowery v Enbridge Energy Ltd Partnership*, 500 Mich 1034 (2017) (MARKMAN, C.J., concurring), was adopted as the appropriate analytical framework for consideration of general and specific causation in toxic-tort cases. Under this rationale, the general-and-specific-causation framework applies in determining whether a plaintiff has presented evidence of factual causation to support a claim of negligence in a toxic-tort case. General causation pertains to whether a toxin is capable of causing the harm alleged, and a necessary predicate to this inquiry is identifying the asserted exposure level of the toxin. The mere

existence of a toxin in the environment is insufficient to establish causation without proof that the particular level of exposure could cause the plaintiff's symptoms. Specific causation requires proof that exposure to the toxin more likely than not caused *the plaintiff's* injury. To avoid leaving the jury in a position in which it is required to speculate, the plaintiff bears the onus of putting forth evidence that he or she was, in fact, exposed to the toxin at issue, including the estimated amount and duration of exposure. If relying on circumstantial evidence, the evidence must be such that reasonable inferences can be drawn concerning the plaintiff's exposure level. A plaintiff must also present evidence to exclude other reasonably relevant potential causes of a plaintiff's symptoms. The need for expert testimony regarding causation in a toxic-tort case is determined on the basis of whether the matter is so obvious that it is within the common knowledge and experience of an ordinary layperson. In this case, plaintiffs argued that they satisfied the requirement of general causation because they presented evidence establishing that toxic chemical emissions were present in the Metroplex facility and that plaintiffs all suffered health effects that could be attributed to those emissions. However, plaintiffs did not present evidence of the level of the toxic emissions and whether that level was sufficient to cause the alleged health effects. This omission would render plaintiffs' proffered evidence insufficient to survive a motion for summary disposition brought at the appropriate time. Furthermore, while plaintiffs showed that there was a general increase in the presence of methane in parts of the Metroplex facility since testing conducted prior to the facility's construction, plaintiffs did not present any evidence of the alleged specific levels of methane or other potentially harmful toxins in or around the Metroplex facility to which plaintiffs were exposed. Without such evidence, it was not possible to determine whether the alleged exposure could have harmed plaintiffs and caused their alleged injuries. Accordingly, on remand, the causation analysis (after sufficient discovery is conducted) should focus on whether plaintiffs could provide specific information regarding the level of methane gas and other toxins potentially present at the Metroplex facility to which plaintiffs (and other members of the prospective class) were exposed and whether exposure at that level could cause plaintiffs' symptoms.

3. The trial court erred by granting summary disposition to defendants before discovery had been completed. Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. The dispositive inquiry is whether further discovery presents a fair likelihood of uncovering factual support for the party's position.

In this case, the parties stipulated at the outset of the case to a bifurcated discovery period, during which discovery related to class-certification would take place before discovery related to plaintiffs' substantive claims. A deadline for dispositive motions was set nearly two years into the future. Notwithstanding the fact that discovery was still in its early stages, plaintiffs did present documentary evidence in support of many of their allegations, although plaintiffs' evidence at that stage of the proceedings was insufficient to prove a genuine issue of material fact regarding causation because plaintiffs did not present evidence proving the level of exposure or that the alleged exposure caused their symptoms. However, plaintiffs at least asserted that a dispute did exist and supported that assertion with some independent evidence. Accordingly, further discovery would present a fair likelihood of uncovering factual support for plaintiffs' position. This decision was bolstered by the fact that the causation analysis almost surely requires expert testimony, yet neither the class-certification nor substantive-issue deadline for naming expert witnesses had passed at the time defendants' motion was decided. Therefore, plaintiffs were entitled to further discovery on the issue of causation.

Reversed and remanded for reinstatement of plaintiffs' claims and for further proceedings.

NEGLIGENCE — TOXIC-TORT CASES — FACTUAL CAUSATION — APPLICATION OF THE GENERAL-AND-SPECIFIC-CAUSATION FRAMEWORK.

Toxic-tort cases require consideration of both general causation and specific causation; the general-and-specific-causation framework outlined in *Lowery v Enbridge Energy Ltd Partnership*, 500 Mich 1034 (2017) (MARKMAN, C.J., concurring), applies in determining whether a plaintiff has presented evidence of factual causation to support a claim of negligence in a toxic-tort case; general causation pertains to whether a toxin is capable of causing the harm alleged, and a necessary predicate to this inquiry is identifying the asserted exposure level of the toxin; the mere existence of a toxin in the environment is insufficient to establish causation without proof that the particular level of exposure could cause the plaintiff's symptoms; specific causation requires proof that exposure to the toxin more likely than not caused *the plaintiff's* injury; the plaintiff bears the burden of putting forth evidence that he or she was, in fact, exposed to the toxin at issue, including the estimated amount and duration of exposure; if the plaintiff relies on circumstantial evidence, the evidence must be such that reasonable inferences can be drawn concerning the plaintiff's exposure level; a plaintiff must also present evidence to exclude

> other reasonably relevant potential causes of a plaintiff's symptoms; and the need for expert testimony regarding causation in a toxic-tort case is determined on the basis of whether the matter is so obvious that it is within the common knowledge and experience of an ordinary layperson.

Edwards & Jennings, PC (by *Alice B. Jennings*) and *Jerome D. Goldberg, PLLC* (by *Jerome D. Goldberg*) for plaintiffs.

Foley, Baron, Metzger & Juip, PLLC (by *Richard S. Baron*, *Benjamin L. Fruchey*, and *Nicholas J. Tatro*) for defendants.

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

BOONSTRA, J. Plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiffs filed this putative class action on behalf of workers at the United States Postal Service (the USPS) Metroplex Processing and Distribution Center in Pontiac, Michigan (the Metroplex facility). Plaintiffs alleged negligence and public nuisance, claiming that they had suffered various physical ailments as a result of exposure to toxic chemicals, including methane gas and volatile organic compounds (VOCs), while working at the facility.

The property on which the Metroplex facility was built was previously used by General Motors Corporation as a foundry, for manufacturing operations, and for the storage of hazardous materials. In 2004, General Motors leased the property to the USPS, and the

USPS built the Metroplex facility on the property. The Metroplex facility opened for operations in 2008. The lease between General Motors and USPS is governed by a Master Agreement, under which General Motors retained responsibility for cleaning up, monitoring, and remediating environmental contamination on the property, including known and unknown environmental conditions that existed at the time the Master Agreement was executed. General Motors retained an access easement over the property to conduct environmental cleanup and remediation. After General Motors filed for bankruptcy in 2009, the Motors Liquidation Company General Unsecured Creditors Trust (the Motors Liquidation Trust) became the owner of the property and was to handle any existing and prior environmental liability claims. In 2011, the United States Bankruptcy Court established the Revitalizing Auto Communities Environmental Response Trust (defendant RACER Trust) in an effort to remediate properties formerly owned by General Motors that had environmental contamination. The Motors Liquidation Trust quitclaimed all rights and interest in the property to defendant RACER Properties, LLC, a subsidiary of the RACER Trust.

Plaintiffs alleged that the Metroplex facility was built on land containing pools filled with Light Non-Aqueous Phase Liquid (LNAPL). According to plaintiffs, such liquids do not absorb into the water below, and anaerobic decomposition of the LNAPLs results in the generation of methane and other toxic gases. Petroleum-based LNAPLs may include gasoline, benzene, and toluene, which are themselves also toxic.[1]

[1] See, e.g., United States Environmental Protection Agency, *Ground Water Issue: Light Nonaqueous Phase Liquids*, EPA/540/S-95/500, available at <https://www.epa.gov/sites/production/files/2015-06/documents/

Plaintiffs maintain that they have been exposed to hazardous levels of methane and other toxic gases at the Metroplex facility since August 2015 and that this exposure has caused a variety of physical symptoms.

According to plaintiffs, defendants negligently allowed methane gas and other toxic chemicals to build up on the property and "knew or should have known that extremely hazardous toxic chemicals were being produced, released and discharged under their former operations" but did not use available technology and knowledge to prevent the release and discharge of the toxins. Plaintiffs also alleged that the release of toxic chemicals into the Metroplex facility amounted to a public nuisance.

On November 3, 2018, the trial court entered an initial scheduling order providing a discovery cutoff date of May 24, 2019. On November 30, 2018, the parties stipulated to the entry of an amended scheduling order providing that discovery for class-certification purposes would be completed by September 13, 2019, with non-class-certification discovery completed by August 31, 2020, and dispositive motions filed by September 30, 2020. On December 28, 2018, in lieu of answering the complaint, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they did not owe a duty of care to plaintiffs and that plaintiffs could not establish that defendants were the cause of plaintiffs' alleged injuries. Plaintiffs responded on March 6, 2019, arguing that discovery had not yet been completed and that under the terms of the stipu-

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lnapl.pdf> [https://perma.cc/VGX3-D448]; Michigan Department of Environmental Quality, *Non-Aqueous Phase Liquid (NAPL) Characterization, Remediation, and Management for Petroleum Releases*, RRD Resource Materials-25-2014-01 (June 2014), available at <https://www.michigan.gov/documents/deq/deq-rrd-NAPLResourceDocument_464472_7.pdf> [https://perma.cc/SUL3-ZVTP].

lated scheduling order, discovery for class-action certification was to precede discovery on the substantive merits of plaintiffs' claims, rendering defendants' motion premature. Plaintiffs also argued that, in any event, they had presented sufficient evidence of defendants' duty of care and causation to withstand summary disposition. Plaintiffs also requested that if the trial court found their complaint to be insufficiently detailed, plaintiffs should be permitted to amend their complaint, and they attached a proposed amended complaint.

The trial court held a hearing on defendants' motion on March 20, 2019. On April 11, 2019, the trial court issued a written opinion and order granting defendants' motion for summary disposition, concluding that defendants were not responsible for the air conditions in the Metroplex facility and that plaintiffs had not presented evidence of causation to avoid summary disposition.

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). The trial court in this case granted summary disposition in favor of defendants under MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). 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 motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of

> material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson*, 502 Mich at 761 (quotation marks, citation, and brackets omitted). [*El-Khalil*, 504 Mich at 160 (emphasis omitted).]

Whether a defendant owed a duty of care to a plaintiff is a question of law that we review de novo. *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

III. DUTY OF CARE

Plaintiffs argue that the trial court erred by determining that defendants owed no duty of care to plaintiffs regarding exposure to environmental contaminants. We agree.

To establish a prima facie case of negligence, a plaintiff must satisfy the following elements:

> (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. [*Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012) (quotation marks and citation omitted).]

A duty of care may be one that the defendant owes specifically to the plaintiff, or it may be one that the defendant owes to the general public, of which the plaintiff is a member. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), impliedly overruled on other grounds by *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004). While one person generally does not have an obligation to help or protect another, a duty of care may arise by way of statute, a contractual relationship, or the common law. *Hill*, 492 Mich at 660-661; *Clark*, 379 Mich at 261. The common law imposes on

"every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark*, 379 Mich at 261.

The Master Agreement in this case explicitly states that the property was subject to a "Performance Based RCRA [Resource Conservation and Recovery Act, 42 USC 6901 *et seq*.] Corrective Action Agreement" between the United States Environmental Protection Agency and General Motors regarding the remediation of environmental conditions on the property. The Master Agreement places the responsibility on General Motors (and thus, by assignment, on defendants) to "undertake cleanup, remediation, investigation, sampling, monitoring, inspection, evaluation, construction, installation, operation and maintenance of any remedial systems installed at, in, or on the Property, or other actions" required to remediate "Environmental Conditions" on the property, known or unknown, that existed or were caused by operations on the property prior to its lease to the USPS. The Master Agreement's definition of "Environmental Conditions" includes "[a]ny contamination in, at, or of the soils, surface waters, or groundwater at the Property, including any abandoned underground storage tanks or other discrete containers which may contain or formerly contained chemicals or waste materials . . . ." The Master Agreement also gives General Motors the right to access the property in order to complete any necessary remediation efforts. As stated, plaintiffs have alleged that they were injured as a result of the contamination of the property's soil by LNAPLs, which broke down into methane and other toxic gases. Under these circumstances, the terms of the Master Agreement support our conclusion that defendants owe a duty of care to those injured by environmental conditions on the property.

Defendants argue that § 2(k) of the Master Agreement places the responsibility for the "working conditions" in the facility on the USPS and that any exposure to methane was therefore the USPS's responsibility. In that regard, the trial court held, "As an initial matter, Plaintiffs have failed to establish how Defendants are responsible for the working conditions in a building, constructed and operated by their employer, the USPS." We disagree and find defendants' argument unpersuasive in light of the text of that provision:

> USPS Construction. From and after the Commencement Date, and except as provided in this Agreement, USPS shall be solely responsible for all conditions of the Property (*except for the Environmental Condition as described herein*), including, without limitation, the control of dust on the Property, air monitoring, storm water pollution prevention plan implementation, management of waste materials, erosion control, traffic requirements and all matters set forth in the Ground Lease. [Emphasis added.]

The provision clearly carves out an exception for preexisting environmental conditions on the property. We conclude that the trial court erred to the extent it determined that defendants owed no duty of care to plaintiffs. *Hill*, 492 Mich at 660-661; *Clark*, 379 Mich at 261.

IV. CAUSATION

Plaintiffs also argue that the trial court erred by granting summary disposition in favor of defendants on the issue of causation. We agree that the trial court acted prematurely in doing so.

The causation element of a negligence claim encompasses both factual cause (cause in fact) and proximate, or legal, cause. See *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Factual cause

"generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id*. at 163. Proximate cause, by contrast, "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id*. A plaintiff must necessarily establish factual cause in order to establish proximate cause. *Id*. While factual causation may be established with circumstantial evidence, the evidence must support "reasonable inferences of causation, not mere speculation." *Id*. at 164. The *Skinner* Court explained that to provide circumstantial evidence that permits a reasonable inference of causation, a plaintiff "must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id*. at 164-165. The mere possibility of causation is insufficient to survive summary disposition. *Id*. at 166.

In a "toxic tort" case such as this, the causation issue is complicated by the further consideration of both general causation and specific causation. Indeed, the trial court appeared to recognize this because it held that "Plaintiffs have not established general or specific causation linking any particular constituent to any alleged injury."

There is no binding caselaw in Michigan on this subject, however. Consequently, to provide guidance to the trial court and the parties on remand as well as to future "toxic tort" litigants and courts, we take this opportunity to address the issue.[2]

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[2] The parties appear to agree that in a "toxic tort" case such as this, both general causation and specific causation must be proven. Where they part company is with regard to the type or level of causation that must be shown at the summary-disposition stage of the litigation.

A. GENERAL AND SPECIFIC CAUSATION

In *Lowery v Enbridge Energy Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2015 (Docket No. 319199), p 1, the plaintiff, who lived near the Kalamazoo River, alleged that he had suffered injuries after an oil spill into the Talmadge Creek and the Kalamazoo River had exposed him to toxic fumes. After the spill, the plaintiff began to have migraine headaches and experienced vomiting and severe abdominal pain that ultimately required his hospitalization. *Id*. Subsequent testing revealed that the plaintiff had experienced an avulsion of his short gastric artery that caused internal bleeding. *Id*. The *Lowery* Court considered the opinion of the plaintiff's medical expert in addressing whether the plaintiff had established a prima facie case of negligence:

> Plaintiff's medical expert reviewed plaintiff's hospital records and concluded that oil fumes caused plaintiff's headaches, nausea, coughing, and vomiting, and that "the tear in his short gastric artery was caused by violent and uncontrollable bouts of coughing and vomiting which resulted in changes in intra-abdominal pressure and sudden and violent movement of the upper intra-abdominal organs . . . ." The expert did not examine plaintiff, basing his opinion solely on a review of the medical records. [*Id*. at 1-2.]

The Court concluded that the plaintiff had presented sufficient evidence of causation to withstand summary disposition under MCR 2.116(C)(10), explaining:

> A plaintiff is permitted to prove his case through circumstantial evidence and reasonable inferences. Here, there was a strong enough logical sequence of cause and effect for

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Plaintiffs maintain that they need only show general causation to survive summary disposition; defendants argue that plaintiffs must show both general causation and specific causation.

> a jury to reasonably conclude that [the] plaintiff's exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture. Plaintiff lived in the vicinity of the oil spill and was aware of an overpowering odor and was aware that "the news just kept saying that headaches and nausea [sic]." A reasonable reading of plaintiff's testimony is that he had an approximately weeklong spell of severe migraines that started the day after the spill and then, approximately a week after that, he experienced a several-days-long bout of vomiting. During a fit of vomiting, plaintiff felt a sharp pain in his abdomen, and it turned out that his short gastric artery (which runs between the stomach and the spleen) had ruptured, requiring surgery. Given the proffered evidence, the claim that the already-adjudged negligence of defendants in the release of oil into the Kalamazoo River caused the artery rupture goes beyond mere speculation. [*Id*. at 3 (citation omitted).]

Our Supreme Court granted leave to appeal to consider whether the plaintiff had sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10) and whether the plaintiff was required to present expert-witness testimony regarding general and specific causation. *Lowery v Enbridge Energy Ltd Partnership*, 499 Mich 886 (2016). Ultimately, however, the Court issued a short form order that addressed only the first of those issues, concluding that the plaintiff had failed to show a genuine dispute of material fact regarding causation. The Court concluded that the plaintiff's expert had engaged in mere speculation or conjecture, employing post hoc reasoning to conclude that the defendants' oil spill was the cause in fact of the plaintiff's injury merely by virtue of the fact that the plaintiff had problems after, but not before, the oil spill. *Lowery v Enbridge Energy Ltd Partnership*, 500 Mich 1034, 1034-1035 (2017).

Chief Justice MARKMAN, in a concurring statement joined by Justices ZAHRA and WILDER, wrote separately

"to provide counsel to the bench and bar concerning toxic tort litigation." *Id*. at 1035 (MARKMAN, C.J., concurring). We now adopt the rationale articulated by Chief Justice MARKMAN in his concurring statement in *Lowery* as the appropriate analytical framework.

Chief Justice MARKMAN noted that the Supreme Court's order did not decide the applicability of the general/specific causation framework to the issue of factual causation. *Id*. Because, he said, "[u]ncertainty continues to characterize [Michigan's] toxic tort jurisprudence"—even while most jurisdictions had adopted the general/specific causation framework in toxic-tort cases—Chief Justice MARKMAN sought to provide "some semblance of guidance" to litigants in toxic-tort cases as well as to the lower courts deciding and reviewing the cases. *Id*. He stated:

> I agree with the vast majority of other jurisdictions that the general-and-specific-causation framework may be utilized to analyze the cause-in-fact element of a toxic tort claim. At a minimum, this framework should apply when a plaintiff seeks to prove factual causation employing group-based statistical evidence. [*Id*. at 1036.]

Chief Justice MARKMAN acknowledged that "[t]he great majority of jurisdictions have bifurcated the cause-in-fact element in toxic tort cases into separate and distinctive analyses of 'general causation' and 'specific causation.' " *Id*. at 1039-1040. Additionally, secondary literature supported the use of the framework. *Id*. at 1040-1041. Chief Justice MARKMAN further explained the concepts of general and specific causation:

> General causation pertains to whether a toxin is capable of causing the harm alleged. A necessary predicate to this inquiry is identifying the asserted exposure level of the toxin. "A number of courts have required plaintiffs to prove the level of exposure (dose) in order to establish

> causation." *Goeb v Tharaldson*, 615 NW2d 800, 815 (Minn, 2000). "[T]he mere existence of a toxin in the environment is insufficient to establish causation without proof that the [particular] level of exposure could cause the plaintiff's symptoms." *Pluck v BP Oil Pipeline Co*, 640 F3d 671, 679 (CA 6, 2011). Put another way, causation "requires not simply proof of exposure to the substance, but proof of enough exposure to cause the plaintiff's specific illness." *McClain v Metabolife Int'l, Inc*, 401 F3d 1233, 1242 (CA 11, 2005)[, reh den 159 Fed Appx 183 (CA 11, 2005)]. [*Lowery*, 500 Mich at 1043 (MARKMAN, C.J., concurring).]

Chief Justice MARKMAN elaborated that it is crucial that the plaintiff present evidence of the specific exposure level in determining whether the toxin caused the alleged harm, because many chemicals are safe at some levels but toxic and harmful at different levels. *Id*. On the other hand, specific causation requires "proof that exposure to the toxin more likely than not caused *the plaintiff's* injury." *Id*. at 1044. To avoid leaving the jury in a position in which it is required to speculate, the plaintiff bears the onus of putting forth evidence that he or she was, in fact, exposed to the toxin at issue, "including the estimated amount and duration of exposure." *Id*. at 1045. If relying on circumstantial evidence, the evidence must be such that reasonable inferences can be drawn concerning the plaintiff's exposure level. *Id*. Citing *Skinner*, 445 Mich at 166, Chief Justice MARKMAN also opined that a plaintiff, to establish specific causation, bears the onus of presenting evidence that excludes other "reasonably relevant potential causes of a plaintiff's symptoms." *Lowery*, 500 Mich at 1046 (MARKMAN, C.J., concurring).

With regard to expert testimony, Chief Justice MARKMAN observed that the majority of jurisdictions have held that expert testimony is generally necessary, with most jurisdictions going so far as to suggest that

it is indeed required. *Id*. at 1047-1048. While acknowledging that Michigan courts have not squarely addressed this question, Chief Justice MARKMAN stated that he would apply Michigan's general rule and conclude "that the need for expert testimony regarding causation in a toxic tort case is determined on the basis of whether the matter 'is so obvious that it is within the common knowledge and experience of an ordinary layperson.' " *Id*. at 1049, quoting *Elher v Misra*, 499 Mich 11, 21-22; 878 NW2d 790 (2016).

Chief Justice MARKMAN's concurring statement in *Lowery* is instructive and provides meaningful guidance regarding the applicability of the general/specific causation framework in determining whether a plaintiff has presented evidence of factual causation to support a claim of negligence in a toxic-tort case, and we hereby adopt it as our own.[3]

Plaintiffs maintain that they satisfied the requirement of showing general causation because they presented evidence "establishing that toxic chemical emissions were present in the Metroplex and that the [p]laintiffs all suffered health effects that can be attributed to those emissions." However, plaintiffs acknowledge that they have not presented evidence of the level of the toxic emissions to which they were exposed in the

[3] The approach advocated by Chief Justice MARKMAN has been approved by federal courts, including the United States Court of Appeals for the Sixth Circuit. See, e.g., *Pluck v BP Oil Pipeline Co*, 640 F3d 671, 676-677 (CA 6, 2011) (stating that "[i]n a toxic-tort case, . . . the plaintiff must establish both general and specific causation" and noting that general causation requires "proof that the toxic substance is capable of causing . . . the plaintiff's alleged injury" while specific causation requires "proof that the toxic substance . . . did cause the plaintiff's alleged injury." (Punctuation omitted.) While the decisions of lower federal courts are not binding on this Court, they may be persuasive. *Vanderpool v Pineview Estates LC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010).

Metroplex facility and whether that level was sufficient to cause the alleged health effects. In our view, this omission would render plaintiffs' proffered evidence insufficient to survive a motion for summary disposition brought at the appropriate time. We agree with Chief Justice MARKMAN that "identifying the asserted exposure level of the toxin" at issue is necessary in determining whether the toxin at issue is even capable of causing the harm alleged. *Lowery*, 500 Mich at 1043 (MARKMAN, C.J., concurring).

While plaintiffs presented evidence showing that testing in November 2016 established that the presence of methane in parts of the Metroplex facility had increased since previous testing conducted before the facility was constructed, plaintiffs did not present any evidence of the alleged specific levels of methane or other potentially harmful toxins in or around the Metroplex facility to which plaintiffs were exposed. Without such evidence, it is not possible to determine whether the alleged exposure could have harmed plaintiffs and caused their alleged injuries. *Id*. at 1044. And although plaintiffs presented evidence that methane and other toxins, such a benzene, might have been present in the Metroplex facility, there is no information, absent some indication of the level of toxins that might have been present, from which a fact-finder could determine whether any exposure could have caused plaintiffs' alleged injuries. *Id*. As Chief Justice MARKMAN clarified, "[E]vidence of general causation should be tailored to the *estimated* amount and duration of exposure at issue to enable the fact-finder to reasonably conclude that exposure to the defendant's toxin in the amount and duration alleged is capable of causing the alleged injury." *Id*.

Accordingly, on remand, the causation analysis (after sufficient discovery) should focus on whether plain-

tiffs can provide specific information regarding the level of methane gas and other toxins potentially present at the Metroplex facility to which plaintiffs (and other members of the prospective class) were exposed and whether exposure at that level could cause plaintiffs' symptoms.

B. PREMATURITY

Plaintiffs argue that the trial court erred by prematurely holding, before discovery had been completed, that no genuine issue of material fact had been raised concerning causation. We agree that the trial court erred by granting summary disposition under MCR 2.116(C)(10) at such an early stage in the proceedings.

"Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). However, a party may not simply allege that summary disposition is premature. The party must clearly identify the disputed issue for which it asserts discovery must be conducted and support the issue with independent evidence. *Id*. The dispositive inquiry is whether "further discovery presents a fair likelihood of uncovering factual support for the party's position." *Mazzola v Deeplands Dev Co LLC*, 329 Mich App 216, 230; 942 NW2d 107 (2019) (quotation marks and citation omitted).

As discussed, the parties stipulated at the outset of this case to a bifurcated discovery period, during which discovery related to class-certification would take place before discovery related to plaintiffs' substantive claims. A deadline for dispositive motions was set nearly two years into the future. Yet the very next month defendants moved for summary disposition un-

der MCR 2.116(C)(10), seeking to test the factual sufficiency of the evidence supporting plaintiffs' allegations. See *El-Khalil*, 504 Mich at 160. According to plaintiffs, defendants had not even produced documents in response to their first request for production of documents at the time of the hearing, and plaintiffs were in the process of answering defendants' first request for interrogatories.

Notwithstanding the fact that discovery was still in its early stages, plaintiffs did present documentary evidence in support of many of their allegations. Plaintiffs presented ample evidence demonstrating that the property on which the Metroplex facility was built is contaminated and that LNAPLs are located on the property. Plaintiffs also presented evidence that a methane-detection system at the Metroplex facility was not operating properly from March 2015 until the Office of the Inspector General (OIG) for the USPS submitted its February 22, 2016 memorandum and that as a result of the malfunction, the Metroplex facility, according to a vendor who performed system maintenance on the methane-detection system, experienced methane buildup. With regard to the presence of chemicals and gases at the Metroplex facility, a January 25, 2017 OIG report revealed that testing performed at the Metroplex facility in November 2016 confirmed that methane levels in parts of the building "exceeded the concentrations considered when the building was designed." Testing performed in 2016 detected levels of benzene (a VOC) exceeding acceptable levels established by the Michigan Department of Environmental Quality, although other tests performed in 2016 did not detect excessive levels of benzene. Plaintiffs also presented evidence that they had suffered various physical and mental ailments

during the relevant time periods and provided evidence that exposure to methane and VOCs could cause these ailments.

We agree with defendants that the evidence presented by plaintiffs to date was, in itself, insufficient to prove a genuine issue of material fact regarding causation; specifically, plaintiffs did not present evidence proving the level of exposure acutely or chronically suffered by plaintiffs or definitively establish (most likely with expert testimony, as discussed later) that the alleged exposure caused their symptoms. See *Lowery*, 500 Mich at 1034. However, in the context of plaintiffs' claim that defendants' motion for summary disposition was premature, we conclude that plaintiffs have "at least assert[ed] that a dispute does indeed exist and support[ed] that allegation by some independent evidence." See *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). In other words, "further discovery presents a fair likelihood of uncovering factual support for the party's position." *Mazzola*, 329 Mich App at 230 (quotation marks and citation omitted). Our decision is bolstered by the fact that the causation analysis almost surely requires expert testimony, yet neither the class-certification nor substantive-issue deadline for naming expert witnesses had passed at the time defendants' motion was decided. See *Bayn v Dep't of Natural Resources*, 202 Mich App 66, 70-71; 507 NW2d 746 (1993) (stating that the "defendant's motion for summary disposition was granted prematurely because it was not reasonable to expect plaintiff to gather sufficient facts to withstand a motion for summary disposition within the compressed time frame allotted in this case between the filing of the complaint and the granting of the motion for summary disposition" and noting that with additional time the plaintiff's expert

could have collected additional data to support her position). While we express no opinion on whether plaintiffs will ultimately prevail on any future MCR 2.116(C)(10) motion brought after discovery, we conclude that plaintiffs are entitled to further discovery on the issue of causation.[4]

Reversed and remanded for reinstatement of plaintiffs' claims and for further proceedings that are consistent with this opinion.[5] We do not retain jurisdiction. Plaintiffs, as the prevailing parties, may tax costs. MCR 7.219(A).

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

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[4] We also note that the trial court, in its dispositional order, did not address plaintiffs' request to amend their complaint. MCR 2.116(I)(5) states that a trial court "shall give the parties an opportunity to amend their pleadings" if the grounds asserted for summary disposition are based on MCR 2.116(C)(10), unless "the evidence then before the court shows that amendment would not be justified."

[5] Given this outcome, we need not address plaintiffs' argument that the trial court failed to explicitly consider their public-nuisance claim. However, we reject defendants' argument, made at oral argument, that plaintiffs waived their nuisance claim, either before the trial court or on appeal.

TINSLEY v YATOOMA

Docket No. 349354. Submitted August 5, 2020, at Detroit. Decided August 13, 2020, at 9:10 a.m. Leave to appeal denied 507 Mich 893 (2021).

Ronald Tinsley, Van Buren Steel, Inc., and Van Buren Properties of Michigan, LLC, filed a complaint against Norman Yatooma and Norman Yatooma & Associates, PC, in the Wayne Circuit Court alleging legal malpractice. Plaintiffs had retained defendants to represent them in a separate action. In this action, plaintiffs complained that they were forced to settle the underlying litigation for less than the case was worth as a result of defendants' malpractice. Defendants moved for summary disposition under MCR 2.116(C)(7), asserting that any disputes, including claims of attorney malpractice, had to be resolved through binding arbitration pursuant to an arbitration provision in an engagement agreement the parties signed when plaintiffs had retained defendants. Defendants argued that the arbitration provision was valid as a matter of contract law because Tinsley had the agreement reviewed by independent counsel and fully understood the agreement before he voluntarily signed it. The trial court, Patricia Fresard, J., granted summary disposition for defendants and concluded that the arbitration provision was enforceable under the plain language of MRPC 1.8(h)(1) and an ethics opinion issued by the State Bar of Michigan, EO R-23, because Tinsley had consulted with independent counsel before he signed the agreement. Plaintiffs appealed.

The Court of Appeals *held*:

Plaintiffs argued that the arbitration provision was unenforceable because defendants had failed to fully explain the consequences of the provision in writing or to advise plaintiffs to consult with independent counsel regarding the provision in violation of their ethical duties under MRPC 1.8(h) and EO R-23. Arbitration is a matter of contract, and the same legal principles that apply to contract interpretation also apply to the interpretation of an arbitration agreement. Under the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*., an agreement to submit to arbitration is valid and enforceable except when legal or ethical grounds exist to

revoke the agreement. Contracts that violate ethical rules are not enforceable because they are contrary to public policy. While a violation of the MRPC could potentially serve as a basis for a court to revoke an arbitration provision under the UAA, it is not clear that MRPC 1.8(h)(1) applies to an arbitration provision. Nevertheless, assuming that MRPC 1.8(h)(1) was implicated in this case, the arbitration provision did not violate the rule because plaintiffs were represented by independent counsel in the signing of the agreement, which is all that MRPC 1.8(h)(1) requires. Similarly, EO R-23 requires, as one alternative, that a client consult with independent counsel before signing a fee agreement, which happened in this case. To the extent that EO R-23 could be construed to demand more, it is disavowed. Further, contrary to plaintiffs' argument, nothing in the plain language of MRPC 1.8(h)(1) requires an attorney to specifically advise a client regarding a retainer agreement that when consulting independent counsel about the agreement, independent counsel should or must discuss the arbitration provision in the agreement with the client.

Affirmed.

Speaker Law Firm, PLLC (by *Jennifer M. Alberts* and *Liisa R. Speaker*) for Ronald Tinsley, Van Buren Steel, Inc., and Van Buren Properties of Michigan, LLC.

Norman Yatooma & Associates, PC (by *Christine L. Constantino Jr.*, *Norman A. Yatooma*, and *Gavin J. Fleming*) for Norman Yatooma and Norman Yatooma & Associates, PC.

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

PER CURIAM. Plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7) (dismissal appropriate because of agreement to arbitrate). We affirm.

I. BACKGROUND

Plaintiffs retained defendants to represent them in a malpractice action (the underlying litigation) against

plaintiffs' former attorneys and business broker. In connection with defendants' representation of plaintiffs in the underlying litigation, the parties entered into an "Engagement Agreement." The engagement agreement contained a provision for binding arbitration, encompassing, among other issues, any "claim of attorney malpractice." The engagement agreement further provided:

> THE CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT, BY AGREEING TO BINDING ARBITRATION, THE CLIENT WAIVES THE RIGHT TO SUBMIT THE DISPUTE TO A COURT FOR DETERMINATION AND ALSO WAIVES THE RIGHT TO A JURY TRIAL OR TO PROSECUTE A CLASS ACTION.

Plaintiffs filed a complaint against defendants in the instant suit, alleging legal malpractice in the underlying litigation that forced plaintiffs to settle that action for less than the case was worth. Defendants moved for summary disposition under MCR 2.116(C)(7), asserting that the agreement to arbitrate required dismissal of any court proceedings. Defendants argued that the arbitration provision was valid as a matter of contract law because plaintiff Ronald Tinsley had the engagement agreement reviewed by independent counsel, John Valenti, and fully understood its contents before voluntarily signing it.

Plaintiffs responded that the arbitration provision was unconscionable and unenforceable because it violated Michigan Rule of Professional Conduct (MRPC) 1.8(h)(1), which prohibits a lawyer from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement[.]" Plaintiffs asserted that State Bar of Michigan Ethics Opinion

R-23 (July 22, 2016) (EO R-23)[1] indicated that an arbitration clause in an attorney-client agreement violates MRPC 1.8(h) unless, before signing the agreement, the client is fully informed of the provision's consequences in writing or consults with independent counsel regarding the arbitration provision. In support of their position, plaintiffs submitted the affidavits of Tinsley and Valenti, averring that they had not discussed the arbitration provision because defendants did not advise Tinsley that such a discussion was warranted. Defendants contended that they were not responsible for Tinsley and Valenti's failure to specifically discuss the arbitration provision contained in the engagement agreement.

The trial court concluded that the arbitration provision was enforceable under the plain language of MRPC 1.8(h)(1) and EO R-23 because Tinsley had consulted with independent counsel before signing the engagement agreement. The trial court granted defendants' motion for summary disposition on the basis that Tinsley had voluntarily signed the engagement agreement that contained an enforceable arbitration provision. Plaintiffs now appeal.

II. ANALYSIS

Plaintiffs argue that the arbitration provision is unenforceable because defendants violated their ethical duties under MRPC 1.8(h)(1) and EO R-23 to fully explain the consequences of the provision in writing or to advise plaintiffs to consult with independent counsel regarding the arbitration clause. Plaintiffs maintain that Tinsley and Valenti did not specifically discuss the

[1] State Bar of Michigan, Ethics Opinion R-23 (July 22, 2016), available at <https://perma.cc/9HKK-ZJCL>.

arbitration provision because defendants did not indicate to Tinsley that such a particular consultation was necessary.

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred because of "an agreement to arbitrate[.]"[2] We review de novo a trial court's decision on a motion for summary disposition. *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016). Whether a claim is subject to arbitration is also reviewed de novo, as is the construction of contractual language. *Id*. at 295.

In *Altobelli*, the Michigan Supreme Court explained as follows regarding the applicability of arbitration:

> Arbitration is a matter of contract. Accordingly, when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation. Our primary task is to ascertain the intent of the parties at the time they entered into the agreement, which we determine by examining the language of the agreement according to its plain and ordinary meaning. In considering the scope of an arbitration agreement, we note that a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration. The general policy of this

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[2] In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court recited the principles pertaining to a motion for summary disposition brought pursuant to MCR 2.116(C)(7):

> Under MCR 2.116(C)(7) . . . , this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

> State is favorable to arbitration. The burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement. In deciding the threshold question of whether a dispute is arbitrable, a reviewing court must avoid analyzing the substantive merits of the dispute. If the dispute is arbitrable, the merits of the dispute are for the arbitrator. [*Id*. at 295-296 (quotation marks, citations, and brackets omitted).]

The Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*., which was enacted pursuant to 2012 PA 371, provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made." MCL 691.1683(1). MCL 691.1686 states, in pertinent part:

> (1) An agreement contained in a record[3] to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.
>
> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

"[C]ontracts that violate our ethical rules violate . . . public policy and therefore are unenforceable." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002) (addressing referral-fee arrangements). "[C]ontracts containing performance requirements that would violate the MRPC are not enforceable because such contracts contradict Michigan's public policy." *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003) (addressing referral-fee arrangements). MRPC 1.8(h)(1) was referred to in EO R-23, which opinion came to the following conclusion:

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[3] "Record" is statutorily defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." MCL 691.1681(2)(f).

> A provision in a fee agreement for legal services purporting to require the parties to arbitrate any future dispute relating to the representation that might arise between them is not ethically permissible unless, prior to signing the fee agreement, the client either consults with independent counsel or consults with the contracting lawyer and is fully informed in writing regarding the scope and practical consequences of the arbitration provision.

"[E]thical opinions clearly are not binding on this Court and provide little, if any, precedential value, especially when statutory and judicial rules are completely dispositive with regard to the issues that the parties present." *Morris & Doherty*, 259 Mich App at 60-61, citing *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000).

The panel in *Watts* directly addressed the validity of an arbitration provision contained in an attorney-client agreement, concluding that under the then-applicable statutory arbitration scheme, the arbitration provision was fully enforceable. The Court reached this conclusion despite various ethics opinions that were inconsistent with the ruling and regardless of the fact that the defendants had not specifically advised the plaintiff about the arbitration provision or given him the opportunity to obtain the advice of independent counsel on the matter. *Watts*, 242 Mich App at 604-609. The Court reasoned that ethics opinions issued by the State Bar, while "instructive, are not binding on this Court." *Id*. at 607. The Court further stated:

> On the other hand, public policy pronouncements of the Michigan Legislature, enacted as statutes, are binding on this Court. . . .

* * *

> It is undisputed that plaintiff voluntarily signed the fee agreement in which he promised to submit to arbitration all disputes arising out of the agreement or the legal representation. . . . Plaintiff's legal malpractice claim is arguably covered by this language.
>
> Plaintiff does not allege fraud or deception in the procuring of the agreement. As noted, plaintiff's failure to read or understand the agreement is no defense. He has not provided this Court with any grounds for refusing to enforce the valid arbitration agreement. Resolving any doubts in favor of arbitration, the trial court's order granting defendants' motion for summary disposition and compelling arbitration was proper. [*Id*. at 607-609 (citations omitted).]

Likewise, in this case, it is undisputed that Tinsley voluntarily signed the engagement agreement that contained the arbitration provision. And, unlike the plaintiff in *Watts*, Tinsley was a sophisticated businessman who had the opportunity to review the engagement agreement with experienced independent counsel before he signed it. For those reasons, the present action is even more compelling than *Watts* with respect to the need to enforce the arbitration clause. We do note that, as quoted earlier, the UAA provides that an arbitration "agreement is valid, enforceable, and irrevocable *except on a ground that exists at law or in equity for the revocation of a contract*." MCL 691.1686(1) (emphasis added). This language essentially incorporates common-law contract principles. We do believe that a violation of the MRPC could potentially serve as a basis to revoke an arbitration provision under the UAA.[4]

We are, however, not entirely convinced that MRPC 1.8(h)(1) even applies to an arbitration provision, con-

[4] The parties do not address the UAA. Assuming that the arbitration clause in the engagement agreement is not covered by the UAA, see MCR 3.602(A), our ruling would be the same under general contract principles.

sidering that it specifically concerns "an agreement prospectively limiting the *lawyer's liability* to a client for malpractice." (Emphasis added.) Although parties may not have access to the courts for resolution when they have agreed to binding arbitration, we question whether arbitration actually limits liability. Nevertheless, assuming that MRPC 1.8(h)(1) was implicated, plaintiffs were "independently represented in making the agreement," which is all that MRPC 1.8(h)(1) requires.[5] And EO R-23 merely requires, as one alternative, that a client consult with independent counsel before signing the fee agreement; that is what occurred here. To the extent that EO R-23 could be construed to demand more, we disavow it.

Nothing in the plain language of MRPC 1.8(h)(1) suggests that a contracting attorney commits an ethical violation by demanding arbitration when a former client, who actually consulted with independent counsel regarding the underlying attorney-client agreement that contained the arbitration clause, fails to bring up the clause or issue during the consultation. And *Watts* makes clear that a failure to read an agreement is no defense. Furthermore, nothing in the plain language of MRPC 1.8(h)(1), or any of the other rules of professional conduct, indicates that an attorney needs to specifically advise a client that a consultation with an independent attorney regarding a retainer agreement should or must entail a discussion of an arbitration provision contained in the agreement. Here, the entire engagement agreement between plaintiffs and defendants was only four pages long. The

[5] We suggest contemplation by the State Bar of Michigan and our Supreme Court of an addition to or amendment of MRPC 1.8 to specifically address arbitration clauses in attorney-client agreements. The issue raises sufficient concerns justifying clarification on the subject.

arbitration provision warned plaintiffs in capital letters that signing the engagement agreement would waive their right to submit disputes to a court. Tinsley consulted with independent counsel Valenti regarding the engagement agreement; nothing more was required. It would seem a bit ludicrous to have mandated defendants to particularly inform plaintiffs that Valenti must examine the arbitration provision as part of his review of the engagement agreement. In sum, there was no ethical violation, and the arbitration provision is enforceable. Accordingly, the trial court did not err by summarily dismissing the legal-malpractice action under MCR 2.116(C)(7).

We affirm. Having fully prevailed on appeal, defendants may tax costs under MCR 7.219.

MARKEY, P.J., and K. F. KELLY and TUKEL, JJ., concurred.

SHAHID v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 347123. Submitted August 4, 2020, at Detroit. Decided August 20, 2020, at 9:00 a.m.

The Department of Health and Human Services (DHHS) sought recoupment of benefits from Abdus Shahid for allegedly violating regulations governing the use of benefits he received under Michigan's Food Assistance Program (FAP), which is funded by the Supplemental Nutrition Assistance Program (SNAP), administered by the United States Department of Agriculture (USDA). DHHS notified Shahid that as the result of the USDA's investigation of a store where Shahid had used SNAP/FAP benefits, DHHS believed that Shahid had engaged in benefits "trafficking," or the misuse of SNAP/FAP benefits by exchanging them for cash, nonfood items, or other ineligible items. DHHS requested a hearing through the Michigan Administrative Hearing Service after Shahid did not admit to the trafficking allegations or agree to repay the disputed benefits. During the hearing before an administrative-law judge (ALJ), a DHHS representative indicated that the transactions made by Shahid were indicative of trafficking according to the USDA's criteria. But the representative also acknowledged that DHHS had no evidence independent from the federal government's investigation and that it had no evidence that Shahid had ever actually received cash in exchange for FAP benefits. The ALJ concluded that Shahid had engaged in benefits trafficking on the basis of the USDA's investigation. Shahid sought judicial review in the Wayne Circuit Court, Annette J. Berry, J., which affirmed. Shahid's application for leave to appeal that decision was granted by the Court of Appeals.

The Court of Appeals *held*:

1. Ordinarily, a trial court reviews an administrative agency's factual findings under the substantial-evidence standard, which requires that the agency's factual findings be supported by competent, material, and substantial evidence on the whole record. The substantial-evidence standard requires more than a mere scintilla, but less than a preponderance, of the evidence. However, the standard of proof under federal regulations for establishing that a SNAP recipient committed an intentional program violation (IPV)

is the clear-and-convincing-evidence standard, which is a significantly higher burden of proof. Although Shahid argued that the trial court erred by reviewing the ALJ's factual findings under the substantial-evidence standard, the significance of the DHHS's heightened burden of proof in the administrative proceeding need not be addressed because the trial court clearly erred even under the substantial-evidence standard.

2. No evidence was presented that established that any of Shahid's transactions violated SNAP or FAP rules. The only evidence was by way of inference based on the USDA's criteria as to the types of transactions that fit the pattern of trafficking. However, no evidence explained *why* those criteria were indicative of trafficking. The types of electronic benefit transfer transactions that the USDA considered indicative of trafficking included: transactions ending in the same cents values of $.00, $.50, and $.99; multiple transactions using the same benefits account within a 24-hour period; and transactions in excess of $85. DHHS argued that a store patronized by Shahid carried mostly non-food items, and Shahid's transaction history showed that he used his benefits at other grocery stores; however, neither of these facts explained why the USDA's criteria were indicative of trafficking. The trial court correctly recognized that the ALJ's determinations regarding credibility and the weighing of evidence were entitled to deference. However, the ALJ did not make a credibility assessment; rather, the ALJ accepted the DHHS's conclusion without evidence as to its basis or the specific details of Shahid's transactions, including what he actually received in exchange for his FAP benefits. Although a pattern of transactions deemed to be suspicious pursuant to USDA criteria may provide a proper basis for investigation, it was insufficient to constitute substantial evidence, much less clear and convincing evidence, that Shahid actually committed an IPV. Additionally, even if some of Shahid's transactions were fraudulent, no evidence established that all of the transactions were fraudulent, so it would be improper to require Shahid to repay all of the transactions. Nonetheless, DHHS is not precluded from bringing a new claim against Shahid if it has evidence that any specific transaction was actually fraudulent.

Reversed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Tonya Celeste Jeter*, Assistant Attorney General, for the Department of Health and Human Services.

Ann Erickson Gault PLC (by *Ann E. Erickson Gault*) for Abdus Shahid.

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

RONAYNE KRAUSE, P.J. Appellant, Abdus Shahid, appeals by leave granted[1] the circuit court's order affirming the administrative decision finding that he violated regulations governing the use of benefits received under Michigan's Food Assistance Program (FAP) and funded under the federal Supplementary Nutrition Assistance Program (SNAP), 7 USC 2011 *et seq*. As a consequence, appellant was deemed to have committed an Intentional Program Violation (IPV) and was disqualified from FAP for 12 months; appellee, the Department of Health and Human Services (DHHS), was entitled to recoup the overissuance of benefits. Because there was no evidence presented to explain why appellant's pattern of benefits transactions was indicative of improper use, and DHHS appears to have instead relied on presumption alone, we conclude that the administrative decision was unsupported by substantial evidence. We therefore reverse.

I. BACKGROUND

In November 2016, the United States Department of Agriculture's Food and Nutrition Service (USDA)—the federal agency charged with administering SNAP—began investigating Family Bazar, a seller of food and household items located in Hamtramck, Michigan, for suspected violations of the regulations governing SNAP. During its investigations, the USDA identified

[1] *Shahid v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered May 23, 2019 (Docket No. 347123).

three types of electronic benefit transfer (EBT) transaction patterns that it considered indicative of benefits "trafficking," which refers to using FAP benefits to receive cash, nonfood items, or ineligible food items. The patterns are: (a) transactions ending in the "same cents" values of $.00, $.50, and $.99; (b) multiple transactions made from the same benefits account within a 24-hour period; and (c) transactions in excess of $85. The record does not include an explanation of why the USDA considers those patterns to be indicative of trafficking. The USDA conducted a site inspection of Family Bazar, which was found to have a single point-of-sale cash register without an optical scanner, and it sold various household items in addition to food. The USDA offered Family Bazar an opportunity to respond to the allegations of trafficking, to which Family Bazar apparently did not respond. The USDA determined that Family Bazar had committed benefits trafficking, so it permanently disqualified the store from participating in the program.

After completing its investigation, the USDA provided its investigative reports to DHHS, which administers Michigan's FAP and is responsible for pursuing trafficking charges against individual benefit recipients. A "food stamp trafficking unit supervisor" gave an accumulated packet of federal government investigation documents to Agent Mark Sultana of DHHS's Office of the Inspector General. Agent Sultana reviewed the USDA's investigative reports and identified that appellant had engaged in approximately 60 EBT transactions that met the criteria for suspicious transactions identified by the USDA. Agent Sultana notified appellant that DHHS believed appellant had engaged in benefits trafficking and had committed an IPV of the FAP's regulations. Appellant did not respond to Agent Sultana's invitation to participate in an interview, nor

did he admit the IPV and agree to repay the benefits when invited to by DHHS. Agent Sultana requested a hearing through Michigan's Administrative Hearing Service.

A telephone hearing was held before administrative-law judge (ALJ) Janice Spodarek. Agent Sultana appeared on behalf of the Department, and appellant was represented by an authorized hearing representative. Agent Sultana recited much of the contents of the USDA's investigation of Family Bazar, the transactions made by appellant, and the transactions that satisfied the USDA's criteria for being suspicious. The ALJ expressed some concern as to why those criteria were indicative of trafficking, to which Agent Sultana did not directly respond; instead, he merely referred to the "federal investigation." Agent Sultana admitted that he did not participate in the federal investigation or in the preparation of the federal investigation reports. Rather, he only "put all of this information together." He also admitted that he had no independent evidence other than what he was given from the federal government, nor did he have any evidence of appellant's mental state or that he had ever actually received cash in exchange for an EBT transaction. Appellant testified that he bought "only food" at Family Bazar.

The ALJ essentially adopted DHHS's factual assertions without ever mentioning appellant's brief testimony. The ALJ recognized that DHHS had the burden of proving trafficking by clear and convincing evidence. It found that DHHS had met that burden because

> [a] review of the Respondent's EBT history revealed that [his] EBT Bridge card was used to perform unauthorized FAP transactions at the Family Bazar as documented by the USDA Food and Nutrition Service, including an un-

> usual number of transactions ending in the same cents value, multiple transactions made from individual benefit accounts in unusually short time frames or excessively large recipient purchase transactions for a store of this size and inventory.
>
> The Petitioner does not need to prove explicit intent; it may be inferred with circumstantial evidence.

Appellant sought judicial review of the ALJ's decision in the circuit court. The circuit court affirmed, citing the deference given to the ALJ to weigh the evidence and assess the credibility of the witnesses. Appellant sought, and we granted, leave to appeal the circuit court's decision. *Shahid v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered May 23, 2019 (Docket No. 347123).

II. STANDARD OF REVIEW

Generally, we review de novo a trial court's legal conclusions, and we review for clear error its factual findings. *Braska v Challenge Mfg Co*, 307 Mich App 340, 351-352; 861 NW2d 289 (2014). We also review for clear error whether the trial court misapprehended or misapplied its own review of whether the agency's factual findings were adequately supported. *Id*. Ordinarily, a trial court would review an agency's factual findings under the substantial-evidence standard, under which the agency's factual findings must be supported by competent, material, and substantial evidence on the whole record, which has been described as "more than a mere scintilla, but less than a preponderance of the evidence." *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 583-584; 701 NW2d 214 (2005) (quotation marks and citation omitted). However, as the ALJ recognized, federal regulations require a significantly elevated quantum of proof for

establishing an IPV: clear and convincing evidence. 7 CFR 273.16(e)(6). The clear-and-convincing-evidence standard is "the most demanding standard applied in civil cases." *In re Martin*, 450 Mich 204, 226-227; 538 NW2d 399 (1995). In contrast, "substantial evidence" may well be the least-demanding standard.

Appellant argues that in reviewing the ALJ's factual findings under the substantial-evidence standard, the trial court erred by failing to recognize that DHHS's standard of proof before the ALJ was that of clear and convincing evidence. Nevertheless, under the circumstances of this case, we need not address the significance, if any, of DHHS's heightened burden of proof in the administrative proceeding. As we will discuss, we conclude that the trial court clearly erred even in applying the substantial-evidence standard. We therefore leave for another day whether a trial court should review agency findings in a SNAP IPV determination under the clear and convincing standard. Appellant also raises a due-process argument, which is a constitutional question we review de novo. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717; 660 NW2d 74 (2002) (citation omitted).

III. ANALYSIS

There is no dispute that appellant made the transactions documented by DHHS. There is no dispute as to the nature, design, or operations of Family Bazar. There is no dispute that the USDA found Family Bazar to have violated the SNAP program, or that the USDA has certain criteria it deems indicative of benefits trafficking. However, there is no evidence whatsoever that any of appellant's transactions were actually in violation of any SNAP or FAP rules. The only ostensible evidence is by way of inference based on the USDA's criteria; yet,

there is no evidence whatsoever explaining why those criteria are indicative of trafficking. The record shows that DHHS had ample opportunity to provide an explanation and simply failed to do so.

On appeal, DHHS argues that Family Bazar carried mostly nonfood items and that appellant's transaction history shows that he used his EBT card at other grocery stores. This does not explain why the USDA's criteria are indicative of trafficking, or why, for example, a high-dollar-value transaction should be, as DHHS puts it, "unusual, irregular and inexplicable." The trial court properly recognized that the ALJ's credibility determinations and weighing of the evidence are entitled to deference. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372-373; 733 NW2d 403 (2007). However, the ALJ made no credibility assessment; she simply accepted DHHS's unexplained conclusion essentially verbatim, without evidence as to its basis or the specifics of appellant's transactions, e.g., what he received in exchange for FAP benefits or what his intent was. Although a pattern of transactions deemed to be suspicious may provide a proper basis for investigation, we conclude that such a pattern alone is insufficient to constitute substantial (much less clear and convincing) evidence that appellant *actually* committed an IPV.

We emphasize that we are not holding that appellant did not commit an IPV. However, DHHS failed to provide any explanation for *why* the USDA's criteria are indicative of trafficking. Even if DHHS could provide such an explanation—which it was not even able to do during oral argument before this Court—it would still also need to establish that one or more individual transactions were fraudulent. In other words, a suspicious pattern may be cause for an investigation, but it is

not, by itself, proof that any particular transaction was actually fraudulent, especially under the "clear and convincing" standard of proof. Finally, even if the evidence showed that some of appellant's transactions were fraudulent, that would not establish that all of them were fraudulent. It would therefore be improper to require appellant to repay *all* transactions just because *some* were improper, or because they happen to fall within a pattern suggesting that some of them *might* have been improper. Nonetheless, we expressly hold that DHHS is not precluded by this opinion from commencing a new IPV claim against appellant if DHHS has some genuine evidence that any specific transaction was actually fraudulent.

IV. CONCLUSION

Because the ALJ's decision was not factually supported under any standard of review, the trial court erred by affirming it. We recognize that appellant has also raised claims that the ALJ's decision was arbitrary and that he was deprived of due process. Because appellant is entitled to reversal on the basis of insufficient factual support, we need not address his remaining arguments.

Reversed.

SAWYER and BOONSTRA, JJ., concurred with RONAYNE KRAUSE, P.J.

PEOPLE v BASKERVILLE

Docket No. 345403. Submitted April 14, 2020, at Detroit. Decided August 20, 2020, at 9:05 a.m.

Travun Baskerville was convicted following a jury trial in the Wayne Circuit Court of second-degree murder, MCL 750.317; human-trafficking enterprise involving death, MCL 750.462d(b), MCL 750.462f(1)(d); human trafficking of a minor involving commercial sexual activity, MCL 750.462e(a); commercial child sexually abusive activity, MCL 750.145c(2); possession of child sexually abusive material, MCL 750.145c(4)(a); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. AB, a minor, had pay-for-sex dates with other men at defendant's behest; defendant kept the money she earned, controlled the details of the enterprise as well as the individual transactions, and used physical violence to prevent her from stopping her involvement. During the encounter at issue in this case, the client demanded his money back after AB refused to have sexual intercourse with him without a condom; AB refused the request and told the client to leave the house. During the argument between AB and the client, defendant entered the room with a long gun, ultimately shooting and killing the client. Defendant and AB later took the client's body out of the house and put it in a dumpster next door; they subsequently moved the dumpster into the garage of a vacant house and moved the client's vehicle. AB made several false statements to the police before stating that defendant had shot the client during a dispute. Although AB testified that she saw defendant with only one gun, the autopsy revealed that the client was shot by two guns. The court, Qiana D. Lillard, J., ordered that defendant's felony-firearm sentence be served consecutively with all of his sentences and that his sentence for human-trafficking enterprise involving death be served consecutively to his remaining five sentences, which were to be served concurrently. Defendant appealed.

The Court of Appeals *held*:

1. Generally, only the jury may determine the credibility of a witness or the weight to be afforded any evidence, and it may convict a defendant based solely on the testimony of an accom-

plice. In that regard, a jury is free to believe or disbelieve, in whole, or in part, any of the evidence presented. Although there are circumstances under which a court may remove a credibility assessment from the jury, those circumstances are extremely rare and require testimony that borders on being impossible. In this case, AB's testimony was not so incredible that it should have been taken from the jury. While AB's testimony was potentially problematic, the jury was instructed that it should exercise caution in considering the testimony of an accomplice testifying in exchange for immunity, and the jury was free to believe AB, in whole or in part. Accordingly, defendant's convictions could be supported by AB's testimony alone, and from her testimony, there was sufficient evidence to support defendant's conviction of second-degree murder. In addition, there was sufficient evidence to support defendant's conviction of human trafficking of a minor involving commercial sexual activity; even though there was no evidence corroborating AB's testimony, corroboration is specifically not required under MCL 750.462g(1).

2. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The prosecution is not obligated to use the least prejudicial evidence possible. Standing alone, the gruesomeness of a photograph is insufficient for it to be excluded. Instead, the proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. The photographs in this case were not offered to simply inflame the jury. Rather, the photographs, which were relevant to the material issues at trial, were the least objectionable of those available, and the trial court did not abuse its discretion by admitting them.

3. In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if expressly authorized by statute. MCL 750.462f(5) provides that a court may order a term of imprisonment imposed for a conviction of human-trafficking enterprise involving death be served consecutively to a term of imprisonment for the commission of any other crime. When a statute grants a trial court discretion to impose a consecutive sentence, that decision is reviewed for an abuse of discretion. The trial court was authorized under MCL 750.462f(5) to impose a consecutive sentence for defendant's conviction of human-trafficking enterprise involving death, and its decision to do so was supported by the particularized reasons it stated on the record—including defendant's treatment of AB; the lack of charges against defendant related to AB's son, who was in the house at the time of the crimes; and the magnitude of defendant's overall guidelines

score. The decision to require that the sentence be served consecutively to defendant's other convictions was not an abuse of discretion. The aggregate of the sentences imposed was not disproportionate because the individual sentences did not exceed the maximum punishment allowed for each sentence, which was life imprisonment.

4. Under MCL 777.41(1)(a), a trial court must assign 50 points for Offense Variable (OV) 11 if two or more criminal sexual penetrations occurred. In scoring OV 11, a trial court may not count a sexual penetration that formed the basis for the conviction, but may score all other sexual penetrations of the victim by the offender arising out of the sentencing offense. To count the penetrations under OV 11, there must be a requisite relationship between the sexual penetrations by the offender and the sentencing offense. Under MCL 750.462d(b) and MCL 750.462f(1)(d), human trafficking involving death does not include sexual penetration as an element of the offense. However, MCL 750.462d(b) provides that with regard to human trafficking, a person shall not "[k]nowingly benefit financially or receive anything of value from participation in an enterprise . . . if the enterprise has engaged in an act proscribed under" the human-trafficking provisions of the Michigan Penal Code, MCL 750.462a *et seq*. "Forced labor or services"—which, under MCL 750.462a(g), (i), and (*l*), includes commercial sexual activity as well as any other activities for the benefit of a defendant—are proscribed under MCL 750.462. With regard to the offense of human trafficking involving death, a trial court may assess points under OV 11 when the sexual penetrations occur as a result of the victim being forced into the criminal enterprise during which the penetrations occur—even when the offender does not personally engage in sexual relations with the victim. Instead, an offender's role in forcing the victim into such a criminal enterprise creates a sufficient causal connection between the crime and the sexual penetrations to score the penetrations for OV 11. In this case, AB's testimony established that defendant forced her to engage in sex-for-hire acts with various persons, which constituted "[f]orced labor or services" for purposes of the offense of human trafficking involving death. By forcing AB to be in the criminal enterprise, there was a sufficient causal connection between the crime and the sexual penetrations to score those penetrations for OV 11, and the trial court did not clearly err by assessing 50 points for OV 11.

5. With regard to defendant's remaining OV challenges, the trial court did not clearly err by (1) assessing 15 points for OV 5 (serious psychological injury to a victim's family requiring profes-

sional treatment) for defendant's second-degree murder conviction, (2) assessing 10 points for OV 14 for defendant's second-degree murder conviction because the evidence supported a finding that defendant was the leader in a multiple-offender situation, or (3) assessing 10 points for OV 19 because the evidence established that defendant interfered with or attempted to interfere with the administration of justice. However, the trial court clearly erred by assessing 10 points for OV 9 (two to nine victims placed in danger of physical injury) for both defendant's second-degree murder and human-trafficking-involving-death convictions because, as conceded by the prosecutor, although AB's one-year-old child was in the house when defendant shot the client, there was no evidence that defendant's conduct for either offense placed the child in danger of physical injury or death. The trial court also clearly erred by assessing 15 points for OV 10 (exploitation of a vulnerable victim involving predatory conduct) with regard to the second-degree murder conviction because, as conceded by the prosecutor, while defendant placed advertisements to induce potential customers to pay for sexual encounters with AB, a preponderance of the evidence did not support that defendant engaged in preoffense conduct directed at a particular victim. The reduction in points for OV 9 and OV 10 for the second-degree murder conviction had no effect on defendant's guidelines range for that conviction. Similarly, the reduction in points for OV 9 for the human-trafficking-involving-death conviction had no effect on defendant's guidelines range for that conviction. Defendant was not entitled to resentencing because the scoring errors did not affect the appropriate guidelines range for either offense.

Defendant's convictions and sentences affirmed. Case remanded to the trial court for the ministerial task of correcting defendant's guidelines scores.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Timothy A. Baughman*, Special Assistant Prosecuting Attorney, for the people.

Melvin Houston for defendant.

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

RONAYNE KRAUSE, J. A jury convicted defendant of second-degree murder, MCL 750.317;[1] human-trafficking enterprise involving death, MCL 750.462d(b), MCL 750.462f(1)(d); human trafficking of a minor involving commercial sexual activity, MCL 750.462e(a); commercial child sexually abusive activity, MCL 750.145c(2); possession of child sexually abusive material, MCL 750.145c(4)(a); felon in possession of a firearm (felon-in-possession), MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve prison terms of 60 to 100 years each for the murder and human-trafficking-enterprise-involving-death convictions, 25 to 50 years each for the human-trafficking-of-a-minor-for-commercial-sexual-activity and the commercial-child-sexually-abusive-activity convictions, 1 to 15 years for the possession-of-child-sexually-abusive-material conviction, one to five years for the felon-in-possession conviction, and a two-year term of imprisonment for the felony-firearm conviction. The trial court ordered that defendant's felony-firearm sentence be served consecutively with all of his sentences and that his sentence for human-trafficking enterprise involving death be served consecutively to his remaining five sentences, which are to be served concurrently. Defendant appeals as of right. We affirm defendant's convictions and sentences, but we remand for the ministerial task of correcting his sentencing guidelines scores. This appeal is being decided without oral argument under MCR 7.214(E)(1).

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[1] The jury acquitted defendant of the original charge of first-degree premeditated murder, MCL 750.316(1)(a), and found him guilty of the lesser offense of second-degree murder.

I. BACKGROUND

Defendant's convictions arise from the fatal shooting of Donald Calhoun during a pay-for-sex "date" with 17-year-old AB at a Detroit house on the morning of June 1, 2017. AB testified, in accordance with an immunity agreement, that she began dating defendant when she was 16 years old. She did not want to have sex for money; however, defendant persuaded her to do so, took the money she made, controlled and dictated all details of the enterprise and individual transactions, and refused her requests to stop by using physical violence against her. In the instant incident, after a "date" was arranged, Calhoun met with AB at her house on Burgess Street. According to AB, after engaging in oral sex using a condom as AB required, Calhoun asked to engage in vaginal intercourse without using a condom. AB refused and told Calhoun to leave. In turn, Calhoun demanded his money back. Some manner of dispute between AB and Calhoun ensued, at which point defendant entered the room with a "long gun." Defendant and Calhoun exchanged words, and Calhoun suggested that they go outside to settle the matter. Defendant shot Calhoun instead. AB's child, who was then one year old, was in a bedroom further back in the house at the time.

After "an hour or two," defendant and AB dragged Calhoun's body out of the house, put his body in a dumpster they found next to the vacant house next door, and pushed the dumpster to the detached garage of another vacant house on the other side of a grassy field. They also moved Calhoun's vehicle. The next day, on June 2, Calhoun's sister filed a missing-person report, and an investigation eventually led the police to the Burgess Street residence. After making several false statements, which she explained were at least

partially made at defendant's direction,[2] AB told the police that defendant shot Calhoun during a dispute. On July 7, AB led the police to Calhoun's body, which was badly decomposed and identified by Calhoun's sister on the basis of his tattoos. AB testified that she only observed one gun in the house or in defendant's possession and that she did not see Calhoun with a gun. However, Calhoun's autopsy revealed that Calhoun had been shot by bullets fired from two different guns.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution did not present sufficient evidence to prove beyond a reasonable doubt that he committed second-degree murder or engaged in human trafficking of a minor involving commercial sexual activity. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must "review[] the evidence in a light most favorable to the prosecutor to determine whether any tier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (citation and quotation marks omitted). "[A] reviewing court is required to draw all reasonable inferences and make

[2] Telephone calls defendant made to AB "sometime in July" were played for the jury. We have not been able to find a transcript of those calls, nor were the calls themselves given to this Court in any fashion. Apparently, the calls consisted of efforts by defendant either to dissuade AB from talking to the police or to persuade her to provide the police with a fictitious version of events. AB characterized defendant's calls as "[h]e's saying all this to try to save [him]self from me talking, that's why he's saying that."

credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicting evidence, and any reasonable inferences that may be drawn from that evidence, must be resolved in favor of the prosecution. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012).

Before we address any specific convictions, the gravamen of defendant's argument on appeal is that most of the evidence against him consisted of AB's testimony, which he alleges was not credible and not corroborated, so it should not be relied upon. Defendant notes that the trial court harbored some doubt that AB told the complete truth regarding the circumstances of Calhoun's murder, especially given the discrepancy between her testimony that she only saw one gun and the forensic evidence that Calhoun had been shot by two guns. We do not dismiss the trial court's reservations. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). However, although it is sometimes appropriate for a court to remove a credibility assessment from the jury's consideration, those circumstances are extremely rare and require testimony that borders on being impossible. See *People v Lemmon*, 456 Mich 625, 642-646; 576 NW2d 129 (1998). Otherwise, only the jury may determine the credibility of a witness or the weight to be afforded any evidence, and it may convict a defendant based solely on the testimony of an accomplice. *People v Koukol*, 262 Mich 529, 532-533; 247 NW 738 (1933); *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). "[T]he credibility of witnesses is a matter of weight, not sufficiency." *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977).

"[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The jury may

choose to believe part of a witness's testimony and disbelieve another part of the same witness's testimony. See *Ferris v Neville*, 127 Mich 444, 449-451; 86 NW 960 (1901); *Detroit Electric Light & Power Co v Applebaum*, 132 Mich 555, 557-558; 94 NW 12 (1903). Defense counsel thoroughly explored various weaknesses in AB's testimony. The trial court properly instructed the jury that it should exercise caution in considering the testimony of an accomplice who had received an immunity agreement in exchange for testimony, that it could consider a witness's prior inconsistent statements in determining the witness's believability, and that it was permitted to believe that a witness lied about some things but told the truth about others. AB's testimony was not so incredible that it should have been taken from the jury. The jury was fully aware that AB's testimony was potentially problematic, and it nevertheless chose to believe AB, as was the jury's right. Therefore, we reject defendant's argument that his convictions could not be based on AB's testimony alone.

A. SECOND-DEGREE MURDER

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.' " *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Second-degree murder evolved from common-law murder, under which "malice afore

thought" was understood for centuries to be the "grand criterion" distinguishing murder from less "wicked" homicides. *People v Hansen*, 368 Mich 344, 350-351; 118 NW2d 422 (1962) (citation and quotation marks omitted); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544-547; 775 NW2d 857 (2009) (citation and quotation marks omitted).

AB's testimony at trial—which the jury was free to, and clearly did, believe—was that defendant intervened in a dispute between AB and Calhoun, which led to further arguing between Calhoun and defendant. When Calhoun suggested that they step outside, defendant shot Calhoun and then hid his body in a dumpster. The evidence therefore shows that defendant intentionally killed Calhoun; and no mitigating circumstances, such as self-defense or an accident, were present to negate the clear presence of malice. See *Mesik*, 285 Mich App at 546. Defendant argues that AB did not know how many times defendant fired his gun, and of the three bullets recovered from Calhoun's body, there was no evidence of how much damage each bullet caused. Defendant concludes that Calhoun *could* have sustained a fatal wound from only one gunshot from the mysterious second gun, which *could* have been fired by someone other than defendant. Although this may be a plausible theory, we decline defendant's invitation to invade the jury's role of determining what inferences should be drawn from the evidence. The evidence, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that defendant committed the crime of second-degree murder.

B. HUMAN TRAFFICKING OF A MINOR INVOLVING COMMERCIAL SEXUAL ACTIVITY

MCL 750.462e(a) provides that a person shall not "[r]ecruit, entice, harbor, transport, provide, or obtain

by any means a minor for commercial sexual activity." The elements of the offense, as delineated in M Crim JI 36.4a, are as follows: (1) "that the defendant participated in an enterprise that engaged in forced labor or services or commercial sexual activity involving a person or persons less than 18 years old," (2) "that the defendant knew that the enterprise was engaged in forced labor or services or commercial sexual activity with this person or persons," and (3) "that the defendant benefited financially or received anything of value from [his/her] participation in the enterprise."

AB testified at trial that defendant manipulated her into engaging in pay-for-sex activities when she was a minor; that she informed defendant that she wanted to stop this activity but defendant would not let her stop, including through the use of physical violence; that defendant set up and controlled almost every aspect of the pay-for-sex enterprise; and that she turned all the money for her pay-for-sex encounters over to defendant. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant committed the crime of human trafficking of a minor involving commercial sexual activity. Although, as noted, defendant argues that there was no evidence to corroborate AB's testimony, corroboration is not required under the human-trafficking statute. See MCL 750.462g(1) (providing that "if a victim testifies, that testimony need not be corroborated"). The prosecution presented sufficient evidence to support defendant's conviction of human trafficking of a minor involving commercial sexual activity.

III. PHOTOGRAPHIC EVIDENCE

Defendant next argues that the trial court abused its discretion by admitting color photographs depicting

Calhoun's decomposed body. Defendant did not object to the admission of the photographs altogether, but only to doing so in color rather than in black and white. We disagree. We review for an abuse of discretion a trial court's decision to admit or exclude photographic evidence, and the decision will not be disturbed on appeal absent a clear abuse of that discretion. *People v Head*, 323 Mich App 526, 539-540; 917 NW2d 752 (2018). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013).

The general rule is that "relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, the[] rules [of evidence], or other rules adopted by the Supreme Court"; 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. "A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011). Relevant evidence may be excluded under MRE 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. MRE 403 is not intended to exclude "damaging" evidence because any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) (citation and quotation marks omitted), mod on other grounds 450 Mich 1212 (1995). Rather, MRE 403 excludes only *unfairly* prejudicial evidence, meaning there is a serious danger that the jury would give evidence with relatively little

logical relevance undue weight or that the evidence would tend to arouse the jury's emotions to a degree that would preclude proper consideration of the actual merits of the case. *Mills*, 450 Mich at 75-76; *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995).

The prosecution may not introduce evidence specifically calculated to inflame the jury's emotions, especially if the evidence has little other substantive value. *Mills*, 450 Mich at 77. However, the prosecution is not obligated to use the least prejudicial evidence possible, *Fisher*, 449 Mich at 452, and the "unfairness" of potentially emotionally inflammatory evidence is mitigated when the proponent lacks any less prejudicial way to establish a critical issue, *Mills*, 450 Mich at 76. The gruesomeness of a photograph, standing alone, is insufficient to merit its exclusion. *Id*. at 77. "The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id*. at 76.

We have reviewed the challenged color photographs. Most of the photographs were of clean skeletal remains, two were of the dumpster in which Calhoun was found without any body parts readily obvious, two were x-ray images that were already black and white, one is of three men wearing black clothing strapping a completely wrapped bundle (presumably a body) to a stretcher, and two are close-up photographs of Calhoun's tattoos. Only the latter two show obvious decomposing human remains. The latter two are by far the most disturbing, but they do not appear to be purposelessly gruesome. The photographs further served as corroboration of AB's testimony concerning what she observed and her own actions during the incident, and also served as illustration and corroboration for the testimony provided by an evidence technician and the

medical examiner. We are unconvinced that the emotional impact of the nontattoo photographs would have been appreciably diminished had they been rendered in black and white rather than in color, and any details would have been more difficult to discern. The photographs of Calhoun's tattoos might indeed have had less emotional impact in black and white, but they might also have been rendered incomprehensible.

In any event, a relevant photograph is not inadmissible merely because it may arouse emotion. These photographs were not offered simply to inflame the jury. The prosecutor explained that the color photographs were necessary for visual "clarity," and that the least objectionable ones, from the many available, had been selected. Defense counsel conceded that there were other photographs that were "[w]ay worse." The trial court agreed that the selected photographs are "the least traumatic of the pictures that allow the people to still convey the relevant information . . . ." In sum, the trial court endeavored to judiciously balance the probative value of the evidence against its prejudicial effect, and its decision to admit the photographs, which were relevant to material issues at trial, was within the range of reasonable and principled outcomes. Accordingly, the trial court did not abuse its discretion by admitting them.

IV. CONSECUTIVE SENTENCES

Defendant challenges as error the trial court's decision to order that his sentence for human-trafficking enterprise involving death be served consecutively to his other sentences. We disagree.

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v Ryan*, 295

Mich App 388, 401; 819 NW2d 55 (2012) (citation and quotation marks omitted). Contrary to defendant's claim, MCL 750.462f(5) authorizes a trial court to impose a consecutive sentence for a violation of the human-trafficking statute. When a statute grants a trial court discretion to impose a consecutive sentence, that decision is reviewed for an abuse of discretion. *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). To facilitate appellate review, a trial court must "articulate on the record the reasons for each consecutive sentence imposed." *Id*. The court is required to "give particularized reasons" when imposing a consecutive sentence. *Id*. at 666.

The trial court's reasons, considered in conjunction with the Legislature's express authorization of consecutive sentences, were sufficient to demonstrate an outcome within the range of reasonable and principled outcomes under the circumstances of this case. The trial court extensively described defendant's treatment of AB, who was a child at the time, as akin to slavery, and the court marveled at how defendant had somehow never been charged with any crimes regarding AB's son. The trial court observed that it had never seen a sentencing guidelines score as high as defendant's score. The court also observed that defendant likely "would have got[ten] away with this whole thing" if he had called the police and claimed he was defending AB from an assault after the murder. Instead, defendant lured Calhoun to have sex with "a child" and then "put him away like a piece of trash to rot" and severely undermined himself with his telephone calls to AB from jail. It is apparent that the trial court considered the offenses and the offender and decided that consecutive sentences were appropriate under the circumstances.

Defendant argues that given his age at the time of sentencing, his 60-year minimum sentence is already a "death sentence" and that consecutives sentences are, therefore, "overkill" and disproportionate under the circumstances of this case.[3] However, because the individual sentences do not exceed the maximum punishment allowed for each sentence, which is life imprisonment, MCL 750.462f(1)(d) and MCL 750.317, the aggregate of the sentences is not disproportionate. See *Ryan*, 295 Mich App at 401 n 8. Consequently, we conclude that the trial court did not abuse its discretion.

V. SCORING OF THE OFFENSE VARIABLES

In his last claim, defendant argues that he is entitled to be resentenced because the trial court erroneously scored several offense variables (OVs) of the sentencing guidelines.[4] Although we agree that some of the OVs were erroneously scored, we conclude that resentencing is not required. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[3] The principle of proportionality governs the reasonableness of sentences and " '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), quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

[4] The trial court scored the guidelines for defendant's convictions of both second-degree murder and human-trafficking enterprise involving death. We have only been able to find the PSIR sentencing guidelines worksheet for defendant's murder conviction in the record, but the trial court made a commendable record of its scoring decisions for both convictions at the sentencing hearing.

"Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

A. OV 5

The trial court scored OV 5 at 15 points for defendant's murder conviction. "OV 5 is scored when a homicide or homicide-related crime causes psychological injury to a member of a victim's family." *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). A score of 15 points is appropriate if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). "In this context, 'serious' is defined as 'having important or dangerous possible consequences.' " *Calloway*, 500 Mich at 186 (citation omitted). "[I]n scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received." *Id*.

At sentencing, Calhoun's sister gave an impact statement, expressing her anger, grief, and despair at the loss of her younger brother. She expressed that Calhoun's murder "has forced [her] to live an unfamiliar life," "[f]orced [her] to take medication in order to get a full night's rest," and "forced [her] to deal with [her] nightmares . . . ." Calhoun's murder had caused her to be less sociable, less lively, "not real productive at work," and "depressed and sad most days." Since Calhoun's murder, she "wake[s] in the middle of the night with a total sadness in the pit of [her] stomach. The pain is the way [she] start[s] each and every day."

She indicated that her family lived within five miles of where Calhoun was murdered and that her "stomach turns, [she] get[s] nauseous, [her] palms begin to sweat and [she] get[s] a pounding headache whenever [she is] close to that area." She also expressed how her children and husband were suffering and noted that her daughter had "become withdrawn and sad . . . ." These statements provided a reasonable basis for the court to conclude that Calhoun's family members suffered serious psychological injury.[5]

Defendant challenges the 15-point score on the basis that there was no evidence that psychological treatment was necessary, sought, or intended to be sought by any member of Calhoun's family. However, MCL 777.35(2) directs the assessment of 15 points if the "serious psychological injury to the victim's family *may* require professional treatment." (Emphasis added.) "In making this determination, the fact that treatment has not been sought is not conclusive." *Id*. OV 5 "does not require proof that a victim's family member has already sought or received, or intends to seek or receive, professional treatment." *Calloway*, 500 Mich at 186. Rather, "[p]oints are also properly assessed when the serious psychological injury may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment." *Id*. at 188. The nature and descriptions of the psychological effects of Calhoun's death on his family members were sufficient to establish that even if professional treatment had not yet been sought, it may be necessary in the future. Consequently, the

[5] "When calculating scores under the sentencing guidelines, a trial court may consider all the evidence in the trial court record." *People v Dickinson*, 321 Mich App 1, 21; 909 NW2d 24 (2017).

trial court did not clearly err by finding that the evidence supported a 15-point score for OV 5.

B. OV 9

The trial court scored OV 9 at 10 points for both defendant's murder conviction and his human-trafficking-involving-death conviction. Ten points must be assessed for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). Each person placed in danger of injury or death during the commission of the sentencing offense is considered a "victim" for the purpose of scoring OV 9. *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007). "A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *People v Gratsch*, 299 Mich App 604, 624; 831 NW2d 462 (2013), vacated in part on other grounds 495 Mich 876 (2013). OV 9 may not be scored on the basis of conduct outside the particular criminal transaction that gave rise to the sentencing offense. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008); *Gullett*, 277 Mich App at 217-218.

The trial court's score of 10 points for OV 9 for both convictions was based on the danger posed to AB's one-year-old child by defendant's shooting of Calhoun and by the child being left alone while defendant and AB moved Calhoun's body and vehicle. We applaud the trial court for its concern for the child. However, we cannot find any evidence in the record that the child was in close proximity when defendant shot Calhoun. AB testified that the shooting occurred in the front living room and that the child was in his bedroom, which was toward the back of the house. Because bullets can travel a very long distance, "close proximity" to a physically

threatening situation with a gun may be much more extensive than "close proximity" to, say, a physically threatening situation with a knife. However, defendant emerged from the back of the house, so the child would have been behind defendant and thus not in any potential line of fire, and no other specific individuals who might have been in the line of fire have been identified. The record reflects that the child was left alone for some period of time, but only after the homicide had occurred. In any event, the record does not clearly indicate the length of time the child was left alone or whether the child was really endangered as a consequence. The child was in an obviously unhealthy environment, but the evidence does not indicate that defendant's procurement of the pay-for-sex "dates" posed any specific danger of *physical* harm to the child.

The evidence does not support a finding that defendant's conduct during the offenses of second-degree murder or human trafficking involving death placed the child "in danger of physical injury or death" for purposes of scoring OV 9. Accordingly, as the prosecution concedes, the trial court erred by assigning a 10-point score for this variable.

C. OV 10

The trial court scored OV 10 at 15 points for defendant's murder conviction.[6] The prosecutor concedes that OV 10 was erroneously scored, and we agree.

OV 10 addresses exploitation of a vulnerable victim, and the trial court must assess 15 points if "[p]redatory conduct was involved." MCL 777.40(1)(a). " 'Predatory

[6] The trial court also scored OV 10 at 10 points for defendant's human-trafficking conviction, but defendant does not challenge that guidelines score on appeal.

conduct' means preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). Predatory conduct encompasses "only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, . . . 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.' " *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (citation omitted). In order to find that a defendant engaged in predatory conduct, a trial court must conclude that (1) the defendant engaged in preoffense conduct, (2) the defendant directed that conduct toward "one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation," and (3) the defendant's primary purpose in engaging in the preoffense conduct was victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

There is evidence that defendant placed advertisements to induce potential customers to pay to engage in sexual encounters with AB. However, as the parties observe, there is no evidence that defendant's conduct was intended to lure Calhoun, or anyone else, to the Burgess Street location for the purpose of killing him. Defendant intended Calhoun to go to the location to engage in sexual acts with AB. Defendant later shot Calhoun during a dispute stemming from Calhoun's request to engage in sexual intercourse without a condom and demand for his money to be returned. The trial court's statement that the "ads that were made and directed at Mr. Baskerville's direction in order to lure for the homicide" or to lure him to a place of danger are not supported by the record. A preponderance of the evidence does not support that defendant

engaged in preoffense conduct directed at a particular victim, Calhoun, with the intent to victimize him by shooting him. Therefore, as the prosecutor concedes, no points should have been assigned to OV 10 for the offense of second-degree murder.

D. OV 11

The trial court scored OV 11 at 50 points for defendant's human-trafficking conviction. The trial court must score 50 points for OV 11 if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). In scoring OV 11, a trial court may not count a sexual penetration that formed the basis for the conviction, MCL 777.41(2)(c), but may score all other "sexual penetrations of the victim by the offender arising out of the sentencing offense," MCL 777.41(2)(a). The phrase "arising out of" suggests "a causal connection between two events of a sort that is more than incidental." *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006) (opinion by TAYLOR, C.J. and MARKMAN, J.).[7] "Something that 'aris[es] out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *Id*. (alteration in original). Therefore, in order to count the penetrations under OV 11, there must be the requisite relationship between the penetrations by defendant ("the offender") and the sentencing offense, i.e., the human-trafficking enterprise.

[7] Although the lead opinion in *Johnson* was signed by only two justices, it was designated a per curiam opinion of the Court. Justice CORRIGAN, joined by Justices WEAVER and YOUNG, dissented only from the conclusion in the lead opinion that remand for resentencing was required. *Johnson*, 474 Mich at 104 (opinion by CORRIGAN, J.). Justices CAVANAGH and KELLY concurred in the result only. *Id*. (CAVANAGH and KELLY, JJ., concurring in the result only).

In scoring OV 11, a trial court may score all "sexual penetrations of the victim by the offender arising out of the sentencing offense," and any additional instances of penetration "extending beyond the sentencing offense" are accounted for in OVs 12 or 13. MCL 777.41(2)(a) and (b). The sentencing offense for which OV 11 was scored is human trafficking involving death, MCL 750.462d(b), MCL 750.462f(1)(d).[8] Consequently, sexual penetration was not an element of the sentencing offense. However, MCL 750.462d(b) provides that with regard to human trafficking, a person shall not "[k]nowingly benefit financially or receive anything of value from participation in an enterprise . . . if the enterprise has engaged in an act proscribed under" the human-trafficking provisions of the Michigan Penal Code, MCL 750.462a *et seq*. MCL 750.462d(b). In that regard, "[f]orced labor or services" are proscribed by MCL 750.462b. Although that can include commercial sexual activity, it can also include any other activities for the benefit of the defendant. MCL 750.462a(g), (i), and (*l*). Therefore, while defendant did not personally engage in sexual relations with the victim (AB) for money as part of the commercial enterprise, he did engage in sexual relations with AB as a result of her being forced into the criminal enterprise. Thus, defendant's sexual penetrations with the victim arose out of the fact that defendant controlled the victim by forcing

[8] At sentencing, the court and parties referred to "the human trafficking offense," without specifying which one, and the record provides no readily apparent further clarification. Generally, the scoring offense will be the conviction with the highest crime classification. See generally *People v Lopez*, 305 Mich App 686, 689-692; 854 NW2d 205 (2014). Human trafficking involving death is a Class A felony, whereas human trafficking of a minor involving commercial sexual activity is a Class B felony. MCL 777.16w. Therefore, "the human trafficking offense," i.e., the scoring offense, would have meant human trafficking involving death.

her to be in the criminal enterprise. This is a sufficient causal connection between the crime and the sexual penetrations to score the penetrations for OV 11. *Johnson*, 474 Mich at 101.

The prosecution also raises a proxy argument as an alternative basis for assessing 50 points under OV 11 if all of the sexual penetrations of the victim by defendant were deemed to have occurred outside the human-trafficking enterprise and pursuant to an independent relationship between them. We need not and do not decide this argument, but we recognize that it may have arguable merit. A number of sexual penetrations with AB occurred for the express purpose of defendant's human-trafficking enterprise. Although they were not literally committed by defendant, they were arranged by defendant, occurred at defendant's volition rather than AB's volition, and occurred completely within defendant's control and at his direction. MCL 777.41 does not define "sexual penetration," but it is well-understood to mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body *or of any object* into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r) (emphasis added). The purpose of the statute is to "protect[] a person's bodily integrity[.]" *People v Anderson*, 331 Mich App 552, 561; 953 NW2d 451 (2020). According to the prosecution, in effect, defendant used other men as "objects" to effectuate sexual penetrations of AB and the requirement of a "causal connection" that is "more than incidental" independently establishes that defendant need not personally have committed the penetrations. All of the pay-for-sex sexual penetrations were closely and causally linked to the human-trafficking offense. Therefore,

argues the prosecution, those sexual penetrations arose out of the human-trafficking enterprise. See MCL 777.41(2)(a).

As noted, although the prosecution's proxy argument is interesting, we need not decide it on the facts of this case. It is clear that there was a more than sufficient causal connection between defendant's crime of human trafficking and his sexual penetrations of the victim. We therefore conclude that the trial court correctly scored OV 11 at 50 points for the human-trafficking conviction.

E. OV 14

The trial court scored OV 14 at 10 points for defendant's murder conviction. OV 14 addresses the role of the offender, and the trial court must assess 10 points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). "The entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). If only two offenders were involved, only one may be considered the leader. *People v Rhodes (On Remand)*, 305 Mich App 85, 88; 849 NW2d 417 (2014). This Court has noted that "[t]o 'lead' is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting." *People v Dickinson*, 321 Mich App 1, 22; 909 NW2d 24 (2017) (citation and quotation marks omitted; alteration in original). "[F]or purposes of an OV 14 analysis, a trial court should consider whether the defendant acted first or gave directions or was otherwise a primary causal or coordinating agent." *Id*. (citation and quotation marks omitted).

Considering the entire criminal transaction, the facts of the case provided a reasonable basis for the trial court to conclude that defendant was the leader in

a multiple-offender situation. There is evidence that defendant shot Calhoun in AB's presence, during an argument that arose out of an initial disagreement between Calhoun and AB. After the shooting, AB helped defendant drag Calhoun's body out of their house and place it in a dumpster. Defendant later had AB accompany him to move the dumpster containing Calhoun's body and to move Calhoun's vehicle, and he subsequently instructed her not to tell the police about anything that occurred. Finally, although defendant was clearly in total control over AB, because the autopsy revealed Calhoun to have been shot by two guns, the trial court had a reasonable basis for suspecting that AB may have had more involvement in the shooting than reflected in her testimony. Given these facts, the trial court did not clearly err by finding that a preponderance of the evidence supported that defendant was the leader in a multiple-offender situation. Accordingly, the 10-point score for OV 14 was warranted for the offense of second-degree murder.

F. OV 19

OV 19 addresses interference with the administration of justice. The trial court must assess 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(c). A defendant interferes with the administration of justice by "oppos[ing] so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). In scoring OV 19, a court may consider the defendant's conduct after the completion of the sentencing offense. *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010).

The facts of the case provided a reasonable basis for the trial court to conclude that defendant interfered in the administration of justice when he moved Calhoun's body in an attempt to conceal or dispose of it, got rid of the gun, moved Calhoun's vehicle, and encouraged AB to tell the police that she knew nothing about this incident. As this Court observed in *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016), "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." Accordingly, the trial court did not err when it assessed 10 points for OV 19.

G. RESENTENCING

The trial court scored the guidelines for defendant's convictions of second-degree murder, which is a Class M2 offense, MCL 777.16p, and human-trafficking enterprise involving death, which is a Class A offense, MCL 777.16w. As previously stated, the trial court erroneously scored OV 9 at 10 points for defendant's murder and human-trafficking convictions, and it erroneously scored OV 10 at 15 points for defendant's murder conviction. Defendant is entitled to have his guidelines scores corrected because those scores may affect decisions made about him by the Department of Corrections. See *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009); *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). However, defendant is not entitled to resentencing because the scoring errors do not affect the guidelines ranges under which he was sentenced.

For second-degree murder, defendant received a total OV score of 165 points, which, combined with his 80 prior record variable (PRV) points, placed him in the F-III cell of the Class M2 sentencing grid, for which the

minimum sentence range is 365 to 1,200 months or life for a fourth-offense habitual offender. MCL 777.61; MCL 777.21(3)(c). Deducting the 25 points attributable to OVs 9 and 10 reduces his OV score to 140 points, which still significantly exceeds the 100 points necessary to place him in OV Level III. MCL 777.61. Therefore, that deduction has no effect on defendant's guidelines range for his murder conviction.

For human-trafficking enterprise involving death, defendant received a total OV score of 235 points, which, combined with his 80 PRV points, placed him in the F-VI cell of the Class A sentencing grid, for which the minimum sentence range is 270 to 900 months or life for a fourth-offense habitual offender. MCL 777.62; MCL 777.21(3)(c). Deducting the 10 points attributable to OV 9 reduces his OV score to 225 points, which, again, still significantly exceeds the 100 points necessary to place him in OV Level VI.[9] MCL 777.62. Therefore, that deduction again has no effect on defendant's guidelines range for his human-trafficking conviction. Because the scoring errors do not affect the appropriate guidelines range for either offense, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Biddles*, 316 Mich App 148, 156; 896 NW2d 461 (2016).

Defendant's convictions and sentences are affirmed. We remand for the ministerial task of correcting defendant's guidelines scores. We do not retain jurisdiction.

MURRAY, C.J., and TUKEL, J., concurred with RONAYNE KRAUSE, J.

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[9] We note that even if we had found a score of 50 points improper under OV 11, the deduction of an additional 50 points would still leave defendant's total OV score significantly above the threshold for placing him in OV Level VI.

PEOPLE v STOKES

Docket Nos. 348471 and 348472. Submitted August 12, 2020, at Detroit. Decided August 20, 2020, at 9:10 a.m. Leave to appeal denied 507 Mich 939 (2021).

In Docket No. 348471, Christopher W. Stokes was convicted by a jury of carjacking, MCL 750.529a(1), and armed robbery, MCL 750.529, in the Wayne Circuit Court on February 11, 2014. Defendant was sentenced to 18 to 30 years in prison for each conviction. The Court of Appeals, TALBOT, C.J., and WILDER and FORT HOOD, JJ., affirmed defendant's convictions on appeal, but remanded to the trial court to follow the procedure in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). 312 Mich App 181 (2015), vacated in part 501 Mich 918 (2017). On remand, the trial court, Ulysses W. Boykin, J., resentenced defendant to 18 to 30 years in prison for each conviction. Defendant appealed.

In Docket No. 348472, defendant was convicted by a jury on October 20, 2014, of carjacking and armed robbery. Defendant was sentenced to concurrent terms of 20 to 30 years in prison for each conviction. On appeal, the Court of Appeals, K. F. KELLY, P.J., and FORT HOOD and BORRELLO, JJ., remanded and ordered the trial court to follow the *Crosby* procedure. On remand, the trial court resentenced defendant to 20 to 30 years' imprisonment for each conviction. Defendant appealed, and the Court of Appeals consolidated the appeals in Docket Nos. 348471 and 348472.

The Court of Appeals *held*:

In *People v Beck*, 504 Mich 605 (2019), the Supreme Court held that due process bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted and basing a sentence on that finding. Defendant argued that because his presentence investigation reports (PSIRs) contained information regarding conduct of which he was acquitted, the sentencing court violated *Beck* by reviewing them. However, no evidence in the record established that the trial court *relied* on the acquitted conduct when resentencing defendant. A sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted

conduct when sentencing the defendant. Absent evidence in the record that the sentencing court relied on the acquitted conduct in determining a defendant's sentence, a conclusion that the court committed a *Beck* violation would rest on speculation that the court's decision was influenced by acquitted conduct.

Affirmed.

SENTENCING — DUE PROCESS — ACQUITTED CONDUCT — PRESENTENCING INVESTIGATION REPORTS.

In *People v Beck*, 504 Mich 605 (2019), the Supreme Court held that due process bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted and basing a sentence on that finding; however, a sentencing court may review a presentencing investigation report that contains information on the defendant's acquitted conduct without violating *Beck* or the defendant's right to due process so long as the court does not rely on the acquitted conduct when determining the defendant's sentence.

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: REDFORD, P.J., and METER and O'BRIEN, JJ.

REDFORD, P.J. In Docket No. 348471, a jury convicted defendant, Christopher Wayne Stokes, of carjacking, MCL 750.529a(1), and armed robbery, MCL 750.529, on February 11, 2014. On March 20, 2014, the trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of 18 to 30 years' imprisonment for each conviction. Defendant appealed his convictions and sentences. *People v Stokes*, 312 Mich App 181; 877 NW2d 752 (2015), vacated in part 501 Mich 918 (2017). This Court affirmed his convictions but remanded and

ordered the trial court to follow the *Crosby*[1] procedure. On remand, the trial court resentenced defendant to 18 to 30 years' imprisonment for each conviction. Defendant now appeals as of right. We affirm.

In Docket No. 348472, a jury convicted defendant on October 20, 2014, of carjacking and armed robbery. The trial court sentenced defendant on November 17, 2014, as a second-offense habitual offender to concurrent terms of 20 to 30 years' imprisonment for each conviction. Defendant appealed his convictions and sentences. *People v Stokes*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2016 (Docket No. 325197). This Court remanded and ordered the trial court to follow the *Crosby* procedure, and on remand the trial court resentenced defendant to concurrent terms of 20 to 30 years' imprisonment for each conviction. Defendant now appeals as of right. We affirm.

I. BACKGROUND

The trial court granted defendant resentencing in both cases and held a combined resentencing hearing on March 15, 2019. The trial court noted that, in addition to listening to counsel and defendant at the hearing, it had reviewed the new presentence investigation reports (PSIRs) and the opinions from this Court. Finding no error in its previous assessment of the factors under the advisory sentencing guidelines, and not being persuaded by defense counsel that changes were warranted to defendant's previous sentences, the trial court resentenced defendant to the same sentences it had imposed at defendant's original sentencing hearings.

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[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

II. ANALYSIS

In both appeals, defendant argues that he is entitled to resentencing on the ground that the trial court violated his due-process rights by considering acquitted conduct in determining his sentences. We disagree.

Defendant failed to preserve this issue in the trial court. "This Court reviews unpreserved issues alleging constitutional error for plain error affecting a defendant's substantial rights." *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763 (quotation marks and citation omitted).

In *People v Beck*, 504 Mich 605, 629; 939 NW2d 213 (2019), our Supreme Court held "that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." In other words, "[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. Our Supreme Court remanded for resentencing in *Beck* "[b]ecause the trial court in [that] case relied at least in part on acquitted conduct when imposing sentence for the defendant's conviction . . . ." *Id*. at 609-610.

In *People v Roberts (On Remand)*, 331 Mich App 680; 954 NW2d 221 (2020), this Court explained the scope of application of the principle articulated in *Beck*. In *Roberts*, the defendant and his friend were in a nightclub when someone shot a patron, and they and other patrons fled outside. *Id*. at 683. Outside the nightclub, the defendant passed a gun to his friend as they advanced toward a group of people. *Id*. at 684. The defendant's friend fired shots and apparently passed the gun back to the defendant before the two of them fled the scene. *Id*. The police pursued them, and an officer saw the defendant dispose of the gun which the police later retrieved. *Id*. The jury convicted the defendant of being a felon in possession of a firearm and of possession of a firearm during the commission of a felony, but acquitted him of assault with intent to murder under an aiding and abetting theory. *Id*. at 683. The sentencing court considered the background facts of the incident when scoring the offense variables under the advisory sentencing guidelines and imposed an upward departure sentence. *Id*. at 685-686. The defendant argued on appeal that the sentencing court violated the principle articulated in *Beck* by considering facts unrelated to the offenses of which the jury convicted him. See *id*. at 688-692. This Court disagreed and explained:

> It has long been understood that failure to persuade a jury beyond a reasonable doubt is not conclusive as to proofs under the less-stringent preponderance-of-the-evidence standard. *Stone v United States*, 167 US 178, 188-189; 17 S Ct 778; 42 L Ed 127 (1897); *Martucci v Detroit Comm'r of Police*, 322 Mich 270, 273-274; 33 NW2d 789 (1948). Nevertheless, our Supreme Court has recently taught us that sentencing courts may not consider any "acquitted conduct" in crafting their sentences, although they remain free to consider "uncharged conduct." *Beck*, 504 Mich at 626-627. "Acquitted conduct" means any

> "conduct . . . underlying charges of which [the defendant] had been acquitted." *United States v Watts*, 519 US 148, 153-154; 117 S Ct 633; 136 L Ed 2d 554 (1997), cited by *Beck*, 504 Mich at 609 n 1. We infer from this broad definition that under *Beck*, a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding that the essential elements of any acquitted offense were proved beyond a reasonable doubt. Nevertheless, as we will discuss in more detail below, *Beck* expressly permits trial courts to consider uncharged conduct and any other circumstances or context surrounding the defendant or the sentencing offense. [*Id*. at 688.]
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> The trial court explicitly declined to hold defendant responsible for "what happened in the night club," implicitly meaning the trial court did not consider any victims placed in danger *by the shooting* of which defendant was acquitted. Nevertheless, we agree with the trial court that a substantial and qualitative difference exists between possessing contraband in one's own home and unlawfully possessing and passing around a concealed firearm in a crowded bar during a shooting. Nothing in *Beck* precludes a sentencing court from generally considering the time, place, and manner in which an offense is committed. We conclude that *Beck* does not exclude from consideration the contextual fact that the acquitted conduct was committed by someone, so long as that conduct is not actually attributed to the defendant. Irrespective of whether defendant participated in the shooting, the context within which he committed the offense of felon-in-possession intrinsically placed people in grave danger. We therefore reiterate our previous conclusion that the trial court was justified in finding that defendant's actions placed at least 10 victims in danger of physical injury or death. The trial court therefore did not err in assigning 25 points under OV 9. [*Id*. at 689-690.]

This Court explained further:

> As discussed, the definition of "acquitted conduct" covers a broad range of conduct. Nevertheless, we do not understand *Beck* to preclude all consideration of the entire res gestae of an acquitted offense. . . . We conclude that even under *Beck*, a sentencing court may consider, for example, the fact that a felon on probation bringing a concealed gun into a crowded nightclub demonstrates—at a minimum—an appallingly reckless disregard for the predictable outcome. Defendant may not be deemed to have provided a weapon for the purpose of shooting it into a crowd, nor can defendant be deemed to have "allowed" the shooting. Nevertheless, defendant can certainly be deemed to have knowingly acted in a manner that drastically increased the likelihood that such a tragedy, whether or not this particular tragedy, would occur. As discussed above, the trial court appropriately observed that it is "one thing" to illegally possess a gun in one's own home, but quite another to introduce an illegally possessed and concealed gun into an environment that was already chaotic and unstable. [*Id*. at 691-692.]

This case significantly differs from *Beck* and *Roberts*; nevertheless, defendant argues that the trial court violated the principle articulated in *Beck* because the court reviewed the PSIRs for each case, and the PSIRs contained information about defendant's acquitted conduct. Defendant further argues that "[t]he practice of including information on acquitted charges in the presentence report should stop, as it violates [d]ue [p]rocess for a sentencing judge to consider it." We disagree.

As explained in *Beck*, a sentencing court may not rely even in part on acquitted conduct when imposing a sentence for the defendant's conviction. In *Roberts*, this Court clarified that sentencing courts do not violate that principle by considering the entire res gestae of an acquitted offense, and *Beck* does not preclude a sentencing court from generally considering the time, place, and manner in which an offense of which a defendant

has been convicted is committed. Neither *Beck* nor *Roberts* addressed whether the principle articulated in *Beck* is violated by a mere reference to a jury's acquittal of charged offenses in a separate case in the defendant's criminal history reported in the PSIR.

In these cases, defendant's lengthy criminal history, as reported in the PSIRs, showed that defendant was arrested on July 24, 2013, and charged with carjacking and firearm offenses, but a jury found him not guilty of the charges. Further, the PSIRs noted that, while on parole, defendant was charged with carjacking and firearm offenses in two separate cases; he was found guilty in one case, but in the other case the jury found him not guilty of the charged offenses. The contents of the PSIRs were reviewed by the sentencing court in preparation for defendant's resentencing hearing. No evidence in the record, however, establishes that the trial court relied on acquitted conduct when resentencing defendant. The trial court did not refer to any acquitted conduct during the resentencing hearing or even intimate that such conduct influenced its sentencing decisions.

We hold that a sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant. *Beck* supports this conclusion. In *Beck*, our Supreme Court remanded for resentencing because the sentencing court unquestionably "*relied*" on acquitted conduct for its sentencing decision. *Beck*, 504 Mich at 609-610 (emphasis added). A sentencing court that reviews a PSIR that merely contains information about acquitted conduct, however, does not necessarily rely on such information when sentencing a defendant. There must be some evidence in the record that the sentencing

court relied on such information to warrant finding a *Beck* violation. Had the sentencing court specifically referenced acquitted offenses as part of its sentencing rationale, a *Beck* violation would be apparent. But when PSIRs prepared by the Department of Corrections merely refer to an acquittal by a jury of offenses in a separate case, and the sentencing court does not refer to or expressly rely upon such acquitted offenses as part of its sentencing rationale, this Court cannot conclude that the sentencing court committed a *Beck* violation because such a conclusion would rest on speculation that acquitted conduct influenced the sentencing court's decision.

In the absence of evidence presented by a defendant demonstrating that a sentencing court actually relied on acquitted conduct when sentencing the defendant, the defendant is not entitled to resentencing. Because no evidence in the record in these cases establishes that the sentencing court relied on acquitted conduct referenced in the PSIRs when sentencing defendant, defendant has failed to establish his claims of error. Defendant has also failed to establish the existence of any plain error that affected his substantial rights and determined the outcome of the proceedings.

Affirmed.

METER and O'BRIEN, JJ., concurred with REDFORD, P.J.

INDIANA MICHIGAN POWER COMPANY v COMMUNITY MILLS, INC

Docket No. 349671. Submitted August 6, 2020, at Grand Rapids. Decided August 20, 2020, at 9:15 a.m.

Indiana Michigan Power Company (IMPC) filed an action for condemnation in the Cass Circuit Court against Community Mills, Inc., under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. Community Mills challenged the necessity of the condemnation and asserted that the trial court lacked subject-matter jurisdiction because IMPC had failed to make a good-faith offer to all the owners of the property it sought to condemn, as required by the UCPA. Community Mills later moved for summary disposition on the ground of subject-matter jurisdiction, asserting that IMPC had not submitted a good-faith offer to GreenStone Farm Credit Services, ACA, which held a recorded mortgage on the property. Before the date of a scheduled hearing on Community Mills' motion, IMPC recognized its mistake regarding GreenStone and agreed to the entry of a stipulated order dismissing its complaint without prejudice. However, the parties disputed whether Community Mills was entitled to attorney fees and expenses. Community Mills moved for reimbursement under MCL 213.66(2) of $71,409.14 in attorney fees and expenses incurred in defending against the condemnation action and in preparing its motion and appearing in court. IMPC argued that Community Mills was only entitled to recover its actual and reasonable attorney fees and expenses that it had incurred as a direct result of the jurisdictional defect in the action. The trial court, Susan L. Dobrich, J., limited reimbursement of attorney fees to Community Mills to those stemming from the issues of nonjoinder and subject-matter jurisdiction, which amounted to an award of $34,600.40. Community Mills appealed.

The Court of Appeals *held*:

1. The purpose of the UCPA is to ensure just compensation for the taking of private property, as required by Const 1963, art 10, § 2. Under certain circumstances, the UCPA allows a property owner to recover attorney fees and costs incurred in a condemnation action. Specifically, MCL 213.66(2) provides that if a property

owner successfully challenges the condemning agency's right to acquire property or the legal sufficiency of the proceedings, the court shall order the agency to reimburse the property owner for actual reasonable attorney fees and expenses incurred in defending against the improper action. Contrary to IMPC's argument that the reimbursement award was properly limited to only the fees and expenses relating to the procedural defect, nothing in the language of MCL 213.66(2) limits the reimbursement of attorney fees to the work that led to the specific grounds on which dismissal was granted. Rather, the legislative purpose of the UCPA is to place the property owner in as good a position as was occupied before the taking. In order to align with this purpose, *all* reasonable fees incurred in defending against an improper acquisition must be reimbursed.

2. IMPC voluntarily dismissed its original complaint after admitting that it was improper because IMPC had not joined GreenStone as a party; IMPC later refiled its motion. IMPC argued that Community Mills' reimbursement award should be limited to those fees directly related to the jurisdictional or joinder defects because if Community Mills prevailed in the second action, it could improperly receive attorney fees related to the first action. Except when a property owner has already obtained reimbursement of attorney fees in a second action at the time the court awards attorney fees for the first action, the court must award all actual reasonable attorney fees incurred in successfully defending the first action to ensure that the property owner will be made whole. If the owner later obtains a favorable outcome in a subsequent action, the owner may not be reimbursed under MCL 213.66(2) or (3) for duplicative fees and costs incurred in the second action. Further, the trial court has discretion to disallow fees that it determines were unreasonable.

Reversed and remanded for further proceedings.

1. UNIFORM CONDEMNATION PROCEDURES ACT — IMPROPER OR PROCEDURALLY DEFECTIVE ACQUISITIONS — PROPERTY OWNERS — ATTORNEY FEES.

The purpose of the Uniform Procedures Act, MCL 213.51 *et seq*., is to ensure just compensation for the taking of private property, as required by Const 1963, art 10, § 2; "just compensation" is defined as the amount of money that will put the person whose property was taken in as good a position as the person would have been in if the taking had not occurred; MCL 213.66(2) permits a trial court to award attorney fees to a property owner who successfully challenges the condemning agency's right to acquire property or the legal sufficiency of the proceedings; MCL 213.66(2) does not

limit the reimbursement of attorney fees and expenses to those directly related to the defect that made the acquisition improper; in other words, the statute does not limit reimbursement of attorney fees and expenses so long as they were actually and reasonably incurred while defending against the improper acquisition.

2. UNIFORM CONDEMNATION PROCEDURES ACT — IMPROPER OR PROCEDURALLY DEFECTIVE ACQUISITIONS — PROPERTY OWNERS — ATTORNEY FEES — MULTIPLE ACTIONS.

If the condemning agency and the property owner are parties to multiple actions challenging an acquisition and the property owner successfully defends against the actions, the trial court may not award duplicative attorney fees to the owner under MCL 213.66(2) or (3); the court may only award the owner's actual and reasonable attorney fees under MCL 213.66(2), and the court may disallow fees it determines to be unreasonable.

Carson LLP (by *Calvert S. Miller*) for Indiana Michigan Power Company.

Dickinson Wright PLLC (by *Peter H. Webster* and *Frederick R. Dewey*) for Community Mills, Inc.

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

SHAPIRO, P.J. Defendant, Community Mills, Inc. (Community Mills), appeals the trial court order awarding it $34,600.40 in attorney fees and expenses pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. Community Mills argues that the trial court improperly reduced its requested reimbursement award of $71,409.14. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On June 11, 2018, plaintiff, Indiana Michigan Power Company (IMPC), filed a complaint seeking to con-

demn certain real property owned by Community Mills for the purpose of rebuilding and upgrading an existing transmission line. On July 6, 2018, Community Mills filed a motion challenging the necessity of the condemnation. Community Mills also maintained that the trial court lacked subject-matter jurisdiction. In an accompanying answer and affirmative defenses, Community Mills asserted, *inter alia*, that IMPC did not properly invoke the trial court's jurisdiction because it had failed to make a good-faith written offer to all the owners of the property it sought to condemn as required by the UCPA.

On July 25, 2018, IMPC moved for a preliminary injunction asking that the trial court enjoin Community Mills from acting pursuant to a notice of revocation of a preexisting license that permitted IMPC to install, maintain, and use powerlines over a portion of the property. IMPC also responded to the motion to review necessity, generally denying that it had failed to comply with legal requirements under the UCPA and requesting that the trial court promptly rule on Community Mills' subject-matter jurisdiction challenge. On August 2, 2018, Community Mills filed for summary disposition, arguing that the trial court lacked subject-matter jurisdiction because IMPC's good-faith offer was not also submitted to GreenStone Farm Credit Services, ACA (GreenStone), the holder of a recorded mortgage on the property. Community Mills also contended that IMPC's failure to join GreenStone as a defendant rendered the proceedings legally deficient.

A motion hearing was scheduled for September 11, 2018, to address the three pending motions. However, IMPC recognized its mistake regarding GreenStone and agreed to the entry of a stipulated order dismissing its complaint without prejudice. The parties fur-

ther stipulated that Community Mills successfully challenged the legal sufficiency of the proceedings, but they disputed whether Community Mills was entitled to attorney fees and expenses.

Community Mills subsequently moved under MCL 213.66(2) for reimbursement of $71,409.14 for its attorney fees and expenses incurred in defending against IMPC's action. Community Mills further sought the fees and costs it had incurred by having to prepare the motion and appear in court. The amount of requested fees was supported by an itemized statement of the hours billed for specific services. In response, IMPC admitted that the acquisition as originally commenced was improper because it did not join GreenStone as a party. Accordingly, it voluntarily dismissed the action and refiled.[1] Citing an unpublished decision from this Court, IMPC maintained that Community Mills could only recover the actual and reasonable attorney fees and expenses it had incurred as a direct result of the jurisdictional defect. An evidentiary hearing was held in April 2019, where the trial court heard testimony from Community Mills' trial counsel and Jerome Pesick, an expert in legal representation in eminent-domain cases. In a written opinion issued in May 2019, the trial court limited reimbursement of attorney fees and expenses incurred by Community Mills to those resulting from the procedural defect in the original complaint. Accordingly, the court reimbursed Community Mills only for the fees and expenses stemming from the issues of nonjoinder and subject-matter jurisdiction, which amounted to an award of $34,600.40.

[1] The second action was filed on November 19, 2018. On August 27, 2019, the trial court granted Community Mills summary disposition. IMPC's appeal of that decision is now pending before this Court in Docket No. 350626.

II. ANALYSIS

Community Mills argues that the trial court erred by limiting the award of attorney fees and expenses to the issues of nonjoinder and subject-matter jurisdiction. We agree.

Generally, an attorney-fee award in a condemnation action is reviewed for an abuse of discretion. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 292; 730 NW2d 523 (2006). However, we review de novo issues arising from the interpretation and application of the UCPA. See *Washtenaw Co Bd of Co Rd Comm'rs v Shankle*, 327 Mich App 407, 412; 934 NW2d 279 (2019). Our goal in interpreting a statute is to discern the Legislature's intent, the most reliable indicator of which is the statute's language. *In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015).

The purpose of the UCPA is to ensure just compensation for the taking of private property, as required by Const 1963, art 10, § 2. *Washtenaw Co Bd*, 327 Mich App at 414. "Just compensation is defined as the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred." *In re Acquisition of Land for the Central Indus Park Project*, 127 Mich App 255, 261; 338 NW2d 204 (1983). Under certain circumstances, the UCPA authorizes the property owner to recover attorney fees and costs incurred in a condemnation action. The UCPA attorney-fee provision at issue here, MCL 213.66(2), provides:

> If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, *the court shall order the agency to reimburse the owner for*

> *actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition*. [Emphasis added.]

The rationale behind MCL 213.66(2) is that "property owners may not be forced to suffer because of an action that they did not initiate and that endangered, through condemnation proceedings, their right to private property." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008).

In *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 812-813; 402 NW2d 505 (1986), we held that "a finding that the condemnation proceedings are procedurally defective is per se a finding that the proposed acquisition is improper" and triggers the right to reimbursement of fees and expenses under MCL 213.66(2). IMPC concedes that the first action was an improper acquisition,[2] but it seeks to limit the reimbursement award to only those fees and expenses relating to the procedural defect. However, nothing in the language of MCL 213.66(2) limits the reimbursement of attorney fees and expenses so long as the costs were actually (and reasonably) incurred while defending the improper acquisition. The statute simply does not limit recovery of fees to the work that led to the specific grounds on which dismissal was granted.

In *Escanaba*, 156 Mich App at 810, the condemning authority likewise argued that—although its acquisition was procedurally defective and, therefore, improper—it should not be held responsible under MCL 213.66(2) for fees and expenses incurred by the property owner while defending a separate motion filed by the

[2] We are not bound by *Escanaba* because it was decided before November 1, 1990, see MCR 7.215(J)(1), but neither party argues that the case was wrongly decided.

condemning authority to disqualify the trial court judge assigned to the case. We disagreed, reasoning as follows:

> The legislative intent behind the [UCPA] is to place the owner of the property in as good a position as was occupied before the taking. While it is argued that on the motion to disqualify the opposing party was the judge and not the property owners, it is clear to us that if a new judge had been appointed, there would have been a much greater chance that he would overturn the orders granting summary judgment to defendants. Therefore, defendants very properly opposed the motion to disqualify and incurred legal costs in so doing. Unless such legal expenses are reimbursable, the property owners are made to suffer for proceedings they did not initiate. This would be contrary to legislative intent. [*Id*. at 815 (quotation marks and citation omitted).]

Thus, *Escanaba* confirms what the statutory language makes clear—MCL 213.66(2) does not limit the recovery of fees and expenses to those directly related to the defect that made the acquisition improper. In order to place the property owner in as good a position as before the attempted taking, *all* reasonable fees incurred in defending against the improper acquisition must be reimbursed.

IMPC argues, and the trial court agreed, that *In re Hahn Drainage Dist*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 1996 (Docket No. 173316),[3] supports the proposition that Community Mills' reimbursement award should be restricted to those fees directly relating to the jurisdictional or joinder defects. In *Hahn*, the trial court dismissed a condemnation acquisition as improper for

[3] Unpublished opinions may be considered for their persuasive value, but they are not binding precedent. *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 137; 892 NW2d 33 (2016).

nonjoinder and lack of subject-matter jurisdiction. *Id*. at 2-3. After the condemning agency refiled, the trial court held in abeyance the property owner's motion for reimbursement of attorney fees under MCL 213.66(2). *Id*. at 5. The trial court was concerned about reimbursing the property owner for work done in the first case that would also be applicable to the second action. See *id*. at 4. The parties reached a settlement in the second action that included a provision for the property owner's attorney fees. *Id*. at 6. Given that the property owner was reimbursed for attorney fees in the second action, the trial court limited the attorney-fee award in the first action to the issues of nonjoinder and subject-matter jurisdiction. *Id*. at 8-9. A panel of this Court affirmed, reasoning as follows:

> The court's bifurcated approach to the two actions was reasonable, as was the court's determination that because the substantive matters were settled in the second suit, in which defendant received a separate attorney fee under the statute, limiting defendant's compensation in the first action to fees relating to the technical issues rendering plaintiff's first suit deficient would adequately make defendant whole. [*Id*. at 11.]

We agree with the *Hahn* panel that the trial court's approach was reasonable under the facts of that case. Because the property owner had obtained recovery of attorney fees in the second action, it was appropriate for the court to limit recovery of fees in the first action to legal services relating to the procedural defect. The trial court's ruling correctly prevented the property owner from obtaining a double recovery of attorney fees.

In this case, however, when the trial court decided the amount of reimbursement in the first action, the second action was still pending. Thus, it was unknown

whether Community Mills would be reimbursed in the second action for attorney fees that were attributable to the first action. Indeed, it is also possible that following a dismissal the condemning entity will withdraw and decide not to pursue condemnation. In these instances, the "bifurcation" approach of limiting fees and costs to those related to the procedural defect is inadequate because the property owner might not be subsequently reimbursed for the other incurred expenses. *Hahn* is unique in that the property owner had obtained reimbursement of attorney fees in the second action at the time that the trial court awarded attorney fees for the first action. Excluding that scenario, the trial court must award all actual reasonable attorney fees incurred in successfully defending the first action to ensure that the property owner will be made whole. And if the property owner later obtains a favorable outcome in the second action, such that there is an entitlement to fees under MCL 213.66(2) or (3), then the owner may not be reimbursed for duplicative fees and costs incurred in the second action.

Given that a double recovery of fees and costs is not permitted, we find IMPC's concerns about following the unambiguous language of MCL 213.66(2) to be unfounded.[4] Further, the recovery of attorney fees under MCL 213.66(2) is subject to the requirement that the fees be reasonable. In *Dep't of Transp v Randolph*, 461 Mich 757, 765; 610 NW2d 893 (2000), the Supreme Court explained how trial courts are to determine an "owner's reasonable attorney fees" for purposes of MCL 213.66(3).[5] First, the trial court must

[4] To be clear, if Community Mills ultimately prevails in the second action, it may not be reimbursed for fees and expenses awarded in the first action.

[5] MCL 213.66(3) provides in part:

decide whether the attorney fees actually charged to the property owner are reasonable. *Id*. at 765-766. In making that determination, "the trial court should consider the eight factors listed in MRPC 1.5(a)." *Id*. at 766. "If the trial court determines that the owner's attorney fees are unreasonable, it should utilize its discretion to determine what amount of the owner's requested attorney fees should be reimbursed by the agency."[6] *Id*. But "[t]he court must articulate the reasons for its decision in order to facilitate appellate review." *Id*. at 767.

We conclude that this framework is equally applicable to determining a property owner's "actual reasonable attorney fees" under MCL 213.66(2). Also, the trial court plainly has discretion to disallow fees that it determines to be unreasonable. Put differently, the trial court may conclude that some of the work done by the property owner's attorney was not reasonable to do. We reiterate, however, that the statute does not limit attorney fees to the work that proved successful. Nor is recovery precluded for legal services that, in hindsight, were ultimately unnecessary if those services were reasonable at the time they were rendered.

> If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney fees shall be determined by the court.

[6] The *Randolph* Court went on to say that if the trial court determines that the property owner's attorney fees are reasonable, then the court has "*additional* discretion [under MCL 213.66(3)] to order reimbursement of those fees 'in whole or in part.' " *Randolph*, 461 Mich at 767, quoting MCL 213.66(3). No such discretion exists under MCL 213.66(2), however, and therefore a trial court may not reduce a property owner's actual attorney fees if that amount is found to be reasonable.

III. CONCLUSION

We remand this matter to the trial court so that it may determine in the first instance the full amount of fees and expenses incurred by Community Mills while defending against the improper acquisition, as well as the costs incurred while pursuing its lawful recovery of attorney fees and expenses under MCL 213.66(2). On remand, Community Mills may also pursue additional fees and costs incurred as a result of this appeal. See *Lansing v Edward Rose Realty, Inc*, 450 Mich 851; 538 NW2d 677 (1995). The trial court has discretion to determine whether the actual attorney fees incurred by Community Mills are reasonable.

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

SERVITTO and LETICA, JJ., concurred with SHAPIRO, P.J.

HOUSE OF REPRESENTATIVES v GOVERNOR

Docket No. 353655. Submitted August 4, 2020, at Detroit. Decided August 21, 2020, at 9:00 a.m. Reversed in part and remanded 506 Mich 934 (2020).

The Michigan House of Representatives and the Michigan Senate (collectively, the Legislature) filed an action in the Court of Claims against the Governor of Michigan, seeking an immediate declaratory judgment that the Governor did not have authority under the Emergency Management Act (EMA), MCL 30.401 *et seq*., to redeclare states of emergency and disaster on April 30, 2020, or to issue subsequent executive orders (EOs) related to her management of the COVID-19 pandemic in Michigan because the Legislature had declined to pass a resolution extending the states of emergency and disaster; that the Governor did not have authority under the emergency powers of the governor act (EPGA), MCL 10.31 *et seq*., to issue statewide COVID-19 EOs; that the Governor did not have authority under Const 1963, art 5, § 1 to issue the EOs; and that the Governor's extension of EOs past April 30, 2020, violated Const 1963, art 3, § 2 as an unconstitutional delegation of legislative power. The Governor opposed the motion and requested that judgment be entered in her favor under MCR 2.116(I)(1) and (2). With respect to the Legislature's complaint and motion for immediate declaratory judgment, the court, Judge CYNTHIA D. STEPHENS, J., concluded that (1) the Legislature had standing to pursue this action; (2) the Governor had authority under the EPGA to declare states of emergency and disaster in EO 2020-67 on April 30, 2020, and that the subsequent executive orders issued under the EPGA were valid; (3) the EPGA was constitutionally valid and did not violate Const 1963, art 3, § 2; (4) Const 1963, art 5, § 1 did not grant her authority to issue the EOs; and (5) the Governor did not have authority under the EMA to redeclare states of emergency and disaster in EO 2020-68 on April 30, 2020, because the Legislature had not approved the extension of her declarations and orders past that date, and the Governor's issuance of EO 2020-68 was therefore ultra vires under the EMA. The Court of Claims also dismissed as moot the Governor's argument that the Legislature's original complaint violated the MCL 600.6431(2)(d) verification require-

ment. During the pendency of the proceedings, John F. Brennan, Mark Bucchi, Samuel H. Gun, Martin Leaf, and Eric Rosenberg, practicing attorneys in Michigan, had moved to intervene. The Court of Claims denied the motion, reasoning that the Legislature adequately represented the interests of the five attorneys and that allowing intervention would cause a delay in the proceedings. The Legislature appealed the Court of Claims' conclusion that the Governor's EOs were valid under the EPGA; the Governor cross-appealed the Court of Claims' determination that the Governor's EOs were not valid under the EMA and that the Legislature had standing; and the prospective intervening parties cross-appealed the Court of Claims' denial of their motion to intervene.

The Court of Appeals *held*:

MCL 10.31(1) provides that during times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. A governor's authority under the EPGA, by its own terms, applies to statewide emergencies affecting all of Michigan as well as local emergencies, depending on the extent of the public crisis, disaster, or catastrophe. Thus, a governor has authority under the EPGA to declare a statewide emergency and to promulgate reasonable orders, rules, and regulations during statewide emergencies as deemed necessary by the governor; the governor has authority to amend, modify, or rescind those orders, rules, and regulations; and any declaration of emergency by the governor simply continues until the governor declares that the emergency no longer exists. Although the EMA is more comprehensive, specific, and detailed than the EPGA, was enacted more than 30 years after the EPGA, and under MCL 30.402(e), the EMA explicitly defines the term "disaster" as including an "epidemic," the EMA does not negate that the EPGA also applies to statewide emergencies involving an epidemic; to hold otherwise would offend MCL 30.417(d), which expressly provides that the EMA shall not be construed to limit, modify, or abridge the governor's authority to proclaim a state of emergency under the EPGA. The Legislature was aware of the EPGA when it enacted the EMA, and it required legislative approval to extend a state of emergency under the EMA, while at the same time declaring that the EMA could not be construed as limiting, modifying, or abridging the governor's

powers under the EPGA. The EPGA's delegation of power to the governor to declare states of emergency and disaster does not violate the separation-of-powers or nondelegation doctrines; the EPGA contains standards—reasonableness and necessity—that are as reasonably precise as the subject matter requires or permits such that by enacting the EPGA, the Legislature availed itself of the executive branch's resources and expertise to assist in the execution of legislative policy. In this case, because the appeal was expedited, the Court of Appeals assumed that the Legislature had standing to bring the suit for declaratory relief. The Court of Claims correctly concluded that the Governor had authority under the EPGA to declare states of emergency and disaster, to extend those declarations under EO 2020-67, and to issue related EOs following that redeclaration. The Court of Claims also correctly concluded that the EPGA did not violate the Separation of Powers Clause. The issues of whether the Governor had authority under the EMA to take the same measures as under the EPGA and whether the Governor violated the EMA were moot. There was no basis to reverse the Court of Claims' denial of the prospective intervenors' motion to intervene.

Affirmed.

TUKEL, J., concurring in part and dissenting in part, agreed with the majority that the Court of Claims correctly denied the motion to intervene but disagreed with the majority's analysis of the remaining issues. The Legislature had standing to bring this action because the Governor's declarations of states of emergency and disaster under the EPGA usurped the Legislature's express authority under the EMA to approve or disapprove EOs extending beyond 28 days. The Governor's actions violated the EMA because the Legislature declined to extend the EOs. Further, reading the EMA and the EPGA *in pari materia*, only the EMA applied to the circumstances of this case because the states of emergency and disaster involved an "epidemic," which was expressly provided for in the EMA but not in the EPGA. Judge TUKEL would have affirmed the Court of Claims' determination that the Governor's EOs under the EMA were ultra vires because the Legislature refused to extend the Governor's EOs past 28 days. Although Judge TUKEL would have preferred to not reach the constitutional issues in this case because the case could be decided on the statutory analysis of the EMA, he would have concluded that the Governor's actions under the EPGA violated the Separation of Powers Clause and would have struck down the Governor's EOs issued under the EPGA on that basis as well.

Bush Seyferth PLLC (by *Patrick G. Seyferth*, *Stephanie A. Douglas*, *Susan M. McKeever*, *Michael R. Williams*, and *Frankie A. Dame*), *Hassan Beydoun*, and *William R. Stone* for the Michigan House of Representatives and the Michigan Senate.

John F. Brennan, Samuel H. Gun, Mark P. Bucchi, Martin Leaf, and Eric Rosenberg *in propriis personis*.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, *Christopher M. Allen*, Assistant Solicitor General, and *Joseph T. Froehlich*, *Joshua Booth*, and *John Fedynsky*, Assistant Attorneys General, for the Governor.

Amici Curiae:

Pentiuk, Couvreur & Kobiljak, PC (by *Kerry Lee Morgan* and *Randall A. Pentiuk*) and *Gerald R. Thompson* for the LONANG Institute.

Samuel R. Bagenstos and *Nathan Triplett* for Democratic Leader Christine Greig and the Democratic Caucus of the Michigan House of Representatives.

Professor Richard Primus *in propria persona*.

Allison V. Paris and *John Wm. Mulcrone* for the Democratic Caucus of the Michigan Senate.

Katherine L. Henry *in propria persona*.

Kaplan Hecker & Fink LLP (by *Joshua Matz*, *Raymond P. Tolentino*, *Jonathan R. Kay*, and *Mahrah M. Taufique*) and *Fagan McManus, PC* (by *Jennifer L. McManus*) for Michigan Epidemiologists.

Outside Legal Counsel PLC (by *Philip L. Ellison*) and *Matthew E. Gronda* for Michigan United for Liberty.

Barris, Sott, Denn & Driker, PLLC (by *Todd R. Mendel* and *Eugene Driker*) and *Patterson Belknap Webb and Tyler LLP* (by *Steven A. Zalesin* and *Ryan J. Sheehan*) for the Michigan Nurses Association and 30 Michigan healthcare professionals.

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

MARKEY, P.J. Plaintiffs, the Michigan House of Representatives and the Michigan Senate (the Legislature), appeal by right the opinion and order of the Court of Claims granting a declaratory judgment in favor of defendant, the Governor of Michigan, with respect to the Governor's authority to extend a state of emergency and to issue associated executive orders (EOs) under the emergency powers of the governor act (EPGA), MCL 10.31 *et seq*. The Court of Claims additionally concluded, however, that actions taken by the Governor under the Emergency Management Act (EMA), MCL 30.401 *et seq*., were ultra vires. The Governor has filed a cross-appeal in regard to that ruling and also takes issue with the determination by the Court of Claims that the Legislature had standing to file suit and seek declaratory relief. Prospective intervenors John F. Brennan, Mark Bucchi, Samuel H. Gun, Martin Leaf, and Eric Rosenberg, all of whom are attorneys, cross-appeal the denial of their motion to intervene in this lawsuit. Proceeding on the assumption that the Legislature has standing to sue, we hold that the Governor's declaration of a state of emergency, her extension of the state of emergency, and her issuance of related EOs fell within the scope of the

Governor's authority under the EPGA. We further hold that the EPGA is constitutionally sound. We therefore decline to address whether the Governor was additionally authorized to take those same measures under the EMA and whether the Governor violated the EMA: those matters are moot. Finally, we hold that there is no basis to reverse the order of the Court of Claims denying the motion to intervene. In sum, we affirm on the issues necessary to resolve this appeal.

I. PREFACE

This case arises out of a worldwide pandemic involving the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes the disease known as COVID-19. In an effort to combat the spread of COVID-19 in Michigan, the Governor declared and extended a state of emergency and issued numerous EOs in connection with the emergency. This lawsuit stems from a dispute between the Governor and the Legislature regarding the scope of the Governor's authority to issue, implement, and extend those emergency-based EOs. We are not called upon, nor is it our role, to examine and resolve issues concerning the nature of COVID-19, the data related to the disease, the statistical or human impact of COVID-19 on Michiganders, whether emergency circumstances justifying the EOs existed, or the appropriateness of the measures the Governor has taken in tackling COVID-19. Rather, we are presented with pure procedural and legal issues, including whether the Legislature had standing to bring suit against the Governor, whether the Governor's declarations and orders exceeded her constitutional and statutory authority, whether the EPGA violates the separation-of-powers and attendant

nondelegation doctrine, and whether the prospective intervenors were entitled to intervene in the suit.

II. CONSTITUTIONAL AND STATUTORY FRAMEWORK

In Michigan, "[t]he powers of government are divided into three branches: legislative, executive and judicial." Const 1963, art 3, § 2. And "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id*. "[T]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "[T]he executive power is vested in the governor." Const 1963, art 5, § 1.

In 1945, the Legislature enacted the EPGA. 1945 PA 302. The EPGA was later amended by 2006 PA 546. Section 1 of the EPGA, codified at MCL 10.31, currently provides:

> (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or

> regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.
>
> (2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.
>
> (3) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.

Notably, MCL 10.31 does not provide any active role for the Legislature during a public emergency, let alone the power to directly act as a check against a governor's exercise of authority under the EPGA. Our Supreme Court has recognized that "the emergency powers granted to the Governor by PA 1945, No 302 are exclusive[.]" *Walsh v River Rouge*, 385 Mich 623, 640; 189 NW2d 318 (1971). With respect to the EPGA, the Legislature expressly articulated its intent, explaining:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. *The provisions of this act shall be broadly construed to effectuate this purpose*. [MCL 10.32 (emphasis added).]

A violation of any order, rule, or regulation promulgated by a governor under the EPGA is punishable as a misdemeanor if the order, rule, or regulation expressly states that a violation constitutes a misdemeanor. MCL 10.33.

A little over 30 years later, the Legislature enacted the EMA. 1976 PA 390. The EMA has been amended a couple of times since its inception. See 1990 PA 50; 2002 PA 132. Section 3 of the EMA, MCL 30.403, now provides:

> (1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.
>
> (2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. . . . [A]n executive order, proclamation, or directive may be amended or rescinded by the governor.
>
> (3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster[1] has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature*. . . .
>
> (4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emer-

[1] The statutory definition of "disaster" includes an "epidemic." MCL 30.402(e).

> gency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature*. [MCL 30.403 (emphasis added).]

As reflected in MCL 30.403, if a governor wishes to extend an existing state of disaster or emergency beyond 28 days, the Legislature must approve the extension by resolution. In that respect, the EMA diverges from the EPGA. Of substantial significance, the EMA expressly provides that it shall not be construed to "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws," i.e., the EPGA. MCL 30.417(d).

III. BACKGROUND AND PROCEDURAL HISTORY

A. THE GOVERNOR ACTS IN RESPONSE TO COVID-19 CASES IN MICHIGAN

On March 10, 2020, in EO 2020-4, the Governor declared a state of emergency because of the escalation of COVID-19 cases and deaths in Michigan. The legal authorities the Governor cited in support of the declaration were the EMA, the EPGA, and Const 1963, art 5, § 1. Among other actions, the Governor closed elementary and secondary schools in EO 2020-5, barred visitors to healthcare facilities under EO 2020-6, shuttered restaurants and bars in EO 2020-9, and restricted nonessential medical and dental procedures in

EO 2020-17. The Governor issued the first stay-at-home directive on March 24, 2020, in EO 2020-21, which also identified various exceptions and parameters in regard to the mandate and criteria with which to evaluate whether to maintain, intensify, or relax restrictions in the future.

On April 7, 2020, both chambers of the Legislature adopted Senate Concurrent Resolution No. 24 (2020), which indicated approval of the Governor's declaration of a state of emergency or disaster[2] and, consistently with the EMA, set an expiration date of April 30, 2020, in respect to the duration of the declared emergency. On April 9, 2020, the Governor issued EO 2020-42, which rescinded EO 2020-21, opined that the SARS-CoV-2 continued to be aggressive and a threat to public health, and extended the stay-at-home directive until April 30, 2020. On April 24, 2020, the Governor issued EO 2020-59, rescinding EO 2020-42 and extending the stay-at-home order until May 15, 2020.

B. THE DISPUTE BETWEEN THE LEGISLATURE AND THE GOVERNOR ARISES

On April 27, 2020, the Governor, as required by the EMA, asked the Legislature to extend the state of emergency. The Legislature declined to pass a resolution extending the state of emergency. Instead, the Legislature passed 2020 SB 858, seeking to amend the EMA. The Senate bill provided that "[n]otwithstanding the termination of the underlying state of disaster or state of emergency declaration under this act," more than two dozen of the Governor's EOs would be extended with end dates varying from April 30, 2020, to

[2] Hereafter, for ease of reference, we shall simply refer to a state of "emergency," which shall also encompass a state of "disaster" unless otherwise indicated.

December 31, 2020. Despite extending some of the EOs under 2020 SB 858, the Legislature essentially sought to reopen Michigan businesses subject to precautionary measures recommended by the Centers for Disease Control and Prevention, with those measures scheduled to expire on May 30, 2020, under the proposed legislation. The Legislature submitted 2020 SB 858 to the Governor on April 30, 2020. The Governor vetoed the bill.

On April 30, 2020, the Governor issued EO 2020-66. The EO noted that the coronavirus remained "present and pervasive in Michigan," that "[t]he health, economic, and social harms of the COVID-19 pandemic" remained "widespread and severe," and that the danger continued to "constitute a statewide emergency and disaster." The order indicated that a statewide response was necessary to save lives, to protect public health and safety, and to avert catastrophe, while acknowledging the effects on the economy and society as a whole. EO 2020-66 observed that the Legislature, "despite the clear and ongoing danger to the state," refused to extend the state of emergency under the EMA. EO 2020-66 terminated the state of emergency under and as required by the EMA.

That same day, however, the Governor issued EO 2020-67, which cited the EPGA as supporting legal authority for this order. EO 2020-67 was issued one minute after EO 2020-66 was released. EO 2020-67 included language from the EPGA, and it declared that a state of emergency was to remain in place. Quoting MCL 10.31(2), the order provided that the state of emergency would cease " 'upon declaration by the governor that the emergency no longer exists.' " EO 2020-67 did set a discontinuation date of May 28, 2020, subject to evaluation by the Governor before expiration

in order for her to assess whether the state of emergency should continue beyond that date. The Governor then issued EO 2020-68 *under the EMA*, declaring—anew—a state of emergency across Michigan. This order was made effective immediately and was scheduled to continue through May 28, 2020. EO 2020-68 indicated that the Governor would evaluate the continuing need for the order before its expiration. EOs 2020-67 and 2020-68 extended the life of various earlier EOs.[3]

C. THE LEGISLATURE COMMENCES SUIT AGAINST THE GOVERNOR IN THE COURT OF CLAIMS

The slew of EOs the Governor issued on April 30, 2020, triggered an immediate response from the Legislature. On April 30, the Senate adopted a resolution authorizing the Senate Majority Leader to commence legal action on behalf of the Senate, challenging the Governor's authority to extend or redeclare a state of emergency; the House adopted a similar resolution.

On May 6, 2020, the Legislature filed suit in the Court of Claims against the Governor, alleging that EO 2020-67 (April 30, 2020 order keeping a state of emer-

[3] EOs 2020-67 and 2020-68 were later rescinded by orders that themselves were subsequently rescinded. The Governor eventually extended the state of emergency in EO 2020-165, which order is set to expire on September 4, 2020, subject to evaluation of the need to continue the state of emergency. EO 2020-165 states:

> This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.

gency in place under the EPGA) and EO 2020-68 (April 30, 2020 order redeclaring a state of emergency under the EMA) were invalid.[4] The Legislature contended that the Governor's actions were not statutorily or constitutionally authorized. The Legislature alleged a violation of the EMA in Count I, a violation of the EPGA in Count II, a violation of Const 1963, art 5, § 1 in Count III, and a violation of the Separation of Powers Clause, Const 1963, art 3, § 2, in Count IV. Additionally, the Legislature moved for a declaratory judgment, asking the Court of Claims to declare that the Governor's EOs were ultra vires. In particular, the Legislature requested the following declarations:

1. The Governor's authority to act under the EMA ended April 30, 2020;

2. The EPGA does not provide authority for the Governor's COVID-19 executive orders;

3. The Governor has no lawmaking power under Const 1963, art 5, § 1; and

4. The Governor's ongoing COVID-19 executive orders violate the separation of powers.

The Governor responded that the complaint did not satisfy the verification requirement of MCL 600.6431(2)(d).[5] The Governor further argued that the Legislature lacked standing because it had no special interest at stake and could not meet the obligation to show an actual controversy under MCR 2.605. The Governor also insisted that she had authority under

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[4] Although these two particular EOs have been rescinded, the dispute remains very much alive given the subsequent EOs the Governor has issued. Accordingly, the lawsuit is not moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

[5] MCL 600.6431(2)(d) requires that a complaint filed in the Court of Claims contain, among other things, "[a] signature and verification by the claimant before an officer authorized to administer oaths."

both the EPGA and the EMA to declare states of emergency and to issue orders to protect the residents of Michigan. The Governor additionally posited that the standards contained in the EPGA protected against any claim that the Legislature improperly delegated its lawmaking or legislative power to the executive branch when it enacted the EPGA. Thus, there was no violation of the Separation of Powers Clause.

The Legislature replied that it had standing because it held a special and unique interest in the case in that the Governor had nullified a legitimate legislative decision not to authorize continuation of the state of emergency. The Legislature also asserted that it had established the existence of an actual controversy for purposes of seeking declaratory relief under MCR 2.605. The Legislature disputed that the EMA granted the Governor continuing authority to act alone beyond the initial 28-day period of a state of emergency, contending that to so rule would render the legislative-approval provision in MCL 30.402 obsolete. Furthermore, the Legislature maintained that the EPGA did not provide the Governor with boundless authority and that the EPGA violated the Separation of Powers Clause.

D. THE EFFORT TO INTERVENE

Cross-appellants, five individual attorneys, moved to intervene in the lawsuit, arguing that they enthusiastically agreed with the Legislature but wanted the Court of Claims to remember that attorneys had an interest in "being free of unlawful and arbitrary strictures on [their] personal and professional activities." The Legislature expressed concerns about a potential delay should the Court of Claims choose to grant the

motion to intervene, insisting that the Legislature adequately represented the position of prospective intervenors. The Governor opposed intervention on the basis of the purported delay that would occur by allowing the attorneys into the suit. The Governor indicated that prospective intervenors would be more appropriately heard as amici curiae.

The Court of Claims denied the motion to intervene, reasoning that the Legislature adequately represented the interests of the five attorneys. The Court of Claims also determined that issues that would be created by allowing intervention were outside the focus of the case and that intervention would cause a delay in the proceedings. The Court of Claims permitted the five cross-appellants to be received as amici curiae.

E. OPINION AND ORDER OF THE COURT OF CLAIMS

The Court of Claims conducted a hearing on the issues posed in the case and permitted extensive arguments by the parties. Subsequently, the Court of Claims issued a written opinion and order. The Court of Claims first disposed of the Governor's argument regarding the verification requirement of MCL 600.6431(2)(d). Considering that the Governor acknowledged that a subsequent filing by the Legislature was notarized in accordance with the statute, the Court of Claims determined that the issue was moot and declined to analyze it.

The Court of Claims next addressed the question of the Legislature's standing to bring the action and obtain relief, framing the issue as "whether the Governor's issuance of EO 2020-67 and/or 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster." It cited with approval federal caselaw from the United States

Court of Appeals for the Sixth Circuit holding that legislators have standing to sue when arguing that their votes had been nullified. The Court of Claims also noted that the Sixth Circuit had indicated that a completely nullified legislative vote is a sufficiently concrete injury to the Legislature's interest to support standing. The Court of Claims distinguished *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156; 952 NW2d 491 (2020), on the basis that the Legislature here was not seeking court resolution of a lost political battle; it was, instead, alleging that the Governor's actions uniquely injured it by nullifying an act of the body as a whole. The Court of Claims concluded that the Legislature had standing.

The Court of Claims next made short shrift of the Governor's reliance on Const 1963, art 5, § 1, which vested her with executive power, in providing her the requisite authority to issue the EOs. The Court of Claims observed that the Governor did not assert that she had authority to issue the EOs solely on the basis of the constitutional provision and absent enabling legislation.

The Court of Claims next examined the EPGA, explaining that it bestowed broad authority on the Governor to declare a state of emergency and to act to bring the emergency under control. The Court of Claims rejected the Legislature's attempt to restrict the scope of the EPGA to only local or regional emergencies, stating that that argument was inconsistent with the EPGA's plain language, which casts a much wider net. The Court of Claims discounted the Legislature's argument that when the EPGA and EMA are read together, it is apparent that the EPGA was not intended to address statewide concerns. The Court of Claims opined that the Legislature itself

harmonized the two acts when it expressly provided that nothing in the EMA was intended to limit a state of emergency proclaimed under the EPGA. The Court of Claims rebuffed the argument that the legislative history of the EPGA revealed a limitation to local matters, determining, in part, that the Legislature was relying on "mere generalities and anecdotal commentary."

The Court of Claims likewise dispatched the Legislature's argument that the Governor's EOs violated the separation of powers. It relied on caselaw holding that the Legislature may, without violating the Separation of Powers Clause, obtain the assistance of the executive branch, provided that the Legislature sets forth adequate standards. The Court of Claims concluded that the EPGA contained sufficient standards and criteria to guide a governor's declaration of an emergency and to issue associated EOs, including the requirement that orders be reasonable and necessary under the circumstances. The Court of Claims determined that the Legislature's challenge of the EPGA was meritless and that the Legislature had failed to establish grounds to invalidate the EOs predicated on the EPGA.

Finally, the Court of Claims turned to the validity of EO 2020-68, in which the Governor redeclared a state of emergency under the EMA. The Court of Claims opined that nothing in the EMA precluded legislative extension for multiple 28-day periods. According to the Court of Claims, the Governor's redeclaration of an emergency occurred only because the initial 28-day period had expired without renewal, not because the emergency had ceased to exist and then reemerged. The Court of Claims focused on the language in the EMA providing that a governor "shall

issue an executive order" declaring the emergency terminated absent the Legislature's approval of an extension by resolution. MCL 30.403(3) and (4). The Court of Claims characterized the 28-day statutory limit in MCL 30.403 as a restriction imposed on gubernatorial authority. It indicated that the Legislature limited the time in which the Governor could act independently in responding to a specific emergency. The Court of Claims ruled that because the Legislature did not extend the emergency by resolution upon request by the Governor, the Governor's issuance of EO 2020-68 was ultra vires under the EMA.

IV. ANALYSIS

A. STANDING

We conclude that the Governor's declaration and extensions of a state of emergency, along with the associated EOs, were actions all falling within the scope of the Governor's authority under the constitutionally sound EPGA. Our holding renders moot issues concerning whether the Governor was additionally authorized to take those same measures under the EMA or whether the Governor violated the EMA. The Legislature is thus not entitled to relief even if it has the requisite standing to sue the Governor. In light of this highly expedited appeal, we shall proceed on the assumption that the Legislature had standing to file suit against the Governor for declaratory relief.

B. THE EPGA

1. STANDARD OF REVIEW

We review de novo as a question of statutory interpretation whether the Governor exceeded the power

granted her by statute. See *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702; 918 NW2d 756 (2018). "That means that we review it independently, with no required deference to the trial court." *Id*. "Likewise, this Court reviews de novo constitutional questions, including those concerning the separation of powers." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

2. RULES OF STATUTORY CONSTRUCTION

In *Slis v Michigan*, 332 Mich App 312, 335-336; 956 NW2d 569 (2020), this Court recited the well-established principles of statutory construction, observing:

> 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. We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. When statutory language is clear and unambiguous, we must apply the statute as written. A court is not permitted to read anything into an unambiguous statute that is not within the manifest intent of the Legislature. Furthermore, this Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature.
>
> Judicial construction of a statute is only permitted when statutory language is ambiguous. A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. 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. [Quotation marks and citations omitted.]

3. DISCUSSION AND RESOLUTION—SCOPE AND EXTENT OF AUTHORITY

The Legislature argues that the Governor cannot use the EPGA to justify an indefinite statewide emergency. The Legislature further contends that the Court of Claims created an irreconcilable conflict between the EPGA and the EMA with its construction of the two acts. The Legislature also maintains that the text of the EPGA and its historical context establish that the EPGA is intended to address emergencies that are confined to the local level and not statewide emergencies. As an overview of its position, the Legislature asserts as follows:

> All parties agree that the EPGA and the EMA cover the same subject matter. Under fundamental principles of statutory construction, they must be harmonized and read so that every word in both statutes is given meaning. Only the Legislature has offered such a reading here: the EPGA is for localized issues, while the EMA can reach as widely as a statewide disaster. The Court of Claims's adoption of the Governor's position—that the statutes independently authorize every single action she has taken—renders ever[y] word of the 1976 EMA's 12 pages of text surplusage. This Court should reverse.

We hold that the plain and unambiguous language of the EPGA and the EMA does not support the Legislature's position. We begin by dissecting the EPGA's language to determine whether the EPGA's application was intended to be restricted to local emergencies. The first sentence of MCL 10.31(1) provides:

> During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan

> state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved.

It hardly sounds as if the Legislature was focused solely on local emergencies when speaking in terms of a great public crisis, disaster, catastrophe, or similar emergency that imperils public safety. Indeed, its use of the adjective "great" instead suggests legislative contemplation of an emergency that is expansive or substantial, not merely a local emergency. A statewide outbreak of disease such as COVID-19 can certainly constitute a great public crisis, disaster, or catastrophe, and it undoubtedly can imperil public safety. Although "rioting" occurs most often in a limited area, statewide rioting can happen. Moreover, rioting is but one example of a public emergency listed in MCL 10.31(1). The statutory language also plainly states the public emergency must exist "within the state." *Id*. Contrary to the Legislature's strained interpretation, an emergency "within" our state can patently encompass not only a local emergency but also a statewide emergency affecting all of Michigan. There can be no dispute that the spread of COVID-19 was and is occurring "within the state" of Michigan. The prepositional phrase "within the state" clearly does not restrict the emergencies the EPGA contemplates to isolated emergencies in local communities. A single Michigan county can be described as being "within the state," but the same is true when discussing all 83 of Michigan's counties viewed together as a whole: they are "within the state." The Legislature could have easily expressed that the EPGA pertains only to public emergencies within a village, city, township, county, or other unit of governance, or the Legislature could have stated that the EPGA does not apply to

statewide emergencies, *but it did not do so*.[6] The language the Legislature chose likely reflected the unremarkable and self-evident proposition that emergencies occurring outside the state did not implicate the EPGA.

With respect to the language in the first sentence of MCL 10.31(1) referring to an application for a declaration of emergency from a mayor, county sheriff, state police commissioner, or a governor acting on his or her own volition, we easily determine that the language is broad enough to encompass the occurrence of either a localized or a statewide emergency. While an application by a mayor or a county sheriff would likely relate to a local emergency, an application by a state police commissioner[7] or governor could unquestionably concern a statewide emergency.

The concluding language in the first sentence of MCL 10.31(1) provides that a "governor may proclaim a state of emergency and *designate the area involved*." (Emphasis added.) The emphasized language plainly does not preclude the declaration of a state of emergency that designates the entire state as the "area involved." There is no restrictive or limiting language with respect to the term "area," and "area"

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[6] Our review of the Michigan Compiled Laws reveals that the Legislature has used the phrase "within the state" on numerous occasions in various contexts with the indisputable intent to include the entire state of Michigan. For example, the Insurance Code provides that the insurance commissioner may restrict the solicitation of new business "within the state." MCL 500.437(5). The Revised Judicature Act establishes jurisdiction of the courts over corporations that conduct general business "within the state." MCL 600.711(3). As yet another example, the rules of the State Higher Education Facilities Commission relate to institutions of higher education "within the state." MCL 390.944.

[7] "The [state police] commissioner shall formulate and put into effect plans and means of cooperating with the local police and peace officers *throughout the state* . . . ." MCL 28.6(4) (emphasis added).

simply means, in pertinent part, "a geographic region." *Merriam-Webster's Collegiate Dictionary* (11th ed). Were we to exclude the "state" as a whole from constituting the "area" subject to an order, rule, or regulation under the EPGA, we would be reading language into an unambiguous statutory provision and rewriting the plain language of the EPGA. That we may not do.

The second sentence of MCL 10.31(1) provides that "[a]fter making the proclamation or declaration [of a state of emergency], the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation *within the affected area* under control." (Emphasis added.) The prepositional phrase "within the affected area" is plain and unambiguous. Consequently, for the reasons already discussed with regard to examining the term "area" and the phrase "within the state," the language can concern a local emergency or a statewide emergency depending on the extent of the public crisis, disaster, or catastrophe. An "affected area" can span the entire state, especially with respect to a contagious disease, thereby establishing a statewide emergency that needs to be controlled. Additionally, and quite obviously, a governor's efforts under the EPGA "to protect life and property" can extend to the lives and property of persons in a local community or the lives and property of everyone in Michigan.

Keeping our attention on the EPGA for now, we note that the last sentence of MCL 10.31(1) provides:

> Th[e] orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles

> may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

There is nothing in the plain and unambiguous language of this provision that limits or restricts the use of orders, rules, and regulations to solely confront local emergencies; the language is broad enough to include statewide emergencies. We have already dispensed with the arguments regarding the word "area." And all of the specific examples of orders, rules, and regulations can apply in a limited manner at a local level or in an extensive manner at a statewide level. For example, during a state of emergency, a governor could regulate the use of buildings in a small town or across the entire state.

Without yet considering the EMA, under the plain and unambiguous language of the EPGA, we conclude that a governor has the authority to declare a *statewide* emergency and to promulgate reasonable orders, rules, and regulations during the pendency of the statewide emergency as deemed necessary by the governor, and which the governor can amend, modify, or rescind. Additionally, a declared statewide emergency only ends upon the governor's declaration that the emergency no longer exists. That has yet to occur in the instant case. As noted earlier in this opinion in regard to the EPGA, the Legislature specifically declared that its intent was "to invest the governor with sufficiently *broad power of action* in the exercise of the police power of the state to provide adequate control over persons and conditions during such peri-

ods of impending or actual public crisis or disaster." MCL 10.32 (emphasis added). Our conclusion regarding the breadth of the EPGA and that it pertains to statewide emergencies is entirely consistent with the expressed legislative purpose of the EPGA.[8]

The Legislature argues that the EPGA must be harmonized with the EMA and that a distinguishing feature between the two acts must be recognized because if they are effectively interchangeable and a governor can pick and choose which statute to invoke as he or she likes, the EMA and its requirement of legislative approval to extend a state of emergency are rendered surplusage. The Legislature contends that to distinguish the acts so as to make it possible to read them in harmony and give the EMA meaning, it is incumbent upon us to limit or restrict a governor's authority under the EPGA to local emergencies. Again, the Legislature maintains that only the EMA applies to statewide emergencies.

When two or more statutes arguably relate to the same subject or have the same purpose, the statutes

[8] Citing a 1945 newspaper article and a message from Governor William Milliken to the Speaker of the House of Representatives in the 1970s, the Legislature argues that the historical context of the EPGA reveals that it was intended for local matters, specifically rioting and civil disturbances. Extrinsic materials may play a role in statutory construction only to the extent that they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous language. *McCormick v Carrier*, 487 Mich 180, 220-221; 795 NW2d 517 (2010). "[T]he duty of this Court is to construe the language of Michigan's statutes before turning to secondary sources . . . ." *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 57; 693 NW2d 149 (2005). Here, the clear and unambiguous language of the EPGA indicates that it applies to more than rioting and that it can encompass statewide emergencies; consequently, the secondary sources cited by the Legislature are of no relevance and they are not inherently inconsistent with our analysis.

are deemed *in pari materia* and must be read together in order to discern legislative intent. *Measel v Auto Club Group Ins Co*, 314 Mich App 320, 329 n 7; 886 NW2d 193 (2016). The purpose of the *in pari materia* rule is to effectuate the legislative goal as evinced by the harmonious statutes on a particular subject. *Id*. "When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). "It is . . . 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." *In re Midland Publishing Co, Inc*, 420 Mich 148, 163; 362 NW2d 580 (1984). These are statutory-construction doctrines designed to discern the intent of the Legislature.

There can be no dispute that the EMA is much more comprehensive, specific, and detailed than the EPGA, that the EPGA is the older legislation, and that the EMA explicitly defines a disaster as including an "epidemic," MCL 30.402(e). The Legislature relies on the doctrines of statutory interpretation already mentioned in its effort to persuade us that the EPGA must be construed to apply only to local emergencies. Given our earlier conclusion that the EPGA, when considered solely on the basis of the language in the EPGA, provides a governor with broad authority to issue orders to confront local as well as statewide emergencies, were we to adopt the Legislature's argument, we would effectively be limiting, modifying, and abridging the EPGA. Our doing so would be in direct contravention of

the Legislature's directive in § 17 of the EMA, which provides that the EMA "shall not be construed to"

> [l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act. [MCL 30.417(d).]

The purpose of this provision is evident on its face and undeniable—the Legislature sought to arm a governor with a full legal arsenal to combat a public emergency, not just the EMA, but also the EPGA, other pertinent statutes, the Michigan Constitution, and even the common law, in conjunction with or independent of the EMA. MCL 30.417(d) does not permit us to use language in the EMA to diminish the reach and scope of the EPGA. The judiciary does not legislate.

Although the EMA specifically refers to an epidemic, we have determined that the EPGA would also cover a statewide emergency involving a contagious disease such as COVID-19, or in other words, an epidemic, which, because of COVID-19's worldwide reach, is coined a pandemic. If despite this conclusion we held that only the EMA is implicated for purposes of ascertaining a governor's authority to address an epidemic or a pandemic, we would offend MCL 30.417(d) and its mandate not to diminish a governor's authority to act under the EPGA. We cannot employ statutory-construction principles or doctrines used to discern legislative intent to produce an interpretation that conflicts with an *explicit declaration* of the Legislature's intent. See *People v Mazur*, 497 Mich 302, 314; 872 NW2d 201 (2015) (stating that when the Legislature actually expressed a clear intent, application of the *in*

pari materia doctrine to find a contrary legislative intent would not be proper). The Legislature's general argument is contrary to the plain and unambiguous language of the EPGA, specifically MCL 10.31, and the EMA, specifically MCL 30.417(d).[9]

Our concurring-and-dissenting colleague constructs most of his statutory stance on the basis that the EMA specifically refers to an "epidemic," concluding that this establishes that the EPGA was never intended to cover epidemics. We rejected this view for the reasons discussed above. We also note that the Legislature does not even make the particular argument formulated by the partial concurrence in its brief, nor did it make the argument in the Court of Claims. Our colleague agrees that the argument actually posed by the Legislature—i.e., the EPGA solely addresses local emergencies and the EMA concerns both local and statewide emergencies—lacks merit. Although it is the Legislature's position that the EPGA does not encompass statewide epidemics, it did not contend in its brief on appeal that the EPGA did not cover localized or regional epidemics or epidemics in general. Indeed, as noted earlier, the Legislature conceded that the parties agreed that the two acts "cover the same subject matter." This is akin to a waiver of the issue. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

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[9] At oral argument, counsel for the Legislature responded to a query by this panel whether a governor could have acted on a statewide basis under the EPGA had the pandemic struck in 1975, a year before the EMA was enacted. Counsel replied in the negative, but also suggested that the EPGA could have been used on a county-by-county approach to address the hypothetical 1975 pandemic. This answer appears to accept that a governor can use the EPGA to address a statewide crisis, but would apparently have to do so in a laborious, fragmented fashion, categorizing each county separately. Regardless, the alleged distinction between local and statewide emergencies simply finds no support in the statutory language.

Again, MCL 30.417(d) precludes construction of the EMA to "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws[.]" We reject any contention that this provision only bars a limitation, modification, or abridgment of a governor's authority to *proclaim or declare* a state of emergency under the EPGA, absent any application to the *extension* of a state of emergency, thereby allowing imposition of the legislative-approval provision in § 3 of the EMA, MCL 30.403. We believe this to be a tortured construction of MCL 30.417(d), which clearly sought to preserve the entire EPGA and to preclude diminishing any and all of the powers the EPGA granted a governor in addition to his or her initial authority to declare an emergency. Moreover, the argument ignores the manner in which the EPGA operates under MCL 10.31. Pursuant to MCL 10.31(2), a governor proclaims or declares a state of emergency, and it simply continues until the governor declares "that the emergency no longer exists." There is no specific language in the EPGA regarding *extensions* of a state of emergency, so there would be no reason or need for that language in MCL 30.417(d).[10]

The Legislature makes the argument that the EMA is rendered meaningless if the Governor's position is validated and the Governor can take the very same measures under both the EMA and the EPGA. We, however, are simply not at liberty to question or ignore the Legislature's informed, intentional decision when enacting the EMA to leave the broad language of the EPGA untouched, fully intact, and operational. "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on,

[10] To be clear, however, there is nothing in the EPGA that prevents a governor from acting incrementally during an emergency.

all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). Here, we find compelling the fact that in enacting the EMA, the Legislature specifically referred to the EPGA. Hence, we know with certainty that the Legislature was aware of the EPGA; therefore, we must presume that the Legislature recognized and appreciated that the EPGA did not require legislative approval of a governor's actions in continuing a state of emergency until the emergency ceased. Despite this presumed knowledge, the Legislature, while requiring legislative approval to extend a state of emergency under the EMA, expressly declared that the EMA could not be construed as limiting, modifying, or abridging the EPGA.[11] Perhaps the Legislature desired an executive-legislative partnership in confronting a public emergency but also wished to avoid a political impasse and inaction in the face of an emergency should the partnership fail. Whatever the reason, we now simply read these statutes as required and accept the Legislature's explicitly articulated decision to retain the EPGA as a source of gubernatorial power during an emergency notwithstanding its subsequent enactment of the EMA.

4. DISCUSSION AND RESOLUTION— THE EPGA AND SEPARATION OF POWERS

The Legislature argues that if we construe the EPGA as urged by the Governor and determined by the Court of Claims, "then the statute faces a larger

[11] We do conclude that reading a requirement for legislative approval to extend a state of emergency into the EPGA would have the effect of limiting, modifying, or abridging a governor's authority under the EPGA because the EPGA gives the governor alone the power to determine when an emergency has ended.

constitutional problem: separation of powers." The Legislature contends that the lawmaking power rests exclusively with the Legislature, that the Governor is unilaterally making laws, that the crisis does not diminish the separation-of-powers doctrine, and that the EPGA's supposed delegation of power to the Governor cannot save the EOs.

As an initial observation, we are at a loss to understand how the EPGA is apparently constitutional for purposes of the separation-of-powers doctrine if construed to solely give a governor the power to address local emergencies but violates the separation-of-powers doctrine if applied to statewide emergencies. If there were an unconstitutional delegation of legislative power to the executive branch under the EPGA, whether that power is exercisable to only combat local emergencies or instead available to tackle local and statewide emergencies seems inconsequential to the constitutional analysis and determination of a violation. Regardless, the Legislature has failed to meet its burden to show that the EPGA violates the Separation of Powers Clause.

A statute is presumed to be constitutional, and courts are obligated to interpret a statute as constitutional unless its unconstitutionality is readily apparent. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011). Extreme caution must be used when deciding whether to exercise the power to declare a statute unconstitutional. *Id*. If serious doubt exists with respect to whether we should declare a law unconstitutional, the power to do so must not be exercised. *Id*. at 307-308. Every reasonable presumption must be indulged in favor of the constitutional validity of a statute. *Id*. at 308. When examining an

argument that a statute is unconstitutional, this Court does not inquire into the wisdom of the legislation. *Id*. The burden to prove that a statute is unconstitutional rests with the party who is challenging the law. *Id*.

As stated earlier, legislative power is vested in the Legislature. Const 1963, art 4, § 1. Under Const 1963, art 4, § 51, "[t]he 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." Under our Separation of Powers Clause, Const 1963, art 3, § 2, and what is known as the nondelegation doctrine, which flows from the clause, the legislative branch may not delegate its lawmaking authority to the executive or judicial branches. *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 8; 658 NW2d 127 (2003); *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 458; 294 NW2d 68 (1980); *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956). In *Makowski v Governor*, 495 Mich 465, 482-483; 852 NW2d 61 (2014), our Supreme Court provided some clarification regarding the nondelegation doctrine, explaining:

> While the Constitution provides for three separate branches of government, Const 1963, art 3, § 2, the boundaries between these branches need not be "airtight." In fact, in designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. The true meaning [of the separation-of-powers doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert

> the principles of a free Constitution. [Quotation marks, citations, and brackets omitted; alteration in original.]

The Michigan Supreme Court has recognized that the Separation of Powers Clause and the nondelegation doctrine do not prevent our Legislature from obtaining the assistance of the coordinate branches. *Taylor*, 468 Mich at 8-9. In *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 51-52; 367 NW2d 1 (1985), the Supreme Court observed:

> Challenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power. Although for many years this and other courts evaluated delegation challenges in terms of whether a legislative (policymaking) or administrative (factfinding) function was the subject of the delegation, this analysis was replaced by the "standards" test as it became apparent that the essential purpose of the delegation doctrine was to protect the public from misuses of the delegated power. The Court reasoned that if sufficient standards and safeguards directed and checked the exercise of delegated power, the Legislature could safely avail itself of the resources and expertise of agencies and individuals to assist the formulation and execution of legislative policy.
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> The criteria this Court has utilized in evaluating legislative standards are . . . : 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. Additionally, due process requirements must be satisfied for the statute to pass constitutional muster. Using these guidelines, the Court evaluates the statute's safeguards to insure against excessive delegation and misuse of delegated power. [Citations omitted.]

The "standards test" satisfies the Separation of Powers Clause, and when legislation contains, either expressly or by incorporation, adequate standards, then the courts, the public, and the Legislature may, if necessary, constitutionally " 'check' " the use of delegated power. *Westervelt v Natural Resources Comm*, 402 Mich 412, 439; 263 NW2d 564 (1978). "In making th[e] determination whether the statute contains sufficient limits or standards we must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power . . . ." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976).

We hold that the EPGA contains standards that are as reasonably precise as the subject matter—public emergencies—requires or permits, such that the Legislature, by enacting the EPGA, safely availed itself of the resources and expertise of the executive branch to assist in the execution of legislative policy. Accordingly, the EPGA does not violate the Separation of Powers Clause, and the Legislature did not prove otherwise. The standards found in the EPGA are sufficiently broad to permit the efficient administration of carrying out the policy of the Legislature with regard to addressing a public emergency but not so broad as to leave Michiganders unprotected from uncontrolled, arbitrary power.

The Legislature complains about the alleged broad and sweeping nature of the EOs issued by the Governor and criticizes the Governor for subjecting citizens to criminal penalties for violating those expansive EOs. But it was the Legislature itself, exercising its role to make policy and enact laws in 1945, that

expressly invested the governor with "broad" police power during a public emergency, MCL 10.32, and that explicitly directed that a violation of an order could "be punishable as a misdemeanor," MCL 10.33. Of course, the Legislature claims that the individuals composing the Legislature in 1945 overstepped their constitutional bounds when enacting the EPGA. We find it more than a bit disconcerting that the very governmental body that delegated authority to the governor to confront public emergencies—and holds and has held the exclusive power to change it—steps forward 75 years later to now assert that it unconstitutionally delegated unconstrained authority.

Under the standards articulated by the Legislature in the EPGA, a governor may declare a state of emergency and promulgate orders, rules, and regulations to address a "great public crisis, disaster, rioting, catastrophe, or similar public emergency . . . , or [when there is] reasonable apprehension of immediate danger of a public emergency of that kind[.]" MCL 10.31(1). The declared emergency must imperil "public safety." *Id*. Considering the complexity of the subject matter and the myriad unfathomable forms that a public emergency could take, we find this language is as reasonably precise as the subject matter requires or permits. Indeed, more exacting standards would likely be overly confining and unnecessarily bind a governor's hands in any effort to mitigate and control an emergency at the very time he or she would need to be nimble.

Moreover, the orders, rules, and regulations must be "reasonable" and, as judged by a governor, "necessary to protect life and property or to bring the emergency situation . . . under control." *Id*. Reasonableness and necessity, as couched in the statutory language, consti-

tute appropriate limits or standards that prohibit and can prevent the exercise of uncontrolled and arbitrary power, yet are sufficiently broad to permit a governor to carry out the legislative policy of protecting life and property during an emergency and controlling a great public crisis.[12]

Adding further parameters or guidelines, the EPGA sets forth examples of appropriate orders, rules, and regulations, touching on traffic, transportation, the establishment of zones to regulate the use and occupancy of buildings, the prohibition and regulation of ingress and egress relative to buildings, the control of places of assembly and streets, curfews, and the transportation of explosives. *Id*. And a governor's authority ends when it is determined "that the emergency no longer exists." MCL 10.31(2). Finally, the EPGA "does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons." MCL 10.31(3).[13]

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[12] See *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159, 173; 220 NW2d 416 (1974) (noting that the standard of "necessity" in an eminent-domain statute is a sufficient standard for delegation of authority because it is as reasonably precise as the subject matter requires or permits); see also *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) ("In the context of this case, 'necessary' was a sufficiently precise standard."). "A *reasonable* determination is the antithesis of one which is *arbitrary*[.]" *Dooley v Hwy Truckdrivers & Helpers, Local 107, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 192 F Supp 198, 200 (D Del, 1961) (emphasis added).

[13] As reflected in our discussion of the various standards and criteria in MCL 10.31, there is no basis whatsoever for the claim by the partial concurrence that we are holding that the EPGA empowers a governor "to do anything" the governor wishes. Furthermore, the "reasonable" standard in MCL 10.31(1) relative to promulgated orders interjects an objective component into the statute. See *Radtke v Everett*, 442 Mich 368, 387; 501 NW2d 155 (1993) (stating that reasonableness involves an objective, not subjective, examination). Finally, the EPGA does not allow

In sum, exercising extreme caution, indulging every reasonable presumption in favor of the constitutionality of the EPGA, and evaluating the EPGA's safeguards, criteria, and standards in total, not in a vacuum, we conclude that there was no excessive or improper delegation of power to the governor with the enactment of the EPGA.

C. THE EMA

If this panel, as urged by the Legislature, were to rule that the Governor violated the EMA and lacked authority to utilize the EMA to extend the state of emergency and issue EOs on and after April 30, 2020, it would be entirely pointless because the Governor had the authority to continue the very same state of emergency and issue the very same EOs under the EPGA. Stated otherwise, we could provide no meaningful relief to the Legislature if we ruled in its favor with respect to the EMA. Therefore, given our holding in regard to the EPGA, we can only conclude that any issues concerning the Governor's powers under the EMA are now moot. See *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920) (explaining that a matter is moot if a judgment on the matter, "when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy"); *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000) ("An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief."); *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (applying the doctrine of mootness when "there is no meaningful relief this

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for the issuance of never-ending orders given that the governor's authority ceases at the conclusion of the emergency. MCL 10.31(2).

Court can provide because petitioners can assign their lottery winnings to the same parties under the amended statute").

D. INTERVENTION

Prospective intervenors argue that the Court of Claims abused its discretion by denying their motion to intervene. "This Court reviews a trial court's decision on a motion to intervene for abuse of discretion." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). A court abuses its discretion when a decision falls outside the range of reasonable and principled outcomes. *Id*.

The five attorneys argue that their law practices "remain threatened by the possibility that The Governor will [impose] criminal prosecution for, well, going to our own offices 'too often.' " Prospective intervenors acknowledge that the stay-at-home EOs have been lifted, a fact that would appear to render moot the majority of their claims. Regardless, reversal is unwarranted. In denying the motion to intervene, the Court of Claims reasoned, in pertinent part:

> In this case, the putative intervenors echo much of the argument offered in support of the plaintiffs' case and additionally present . . . an "as applied" challenge to the scope of the executive orders as they affect lawyers and litigants. The focus of the case pled by plaintiffs is on an assertion that the Governor is without authority to act as she has under the Michigan Constitution, [the EMA], or [the EPGA]; or that the EPGA itself is unconstitutional. Those issues are adequately represented by the plaintiffs. The distinct issues of whether any, all, or some of the executive orders impermissibly infringe on the rights, duties or privileges of attorneys or their clients is not the focus of this case and would be better framed in a separate

> action. Additionally, this matter is emergent and affording party status to these putative plaintiffs would delay resolution.

The rule regarding permissive intervention,[14] MCR 2.209(B), provides as follows:

> On timely application a person may intervene in an action
>
> (1) when a Michigan statute or court rule confers a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

MCR 2.209(B)(2) was the only provision potentially implicated in this case. The five attorneys describe their arguments as "virtually identical" to those made by the Legislature. To the extent that this claim is true, our ruling today eliminates the need for future intervention by prospective intervenors to litigate the arguments already posed by the Legislature and rejected in this appeal. To the extent that the attorneys presented questions of law and fact unique to them, this does not bode well for them under MCR 2.209(B)(2) because, as stated, the rule permits intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Additionally, it would make no procedural sense to remand this case and allow the five cross-appellants to litigate those unique matters against the Governor; they can always file their own action or attempt to intervene in other lawsuits regarding the Governor's EOs. Moreover, on

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[14] Prospective intervenors do not claim that they have a "right" to intervene under MCR 2.209(A).

appeal, prospective intervenors do not even address the issue of any delay that would have been caused by their intervention, although the Court of Claims cited undue delay as a basis for its ruling. "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). In sum, we hold that there is no basis for reversal.

V. CONCLUSION

Proceeding on the assumption that the Legislature had standing to file suit, we hold that the Governor's declaration of a state of emergency, her extensions of the state of emergency, and her issuance of related EOs clearly fell within the scope of the Governor's authority under the EPGA. We further hold that the EPGA does not violate the Separation of Powers Clause. We therefore decline to address whether the Governor was additionally authorized to take those same measures under the EMA and whether the Governor violated the EMA—those matters are moot. Finally, we hold that there is no basis to reverse the order of the Court of Claims denying the motion to intervene.

We affirm on the issues necessary to resolve this appeal.

K. F. KELLY, J., concurred with MARKEY, P.J.

TUKEL, J. (*concurring in part and dissenting in part*).

INTRODUCTION

I agree with the majority's decision that the Court of Claims properly denied the motion for intervention. I disagree, however, with the remainder of the majority's

opinion. The United States Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v United States*, 488 US 361, 380; 109 S Ct 647; 102 L Ed 2d 714 (1989).

Our Michigan Constitution broadly follows the same parameter, and has done so, in similar terms, since before statehood in 1837. Under our law, "[t]he 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; see also *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613, 684 NW2d 800 (2004) ("By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise."), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed* 487 Mich 349, 792 NW2d 686 (2010).[1]

Under that tripartite approach "the legislative power of the State of Michigan is vested in a senate and a house of representatives," Const 1963, art 4, § 1;

[1] Our first Constitution, in 1835, preceded statehood but nonetheless provided that "[t]he powers of the government shall be divided into three distinct departments; the Legislative, the Executive and the Judicial; and one department shall never exercise the powers of another, except in such cases as are expressly provided for in this constitution." Const 1835, art 3, § 1. The 1835 Constitution further provided, "The legislative power shall be vested in a Senate and House of Representatives." *Id*. at art 4, § 1. Almost identical provisions have been enacted in our three subsequent Constitutions, including the current one. See Const 1850, art 4, § 1; Const 1908, art 5, § 1; Const 1963, art 3, § 2.

"the executive power is vested in the governor," *id*. at art 5, § 1; and "the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house," *id*. at art 6, § 1, except "to the extent limited or abrogated by article 4, section 6 or article 5, section 2," an exception that applies to each of the three branches.[2]

This case involves the scope of those executive and legislative powers. The questions presented are whether the Legislature, in the 1945 emergency powers of the governor act (EPGA);[3] and the 1976 Emergency Management Act (EMA),[4] authorized a governor to rule on an emergency basis without any durational limit and whether, if the Legislature did give such authority, its delegation of that power was constitutional. The case comes to us in response to executive orders issued by Governor Gretchen Whitmer relating to the current pandemic involving COVID-19. The executive orders, which have evolved over time, have in various iterations significantly restricted the liberties of all Michigan citizens in many ways, imposing broad economic and travel restrictions; setting forth mandatory stay-at-home orders; and promulgating

[2] That exception is not at issue here. Article 5, § 2 of Michigan's 1963 Constitution involves the authority of the governor to reorganize principal departments and places a limit of 20 on the number of such departments; Article 4, § 6 of Michigan's 1963 Constitution involves the establishment of an independent citizens redistricting commission.

[3] 1945 PA 302 as amended, codified at MCL 10.31 *et seq*.

[4] 1976 PA 390 as amended, codified at MCL 30.401 *et seq*.

many other regulations. The executive orders are backed by criminal sanctions, which provide that persons who violate them are subject to the misdemeanor penalties of the EPGA, see MCL 10.33, and the EMA, see MCL 30.405(3). Those orders, and the associated criminal penalties, were imposed solely by executive order of the Governor, bypassing the normal legislative process.[5]

The Governor asserts that her authority under the EPGA is essentially unlimited in scope and duration. The executive orders thus implicate statutory interpretation involving the interplay between the EPGA and the EMA because the later-enacted EMA provides that a governor's authority to issue such an executive order expires at the end of 28-days if not approved by both houses of the Legislature. The case also presents the question of whether, if the Legislature did grant such broad authority to the governor, the legislation was constitutional. And the Governor asserts that the Legislature lacks standing to bring the instant suit challenging the executive orders. These questions take place against a backdrop in which no governor has ever asserted such unbridled authority outside the normal and constitutionally sanctioned legislative process.[6]

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[5] Various iterations of the orders have relied on different authorities. Executive Order 2020-67 invoked the Governor's constitutional authority under Const 1963, art, 5, § 1 and the EPGA; Executive Order 2020-68 invoked the Governor's constitutional authority and the EMA, declaring both a state of emergency and a state of disaster under the EMA. See generally Part III of this opinion. Ultimately, the analysis in this opinion does not rest on which statute the Governor relied on in any particular order because the statutes must be interpreted *in pari materia* and both statutes are thus at issue. See generally Part III of this opinion.

[6] It also is worth noting what is not at issue in this case, principally, whether COVID-19 is an extremely dangerous public-health challenge that must be addressed by government; clearly it is. The question, thus, is not whether actions should be taken by government but, rather, how

Ultimately, I believe the questions presented here yield a clear answer on statutory terms: the EPGA and the EMA, properly construed *in pari materia*, do not each stand on their own, as the Governor asserts and the majority holds; rather, at least in a case such as this involving an "epidemic," and for the reasons discussed more fully in this opinion, the EMA's 28-day time limit controls. For the reasons stated by the Court of Claims, the Legislature has standing to bring this suit, because the Governor's actions have vitiated the Legislature's express authority under the EMA to approve or disapprove executive orders extending beyond 28 days; properly construed, the EPGA has no role to play in this analysis. Thus, given that the Governor's actions violate the EMA because the Legislature has declined to extend the executive orders (as correctly found by the Court of Claims), I would affirm that portion of its order and strike down the executive orders at issue. Given my preference, I also would not reach the constitutional questions involved, particu-

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they should be taken—by unlimited executive fiat, or through constitutional methods in place since before statehood. We also do not weigh any particular policy prescription set forth by the Governor or the Legislature. Rather, the correct resolution turns on constitutional text; legislative language which expresses the Legislature's policy determinations and legislative intent based on such language; all as filtered through well-established canons of construction that dictate how we view and interpret legal authorities. See *Robinson v Detroit*, 462 Mich 439, 474; 613 NW2d 307 (2000) (CORRIGAN, J., concurring) ("[A] Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature[.]"). The case of course presents critical issues involving self-government because "the underlying issues in these cases pertain to an 'emergency' of the most compelling and undisputed character," *House of Representatives v Governor*, 505 Mich 1166, 1168 (2020) (CAVANAGH, J., concurring) (quotation marks and citation omitted), and "is arguably the most significant constitutional question presented to this Court in the last 50 years," *House of Representatives v Governor*, 505 Mich 1142, 1149 (2020) (ZAHRA, J., dissenting), recon den 505 Mich 1166 (2020).

larly whether the Governor has improperly exercised legislative authority belonging to the Legislature, in violation of Article 3, § 2 of the 1963 Constitution. As discussed more fully in this opinion, the doctrine of constitutional avoidance directs us to decline such constitutional interpretation if a case can be decided on other grounds; here, the statutory analysis would fully dispose of the questions presented. However, the majority rejects the statutory analysis that I believe is mandated, which thus requires that I consider the constitutional question of whether the Governor improperly exercised (and continues to exercise) legislative powers, in violation of our Constitution. For the reasons stated more fully in this opinion, I would conclude that the Governor's actions violate the Separation of Powers Clause and would strike down the executive orders on that basis as well. However, because I agree with the majority that the Court of Claims did not abuse its discretion by denying intervention, I join Part IV(D) of the majority opinion.

I. STANDING

The majority never determines whether plaintiffs, the Michigan House of Representatives and the Michigan Senate (collectively, the Legislature), have standing to pursue the present case against defendant, the Governor of Michigan, simply assuming that the Legislature did have standing. While I would conclude that there was nothing incorrect in that portion of the Court of Claims' opinion which found standing, I do not think that we can simply assume standing. Therefore, I will briefly review why I conclude that the Legislature properly established standing for this case.

"Whether a party has standing is a question of law that is reviewed de novo." *Mich Ass'n of Home Builders*

v City of Troy, 504 Mich 204, 212; 934 NW2d 713 (2019). Standing is a component of every case. See *Miller v Allstate Ins Co*, 481 Mich 601, 606-607; 751 NW2d 463 (2008) ("Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim. This constitutional standing doctrine is longstanding and stems from the separation of powers in our constitution.") (citation omitted); *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 28; 755 NW2d 553 (2008) ("[T]he elements of individual and organizational standing must be met in environmental cases *as in every other lawsuit*, unless the constitution provides otherwise.") (citation and quotation marks omitted; emphasis added).

" '[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue.' " *House Speaker v Governor*, 443 Mich 560, 572 n 15; 506 NW2d 190 (1993), quoting *Flast v Cohen*, 392 US 83, 99-100; 88 S Ct 1942; 20 L Ed 2d 947 (1968). "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.' " *Lansing Sch Ed Ass'n*, 487 Mich at 355 (citations omitted). Absent standing, a court's decision would constitute a mere advisory opinion, which is outside the " 'judicial power' " provided for by our Constitution. See generally *Nat'l Wildlife Federation*, 471 Mich at 612-614, citing Cooley, *Constitutional Limitations* (1st ed), p 92.[7]

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[7] In a number of cases, including *House Speaker v State Admin Bd*, 441 Mich 547, 559 & n 20; 495 NW2d 539 (1993), and *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007), overruled on other grounds *Lansing Sch Ed Ass'n*, 487 Mich at 374 n 16, our Supreme

Thus, under the Michigan Constitution, a litigant has standing whenever there is a legal cause of action. Further, a litigant who meets the requirements of MCR 2.605 sufficiently establishes standing to seek a declaratory judgment. *Lansing Sch Ed Ass'n*, 487 Mich at 372. If a cause of action is not provided at law,

> then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id.*]

There is no cause of action provided by law that would apply in this case. The EMA, however, provides that an executive order that the governor issues under his or her authority expires after 28 days "unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature." MCL 30.403(3) (regarding states of disaster). See also MCL 30.403(4) (providing identical language regarding states of emergency). The Legislature argues that under the required *in pari materia* reading of the EMA

Court emphasized that "[o]ne notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions. Const 1963, art 3, § 8. Under Article III of the federal constitution, federal courts may issue opinions only where there is an actual case or controversy." *House Speaker*, 441 Mich at 559 n 20. Const 1963, art 3, § 8 is limited in scope in a number of respects, providing that "[e]ither house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Thus, while that provision authorizes the Supreme Court under certain circumstances to issue an advisory opinion, there is no such provision granting this Court that authority. Accordingly, this Court is bound to find standing in a case before we may exercise the judicial power.

and the EPGA, the provisions of the EMA control; the Legislature thus argues that failing to grant it standing in this case would have the effect of nullifying the statutory scheme that the Legislature enacted regarding time limits for the executive orders at issue, a position which the Court of Claims accepted. In addition, the Legislature argues that the EPGA is unconstitutional.

"For purposes of determining standing, we must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *American Family Ass'n of Mich v Mich State Univ Bd of Trustees*, 276 Mich App 42, 46; 739 NW2d 908 (2007) (citations and quotation marks omitted). Consequently, I must consider as true the Legislature's allegations that in issuing her executive orders and repeatedly extending a state of emergency without legislative approval, the Governor encroached on its authority. See *id*.

It is, of course, clearly settled law that " '[i]nterpretation of the State Constitution is the exclusive function of the judicial branch. Construction of the Constitution is the province of the courts and this Court's construction of a State constitutional provision is binding on *all* departments of government.' " *House Speaker*, 443 Mich at 575 n 19, quoting *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968). See also *House Speaker*, 443 Mich at 575 n 19 (" 'A conflict between the constitution and the statute is clearly a legal question which only a court can decide[.]' "), quoting *Regents of the Univ of Mich v Employment Relations Comm*, 389 Mich 96, 103; 204 NW2d 218 (1973).

I would conclude, as did the Court of Claims, that given the statutory structure of the EMA and the significant issues regarding the EMA's interrelationship with the EPGA, as well as the question of the

constitutionality of the EPGA under the circumstances presented, see Part IV of this opinion, that the Legislature has alleged a special injury or right, as well as a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large. *Lansing Sch Ed Ass'n*, 487 Mich at 372. The Legislature alleges that its statutory authority to decline a governor's request to extend a state of disaster or state of emergency is being effectively eviscerated through the Governor's actions in this case; given the language of the EMA, I agree that the allegation of a loss of such prerogatives through encroachment by a different branch of government constitutes "a special injury or right." By definition, the injury is one that only the Legislature could suffer because the Legislature is the only entity given authority to authorize or decline to authorize requests to extend a state of emergency. It seems clear to me that the Legislature thus alleges a "special injury" because the injury, if it occurred, could affect the scope of the Legislature's powers only; and it also is clear that because it is an injury that could affect the Legislature powers only, the injury is not one that would affect the citizenry at large, other than in the general sense of the law not being followed, which is insufficient to establish standing.

Moreover, a party has standing "if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*. Given the nature of the disputes in this case—i.e., those involving statutory and constitutional interpretation—only the judicial branch may resolve them. And I see no reason to conclude that the Legislature would have gone to the trouble of enacting the time limitation provisions of the EMA, which, when applicable, work to grant it the ability to cabin the governor's authority, if it did not intend to afford itself recourse to the courts in those

instances in which it alleged that the governor failed to comply with such limits.

In other words, in my opinion, the Legislature has alleged a special injury unique to it; an injury not available to the public at large or any other person or entity, thus establishing that the Legislature's injury is different in kind from any potentially suffered by the public at large; that the nature of the disputes are such that only the judicial branch can conclusively determine them; and that the statutory scheme evinces an intention on the part of the Legislature to grant itself standing to litigate such suits.[8] The fact that the injury would have " 'completely nullified' " the Legislature's authority under the statutory scheme, see *Arizona State Legislature v Arizona Independent Redistricting Comm*, 576 US 787, ___; 135 S Ct 2652, 2665; 192 L Ed 704 (2015); *Tennessee ex rel Tennessee Gen Assembly v United States Dep't of State*, 931 F3d 499, 509 (CA 6, 2019), and thus also would have satisfied the more restrictive Article III definition of standing, as the Court of Claims also concluded, in my opinion, simply reinforces that the Legislature has established standing. I therefore turn to the merits of the case.

II. STANDARD OF REVIEW

The questions presented here all are subject to de novo review. We review de novo whether a party has standing to pursue a case, *In re Pollack Trust*, 309 Mich App 125, 154; 867 NW2d 884 (2015); the proper inter-

[8] While I acknowledge that the Legislature has the power through the normal political process to amend or repeal the EMA and the EPGA, which may have application to future executive actions, it does not have the power to ensure that the Governor has not exceeded a governor's power under these statutes as currently in force, the issue presented here. That is the judiciary's role.

pretation and construction of statutes, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012); and the scope of constitutional provisions, *Thomas v Deputy Warden, State Prison of Southern Michigan*, 249 Mich App 718, 724; 644 NW2d 59 (2002).

III. STATUTORY CONSTRUCTION

As an initial matter, the majority states that the Legislature failed to argue, in its brief on appeal, that the EPGA does not apply to epidemics. At oral argument, however, the Legislature made clear that it *was* making that argument. I question, therefore, whether the Legislature could be deemed to have waived anything. More fundamentally, this case properly involves the interpretation of two statutes *in pari materia*. Under the *in pari materia* rules of construction, we are to find a harmonious reading of the two statutes if possible. In undertaking that task, we are not restricted by whether a party made a particular argument for a harmonious reading of the statutes; the proper interpretation of statutes is a judicial function, which cannot be waived by a party. I discern no basis for the Legislature's argument that, properly construed, the EPGA has a geographic limitation, and therefore I agree with the majority as to that point; but nonetheless, I would conclude that the proper construction of the statute demonstrates the inapplicability of the EPGA to an "epidemic."

A. *IN PARI MATERIA* CANON OF CONSTRUCTION

Both the EPGA and the EMA deal with the declaration of a state of emergency in the generic sense;[9] the

[9] Under the EMA, a governor can declare a "state of disaster," MCL 30.403(3), or a "state of emergency," MCL 30.403(4). However, an

invocation of emergency powers to address such emergencies, which powers vary markedly from those ordinarily in effect under our constitutional structure; and the limits, if any, placed on a governor exercising such powers. Accordingly, both statutes relate to the same subject matter and, thus, are *in pari materia* (literally, "in a like manner"). "It is the rule that in 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 enacted at different times, and containing no reference one to the other." *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965), overruled on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109, 119 (2006). " 'The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject.' " *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994), quoting *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930). That is because " '[s]everal acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as action upon one system.' " Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Thompson/West, 2012), p 252, quoting 1 James Kent, Commentaries on American Law 433 (1826). When applying an *in pari materia* construction, "[i]f statutes lend themselves to a construction that avoids conflict, that construction

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epidemic can only be the basis for executive action as a state of disaster, as is expressly provided by the EMA's definitions. See MCL 30.402(e); note 16 of this opinion (discussing the *expressio unius* canon of construction).

should control." *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). "When there is a conflict between statutes that are read *in para* [sic] *materia*, the more recent and more specific statute controls over the older and more general statute." *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007), abrogated in part on other grounds by *People v Arnold*, 502 Mich 438 (2018). In addition, and outside the *in pari materia* rules of construction, we construe statutes in such a manner that each word has meaning and that no word is deemed to be surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).[10]

B. BACKGROUND INFORMATION REGARDING THE STATUTORY SCHEMES

Under the EMA:

1. An "epidemic" expressly may be a triggering event for executive action.[11] MCL 30.402(e); MCL 30.403(3).

2. A declaration of a state of disaster authorizes a governor, in addition to some specific powers, to "[d]irect all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(j).

3. A state of disaster must terminate after 28 days unless the governor requests and the Legislature approves an extension. MCL 30.403(3).

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[10] Just so it is absolutely clear, there are three general canons of construction implicated here: (1) statutes regarding the same general subject matter are construed *in pari materia*; (2) we assume that the Legislature did not intend for its enactments to be mere surplusage but, rather, that it strives for an interpretation that gives every word meaning; and (3) we assume that when the Legislature enacts legislation, it knows what the existing state of the law is and crafts its work accordingly.

[11] See note 9 of this opinion.

Under the EPGA:

1. The governor may declare a state of emergency "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state[.]" MCL10.31(1).

2. "After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). The statutory provision includes a nonexclusive list of the governor's powers.

3. The governor's orders are in effect until they expire under their own terms, or when the governor declares "that the emergency no longer exists." MCL 10.31(2). The majority concludes that the governor may invoke the EPGA to address an epidemic or a pandemic.[12] There are no categorical limits placed on

[12] The word "disaster" is undefined in the EPGA. Under the EMA, however, " '[d]isaster' means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, *epidemic*, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders." MCL 30.402(e) (emphasis added). The COVID-19 threat has been deemed a "pandemic." A "pandemic" is "an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population." Merriam-Webster, *Usage Notes*: *'Pandemic' vs 'Epidemic' How They Overlap And Where They Differ* <https://www.merriam-webster.com/words-at-play/epidemic-vs-pandemic-difference#:~:text=An%20epidemic%20is%20defined%20as,high%20proportion%20of%20the%20population> [https://perma.cc/D2F5-5VY3]. An "epidemic," by contrast, means " 'an outbreak of disease that spreads quickly and affects many individuals at the same time.' " *Id*. A pandemic is thus more widespread and encom-

the orders a governor can impose after a declaration under either statute: the EPGA permits "reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control," MCL 10.31(1), while the EMA permits the governor to "[d]irect all other actions which are necessary and appropriate under the circumstances," MCL 30.405(1)(j). There is no material difference between the two; each permits the governor to take whatever actions the governor deems necessary.

Thus, applying the rules of construction in a straightforward manner, it is readily apparent that the inclusion of the word "epidemic" in the definition of "disaster" under the EMA means that the Legislature did not understand any of the EPGA's triggering events to include an epidemic. If the EPGA applied to an epidemic, there would have been no reason to include it in the EMA definition—inclusion would be a redundancy, contrary to how we construe statutes—because the governor can impose the same relief under the EPGA that may be imposed under the EMA. Reading the EPGA in the manner it does, the majority renders at least a portion of the EMA redundant; there is nothing the governor can do under one statute that cannot also be done under the other. Given that fact, there was no reason for the Legislature to have enacted the EMA.

Of course, we do not construe any word in a statute to be nugatory if there is an alternative interpretation. A straightforward reading of the statutes, in light of

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passes a greater disaster than an epidemic. The greater necessarily includes the lesser; because the EMA expressly defines an epidemic to be a disaster, *a fortiori* a pandemic also qualifies as a disaster.

the canons of construction, in fact yields such an alternative interpretation: the Legislature would not have included the word "epidemic" as a permissible triggering event under the EMA, and would not have otherwise mimicked the EPGA, unless it understood that the EPGA did not apply to an epidemic. This is the only interpretation that makes sense of the inclusion of the word "epidemic" in the EMA—a word that is notably absent from the EPGA; this interpretation also explains the Legislature's creation of executive authority, which otherwise would be substantively identical with that provided for in the EPGA.

C. THE GOVERNOR'S "BELT AND SUSPENDERS" ARGUMENT

The Governor makes two arguments in response to this point. First, the Governor argues that by including the word "epidemic" as a condition that can justify a state of disaster under the EMA, the Legislature employed "a belt and suspenders" approach to show the importance it attached to the use of the word in the EMA; the Governor makes this assertion even though, in the Governor's view, the EPGA already reached epidemics at the time the Legislature defined an "epidemic" as a disaster under the EMA. This response by the Governor is particularly weak because it stands on its head a longstanding canon of construction, which assumes that the Legislature did not intend to enact surplusage. Rather, the Governor would have us hold that if the Legislature deems a situation unusually important, it *would* enact surplusage to signal to the world the importance it attaches to a particular construction. Frankly, this argument is frivolous because there are accepted methods by which a Legislature may communicate its intent and by which courts know how to discern that intent; enacting surplusage is

simply the opposite of the manner in which the Legislature does so. See, e.g., *Reading Law*, p 174 (" 'These words cannot be meaningless, else they would not have been used.' "), quoting *United States v Butler*, 297 US 1, 65; 56 S Ct 312; 80 L Ed 477 (1936). Our own Justice COOLEY made the same point well over 150 years ago, when he wrote, " 'The courts must lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.' " *Reading Law*, p 174 n 3, quoting Cooley, *Constitutional Limitations* (2d ed), p 58 (brackets and ellipsis omitted). That approach has been uniformly followed until the present. See, e.g., *Apsey*, 477 Mich at 127 ("Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory.").

The EPGA authorizes the Governor, in a state of emergency (which includes a "disaster")[13] to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control" and provides a nonexclusive list of the governor's powers. MCL 10.31(1). Thus, the majority holds that from 1945 on, following the enactment of the EPGA and continuing on through 1976 and the enactment of the EMA until today, the governor had essentially unlimited authority to deal, on an emergency basis, with epidemics and threats to public health. That construction is an absurdity in light of the Legislature's specific use of the word "epidemic" in the

[13] The EPGA applies to a "great public crisis, disaster, rioting, catastrophe or similar public emergency . . . ." MCL 10.31(1). There can be no doubt that a "public emergency" under that definition comports with the definition of "state of emergency" under the EMA and that the EPGA's use of the term "disaster," which itself can constitute a "public emergency," comports with the EMA's use of that same term.

definition of "disaster" in the EMA. As I already have noted, we assume that when the Legislature crafts legislation it knows what the existing law is and takes it into consideration. *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016). If the Governor's position is correct, the Legislature, knowing that a governor's authority to take executive action under the EPGA included the authority to address an "epidemic" nonetheless granted the governor the authority in the EMA to address an "epidemic." That conclusion flies in the face of how courts and legislatures go about their business of crafting their work and taking steps, through well-understood conventions, to ensure that they each understand exactly what is intended of the other. In this case, that means that the 1976 Legislature can only be deemed to have understood that the EPGA *did not* extend to epidemics; thus, the only legislative enactment which covers such an event is the EMA.[14]

D. THE GOVERNOR'S AND THE MAJORITY'S RELIANCE ON MCL 30.417(D)

The majority and the Governor rely on § 17(d) of the EMA, MCL 30.417(d), in an attempt to show that the

[14] It is not entirely correct to say that neither the EPGA nor the EMA have any limits as to the nature of the orders which the governor may issue following a declaration of an emergency. Both the EPGA and the EMA, in nearly identical terms, provide that an executive order issued under either of them "does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons," EPGA, MCL 10.31(3); nor does it "authorize the seizure, taking, or confiscation of lawfully possessed firearms or ammunition," EMA, MCL 30.405(2).

There are two possible interpretations of the inclusion of the firearms-protection language in the two statutes. One is that the Legislature, in enacting the EMA, recognized that it was extending executive authority to new areas in instances in which such authority

Legislature's use of the word "epidemic" in the EMA works no redundancy with the EPGA. Section 17(d) provides that the EMA "shall not be construed to do any of the following":

> Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

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had not previously existed; an "epidemic," as discussed in Part III of this opinion, is one example of such a recognition by the Legislature. Given that knowledge, had the Legislature wanted to continue the policy-driven decision of protecting lawfully possessed firearms, it would have had to include such language in the EMA because it would have understood that the EPGA did not apply to such circumstances. Such an interpretation supports the statutory conclusion I reach in this opinion.

The other alternative is that the Legislature simply wanted, again for policy reasons, to reduce the scope of the firearms-protection provision of the EMA, MCL 30.405(2), by removing "other weapons," thereby limiting protections to lawfully possessed firearms and ammunition. All firearms are weapons, but not all weapons are firearms. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "firearm" as "a weapon from which a shot is discharged by gunpowder—usu. used of small arms" and defining "weapon" as "something (a club, knife, or gun) used to injure, defeat, or destroy" and as "a means of contending against another"); *Webster's New World Dictionary of the American Language* (2d college ed) (defining "firearm" as "any weapon from which a shot is fired by the force of an explosion; esp., such a weapon small enough to be carried, as a rifle or pistol" and defining "weapon" as "an instrument or device of any kind used for fighting, as specif. in warfare," and as "any means of attack or defense"). (Those definitions have remained consistent over time and, thus, are no different today than they were upon enactment of the two statutes.) As an aid to statutory interpretation, this possibility does not clarify the interrelationship between the EPGA and the EMA at all because there are two potentially harmonious readings of the statutes. However, one can conclude from the two firearms provisions that they either support the statutory interpretation I make in this opinion, or they are neutral as to it; in no way do they detract from that interpretation.

This is the critical statutory provision in this case, and it is the only textual basis which could arguably show a reasonable reading of legislative intent in derogation of the normal canons of construction. See *People v Pinkney*, 501 Mich 259, 283; 912 NW2d 535 (2018) (holding that canons of construction can be overcome if there is sufficient evidence to do so).

1. SCOPE OF THE GOVERNOR'S AUTHORITY TO DECLARE A STATE OF EMERGENCY UNDER THE EPGA

Section 17(d) is divided into two disjunctive parts. As noted, the first portion provides that the EMA shall not be construed to "[l]imit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to" the EPGA (emphasis added). The authority to proclaim an emergency, under either the EPGA or the EMA, is a distinct authority. Whether the governor also has the additional power to have any such declared emergency continue—without any limitations or input from anyone else, so long as the governor sees fit to do so, the position the Governor argues and the majority adopts—is the question presented here, and through an *in pari materia* reading of the two statutes, it is a conclusion with which I do not agree. Nothing that I have said regarding the governor's authority under the EPGA and its interplay with § 17(d) in any way limits the authority of the Governor to issue a declaration of emergency. Simply put, the first part of § 17(d) has no application to this case.[15]

[15] The majority simply misreads this portion of § 17(d), engrafting language that it does not contain. The majority states that it rejects "any contention that this provision only bars a limitation, modification, or abridgement of a governor's authority *to proclaim or declare* a state of emergency under the EPGA, absent any application to the *extension* of a state of emergency, thereby allowing imposition of the legislative-approval provision in § 3 of the EMA." By this reading, the majority

That brings us to the second portion of the statute. It provides, as relevant here, that the EMA shall not be construed to "[l]imit, modify, or abridge the authority of the governor to . . . exercise any other powers vested in him or her under . . . statutes[.]"[16] Let us simply assume that the "statutes" referred to include the EPGA because that assumption does not affect the final analysis. This is so because it is not *a construction of the EMA* that places the EPGA off-limits for an executive declaration regarding an epidemic. Rather, it is the straightforward application of standard rules of construction, applicable in all instances to all statutes, under which we determine the scope of the EPGA as written by the Legislature. To recapitulate reasons already stated—namely, that any other construction would render the Legislature's use of the word "epidemic" in the EMA surplusage—it is clear that the

asserts that the word "proclamation" is broader than the mere formal announcement of a state of emergency. That reading is not supported by the statutory text. MCL 30.405(1) provides, "In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or state of emergency do 1 or more of the following:" Thus, the text is clear that the governor's authority to take certain actions has as a prerequisite the declaration of a state of disaster or emergency but that those powers are distinct from, although they are triggered by, the declaration itself. The EMA also makes clear that an extension is a separate act that requires the Legislature's approval. See MCL 30.403(3) and (4).

[16] It is not clear that the statutes referred to include the EPGA because there already was one reference to that statute in § 17(d), and, as noted, that reference did not relate to the authority of the governor to do anything under the EPGA except to declare an emergency. Generally speaking, the doctrine of *expressio unius est exclusio alterius* ("express mention in a statute of one thing implies the exclusion of other similar things") would exclude the EPGA from the inclusion in the collective "statutes." *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 572; 592 NW2d 360 (1999). As applicable here, that would be because the single, specific reference in § 17(d) to the EPGA, followed by the general reference to "statutes" which follows, would not include the EPGA as one of those statutes. But we need not decide that question here to determine the scope of the governor's authority.

Legislature that enacted the EMA did not understand the EPGA to encompass epidemics because, simply put, the Legislature would not have intended to enact surplusage. We assume that when the Legislature crafts legislation it knows what the existing law is and takes that into consideration, *O'Connell*, 316 Mich App at 99, and there simply is no reason the Legislature would have included the word "epidemic" in the EMA if it had understood the EPGA to have covered that situation already, *Apsey*, 477 Mich at 127. Thus, it is not the EMA that in any way limits application of the EPGA to epidemics but, rather, the standard rules of construction, which embody assumptions about how legislatures work, that control the interpretation. The canons of construction work in both directions—courts use the canons so that there are consistent applications of the law in judicial opinions; but the canons also allow legislators and legislatures to know in advance how courts will construe the work of the legislative branch. The doctrine that the Legislature is presumed to know the existing law when it writes a statute includes a presumption that the Legislature knows how a law will be interpreted in connection with the canons. See *Reading Law*, p 269 n 6 (" 'It is presumable that Congress legislates with knowledge of our basic rules of statutory construction[.]' "), quoting *McNary v Haitian Refugee Ctr, Inc*, 498 US 479, 496; 111 S Ct 888; 112 L Ed 2d 1005 (1991).

Simply put, the Legislature would have known, before enacting the EMA, that by including the word "epidemic" in the statute, it was telling the courts that the Legislature did not consider epidemics to be covered by the existing law, the EPGA, and that it understood that courts would so interpret its actions. Contrary to the majority, this is not "reading a requirement for legislative approval to extend a state of

emergency into the EPGA . . . .” It is simply a confirmation that given the language used and the standard canons of construction, the Legislature that enacted the EMA did not understand the EPGA to apply to an epidemic, and it therefore has no application to the present circumstances. Indeed, there would be no point in reading something into a statute that never applied to the situation at hand. Nor does this analysis constitute a judicial construction which *limits, modifies, or abridges* the governor's power, as is prohibited by § 17(d), but is a mere literal application of the Legislature's words to demonstrate that the EPGA never extended so far as to encompass authority over an epidemic. This construction not only does not run afoul of § 17(d), it is compelled by it—a court cannot “limit,” or “modify,” or “abridge,” an authority of a governor which the governor never possessed in the first instance.[17]

2. THE GOVERNOR'S CONSTRUCTION LEADS TO AN ADDITIONAL REDUNDANCY

In addition, the majority's and the Governor's construction of the two statutes render another portion of the EMA redundant or nugatory. As the Court of Claims correctly noted, the EMA permits the Governor to declare a state of disaster or a state of emergency. Each of those types of declarations has a

[17] And consistently with that reading, there was a public-health code that long predated the EPGA that authorized emergency government action to address “cholera and other dangerous communicable diseases.” See 1885 PA 230, § 2. The EPGA did not repeal or amend that statute, thus strengthening the inference that the 1945 Legislature did not intend to change the emergency powers to address epidemics from the historical approach. That historical approach to epidemics and emergency powers changed with the enactment of the EMA.

durational limit. With regard to the duration of a state of disaster, MCL 30.403(3) provides:

> The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature.

Similarly, with regard to the duration of a state of emergency, MCL 30.403(4) provides:

> The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature.

The majority and the Governor take the position that the EPGA and the EMA are coextensive, providing the Governor the same authority to issue orders, as to essentially any subject. Again, the Legislature knew all of that at the time it enacted the EMA. Yet the Legislature also enacted the 28-day time limit on the governor's unilateral authority under the EMA. To engraft such a durational limitation on the EMA while leaving the governor's equivalent powers under the

EPGA completely unconstrained (subject only to the governor's whim) would render the EMA's time limits surplusage.[18]

Indeed, unless we construe the statute in the manner I suggest, one is left scratching one's head wondering what the Legislature thought it was accomplishing through the EMA. According to the majority, what the Legislature thought it was accomplishing was the enactment of a clone of the EPGA, but with a provision terminating the governor's executive authority after 28 days unless that self-same Legislature gave its approval. But according to the majority, the Legislature also allowed the EPGA to co-exist, so that the governor could circumvent the 28-day limit on executive action by the governor which the Legislature had just gone to the trouble of enacting.

Such an assertion simply makes no sense. Obviously, the Legislature did not intend its pronouncements in the EMA to be surplusage or nugatory. Thus,

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[18] The majority's construction of the word "epidemic" in the EPGA "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v Roadway Express, Inc*, 511 US 298, 312-313; 114 S Ct 1510; 128 L Ed 2d 274 (1994). See also *id*. at 313 n 12; *Plaut v Spendthrift Farm, Inc*, 514 US 211, 216; 115 S Ct 1447; 131 L Ed 2d 328 (1995). In other words, when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 511 US at 313 n 12. We presume that when the Legislature acts, it knows what the law is. *Apsey*, 477 Mich at 127. Thus, under the majority's view, the Legislature knew in 1976 that it already possessed the same authority under the EPGA to address epidemic and public-health emergencies that it was enacting under the EMA. And yet the Legislature nonetheless enacted a limitation on the governor's authority to act unilaterally under the EMA but refused to enact a similar limit under the EPGA, allowing the governor to proceed under either authority. In other words, according to the majority and the Governor, the Legislature enacted a durational limit of 28-days on executive action, but gave the governor full authority to opt-out from under such time limits any time the governor so chose. Again, it is logically absurd for a court to conclude that the Legislature so intended.

properly construed, there is nothing in the EMA that limits the Governor's authority under the EPGA; the EPGA simply does not apply to the current situation involving a pandemic, and the only authority upon which the Governor may rely for her executive orders regarding it is the EMA, with its associated time limit.

The majority's construction, meanwhile, is no construction at all. Although we are supposed to employ a harmonious reading of the two statutes if possible, the majority arrives at a construction under which the EPGA and the EMA each apply to an epidemic; the governor can proceed under either one, without any restriction; each permits the governor to exercise unlimited power; but one limits the governor's authority to 28 days without legislative authorization, while the other continues indefinitely until the governor says otherwise. This result by the majority constitutes anything but a harmonious construction; it is a completely discordant result, which does not even attempt to reconcile the inconsistencies between the two statutes but, simply, lumps all of the various aspects of them together, throws up its hands, and concludes, essentially, "Who are we to say that the Legislature did not intend to nullify its own work?" If the majority was unable to harmonize the result, as it obviously was, then it was obligated to give controlling effect to the more recent and more specific statute, the EMA. See *Buehler*, 477 Mich at 26.[19]

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[19] It is worth underscoring that the majority's construction of the word "epidemic" in the EPGA "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers*, 511 US at 312-313. See also *id*. at 313 n 12; *Plaut*, 514 US at 216. In other words, when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 511 US at 313 n 12. We presume that when the Legislature acts, it knows what the law is.

IV. UNDER THE CIRCUMSTANCES OF THIS CASE, THE EPGA IS UNCONSTITUTIONAL

A. THE FRAMEWORK

The majority holds that the EPGA is constitutional on the basis of *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 51-52; 367 NW2d 1 (1985). This Court reviews de novo constitutional issues. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010). Although the question presented in *Blue Cross* regarding the lawfulness of the delegation of legislative power was significantly narrower than the question presented here, in *Blue Cross* our Supreme Court established the framework for evaluating all such claims.

Blue Cross addressed whether the Nonprofit Health Care Corporation Reform Act, MCL § 550.1101 *et seq*., represented an unconstitutional delegation of legislative authority to Blue Cross Blue Shield of Michigan and other private parties. Specifically, that act required each nonprofit healthcare corporation to "assign a risk factor for each line of the corporation's business." *Blue Cross*, 422 Mich at 52-53. The insurance commissioner then was required either to approve or disapprove the factors proposed by the healthcare corporation, but "[n]o guidelines are provided to direct the Insurance Commissioner's response." *Id*. And finally, if the risk factors

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Apsey, 477 Mich at 127. Thus, under the majority's view, the Legislature knew in 1976 that it already possessed the same authority under the EPGA to address epidemic and public-health emergencies as it was to enact under the EMA. And yet the Legislature nonetheless enacted a limitation on a governor's authority to act unilaterally under the EMA but refused to enact a similar limit under the EPGA; and it allowed the governor to proceed under either authority. Thus, the Legislature enacted a durational limit of 28-days on executive action, but gave the governor full authority to opt-out from under such time limits any time the governor so chose. Again, it is logically absurd for a court to conclude that the Legislature so intended.

were disapproved, a panel of three actuaries " 'shall determine a risk factor for each line of business.' No further directions are set forth to guide the panel." *Id*. at 52. The Court held that "[t]he act is completely devoid of any indication why one factor should be preferred over another; no underlying policy has been articulated, nor has the Legislature detailed the criteria to be employed by the panel in making this determination." *Id*. at 55, citing *Osius v St Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956). "This complete lack of standards is constitutionally impermissible," such that "the lack of standards defining and directing the Insurance Commissioner's and the actuary panel's authority renders this dispute resolution mechanism constitutionally defective." *Blue Cross*, 422 Mich at 55.

Blue Cross is instructive as to the present case, and it establishes the framework for evaluating claims of improper delegation of legislative power. The Court held that in reviewing such claims, "1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits." *Id*. at 51. "The preciseness required of the standards will depend on the complexity of the subject." *Id*. Although the focus of the act at issue was narrow, the Court had no difficulty determining that it involved an impermissible delegation of legislative authority because it gave no direction and created no standards as to how the authority should be exercised.

Moreover, our Supreme Court has noted on many occasions:

> The separation of powers doctrine has never been interpreted to mean that the three branches of government

> "must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the *whole power of one of these departments* should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution."
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> [*House Speaker*, 443 Mich at 586 n 32, quoting *Local 321, State, Co & Muni Workers of America v Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945), in turn quoting Story, *Constitutional Law* (4th ed), pp 380 ff (emphasis added).]

See also *Makowski v Governor*, 495 Mich 465, 482-483; 852 NW2d 61 (2014) (also quoting *Local 321, State, Co & Muni Workers of America*).

B. THE EPGA DELEGATES LEGISLATIVE POWER

The issue here does not involve the declaration of an emergency; rather, the act of declaring such an emergency is properly to be regarded as executive action. See Const 1963, art 5, § 1. Instead, the issue is the orders authorized by such a declaration, which the majority holds have no categorical limitations but, rather, essentially empower the governor to do anything.

More than one hundred years ago, our Supreme Court summed up quite nicely the principle involved: "The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend." *In re Brewster Street Housing Site*, 291 Mich 313, 340; 289 NW 493 (1939), quoting *King v Concordia*

Fire-Ins Co, 140 Mich 258, 268; 103 NW 616 (1905) (quotation marks and citation omitted). Thus,

> The people, by the adoption of the Constitution, have vested the legislative power in the legislature of the State, subject to the initiative referendum and recall, and the legislature of the State cannot abdicate the power delegated to it by the Constitution, but it is clear the legislature may confer the authority for the finding of facts upon administrative officers, board or commissions. [*In re Brewster Street Housing Site*, 291 Mich at 340, citing *Horn v People*, 26 Mich 221 (1872).]

Clearly, the orders recently issued by the Governor involve no action by any administrative officer, board or commission but, rather, the wholesale handing over to the governor the unfettered discretion to legislate any emergency order which the governor thinks appropriate. The delegation of authority under the EPGA, as interpreted by the majority, is legislative: "The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *King*, 140 Mich at 268, quoting *Locke's Appeal*, 72 Pa 491, 498 (1873). The orders here, however, involve the making of law. Thus, "[t]he true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *King*, 140 Mich at 268-269 (citation and quotation marks omitted).[20]

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[20] Indeed, our Supreme Court previously has held that a legislative act authorizing a quarantine to be carried out by health inspectors, under general rules enacted by the Legislature that provided for discretion on the part of the inspectors as to when to detain persons and

C. AS INTERPRETED BY THE MAJORITY, THE GOVERNOR EXERCISES FULL LEGISLATIVE POWER AS WELL AS FULL EXECUTIVE POWER

Having determined that the orders issued by the Governor are in fact legislative, it is apparent that under the circumstances of this case, the executive orders that were issued are, in fact, unconstitutional. As the majority interprets the governor's authority to issue the orders, they involve the whole power of the Legislature because there are no subject matters outside their potential scope. Because, as the majority concludes, there are no limits as to the subject matter a governor may order or regulate or direct in this manner pursuant to the EPGA, the governor is granted "the *whole power of one of these departments*" of government, i.e., the full legislative power. *House Speaker*, 443 Mich at 586 n 32 (citations and quotation marks omitted; emphasis added). And the governor, of course, retains the full executive power of that office as well. Const 1963, art 5, § 1.

Acting under the EPGA, the governor thus possesses the full power of the legislative branch, as well as the full power of the executive branch; in other words, the EPGA, as interpreted by the majority, commits to the governor "the whole power of one of these departments," allowing it to be "exercised by the same hands which possess the whole power of either of the other departments[.]" *House Speaker*, 443 Mich at 586 n 32 (citations and quotation marks omitted). That is, the majority's interpretation allows precisely the evil the separation-of-powers doctrine intended to preclude, and

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goods, subject to standard stated in the legislation, was constitutional. *Hurst v Warner*, 102 Mich 238, 244; 60 NW 440 (1894). The EPGA is quite different in that it allows the governor to create any rule the governor wishes, as to any subject, in the first instance. That power is legislative.

it is therefore unconstitutional. Const 1963, art 3, § 2. See *Makowski*, 495 Mich. at 482-483; *House Speaker*, 443 Mich at 586 n 32.

D. THE MAJORITY OPINION FAILS TO CONSTRUE THE EPGA IN A MANNER THAT WOULD PRECLUDE ITS UNCONSTITUTIONALITY HERE

The unconstitutionality of such a procedure would be mitigated if there were any durational limits imposed as to an executive order issued under the EPGA or the EMA. A durational limit (and not merely a gubernatorial rescinding of an order, followed by its reissuance in the identical or near identical form) would change the nature of any such order from something legislative, which simply lives on until it is repealed, to a true emergency order, which would exist only during a genuine period of emergency.[21]

The violation of the Constitution, in my opinion, thus occurs through the confluence of two different authorities approved by the majority: (1) the retention of the governor's executive powers plus (2) the unlimited nature of legislative power granted the governor following a declaration of an emergency, including the unlimited duration of any such order.

The lack of any durational limit simply underscores and compounds the constitutional difficulty, transforming temporary, and thus emergency orders, into something essentially unlimited and, thus, legislative. It is settled that when applying strict-scrutiny analysis, applicable to many of the most important constitutional rights, a court can uphold an action only if it

[21] As noted by the majority, "Pursuant to MCL 10.31(2), a governor proclaims or declares a state of emergency, and it simply continues until the governor declares 'that the emergency no longer exists.' " Taken together, these statements by the majority mean that a governor can order anything, forever, a truly striking concept in a democratic republic.

involves a compelling governmental interest, which must be narrowly tailored to achieve that interest. See, e.g., *Burson v Freeman*, 504 US 191, 198; 112 S Ct 1846; 119 L Ed 2d 5 (1992) (opinion by Blackmun, J.) (involving the impingement of First Amendment right). The narrow-tailoring requirement imposes an obligation that whenever permissible action impinges a constitutional right, it continue no longer than necessary. See, e.g., *City of Richmond v J A Croson Co*, 488 US 469, 497-498; 109 S Ct 706; 102 L Ed 2d 854 (1989) (opinion by O'Connor, J.) (prohibiting remedy for discrimination "essentially limitless in scope and duration"); *In re Nat'l Security Letter*, 863 F3d 1110, 1126 (CA 9, 2017) ("In order to ensure that the nondisclosure requirement is narrowly tailored to serve the government's compelling interest in national security, a nondisclosure requirement must terminate when it no longer serves such a purpose.").

The majority holds that the spare statutory standards of the EPGA, requiring only that the declaration involve a "great public crisis, disaster, rioting, catastrophe, or similar public emergency . . . or [when there is] reasonable apprehension of immediate danger of a public emergency of that kind," which also must imperil "public safety," MCL, 10.31(1), is "as reasonably precise as the subject matter requires or permits." The majority adds, "Indeed, more exacting standards would likely be overly confining and unnecessarily bind a governor's hands in any effort to mitigate and control an emergency at the very time he or she must need to be nimble." Moreover, the majority acknowledges that not only is the "standard" completely amorphous but contains a large measure of subjectivity to whatever a governor desires. Thus, the majority holds that an order entered pursuant to a declared emergency need only be " 'reasonable' and, *as judged by a*

governor, 'necessary to protect life and property or to bring the emergency situation . . . under control.' " (Quoting MCL 10.31(1).) This means that there are few objective, outside controls or standards at all, save for "reasonableness"; the statute essentially requires only a governor's subjective determination of what is necessary to control the situation.

Taking steps to deal with a global pandemic is certainly a " 'compelling state interest.' " *Burson*, 504 US at 198 (citation omitted). Thus, there is no doubt that a government could take steps to address such a crisis for at least some period of time on an emergency basis, through means that ordinarily would not comport with constitutional restrictions; after all, the "constitutional Bill of Rights" is not "a suicide pact," *Terminiello v Chicago*, 337 US 1, 37; 69 S Ct 894; 93 L Ed 1131 (1949) (Jackson, J., dissenting), nor is the constitutional separation of powers. This case does not address whether government has the authority to impose mandatory public-health orders to address a crisis; clearly it does. See *Jacobson v Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905). The issue here is not what actions may be taken, but how they are to be taken: by a governor acting under emergency authority, with no limitations as to how, or how long, those measures may be instituted; or whether, following a reasonable period of emergency authority, legislative power must revert to normal constitutional norms. Our Constitution declares, after all, that "[a]ll political power is inherent in the people." 1963 Const art 1, § 1.

No doubt to address this potentially gaping exception to normal, constitutional governance, the Legislature, in the EMA, enacted a rule that executive orders to address a state of emergency or a state of disaster,

after a reasonable period not to exceed 28-days, must either terminate or be ratified by the elected Legislature. The Legislature has not authorized continued emergency action relating to an epidemic. In addition, the statutory construction of the EPGA and the EMA set forth in Part III of this opinion avoids the constitutional infirmity identified here because an executive order, which either becomes legislatively authorized after 28 days or terminates, is constitutionally reasonable. Indeed, that fact alone should give the majority pause about its statutory analysis that the EPGA applies without limitation to an epidemic, without any consideration of an *in pari materia* construction or the EMA's use of the word "epidemic." "If statutes lend themselves to a construction that avoids conflict, then that construction should control." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). See also *Hunter v Hunter*, 484 Mich 247, 264 n 32; 771 NW2d 694 (2009) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.") (citations and quotation marks omitted; alteration in original).

If the majority correctly read the EPGA and the EMA, in accordance with Part III of this opinion, such that only the EMA applies to an epidemic, then the executive orders here would be constitutional exercises of emergency powers because they would be properly limited in duration, or constitutionally ratified by the Legislature. However, given the majority's construction that the EPGA not only applies but that it authorizes unilateral action by the governor that "simply continues until the governor declares 'that the emergency no longer exists,' " it is unconstitutional in these circumstances. (Citation omitted.)

I respectfully dissent from the majority's standing, statutory interpretation, and constitutional-interpretation analyses.

ESTATE OF CORRADO v RIECK

Docket No. 346920. Submitted April 9, 2020, at Detroit. Decided April 23, 2020. Approved for publication August 27, 2020, at 9:00 a.m. Affirmed in part, reversed in part, and remanded 509 Mich ___ (2022).

Lesley Meyers, personal representative of the estate of Samuel Corrado, brought an ordinary negligence action on behalf of the estate against Karen Rieck, Radi Gerbi, Shelby Nursing Center Joint Venture (doing business as Shelby Nursing Center, a nursing home), and others in the Macomb Circuit Court following the death of Corrado while he was a patient in the nursing home. Corrado was admitted to the nursing home for rehabilitation after he underwent a surgical procedure to help combat rapid weight loss attributed to progressive dysphagia (difficulty swallowing). In June 2014, Corrado vomited at least twice before experiencing severe respiratory distress; he died of acute aspiration shortly after being transferred to a hospital. The estate filed a complaint claiming ordinary negligence and later moved to amend it to add that Gerbi, a nurse, had failed to comply with a standing order at the nursing home that directed nurses to immediately report to a physician if a patient experienced more than one episode of vomiting during a 24-hour period. Shelby Nursing moved for summary disposition of all claims arising from Gerbi's alleged noncompliance with the standing order on the basis that any such claims sounded in medical malpractice, not ordinary negligence, and that the standard of care could not be established or bolstered on the basis of the standing order. The trial court, James M. Maceroni, J., denied the motion, concluding that the issue of noncompliance with the standing order was a matter of ordinary negligence because the order created a mandatory requirement that did not require the use of any medical judgment. Shelby Nursing sought leave to appeal, and the Court of Appeals granted the application; the other defendants were dismissed from the case by stipulated order.

The Court of Appeals *held*:

1. In determining whether a claim sounds in ordinary negligence or medical malpractice, a court must consider two ques-

tions: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. A claim falls within the realm of medical malpractice when both questions are answered affirmatively. In this case, the focus of the inquiry concerned the second question. A claim sounds in ordinary negligence if the reasonableness of the defendant's actions can be evaluated on the basis of common knowledge and experience. Conversely, if a fact-finder requires expert testimony regarding the applicable standard of care to assess the reasonableness of the defendant's actions, then the question involves medical judgment and presents a claim of medical malpractice. The estate did not articulate the nature of its claim regarding the standing order, but in its motion for leave to amend the complaint the estate stated that it takes no issue with the formulation or content of the standing order. Rather, the estate would assert liability on the basis of Gerbi's failure to comply with the standing order. The estate argued that Gerbi did not have to exercise medical judgment to recognize that the conditions outlined in the standing order existed (i.e., a patient had vomited twice in less than 24 hours), thereby triggering Gerbi's duty under the standing order to immediately notify a physician. Therefore, according to the estate, because the standing order dictated the appropriate response to the patient's condition, a fact-finder could evaluate the reasonableness of Gerbi's response without the benefit of expert testimony explaining what actions should have been taken. Even accepting the estate's articulation of the proposed claim, the proposed claim sounded in medical malpractice. A claim of ordinary negligence can be evaluated on the basis of common knowledge and experience because the average fact-finder would be able to appreciate that *something* should have been done to reduce a clear risk of harm, even if determining what constitutes a reasonable response required some degree of specialized knowledge. In this case, the estate did not simply allege that Gerbi was negligent in failing to take *any* action after Corrado vomited a second time; the estate alleged that Gerbi was negligent for failing to take a *specific* action in response. A lay fact-finder would not know that a doctor should be immediately informed if a patient vomits twice within a 24-hour period and could not rely on common knowledge and experience to determine whether it was reasonable for Gerbi to have waited at least 20 minutes before he attempted to consult a doctor regarding Corrado's condition. Although the estate contended that the fact-finder could rely on the standing order to assess the reasonableness of Gerbi's actions,

the very fact that information outside the realm of common knowledge and experience would be required to determine liability supported the conclusion that the estate's proposed claim sounded in medical malpractice.

2. Shelby Nursing was also entitled to summary disposition of all claims in the complaint that relied on the standing order, including claims sounding in medical malpractice, because the standing order did not establish the standard of care. Medical malpractice occurs when a medical professional who is employed to treat a case professionally fails to fulfill the duty to exercise the degree of skill, care, and diligence exercised by members of the same profession practicing in the same or similar locality in light of the present state of medical science. With respect to nurses in particular, they must exercise the skill and care ordinarily possessed and exercised by practitioners of the nursing profession in the same or similar localities. Unless negligence is so obvious that it is within the common knowledge and experience of an ordinary layperson, the plaintiff in a medical malpractice action must present expert testimony to establish the applicable standard of care. Therefore, a defendant's internal rules and regulations cannot be used to establish the standard of care. The parties in this case disputed whether the standing order was mandatory or discretionary. Regardless of the nature of the standing order, however, it was not applicable outside the confines of Shelby Nursing's nursing home. Because there was no evidence that nurses not employed by Shelby Nursing, exercising the skill and care ordinarily possessed within the same or similar localities, would be bound by Shelby Nursing's standing order, the standing order could not be used to establish the standard of care. The standing order also could not be used in conjunction with expert testimony to establish the standard of care. Consequently, Shelby Nursing was entitled to summary disposition of any medical malpractice claim arising from Gerbi's failure to comply with the standing order.

3. Shelby Nursing argued that it was entitled to summary disposition of any claims arising from the standing order because the standing order would be inadmissible at trial. Because the estate's proposed claim sounded in medical malpractice, the estate was required to prove: (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury. The Court of Appeals has previously found that there was no error in a medical malpractice action when a court excluded a defendant's internal rules and regulations because the standard of care in a medical malpractice action must be established through expert testimony.

In this case, the standing order was not relevant and was therefore inadmissible under MRE 402 because it did not make it more or less probable that the standard of care required a nurse to immediately notify a physician after two episodes of vomiting. Even if the standing order was created to comply with applicable regulations, it was evident that it only governed the conduct of Shelby Nursing's staff within the nursing home and was not representative of a community standard of care.

Reversed and remanded for further proceedings.

NEGLIGENCE — MEDICAL MALPRACTICE — STANDARD OF CARE — EVIDENCE — INTERNAL REGULATIONS OF A MEDICAL PROVIDER.

A medical malpractice action requires a plaintiff to establish that a medical professional failed to exercise the degree of skill, care, and diligence exercised by other members of the profession in the same or similar localities; the plaintiff must present expert testimony to establish the applicable standard of care; the defendant's internal rules and regulations cannot be used to establish the standard of care, separately or in conjunction with expert testimony, because they are not relevant to establish the skill and care ordinarily possessed in the same or similar localities.

Mark Granzotto, PC (by *Mark Granzotto*) and *The Sam Bernstein Law Firm, PLLC* (by *Stanley J. Feldman*) for the estate of Samuel Corrado.

Abbott Nicholson, PC (by *Lori A. Barker* and *Alyssa C. Dechow*) for Shelby Nursing Center Joint Venture.

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM. Defendant, Shelby Nursing Center Joint Venture, doing business as Shelby Nursing Center,[1] appeals by leave granted[2] an order denying its motion for summary disposition of claims arising from

[1] Defendants Karen Rieck, Radi Gerbi, R.N., Jessica Johnson, L.P.N., Beaumont Nursing Home Services, Inc., and Pinehurst East, Inc., were dismissed by stipulated order and are not participating in this appeal.

[2] *Corrado Estate v Rieck*, unpublished order of the Court of Appeals, entered April 24, 2019 (Docket No. 346920).

a nurse's alleged noncompliance with a standing order regarding patient care. We agree that any such claim sounds in medical malpractice and that the standing order could not be relied on as evidence of the standard of care. Accordingly, we reverse the trial court's order denying defendant's motion for summary disposition and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff's decedent, Samuel Corrado, was admitted to defendant's nursing home for rehabilitation after having a percutaneous endoscopic gastrostomy tube surgically placed to help combat rapid weight loss attributed to progressive dysphagia (difficulty swallowing). On the afternoon of June 2, 2014, Corrado vomited at least twice. He went into severe respiratory distress and passed away from acute aspiration shortly after being transferred to a hospital. At issue in this appeal is plaintiff's contention that Radi Gerbi, a nurse employed by defendant, was negligent in failing to comply with defendant's standing order regarding patients who experience nausea or vomiting. Among other things, the standing order directs nurses to "immediately" report to a physician if a patient experiences more than one episode of emesis (vomiting) within 24 hours. Gerbi testified that he tried, without success, to contact a doctor approximately 20 to 30 minutes after Corrado's second episode of emesis.

Plaintiff brought an ordinary negligence claim and later moved to amend the complaint to specifically add Gerbi's noncompliance with the standing order. While that motion was pending, defendant moved for summary disposition of all claims arising from Gerbi's alleged noncompliance with the standing order, argu-

ing that any such claim sounded in medical malpractice and that the standard of care could not be established or bolstered by way of the standing order. The trial court disagreed, concluding that Gerbi's noncompliance with the standing order was a matter of ordinary negligence because the standing order unambiguously created a mandatory requirement concerning physician notification, which "does not involve any medical judgment." This appeal followed.[3]

II. STANDARD OF REVIEW

This Court reviews rulings on summary-disposition motions de novo. *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 199; 871 NW2d 15 (2015). The standard of review for dispositive motions brought under MCR 2.116(C)(10) is well settled:

> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the

[3] We note that plaintiff's original complaint set forth claims of medical malpractice and ordinary negligence arising from a variety of other actions and inactions on the part of defendant's staff. The trial court granted summary disposition with respect to claims involving defendant's administrators and claims grounded in compliance with federal and state regulations. Those rulings are not challenged on appeal. At the time the trial court entered the order from which this appeal was taken, it had yet to rule on defendant's earlier motion for summary disposition as to the claims of ordinary negligence presented in plaintiff's original complaint. Thus, those claims remain pending and are beyond the scope of this appeal. Plaintiff's additional medical malpractice theories that were not the subject of dispositive motions likewise remain pending and are not at issue in this appeal.

> moving party is entitled to judgment as a matter of law." [*Trueblood Estate v P&G Apartments, LLC*, 327 Mich App 275, 284; 933 NW2d 732 (2019), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 12; 930 NW2d 393 (2018) (quotation marks and citation omitted).

III. ANALYSIS

Defendant argues on appeal that the trial court erred by holding that plaintiff's proposed claim regarding the standing order sounded in ordinary negligence. We agree.

Courts are not bound by the procedural labels a party attaches to its claim and, instead, must look to the substance of the claim to determine its nature. *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). In determining whether a claim sounds in ordinary negligence or medical malpractice, this Court considers two questions: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). The claim falls within the realm of medical malpractice when both of these inquiries are answered in the affirmative. *Id*. Because the parties do not dispute that the care provided by defendant's staff before Corrado's death arose in the context of a professional relationship, the nature of plaintiff's proposed claim rests on whether the claim raises questions of medical

judgment beyond the realm of common knowledge and experience. This inquiry focuses on whether the reasonableness of the defendant's actions can be evaluated on the basis of common knowledge and experience. *Id*. at 423. If so, the claim does not involve medical judgment and, therefore, sounds in ordinary negligence. *Id*. Conversely, if a fact-finder cannot assess the reasonableness of the defendant's actions without the benefit of expert testimony concerning the applicable standard of care, the question involves medical judgment and presents a claim for medical malpractice. *Id*.

In *Bryant*, our Supreme Court applied this standard to claims that arose when the plaintiff's decedent died from positional asphyxia after her neck became wedged between a bedside rail and the mattress, *id*. at 417; the Court found that most, but not all, of the plaintiff's claims sounded in medical malpractice, *id*. at 426-431. The plaintiff alleged that the defendant had failed to properly train its staff to assess the risk of potential asphyxia and had failed to recognize the risk posed by the decedent's bedding. The Court reasoned that these claims involved medical judgment because both theories required specialized knowledge regarding the risks of the particular equipment provided to the decedent. *Id*. at 427-430. The plaintiff's final claim alleged that the defendant had failed to take steps to protect the decedent after she was discovered entangled in a similar position the day before. *Id*. at 430. Notably, after the decedent was repositioned following the first incident, members of the defendant's staff reported to supervisors that the decedent was at risk of asphyxiation, clearly demonstrating that the defendant was aware of the danger. *Id*. The Court observed that the plaintiff's claim did not involve the propriety of affirmative steps taken by the defendant, but rather

the defendant's complete failure to respond to a recognized risk. *Id*. The Court offered a hypothetical scenario to help elucidate the distinction:

> Suppose, for example, that two CENAs [certified evaluated nursing assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.
>
> If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the *Dorris* [*v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999),] standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Id*. at 431.]

The *Bryant* Court then concluded that the plaintiff's failure-to-protect theory likewise involved ordinary negligence because "[p]rofessional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff's allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant's agents noticed that [the decedent] was in peril." *Id*.

The task of ascertaining the gravamen of plaintiff's claim in this case is complicated by the fact that plaintiff has not yet filed an amended complaint articulating the claim at issue. In its motion seeking leave to

amend, plaintiff asked to "add as part of its claim for ordinary negligence the fact that Nurse Gerbi failed to comply with [the] standing order to contact the physician on call." On appeal, defendant characterizes plaintiff's proposed claim as alleging "failure to properly treat and monitor a patient, with known swallowing and aspiration risks, after repeat episodes of vomiting resulting in respiratory distress and death." Defendant contends that while the standing order provided guidance for Gerbi's response to Corrado's condition, Gerbi still had to exercise professional judgment in implementing and carrying out the order. Plaintiff, on the other hand, emphasizes that it takes no issue with the formulation or content of the standing order and contends that it would assert liability on the basis of Gerbi's failure to comply with the standing order. Plaintiff reasons that it took no medical judgment for Gerbi to recognize that the conditions outlined in the standing order existed—a patient had vomited twice in less than 24 hours—thereby triggering the requirements of the standing order. Moreover, because the standing order dictated that Gerbi must immediately contact a doctor after such an occurrence, a fact-finder could evaluate the reasonableness of Gerbi's response without expert testimony explaining what actions should have been taken. According to plaintiff, the standing order removed judgment of any sort, let alone *medical* judgment, from the equation.

Even accepting plaintiff's more narrow articulation of the proposed claim, we conclude that the proposed claim sounds in medical malpractice. The hypothetical and actual claims of ordinary negligence discussed in *Bryant* could be evaluated on the basis of common knowledge and experience because the average fact-finder would be able to appreciate that *something* should have been done to reduce a clear risk of harm,

even if determining *what* response was reasonable required some degree of specialized knowledge. *Id*. at 430-431. Plaintiff's position is distinguishable from this type of failure-to-protect theory because plaintiff does not simply allege that Gerbi was negligent in failing to do *anything* after Corrado vomited the second time. Rather, plaintiff alleges that Gerbi was negligent because he failed to take a specific action in response to the circumstances. A lay fact-finder would not know that a physician should be immediately informed when a patient vomits twice in a matter of hours and could not rely solely on common knowledge and experience to determine whether it was reasonable for Gerbi to wait at least 20 minutes before attempting to consult a doctor about Corrado's status. Plaintiff would have the fact-finder rely on the standing order to assess the reasonableness of Gerbi's actions, but the very fact that information outside the realm of common knowledge and experience (i.e., the standing order) would be required to determine liability supports the conclusion that plaintiff's proposed claim sounds in medical malpractice. Accordingly, the trial court erred by holding that plaintiff's proposed claim was one of ordinary negligence.

Defendant also contends that it was entitled to summary disposition with respect to all claims relying on the standing order, including claims sounding in medical malpractice, because the standing order did not establish the standard of care. We agree.

Medical malpractice occurs when a medical professional who is "employed to treat a case professionally, [fails] to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Id*. at 424

(quotation marks and citation omitted). With respect to nurses in particular, he or she must likewise exercise the "skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities." *Cox v Bd of Hosp Managers*, 467 Mich 1, 21-22; 651 NW2d 356 (2002). Unless negligence is so obvious that it is within the common knowledge and experience of an ordinary layperson, the plaintiff must present expert testimony to establish the applicable standard of care. *Elher v Misra*, 499 Mich 11, 21-22; 878 NW2d 790 (2016). Accordingly, the defendant's internal rules and regulations cannot be used to establish the standard of care. *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 765-766; 431 NW2d 90 (1988).[4] See also *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002), citing *Gallagher*, 171 Mich App at 764-765 ("Defendants are correct in their assertion that internal policies of an institution, including a hospital, cannot be used to establish a legal duty in a negligence claim.").

The parties vehemently dispute whether the standing order at issue was a mandatory order that defendant's nurses had to follow without discretion or a general guideline that the nurses could turn to in conjunction with their own professional judgment. The parties' focus on this distinction is misplaced. The standard of care is governed by the standards within "the same or similar localities." *Cox*, 467 Mich at 21-22. Regardless of the mandatory or discretionary nature of the standing order, it is beyond dispute that the order was not applicable outside the confines of defendant's

[4] Opinions of this Court issued before November 1, 1990, are not precedentially binding under MCR 7.215(J)(1) but may be considered for their persuasive value. *Jackson v Dir of Dep't of Corrections*, 329 Mich App 422, 428 n 5; 942 NW2d 635 (2019).

nursing home. Because there is no evidence that nurses who were not employed by defendant, exercising the skill and care ordinarily possessed within the same or similar localities, would be bound by defendant's standing order, it cannot be used to establish the standard of care. *Id*.

Moreover, the standing order cannot be used as evidence in conjunction with expert testimony to establish the standard of care. In *Jilek v Stockson*, 289 Mich App 291, 306; 796 NW2d 267 (2010) (*Jilek I*), the majority rejected the notion that all internal guidelines had to be excluded from medical malpractice cases under the precedent established in *Gallagher*, 171 Mich App 761. The majority recognized that a healthcare provider's internal rules could not "fix" or "establish" the standard of care, but opined that there was no reason to impose a wholesale bar on the use of internal policies and guidelines in medical malpractice actions. *Jilek I*, 289 Mich App at 308-309, 314. The majority favorably cited *Gallagher*'s statement that " 'a hospital's rules could be admissible as reflecting the community's standard where they were adopted by the relevant medical staff and where there is a causal relationship between the violation of the rule and the injury' " and observed that the plaintiff was not trying to *establish* the standard of care on the basis of internal policies. *Id*. at 306-309, quoting *Gallagher*, 171 Mich App at 767. Rather, the plaintiff only asserted that the policies were "relevant to the jury's determination, in light of the expert testimony, of what that standard was." *Jilek I*, 289 Mich App at 307. The majority concluded that the admissibility of internal policies was ultimately a matter of relevancy and that certain internal policies could be relevant, depending on the manner in which the parties' experts viewed them. *Id*. at 310-312.

Judge BANDSTRA dissented, stating:

> The trial court also concluded that all of plaintiff's nine proposed documentary exhibits relating to guidelines and policies for the care of persons allegedly like the deceased were to be excluded from consideration by the jury. The majority finds fault with the trial court with respect to only three of those documents, and it does so only after concluding that it is either "not bound to follow" the only Michigan precedent directly on point, *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988), or that the holding of *Gallagher* should be ignored while dictum within that precedent should be followed. I disagree with the majority and conclude that binding precedent that applied and reiterated the *Gallagher* holding cannot be distinguished away. See *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992), and *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). But, apart from all of that, even if I were to agree with the majority's conclusion that the three documents were improperly excluded, I would not conclude that it would have made any difference in the outcome of the trial. [*Jilek I*, 289 Mich App at 316-317 (BANDSTRA, P.J., dissenting).]

The Supreme Court later reversed the *Jilek I* majority's decision regarding this issue for the reasons articulated by Judge BANDSTRA. *Jilek v Stockson*, 490 Mich 961, 962 (2011) (*Jilek II*). In doing so, the Supreme Court gave Judge BANDSTRA's dissent the effect of binding precedent. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369-370; 817 NW2d 504 (2012) ("By referring to the Court of Appeals dissent, this Court adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own."); *Sanders v McLaren-Macomb*, 323 Mich App 254, 276 n 10; 916 NW2d 305 (2018) ("An order of the Michigan Supreme Court is binding precedent if it includes an understandable rationale supporting its decision."). Consequently, defendant was entitled to summary dis-

position with respect to a medical malpractice claim arising from Gerbi's failure to comply with the standing order because the standing order could not be used to establish, or as evidence of, the standard of care.[5]

Lastly, defendant argues that it was entitled to summary disposition of claims arising from the standing order because the order would be inadmissible at trial. We agree.

In ruling on a motion for summary disposition, a trial court should only consider substantively admissible evidence. MCR 2.116(G)(6); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). As it did before the trial court, defendant contends that the standing order was inadmissible under *Gallagher*, 171 Mich App at 767-768, and a general public policy in favor of encouraging healthcare facilities to establish internal policies that promote exceptional patient care. Plaintiff argues that defendant's reliance on *Gallagher* is misplaced for several reasons and that the admissibility of the standing order is governed exclusively by the Michigan Rules of Evidence (MRE).

Plaintiff correctly observes that our Supreme Court has held that certain evidentiary rules derived from caselaw predating the adoption of the MRE were superseded by the codified rules. See, e.g., *Waknin v Chamberlain*, 467 Mich 329, 332-333; 653 NW2d 176 (2002)

[5] This conclusion should not be construed as suggesting that plaintiff could not establish that the conduct that purportedly violated the standing order, i.e., Gerbi's 20- to 30-minute delay in attempting to notify a physician about Corrado's condition, was a violation of the standard of care. To do so, however, plaintiff would have to establish through expert testimony that the delay breached the standard of care because other nurses exercising the skill and care ordinarily possessed by nurses in the same or similar localities would have immediately contacted a physician under the circumstances, and not because immediate notification was required by defendant's standing order.

(stating that a common-law rule concerning the admissibility of a criminal conviction in civil proceedings did not survive the adoption of the MRE); *People v Kreiner*, 415 Mich 372, 377; 329 NW2d 716 (1982) (noting that the tender-years exception to the hearsay rule did not survive codification of the MRE). Although *Gallagher* cites several older cases, *Gallagher* itself was decided in 1988, well after the MRE were adopted in 1978. Furthermore, while *Gallagher* does not discuss the issue in terms of the codified rules, its analysis appears entirely consistent with the MRE.

The *Gallagher* Court found no error in the exclusion of the defendant's nursing manual or internal rules because the standard of care in a medical malpractice action must be established through expert testimony. *Gallagher*, 171 Mich App at 764-768. The Court explained:

> Plaintiff sought to introduce internal rules concerning restraint of patients, charting of observations and monitoring changes in behavior. But the question at trial was whether [the patient] had received adequate nursing care or, in other words, whether the nurses had exercised appropriate medical judgment. The rules plaintiff sought to use were not standards for exercising judgment but were more in the nature of the hospital's administrative guidelines. As such, they were not indicative of community standards nor do they appear to be causally connected to the injury.
>
> . . . [T]he ultimate question is what responsibility has the hospital assumed regarding the care of the patient. In Michigan, we look to the standard practiced in the community rather than internal rules and regulations to determine that responsibility in a malpractice action. . . . [*Id*. at 767-768.]

This explanation, while devoid of reference to evidentiary rules, seems to be premised in what is argu-

ably the most elementary rule of evidence—relevance. MRE 402 establishes the basic notion that relevant evidence is admissible, while irrelevant evidence is not. *Rock v Crocker*, 499 Mich 247, 256; 884 NW2d 227 (2016). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The essence of *Gallagher*'s rationale is that evidence having no bearing on the applicable standard of care should not be admitted at trial because it would not tend to make the ultimate fact in question (the defendant's liability) more or less probable.

The same holds true in this case. As explained earlier, plaintiff's proposed claim regarding compliance with the standing order sounds in medical malpractice. Thus, plaintiff was obligated to prove four elements: "(1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017). The standing order purports to define what actions a nurse should or must take when a patient experiences nausea with or without vomiting. The standard of care applicable to nurses, however, is "the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities," *Cox*, 467 Mich at 21-22, and a healthcare provider's internal policies cannot be relied on in establishing that standard, *Zdrojewski*, 254 Mich App at 62; *Gallagher*, 171 Mich App at 765-766. See also *Jilek II*, 490 Mich at 962 (adopting the *Jilek I* dissent); *Jilek I*, 289 Mich App at 316 (BANDSTRA, P.J., dissenting) (disagreeing with the majority's conclusion that internal policies can be used, in conjunction with expert testimony, to determine the

applicable standard of care). At most, the standing order dictates only what nurses employed by defendant are required to do. The standing order is therefore irrelevant because it does not make it more or less probable that the standard of care required a nurse to immediately notify a physician after a second episode of emesis. Because the standing order is not relevant to the standard of care or any other required element, it was inadmissible under MRE 402. The trial court erred by basing its ruling on defendant's motion for summary disposition on substantively inadmissible evidence.[6] *Barnard Mfg Co, Inc*, 285 Mich App at 373.

Plaintiff disagrees and cites the *Gallagher* Court's recognition that "a violation of a regulation promulgated pursuant to statutory authority is admissible in a medical malpractice action[.]" *Gallagher*, 171 Mich App at 766. As plaintiff explains in its appellate brief, *Gallagher* discussed two cases supporting this proposition: *Davis v Detroit*, 149 Mich App 249; 386 NW2d 169 (1986), and *Young v Ann Arbor*, 119 Mich App 512; 326 NW2d 547 (1982), vacated in part by *Young v Ann Arbor (On Rehearing)*, 125 Mich App 459 (1983). Plaintiff's position is unpersuasive. Both *Davis* and *Young* involved rules established by the Department of Corrections that applied to all local penal institutions throughout the state and, in both instances, compliance was mandated by statute. *Davis*, 149 Mich App at 255-261; *Young*, 119 Mich App at 516-518. The precedent from those cases was not controlling in *Gallagher* because the defendant's internal policies were not mandated by law. *Gallagher*, 171 Mich App at 767.

Although compliance with regulations has sometimes been considered in a medical malpractice con-

[6] Given this conclusion, it is unnecessary for us to address defendant's alternative public-policy argument.

text, those cases have uniformly involved regulations that applied throughout the same or similar localities. For instance, in *Lockwood v Mobile Med Response, Inc*, 293 Mich App 17, 21, 25; 809 NW2d 403 (2011), the plaintiff alleged that the defendant failed to comply with guidelines promulgated by the Saginaw Valley Medical Control Authority, which was authorized by statute to create protocols for emergency medical services in two counties. In *Kakligian v Henry Ford Hosp*, 48 Mich App 325, 330-332; 210 NW2d 463 (1973) (opinion by BRENNAN, J.), it was alleged that the defendant hospital violated Mich Admin Code, R 325.1027, a statewide administrative rule, by failing to have a written policy concerning consultations. The rule at issue in *Zdrojewski*, 254 Mich App at 62-63, was created by a nonprofit organization that set standards for and accredited healthcare organizations. In each of these cases, the relevant regulation or rule was created by an external agency or organization and applied to healthcare providers beyond the specific defendant involved in the case.

Plaintiff contends that the standing order was evidence of negligence because it was promulgated pursuant to federal and state regulations requiring nursing homes to establish, maintain, and implement written policies regarding patient care. Assuming, without deciding, that plaintiff correctly characterizes the requirements of the applicable regulations, the regulation that would be relevant to the issue of negligence is the regulation requiring patient care policies. The standing order is simply not a "regulation promulgated pursuant to statutory authority," nor is the specific content of the order mandated by law. *Gallagher*, 171 Mich App at 766. Even if the standing order was created to comply with applicable regulations, it is evident that it only governed the activities

within defendant's nursing home and was not representative of a community standard of care.

For the foregoing reasons, we reverse the trial court's order denying defendant's motion for summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ., concurred.

WARREN CITY COUNCIL v BUFFA

Docket No. 354663. Submitted September 2, 2020, at Lansing. Decided September 2, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 889.

The Warren City Council brought an action in the Macomb Circuit Court against Sonja Buffa (the Warren City Clerk) and Fred Miller (the Macomb County Clerk), seeking a writ of mandamus and declaratory relief compelling Buffa to certify ballot language pursuant to MCL 168.646a(2). On June 30, 2020, plaintiff approved a ballot proposal that, if approved by voters in the November 3, 2020 election, would amend the Warren City Charter to limit the mayor's term limit from five terms to three terms. Mayor James R. Fouts vetoed the resolution on July 2, 2020, but plaintiff voted to override the veto on July 14, 2020. On July 20, 2020, Buffa certified the resolution as a true and correct copy of the resolution that was adopted on June 30, 2020. On July 21, 2020, plaintiff submitted the ballot proposal to the Governor, through her chief legal counsel, and asked that the resolution be approved pursuant to MCL 117.22. The Governor approved the ballot proposal in a letter dated August 12, 2020, which was e-mailed to Buffa on August 13, 2020. Under MCL 168.646a(2), Buffa, as the local clerk, was then to certify the ballot proposal to the county clerk at least 82 days before the election; 82 days before the November 3, 2020 election was August 13, 2020. However, Buffa refused to certify the ballot language to the Macomb County Clerk and argued that under MCL 168.646a(2), the Governor's approval was required by 4:00 p.m. on the twelfth Tuesday before the election, which was August 11, 2020. Because the Governor did not approve it by 4:00 p.m. on August 11, 2020, the statutory requirement was not satisfied, according to Buffa, and her duty to certify the proposal under MCL 168.646a(2) to the Macomb County Clerk at least 82 days before the election never arose. The trial court, Edward A. Servitto, J., agreed with Buffa and refused to issue a writ of mandamus. The Court of Appeals granted plaintiff's application for leave to appeal and for immediate consideration.

The Court of Appeals *held*:

1. At issue in this case is the interaction between MCL 168.646a(2) and MCL 117.22. MCL 168.646a(2), part of the Michigan Election Law, MCL 168.1 *et seq*., provides that if a ballot question of a political subdivision of the state is to be submitted to voters in a regular or special election, the ballot wording of the ballot question must be certified to the proper local or county clerk no later than 4:00 p.m. on the twelfth Tuesday before the election. If the ballot question has been first certified to a clerk other than the county clerk, that clerk must certify the ballot wording to the county clerk at least 82 days before the election. MCL 117.22, part of the Home Rule City Act, MCL 117.1 *et seq*., provides that an amendment to a city charter must be transmitted for approval to the governor before it is submitted to electors. The governor's approval, required by MCL 117.22, is not the certification to the local clerk that is required under MCL 168.646a(2) by 4:00 pm. on the twelfth Tuesday before the election. These statutes do not contain references to each other, and MCL 117.22 does not state that the governor's approval must be transmitted to any particular official or that it is a certification to a local clerk under MCL 168.646a(2). Similarly, MCL 168.646a(2) does not refer to anything being received from the governor or otherwise refer to the approval process of MCL 117.22. These facts seem to clearly indicate that the Legislature did not intend for the governor's approval to be a prerequisite to the local clerk's certification of ballot language to the county clerk under MCL 168.646a(2). Additionally, the plain language of the statutes does not support a reading that the governor's approval, referred to in MCL 117.22, is the certification contemplated by MCL 168.646a(2). The statutes use different terms, in that MCL 117.22 states that the governor must "approve" the amendment to a city charter, while MCL 168.646a(2) requires the ballot wording be "certified." Moreover, MCL 117.22 states only that the governor must approve the language before a proposal is submitted to the electors, while MCL 168.646a(2) sets forth specific deadlines by which certain acts must be taken. The Governor's approval here fully complied with MCL 117.22, and reading a requirement into the statute that the governor's approval must come before 4:00 p.m. on the twelfth Tuesday before the election would run contrary to the language of MCL 117.22, which mandates only that the approval be given before a proposal is submitted to the voters. This conflict is resolved if one understands that the act of certifying ballot language to a local clerk under MCL 168.646a(2) is not the same as the governor's act of approving a charter amendment under MCL 117.22.

2. The *in pari materia* doctrine of statutory construction does not lead to the conclusion that the governor's approval should be understood as the certification to the local clerk contemplated by MCL 168.646a(2). This doctrine holds that statutes relating to the same subject or sharing a common purpose should be read together as one, even if the statutes do not refer to each other and were enacted at different times. In this case, MCL 117.22 and MCL 168.646a(2) do not share a common purpose. MCL 117.22 addresses the process for amending a city charter, while MCL 168.646a(2) addresses the procedure for putting ballot questions of a political subdivision on the ballot of a regular or special election. Although both statutes ultimately concern election matters, each has a distinct purpose. Given these distinct purposes, there was no merit to Buffa's contention that because she did not receive the Governor's approval until after 4:00 p.m. on August 11, 2020, MCL 168.646a(2) was not satisfied and she was therefore not required to certify the ballot language to the Macomb County Clerk. In fact, the first deadline set forth in MCL 168.646a(2) was satisfied on July 30, 2020, well before August 11, 2020, when plaintiff submitted a correct resolution to Buffa after voting to override the Mayor's veto.

3. To establish entitlement to a writ of mandamus, a plaintiff must show that it (1) has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. The first two elements were satisfied in that plaintiff, as the body that passed the resolution, had a right to the performance of Buffa's duty to certify the ballot language to the county clerk, and Buffa had a clear legal duty to certify the ballot language by August 13, 2020. The third element was also satisfied because the act at issue was ministerial. The language of MCL 168.646a(2) provides that the local clerk *shall* certify the ballot wording to the county clerk at least 82 days before the election. The word "shall" indicates a mandatory, not a discretionary, directive. Because the ballot language was certified to Buffa before the August 11, 2020 deadline, Buffa was obligated by law to certify the language to the county clerk before August 13, 2020. The fourth element was also met, in that plaintiff demonstrated that no other legal remedy was available. Mandamus is generally an appropriate remedy to compel performance of election-related duties, and MCL 117.25 provides that a person aggrieved by an act or omission of a county clerk may bring an action for writ of mandamus. No other legal or equitable remedy was available to plaintiff, so plaintiff was entitled to issuance of the writ.

4. Plaintiff asked for a declaration that when it submitted the ballot proposal to the Macomb County Clerk on August 10, 2020, the certification requirement of MCL 168.646a(2) was satisfied. This declaratory relief was not requested below and would be improper because MCL 168.646a(2) clearly indicates that the *local* clerk must certify the ballot wording to the county clerk, and does not provide that the request may be satisfied in any other way or by any other person or entity.

Order denying mandamus reversed; defendant Buffa ordered to immediately certify the ballot language to the county clerk pursuant to MCL 168.646a(2).

ELECTION LAW — POLITICAL SUBDIVISIONS — BALLOT QUESTIONS — CERTIFICATION.

MCL 168.646a(2) requires that if a ballot question of a political subdivision is to be submitted to voters in an upcoming election, the ballot wording must be certified to a local clerk or county clerk no later than 4:00 p.m. on the twelfth Tuesday before the election; MCL 117.22, which addresses amendments to city charters, requires that proposed amendments be submitted to the governor for approval before being submitted to voters; the governor's approval under MCL 117.22 is not the certification required by MCL 168.646a(2); the statutes have distinct purposes and should not be read together.

Plunkett Cooney (by *Robert G. Kamenec* and *Jeffrey M. Schroder*) for Warren City Council.

The Smith Appellate Law Firm (by *Michael F. Smith*) and *Allen Brothers, PLLC* (by *James P. Allen, Sr.*) for Sonja Buffa.

Frank Krycia, Macomb County Corporation Counsel, for Fred Miller.

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

PER CURIAM. Plaintiff, the Warren City Council, appeals as of right the trial court's order denying plaintiff's request for a writ of mandamus compelling defendant Sonja Buffa, the Warren City Clerk, to

certify ballot language to the Macomb County Clerk (defendant Fred Miller) pursuant to MCL 168.646a(2). We reverse and order Buffa to immediately certify the ballot language to the Macomb County Clerk pursuant to MCL 168.646a(2).

I. BACKGROUND

At issue in this matter is a ballot proposal that, if approved by the voters at the upcoming November 3, 2020 election, would amend the Warren City Charter and reduce the mayor's term limit from five terms to three. This proposal was approved by plaintiff on June 30, 2020. But on July 2, 2020, Mayor James R. Fouts vetoed the resolution. On July 14, 2020, plaintiff voted 7-0 to override that veto. On July 20, 2020, Buffa certified the resolution as being a "true and correct copy of the resolution adopted . . . on June 30, 2020."

The next series of events were triggered by MCL 117.22, a provision of the Home Rule City Act, MCL 117.1 *et seq*. MCL 117.22 provides:

> *Every amendment to a city charter* whether passed pursuant to the provisions of this act or heretofore granted or passed by the state legislature for the government of such city, *before its submission to the electors*, and every charter before the final adjournment of the commission, *shall be transmitted to the governor of the state. If he shall approve it, he shall sign it*; if not, he shall return the charter to the commission and the amendment to the legislative body of the city, with his objections thereto, which shall be spread at large on the journal of the body receiving them, and if it be an amendment proposed by the legislative body, such body shall re-consider it, and if 2/3 of the members-elect agree to pass it, it shall be submitted to the electors. If it be an amendment proposed by initiatory petition, it shall be submitted to the electors notwithstanding such objections. [Emphasis added.]

On July 21, 2020, plaintiff, through counsel, transmitted the ballot proposal to Governor Gretchen Whitmer's Chief Legal Counsel and asked that it be approved. The record shows that an assistant attorney general reviewed the language and, on August 6, 2020, recommended that the Governor give her approval. The Governor did give her approval to the ballot proposal in a letter dated August 12, 2020, which was e-mailed to Buffa the morning of August 13, 2020. In the interim, on August 10, 2020, plaintiff's counsel forwarded the ballot language to the Macomb County Clerk's Office.

MCL 168.646a(2), a provision of the Michigan Election Law, MCL 168.1 *et seq*., provides:

> If a ballot question of a political subdivision of this state including, but not limited to, a county, city, village, township, school district, special use district, or other district is to be voted on at a regular election date or special election, *the ballot wording of the ballot question must be certified to the proper local or county clerk not later than 4 p.m. on the twelfth Tuesday before the election*. *If the wording is certified to a clerk other than the county clerk, the clerk shall certify the ballot wording to the county clerk at least 82 days before the election*. Petitions to place a county or local ballot question on the ballot at the election must be filed with the clerk at least 14 days before the date the ballot wording must be certified to the local clerk. [Emphasis added.]

Thus, the statute contains two timelines applicable to this matter. First, the ballot wording must be "certified to the proper local . . . clerk not later than 4 p.m. on the twelfth Tuesday before the election." MCL 168.646a(2). All parties agree that the twelfth Tuesday before the election was August 11, 2020. Second, the local clerk "shall certify the ballot wording to the county clerk at least 82 days before the election." MCL 168.646a(2). All agree that 82 days before the

November 3, 2020 election was August 13, 2020. In other words, both sides agree with guidance provided by the Secretary of State concerning MCL 168.646a(2):

Filing Deadlines: County and Local Proposals

* * *

By 4:00 p.m., August 11, 2020	Ballot wording of county and local proposals to be presented at the November general election certified to county and local clerks; local clerks receiving ballot wording forward to county clerk within two days. (168.646a)[1]

Buffa has, to this point, refused to certify the ballot language to the Macomb County Clerk. In the trial court and on appeal, Buffa contends that the Governor's approval was required by 4:00 p.m. on August 11, 2020, and because that approval did not come until after that date, the requirement that the ballot language be certified to Buffa by 4:00 p.m. on August 11, 2020, was not satisfied. On this basis, Buffa contends that her duty to certify the language to the Macomb County Clerk on August 13, 2020, never arose. The trial court agreed with this logic and refused to issue the writ. This appeal followed.[2]

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[1] Secretary of State, *2020 Michigan Election Dates*, p 5, available at <https://www.michigan.gov/documents/sos/2020_Elec-Dates-Booklet_ED-12_10-09-19_668275_7.pdf> [https://perma.cc/X5T9-4FTH].

[2] This Court denied Buffa's motion to affirm and granted plaintiff's motion to expedite this appeal. *Warren City Council v Buffa*, unpublished order of the Court of Appeals, entered September 1, 2020 (Docket No. 354663).

II. STANDARD OF REVIEW

"A trial court's decision to deny a writ of mandamus will not be reversed absent an abuse of discretion." *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993). To establish entitlement to the writ, a plaintiff must show that (1) the plaintiff "has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 366-367; 820 NW2d 208 (2012) (quotation marks and citation omitted). Although the trial court's decision whether to issue a writ of mandamus is reviewed for an abuse of discretion, this Court reviews de novo the first two elements—the existence of a clear legal right and a clear legal duty—as those are questions of law. *Id*. To the extent that this Court must interpret the relevant statutes, questions of statutory interpretation are likewise reviewed de novo. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009).

III. ANALYSIS

Plaintiff argues that the trial court abused its discretion by refusing to issue a writ of mandamus compelling Buffa to immediately certify the ballot language to the Macomb Circuit Court. We agree.

The dispute in this case largely centers on the interaction between MCL 168.646a(2) and MCL 117.22. When interpreting statutes, this Court's duty is to effectuate the Legislature's intent. *PNC Nat'l Bank Ass'n*, 285 Mich App at 506. "The primary goal of

statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012) (quotation marks and citation omitted). Every word or phrase in a statute should be given its plain and ordinary meaning. *PNC Nat'l Bank Ass'n*, 285 Mich App at 506.

We conclude that the governor's approval under MCL 117.22 is not the certification to the local clerk that is required by 4:00 p.m. on the twelfth Tuesday before the election required by MCL 168.646a(2). First, the two statutes contain no references to each other. MCL 117.22 does not state that the governor's approval must be transmitted to any particular official, nor does it indicate that the governor's approval amounts to "certifi[cation]" to a local clerk under MCL 168.646a(2). Likewise, MCL 168.646a(2) does not speak of anything being received from the governor or otherwise refer to the approval process of MCL 117.22. That seems a clear indication that our Legislature did not intend for the governor's approval to stand as a prerequisite to the local clerk's act of certifying ballot language to the county clerk under MCL 168.646a(2).

Second, nothing in the plain language of the statutes implies that the governor's approval under MCL 117.22 is the certification contemplated by MCL 168.646a(2). Rather, the statutes use different terms; MCL 117.22 refers to the governor's "approv[al]" of an amendment to a city charter, while MCL 168.646a(2) speaks of certification. "When the Legislature uses different words, the words are generally intended to connote different meanings." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). The

use of different terms suggests that the governor's approval under MCL 117.22 is not the certification to be made to the local clerk under MCL 168.646a(2).

Third, while MCL 168.646a(2) sets forth very specific deadlines by which certain acts must be taken, MCL 117.22 only states that the governor's approval must come "before [a proposal's] submission to the electors." Therefore, the trial court's reading of the statutes creates a conflict. The Governor's approval fully complied with MCL 117.22, as it came well before the proposal would be submitted to the electors. Indeed, it came before the deadline for Buffa to certify the ballot language to the Macomb County Clerk. Nonetheless, Buffa would have this Court impose a second time requirement: to be of any effect, the governor's approval must come before 4:00 p.m. on the twelfth Tuesday before the election. That requirement is not stated in MCL 117.22; in fact, such a requirement would run contrary to the language of MCL 117.22, which indicates that the governor's approval must only be given before a proposal is submitted to the voters. But that conflict is easily resolved if one understands that the act of certifying ballot language to a local clerk under MCL 168.646a(2) is not the same as the governor's act of approving a charter amendment under MCL 117.22.

Buffa relies on the *in pari materia* rule of statutory construction to argue that the governor's approval should be understood as the certification to the local clerk contemplated by MCL 168.646a(2). "The *in pari materia* rule of statutory construction holds that statutes relating to the same subject or sharing a common purpose should be read together as one, even if the two statutes contain no reference to each other and were enacted at different times." *Summer v Southfield Bd of*

Ed, 324 Mich App 81, 93; 919 NW2d 641 (2018). Contrary to Buffa's argument, applying the doctrine of *in pari materia* does not automatically lead to the conclusion that the governor's approval, spoken of in MCL 117.22, is the "certification" that must be made to the local clerk by 4:00 p.m. on August 11, 2020. To begin, the two statutes do not share a common purpose. MCL 117.22 relates solely to the procedure for amending a city charter, and more specifically, to a particular procedure that is one part of the process. MCL 168.646a, on the other hand, concerns procedures applicable to "ballot question[s] of a political subdivision of this state." Thus, while both statutes ultimately concern ballot questions, MCL 168.646a encompasses any ballot question of a political subdivision of the state, while MCL 117.22 concerns only a narrow category, proposed amendments to city charters.[3] We do not view that as a "common purpose" such that this Court should assume that one references or implicates the other. Rather, these statutes seem better categorized as statutes that incidentally refer to the same subject. "An act is not in pari materia with another act, even if it incidentally refers to the same subject, if the scope and aim of the two acts are distinct and unconnected." *Pavlov v Community Emergency Med Serv, Inc*, 195 Mich App 711, 721; 491 NW2d 874 (1992). MCL 117.22 and MCL 168.646a(2) both generally refer to election matters, but each has a distinct purpose. This Court cannot read additional requirements into

[3] And even in that regard, charter amendments proposed by initiative, rather than by legislative act, are to be submitted to the electors whether or not the governor provides his or her blessing. See MCL 117.22 ("If it be an amendment proposed by initiatory petition, it shall be submitted to the electors notwithstanding such objections."). Thus, the approval process is even more limited, only having a practical effect on those charter amendments proposed by a legislative body.

either MCL 117.22 or MCL 168.646a(2) that were not placed there by the Legislature. *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479, 488; 875 NW2d 756 (2015).

In sum, we find no merit to Buffa's contention that because the Governor's approval did not come until after 4:00 p.m. on August 11, 2020, MCL 168.646a(2) was not satisfied and she had no choice but to refrain from submitting the proposal to the Macomb County Clerk.[4] Rather, the proposal was "certified" to Buffa no later than July 20, 2020. Plaintiff's proposal was first put forth in a resolution adopted on June 30, 2020. That resolution was vetoed by the Mayor a few days later. But the veto was overridden by a unanimous vote conducted on July 14, 2020. Buffa certified the resolution, pursuant to the July 14, 2020 vote, on July 20, 2020. We do not necessarily view Buffa's act of certifying the resolution as "certif[ying]" the ballot wording to Buffa. MCL 168.646a(2). Rather, Buffa's certification was, as she argued below, merely a certification that the resolution was a "true and correct copy of the resolution adopted" by plaintiff. And in any event, MCL 168.646a(2) requires that the ballot language be certified *to* Buffa, not *by* Buffa. But it would seem in

[4] Buffa contends that this Court's reading of the statutes could force her to commit a misdemeanor if she certifies language that is later disapproved by the Governor. This argument is based on guidance from the Secretary of State quoted previously in this opinion, which, according to Buffa, she must follow or else commit a misdemeanor. The guidance, however, says absolutely nothing about waiting for the Governor's approval before a local clerk may certify ballot language to the county clerk. Buffa's concerns seem misplaced. And to the extent this result might create "chaos," as Buffa envisions, we note that the Governor and the Attorney General seem fully aware of the realities of election matters, including time requirements for printing ballots. Certainly in this case, the Governor's approval was rendered in time so as not to wreak havoc on the preparation of ballots. The Governor's approval was granted before Buffa was to certify the ballot language to the county clerk, and thus in no way disturbed the process.

this case, once plaintiff voted to override the Mayor's veto and submitted the resolution to Buffa, plaintiff certified the proposal to Buffa. While there is some dispute regarding when, exactly, a correct resolution was submitted to Buffa, she clearly had that resolution in hand by July 20, 2020. That was well before August 11, 2020. The first deadline of MCL 168.646a(2) was satisfied, and both Buffa and the trial court were wrong to conclude otherwise.

The question then becomes whether plaintiff established the elements necessary to obtain a writ of mandamus compelling Buffa to act. We conclude that plaintiff did. Buffa had a clear legal duty to certify the ballot language to the Macomb County Clerk by August 13, 2020. As explained, the ballot language was certified to Buffa before 4:00 p.m. on August 11, 2020. Even if Buffa needed the Governor's approval before she could certify the proposal to the county clerk, Buffa had that approval the morning of August 13, 2020.[5] Pursuant to MCL 168.646a(2), Buffa's obligation was to certify the ballot language to the county clerk "at least 82 days before the election," i.e., by August 13, 2020. Buffa had a clear legal duty to do so. And as the

[5] For clarity, our opinion today decides that the Governor's approval was not required for "the ballot wording of the ballot question" to be "certified to the proper local or county clerk not later than 4 p.m. on the twelfth Tuesday before the election" as required in the first sentence of MCL 168.646a(2). That is, Buffa did not need the Governor's approval to certify the ballot wording before 4:00 p.m. on August 11, 2020. Our opinion does not decide the tangential question whether Buffa needed the Governor's approval before she (Buffa) could certify the ballot wording to the county clerk because this case does not present an opportunity to do so. Buffa needed to certify the ballot wording to the county clerk before August 13, 2020, and Buffa had the Governor's approval by then. Nonetheless, it is worth noting that, again, nothing in the relevant statutes would seem to indicate that the local clerk must await that approval before he or she may certify the ballot language to the county clerk.

body who passed the resolution, we conclude that plaintiff has a right to the performance of that duty.

The third element asks if the duty was ministerial, or instead, involves a measure of discretion. We conclude that the act was ministerial. An act is ministerial when the law states that duty "with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Garrett*, 316 Mich App 37, 44-45; 890 NW2d 882 (2016) (quotation marks and citation omitted). In this case, MCL 168.646a(2) provides that if proposed ballot language is certified to a local clerk by 4:00 p.m. on the twelfth Tuesday before the election, "the clerk shall certify the ballot wording to the county clerk at least 82 days before the election." That language leaves no room for discretion. The word "shall" is indicative of a mandatory directive, not a discretionary one. *Oakland Co v Michigan*, 456 Mich 144, 154-155 & n 10; 566 NW2d 616 (1997). Because the ballot language was certified to Buffa before the August 11, 2020 deadline, she was obligated by law to then certify the language to the Macomb County Clerk before August 13, 2020.

Finally, before the writ may issue, plaintiff must demonstrate that it has no other legal remedy. Mandamus is generally an appropriate remedy to compel the performance of election-related duties. See, e.g., *Coalition for a Safer Detroit*, 295 Mich App 362. Indeed, MCL 117.25(7) specifically recognizes that "[a] person aggrieved by an action, or failure of action, of the city clerk may bring an action against the clerk in the circuit court for writ of mandamus or other appropriate relief." Buffa claims that by requesting declaratory relief in the complaint, plaintiff defeated its request for mandamus because it effectively admitted that another remedy is available. But requesting another form of relief does not

prove entitlement to that relief. Further, all that was requested was a declaration that Buffa has a duty to certify the ballot language at issue. A declaration would not necessarily *compel* her to certify the language; hence, the need for a writ of mandamus. We conclude that no other legal or equitable remedy besides mandamus is available.[6] Thus, plaintiff is entitled to issuance of the writ, and the circuit court abused its discretion by declining to issue it.

Plaintiff's brief on appeal also asks this Court to declare that when plaintiff submitted the proposal to the Macomb County Clerk on August 10, 2020, the requirement of MCL 168.646a(2) that the ballot language be certified to the county clerk was satisfied. Ignoring the fact that no such relief was requested below, we note that MCL 168.646a(2) is clear: the *local clerk* must certify the ballot language to the county clerk. The statute does not contemplate that requirement being satisfied in any other way or by any other person or entity. A declaration in the nature requested would be wholly improper. We therefore decline to grant relief of that sort.

IV. CONCLUSION

The circuit court's order is reversed to the extent that it denied plaintiff's request for a writ of mandamus compelling Buffa to certify the ballot language to

[6] Buffa suggests that rather than pursue this action, plaintiff should pass the resolution again and put the matter on a future election ballot. The question is whether there is another adequate *legal or equitable* remedy available, *Berry*, 316 Mich App at 41, not whether plaintiff might be able to place the matter on the ballot for some later election. Buffa's argument also ignores the reality that not all elections are equal and that turnout at the upcoming general election will, in all likelihood, surpass that of subsequent elections in 2021 or 2022, given that the office of President of the United States will not be up for vote in those elections.

the Macomb County Clerk. Buffa is hereby ordered to immediately certify the ballot language to the Macomb County Clerk pursuant to MCL 168.646a(2). A public question being involved, no costs may be taxed under MCR 7.219. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

O'BRIEN, P.J., and CAVANAGH and JANSEN, JJ., concurred.

HARTFIEL v CITY OF EASTPOINTE

Docket No. 348642. Submitted August 12, 2020, at Detroit. Decided September 3, 2020, at 9:00 a.m.

Eric M. Hartfiel filed a three-count complaint in the Macomb Circuit Court against the city of Eastpointe, alleging causes of action for quiet title, slander of title, and writ of mandamus. In pertinent part, plaintiff alleged that defendant unlawfully claimed liens against plaintiff's two rental properties and added unpaid water bills to the property tax assessments for those properties. For each of the two properties, plaintiff had submitted to defendant a signed copy of a lease agreement along with an affidavit stating that his tenants were responsible for paying the water charges. Plaintiff's finance director established procedures for transferring delinquent water charges from a landlord to a tenant, and these procedures provided that if water service was terminated for nonpayment, the tenant's security deposit was forfeited and the responsibility for all subsequent water and sewer charges became the responsibility of the landlord. Those subsequent water and sewer charges then became a lien against the property. The procedures required that each new leasehold was subject to the same procedures as the first. For each of the two properties, plaintiff entered into a one-year lease agreement with his tenants. Both sets of tenants renewed their lease agreement twice; however, plaintiff never filed any new affidavits regarding payment of water charges. Defendant voided the water affidavits of plaintiff's tenants for nonpayment, and in each case, defendant transferred the unpaid water bills to plaintiff's property tax bill. Plaintiff brought the instant action, and defendant moved for summary disposition. Plaintiff, in turn, moved for summary disposition under MCR 2.116(I)(2). The trial court, Julie Gatti, J., issued an opinion and order granting defendant's motion for summary disposition, holding that plaintiff failed to comply with the statutory requirements of MCL 123.165 and MCL 141.121(3) that he file both a lease and water affidavit with defendant for each leasehold period in order to avoid liability for charges and a lien on the property. The court further determined that defendant was statutorily required to place liens on plaintiff's

rental properties as security for the collection of the water arrearages and that the placement of the liens on the tax rolls was proper. Plaintiff appealed.

The Court of Appeals *held*:

The trial court did not err when it held that plaintiff was required to file both a lease and a water affidavit with defendant for each leasehold period in order to avoid liability for charges and a lien on the property; however, because defendant was without authority to transfer outstanding water charges to plaintiff's tax rolls before the expiration of the statutory six-month delinquency period, the trial court erred when it held that defendant was statutorily required to place liens on the properties. MCL 123.165 and MCL 141.121(3) both permit a lessor to avoid a lien arising from a tenant's nonpayment of charges for which the tenant is responsible. However, the owner's exemption from a lien has a beginning and ending period: when the lease term ends, so does the exemption from a lien. From the lease expiration date forward, all charges for water and sewage service are once again a lien against the property. Because the lien exemption is inextricably tied to the lessor's lack of direct liability for charges, it can be reasonably inferred that the exemption set forth in MCL 123.165 and the affidavit establishing entitlement to the exemption both expire along with the lease. Although MCL 141.121(3) places less emphasis on the expiration of the lease agreement, it still requires that a tenant is responsible for the payment of the charges, and the tenant's responsibility and the corresponding owner's exemption from a lien for water charges arise by virtue of a contractual agreement. When the agreement expires, the tenant's responsibility ends and the landlord's exemption from a lien against the property also ends. Reading MCL 141.121(3) and MCL 123.165 *in pari materia*, the lien exemption in MCL 141.121(3) was intended to apply only during the term of the lease under which the tenant assumed responsibility for the charges. Furthermore, to the extent that a conflict exists between MCL 141.121(3) and MCL 123.165 concerning the effect of the expiration of the lease, MCL 123.165 controls because it was enacted more recently and more specifically addresses municipal water and sewer liens. Accordingly, to be entitled to protection from liens beyond the date on which the subject lease expires, the lessor must provide the applicable governmental official with a new notice regarding the terms of subsequent leases and, under MCL 123.165, that notice must be in the form of an affidavit that identifies the expiration date of the lease. In this case, plaintiff admitted that he filed only one water affidavit for each of his rental properties. Because the relevant

charges were incurred after the respective leases and affidavits expired, defendant was not prohibited from imposing a lien for those charges. However, MCL 141.121(3) barred defendant from certifying past-due charges for placement on the tax roll until the charges had been delinquent for at least six months. Defendant violated this restriction by transferring the charges to plaintiff's tax bills less than 60 days after the charges accrued. Accordingly, this matter had to be remanded to the trial court for the limited task of refunding plaintiff for charges paid as a result of the liens being unlawfully placed on the tax rolls before the expiration of the statutory six-month period.

Affirmed in part, reversed in part, and remanded.

1. LANDLORD AND TENANT — LIENS AGAINST THE PROPERTY — WATER AFFIDAVIT.

A landlord must file a new water affidavit with each lease in order to prevent charges for water arrears from becoming the responsibility of the landlord and a lien against the property (MCL 123.165; MCL 141.121).

2. LANDLORD AND TENANT — PAST-DUE WATER CHARGES — SIX-MONTH STATUTORY PERIOD.

A municipality may not transfer past-due water charges to a landlord's tax rolls until the charges have been delinquent for at least six months (MCL 141.121(3)).

Mark K. Wasvary, PC (by *Mark K. Wasvary*) for plaintiff.

Cummings, McClorey, Davis & Acho, PLC (by *Douglas J. Curlew*) for defendant.

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

STEPHENS, J. Plaintiff appeals as of right the trial court order granting defendant summary disposition under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

I. BACKGROUND

This matter arises from defendant's handling of charges incurred for water and sewer services provided

to plaintiff's rental properties. Plaintiff owned two rental properties in the city of Eastpointe: 23126 Beechwood (the Beechwood Property) and 22438 Linwood (the Linwood Property). Defendant's finance director, Randall Blum, established procedures for transferring delinquent water charges from a landlord to a tenant. Pursuant to those procedures, a landlord was required to submit a copy of the lease agreement along with a water affidavit stating that the tenant was responsible for paying the water charges. Subsequent to a landlord's filing both the lease and affidavit, tenants were required to file a security deposit and complete an "ACH Payment Authorization Agreement" to allow automatic withdrawal of the water payment from the tenant's bank account. The written procedures provided that if water service was terminated for nonpayment, the tenant's security deposit was forfeited and the responsibility for all subsequent water and sewer charges became the responsibility of the landlord. Those subsequent water and sewer charges then became a lien against the property. The procedures required that each new leasehold was subject to the same procedures as the first.

Plaintiff initially entered into a one-year lease on the Linwood Property with Francis Eugene Sauro and Sheri Lou Sauro beginning October 1, 2013, with the tenants assuming responsibility for water and sewer charges. On October 3, 2013, plaintiff and Francis executed a water affidavit indicating that the lease agreement made the Sauros responsible for all charges incurred for water during the term of the lease, which had an expiration date of October 1, 2014. Plaintiff and the Sauros subsequently renewed their lease agreement twice with one-year leasing terminating on October 1, 2015, and October 1, 2016. No new water affidavits were filed for the Linwood Property. Defen-

dant issued several shutoff notices between April 2014 and April 2015 due to nonpayment. Defendant's employee verbally told plaintiff sometime between October 2015 and January 2016 that the water affidavit had been voided due to the Sauros' poor payment history. On June 2, 2016, delinquent charges for unpaid April and May 2016 bills for service to the Linwood Property in the amount of $129.11 were added to plaintiff's tax bill.

Plaintiff leased the Beechwood Property to Tanya Smith and Williams Woodson for a one-year term beginning April 1, 2015. On March 25, 2015, plaintiff, Smith, and Woodson executed a water affidavit indicating that their lease agreement made Smith and Woodson responsible for all charges for water incurred during the term of the lease. The water affidavit indicated that the lease expired on April 1, 2016. Defendant voided the 2015 water affidavit for Beechwood on October 21, 2015, after multiple attempts to automatically withdraw water payments failed. Plaintiff renewed his lease agreement with Smith and Woodson for two additional one-year terms, the first ending April 1, 2017, and the last ending April 1, 2018. Plaintiff claims to have filed a copy of the 2016 lease with defendant. Defendant claims no record of this filing. It is, however, uncontroverted that when plaintiff attempted to file the 2017 lease it was returned to him via certified mail with a letter indicating that the municipality had no understanding of why it had been sent to it. The May 1, 2017 unpaid water bill of $77.02 was added to plaintiff's property tax bill for the year 2018.

On April 23, 2018, plaintiff filed a three-count complaint against defendant, alleging causes of action for quiet title, slander of title, and writ of mandamus. In

pertinent part, plaintiff alleged that defendant unlawfully claimed liens against the properties and added the unpaid water bills to the property tax assessments for his rental properties. Plaintiff asserted that defendant's liens were prohibited because he complied with the requirements of MCL 123.165 and MCL 141.121 for both rental properties.

On February 19, 2019, defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Relevant to this appeal, defendant argued that plaintiff's quiet-title claim was barred by his failure to comply with applicable statutes or defendant's procedures. In response to defendant's motion, plaintiff asked for summary disposition in his favor under MCR 2.116(I)(2) and argued that defendant's procedure for water affidavits included additional requirements to those set forth in MCL 141.121(3) and MCL 123.165. Plaintiff argued that defendant did not have the authority to impose such additional requirements. Therefore, because he was compliant with state law, plaintiff argued that defendant was prohibited from imposing liens on his properties. Plaintiff asserted that once water affidavits were filed, defendant's only remedy for nonpayment was to shut off services.

On April 9, 2019, the trial court issued an opinion and order granting defendant's motion for summary disposition. The court opined that plaintiff failed to comply with the statutory requirements of MCL 123.165 and MCL 141.121(3) that he file both a lease and water affidavit with defendant for each leasehold period in order to avoid liability for charges and a lien on the property. The court further determined that defendant was statutorily required to place liens on the Linwood and Beechwood properties as security for the

collection of the water arrearages and that the placement of the liens on the tax rolls was proper. This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition.[1] *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "When deciding a motion for summary disposition under [MCR 2.116(C)(10)], a court must consider in the light most favorable to the nonmoving party the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties." *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted).

"Questions of law, including statutory interpretation, are reviewed de novo." *Kuhlgert v Mich State*

[1] The trial court did not identify the subrule or subrules on which it relied to grant defendant's motion. Nonetheless, the only rule applicable to this appeal is MCR 2.116(C)(10) because plaintiff does not challenge the trial court's ruling regarding governmental immunity and the parties and trial court relied on evidence outside the pleadings. See *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 776; 910 NW2d 666 (2017) (reviewing denial of summary disposition under MCR 2.116(C)(10) when "resolution of the motion required consideration of evidence outside the pleadings").

Univ, 328 Mich App 357, 371; 937 NW2d 716 (2019). This Court's primary goal in statutory interpretation is to give effect to the intent of the Legislature, as conveyed through the plain language of the statute. *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019). "When the language of the statute is clear and unambiguous, judicial construction is not permitted and this Court must give the words their plain and ordinary meaning." *Buckmaster v Dep't of State*, 327 Mich App 469, 475; 934 NW2d 59 (2019). "This Court must avoid interpreting a statute in a way that would make any part of it meaningless or nugatory." *Maples v Michigan*, 328 Mich App 209, 218; 936 NW2d 857 (2019). In addition, "[w]hen two statutes cover the same general subject, they must be construed together to give reasonable effect to both, if at all possible." *Buckmaster*, 327 Mich App at 475 (quotation marks and citation omitted).

B. ANALYSIS

Plaintiff argues that the trial court erred in its interpretation of MCL 123.165 and MCL 141.121(3). We disagree.

MCL 123.165 pertains to municipal water and sewage liens. It provides:

> The lien created by this act[2] shall, after June 7, 1939, have priority over all other liens except taxes or special assessments whether or not the other liens accrued or were recorded before the accrual of the water or sewage system lien created by this act. *However, this act shall not apply if a lease has been legally executed, containing a provision that the lessor shall not be liable for payment of*

[2] MCL 123.162 grants a municipality operating a water-distribution or sewage system a lien on premises to which services are provided as security for payment of charges.

> *water or sewage system bills accruing subsequent to the filing of the affidavit provided by this section*. An affidavit with respect to the execution of a lease containing this provision shall be filed with the board, commission, or other official in charge of the water works system or sewage system, or both, and 20 days' notice shall be given by the lessor of any cancellation, change in, or termination of the lease. The affidavit shall contain a notation of the expiration date of the lease. [Emphasis added.]

The second statutory provision, MCL 141.121(3), is from the Revenue Bond Act (the RBA), MCL 141.101 *et seq*., and provides:

> Charges for services furnished to a premises may be a lien on the premises, and those charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered, and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes. The time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien shall be prescribed by the ordinance adopted by the governing body of the public corporation. *However, in a case when a tenant is responsible for the payment of the charges and the governing body is so notified in writing, the notice to include a copy of the lease of the affected premises, if there is one, then the charges shall not become a lien against the premises after the date of the notice*. In the event of filing of the notice, the public corporation shall render no further service to the premises until a cash deposit in a sum fixed in the ordinance authorizing the issuance of bonds under this act is made as security for the payment of the charges. In addition to any other lawful enforcement methods, the payment of charges for water service to any premises may be enforced by discontinuing the water service to the premises and the payment of charges for sewage disposal service or storm water disposal service to a premises may

> be enforced by discontinuing the water service, the sewage disposal service, or the storm water disposal service to the premises, or any combination of the services. The inclusion of these methods of enforcing the payment of charges in an ordinance adopted before February 26, 1974, is validated. [Emphasis added.]

In construing statutes that relate to the same subject matter, the terms of the relevant provisions must be read *in pari materia* and construed, whenever possible, in a manner that avoids conflict. *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27; 811 NW2d 98 (2011). However, "when two applicable statutory provisions conflict, the one that is more specific to the subject matter prevails over the provision that is only generally applicable." *Pike v Northern Mich Univ*, 327 Mich App 683, 693; 935 NW2d 86 (2019). "[T]he rules of statutory construction also provide that a more recently enacted law has precedence over the older statute," particularly when the more specific statute is also the most recent of the two statutes. *Parise*, 295 Mich App at 28 (quotation marks and citation omitted; alteration in original).

The RBA "authorized a locality to issue a limited type of bond for public improvements that would be repaid through revenue generated solely from the public improvement financed by the bond." *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 27-28; 894 NW2d 758 (2016). Water-supply and sewer systems are among the public improvements authorized under the RBA. *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 125-126; 892 NW2d 33 (2016). A municipality *may* effectuate a lien on the premises to which the services have been provided to collect charges for those services. Charges that have been delinquent for at least six months may be "certified annually to the proper tax

assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered . . . ." MCL 141.121(3). The RBA grants the municipality discretion as to whether to treat the delinquent charges as liens against the service property except when the tenant has the responsibility to pay those charges. *N L Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 234; 886 NW2d 772 (2016). In such cases, this discretion is limited as follows:

> [I]n a case when a tenant is responsible for the payment of the charges and the governing body is so notified in writing, the notice to include a copy of the lease of the affected premises, if there is one, then the charges shall not become a lien against the premises after the date of the notice. In the event of filing of the notice, the public corporation shall render no further service to the premises until a cash deposit in a sum fixed in the ordinance authorizing the issuance of bonds under this act is made as security for the payment of the charges. [MCL 141.121(3).]

We note that additional statutory provisions concerning municipal water and sewage liens were also enacted by 1939 PA 178, MCL 123.161 *et seq*. *N L Ventures VI Farmington*, 314 Mich App at 228. Under MCL 123.162, "[a] municipality that has operated or operates a water distribution system or a sewage system . . . has as security for the collection of water or sewage system rates . . . a lien upon the house or other building and upon the premises . . . to which the sewage system service or water was supplied." Unlike the lien authorized under the RBA, the lien authorized by MCL 123.162 is mandatory. *N L Ventures VI Farmington*, 314 Mich App at 229-230. "This lien becomes effective immediately upon the distribution of the water or provision of the sewage system service to the premises or property

supplied, but shall not be enforceable for more than 5 years after it becomes effective." MCL 123.162.

Similar to MCL 141.121(3), the later-enacted statutory scheme also provides a mechanism for lessors to avoid liens for delinquent charges owed by a lessee. *N L Ventures VI Farmington*, 314 Mich App at 229. In pertinent part, MCL 123.165 provides:

> [T]his act shall not apply if a lease has been legally executed, containing a provision that the lessor shall not be liable for payment of water or sewage system bills accruing subsequent to the filing of the affidavit provided by this section. An affidavit with respect to the execution of a lease containing this provision shall be filed with the board, commission, or other official in charge of the water works system or sewage system, or both, and 20 days' notice shall be given by the lessor of any cancellation, change in, or termination of the lease. The affidavit shall contain a notation of the expiration date of the lease.

Because these statutes relate to the same subject matter, they must be read *in pari materia* "to effectuate the legislative purpose as found in harmonious statutes." *Parise*, 295 Mich App at 27 (quotation marks and citation omitted). Both MCL 123.165 and MCL 141.121(3) clearly permit a lessor to avoid a lien arising from a tenant's nonpayment of charges for which the tenant is responsible. Plaintiff argues that the trial court erred in its interpretation of MCL 123.165 and MCL 141.121(3) by requiring a new affidavit for each leasehold period contrary to the explicit language of the statute. We disagree.

Each municipality issuing revenue bonds or operating a water and sewer system has the obligation to maintain the integrity of those bonds and secure payments for system services by complying with state mandates regarding the payments for services rendered. The default security is a lien against the property

to which those services were rendered. A lessor who desires to claim the statutory exception to this default process set forth in MCL 123.165 must take affirmative steps. *N L Ventures VI Farmington*, 314 Mich App at 239. First, the lessor must execute a lease providing that the lessor is not liable for charges accruing after an affidavit concerning the tenant's responsibility for charges is filed. MCL 123.165. Second, the lessor must file an affidavit with "the board, commission, or other official in charge of the water works system or sewage system," and the affidavit must identify the expiration date of the lease. *Id*. After complying with these requirements, the lessor's property is exempt from the mandatory lien that arises by operation of law under MCL 123.162. See MCL 123.165. The affidavit apprises the municipality of two things: an agreement between the landlord and tenant regarding the responsibility for water and sewage service, and the expiration date for that agreement. Once it is in receipt of an affidavit, the municipality has the obligation to determine the appropriate security to be charged to the lessee for the leasehold period. The owner's exemption from a lien has a beginning and ending period. Simply put, when the lease term ends, so does the exemption from a lien. From the lease expiration date forward, all charges for water and sewage service are once again a lien against the property. Because the lien exemption is inextricably tied to the lessor's lack of direct liability for charges, it can be reasonably inferred that the exemption set forth in MCL 123.165 and the affidavit establishing entitlement to the exemption both expire along with the lease.[3]

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[3] The portion of MCL 123.165 that requires the lessor to notify the board, commission, or other applicable official "of any cancellation, change in, or termination of the lease" supports this interpretation. It

MCL 141.121(3) only states that charges "shall not become a lien against the premises" when the governing body "is . . . notified in writing" that the tenant is responsible for payment of the charges. The written notice must "include a copy of the lease of the affected premises, if there is one . . . ." *Id*. Although MCL 141.121(3) places less emphasis on the expiration of the lease agreement, it still requires that "a tenant is responsible for the payment of the charges . . . ." *Id*. Again, a tenant's responsibility and the corresponding owner's exemption from a lien for such charges arise by virtue of a contractual agreement. When the agreement expires, the tenant's responsibility ends and the owner/landlord's exemption from a lien against the property also ends. Reading MCL 141.121(3) and MCL 123.165 *in pari materia*, it can reasonably be inferred that the lien exemption in MCL 141.121(3) was intended to apply only during the term of the lease under which the tenant assumed responsibility for the charges. Furthermore, to the extent that a conflict exists between MCL 141.121(3) and MCL 123.165 concerning the effect of the expiration of the lease, MCL 123.165 controls because it was enacted more recently and more specifically addresses municipal water and sewer liens, while the RBA applies to a variety of public improvements. *Parise*, 295 Mich App at 27-28.

This Court must construe statutes reasonably, "keeping in mind the purpose of the act, and to avoid absurd results." *Rogers v Wcisel*, 312 Mich App 79, 87; 877 NW2d 169 (2015). MCL 123.161 *et seq*. was enacted " 'to provide for the collection of water or sewage

again suggests that the Legislature intended the exemption to exist concomitantly with the lease provision relieving the lessor from liability for charges incurred by the tenant.

system rates, assessments, charges, or rentals; and to provide a lien for water or sewage system services furnished by municipalities . . . .' " *N L Ventures VI Farmington*, 314 Mich App at 228 (citation omitted). The RBA was enacted for the purpose of creating " 'full and complete additional and alternate methods' " for public corporations to exercise the powers authorized by the RBA, including the powers to operate and finance public improvements. *Id*. at 231-232, citing MCL 141.102 and MCL 141.106. Under plaintiff's interpretation of these statutes, a landowner could lease a property to a tenant for a short period of time pursuant to an agreement requiring the tenant to pay charges and continue to receive the benefit of exemption from liens under MCL 123.165 and MCL 141.121(3) in perpetuity as long as the property owner filed an initial affidavit with the appropriate governmental official. This result would frustrate the purpose of these legislative enactments by interfering with a municipality's ability to secure payment for services furnished to properties that were once exempt from liens even after those properties no longer meet the requirements for exemption. To be entitled to protection from liens beyond the date the subject lease expires, the lessor must provide the applicable governmental official with a new notice regarding the terms of subsequent leases and, under MCL 123.165, that notice must be in the form of an affidavit that identifies the expiration date of the lease.

Plaintiff admitted that he filed only one water affidavit for each of his rental properties. The affidavit for the Linwood Property indicated that plaintiff's lease with the Sauros ended on October 1, 2014, and the affidavit for the Beechwood Property indicated that plaintiff's lease with Smith and Woodson expired on April 1, 2016. The delinquent charges at issue for the Linwood Prop-

erty accrued in April and May 2016, after the initial lease and affidavit expired. The delinquent charges at issue for the Beechwood Property accrued in May 2017, again after the initial lease and affidavit expired. Because the relevant charges were incurred after the respective leases and affidavits expired, defendant was not prohibited from imposing a lien for those charges. The fact that plaintiff might have filed, or attempted to file, subsequent leases with defendant is of no consequence because MCL 123.165 explicitly requires the lessor who wishes to avoid a lien for a tenant's charges to file an affidavit, which plaintiff did not do.

Plaintiff also argues that, regardless of whether he complied with the statutory filing requirements, defendant could not lawfully transfer the charges to the tax roll because the charges involved in this case had been delinquent for less than six months. We agree.

This issue was raised in the trial court, but the trial court did not address it. "Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review." *King v Oakland Co Prosecutor*, 303 Mich App 222, 239; 842 NW2d 403 (2013). However, "this Court may overlook preservation requirements where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002) (citations omitted). The last of these considerations applies here.

Both statutory schemes at issue in this case authorize a lien in favor of the municipality for unpaid charges unless the landlord exemption applies. MCL 123.162; MCL 123.165; MCL 141.121(3). See also

N L Ventures VI Farmington, 314 Mich App at 230, 233 (discussing the mandatory lien under MCL 123.162 and the permissive lien under MCL 141.121(3)). Both statutory schemes also address methods by which the municipality can enforce its lien. However, neither includes any language "mandating immediate placement on the tax rolls." To the contrary, the plain language of MCL 141.121(3) refers to a minimum delinquency criteria—delinquency for "6 months or more"—before that enforcement mechanism can be used. MCL 123.161 *et seq*. does not directly address the placement of past-due charges on the tax roll and, instead, broadly permits the statutory lien to be "enforced by a municipality in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, or by an ordinance duly passed by the governing body of the municipality." MCL 123.163. The parties have not identified any charter provision, ordinance, or general law of the state—outside of the RBA and MCL 123.161 *et seq*.—that are relevant to defendant's enforcement of its lien.

According to defendant's payment registers, defendant transferred $129.11 in delinquent charges to plaintiff's tax bill for the Linwood Property on June 2, 2016, and $77.02 to plaintiff's tax bill for the Beechwood Property on May 30, 2017, or May 31, 2017. Although defendant may have been entitled to immediate liens against the respective properties as security for the payment of these charges, MCL 141.121(3) barred defendant from certifying past-due charges for placement on the tax roll until the charges had been delinquent for at least six months. Defendant violated this restriction by transferring the charges to plaintiff's tax bills less than 60 days after the charges

accrued. Consequently, the trial court erred by granting summary disposition in favor of defendant on plaintiff's quiet-title and writ-of-mandamus claims as to defendant's procedure for placement of the arrears on the tax rolls.[4]

Plaintiff additionally argues that defendant's actions of placing the water liens on the tax roll were preempted by state law because MCL 141.121(3) prohibits the charges from becoming a lien against the premises when the governmental unit is notified of the tenant's responsibility for the charges. Plaintiff waived appellate review of this issue by arguing in the trial court that preemption principles were inapplicable. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Mich / Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). By concluding that preemption was not an issue in this case, plaintiff waived review of this issue. *Id*. at 148-189. Regardless, plaintiff's preemption claim does not affect the disposition of this appeal. Although the trial court made passing reference to the fact that defendant canceled or voided plaintiff's water affidavits, the fact remains that the only affidavits plaintiff filed referred to leases that expired before the relevant charges accrued.

In sum, MCL 123.165 and MCL 141.121 require a landlord to file a new water affidavit with each lease in order to prevent charges for water arrears from becoming the responsibility of the landlord and a lien against the property. In this case, there is no genuine issue of

[4] We note that this conclusion does not apply to plaintiff's slander-of-title claim, which was dismissed on the basis of governmental immunity—rather than the parties' respective compliance with the statutory provisions—and was not appealed in this Court.

material fact that defendant had statutory authority to place the liens against plaintiff's rental properties because for both properties, plaintiff failed to file a new water affidavit with each subsequent lease. However, defendant was without authority to transfer outstanding water charges to the tax rolls before the expiration of the statutory six-month period. Thus, defendant's procedure for entering the lien on the tax roll was unlawful. Accordingly, this matter is remanded to the trial court for the limited task of refunding plaintiff for charges paid as a result of the liens being unlawfully placed on the tax rolls before the expiration of the statutory six-month period.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

GLEICHER, P.J., and CAMERON, J., concurred with STEPHENS, J.

SPECTRUM HEALTH HOSPITALS v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

Docket Nos. 347553 and 348440. Submitted May 5, 2020, at Grand Rapids. Decided September 3, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 999 (2021).

Spectrum Health Hospitals brought an action in the Kent Circuit Court against Farm Bureau General Insurance Company of Michigan (Farm Bureau) and Farm Bureau Mutual Insurance Company of Michigan under the no-fault act, MCL 500.3101 *et seq*., to recover the full amount it charged for treating Brett Sabby, who was insured by Farm Bureau, after he was injured in a motor vehicle accident. Farm Bureau paid only 80% of the amount that Spectrum billed, claiming that the remaining amount was "unreasonable" under the version of MCL 500.3157 in effect at the time. Spectrum also sought costs, attorney fees, and declaratory judgments that Farm Bureau was liable for payment of Sabby's personal protection insurance (PIP) benefits and that its practice of paying only 80% of claims violated the no-fault act. Farm Bureau moved in limine to qualify an expert witness and for various rulings related to what types of evidence are admissible to establish whether Spectrum's charges were reasonable, including the amount that other entities pay for services on the open market and the ratio of Spectrum's costs to charges. The trial court, Mark A. Trusock, J., granted the motion to qualify the expert but denied the remainder of Farm Bureau's motion, ruling that evidence pertaining to payments by third-party payers was not pertinent to the question whether Spectrum's charges were reasonable for purposes of the no-fault act. Thereafter, the parties entered into a consent judgment, which dismissed Farm Bureau Mutual Insurance Company with prejudice and preserved Farm Bureau's right to challenge the trial court's ruling on its motion in limine. Subsequently, the trial court entered an order denying Spectrum's request for attorney fees under the attorney-fee penalty provision of the no-fault act, MCL 500.3148. In Docket No. 347553, Farm Bureau appealed by right, challenging the trial court's earlier decision on the motion

in limine. In Docket No. 348440, Spectrum appealed by right the denial of its request for attorney fees. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Under MCL 500.3105(1), an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. MCL 500.3107(1)(a) provides that PIP benefits are payable for allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Before its amendment by 2019 PA 21, MCL 500.3157 provided that a physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by PIP, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services, and accommodations rendered. It further provided that the charge could not exceed the amount the person or institution customarily charged for like products, services, and accommodations in cases not involving insurance. When read in harmony, former MCL 500.3107 and MCL 500.3157 clearly indicated that an insurance carrier need pay no more than a reasonable charge and that a healthcare provider could charge no more than that. Further, under former MCL 500.3157, a no-fault insurer is not liable for the amount of any charge that exceeds the healthcare provider's customary charge for a like product, service, or accommodation in a case not involving insurance. A plaintiff seeking payment of no-fault benefits bears the burden of proving both the reasonableness and the customariness of the provider's charges. With regard to the customary-charge limitation, a healthcare provider cannot charge a no-fault insurer—and a no-fault insurer is not liable for—an amount that exceeds the amount that the healthcare provider would customarily charge patients without insurance. The fact that a charge is "customary" in cases without insurance does not necessarily mean that the charge is also reasonable. While the "customary" limitation establishes a cap on charges, the statutory "reasonable amount" restriction on charges also functions as a distinct means of controlling healthcare costs in the context of the no-fault act. The requirement that no-fault insurance carriers pay no more than what is reasonable in relation to medical expenses evinces the Legislature's intent to place a check on healthcare providers who are without incentive to keep medical bills at a minimum. The no-fault act leaves open the questions

of what constitutes a reasonable charge, who decides whether a charge is reasonable, and what criteria may be used to determine whether a charge is reasonable. Caselaw has established that healthcare providers make the initial determination of reasonableness by charging the insured for the services, and the insurer then makes its own determination regarding what is reasonable and pays that amount. If the no-fault insurer does not pay all the charges, a healthcare provider may file suit to challenge the failure to fully pay the bills. It is the healthcare provider's burden to establish the reasonableness of the charges by a preponderance of the evidence. Whether the amount charged is reasonable is ultimately a question of fact for a jury.

2. There was no binding caselaw controlling whether the payments that healthcare providers accept for services from other payers, including health insurers and government programs such as Medicaid and Medicare, may be considered when determining whether a charge is reasonable for purposes of the no-fault act. While some Court of Appeals cases contained language that could be construed as precluding consideration of amounts paid by third parties when determining the reasonableness of an amount charged by a healthcare provider, a careful review of the caselaw showed that this specific question was neither at issue nor expressly considered in these decisions.

3. Third-party payments may be considered when assessing the reasonableness of the amounts charged by healthcare providers for purposes of the no-fault act. The Legislature did not define the term "reasonable" in the no-fault act, but the common understanding of the term indicates that a healthcare provider's charge must be fair, proper, or moderate, in accord with reason, and not excessive. A determination of reasonableness, while initially made by the healthcare provider and independently reviewed by the insurer, is ultimately a question for the fact-finder. While it is not dispositive of the reasonableness of a charge, the amount that third parties pay is nevertheless evidence bearing on the reasonableness of a healthcare provider's fees. Third-party payments that are accepted by a healthcare provider as payment in full during the pertinent time frame for products and services are relevant to determining the reasonableness of charges for those very same products and services in the context of treatment covered by PIP benefits. Under MRE 401, relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In this case, a comparison of the amounts

that Spectrum charged for the services Sabby received to the amounts that others actually paid for the same services during the same general time frame—and that Spectrum accepted as payment in full for these services—tends to make it more or less likely that the amounts Spectrum charged were reasonable. Unlike the customary-charge cap, which is expressly limited to comparison of the charges to cases not involving insurance, the reasonableness prong does not contain any similar restriction. Rather, it is more broadly concerned with ensuring that a charge is fair and not excessive, and this concern invites comparison to amounts actually being paid on the open market. A medical provider's typical price cannot be deemed reasonable unless it reflects an amount that is actually being charged in the marketplace, and a realistic standard considers the amount insurers actually pay and the amount a medical provider is willing to accept. Accordingly, when determining reasonableness, the amount that others pay for the same goods or services is a pertinent, though not conclusive, factor to be considered when deciding whether a charge of those same goods or services is reasonable. Contrary to Spectrum's argument, the fact that "payments" are not the same thing as "charges" did not alter this conclusion.

4. Neither the discovery provisions of the no-fault act nor *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), precluded the discovery or admission of evidence regarding third-party payments to healthcare providers or evidence of Spectrum's costs. Generally, Michigan allows discovery for any relevant matter, unless privileged, although trial courts should also avoid subjecting the party opposing discovery to excessive, abusive, or irrelevant discovery requests. The no-fault act contains two pertinent provisions regarding discovery. First, MCL 500.3158(2) requires a physician, hospital, clinic, or other medical institution that has provided any product, service, or accommodation to a PIP claimant to provide a written report of the history, condition, treatment, and dates and costs of treatment of the claimant to the claimant's insurer upon request, and it also requires those entities to produce and permit inspection and copying of its records regarding the history, condition, treatment, and dates and costs of treatment. Second, MCL 500.3159 provides in part that in a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about the person's history, condition, treatment, and dates and costs of treatment, a court may enter an order for the discovery and may also enter an order refusing discovery or specifying conditions of discovery in order to protect against annoyance, embarrassment,

or oppression, as justice requires. However, these provisions do not necessarily represent the complete panoply of discovery tools that the Legislature intended to provide in connection with mandatory no-fault insurance coverage, and much, if not all, of the information Farm Bureau sought to rely on was publicly available, meaning that the issue related not to discovery but rather admissibility. Provided that the data was relevant and otherwise admissible under the rules of evidence, neither § 3158 nor § 3159 precluded its admission. Contrary to Spectrum's argument, *Covenant* did not overrule *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431 (2012), it did not alter the method of disputing reasonableness, and it did not otherwise change a healthcare provider's obligation to comply with § 3158(2).

5. The trial court's blanket exclusion of evidence regarding third-party payments constituted an error of law amounting to an abuse of discretion. The trial court's ruling on this point was reversed and the matter remanded for the trial court to determine whether this evidence was admissible under the proper legal framework. The trial court was to consider the relevance of the specific data in question to the particular healthcare charges at issue in this case that were billed in 2016, address the expert witness's particular methods of analyzing that data, and develop the record with respect to the precise cost information Farm Bureau seeks to discover and whether the cost information meets the standards in *Bronson*.

6. Consideration of whether the trial court erred by denying Spectrum's motion for attorney fees under MCL 500.3148 was premature in light of the decision to remand the matter for additional proceedings.

Reversed and remanded for further proceedings.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — HEALTHCARE PROVIDER CHARGES — REASONABLENESS — EVIDENCE.

Under MCL 500.3157 as enacted by 1972 PA 294, a healthcare provider rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services, and accommodations rendered; in suits seeking payment from insurance companies for personal protection insurance benefits, evidence regarding the amounts that third parties pay for the particular products or services at issue during the same general time frame may be relevant and admissible for

purposes of assessing whether a healthcare provider's charge is reasonable for purposes of the no-fault act, MCL 500.3101 *et seq*.

Miller Johnson (by *Joseph J. Gavin*) for Spectrum Health Hospitals.

Kuiper Kraemer PC (by *Jack L. Hoffman*) for Farm Bureau General Insurance Company of Michigan.

Before: TUKEL, P.J., and MARKEY and GADOLA, JJ.

MARKEY, J. In this dispute involving personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., defendant Farm Bureau General Insurance Company of Michigan (Farm Bureau)[1] paid 80% of the charges billed by plaintiff Spectrum Health Hospitals for treating a person insured by Farm Bureau who was injured in a motor vehicle accident, but it refused to pay the full amount on the basis that charges exceeding 80% of the total amount billed were "unreasonable." Spectrum filed suit against Farm Bureau, seeking payment of the balance. The trial court denied Farm Bureau's motion in limine regarding, primarily, the relevance of evidence pertaining to payments by third-party payers such as health insurers, Medicare, and Medicaid, concluding categorically that this evidence was not pertinent to the question whether Spectrum's charges were reasonable within the meaning of the no-fault act. Thereafter, the parties entered into a consent judgment, preserving Farm Bureau's right to challenge the trial court's ruling on its motion in limine. Subsequently, the trial court entered an order denying Spectrum's request for

[1] Spectrum sued both Farm Bureau General Insurance Company of Michigan and Farm Bureau Mutual Insurance Company of Michigan, but the latter entity was subsequently dismissed with prejudice in a consent order.

attorney fees under the attorney-fee penalty provision of the no-fault act, MCL 500.3148. In Docket No. 347553, Farm Bureau appeals by right, challenging the trial court's earlier decision on the motion in limine. In Docket No. 348440, Spectrum appeals by right the denial of its request for attorney fees. The appeals have been consolidated by this Court.[2] We reverse in Docket No. 347553, which requires us to also reverse in Docket No. 348440, and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

On August 22, 2016, Brett Sabby suffered bodily injuries in a motor vehicle accident that occurred when the car in which he was a passenger left the road and struck a tree. As a result of the accident, Sabby received medical care and treatment at Spectrum. Many of the medical records available to us on appeal have been heavily redacted. But from the available information, it appears that, among other injuries, Sabby suffered a femur fracture, a complex open ankle fracture, broken ribs, a knee laceration, and a "Roy-Camille type III sacral U fracture." From the redacted billing-related documents, it also appears that Sabby's treatment included surgery, laboratory tests, x-rays, implants, physical therapy, "recovery room" services, and pharmacy services. For treatment and services provided between August 22, 2016, and September 2, 2016, Spectrum's charges totaled $225,279.10.

Farm Bureau was responsible for providing Sabby with PIP benefits under the no-fault act. Spectrum submitted Sabby's bills to Farm Bureau for payment,

[2] *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, unpublished order of the Court of Appeals, entered April 16, 2019 (Docket Nos. 347553 and 348440).

but Farm Bureau only partially paid the bills. In total, Farm Bureau paid Spectrum $180,223.27, or 80% of the total requested, leaving an unpaid balance of $45,055.83. In denying full payment, Farm Bureau maintained that any charges in excess of 80% of Spectrum's gross charges were unreasonable for purposes of the no-fault act. Accordingly, Farm Bureau refused to pay any more than 80% of Spectrum's total charges. In denial letters dated October 14, 2016, Farm Bureau more fully explained its reasons as follows:

> Based on recent court rulings, Farm Bureau understands that in cases not involving insurance, your hospital customarily discounts gross charges by twenty percent if payment is made within ninety days of the date the charges are billed. In those cases, the courts have ruled that under MCL 500.3157, charges to no-fault insureds may not exceed eighty percent of gross charges if payment is made within ninety days. Farm Bureau is making payment within thirty one days of the date the charges have been billed. . . .
>
> Furthermore, based on our own investigation, charges in excess of eighty percent of gross charges are charges in excess of reasonable charges. Because under MCL 500.3107(1)(a) and 3157 a hospital's charge to a no-fault insured may not exceed a reasonable charge, this is an additional reason why no-fault benefits are not owed for charges in excess of eighty percent of gross charges.

On August 22, 2017, Spectrum filed the current lawsuit against Farm Bureau.[3] Spectrum sought (1) payment of Sabby's benefits under the no-fault act,

[3] Sabby was not a party to the case, but Spectrum obtained an assignment from Sabby. And the parties entered into a consent judgment, agreeing that Spectrum was an assignee on the basis of a "valid assignment" of rights. Given the valid assignment, there is no dispute on appeal that Spectrum was permitted to pursue Sabby's no-fault benefits for medical services provided in 2016.

(2) a declaratory judgment to the effect that Farm Bureau was liable for payment of Sabby's no-fault benefits, (3) a declaratory judgment providing that Farm Bureau's practice of unilaterally paying only 80% of a claim was unreasonable and violative of the no-fault act, and (4) an award of prefiling interest, costs, and attorney fees pursuant to MCL 500.3142, MCL 500.3148, MCL 600.6013, and MCR 2.625. In its answer to Spectrum's complaint, Farm Bureau denied that it had any outstanding liability for no-fault benefits. According to Farm Bureau, Spectrum's total charges were in "excess of reasonable charges"; therefore, Farm Bureau did not owe any additional amount.

The parties' arguments regarding the reasonableness of Spectrum's charges and how reasonableness should generally be determined focus primarily on MCL 500.3157, MCL 500.3158, and MCL 500.3159.[4] Relevant to the parties' arguments, MCL 500.3157 provided:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may *charge a reasonable amount* for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution *customarily charges* for like products, services and accommodations in cases not involving insurance. [Emphasis added.]

[4] With the enactment of 2019 PA 21, the Legislature substantially amended portions of the no-fault act, including MCL 500.3157, effective June 11, 2019. Spectrum, however, commenced the current case before the effective date of the amendment, meaning that this case is controlled by the former provisions of the no-fault act. See *George v Allstate Ins Co*, 329 Mich App 448, 451 n 3; 942 NW2d 628 (2019). Unless otherwise noted, references to the no-fault act are to the version in effect at the time this action was commenced.

MCL 500.3158(2) states:

> A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the history, condition, treatment and dates and costs of treatment of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment.

And finally, MCL 500.3159 provides:

> In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

During discovery, Farm Bureau sought documents and information from Spectrum on matters that Farm Bureau asserted related to the reasonableness of Spectrum's charges for Sabby's care and treatment for purposes of the no-fault act. Farm Bureau requested information concerning (1) the average annual increase in Spectrum's charges and (2) whether charges for uninsured persons were the same as for individuals

with no-fault insurance. With respect to Sabby's charges more specifically, Farm Bureau sought information regarding (1) the amount generally billed for the same care for the same dates of service, (2) the 115% Medicare rate for this care, and (3) the rates Priority Health and Blue Cross Blue Shield each paid for such care. Farm Bureau also asked whether Spectrum compared its charges to other hospitals and, if so, whether the charges were comparable. Additionally, Farm Bureau requested that Spectrum produce financial records for the 2015 to 2016 fiscal year, including (1) Spectrum's federal Hospital and Hospital Health Care Complex Cost Reports, (2) Spectrum's IRS Form 990, (3) Spectrum's Audited Financial Statements, (4) Spectrum's Financial Assistance Policy, and (5) various documents related to billing and collection.

Spectrum objected to many, though not all, of these requests on the grounds that the information was "irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." Briefly stated, Spectrum indicated that, to support its charges at issue in this case, Spectrum "anticipate[d] that it [would] rely on its billing and medical records related to the dates of service at issue . . . as well as its financial statements and comparative charge data for the years in dispute."

Relevant to its claim that the charges were unreasonable, on the same date that Farm Bureau filed its answer in this case, Farm Bureau also filed an initial witness list, which included, among other witnesses, Mark A. Hall, who was identified as an expert. Farm Bureau then filed a motion in limine to qualify Hall as an expert in "health services research" specifically related to healthcare costs. In its motion in limine, Farm Bureau did not present Hall's opinions on the charges related to Sabby in particular. Rather, Farm

Bureau offered Hall's general opinions on healthcare costs and opinions he provided in unrelated cases.

In moving to qualify Hall as an expert and in explaining the relevance of his testimony, Farm Bureau asserted that the no-fault act did not define the term "reasonableness," and in the absence of a definition, the courts should look to the open market, just as courts look to the open market when deciding valuation questions in other contexts. But, on the basis of Hall's opinions, Farm Bureau also maintained that open-market rates could not be determined by looking solely at gross charges or even gross charges customary in the industry. Instead, quoting Hall, Farm Bureau asserted:

> "[T]he market for the prices in medical services is not an effective or functioning market unless patients are represented by an insurance company. If patients seek care outside of their insurance network or if they don't have healthcare insurance, then they're left to whatever doctors and hospitals want to charge and they're not in an effective position to negotiate.
>
> So if one is looking for sort of effective market or competition constraint prices, one needs to look in the part of the market in which insurance companies and government agencies negotiate over prices and not at the part of the market where patients are left to their own devices."

In addition to the amounts paid on the open market, Farm Bureau also asserted that reasonableness should be determined by considering (1) costs to the hospital in providing treatment, including specifically the hospital's cost-to-charge ratio, and (2) "the amount generally billed"[5] for the services. Furthermore, Farm Bureau asserted that Hall should be qualified as an

[5] The "amount generally billed" is a specific figure that hospitals must calculate for tax purposes.

expert on healthcare costs and that he should be allowed to offer an opinion on the reasonableness of charges. In making this argument, Farm Bureau emphasized that, in an unrelated case, the Kalamazoo Circuit Court qualified Hall as an expert on these topics after conducting a *Daubert*[6] hearing. Ultimately, Farm Bureau's motion in limine asked the trial court:

> 1. For a ruling qualifying Defendants' expert, Mark Hall.
>
> 2. For a ruling that the No-Fault Act does not define what is a reasonable charge and the normal rules of evidence apply.
>
> 3. For a ruling that what is paid on the open market is relevant to the reasonableness of the gross charge.
>
> 4. For a ruling that evidence of payment rates of payers other than no-fault insurers are relevant to the reasonableness of Spectrum's gross charges.
>
> 5. For a ruling that Spectrum's ratio of costs to charges is relevant to the issue of the reasonableness of the gross charge.
>
> 6. For a ruling that the amount generally billed is relevant, discoverable, and admissible with regard to the reasonableness of the gross charge.

Spectrum filed a response to Farm Bureau's motion. Spectrum indicated that it "did not object" to Hall's qualifications, given his experience, to testify as an expert at trial. Spectrum noted, however, that Hall needed a foundation for his testimony as required by MRE 702 and MRE 703, and Spectrum reserved the right to object to his specific testimony should it fail to meet these requirements. In particular, Spectrum re-

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[6] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

served the right to object on the basis of the facts or data used to support Hall's opinions.

Although Spectrum did not object to Hall's qualifications as an expert, it did object to Farm Bureau's requests for a ruling on what constituted relevant and admissible evidence regarding the reasonableness of Spectrum's charges. Detailing the holdings in several opinions issued by this Court and the Michigan Supreme Court, Spectrum asserted that discovery and evidence relating to reasonableness were limited by the no-fault act. More specifically, citing decisions of this Court, Spectrum maintained that, because the focus of MCL 500.3157 is on "charges" and not "payment," the amount that others—such as insurance companies or Medicare—pay for services is not relevant to a determination of reasonableness under the no-fault act. For this reason, Spectrum asked the trial court to deny Farm Bureau's request for a ruling that the amount others pay is relevant and admissible.

Although disputing Farm Bureau's assertion that the amount others pay is relevant, Spectrum did not expressly address Farm Bureau's additional arguments regarding the relevance of (1) a hospital's cost-to-charges ratio or (2) the amount generally billed. At most, in a footnote, Spectrum asserted that in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), the "costs of treatment" a healthcare provider must disclose under MCL 500.3158 were the costs to the *injured person*, "i.e., the provider's charge," as opposed to the provider's costs.

Farm Bureau filed a reply brief, reiterating Hall's opinions regarding the open market and again asserting that payments for healthcare services on the open market were relevant to assessing reasonableness. In

making this argument, Farm Bureau attempted to distinguish the cases from this Court discussing the irrelevance of "payments" by asserting that the issue in those cases related to whether a charge was "customary" rather than whether it was "reasonable" within the meaning of MCL 500.3157. Farm Bureau also more specifically responded to Spectrum's "costs of treatment" argument under MCL 500.3158. Citing *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431; 814 NW2d 670 (2012), Farm Bureau maintained that this Court had already rejected the contention that a healthcare provider's charge was the sole criterion for assessing reasonableness, a conclusion that Farm Bureau contended had not been altered by *Covenant*.

On January 12, 2018, the trial court held a hearing on Farm Bureau's motion in limine. The parties relied on their briefs. Ruling from the bench, the trial court granted Farm Bureau's motion in limine in part and denied it in part. Specifically, the trial court concluded:

> I have read and reviewed this matter. It's kind of an interesting argument brought by the defense here for their expert. But I am going to side with Spectrum Health with regards to this matter. I am going to adopt the law and argument as stated in their brief. I believe that their definition of what [is] reasonable is appropriate, pursuant to the law in the State of Michigan at this time.

On February 2, 2018, the trial court entered its order, granting in part and denying in part Farm Bureau's motion in limine. The trial court did specify that Hall could testify as an expert, subject to any objections by Spectrum under MRE 702 and MRE 703. But the trial court denied the remainder of Farm Bureau's motion "for the reasons stated on the record."

Thereafter, on March 7, 2018, Farm Bureau moved to compel discovery. Farm Bureau interpreted the trial

court's partial denial of its motion in limine, along with the court's acceptance of Spectrum's legal position, as the court's conclusion that the "only evidence relevant" to the reasonableness of Spectrum's charges was evidence bearing on whether the "gross charges are within a reasonable range of gross charges customary in the industry." Recounting the details of its previous discovery request, Farm Bureau asserted that Spectrum should be required to produce documents "consisting of the gross charges of comparable hospitals for the same treatment" provided to Sabby. More specifically, Farm Bureau sought published, publicly available "charge data" from a source such as "American Hospital Directory.com,"[7] as well as a comparison of Spectrum's gross charges to comparable hospitals.[8]

Subsequently, the trial court entered a stipulated order compelling discovery as follows:

> IT IS ORDERED THAT Plaintiff shall produce such published, publically available comparative data printouts from ahd.com, clinical cost analyzer, showing comparative data, including comparative gross charge data, from comparable hospitals as Plaintiff may rely on at trial in this case.[9]

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[7] American Hospital Directory, *Your Best Source of Hospital Information and Custom Data Services* <http://www.ahd.com> (accessed February 24, 2020) [https://perma.cc/HYR4-GW3J].

[8] Farm Bureau asserted that these types of materials and comparisons had been provided by Spectrum in other cases. As an example, Farm Bureau attached an affidavit from a Spectrum financial director from another lawsuit between Spectrum and Farm Bureau. As set forth in his affidavit and supporting documents, the director conducted various analyses of Spectrum's costs, including comparison of Spectrum's charges for specific treatment codes to the costs of similarly situated medical providers as reported on the American Hospital Directory website.

[9] In its motion to compel discovery, Farm Bureau also sought evidence of the amount customarily "charged" in cases *not* involving insurance, including information about any 20% discount Spectrum might provide to

Notably, in its motion to compel information about Spectrum's gross charges, Farm Bureau conceded that if the data in question showed that Spectrum's charges were in the reasonable range of gross charges customary in the industry, Farm Bureau would likely agree to a stipulated judgment in Spectrum's favor. But it would do so only if it could preserve its right to challenge the trial court's motion-in-limine order pertaining to Hall and the issue of identifying evidence relevant to determining reasonableness. Indeed, following some additional discovery, Farm Bureau moved for entry of judgment in Spectrum's favor in the amount of $47,820.94. The request for judgment preserved Farm Bureau's right to appeal the trial court's motion-in-limine order and any subsequent award of postjudgment costs and attorney fees. Spectrum initially opposed the motion for entry of judgment, asserting that there was no basis for the judgment and that Farm Bureau simply intended to use this case to argue for a change in the law in the appellate courts.

After moving for entry of judgment, Farm Bureau also filed what it characterized as an offer of proof relating to the trial court's motion-in-limine order. In this offer of proof, Farm Bureau detailed Hall's opinions about reasonableness in general and, more specifically, about the reasonableness of the charges in Sabby's case. With regard to Sabby, Hall considered various documents related to Sabby's treatment, and according to his report, he was prepared to offer various opinions regarding the reasonableness of the charges for Sabby's treatment.[10]

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patients for prompt payment. The order did not mention any discount information, and Farm Bureau does not pursue this argument on appeal.

[10] Those opinions were as follows:

2. Farm Bureau paid $180,223.27 on total gross charges of $225,278.92 for insured Brett Sabby for dates of service August 22, 2016 to September 13, 2016. The treatment provided was the medical service of orthopedic surgery. More specifically, the service was categorized as "Base MS-DRG 956-000-00," which signifies "limb reattachment, hip and femur procedures for multiple significant trauma." Spectrum's charge, payment and cost data for these categories of treatment is reported by American Hospital Directory. See attached Exhibit RE. Data regarding average net payment received is reported in Spectrum's Medicare Cost Report and also by the American Hospital Directory.

3. It is my opinion that $180,223.27 reasonably compensates Spectrum for $225,278.92 of gross charges. This opinion is based on my general knowledge and extensive academic research about the extent to which hospitals typically mark-up charges over costs and the extent to which they discount their list prices when they negotiate market rates with third-party payers that have some bargaining power. It is also based on the following information:

3. [sic] In fiscal year ending June 30, 2016 Spectrum reported to the federal government that, on average, it was paid 49% of its gross charges across all of its patients. The American Hospital Directory (AHD) reports similar or greater rates of charges to payments for the areas of clinical service involved in this case. My opinion is that these actual payment amounts are highly relevant to determining the reasonableness of hospitals' non-discounted charges. Rates accepted from private health insurers are freely negotiated in actual market conditions, and thus are a true reflection of market rates. "List prices" that hospitals set in their "chargemasters" usually have no firm basis in market realities or conditions. Almost no patient or insurer pays these prices, so there are no significant market forces that deter hospitals from setting unreasonable and unrealistic list prices. Also, the markups in hospitals' chargemasters are usually demonstrably unreasonable. Spectrum, like other hospitals, sets its undiscounted prices almost 3 times greater than its actual costs, which is much more than what they willingly accept from private insurers. When hospitals' list prices are demonstrably unreasonable, an alternative basis for determining reasonableness is what a hospital actually agrees to accept from private insurers with whom they negotiate.

4. Hospitals have less choice over what they receive from public insurers, such as Medicare and Medicaid. Still, these

On August 17, 2018, the trial court held a hearing on Farm Bureau's motion for judgment. At the hearing, the parties indicated that they had reached the "same agreement" that they reached in another case a "few moments ago." That agreement was not specified on the record in the current case. The other case was *Spectrum Health Hosps v Farm Bureau Mut Ins Co* (Case No. 17-02224-NF). On the record in that case, the parties agreed that there was no issue left for a jury and that judgment should enter in the amount sought in the complaint. But the parties did not reach an agreement regarding penalty attorney fees. And they specified that "[e]verything will be preserved for an appeal."

Following the hearing in the current case, the trial court entered a consent judgment. The judgment

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assure a reasonable level of access for patients. Thus, these government prices have some relationship to market-based reasonableness. Generally speaking, government prices can be thought of as marking a lower bound of reasonable prices, whereas prices from private insurers are closer to the upper range of reasonable prices. Therefore, knowing this actual range of prices from the predominant sources of hospital payment is highly relevant to knowing whether a hospital's list prices exceed what is reasonable.

5. It is also instructive to compare Spectrum's gross charges to its costs. In fiscal year ending June 30, 2016, Spectrum reported to the federal government that its cost to charge ratio was .350044, and AHD reports a similar ratio (0.3445). This means that Spectrum's gross charges were about 290 percent more than its costs. More specific data reported by AHD shows similar cost to charge ratios (0.37-0.38) for the specific medical services relating to limb reattachments, which equates to a 260-270 percent markup.

6. Therefore, paying 80 percent of Spectrum's gross charges equates to paying a mark up of more than double its actual costs. Farm Bureau's payment also equates to paying in excess of 60 percent more than what other payers would pay, on average. In my opinion, this amount paid is reasonable for the services rendered.

awarded Spectrum a total of $60,337.17, which consisted of $45,055.82 for unpaid medical charges; $12,271.05 for interest under MCL 500.3142; $375 for costs pursuant to MCR 2.625; and $2,635.30 in prejudgment interest under MCL 600.6013. The consent judgment specified that Spectrum could file a postjudgment motion for attorney fees. The consent judgment also preserved Farm Bureau's right to appeal the trial court's motion-in-limine order.

Spectrum moved for attorney fees under MCL 500.3158, asserting that Farm Bureau's partial denial of payment of Sabby's medical bills was unreasonable for two reasons. First, Spectrum contended that the denial was unreasonable because it was based on the assumption that *all* hospital charges in excess of 80% of gross charges are per se unreasonable. Moreover, according to Spectrum, this general assumption was unreasonable and violative of Farm Bureau's obligations under MCL 500.3157 to review "in each instance whether a charge is reasonable." Second, Spectrum contended that the denial was unreasonable because it was based on Farm Bureau's contention that reasonableness should be measured by amounts that other contracted-payers pay for services despite the fact that this contention had been consistently rejected by the appellate courts. In total, Spectrum sought attorney fees under MCL 500.3148 in the amount of $14,616.50.

Farm Bureau opposed the motion for attorney fees, asserting that its denial of benefits was reasonable because there were legitimate questions of statutory construction and a bona fide factual controversy. First, in asserting that there was a legitimate legal question in this case, Farm Bureau reiterated its contentions that the no-fault act does not define reasonableness, that caselaw on the question of reasonableness was not

binding because it constituted obiter dictum, and that the plain meaning of the no-fault act should control. Second, with regard to the facts, Farm Bureau maintained that publicly available information proved there was a bona fide factual dispute as to the reasonableness of Spectrum's charges.

On March 8, 2019, the trial court held a hearing on Spectrum's motion for attorney fees. The parties relied on their briefs. The trial court denied the request for attorney fees, explaining as follows: "I think this is a question of bonafide [sic] factual uncertainty. I'm going to adopt the law and argument in Farm Bureau's brief . . . ." Thereafter, on March 25, 2019, the trial court entered an order denying Spectrum's motion for attorney fees.

Both Farm Bureau and Spectrum now appeal in this Court. In Docket No. 347553, Farm Bureau appeals by right the consent judgment, challenging the trial court's motion-in-limine order, which matter was preserved in the consent judgment. In Docket No. 348440, Spectrum appeals by right the trial court's postjudgment denial of attorney fees and costs under MCL 500.3158. The appeals were consolidated.

II. ANALYSIS

A. STANDARDS OF REVIEW AND STATUTORY CONSTRUCTION

This Court reviews for an abuse of discretion a trial court's decisions regarding the admission of evidence and discovery matters. *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018); *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50-51; 555 NW2d 871 (1996). "A trial court abuses its discretion when its decision falls outside the range of reasonable and

principled outcomes." *Mueller*, 323 Mich App at 571 (quotation marks and citation omitted). We review de novo preliminary or underlying questions of law. *Id*. When a trial court makes a determination that is legally incorrect, the court necessarily commits an abuse of discretion. *Id*. This Court reviews de novo questions of statutory interpretation. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018).

With respect to statutory construction, our goal "is to ascertain and give effect to the Legislature's intent." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 21; 891 NW2d 528 (2016) (quotation marks and citation omitted).

> [T]he Court must begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. It is axiomatic that the words contained in the statute provide the most reliable evidence of the Legislature's intent. The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. Only if a statute is ambiguous is judicial construction permitted. [*Bronson*, 295 Mich App at 441-442 (citations omitted).]

B. DISCUSSION

1. THE NO-FAULT ACT AND THE DISTINCTION BETWEEN REASONABLE AND CUSTOMARY CHARGES

With the enactment of the no-fault act in 1972, the Legislature "eliminated the old automobile tort reparations system" and replaced it with a system of mandatory no-fault insurance under which "an injured insured was guaranteed what the Legislature considered to be a sufficient and expeditious recovery from his or her own insurer for all expenses for reasonably

necessary medical care, recovery, and rehabilitation, as well as some incidental expenses." *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007). "The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation," *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978), while minimizing "administrative delays and factual disputes," *Brown v Home-Owners Ins Co*, 298 Mich App 678, 685; 828 NW2d 400 (2012).

But adequate and expeditious compensation were not the no-fault act's only goals. "The no-fault act was as concerned with the rising cost of health care as it was with providing an efficient system of automobile insurance." *Dean v Auto Club Ins Ass'n*, 139 Mich App 266, 273; 362 NW2d 247 (1984). Indeed, "[i]t represents the policy of this state that the existence of no-fault insurance *shall not* increase the cost of health care." *Id*. at 274. Furthermore, the no-fault act was intended to create an affordable system that would restrain insurance premiums. *Stevenson v Reese*, 239 Mich App 513, 519; 609 NW2d 195 (2000); see also *Davey v Detroit Auto Inter-Ins Exch*, 414 Mich 1, 10; 322 NW2d 541 (1982). In short, while the no-fault act sought to "provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses," it was also intended to provide these benefits "at the lowest cost to the individual and the system." *Gooden v Transamerica Ins Corp of America*, 166 Mich App 793, 800; 420 NW2d 877 (1988).

"The no-fault act provides a comprehensive scheme for payment, as well as recovery, of certain 'no-fault' benefits, including personal protection insurance benefits." *Citizens Ins Co of America v Buck*, 216 Mich App

217, 223; 548 NW2d 680 (1996). "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). PIP benefits are payable for "[a]llowable expenses consisting of *reasonable charges* incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a) (emphasis added). The amount that a healthcare provider can "charge" for products and services is further described in MCL 500.3157, which, again, provided as follows before the recent amendment of the no-fault act:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may *charge a reasonable amount* for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution *customarily charges* for like products, services and accommodations in cases not involving insurance. [Emphasis added.]

"When read in harmony, §§ 3107 and 3157 clearly indicate that an insurance carrier need pay no more than a *reasonable* charge and that a health care provider can charge no more than that." *McGill v Auto Ass'n of Mich*, 207 Mich App 402, 406; 526 NW2d 12 (1994) (emphasis added). Under § 3157 it is also clear that a "no-fault insurer is not liable for the amount of any charge that exceeds the health-care provider's *customary* charge for a like product, service, or accommodation in a case not involving insurance." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 103; 535 NW2d 529 (1995) (emphasis added). A plaintiff seeking pay-

ment of no-fault benefits "bears the burden of proving both the reasonableness and the customariness" of the provider's charges. *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 385; 554 NW2d 49 (1996), overruled in part on other grounds by *Covenant*, 500 Mich at 196.

Notably, the provisions requiring that charges be reasonable and customary are two "separate and distinct limitations on the amount health-care providers may charge and what insurers must pay . . . ." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 376; 670 NW2d 569 (2003) (*AOPP*), aff'd 472 Mich 91 (2005). With regard to the customary-charge limitation, "whether there has been an impermissible § 3157 overcharge is determined by looking to the provider's customary charge in cases not involving insurance," meaning "those situations where there is literally no insurance in the lay sense of the term—no Medicare, no Medicaid, no [Blue Cross and Blue Shield of Michigan (BCBSM)], and so forth." *Munson*, 218 Mich App at 389-390 (quotation marks and citation omitted). In short, a healthcare provider cannot charge a no-fault insurer—and a no-fault insurer is not liable for—an amount that exceeds the amount that the healthcare provider would customarily charge patients without insurance. See, e.g., *Hofmann*, 211 Mich App at 103-107.

But simply because a charge is "customary" in cases without insurance does *not* necessarily mean that the charge is also reasonable. See *AOPP*, 257 Mich App at 375-376. That is, a "customary" charge does not automatically equate to a "reasonable" charge. *Id*. at 376. The *AOPP* panel explained:

> Rather than defining what is a "reasonable" charge, the clear and unambiguous language of the second sentence in MCL 500.3157 simply places a maximum on what health-

> care providers may charge in no-fault cases. The first sentence of § 3157 provides that a health-care provider may only charge a reasonable fee, while the second sentence unambiguously provides that a health-care provider's charge for products, services, or accommodations in cases covered by no-fault insurance *shall not exceed* the amount customarily charged in cases not involving insurance. [*Id*. at 375-376 (quotation marks, citations, ellipses, and brackets omitted).]

In other words, under § 3157, a provider's "customary" charge functions as "the cap on what health-care providers can charge," but it is "not, automatically, a 'reasonable' charge requiring full reimbursement under § 3107." *Id*. at 377. "It may be that a health-care provider's 'customary' charge is also reasonable given the services provided, while at other times the 'customary' charge may be too high, and thus unreasonable. Either way, the trier of fact will ultimately determine whether a charge is reasonable."[11] *Id*. at 379. See also *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 95; 693 NW2d 358 (2005) ("[I]t is for the trier of fact to determine whether a medical charge, albeit 'customary,' is also reasonable.").

Accordingly, while the "customary" limitation establishes a cap on charges, the statutory "reasonable amount" restriction on charges also functions as a distinct means of controlling healthcare costs in the context of the no-fault act. See *AOPP*, 257 Mich App at 379; *Hofmann*, 211 Mich App at 113-114. In other words, while health- and accident-insurance carriers are generally free to contain healthcare costs by placing "dollar limits upon the amounts [they] will pay to doctors and hospitals for particular services," a no-

[11] But "a charge that is more than that charged to an uninsured person would, by necessity, be unreasonable because of the limitation in § 3157." *AOPP*, 257 Mich App at 377 n 3.

fault insurer may not do so. *Hofmann*, 211 Mich App at 113 (quotation marks and citation omitted). Instead, a no-fault insurer's ability to control costs—indeed, its *obligation* to police costs as contemplated by the no-fault act—involves determining "in each instance whether a charge is reasonable in light of the service or product provided." *AOPP*, 257 Mich App at 379. The requirement that no-fault insurance carriers pay no more than what is reasonable in relation to medical expenses evinces the Legislature's intent to place a check on healthcare providers who are without incentive to keep medical bills at a minimum. *McGill*, 207 Mich App at 408. The Legislature clearly did not intend that no-fault insurers pay all submitted claims absent review of the claims for excessiveness or fraud. *Id*.

Although the no-fault act and this Court's caselaw clearly provide that no-fault insurers have the right and obligation to pay only reasonable charges, the method of determining reasonableness is unclear. As both this Court and the United States Court of Appeals for the Sixth Circuit have recognized, the no-fault act leaves "open the questions of (1) what constitutes a reasonable charge, (2) who decides what is a reasonable charge, and (3) what criteria may be used to determine what is reasonable." *AOPP*, 257 Mich App at 374-375, citing *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 176 F3d 315, 320 (CA 6, 1999). This Court has provided some answers to these questions.

For instance, in terms of who decides what is a reasonable charge, this Court has explained that healthcare providers "necessarily make the initial determination of reasonableness by charging the insured for the services. Once [they] charge the insured, the insurer then makes its own determination regarding

what is reasonable and pays that amount to plaintiffs." *AOPP*, 257 Mich App at 379 n 4. If the no-fault insurer does not pay all the charges, a healthcare provider may file suit to challenge the failure to fully pay the bills. It is the healthcare provider's burden to establish the reasonableness of the charges by a preponderance of the evidence. *Bronson*, 295 Mich App at 450. And "a hospital's itemized bills and records do not, standing alone, satisfy the 'reasonableness' requirement." *Id*. at 452. Whether the amount charged is reasonable is ultimately a question of fact for a jury. *AOPP*, 257 Mich App at 379.

Although it is clear who determines reasonableness, the answers to the questions (1) what constitutes a reasonable charge and (2) what criteria may be used to make this determination are somewhat less certain. See *id*. at 374-375. This Court has approved consideration of some specific factors when determining reasonableness. In *AOPP*, for example, the panel concluded that the no-fault act did not prohibit consideration of charges by other healthcare providers for the same services for purposes of assessing reasonableness. *Id*. at 382. In *Bronson*, 295 Mich App at 449-450, this Court later clarified that a comparison to the charges of other healthcare providers is not and should not be the only means of determining reasonableness. The *Bronson* panel concluded that the cost to a healthcare provider of durable medical-supply products used in treating an insured is an appropriate (and discoverable) consideration in determining whether the charge for those products was reasonable. *Id*. at 445-454 (focusing specifically on the actual cost of surgical implant products). Neither *AOPP* nor *Bronson*, however, purported to delineate *all* the permissible factors or evidence that would be relevant to a determination of reasonableness. See *AOPP*, 257 Mich

App at 379 ("We will not attempt to delineate the permissible factors for determining what is 'reasonable,' because it is not necessary to do so in resolving plaintiffs' arguments."); see also *Bronson*, 295 Mich App at 449-450.

Against this backdrop, the present case is yet another instance in which a no-fault insurer has denied full payment of charges on the basis that the charges—though apparently consistent with customary charges for patients without insurance—were not reasonable within the meaning of the no-fault act. The issue on appeal concerns the identification of the factors or criteria that may be considered when determining reasonableness. Specifically, Farm Bureau asserts (1) that reasonableness should be measured by the open market, including what others actually pay for services, (2) that a healthcare provider's cost-to-charge ratio is a permissible factor to be considered when judging reasonableness, and (3) that the "amount generally billed" may also be considered when assessing reasonableness.

2. PAYMENTS TO HEALTHCARE PROVIDERS BY THIRD-PARTY PAYERS—THE CASELAW

Although Farm Bureau mentions various types of data allegedly relevant to an assessment of reasonableness, the primary focus of Farm Bureau's appellate briefing is on the payments that healthcare providers accept for services from other payers, including health insurers and government programs such as Medicaid and Medicare. Before considering the merits of Farm Bureau's arguments under the no-fault act regarding the relevance of this information to the reasonableness of a charge, the preliminary question before us is whether this Court's caselaw has already foreclosed

consideration of such data. As we will discuss, this Court undoubtedly has held, and correctly so, that the amount that others, such as a health insurer or government program, actually pay to a healthcare provider has no bearing on the *customary* prong of § 3157. MCL 500.3157, before its amendment in 2019, capped charges at the amount a healthcare provider "*customarily charges* for like products, services and accommodations *in cases not involving insurance*." (Emphasis added.) But, as discussed earlier, this Court in *AOPP* acknowledged that customary charges do not necessarily equate to reasonable charges. In light of the significant distinction between "customary" and "reasonable," we conclude that this Court's caselaw precluding consideration of third-party payments in the context of the "customary" inquiry does not control whether those payments may be considered when determining reasonableness.

More specifically, as detailed by the parties, for many years no-fault insurers have sought to limit their liability under the no-fault act to the amounts paid by third parties such as healthcare insurers, Medicaid, Medicare, and even workers' compensation. This Court has repeatedly rejected these attempts, but in doing so, the focus has been on the "customary" prong of § 3157. This Court has refused to *cap* liability for no-fault insurers at the amounts customarily paid by third parties. But this Court has not squarely addressed whether the amounts actually paid by third parties for the same services might be relevant to the reasonableness of a charge.

To begin with, in *Johnson v Mich Mut Ins Co*, 180 Mich App 314, 320; 446 NW2d 899 (1989), "the defendant insurer argue[d] that the trial court committed error requiring reversal in ordering payment of cus-

tomary hospital charges instead of amounts which Medicaid would have paid had plaintiff not been injured by an automobile." In presenting this argument, the defendant-insurer did *not* question the reasonableness of the charges or the necessity of the services. *Id*. at 321. Instead, the defendant-insurer simply "sought to persuade the trial court that the hospital's charges could only approximate those reimbursable by Medicaid." *Id*. This Court found that assertion "untenable . . . in light of the unambiguous statutory language of MCL 500.3157, which clearly permits health care providers . . . to charge reasonable amounts not exceeding their customary charges for the products, services and accommodations they provide to other injured persons in cases not involving insurance." *Id*. at 321-322 (citation omitted). "[U]nder *Johnson*'s reasoning, the acceptance of discounted payments does not define a health care provider's 'customary' charge." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 535; 791 NW2d 724 (2010). But *Johnson* did not answer, or even address, whether acceptance of discounted payments for services would be relevant to a determination of a "reasonable charge." See *Johnson*, 180 Mich App at 322.

Next, in *Hofmann*, 211 Mich App at 98, the relevant issue again concerned the "customary" prong and, in particular, whether the healthcare providers in that case "violated MCL 500.3157 . . . by charging more for products and services in cases involving no-fault insurance than they customarily charged in cases not involving insurance." In resolving the dispute, the *Hofmann* panel recognized that "the relevant inquiry under § 3157 is not the amount that is customarily charged to other health insurers, but rather the amount that is customarily charged 'in cases not involving insurance.' " *Id*. at 107. More specifically, per-

tinent to the instant case, the insurer in *Hofmann* argued that the amount BCBSM paid as a health insurer should be used to determine the healthcare provider's "customary" charge because, among other reasons, at least 70% of the healthcare provider's patients had BCBSM coverage for the charges in question. *Id*. at 112. In rejecting this argument, this Court reasoned:

> [The insurer's] reasoning is premised on the principle that BCBSM's "payments" to plaintiffs for x-rays, as opposed to plaintiffs' "charges" to BCBSM for those x-rays, are the proper criteria to be used in determining the plaintiffs' "customary charge" for x-rays. This position is untenable, however, in light of the clear statutory language of § 3157, which states that a "charge" in a no-fault case "shall not exceed the amount [a] person or institution customarily *charges* for like products, services and accommodations in cases not involving insurance" (emphasis added). Thus, [the insurer's] reliance on the amount that was "paid" by BCBSM, as opposed to the amount that plaintiffs "charged," is unwarranted.
>
> Furthermore, [the insurer's] position ignores the fact that the amounts that plaintiffs receive in payment from BCBSM are subject to contractual limitations, whereas the amounts that [the insurer] must pay for covered medical expenses are not limited contractually. Our Supreme Court discussed this distinction in *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 139; 485 NW2d 695 (1992):
>
> > One way of containing [health care] costs is for an insurer to place dollar limits upon the amounts it will pay to doctors and hospitals for particular services. While health and accident carriers generally are free to establish such limits, *a no-fault insurer is not*. Only the statutory qualification of reasonableness limits the amount that must be paid by a no-fault carrier for covered medical expenses. [Emphasis added.]

> The Court justified this distinction by noting that the obligation of a no-fault carrier is secondary to that of a health or accident insurer in situations where both types of coverage exist. *Id*.
>
> In essence, [the insurer] is asking this Court to establish a rule that, in situations where other health or accident insurance coverage does not exist, the obligation of a no-fault carrier must be limited to what a health insurer would have had to pay if health insurance existed, notwithstanding that the health insurer's obligation might be controlled by contract, whereas the no-fault carrier's is not. This position does not find support in the no-fault act. [*Hofmann*, 211 Mich App at 113-114.]

In short, *Hofmann*, like *Johnson*, rejected the assertion that "third-party contractual or statutory limitations [may be used] as a benchmark for determining the extent of a no-fault insurer's liability for payment of a health-care provider's *customary charge*." *Id*. at 109 (emphasis added). Notably, also like *Johnson*, *Hofmann* specified that the reasonableness of the charges under § 3157 was not at issue. *Id*. at 114. The *Hofmann* Court expressly qualified its ruling in this respect, stating:

> We note that the absence of contractual limitations in no-fault situations does not give health-care providers liberty to charge no-fault insurers any amount. In addition to the "customary charge" limitation discussed above, §§ 3107 and 3157 also impose a statutory qualification of reasonableness, such that a no-fault carrier is liable only for those medical expenses that constitute a reasonable charge for the product or service. In this case, however, [the insurer] *has not challenged the reasonableness* of the x-ray charges that comprise the basis of its § 3157 counterclaim for reimbursement. [*Id*. (citations omitted; emphasis added).]

Hofmann, in other words, recognized a potential distinction between reasonable charges and customary charges, and its holding regarding the irrelevance of

payments by third parties was specific to the customary-charge cap under § 3157.

The distinction between customary and reasonable charges was somewhat muddied by two decisions from this Court following *Hofmann*. First, in *Munson*, 218 Mich App at 378, the no-fault insurer refused to pay the full amount billed and instead paid the healthcare provider according to the fee schedule in the Worker's Disability Compensation Act, MCL 418.101 *et seq*. In recounting the background and facts of the case, the *Munson* panel noted that the insurer contested the reasonableness of the charges in the trial court on the basis that it was unreasonable and unfair to charge no-fault insurers one amount for services while accepting lesser amounts from other sources—such as Medicaid, Medicare, BCBSM, and workers' compensation—as payment for the same services. *Munson*, 218 Mich App at 379-381. Under a heading of "Reasonable and Customary Charges," the Court turned to analysis of the no-fault act, including § 3157. *Id*. at 381. Importantly, while mentioning "reasonable" charges in the opinion, the *Munson* Court focused its analysis solely on customariness rather than reasonableness. Specifically, the Court stated:

> Under th[e] statutory scheme, [the insurer] is required to pay the "customary charges" for services rendered by Munson. The critical issue in this case is what the statutory term "customary charges" means. Munson, of course, argues that "customary charges" means the standard amount it *bills* on behalf of every patient treated, regardless of the fact that Munson routinely *accepts* less than this amount in many cases (Medicare, Medicaid, and BCBSM insured cases). [The insurer] argues that "customary charges" means the lesser amount that Munson actually *accepts* in full satisfaction of the bill for the services rendered. [*Munson*, 218 Mich App at 382.]

After quoting extensively from *Hofmann*, the *Munson* panel then rejected the no-fault insurer's attempt to limit its liability to the amount paid by third-party payers, holding:

> In the instant case, [the insurer's] proffered definition of "customary charges" is the same one that was rejected by *Hofmann*, although [the insurer's] benchmark is broader here than it was in *Hofmann*. (Here, [the insurer] defines the benchmark as the amount that Munson received from Medicare, Medicaid, BCBSM, and arguably, worker's compensation.) And, as in *Hofmann*, [the insurer] ignores the limitations placed upon Munson by the federal statutes governing Medicare and Medicaid, by the state statutes governing Medicaid and worker's compensation, and by the contractual arrangement between Munson and BCBSM. Defendant's argument therefore fails for the same reasons it did in *Hofmann*. [*Munson*, 218 Mich App at 385.]

In rejecting reliance on what others pay, after quoting from *Hofmann*, the Court in *Munson* recognized that the proper point of comparison for customariness under § 3157 is those patients without any insurance because "it is obvious that the phrase 'in cases not involving insurance' means those situations where there is literally no 'insurance' in the lay sense of the term—no Medicare, no Medicaid, no BCBSM, and so forth." *Id*. at 390. Finally, in rejecting the insurer's reliance on the workers' compensation fee schedules, *Munson* determined that despite "a strong equitable argument" from the insurer, the workers' compensation fee schedules could not simply be incorporated into the no-fault act, particularly when voter-referendum attempts to amend the no-fault act to include fee schedules had failed. *Id*.

Unlike *Hofmann* and *Johnson*, *Munson* did not expressly limit its holding to the customary prong of

§ 3157, and indeed the *Munson* Court mentioned reasonableness, to some extent seeming to lump "reasonable" and "customary" together in its analysis. *Id*. at 381. But despite the reference to reasonableness, we conclude that *Munson* cannot be relied on as having resolved the question presented in this case, i.e., whether payments by third parties are relevant to the reasonableness of a charge. While alluding to reasonableness, *Munson* stated that "[t]he critical issue in this case is what the statutory term 'customary charges' means." *Id*. at 382. The Court proceeded to analyze the term "customary charge" without any analysis of what a reasonable charge entails. *Id*. at 382-385. For *Munson* to be read as having determined what a reasonable charge entails—and whether third-party payments are relevant to reasonableness—the *Munson* panel would have had to assume that reasonableness and customariness were coextensive. Such an assumption, however, is not expressly stated anywhere in *Munson*, and in any event, "[i]t is a well-settled principle that a point assumed without consideration is of course not decided." *2 Crooked Creek, LLC v Cass Co Treasurer*, 329 Mich App 22, 46; 941 NW2d 88 (2019) (quotation marks and citation omitted). And, perhaps more importantly, the assumption that reasonableness and customariness are one and the same has absolutely no validity after *AOPP*. See *AOPP*, 257 Mich App at 376-377.

Indeed, *Munson*'s failure to analyze reasonableness is particularly notable in light of *AOPP*. The foundational premise of *Munson*'s analysis was that the no-fault act *requires* the insurer "to pay the 'customary charges' for services rendered by" the healthcare provider. *Munson*, 218 Mich App at 382. But of course, under *AOPP* and the plain language of the no-fault act, this is not an accurate statement. Rather, the "custom-

ary" inquiry is "separate and distinct" from the reasonableness determination. *AOPP*, 257 Mich App at 376. And while a provider's "customary" charge functions as "the cap on what health-care providers can charge," it is "not, automatically, a 'reasonable' charge requiring full reimbursement under § 3107." *Id*. at 377.

To the extent that *AOPP* and *Munson* could be read to conflict insofar as *Munson* states that an insurer is required to pay customary charges, it bears emphasizing that the Michigan Supreme Court affirmed this Court's decision in *AOPP*, agreeing that "it is for the trier of fact to determine whether a medical charge, albeit 'customary,' is also reasonable." *AOPP*, 472 Mich at 95. By lumping reasonable and customary together and analyzing customariness while wholly failing to provide any analysis of reasonableness, the *Munson* panel failed to recognize the distinction between reasonable and customary. And it ultimately did not consider or decide the question whether evidence of third-party payments may be relevant to *reasonableness*. In short, reasonableness and customariness are separate questions. Rather than assume that *Munson* answered the reasonableness question presented in this case, we read the *Munson* decision as simply having resolved the customariness issue that it actually decided. Any incidental reference to reasonableness in *Munson* was nothing more than dictum. See *People v Aaron*, 409 Mich 672, 722; 299 NW2d 304 (1980) ("While there are some cases containing language which may be construed as assuming the existence of such a rule in Michigan, the language is clearly dictum as the question was neither at issue nor expressly considered."). Consequently, like *Johnson* and *Hofmann*, *Munson* does not provide the answer to the question in this case.

The issue of third-party payers arose again in *Mercy Mt Clemens*, 219 Mich App at 49, wherein the insurer asserted that a " 'charge' means the amount customarily accepted by a plaintiff as payment in full." (Quotation marks omitted.) On the basis of this interpretation, the insurer sought discovery of information about the amounts actually paid by "third-party payers such as Medicare, Medicaid, Blue Cross-Blue Shield . . . , worker's compensation insurers, health maintenance organizations (HMOs), and preferred provider organizations (PPOs)." *Id*. at 48. The healthcare providers sought a protective order, arguing that information about third-party payers was irrelevant because "under § 3157 their charges could not exceed the amount customarily charged for such services 'in cases not involving insurance.' " *Id*. at 49. The trial court agreed with the healthcare providers that amounts paid by third parties were not relevant and "were outside the parameters of discovery." *Id*. at 50.

On appeal, the issue was framed as whether the "reference to 'insurance' in § 3157 . . . should be read to refer to no-fault insurance only, rather than all types of insurance that provide payment for medical care." *Id*. The Court answered this question in the negative, ruling that "[t]he words 'in cases not involving insurance' in § 3157 should not be interpreted to mean 'in cases not involving no-fault insurance.' " *Id*. at 51. The *Mercy Mt Clemens* panel held:

> Reimbursement from Medicare, Medicaid, and worker's compensation insurance is set by statutory and regulatory limitations. Reimbursement from Blue Cross, HMOs, and PPOs is set by contracts between those entities and health-care providers. Under *Munson*, *Hofmann*, *Hicks*, and *Johnson*, such information is not admissible to prove the customary charge that defendant must pay under § 3157. . . . In light of this precedent, we conclude that the

> circuit court did not err in finding that the information sought on discovery was not relevant to whether the amounts charged by plaintiffs met the requirements of §§ 3107 and 3157 of the no-fault act and that it was not reasonably calculated to lead to the discovery of admissible evidence. The circuit court did not abuse its discretion by granting plaintiff's requested protective order. [*Id*. at 54-55.]

This Court also noted that "[r]egardless of whether third-party health-coverage providers such as Medicare, Medicaid, worker's compensation, Blue Cross, HMOs, and PPOs are technically insurance carriers, the amounts that plaintiffs accepted as payment in full from those entities cannot be used to prove the customary charge for those services under § 3157 of the no-fault act." *Id*. at 55.

Very much like *Munson*, the decision in *Mercy Mt Clemens* mentioned reasonable charges and acknowledged that charges must be reasonable. *Id*. at 52. But, like *Munson*, the analysis then focused solely on the question of customary charges and whether third-party payments were relevant to determining a customary charge in cases not involving insurance. *Id*. at 52-55. Missing from *Mercy Mt Clemens* was a recognition that customary charges are not necessarily reasonable and that an insurer need not automatically pay a customary charge. Rather than assume *Mercy Mt Clemens* answered the reasonableness question presented in the instant case, we construe that decision as simply having resolved the customariness issue that it actually addressed and decided. And any incidental reference to "reasonable" in *Mercy Mt Clemens* was nothing more than dictum. See *Aaron*, 409 Mich at 722. Consequently, like the other cases cited by Spectrum, *Mercy Mt Clemens* does not provide the answer to the question in this case.

The first case to actually address the separate and distinct question of reasonableness was *AOPP*. As detailed earlier, the panel in *AOPP*, 257 Mich App at 376, determined that "the 'customary charge' limitation in § 3157 and the 'reasonableness' language in § 3107 constitute separate and distinct limitations on the amount health-care providers may charge and what insurers must pay with respect to victims of automobile accidents who are covered by no-fault insurance." Because they are separate inquiries, and an insurer only has to pay a reasonable charge (subject to a customary-charge cap), *AOPP* also determined that an insurer did not necessarily have to pay a charge simply because it represented a customary charge in cases not involving insurance. *Id*. at 376-379.

While it did address reasonableness, *AOPP* did *not* involve a situation in which the insurer sought to have reasonableness determined on the basis of the amounts paid by third parties. Indeed, this Court in *AOPP* noted that the no-fault insurer did not attempt to use workers' compensation fee schedules, nor did the insurer try to make comparisons to the amounts paid by health insurers, Medicaid, or Medicare. *Id*. at 381-382. Instead, *AOPP* entailed an insurer's use of an 80th percentile test that assessed reasonableness by comparison to the amounts charged by other health-care providers rendering the same service. *Id*. More specifically, under the test, payment is recommended "of one hundred percent of the charges as long as the charge does not exceed the highest charge for the same procedure charged by eighty percent of other providers rendering the same service." *Id*. at 382 (emphasis omitted). The Court held that "the criterion . . . used [by the insurer] in determining whether a particular charge is reasonable is not precluded under the plain

language of the statute or Michigan case law." *Id*. at 381. As part of its analysis, the *AOPP* panel stated:

> Indeed, the panels in *Mercy Mt Clemens*, *Munson*, and *Hofmann* each concluded that the data regarding payments made by third-party payers could not be used to determine the customary charge under § 3157. In contrast, this case involves defendants' review of plaintiffs' medical charges for reasonableness under § 3107 by comparing plaintiffs' charges to those of other providers for similar services. [*AOPP*, 257 Mich App at 382 (citation and emphasis omitted).]

Spectrum asserts here that *AOPP* rejected comparisons to third-party payers because they are irrelevant to the determination of reasonableness. But that question was simply not addressed in *AOPP*.

In sum, while there may be cases from this Court containing language that might be construed as precluding consideration of amounts paid by third parties when determining the reasonableness of an amount charged by a healthcare provider, a careful review of the caselaw shows that this specific question was neither at issue nor expressly considered in these decisions. In other words, there is, at most, obiter dictum on this question, which lacks the force of adjudication and is, therefore, not binding on this Court under the principle of stare decisis. *Aaron*, 409 Mich at 722; *2 Crooked Creek*, 329 Mich App at 46.

3. REASONABLENESS AND THE RELEVANCE OF THIRD-PARTY PAYMENTS

The question, of course, becomes whether third-party payments are a permissible consideration under the no-fault act for purposes of assessing reasonableness. Again, under § 3107(1)(a), an insurer is liable for "[a]llowable expenses consisting of *reasonable charges* in-

curred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." (Emphasis added.) And MCL 500.3157 provides additional details about what a healthcare provider can charge for its services. As commonly understood, "a 'charge' is a '[p]ecuniary burden, cost' or '[a] price required or demanded for service rendered or goods supplied.' " *Douglas v Allstate Ins Co*, 492 Mich 241, 267; 821 NW2d 472 (2012) (citation omitted; alterations in original). Generally speaking, absent a contractual limitation or some other restriction imposed by law, healthcare providers are "free to charge the public whatever they want . . . ." *Mich Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Mich (After Remand)*, 118 Mich App 505, 528; 325 NW2d 471 (1982). In the no-fault context, however, healthcare providers are *not* free to charge whatever they want. Rather, §§ 3107(1)(a) and 3157 limit a charge to a "reasonable" amount, so long as it does not exceed the amount customarily charged.

Although "[t]he Legislature selected 'reasonableness' as the operative criterion for determining the amount of a charge for services," *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 671; 819 NW2d 28 (2011), the Legislature did not define the term "reasonable," *AOPP*, 257 Mich App at 379. Relying on dictionary definitions, the Michigan Supreme Court has generally defined the term "reasonable" as follows:

> The term "reasonable" commonly refers to that which is "agreeable to or in accord with reason; logical," or "not exceeding the limit prescribed by reason; not excessive[.]" The term "reasonable" has also been defined to mean "fair, proper, or moderate under the circumstances" and "[f]it and appropriate to the end in view." [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 159; 802 NW2d 281 (2011) (citations omitted; alterations in original).]

Pursuant to this common understanding of the term "reasonable," we see that a healthcare provider's charge must be fair, proper, or moderate, in accord with reason, and not excessive. A determination of reasonableness—while initially made by the healthcare provider and independently reviewed by the insurer—is ultimately a question for the fact-finder. See *Bronson*, 295 Mich App at 448-449.

In this context, the issue in this case is simply whether amounts paid for the same services by health insurers and others, such as Medicaid and Medicare, may be *considered* by a fact-finder as a point of comparison for determining whether the amount a healthcare provider charged a no-fault insurer was reasonable. We conclude that while it is certainly not dispositive of the reasonableness of a charge, the amount that third parties pay is nevertheless evidence bearing on the reasonableness of a healthcare provider's fees. Cf. *Bronson*, 295 Mich App at 454 ("[P]laintiff's actual cost for the surgical implant products is not dispositive on the issue whether its charges were reasonable; however, the actual cost of the durable medical equipment is certainly a piece of the overall 'collage of factors affecting the reasonable rate' of plaintiff's charges."). Simply put, third-party payments that are accepted by a healthcare provider as payment in full during the pertinent time frame for products and services are relevant to determining the reasonableness of charges for those very same products and services in the context of treatment covered by PIP benefits.

In *Hardrick*, 294 Mich App at 667-668, this Court discussed the characteristics of relevant evidence, explaining as follows:

> Relevant evidence is evidence "having *any* tendency to make the existence of any fact that is of consequence to the

> determination of the action more probable or less probable than it would be without the evidence." MRE 401 (emphasis added). Relevance divides into two components: materiality and probative value. Material evidence relates to a fact of consequence to the action. A material fact need not be an element of a crime or cause of action or defense but it must, at least, be in issue in the sense that it is within the range of litigated matters in controversy. Materiality looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial. . . .
>
> To be relevant, evidence must tend 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. . . . The threshold is minimal: any tendency is sufficient probative force. Evidence is relevant if it in some degree advances the inquiry, and is not objectionable simply because it fails to supply conclusive proof. No single item of evidence can be rejected upon the sole ground that it falls short of making a case; if it contributes to that end it must be received, and its sufficiency in connection with the other evidence must be determined on a review of the whole when the case is closed. [Quotation marks, citations, and brackets omitted.]

In this case, the question is whether the charges for Sabby's surgery and other medical treatments and services were reasonable. In this context, comparison of the amounts that Spectrum charged for the services Sabby received to the amounts that others actually paid for the same services during the same general time frame—and that Spectrum accepted as payment in full for these services—tends to make it more or less likely that the amounts Spectrum charged were reasonable. That is, what others actually pay can be used to measure the value of the medical services provided and can constitute a useful point of comparison for assessing the reasonableness of medical charges. This

evidence, supplying one measure of the value of the services provided, "throws some light, however faint, on the reasonableness of a charge" and is therefore worthy of a jury's consideration. *Bronson*, 295 Mich App at 452 (quotation marks and citation omitted).

Indeed, unlike the customary-charge cap, which is expressly limited to comparison of the charges to cases not involving insurance, the reasonableness prong does not contain any similar restriction. See MCL 500.3157. Rather, it is more broadly concerned with ensuring that a charge is fair and not excessive, and this concern invites comparison to amounts actually being paid on the open market. See, e.g., *Douglas*, 492 Mich at 275 ("The compensation actually paid to caregivers who provide similar services is necessarily relevant to the fact-finder's determination of a reasonable charge for a family member's provision of these services because it helps the fact-finder to determine what the caregivers could receive on the open market."). We agree with the following sentiments of the Georgia Supreme Court in *Bowden v Med Ctr, Inc*, 297 Ga 285, 292; 773 SE2d 692 (2015):

> The amounts that TMC charged to (and agreed to accept as payment in full from) other patients treated at the same hospital for the same type of care during the same general time frame that Bowden was treated may not be dispositive of whether TMC's charges for Bowden's care were "reasonable" under OCGA § 44-14-470(b), to the extent that the other patients were not similarly situated in other economically meaningful ways. But that does not mean that how much TMC charged those other patients is entirely irrelevant—particularly in the broad discovery sense—to the reasonableness of the charges for Bowden's care.
>
> The fair and reasonable value of goods and services is often determined by considering what similar buyers and sellers have paid and received for the same product in the same market, with adjustments upward or downward

> made to account for pertinent differences, and we see no reason why the same cannot be true of health care. [Citation omitted.][12]

A medical provider's typical price cannot be deemed reasonable unless it reflects an amount that is actually being charged in the marketplace, and a realistic standard considers the amount insurers actually pay and the amount a medical provider is willing to accept. *Nassau Anesthesia Assoc PC v Chin*, 32 Misc 3d 282, 286; 924 NYS2d 252 (2011). Quite simply, when determining reasonableness, the amount that others pay for the same goods or services is a pertinent factor to be considered when deciding whether a charge of those same goods or services is reasonable.[13]

We emphasize that the amount third parties pay does *not* conclusively establish a reasonable amount. Instead, in ruling that third-party payments may be relevant, we are simply indicating that such evidence may be *considered* as a point of comparison to assist the trier of fact in determining the amount of a reasonable

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[12] Cases from other jurisdictions, while not binding, may be considered persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

[13] Although we hold that the amount third parties pay for products and services may be relevant to a determination of reasonableness, the evidence needs to be specific to the particular charges at issue and cover the same general time frame. See *AOPP*, 257 Mich App at 379 (a no-fault insurer need only pay a reasonable charge "for the particular product or service"). General information and broad statistics are irrelevant to the question whether the particular charges in a given case were reasonable. Therefore, an insurer would not be justified in uniformly reducing the payment on all medical bills by a set percentage based on general statistics. Instead, each case and each expense needs to be considered and analyzed individually. Here, while Farm Bureau offered general information about the healthcare market and Hall's general opinions on reasonableness, it also provided Hall's opinions specifically with respect to Spectrum's particular charges related to its treatment of Sabby and the amount charged to Farm Bureau as compared to what others would pay.

charge for the services in question. See *Bronson*, 295 Mich App at 451-454. The amount paid by others for the same services is just one measure—among all the evidence the parties might wish to present—regarding the reasonableness of the charges. See *id*.

For instance, a healthcare provider would be free to present evidence and to argue that its charges were similar to those of other providers. And there are, of course, reasons why health insurers, Medicare, and Medicaid pay less, including contractual and statutory limitations, see *Mercy Mt Clemens*, 219 Mich App at 54, and a healthcare provider could present these factors and distinctions to a jury. In view of these differences and any other evidence presented, the jury would be free to give the evidence regarding third-party payers little or no weight and to instead conclude that the amount charged to uninsured individuals, or some other amount, is a better measure of reasonableness. But the fact that there are different measures and factors bearing on the assessment of reasonableness—and potential weaknesses in the evidence Farm Bureau wishes to present—does not render evidence of third-party payments irrelevant as a matter of law. See *Bronson*, 295 Mich App at 451-454. Instead, a jury should be presented with the complete picture of the range of charges and payments for medical services on the open market.

In sum, when assessing the reasonableness of a medical charge, relevant evidence includes the full range of charges and payments falling within the pertinent time frame for the particular services, products, and treatment at issue in the case. Among that evidence, the jury may consider the amounts paid by third parties because such evidence " 'throws some light . . . on the reasonableness of [the] charge[s] . . . .' " *Id*. at 452 (citation omitted).

In contrast to this conclusion, Spectrum relies heavily on *Johnson*, *Munson*, *Mercy Mt Clemens*, *Hofmann*, and *AOPP* for the proposition that the amount third parties pay for medical services is not relevant to the assessment of reasonable charges under § 3157. As discussed, these cases did not actually resolve the question presented in this case—specifically, whether payments by third parties are relevant to the determination of *reasonableness*. Nevertheless, one additional point about these cases warrants discussion in light of Spectrum's arguments on appeal. Specifically, in analyzing the "customary" prong, some of the cases addressed the significance of the use of the term "charges" in §§ 3107(1)(a) and 3157, noting that "payments" are not the same thing as "charges." See, e.g., *Hofmann*, 211 Mich App at 113-114. Employing this reasoning, Spectrum contends that, whether considering customariness or reasonableness, *payments* are not relevant to an analysis of *charges*.

Certainly, "charges" and "payments" are different terms, and the amount someone typically charges for services may not be the same as the amount someone is actually paid for those services. See, e.g., *Law v Griffith*, 457 Mass 349, 357; 930 NE2d 126 (2010) ("The only patients actually paying the stated charges are the uninsured, a small fraction of medical bill payors."). But the significance of this basic distinction between a "charge" and a "payment" falls away when the inquiry becomes one of reasonableness. Under the "customary" prong of § 3157, the sole question concerns the amount the healthcare provider *customarily charges* in cases not involving insurance, and actual payments matter not at all in answering this question. But when the reasonableness of those charges is at issue, the charges alone—even if customary and even if

comparable to the charges of other healthcare providers—cannot be absolutely dispositive of their reasonableness.

> To limit assessing the reasonableness of provider charges solely to a comparison of such charges among similar providers would be to leave the determination of reasonableness solely in the hands of providers, as a collective group, and would abrogate the cost-policing function of no-fault insurers, contrary to the intention of the Legislature. [*Bronson*, 295 Mich App at 449-450.]

Instead, in the context of reasonableness, a difference between the amount paid by third parties when compared to no-fault insurers and the uninsured is clearly relevant to, though not dispositive of, an assessment of reasonableness. To conclude otherwise would be to require the jury to ignore the realities of the marketplace when, in actuality, "the market for a particular service bears on its reasonableness . . . ." *Hardrick*, 294 Mich App at 671-672. And "the parameters of the relevant market present jury questions." *Id*. at 672. When determining reasonableness, the jury cannot be limited to consideration of a healthcare provider's "charges" for services but must be allowed to contemplate the value of the services on the market, including reflection on the amounts paid for such services by third parties.

Textually, in concluding that use of the word "charges" in § 3157 does not preclude consideration of "payments" when assessing reasonableness, we again emphasize that consideration of payments is simply one measure for the jury to ponder; it is certainly not dispositive. We do not suggest that "payments" necessarily establish the unreasonableness of a charge. The issue is simply whether evidence of payments by third parties may be considered by the fact-finder when

gauging the reasonableness of charges. And we hold that nothing in the plain language of § 3107(1)(a) or § 3157 precludes consideration of third-party payments when determining a no-fault insurer's liability for reasonable charges.

4. MCL 500.3158 AND MCL 500.3159

Spectrum contends that the evidence Farm Bureau seeks to admit should be excluded, even if it is relevant, because it is not discoverable under MCL 500.3158 or MCL 500.3159. Spectrum more specifically contends that evidence relating to Spectrum's costs is not relevant or discoverable because *Covenant* overruled this Court's decision in *Bronson*, and as a result, only "costs *to* the injured person," i.e., the provider's charges, are relevant and discoverable. Contrary to these assertions, *Covenant* did not overrule *Bronson*. With regard to the specific evidence in question, *Bronson* appears to have limited applicability to the current case because Farm Bureau has not particularly sought discovery of a "standalone" item, the cost for which is easily quantifiable. Instead, the evidence Farm Bureau seeks to admit is based on publicly available data. While this information may not be obtainable directly from Spectrum under §§ 3158 or 3159, nothing in the no-fault act prevents Farm Bureau from introducing publicly available data with the proper foundation.

Generally, Michigan follows an open and broad approach to discovery, permitting discovery "for any relevant matter, unless privileged." *Bronson*, 295 Mich App at 443. "However, a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Id*. (quotation marks and citation

omitted). The no-fault act contains two provisions regarding discovery that are relevant to this case. First, § 3158(2) provides:

> A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the history, condition, treatment and dates and costs of treatment of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment.

Additionally, § 3159 provides:

> In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

In this case, Spectrum asserts that these statutory provisions preclude discovery of the information Farm Bureau seeks and that because discovery is not allowed, it also follows that the information is not relevant or admissible. We disagree. The discovery

devices specified in the no-fault act do not necessarily represent "the complete panoply of discovery tools that the Legislature intended to provide in connection with mandatory no-fault insurance coverage." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 598 n 14; 648 NW2d 591 (2002). Much, if not all, of the information Farm Bureau wants to rely upon regarding payments by third parties and average cost-to-payment ratios is publicly available and was obtained by Farm Bureau from various sources. Sections 3158 and 3159 of the no-fault act might not specifically require Spectrum to provide this information to Farm Bureau. But nothing in § 3158 or § 3159 precludes the consideration of publicly available data, so to craft such a limitation from the Legislature's silence on publicly available data would unjustifiably hinder no-fault insurers in responsibly investigating claims. Cf. *Cruz*, 466 Mich at 598 n 14 (concluding no-fault discovery mechanisms were "not comprehensive"). Moreover, given that the information is publicly available, Farm Bureau's accessing the information cannot plausibly run afoul of the protections in § 3159 against annoyance, embarrassment, or oppression. Indeed, considering that the information is publicly available, the question is not really one of discovery, but admissibility. So provided that the data is relevant and otherwise admissible under the rules of evidence, neither § 3158 nor § 3159 precludes its admission.

On appeal, with regard to the costs of treatment, Spectrum also specifically argues that this Court's decision in *Bronson*, permitting discovery of a health-care provider's costs (at least to the extent those costs may be easily quantified), was implicitly overruled by *Covenant*. In *Bronson*, 295 Mich App at 450-451, this Court reasoned:

> In keeping with the insurer's obligation to determine the reasonableness of a provider's charges, we believe that defendants were entitled to discover the wholesale cost of the surgical implant products for which the insureds were charged. The no-fault act, MCL 500.3158(2), permits defendants to discover plaintiff's "costs of treatment *of* the injured person," not the "costs of treatment *to* the injured person," which presumably are plaintiff's customary charges. (Emphasis added.) Accordingly, defendants are permitted to consider the cost *to plaintiff* of providing that treatment and not merely the cost of treatment as billed by the provider to the injured person when evaluating the reasonableness of the charges submitted for payment. We recognize that permitting insurers access to a provider's cost information could open the door to nearly unlimited inquiry into the business operations of a provider, including into such concerns as employee wages and benefits. However, we explicitly limit our ruling to the sort of durable medical-supply products at issue here, which are billed separately and distinctly from other treatment services and which defendants represent (and plaintiff has not disputed) require little or no handling or storage by a provider. The surgical implant products here are standalone items that can be easily quantified. Plaintiff must come forward with evidence to convince a jury that the charges for the durable medical equipment were reasonable.

Bronson has limited application to the current facts. That is, at least on appeal, Farm Bureau has not identified a need for information about Spectrum's costs for specific "durable medical-supply products." Instead, Farm Bureau's arguments focus on publicly available data regarding costs relative to charges, an issue that *Bronson* simply did not address. Although not the type of information at issue in *Bronson*, contemplation of this publicly available data is not precluded by § 3158 or § 3159, and because it is publicly available, it does not run afoul of *Bronson*'s concern about opening the door to unlimited discovery requests

of a healthcare provider. In short, *Bronson*'s specific discovery holding seems to have little bearing on the present case.

Nevertheless, we address Spectrum's assertion that *Covenant* implicitly overruled *Bronson* because in making this argument, Spectrum purports to find support for its more general assertion that the reasonableness of medical charges is defined *solely* by comparison to charges among similar healthcare providers. In *Bronson*, this Court expressly rejected the contention that reasonableness could be determined solely by comparison of a provider's charges to similar providers. The *Bronson* panel reasoned that such an approach "would be to leave the determination of reasonableness solely in the hands of providers, as a collective group, and would abrogate the cost-policing function of no-fault insurers, contrary to the intention of the Legislature." *Bronson*, 295 Mich App at 449-450. In concluding that costs were also relevant, this Court noted that § 3158(2) permits discovery of the " 'costs of treatment *of* the injured person.' " *Id*. at 450. In contrast to this conclusion, Spectrum now argues on appeal that § 3158(2) should be read to allow discovery only of the costs of treatment *to* the injured person, i.e., a provider's charges, meaning that the sole point of comparison for determining reasonableness would be a comparison of *charges*.

In analyzing the text of § 3158(2), Spectrum maintains that *Bronson* implicitly involved a misapplication of the last-antecedent rule.[14] That is, Spectrum con-

[14] The last-antecedent rule is a grammatical rule stating "that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Tuscola Co Bd of Comm'rs v Tuscola Co Apportionment Comm*, 262 Mich App 421,

tends that this Court erred by reading the phrase "of the injured person" to only modify "costs of treatment" when "of the injured person" should also be read to modify "history, condition, treatment and dates" as used in § 3158(2). Read in this manner, Spectrum asserts that the Legislature chose "of" because one does not say, for example, "history to the injured person." Spectrum also appears to believe that the Legislature chose "of" to denote a possessive relationship. In other words, according to Spectrum, the Legislature actually meant to say "*injured person's* history, condition, treatment and dates and costs of treatment."

Bronson clearly rejected this position.[15] But Spectrum maintains that *Bronson*'s construction is no longer good law because *Covenant* held that the statutory cause of action for no-fault benefits belongs to the injured person, not a healthcare provider. Spectrum notes that *Bronson* operated under the assumption that healthcare providers could file suit against an insurer. See *Bronson*, 295 Mich App at 450. And Spectrum emphasizes that the *Covenant* Court looked briefly at § 3158(2), noting that this provision "simply requires that a healthcare provider make the injured person's medical records and certain treatment information available to the insurer." *Covenant*, 500 Mich at 205-206.

425; 686 NW2d 495 (2004) (quotation marks and citation omitted). There is no mention of this rule in *Bronson*.

[15] Contrary to Spectrum's arguments, *Bronson* did not purport to apply the last-antecedent rule; and *Bronson* was also clearly correct in not rewriting § 3158(2) in the manner requested by Spectrum. Had the Legislature intended to say "the *injured person's* history, condition, treatment and dates and costs of treatment," it could have easily used this phrase. See *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998). Instead, relevant to this case, the Legislature provided for discovery of the "costs of treatment of the injured person," and *Bronson* properly concluded that the Legislature intended the meaning it clearly and unambiguously expressed. See *Yaldo*, 457 Mich at 346.

Contrary to Spectrum's assertions that *Covenant* overruled *Bronson*, this Court has already recognized that *Covenant* did not affect the method for determining reasonableness as articulated in *AOPP* and *Bronson*. *Auto-Owners Ins Co v Compass Healthcare PLC*, 326 Mich App 595, 609-610; 928 NW2d 726 (2018). The *Compass Healthcare* panel stated:

> As the trial court concluded in its opinion and order on reconsideration, "[t]he only effect of *Covenant* was to place the dispute over the reasonableness of the charges between a provider and a patient-insured, rather than between a provider and an insurer." It did not alter the *method* of disputing the reasonableness of the amount paid. [*Id*. at 610 (alteration in original).]

Indeed, there is nothing inconsistent between *Bronson*'s discovery ruling and *Covenant*. To the contrary, the crux of *Covenant*'s statutory analysis was that the "the no-fault act does not, in any provision, explicitly confer on healthcare providers a direct cause of action against insurers." *Covenant*, 500 Mich at 204-205. And the Supreme Court also could not find any such cause of action in the no-fault provisions "that do not explicitly refer to healthcare providers." *Id*. at 206. In comparison, relevant to *Bronson*'s conclusion, the no-fault act expressly mentions healthcare providers in § 3158(2) and explicitly imposes a duty on healthcare providers to disclose the "costs of treatment of the injured person . . . ." The fact that healthcare providers lack a statutory cause of action does not alter their express obligation to comply with § 3158(2). Even before *Covenant*, this obligation existed in cases brought by an injured person rather than a healthcare provider. In short, *Covenant* did not overrule *Bronson*, it did not alter the method of disputing reasonableness, and it did not otherwise change a healthcare provider's obligation to comply with § 3158(2). In sum, the discovery provi-

sions in §§ 3158 and 3159 do not compel the conclusion that consideration of third-party payments is barred by the no-fault act.

5. APPLICATION

The trial court denied Farm Bureau's motion in limine regarding the relevance and admissibility of evidence, agreeing with Spectrum's assertion that this Court's caselaw construing § 3157 categorically precluded the admission of evidence of third-party payments for similar services. For the reasons set forth in this opinion, we hold that evidence regarding third-party payments *may* be relevant and admissible for purposes of assessing reasonableness under § 3107(1)(a) and § 3157. And the trial court's blanket exclusion of this evidence constituted an error of law amounting to an abuse of discretion. See *Mueller*, 323 Mich App at 571. To be clear, we do not hold as a matter of law that the evidence offered by Farm Bureau is relevant and admissible; rather, we reverse the trial court's ruling and remand the matter for the trial court to make the determination in the first instance under the proper legal framework. Cf. *In re Kerr*, 323 Mich App 407, 412; 917 NW2d 408 (2018) (remanding for a new evidentiary ruling when trial court's exclusion of evidence was based on an error of law). The trial court has not yet considered the relevance of the specific data in question to the particular healthcare charges at issue in this case that were billed in 2016, nor has the court addressed Hall's particular methods of analyzing that data.[16] The

[16] For instance, on appeal, in a footnote, Spectrum asserts that Hall's methodologies—based on "common sense"—do not meet the standards for admission of an expert opinion. This issue, raised for the first time on appeal, should also be addressed on remand in determining the admissibility of Farm Bureau's evidence.

record must also be developed with respect to the precise cost information Farm Bureau seeks to discover and whether the cost information meets the standards in *Bronson*.

6. ATTORNEY FEES UNDER MCL 500.3148

Given our holding that evidence of third-party payments may be relevant, thereby requiring remand for additional proceedings, whether the trial court erred by denying Spectrum's motion for attorney fees under MCL 500.3148 need not be considered because an award of attorney fees at this juncture would be premature.[17]

III. CONCLUSION

In Docket No. 347553, we reverse the judgment entered in favor of Spectrum regarding the balance on the charges billed by Spectrum for medical services rendered to Sabby. In Docket No. 348440, we reverse the order denying Spectrum's motion for attorney fees. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Having prevailed in Docket No. 347553, Farm Bureau may tax costs under MCR 7.219 relative to that particular appeal. We decline to award taxable costs in Docket No. 348440.

TUKEL, P.J., and GADOLA, J., concurred with MARKEY, J.

[17] Although our ruling in favor of Farm Bureau with respect to the motion in limine lends some support to the denial of Spectrum's request for attorney fees, the issue of attorney fees cannot be properly addressed until, at the earliest, it is determined what specific evidence is admissible and the effect of the evidence on the question concerning the reasonableness of Farm Bureau's decision to only pay 80% of the amount billed. And, of course, the issue of liability is now reopened.

PEOPLE v MOSS

Docket No. 338877. Submitted August 7, 2020, at Grand Rapids. Decided September 10, 2020, at 9:00 a.m. Reversed in part and remended 509 Mich ___ (2022).

John A. Moss pleaded no contest to third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(d) (related by blood or affinity and sexual penetration occurs), against his adoptive sister (complainant) in the Berrien Circuit Court. The court, Donna B. Howard, J., sentenced defendant to 6 to 15 years' imprisonment. Defendant moved to withdraw his plea, arguing that the plea lacked an adequate factual basis because although he and the complainant shared an adoptive parent, they were not related by blood or affinity. The court denied the motion, determining that adoptive siblings are related by affinity. Defendant sought leave to appeal in the Court of Appeals, and the Court of Appeals, TALBOT, P.J., and K. F. KELLY and CAMERON, JJ., denied the application in an unpublished order entered on August 21, 2017 (Docket No. 338877). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court, after hearing oral argument on the application, remanded the case to the Court of Appeals for consideration as on leave granted. 503 Mich 1009 (2019). The Supreme Court directed the Court of Appeals to address whether a family relation that arises from a legal adoption is effectively a blood relation, as that term is used in MCL 750.520b through MCL 750.520e, or is a relation by affinity, as that term is used in MCL 750.520b through MCL 750.520e.

The Court of Appeals *held*:

An adequate factual basis existed for defendant's no-contest plea because defendant and complainant were effectively related by blood. MCL 750.520d(1)(d) prohibits a person from engaging in sexual penetration with another person who is related to the actor by blood or affinity to the third degree when the sexual penetration occurs under circumstances not otherwise prohibited by Chapter LXXVI of the Penal Code. MCL 710.60, the effect-of-adoption statute of the Michigan Adoption Code, MCL 710.21 *et seq*., provides that adopted children have the same rights and duties as the natural progeny of the adoptive parent or parents. Accordingly,

the former biological ties of defendant and complainant were each severed by adoption, and a completely new relationship was substituted. Given that the law treats both defendant and complainant as biological children of the adoptive mother, it follows that a constructive biological relationship exists between them as well. Each adopted child is placed in the lineage of the adoptive parent, meaning that, by law, the children share a common ancestor. Accordingly, siblings by adoption are effectively related by blood as that term is used in MCL 750.520d(1)(d). *People v Zajaczkowski*, 493 Mich 6 (2012), did not compel a different result because the facts in that case presented a different question. Therefore, because adoptive siblings are effectively related by blood through the Adoption Code, there was a sufficient factual basis supporting defendant's no-contest plea to CSC-III on the basis of relation by blood, and the trial court did not err by denying defendant's motion to withdraw his plea. As for affinity, the relationship of the two adopted children in this case did not arise from a marriage, and so it was not a relationship by affinity. Finally, defendant's claim of ineffective assistance of counsel was without merit.

Affirmed.

ADOPTION — CRIMINAL SEXUAL CONDUCT — WORDS AND PHRASES — "RELATED BY BLOOD."

MCL 750.520d(1)(d) generally prohibits a person from engaging in sexual penetration with another person who is related to the actor by blood or affinity to the third degree when the sexual penetration occurs under circumstances not otherwise prohibited by Chapter LXXVI of the Penal Code; under MCL 710.60 of the Michigan Adoption Code, MCL 710.21 *et seq*., adopted children are treated as the natural progeny of the adoptive parent or parents; each adopted child is thus placed in the lineage of the adoptive parent, meaning that, by law, the children share a common ancestor; accordingly, siblings by adoption are effectively related by blood as that term is used in MCL 750.520d(1)(d).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Steven Pierangeli*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

SHAPIRO, P.J. Defendant pleaded no contest to third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(d) (related by blood or affinity and sexual penetration occurs), against his adoptive sister (complainant). After being sentenced to 6 to 15 years' imprisonment, defendant later moved to withdraw his plea on the ground that it lacked an adequate factual basis, arguing that although he and the complainant shared an adoptive parent, they were not related "by blood or affinity." The trial court denied the motion, and defendant sought leave to appeal in this Court. We denied defendant's application for leave to appeal. Defendant then sought leave to appeal in the Michigan Supreme Court, and the Supreme Court, after hearing argument on the application, remanded the case to us for consideration as on leave granted. For the reasons stated in this opinion, we affirm the trial court's denial of defendant's motion to withdraw his plea.

I. FACTS & PROCEDURAL HISTORY

Defendant and complainant were legally adopted out of the foster-care system by a single woman. At the time of the offense that occurred in the family home, defendant was 25 years old and complainant was 17 years old. It is unclear from the record whether defendant was living at the family home or was just visiting. In any event, defendant told the police that he climbed through the bathroom window at 5:00 a.m. because no one answered the door. It is undisputed that defendant then went to complainant's bedroom and sexually penetrated her. Complainant went to the hospital and reported that she had been sexually assaulted by her brother; defendant maintains that the sex was consensual.

Defendant was arrested and charged, as a habitual offender, with resisting and obstructing an officer, possession of marijuana (second offense), and two counts of CSC-III (related by blood or affinity, and using force or coercion contrary to MCL 750.520d(1)(b)). The prosecution agreed to dismiss the charges of resisting and obstructing, possession of marijuana, the CSC-III count involving force or coercion, and the habitual-offender status in exchange for defendant entering a no-contest plea to the CSC-III charge based on relation by blood or affinity. The prosecution also agreed to recommend a minimum sentence of 6 years' imprisonment. The trial court accepted defendant's plea on the basis that he was related to complainant by affinity.

After sentencing, defendant was appointed appellate counsel and moved to withdraw his no-contest plea. He argued that there was no factual basis supporting the CSC-III conviction because adoptive siblings are not related by blood or affinity, relying primarily on *People v Zajaczkowski*, 493 Mich 6; 825 NW2d 554 (2012). Defendant also asserted that his trial counsel was ineffective for advising him that he could be found guilty of CSC-III even if the jury agreed that the encounter with complainant was consensual. In a written opinion and order, the trial court determined that adoptive siblings are related by affinity and denied defendant's motion to withdraw. As noted, we initially denied leave to appeal and so now consider the issue for the first time.[1]

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[1] Generally, we review for an abuse of discretion a trial court's denial of a defendant's motion to withdraw a plea. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). However, whether there was a sufficient factual basis for defendant's plea turns solely on statutory interpretation, which is a question of law that we review de novo. *People v Williams*, 491 Mich 164, 169; 814 NW2d 270 (2012). The goal of

In remanding the case to this Court, the Supreme Court directed us to

> specifically address whether a family relation that arises from a legal adoption, see MCL 710.60(2) ("After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons") (1) is effectively a "blood" relation, as that term is used in MCL 750.520b–MCL 750.520e; or (2) is a relation by "affinity," as that term is used in MCL 750.520b–MCL 750.520e, see *Bliss v Caille Bros Co*, 149 Mich 601, 608 (1907); *People v Armstrong*, 212 Mich App 121 (1995); *People v Denmark*, 74 Mich App 402 (1977). [*People v Moss*, 503 Mich 1009, 1009 (2019).]

Having fully reviewed the issue as directed in the Supreme Court's order, we hold that defendant and complainant are effectively related by blood, and so there was an adequate factual basis for defendant's no-contest plea.

II. ANALYSIS

A. BLOOD

Multiple CSC offenses include as an element or alternate element of the offense that the defendant was related to the complainant "by blood or affinity" to either the third or fourth degree. See MCL 750.520b to MCL 750.520e. In this case, defendant pleaded no contest to CSC-III contrary to MCL 750.520d(1)(d), which prohibits a person from engaging in sexual penetration with another person who "is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter."

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statutory interpretation is to discern and give effect to the Legislature's intent. *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2010).

Section 60 of the Michigan Adoption Code, MCL 710.21 *et seq*., is "commonly referred to as the effect-of-adoption statute." *Jones v Slick*, 242 Mich App 715, 736; 619 NW2d 733 (2000). In pertinent part, MCL 710.60 provides:

> (1) After the entry of an order of adoption, if the adoptee's name is changed, the adoptee shall be known and called by the new name. The person or persons adopting the adoptee then become the parent or parents of the adoptee under the law *as though the adopted person had been born to the adopting parents* and are liable for all the duties and entitled to all the rights of parents.
>
> (2) After entry of the order of adoption, *there is no distinction between the rights and duties of natural progeny and adopted persons*, and the adopted person becomes an heir at law of the adopting parent or parents and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, . . . an adopted child is no longer an heir at law of a parent whose rights have been terminated under this chapter or chapter XIIA or the lineal or collateral kindred of that parent . . . . [Emphasis added.]

We have explained that

> [t]he effect of [MCL 710.60(1)] is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child. The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption. [*In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998) (citation omitted).]

By virtue of MCL 710.60, "it is as though [the adopted children] had been born to [the adoptive parent.]" *Wilson v King*, 298 Mich App 378, 382; 827 NW2d 203 (2012).

It is clear therefore that, under the Adoption Code, both defendant and complainant are treated as the natural progeny of their adoptive mother. The former biological ties of defendant and complainant were each severed by adoption, and a completely new relationship was substituted. Given that the law treats both defendant and complainant as biological children of the adoptive mother, it follows that a constructive biological relationship exists between them as well. Each adopted child is placed in the lineage of the adoptive parent, meaning that, by law, the children share a common ancestor. Accordingly, we conclude that siblings by adoption are effectively related by blood as that term is used in MCL 750.520d(1)(d).

We reject defendant's argument that *Zajaczkowski* compels a different result. First, if that were true, it is difficult to see why the Supreme Court would remand the case to us rather than resolve the case by order. Second, the facts in *Zajaczkowski* presented a very different question. In that case, there was neither a biological relationship nor a definitive legal relationship between the defendant and the complainant. The defendant was born during the marriage of his mother to the complainant's father. *Zajaczkowski*, 493 Mich at 9. Although the complainant's father was identified as defendant's legal father in the divorce judgment, a DNA test later established that the complainant's father was not the defendant's biological father. *Id*. In our review of the case, we concluded that the MCL 552.29 presumption of legitimacy to all children born in a marriage controlled and noted that the defendant did not have standing to rebut that presumption. *Id*. at 11-12. The Supreme Court rejected that view, finding that "nothing in the language of MCL 750.520b(1)(b)(*ii*) indicates that a relationship by blood can be established through this presumption." *Id*. at 14. Further, the Court "decline[d]

to conclude as a matter of law that defendant shares a common ancestor with the victim and is thereby related to the victim by blood merely because defendant may be considered the issue of his mother's marriage to the victim's father for legitimacy purposes." *Id*. at 15.

The Supreme Court made clear that the presumption of legitimacy under MCL 552.29 is just that: a presumption that can be rebutted. The presumption is not conclusive proof of a biological relationship, although "in the absence of a determinative DNA test, the prosecution may use evidence that a person was born during a marriage as evidence that the defendant is related to the victim by blood . . . ." *Zajaczkowski*, 493 Mich at 15 n 20. But in cases in which a DNA test establishes the lack of a biological relationship, as in *Zajaczkowski*, the presumption of legitimacy carries no weight for purposes of showing a blood relationship under the CSC statutes. By contrast, the familial relationship established by adoption is *conclusive* rather than presumptive. The Adoption Code creates an unrebuttable familial relationship between children adopted into the same family. By law, adoptive children effectively become the biological children of the adoptive parent, and the necessary implication is that the constructive biological relationship extends between adoptive siblings.

Defendant specifically relies on footnote 18 in *Zajaczkowski*, which can be read to suggest that relations arising by adoption do not constitute blood relationships for purposes of MCL 750.520b to MCL 750.520e. See *Zajaczkowski*, 493 Mich at 14 n 18. However, as noted, *Zajaczkowski* did not involve an adopted family member, and there was no argument regarding the effect of the Adoption Code. Accordingly, we view footnote 18 as dicta, at least until such time as the

Supreme Court directs us otherwise. See *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999) ("It is a well-settled rule that obiter dicta[, i.e., a statement not necessary to the determination of the case,] lacks the force of an adjudication and is not binding under the principle of stare decisis.").

Further, we think it is highly unlikely that the Legislature intended to treat adoptive siblings differently from biological siblings for purposes of the CSC statutes. We reached a similar conclusion in *Armstrong*, 212 Mich App 121, in which we were tasked with deciding whether stepsiblings were related by affinity under the CSC statutes. We reasoned in part:

> In looking to the object of the second-degree criminal sexual conduct statute and the harm it is designed to remedy, and in applying a reasonable construction that best accomplishes the purpose of that statute in this case, we are persuaded that the term "affinity" encompasses the relation between a stepbrother and a stepsister. If the term were not so construed, then the first- and second-degree criminal sexual conduct statutes would impose a penalty more severe where the perpetrator sexually assaulted a spouse's brother or sister than where the perpetrator sexually assaulted a stepbrother or stepsister. In this time of divorce, remarriage, and extended families, we see no reason why the Legislature would give enhanced protection to a victim related to a perpetrator as an in-law but not to a victim related to a perpetrator as a stepbrother or stepsister. Thus, defining the term "affinity" to encompass the relation between a stepbrother and a stepsister avoids a construction of the second-degree criminal sexual conduct statute that would yield absurd results. [*Id*. at 128-129 (citation omitted).]

We find this reasoning applicable to the case at hand. That is, we can discern no reason why the Legislature would have intended to afford greater protection to persons committing sex crimes against

adoptive rather than biological siblings. Siblings, whether adoptive or biological, are the type of potential victims that the statute aims to protect because there exists a special relationship between them that is vulnerable to exploitation. See *id*. at 127 ("In fashioning the criminal sexual conduct statute, MCL 750.520a *et seq*., the Legislature intended to protect young persons from sexual contact by persons with whom they have a special relationship, such as relatives.").[2]

In sum, because adoptive siblings are effectively related by blood through the Adoption Code, there was a sufficient factual basis supporting defendant's no-contest plea to CSC-III on the basis of relation by blood or affinity, and the trial court did not err by denying defendant's motion to withdraw his plea.

B. AFFINITY

Given our holding that there is effectively a blood relationship in this case, it is not necessary that we decide whether a relationship by affinity also exists. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues."). However, considering the Supreme Court's remand order, we will address the issue.

In 1907, the Supreme Court in *Bliss*, 149 Mich at 608, defined "affinity" in the context of judicial disqualification as

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[2] Defendant argues that MCL 750.520d(1)(d) is not restricted by age, and so the purpose of that statute should not be construed as the protection of young people. However, we are construing a relation by blood as that term is used in MCL 750.520b to MCL 750.520e, which includes provisions that are expressly aimed at protecting minors and other vulnerable persons from sexual contact from relatives.

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband.

Both this Court and the Supreme Court have quoted the *Bliss* definition with approval in CSC cases. See *Denmark*, 74 Mich App at 408; *Zajaczkowski*, 493 Mich at 13-14.

In *Armstrong*, 212 Mich App at 126, however, this Court interpreted the term anew, determining that the *Bliss* definition was not controlling for purposes of "whether the Legislature intended the term 'affinity' to encompass stepbrothers and stepsisters" in the context of applying the CSC statutes. In holding that stepsiblings were related by affinity, this Court reasoned, in part:

> The term "affinity" is "neither an unusual nor esoteric word; nor does that criminal sexual conduct statute use the term in an uncommon or extraordinary context." *Denmark*, [74 Mich App at 408]. *Random House College Dictionary* (rev ed) defines the term "affinity" as a "relationship by marriage or by ties other than those of blood." [*People v Barajas*, 198 Mich App 551, 555; 499 NW2d 396 (1993)]; see also MCL 8.3a. The common and ordinary meaning of affinity is marriage. *State v C H*, 421 So 2d 62, 63 (Fla App, 1982). The term "step" is defined as "a prefix used in kinship terms denoting members of a family related by the remarriage of a parent and not by blood." *Random House College Dictionary* (rev ed). Thus, pursuant to the rules of statutory construction, it would appear that [the] defendant and the victim were related by affinity because they were family members related by marriage. [*Armstrong*, 212 Mich App at 127-128.]

In this case, the trial court relied on the lay dictionary definition quoted in *Armstrong*, i.e., that affinity extends to a relationship by marriage *or by ties other than those of blood*. While this single, broad definition may support extending the term affinity to relationships beyond those arising from marriage, *Armstrong* nonetheless concluded that stepsiblings were related by affinity "because they were family members related *by marriage*." *Id*. at 128 (emphasis added). Thus, regardless of the various definitions, affinity has always been understood so as to exist via a marriage, and we are not aware of any published case holding to the contrary. Here, the relationship of the two adopted children did not arise from a marriage, and so it is not a relationship by affinity.

C. EFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that his trial counsel was ineffective for advising him that he could be convicted of CSC-III even if the jury agreed that the sexual encounter was consensual.[3] However, because we conclude that defendant was effectively related to his adoptive sister by blood, defendant could be convicted under MCL 750.520d(1)(d), which does not require the use of force or coercion. Accordingly, trial counsel's

[3] Because the trial court did not hold an evidentiary hearing, our review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

advice was not deficient, and defendant's claim of ineffective assistance of counsel is without merit.

Affirmed.

SERVITTO and LETICA, JJ., concurred with SHAPIRO, P.J.

PEOPLE v FONTENOT

Docket No. 350391. Submitted April 14, 2020, at Detroit. Decided September 10, 2020, at 9:05 a.m. Vacated in part and remanded 509 Mich ___ (2022).

The prosecution appeals the decision of the Oakland Circuit Court denying its interlocutory application for leave to appeal from the order of the 45th District Court denying the prosecution's motion in limine, which sought the admission of DataMaster logs as nontestimonial business records. On October 3, 2017, Alton Fontenot, Jr., was arrested by a Michigan State Police trooper for operating under the influence of alcohol after he failed field sobriety tests. The trooper then administered two breath tests, using a DataMaster testing instrument, that registered defendant's blood alcohol content as 0.09. Defendant was charged in the district court with operating a motor vehicle while intoxicated, MCL 257.635(1). In September 2017 and December 2017, the DataMaster machine that was used to test defendant was inspected by an operator who verified it for accuracy and certified it as being in proper working order in accordance with state regulations. The operator noted the results of the inspections in logs. The prosecution filed a pretrial motion in limine in the district court seeking to declare that the results of the tests, as reflected in the DataMaster logs, were nontestimonial under the Confrontation Clause and to admit the DataMaster logs pursuant to MRE 803(6), which would have made it unnecessary for the prosecution to call the operator to testify at trial. However, the district court, Michelle Friedman Appel, J., denied the prosecution's motion and stayed the trial pending the prosecution's appeal in the circuit court. The prosecution appealed, and the circuit court, Nanci J. Grant, J., denied the interlocutory appeal on procedural grounds without deciding whether the operator's statements in the log were nontestimonial. The Court of Appeals granted the prosecution's application for leave to appeal.

The Court of Appeals *held*:

1. Under the Confrontation Clause, US Const, Am VI, out-of-court testimonial statements are not admissible against criminal defendants unless the declarant is unavailable and the defendant

has had a previous opportunity to cross-examine the declarant. A pretrial statement is testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Additionally, our Supreme Court has adopted the "primary purpose" confrontation-clause analysis, which provides that testimonial statements have two characteristics: (1) they involve out-of-court statements that have the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (2) they involve formalized statements such as affidavits, depositions, prior testimony, or confessions. In this case, the DataMaster logs were nontestimonial because they were created before defendant's breath tests were conducted to verify the accuracy of the DataMaster machine, not for the purpose of prosecuting defendant specifically. Thus, the logs did not accuse a targeted individual of engaging in criminal conduct. Further, the logs were created as part of the normal administrative function of the Michigan State Police to assure that DataMaster machines produced accurate results. Therefore, the primary purpose of the accuracy tests and the logs that recorded the results of the tests was to comply with administrative regulations, see Mich Admin Code R 325.2653(3), not to prosecute defendant. Accordingly, the logs were nontestimonial.

2. The DataMaster logs were also admissible as business records under MRE 803(6). The Michigan State Police kept the logs as part of a regularly conducted business activity, and it is part of the regular practice of its business activity to make the logs. Although DataMaster logs are sometimes presented at trials, they are not prepared in anticipation of litigation but, rather, because administrative regulations require that such logs be kept. Further, MRE 803(6) addresses the trustworthiness of the *type* of document in question, not the *specific* document at issue in a given case; therefore, whether the logs at issue in this case were accurate had no effect on whether they were a business record under the rule. That is, any question about the accuracy of the logs went to the weight to be given to the evidence by the fact-finder, not the admissibility of the evidence. Therefore, while the DataMaster logs were admissible as business records, defendant still had the right to challenge the reliability and credibility of the logs.

Order denying motion in limine vacated and case remanded to the district court for further proceedings.

RONAYNE KRAUSE, J., dissenting, concluded that the evidence demonstrated that the DataMaster logs were unreliable and were therefore not admissible under MRE 803(6), regardless of whether they were properly considered testimonial in nature. Judge RONAYNE KRAUSE noted that the logs were not kept simply to comply with bureaucratic rules; the logs were expected to be and commonly were used in litigation, and they were critical to establishing the reliability of evidence that is difficult for defendants to challenge and considered conclusive per se. Given the circumstances in which the logs were created, Judge RONAYNE KRAUSE believed that they were not trustworthy under MRE 803(6) and, therefore, were not admissible. She recognized that the logs, by definition, were not testimonial, in that they were created before the commission of any crime and therefore were not made under circumstances that would lead an objective witness reasonably to believe that they would be used at a later trial. However, Judge RONAYNE KRAUSE would have held that under the circumstances of this case, the lower courts correctly determined that the testing logs were not admissible under MRE 803(6), regardless of whether they were testimonial, and she would have affirmed.

1. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TESTIMONIAL STATEMENTS — ADMINISTRATIVE RECORDS.

Under the Confrontation Clause, US Const, Am VI, out-of-court testimonial statements are inadmissible unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine the declarant; statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and the statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; logs created as part of the Michigan State Police's normal administrative function of assuring that machines used to measure blood alcohol content produce accurate results are nontestimonial statements because they are not created for the primary purpose of prosecuting a defendant.

2. EVIDENCE — HEARSAY — BUSINESS RECORDS EXCEPTION — ADMINISTRATIVE CODE — INSPECTION OF BREATH ALCOHOL LEVEL TESTING EQUIPMENT.

Business records are admissible under MRE 803(6), which provides that certain records and reports, if kept in the course of regularly conducted business activity and as part of the regular practice of that business activity, are admissible unless the source of the information or circumstances of preparation indicate a lack of

trustworthiness; logs generated by the Michigan State Police, pursuant to Michigan Administrative Code R 325.2653(3), which requires regular inspection of testing equipment that measures blood alcohol levels, are admissible under MRE 803(6) as business records because they are kept in the course of regularly conducted business activity and as part of the regular practice of that business activity.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Louis F. Meizlish* and *Jack B. McIntyre III*, Assistant Prosecuting Attorneys, for the people.

Alona Sharon for defendant.

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

TUKEL, J. The prosecution appeals by leave granted[1] the circuit court's order denying the prosecution's interlocutory application for leave to appeal, which seeks a declaration that DataMaster logs, which are generated to document inspections of breath testing equipment used by police officers conducting alcohol-related investigations, are both nontestimonial under the Confrontation Clause of the Sixth Amendment and admissible as business records under MRE 803(6). This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We vacate.

I. FACTS

On October 3, 2017, Michigan State Police Trooper Jon Gjurashaj conducted a traffic stop of a car driven by defendant in Royal Oak, Michigan, because the front

[1] *People v Fontenot*, unpublished order of the Court of Appeals, entered September 25, 2019 (Docket No. 350391).

passenger was not wearing a seatbelt. Upon approaching the car, Trooper Gjurashaj saw that defendant had bloodshot, glassy eyes and droopy eyelids, and Trooper Gjurashaj smelled an odor of alcohol coming from the car and defendant's mouth. After defendant failed field sobriety tests, Trooper Gjurashaj arrested defendant for operating under the influence of alcohol. Defendant was then taken to a Michigan State Police post and given two DataMaster breath tests; both tests revealed a blood alcohol content of 0.09. In September 2017 and December 2017, Marvin Gier, a Class IV operator who conducted the 120-day tests on the DataMaster pursuant to state regulations, inspected the particular machine that was used on defendant, verified its accuracy, and certified that it was in proper working order, which is reflected in the DataMaster logs.

The prosecution filed a pretrial motion in limine in the 45th District Court to declare that the DataMaster logs are nontestimonial under the Confrontation Clause and admissible as business records under MRE 803(6); those declarations would have made it unnecessary for the prosecution to call Gier as a witness at trial. The district court denied the prosecution's motion in limine and stayed the trial pending the prosecution's appeal in the circuit court. On appeal, the circuit court concluded that it was proper for the district court to deny the prosecution's motion in limine because

> even assuming without deciding that the statements made by Marvin Gier were nontestimonial, the Court fails to see how it could reverse the trial court's June 25, 2019 Order when the People failed to present evidence before the trial court to support that the records in question amounted to business records. . . . Rather, the People appear to have merely promised to present such evidence at trial.

This appeal followed.

II. ANALYSIS

The prosecution argues that the DataMaster logs are nontestimonial and admissible as business records under MRE 803(6). We agree with both propositions.

A. STANDARD OF REVIEW

"The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). Furthermore, "[a] trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). "To the extent that a trial court's ruling . . . involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014) (quotation marks and citation omitted).

B. CONFRONTATION CLAUSE

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. In *Crawford v Washington*, 541 US 36, 50-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause, out-of-court testimonial statements are inadmissible against a criminal defendant unless the declarant is unavailable and the defendant has had a

previous opportunity to cross-examine the declarant. However, the Court stated that it would

> leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. [*Id*. at 68.]

A pretrial statement is testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if the statement was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 51-52 (quotation marks and citation omitted).

The United States Supreme Court later narrowed the scope of what constitutes a testimonial statement in a plurality opinion in *Williams v Illinois*, 567 US 50; 132 S Ct 2221; 183 L Ed 2d 89 (2012).[2] In *Williams*, Justice Alito, writing for a four-justice plurality, held that testimonial statements have two characteristics: "(1) [t]hey involve[] out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (2) they involve[] formalized statements such as affidavits, depositions, prior testimony, or confessions." *Id*. at 82. Our Supreme Court adopted the *Williams* "primary purpose" confrontation-clause analysis in *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012), when it held that a certificate of mailing was not a testimonial statement because the certificate of mailing's primary purpose

[2] "A plurality opinion of the United States Supreme Court, however, is not binding precedent." *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

was to establish that notice was given—not to be used at a later trial. See also *id*. at 706 ("Instead, we believe that the circumstances under which the certificate was generated show that it is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason.").

In *Nunley*, our Supreme Court additionally held that the circumstances under which a statement is given should be considered to determine whether a statement is testimonial. *Nunley*, 491 Mich at 706 ("[U]nder *Crawford* and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial."). For example, the Court characterized the certificate of mailing in *Nunley* as "a routine, objective cataloging of an unambiguous factual matter, documenting that the [Department of State] has undertaken its statutorily authorized bureaucratic responsibilities." *Id*. at 707. Consequently, the certificate of mailing was "created for an administrative business reason and kept in the regular course of the [Department of State]'s operations in a way that is properly within the bureaucratic purview of a governmental agency," and, therefore, was not a testimonial statement. *Id*.

In this case, the DataMaster logs are nontestimonial. The DataMaster logs were created before defendant's breath test to prove the accuracy of the DataMaster machine; they were not created for the purpose of prosecuting defendant specifically. Therefore, they did not "accus[e] a targeted individual of engaging in criminal conduct . . . ." *Williams*, 567 US at 82.

Furthermore, the DataMaster logs were created as part of the Michigan State Police's normal administra-

tive function of assuring that the DataMaster machine produces accurate results. The DataMaster would have been checked for proper functioning even if defendant had not been tested with it. Therefore, the primary purpose of Gier testing the DataMaster's accuracy was to comply with administrative regulations, see Mich Admin Code R 325.2653(3), and to ensure its reliability for future tests—not to prosecute defendant specifically. Accordingly, the DataMaster logs were nontestimonial and the trial court erred by holding that they were testimonial. See *Nunley*, 491 Mich at 706; see also *Melendez-Diaz v Massachusetts*, 557 US 305, 311 n 1; 129 S Ct 2527; 174 L Ed 2d 314 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.").

C. MRE 803(6)

Business records are admissible under MRE 803(6), which provides:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business,

> institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

"The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation." *People v Jambor (On Remand)*, 273 Mich App 477, 482; 729 NW2d 569 (2007).

The DataMaster logs in this case are business records under MRE 803(6). The Michigan State Police keep the DataMaster logs "in the course of a regularly conducted business activity" and it is "the regular practice of that business activity to make the . . . record" as required by the administrative DataMaster regulations. MRE 803(6). Mich Admin Code R 325.2653(3) states:

> Approved evidential breath alcohol test instruments shall be inspected, verified for accuracy, and certified as to their proper working order within 120 days of the previous inspection by either an appropriate class operator who has been certified in accordance with R 325.2658 or a manufacturer-trained representative approved by the department.

Although the DataMaster logs are occasionally presented at trials, they are not prepared for the purpose of litigation, but rather, because the administrative regulations require the keeping of such logs. Thus, the logs are admissible under MRE 803(6).[3]

Our dissenting colleague believes that the circumstances surrounding the creation of the DataMaster

[3] While the DataMaster logs are admissible as business records, this ruling does not prevent defendant from challenging the accuracy of the DataMaster testing machine itself in the future. We express no opinion on that question, or on whether such a challenge would go to weight rather than admissibility of the evidence.

logs in this case establish that the logs are untrustworthy and, therefore, that they cannot be admissible as business records. We disagree. MRE 803(6) addresses the trustworthiness of the type of document in question, not the specific document at issue in a given case. Whether the DataMaster logs at issue in this case were accurate has no effect on whether they are an actual business record. Indeed, a business record can certainly be inaccurate such as when a business intentionally creates inaccurate accounting statements for purposes of tax evasion. Those records are not trustworthy, but they certainly would be considered business records because they were created during the normal course of business. Whether those records should be believed by the fact-finder is a question of the weight and credibility of the evidence for the fact-finder to decide. Such is the case here. Whether the DataMaster logs in this case are accurate and trustworthy is a question of the weight that the fact-finder should give this evidence. See, e.g., *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."). That is a separate question from whether they are admissible as business records. Therefore, the DataMaster logs were admissible as business records. Defendant, however, may still challenge the reliability and credibility of the DataMaster logs. But that question is for the fact-finder to decide, not for the courts to decide in our gatekeeping function when determining whether evidence is admissible.

III. CONCLUSION

We vacate the district court's order denying the prosecution's motion in limine and remand to the

district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., concurred with TUKEL, J.

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent. The evidence in this case demonstrates that the specific records at issue are unreliable and therefore not admissible under MRE 803(6), irrespective of whether the records are considered "testimonial." Furthermore, the nature of the records at issue here is fundamentally different from the nature of the records at issue in the caselaw upon which the majority relies for the conclusion that they are not "testimonial." I would therefore affirm the lower courts.

As the majority explains, MRE 803(6) provides an exception to the hearsay-evidence rule for "records of regularly conducted activity" as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness*.[1] The term "business" as used in this paragraph includes business,

[1] As a consequence of this qualifying clause, I respectfully disagree with the majority that the analysis under MRE 803(6) considers only the general kind of document at issue and disregards trustworthiness concerns pertaining to the specific document at issue.

> institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [Emphasis added.]

"The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation." *People v Jambor (On Remand)*, 273 Mich App 477, 482; 729 NW2d 569 (2007). Importantly, however, nowhere in MRE 803(6) is there any limitation on the meaning of "trustworthiness" or specification of how or why a record might lack trustworthiness.

Given the circumstances under which the logs were created, "the source of information or the method or circumstances of preparation" clearly *does* "indicate [a] lack of trustworthiness." Defendant has provided evidence that Marvin Gier, the Class IV operator who conducted the 120-day tests on the DataMaster, testified in another proceeding (Proceeding 2) that he had used an expired test kit on one occasion (Proceeding 1), and he had no ability to prove that the test kits he used relevant to Proceeding 2 were not also expired. It appears from the Proceeding 2 transcript that Gier only learned he had made the mistake in Proceeding 1 because it was brought out on cross-examination.[2] Therefore, the testing procedure is clearly fallible and is not self-correcting. This is critical, because the testing logs are not merely a bureaucratic record indicating that a routine was followed. Rather, the logs are substantive evidence establishing the reliability of any particular alcohol level test performed by a DataMaster machine in specific cases. In turn, those indi-

[2] Although the implications of Gier's testimony in Proceeding 2 are easily deduced, the better practice would have been to also provide a transcript of Gier's testimony from Proceeding 1.

vidual alcohol level tests carry enormous probative weight. Indeed, in many cases, including felonies, the tests are outright conclusive and effectively unchallengeable—even if, as here, there is a danger that they might be wrong due to an improperly calibrated piece of equipment that is not itself capable of being examined. The evidence shows that the 120-day test logs may not, in fact, be trustworthy *for the purpose for which they are introduced into evidence*: to show that the DataMaster machines were properly tested and therefore provided reliable evidence of a defendant's blood alcohol level.

Importantly, the testing logs are not *merely* kept pursuant to a stray piece of bureaucratic red tape, to be filed away somewhere and usually forgotten. It begs the question simply to say that they are kept because a rule requires them to be kept. The purpose of the administrative rules pertaining to blood alcohol level breath tests is to ensure that the tests are accurate, and failure to comply with the rules therefore renders the accuracy of those tests questionable. *People v Boughner*, 209 Mich App 397, 398-399; 531 NW2d 746 (1995). Our Supreme Court has overruled older caselaw holding that noncompliance with breath-test administrative rules or statutes per se precludes the admissibility of those tests. See *People v Anstey*, 476 Mich 436, 446-449, 447 n 9; 719 NW2d 579 (2006). However, noncompliance with the administrative rules or statutes does undermine the probative value of those tests. See *People v Wager*, 460 Mich 118, 121, 125-126; 594 NW2d 487 (1999). Importantly, "the reliability of the testing device" remains a prerequisite to the admissibility of breath-test results. *People v Kozar*, 54 Mich App 503, 509 n 2; 221 NW2d 170 (1974), overruled in part on other grounds by *Wager*, 460 Mich

at 122-124.[3] In other words, although the testing logs are technically kept pursuant to a regulatory rule, the reason for the regulatory rule is *for the purpose of using the tests in prosecutions*. It cannot be overemphasized that the 120-day test logs do not simply show that a test was administered, but rather that a test was *properly* administered, which in turn is of direct relevance to the reliability and thus admissibility of the test.[4]

In contrast, the certificates of mailing at issue in *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012), were mechanistically generated purely for the purpose of showing the bare fact that a mailing had occurred. *Id*. at 690, 695-696. In other words, the certificates in *Nunley* contrast drastically with the logs here, which exist to certify that a potentially fallible human properly performed a complex operation calling for training

[3] *Wager* specifically only overruled *Kozar* to the extent *Kozar* held that there was a "reasonable time" requirement for the administration of blood alcohol level breath tests.

[4] Of course, noncompliance that has no actual bearing on the accuracy or reliability of testing equipment may be harmless. *People v Rexford*, 228 Mich App 371, 377-378; 579 NW2d 111 (1998). However, as noted, it appears that Gier himself only learned that he had used an expired test kit in Proceeding 1 because he was subpoenaed and called to testify. Thus, there is simply no way a defendant, facing potentially devastating and lifelong consequences, could test the reliability of the equipment used to dictate his or her fate unless that reliability is itself testimonial. It is impossible to determine whether noncompliance is harmless without first learning that it occurred. It has long been recognized that cross-examination is the " ' "greatest legal engine ever invented for the discovery of truth." ' " *People v Fackelman*, 489 Mich 515, 527 n 5; 802 NW2d 552 (2011), quoting *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970). This case shows that cross-examination serves more purposes than merely permitting the trier of fact to assess credibility. Justice requires that defendants be able to explore the reliability of and potential for human error in administering forensic tests that will likely otherwise be regarded as infallible.

and expertise. At the other end of the spectrum, the certificates at issue in *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009), were actually affidavits prepared by persons who conducted sophisticated analyses for the sole and direct purpose of criminal proceedings against particular individuals. *Id*. at 307-308, 310-311. Those certificates again contrast with the logs in this case, but in the opposite direction, because they were prepared to directly establish facts at issue in a specific prosecution. Thus, the 120-day testing logs here seem to occupy an intermediate position not directly addressed in any binding caselaw. However, because the logs are clearly kept for the *substantive* purpose of litigation, and because they offer one of the very limited avenues by which a defendant might be able to test the forensic evidence against him, I would find that the logs should be considered testimonial in nature. See *Nunley*, 491 Mich at 706-707.

Nevertheless, I recognize that, as the majority observes, because the logs "are necessarily created *before* the commission of any crime that they may later be used to help prove," *id*. at 707, our Supreme Court has held that they therefore per se cannot be "*made under circumstances* that would lead an objective witness reasonably to believe that [they] would be available for use at a later trial," *id*. at 709. Therefore, because the logs were not prepared for the benefit of a specific prosecution or targeted at a specific individual, even though they are clearly prepared for litigation, they are, by definition, not testimonial.

To reiterate, I find this reasoning concerning because, notwithstanding the applicable administrative rule, the DataMaster testing logs clearly are expected to be used in litigation, commonly are used in litiga-

tion, and are critical to establishing the reliability of evidence that is frequently conclusive per se and otherwise difficult to challenge. The United States Supreme Court has indicated that the business record exception is inapplicable "if the regularly conducted business activity is the production of evidence for use at trial" or "calculated for use essentially in the court, not in the business." *Melendez-Diaz*, 557 US at 321 (quotation marks and citation omitted). Because the entire purpose for keeping the logs is to establish the reliability of individual test results for prosecutions, they are clearly not just ordinary and routine administrative check-boxes, and I am unconvinced they are not, in substance, testimonial. At a minimum, they should not be admitted as business records without establishing their trustworthiness.

Therefore, I would hold that under the circumstances of this case, the lower courts correctly determined that the 120-day testing logs were not admissible under MRE 803(6), irrespective of whether the logs are testimonial, and I would affirm. I am constrained by *Nunley* to agree that the logs are, by definition, not "testimonial," but I believe the situation at bar differs significantly from the situation in *Nunley*. Therefore, I respectfully urge our Supreme Court to provide the bench and bar with additional guidance.

COOKE v FORD MOTOR COMPANY

Docket No. 346091. Submitted September 3, 2020, at Lansing. Decided September 10, 2020, at 9:10 a.m.

Angela A. Cooke, as personal representative of the estate of Madison C. Cooke, along with Megan E. Ockerman and Gina M. Badia, brought an action against Ford Motor Company (Ford Motor) in the Ingham Circuit Court, alleging wrongful-death and personal-injury claims under the owner's liability statute, MCL 257.401, and common-law vicarious liability. The claims arose from a single-vehicle accident in which the driver, Tariq Y. Strong, Jr., was driving a vehicle that had been leased by Debra Ockerman through a Ford Motor program that allowed certain management-level employees and retirees to lease Ford vehicles from Ford Motor. Debra allowed her daughter, Megan, to use the vehicle to go to a music festival with Strong, Madison, and Gina. Strong lost control of the vehicle and hit a tree; Strong and Madison were killed, and Megan and Gina were seriously injured. Regarding the leased vehicle, Ford Motor Credit Company (Ford Credit) purchased the vehicle from Ford Motor and then leased the vehicle back to Ford Motor, which, in turn, leased the vehicle to Debra pursuant to a "Master Vehicle Agreement." Ford Credit was the title owner. The lease agreement provided that the minimum term of the lease was nine months and that Ford Motor could request reasonable inspection and evaluation of the vehicle as well as request that the lessee provide Ford Motor with evaluation reports and produce the vehicle for inspection. The agreement also encouraged the lessee to allow others to drive the car for up to three days. Plaintiffs brought this action, and Ford Motor moved for summary disposition. Plaintiffs argued that Ford Motor was a statutory owner of the vehicle because it leased the vehicle from Ford Credit and that Ford Motor was a nonexempt lessor under the owner's liability statute because Ford Motor is not "engaged in the business of leasing motor vehicles." Following oral argument on the motion, the trial court, James S. Jamo, J., issued a ruling from the bench, concluding that Ford Motor was not a lessor and was subject to liability under MCL 257.401 as an owner of the motor vehicle. The trial court also concluded that plaintiffs presented a viable theory of common-law

vicarious liability against Ford Motor. Ford Motor moved for a stay pending interlocutory appeal, and the trial court granted the motion. Ford Motor sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application.

The Court of Appeals *held*:

1. The owner's liability statute, MCL 257.401, generally imposes liability on an owner of a motor vehicle for injuries caused by the negligent operation of that motor vehicle. However, MCL 257.401(2) exempts long-term lessors—those "engaged in the business of leasing motor vehicles" for a period that is greater than 30 days—from liability. Further, MCL 257.401a does not consider these long-term lessors to be "owners" for purposes of owner's liability. In this case, Ford Motor was a long-term lessor engaged in the business of leasing motor vehicles and therefore was exempt from statutory liability for negligent operation of the vehicle. The employee/retiree lease program in this case was similar to the program in *Ball v Chrysler Corp*, 225 Mich App 284 (1997), in which the Court of Appeals held that Chrysler was engaged in the business of leasing motor vehicles under a similar lease program for employees and retirees. As the Court of Appeals held in *Ball*, nothing in the owner's liability statute requires that the lessor's primary business be retail leasing or that the lease be profitable. The trial court erroneously applied the "incidental to service" test set forth in *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13 (2004), when it determined that Ford Motor was not engaged in the business of leasing motor vehicles. *Catalina* involved a tax statute—a statute with a different purpose and with its own definition of "business"—and those factors were inapplicable in this case. According to the plain language of the owner's liability statute, Ford Motor was engaged in the business of leasing motor vehicles and was exempt from liability under the owner's liability statute. The trial court erred by denying Ford Motor's motion for summary disposition.

2. Common-law vicarious liability arises from a relationship between a principal and an agent, and this relationship can be created in law or by contract. The central tenant of vicarious liability is that a master's liability is derivative of the servant's. The trial court relied on *Montgomery v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2007 (Docket No. 272862), a case in which Ford Motor was deemed vicariously liable for its employee's negligence, to determine that Ford Motor could be liable to plaintiffs on a common-law vicarious-liability theory. However, the facts in *Montgomery* were dissimilar to the facts in this case on critical

points: the person driving the vehicle in *Montgomery* was the lessee-employee, and the lease directed that the employee must primarily use the vehicle for product testing and evaluation purposes. In this case, Strong, the driver of the vehicle at the time of the accident, was not an employee acting within the scope of employment with Ford Motor; the lease at issue did not direct the employee to primarily use the vehicle for Ford Motor's testing and evaluation purposes; Strong was not driving the vehicle for the purpose of evaluating it at the behest of Ford Motor; and Ford Motor derived no benefit from Strong driving the leased vehicle at the time of the accident. Vicarious liability did not apply under these circumstances. Accordingly, the trial court erred by denying Ford Motor's motion for summary disposition with respect to plaintiffs' claims under the common-law doctrine of vicarious liability.

Reversed and remanded for entry of an order granting summary disposition in favor of Ford Motor.

NEGLIGENCE — OWNER'S LIABILITY STATUTE — LONG-TERM LESSORS — WORDS AND PHRASES — "ENGAGED IN THE BUSINESS OF LEASING MOTOR VEHICLES."

MCL 257.401 generally imposes liability on an owner of a motor vehicle for injuries caused by the negligent operation of that motor vehicle; however, MCL 257.401(2) exempts long-term lessors—those "engaged in the business of leasing motor vehicles" for a period that is greater than 30 days—from liability; MCL 257.401a does not consider these long-term lessors to be "owners" for purposes of owner's liability; nothing in the owner's liability statute requires that the lessor's primary business be retail leasing or that the lease be profitable for the lessor to be "engaged in the business of leasing motor vehicles" under the statute.

Sinas, Dramis, Larkin, Graves & Waldman, PC (by *George T. Sinas*, *Stephen H. Sinas*, *Kevin Z. Komar*, and *Joel T. Finnell*) for the estate of Madison C. Cooke.

Farhat & Story, PC (by *Kitty L. Groh*) for Megan E. Ockerman.

Garris, Garris, Garris & Garris, PC (by *Michael J. Garris*) for Gina M. Badia.

Dykema Gossett, PLLC (by *Boyd White III*, *James P. Feeney*, and *Fred J. Fresard*) and *Bush Seyferth & Paige PLLC* (by *Stephanie A. Douglas* and *Susan M. McKeever*) for Ford Motor Company.

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

CAVANAGH, P.J. Defendant, Ford Motor Company (Ford Motor), appeals by leave granted[1] an order denying its motion for summary disposition in this motor vehicle negligence action raising wrongful-death and personal-injury claims under two theories of liability: Michigan's owner's liability statute, MCL 257.401, and common-law vicarious liability. We reverse and remand for entry of an order granting summary disposition in favor of Ford Motor.

I. BACKGROUND FACTS

This action arose from a single-vehicle accident in which the driver, Tariq Y. Strong, Jr., and a passenger, Madison C. Cooke, were killed, and two other passengers, Megan E. Ockerman and Gina M. Badia, were seriously injured. The facts are generally undisputed. Strong was driving a 2015 Lincoln MKS sedan that had been leased by Debra Ockerman through a Ford Motor program that allowed certain management-level employees and retirees to lease Ford vehicles from Ford Motor. In June 2015, Ockerman allowed her 18-year-old daughter, Megan,[2] to use the vehicle to go to a music festival with Strong, Cooke, and Badia. Megan and her

[1] *Estate of Cooke v Ford Motor Co*, unpublished order of the Court of Appeals, entered March 28, 2019 (Docket No. 346091).

[2] Megan Ockerman will be referred to by her first name to distinguish her from her mother, Debra Ockerman, who will be referred to as Ockerman.

friends attended the music festival and began driving home after midnight. Megan asked Strong to drive. While Strong was driving, he lost control of the car and hit a tree. The collision killed Strong and Cooke. Megan and Badia survived but were seriously injured.

Cooke's estate, Megan, and Badia sued Ford Motor, alleging that as a statutory owner of the vehicle, Ford Motor was liable for Strong's negligent operation of that vehicle under Michigan's owner's liability statute, MCL 257.401. Plaintiffs also named Strong's estate as a defendant. Plaintiffs later filed an amended complaint adding the allegation that Ford Motor was vicariously liable for Strong's negligent operation of the vehicle as the employer of the vehicle's lessee, relying on *Montgomery v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2007 (Docket No. 272862). Plaintiffs filed a second amended complaint reasserting their previous claims and adding defendant Ford Motor Credit Company (Ford Credit), alleging that it, too, was liable under the owner's liability statute.[3]

Ford Credit purchased the vehicle from Ford Motor and then leased the vehicle back to Ford Motor, which, in turn, leased the vehicle to Ockerman. Ford Credit leased the vehicle to Ford Motor pursuant to a "Master Vehicle Agreement." Ford Credit is the title owner. The lease between Ford Motor and Ockerman[4] is entitled "Product Testing and Evaluation Vehicle Lease Agreement." The lessee's monthly payment for the lease of

[3] Ford Credit was subsequently dismissed on its motion for summary disposition, and that order has not been appealed. Thus, we do not further address that matter.

[4] The lease provides that use of the term "lessee" in the lease refers to the employee or retiree—in this case, Ockerman—who is leasing the vehicle.

the vehicle was $438. The minimum term of the lease was nine months. The lease provided that Ford Motor could, "[f]rom time to time," "request reasonable inspection and evaluation of the vehicle" and request that the lessee "produce the vehicle for inspection or provide [Ford Motor] with evaluation reports concerning the quality and performance of the vehicle." The lease allowed Ford Motor to terminate the lessee's participation in the lease program if the lessee failed to submit evaluation reports upon request or if Ford Motor determined that the lessee's participation "would be inappropriate as not serving [Ford Motor]'s interest . . . ." The lease included a provision that encouraged the lessee to allow others to drive the car for up to three days:

> To further [Ford Motor]'s interests by promoting its products, Lessee is encouraged to permit others to drive the vehicle for demonstration purposes. However, regular continuous assignment (herein defined as greater than 3 days) of the vehicle during the term of this lease is restricted to the Lessee and members of the Lessee's family.

After discovery, Ford Motor moved for summary disposition under MCR 2.116(C)(10), arguing that in light of the undisputed facts and this Court's interpretation of "engaged in the business of leasing" set forth in *Ball v Chrysler Corp*, 225 Mich App 284, 288-290; 570 NW2d 481 (1997), Ford Motor was not a statutory owner of the vehicle. Ford Motor argued that even if it were somehow a statutory owner, Michigan's owner's liability statute is preempted by 49 USC 30106 (the Graves Amendment), which prohibits the imposition of ownership liability on long-term lessors. Lastly, Ford Motor argued that it could not be held vicariously liable for Strong's negligence under *Montgomery*—or any

other theory of respondeat superior liability—because Strong was not Ford Motor's employee.

In response, plaintiffs argued that Ford Motor is a statutory owner of the vehicle involved in the accident because it leased the vehicle from Ford Credit. Even though Ford Motor subsequently leased the vehicle to Ockerman, plaintiffs argued, Ford Motor is considered a nonexempt lessor under the owner's liability statute because Ford Motor is not in the business of leasing motor vehicles. Plaintiffs asserted that the phrase "engaged in the business of leasing" should not be interpreted under *Ball* but instead under *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), a tax case interpreting the General Sales Tax Act, to determine whether, under the "incidental to service test," a business is "engaged in the business of" selling products in addition to services. Plaintiffs argued that Ford Motor's employee/retiree lease program is "incidental" to Ford Motor's primary business of selling cars. Plaintiffs also argued that Ford Motor was vicariously liable under the common-law principles identified in *Montgomery* because these principles were not limited to the context of the employer-employee relationship if the lease benefited the employer. Plaintiffs argued that under the reasoning in *Montgomery*, vicarious employer liability for contractually rendered benefits will attach when (1) a contract is entered into between the employer and the employee within the employment relationship, (2) the contract is for the rendition of services that benefit the employer, and (3) the injury occurs in the course of rendering those services. Lastly, plaintiffs argued that the Graves Amendment should be interpreted in accordance with *Catalina*.

Following oral argument on Ford Motor's motion, the trial court issued its ruling from the bench. The trial court concluded that Ford Motor is not a lessor because Ford Motor is not "in the business of leasing motor vehicles" within the meaning of the lessor exemption in the owner's liability statute, MCL 257.401a. Rather, the court noted, this activity was incidental to its business of developing and manufacturing motor vehicles. Ford Motor benefited by providing leased vehicles to certain executives in its employment, possibly as an incentive or as compensation, but also for the promotion of its vehicles to the public as well as for purposes of product testing and evaluation. Thus, Ford Motor was a lessee, not a lessor, and subject to liability under MCL 257.401(1) as an owner of the motor vehicle at issue.

Further, the trial court concluded, plaintiffs presented a viable theory of vicarious liability against Ford Motor. Specifically, the trial court stated:

> As to the second theory, the separate theory, which is one of vicarious liability, I'm not specifically relying on the *Montgomery* case because, obviously, it's not binding precedent. It's an unpublished decision. But it does—it does highlight what I think applies here, and that is common law vicarious liability potential that would apply here, as far as the use of this—this vehicle and the purposes of having the executive lease program.
>
> So I'm going to deny Ford Motor Company's motion for summary disposition as to both of those theories: The ownership liability or lessor—the issue as to ownership liability and to vicarious liability.
>
> But I'm not going to rule in favor, as far as a factual determination, in favor of the Plaintiffs. I think there is a fact question here.

The trial court granted Ford Motor's motion for stay pending this interlocutory appeal. Thereafter, this

Court granted Ford Motor's application for leave to appeal. *Estate of Cooke v Ford Motor Co*, unpublished order of the Court of Appeals, entered March 28, 2019 (Docket No. 346091).

II. OWNER'S LIABILITY STATUTE

Ford Motor argues that the trial court erred by concluding that Ford Motor could be held liable as a statutory owner under Michigan's owner's liability statute, MCL 257.401, because as a long-term lessor of over 15,000 vehicles, Ford Motor is exempt from owner's liability for plaintiffs' wrongful-death and personal-injury claims. We agree.

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Sullivan v Michigan*, 328 Mich App 74, 80; 935 NW2d 413 (2019). 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). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When there is a genuine issue of material fact, summary disposition is not proper. *Id*. "A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*,

322 Mich App 218, 224; 911 NW2d 493 (2017) (quotation marks and citation omitted).

This Court reviews questions of statutory interpretation de novo and a trial court's factual findings for clear error. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). A finding of fact "is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). When interpreting a statute, our goal is to ascertain and effectuate the meaning intended by the Legislature. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). First, we review the language of the statute. If the statutory language is clear and unambiguous, the plain meaning of the statute reflects the Legislature's intent. *Id*. In such cases, judicial construction is not permitted, and this Court will apply the statute as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

B. ANALYSIS

Plaintiffs sought damages from Ford Motor under the owner's liability statute of the civil liability act, MCL 257.401. That act is part of the Michigan Vehicle Code (the MVC), MCL 257.1 *et seq*., and for purposes of the MVC, the term "owner" is defined by MCL 257.37:

> "Owner" means any of the following:
>
> (a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (b) Except as otherwise provided in [MCL 257.401a], a person who holds the legal title of a vehicle.
>
> (c) A person who has the immediate right of possession of a vehicle under an installment sale contract.

The owner's liability statute, MCL 257.401, generally imposes liability on an owner of a motor vehicle for injuries caused by the negligent operation of that motor vehicle:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family. [MCL 257.401(1).]

"The purpose of the statute is to place the risk of damage or injury on the person who has the ultimate control of the motor vehicle, as well as on the person who is in immediate control." *North v Kolomyjec*, 199 Mich App 724, 726; 502 NW2d 765 (1993), abrogated on other grounds by *Chandler v Muskegon Co*, 467 Mich 315 (2002). However, the owner's liability statute exempts long-term lessors from liability:

> A person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days, or a dealer acting as agent for that lessor, is not liable at common law for damages for injuries to either person or property resulting from the operation of the leased motor vehicle, including damages occurring after the expiration of the lease if the vehicle is in the possession of the lessee. [MCL 257.401(2).]

The civil liability act does not consider such a lessor an "owner" for purposes of owner's liability, stating:

> As used in this chapter, "owner" does not include a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days. [MCL 257.401a.]

Ford Motor argues that as a long-term lessor engaged in the business of leasing motor vehicles, it is excluded from the statutory definition of "owner" and exempt from both statutory and common-law liability for negligent operation of the motor vehicle under MCL 257.401(2) and MCL 257.401a. Ford Motor maintains that *Ball*, 225 Mich App 284, is on point both factually and legally, requiring judgment for Ford Motor.

In *Ball*, the plaintiff was injured while a passenger in a vehicle that was leased to a Chrysler employee through Chrysler's employee/retiree lease program as part of its normal business operations. *Id*. at 285. The lease was for two years, and as part of the lease agreement, the employee was required to complete surveys regarding the vehicle at certain mileage intervals. *Id*. The driver at the time of the accident was the employee's stepson. The stepson lost control of the vehicle, which rolled over, injuring the plaintiff. *Id*. The plaintiff sued Chrysler, the employee, and the employee's stepson. *Id*. Chrysler sought summary disposition under MCR 2.116(C)(10), arguing that as a lessor, it was excluded from owner's liability. *Id*. at 286. Chrysler noted that it was uncontested that Chrysler leased cars as part of its business and that the lease for the employee's car was for two years. *Id*. Chrysler presented an affidavit indicating that Chrysler was in the business of leasing motor vehicles. *Id*. at 289. The plaintiff argued that "the vehicle lease was not a true

lease, but more like a vehicle-testing agreement, because the lessee had an obligation to make reports and provide information to Chrysler." *Id*. at 286. The trial court agreed that a question of fact existed as to whether the lease between the employee and Chrysler was, in fact, a "lease" or more akin to a vehicle-testing agreement or fringe benefit; therefore, the trial court denied Chrysler's motion for summary disposition. *Id*.

On appeal, Chrysler argued that the trial court had erred by not determining that Chrysler was "in the business of leasing motor vehicles" under MCL 257.401(2) and MCL 257.401a and therefore was not an "owner" subject to liability under MCL 257.401(1). *Ball*, 225 Mich App at 287-288. This Court agreed, holding:

> Turning to the record before us, plaintiff presented no evidence to counter the affidavit that Chrysler was in the business of leasing motor vehicles. Rather, plaintiff argued that the agreement between Chrysler and [the employee], under Chrysler's employee/retiree lease program, was not a true lease. We disagree. Although the program presumably gave [the employee] a discount lease rate and required that he fill out questionnaires from time to time, there is no question that the agreement between Chrysler and [the employee] was an automobile lease. Nothing in the statute requires that the lessor's primary business be retail leasing, or, for that matter, that the lease be profitable. There is no issue of material fact that Chrysler was "in the business of leasing motor vehicles."
>
> * * *
>
> In sum, there is no question of material fact that Chrysler is in the business of leasing vehicles . . . . Accordingly, under the plain and unambiguous language of the owner's liability statute, Chrysler is not the "owner" of the vehicle involved in the instant case. MCL 257.401, [MCL] 257.401a. The circuit court erred in denying Chrysler's

> motion for summary disposition pursuant to MCR 2.116(C)(10). [*Id*. at 289-290.]

In the present case, plaintiffs argued in the trial court that *Ball* is not dispositive. Plaintiffs agreed that this Court held that Chrysler was entitled to summary disposition on the question of whether it was in the business of leasing motor vehicles. Plaintiffs asserted, however, that the holding was not based on the interpretation of the phrase "engaged in the business of leasing motor vehicles" but, rather, was solely based on the fact that Chrysler averred in an affidavit that it was engaged in the business of leasing vehicles and the plaintiff did not present any evidence to rebut that fact. Plaintiffs acknowledged that in the present case Ford Motor similarly relied on an affidavit to establish that it was engaged in the business of leasing motor vehicles, but plaintiffs argued that the present case is distinguishable from *Ball* because plaintiffs refuted the affidavit with deposition testimony and other documentary evidence. Plaintiffs relied on the testimony of Ford Motor's vehicle program manager, David Smith, who testified that Ford Motor does not make a profit from the lease program and that the Ford employee benefits from participating in the lease program in the form of a cheaper lease rate that merely offsets the costs of the program. Plaintiffs maintained that the lease in this case was merely "incidental" to Ford Motor's primary business of designing, manufacturing, and selling automobiles and was intended to benefit Ford Motor by (1) providing a fleet of vehicles that it could use to evaluate known problems with the vehicles, (2) advancing Ford Motor's marketing efforts, and (3) providing a cost-effective fringe benefit to Ford Motor executives.

The trial court was persuaded by plaintiffs' argument and concluded that Ford Motor is not a lessor for

purposes of MCL 257.401a and MCL 257.401(2) because it is not engaged in the business of leasing motor vehicles. The court stated that Ford Motor's lease program

> is incidental to Ford Motor Company's business of developing, designing, however you want to describe that, manufacturing motor vehicles, and that the leasing is used as a benefit both in terms of a reward or compensation or incentive to a certain level of executive at Ford Motor Company and use[d] for promotion of vehicles for the public and to engage in product testing and evaluation as is described by the lease that's applicable here itself.

Ford Motor argues that the trial court's decision is contrary to *Ball*. In support, Ford Motor notes that Smith attested that Ford Motor "is in the practice of leasing vehicles to its management-level employees for periods of greater than 30 days . . . ." Smith also testified that Ford Motor leased the vehicle involved in this case to Ockerman on September 23, 2014, for a period greater than 30 days.

On review of the record, it appears that the employee/retiree lease program in this case is similar to the lease program in *Ball*. Smith testified that the management lease program "is a perk for what we call LL6 management-level employees and above. And then certain retirees, if they're at the LL4 level and above." Smith explained that "making money" on the leased cars was not really the goal of the program; rather, the goal was to provide a perk to certain employees, and that perk was also considered a tool to attract and retain employees. But Ford Motor does benefit merely by putting vehicles on the road. Smith said that Ford Motor had approximately 15,000 vehicles in the program, with 10,000 to 12,000 of them in Michigan. Because most of these vehicles are in south-

east Michigan, the program has very little promotional value to Ford Motor. Smith explained that Ford Motor secures automobile liability coverage that is prorated for all lease vehicles in the fleet and that the prorated cost of insurance is paid by each employee. The employee is also responsible for a $250 repair fee for each accident.

While the leased vehicle is a fringe benefit to the lessee Ford Motor employee, and while Ford Motor does not necessarily derive a monetary profit from its lease program, we nevertheless reach the same conclusion as the *Ball* Court: "Nothing in the statute requires that the lessor's primary business be retail leasing, or, for that matter, that the lease be profitable." *Ball*, 225 Mich App at 289. Ford Motor presented evidence that it leases approximately 15,000 vehicles a year under its employee/retiree lease program pursuant to a lease agreement for a term of no less than nine months. According to the plain terms of the statutes, Ford Motor was "engaged in the business of leasing motor vehicles" as contemplated by MCL 257.401(2) and MCL 257.401a and is exempt from liability under the owner's liability statute.[5]

And we agree with Ford Motor's contention that the trial court erroneously applied the "incidental to service" test set forth in *Catalina*, 470 Mich at 24, when it determined that Ford Motor was not engaged in the business of leasing motor vehicles. In *Catalina*, the

[5] See also *Joe Panian Chevrolet, Inc v Young*, 239 Mich App 227, 228, 231; 608 NW2d 89 (2000) (holding that a dealership that rented a vehicle for four days, at a rate of $30 a day, to a customer whose vehicle was in the dealership for repair was "engaged in the business of leasing motor vehicles" for purposes of MCL 257.401(5) of the owner's liability statute, which sets forth the circumstances when a short-term lessor will be liable for injuries caused by the negligent operation of the motor vehicle that it leased).

issue was whether a grocery-store checkout-coupon program was a retail sale for purposes of the retail sales tax statute, MCL 205.52. *Id*. at 14. The Court considered the proper test for categorizing business relationships involving both the provision of services and the transfer of tangible property as either a service or a retail sale, generating either use tax or sales tax, and adopted the "incidental to service" test. *Id*. at 14-15, 19, 24. *Catalina* involved a tax statute—a statute with a different purpose and with its own definition of "business."[6]

In this case, neither the trial court nor plaintiffs cited any case that applies the incidental-activity test to the owner's liability statute. And neither the trial court nor plaintiffs cited anything in the owner's liability statute or related caselaw that requires a lessor to demonstrate that its lease program is undertaken for profit or that it be the lessor's primary business. The *Catalina* factors are relevant to "whether the transfer of tangible property was incidental to the rendering of . . . services . . . ." *Id*. at 26. There is nothing to support plaintiffs' suggestion that *Catalina* "overrules by implication" cases interpreting a different phrase in a different statute with a different purpose. The *Catalina* factors are inapplicable in this case, and the trial court erred by implicitly applying those factors.

In summary, the trial court erred by denying Ford Motor's motion for summary disposition because Ford Motor is a lessor engaged in the long-term leasing of motor vehicles and is exempt from civil liability for the negligent use of the leased motor vehicles. In light of

[6] For purposes of the sales tax act, " 'Business' includes an activity engaged in by a person or caused to be engaged in by that person with the object of gain, benefit, or advantage, either direct or indirect." MCL 205.51(1)(e).

our conclusion, we decline to address as moot Ford Motor's alternative argument that the Graves Amendment preempts any liability that would be imposed against Ford Motor under the owner's liability statute.

III. VICARIOUS LIABILITY

Next, Ford Motor argues that the trial court erred by concluding that Ford Motor could be held vicariously liable for a nonemployee's negligent operation of a leased vehicle. We agree.

A. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Sullivan*, 328 Mich App at 80. A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and should be granted if, after consideration of the evidence submitted by the parties in the light most favorable to the nonmoving party, no genuine issue regarding any material fact exists. *Joseph*, 491 Mich at 206; *Maiden*, 461 Mich at 120.

B. ANALYSIS

Plaintiffs sought to hold Ford Motor liable for Strong's negligent operation of the leased vehicle under a common-law theory of vicarious liability. In general, vicarious liability arises from a relationship between a principal and an agent. *Rogers v J B Hunt Transp, Inc*, 466 Mich 645, 650; 649 NW2d 23 (2002). In *Rogers*, the Court stated:

> [A] master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment. An employer is not vicariously liable for acts committed by its employees outside the scope

> of employment, because the employee is not acting for the employer or under the employer's control. For example, it is well established that an employee's negligence committed while on a frolic or detour, or after hours, is not imputed to the employer. In addition, even where an employee is working, vicarious liability is not without its limits. [*Id*. at 651 (quotation marks and citations omitted).]

"[A] master's liability is derivative of the servant's"—that is the central tenet of vicarious liability. *Id*. at 652. This agency relationship can be created in law or by contract. *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 559; 847 NW2d 679 (2014). As has been explained:

> The modern basis for vicarious liability is that, as a matter of public policy, an enterprise or an activity should bear the risk of a tort—committed or resulting from omission—of those who, in fact, carry on the enterprise, activity or operation. It is a part of the cost of doing business or carrying on various activities[.] [57B Am Jur 2d, Negligence, § 1753, pp 447-448.]

In this case, the trial court determined that Ford Motor could be liable to plaintiffs on a vicarious-liability theory. Although recognizing that it was not binding authority, the trial court relied on *Montgomery v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2007 (Docket No. 272862), as persuasive. However, the facts in that case are dissimilar to the facts in this case on critical points. While the vehicle involved in an automobile accident in *Montgomery* was also a vehicle leased through a product testing and evaluation lease agreement, the person driving the vehicle at the time of the accident was the lessee-employee, and she was on her way to work. *Id*. at 2. Further, the lease in *Montgomery* directed that the employee must " 'primarily . . . use the car for product testing and evalua-

tion purposes . . . ." *Id*. at 3. The *Montgomery* employee testified that she was always evaluating the vehicle while driving it and submitted vehicle evaluations regularly to Ford Motor. *Id*. Under those unique circumstances, Ford Motor was deemed vicariously liable for its employee's negligence because the employee's operation of the vehicle at the time of the accident conferred a benefit on Ford Motor. *Id*. That is, at the time of the accident, the employee's operation of the vehicle was "related to her employment with Ford, and she was engaged in the service of the master (Ford) by driving and evaluating the vehicle." *Id*. at 4. Clearly, that is not the case here.

Strong, who was driving the vehicle at the time of this accident, was not the lessee of the vehicle; he was not a Ford Motor employee conceivably acting within the scope of such employment when the accident occurred; the lease did not direct the lessee-employee to primarily use the car for Ford Motor's testing and evaluation purposes; Strong was not driving the vehicle for the purpose of evaluating it at the behest of Ford Motor; and Ford Motor derived no benefit from Strong driving the leased vehicle at the time of the accident. Vicarious liability simply has no application under these circumstances. Therefore, the trial court erred by denying Ford Motor's motion for summary disposition with respect to plaintiffs' claims under the common-law doctrine of vicarious liability.

IV. CONCLUSION

The trial court's order denying Ford Motor's motion for summary disposition is reversed because (1) Ford Motor is exempt from owner's liability for plaintiffs' wrongful-death and personal-injury claims and (2) Ford Motor is not vicariously liable for Strong's negligence.

This matter is remanded for entry of an order granting summary disposition in favor of Ford Motor.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant, Ford Motor Company. We do not retain jurisdiction.

BORRELLO and TUKEL, JJ., concurred with CAVANAGH, P.J.

PEOPLE v DIXON

Docket No. 349631. Submitted September 2, 2020, at Grand Rapids. Decided September 10, 2020, at 9:15 a.m. Reversed and remanded 509 Mich ___ (2022).

Hamin L. Dixon pleaded guilty in the Chippewa Circuit Court to attempted possession of a cell phone by a prisoner, MCL 800.283a and MCL 750.92, in exchange for dismissal of a charge of possession of a cell phone by a prisoner and for an agreement not to charge him as a fourth-offense habitual offender. Defendant was incarcerated at a prison in Chippewa County in 2016 when he was found in possession of a cell phone by prison staff during routine rounds. Following a search of the area within defendant's control, prison staff found a cell phone charger. After pleading guilty, defendant was sentenced to serve 11 to 30 months in prison, with the term of imprisonment set to begin running upon the expiration of the term of imprisonment he was already serving. Defendant later claimed that the cell phone did not belong to him, and he presented an affidavit from his cellmate asserting that the cellmate was the owner of the cell phone. Defendant later filed a motion challenging the sentence as invalid and requesting rescoring of Offense Variable (OV) 19, MCL 777.49, and resentencing on the ground that the trial court had improperly assessed 25 points for OV 19. The trial court, James P. Lambros, J., concluded that OV 19 had been properly scored because a cell phone, like a weapon, by its nature was threatening to the safety and security of a penal institution. Defendant appealed.

The Court of Appeals *held*:

Under MCL 777.49, 25 points should be assessed for OV 19 when the offender, by their conduct, threatened the security of a penal institution or court. In this case, defendant pleaded guilty to attempted possession of a cell phone while incarcerated in a correctional facility. The record revealed that the phone was found in defendant's possession and that a phone charger was found in his area of control. The fact that the Legislature criminalized cell phone possession by prisoners indicates that there are inherent dangers in the presence and unmonitored use of a cell phone within the confines of a penal institution. Such contraband threat-

ens the safety and security of prison staff and prisoners because of the numerous ways in which a prisoner could use an unmonitored cell phone for illicit purposes, including to communicate with persons outside of the prison regarding escape, assault of prison staff or other prisoners, witness intimidation, procurement and delivery of contraband into the prison, and various other criminal activities affecting the safety and security of penal institutions. For these reasons, a prisoner's possession or attempted possession of a cell phone while incarcerated threatens the security of the penal institution, and if a defendant is found guilty of these offenses, a trial court may properly assess 25 points for OV 19. The trial court properly applied and interpreted MCL 777.49(a), properly relied on information in the presentence investigation report and a preponderance of the evidence in the record in scoring OV 19, and drew reasonable inferences from the facts that supported its score for OV 19. Therefore, defendant was not entitled to resentencing.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Robert L. Stratton, III*, Prosecuting Attorney, for the people.

Michael Vogler for defendant.

Before: REDFORD, P.J., and BECKERING and M. J. KELLY, JJ.

REDFORD, P.J. Defendant appeals by delayed leave granted his sentence imposed by the trial court following acceptance of his guilty plea to attempted possession of a cell phone by a prisoner, contrary to MCL 800.283a and MCL 750.92, in exchange for dismissal of the charge of prisoner in possession of a cell phone and for an agreement not to charge defendant as a fourth-offense habitual offender. The trial court sentenced defendant to 11 to 30 months' imprisonment to be served consecutively to the prison term he was serving at the time of sentencing. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

At his plea hearing, defendant admitted that on May 21, 2016, while incarcerated in a Department of Corrections (DOC) prison in Chippewa County, he attempted to possess a cell phone. He admitted that he understood that his conduct violated the prison rules and state laws. He pleaded guilty to attempted possession of a cell phone by a prisoner and the trial court accepted his plea.

The DOC prepared and submitted to the trial court a presentence investigation report (PSIR), which explained that at approximately 12:09 a.m. on May 21, 2016, during routine rounds, prison staff found defendant in a bathroom in possession of a cell phone. Prison staff confiscated the cell phone, searched defendant's area of control, and found a cell phone charger. The PSIR also reported that during his incarceration, defendant incurred 22 major misconduct reports related to fighting, possession of a weapon, substance abuse, theft, and destruction of property. Defendant's criminal history included 14 felony convictions. The DOC recommended that the trial court assess defendant 25 points for Offense Variable (OV) 19, MCL 777.49, on the ground that his conduct threatened the security of the penal institution because possession, use, and attempted use of a cell phone within the secure perimeter of a correctional facility put the lives of staff and inmates in jeopardy and interfered with correctional administrators' ability to maintain institutional safety and security given that unmonitored communication with outside persons could involve matters of escape, assault of prisoners and staff, and the introduction of contraband into the prison.

At defendant's sentencing hearing, the trial court asked defendant if he had reviewed the PSIR, and

defense counsel indicated that he had. The trial court gave defendant an opportunity to speak, and defendant alluded to additional facts regarding the cell-phone incident.

In this colloquy, defense counsel stated that defendant's cellmate indicated in an affidavit that the cell phone belonged to him. Defense counsel said that the cell phone had been found in close proximity to a bathroom stall occupied by defendant but not in his possession.

In response, relying on information in the PSIR, the prosecution responded that defendant had been the only person in the bathroom and he had the cell phone on his person when prison staff found it. The prosecution explained that the inmate who provided the affidavit was defendant's friend and cellmate who was serving a life sentence, and he came forward a year and a half later to say that he gave defendant the cell phone and defendant did not want to have it. The prosecution stated that, based on the information, he agreed to make the plea offer. The prosecution, however, argued that possession of a cell phone jeopardized the safety of the prison and prisoners and constituted a breach of the security of the facility. The prosecution also advised the trial court of defendant's criminal history and his misconduct during his incarceration. Defense counsel advocated for sentencing defendant in the middle of the guidelines range, and the trial court agreed to sentence defendant to a minimum sentence of 11 months with a maximum of 30 months, to be served consecutively to his current prison sentence.

Defendant later moved to correct the sentence as invalid on the ground that the trial court had improperly scored OV 19. At the hearing, defendant argued that his plea to attempted possession of a cell phone did

not justify the assessment of 25 points for OV 19, which is scored under circumstances where a defendant's conduct threatened the security of a penal institution. He asserted that no evidence established that he actually used the cell phone, talked to anyone, or that the phone even worked. He explained that during allocution at sentencing, he had expressed that he did not want the cell phone, and an inmate came forward later and provided an affidavit that clarified that the cell phone did not belong to defendant. Defendant asserted that the prosecution had agreed to dismiss the possession charge, which indicated that it did not view defendant's conduct as a threat to the security of the penal institution. Defendant contended that no evidence established that he used the cell phone to plan an escape or smuggle contraband. Defendant essentially argued that more criminality had to be established to warrant assessment of 25 points for OV 19. Defendant asked the court to rescore OV 19 at zero and resentence him accordingly.

The prosecution argued that the Legislature made it a criminal offense for a prisoner to have a cell phone while incarcerated because such conduct threatens the security and safety of prisons. The prosecution explained that inmate phone calls were monitored and recorded for the safety of the prison, and unauthorized cell phone communication with the outside world interfered with the maintenance of security at the prison. In particular, the prosecution asserted, cell phones were used as currency for illicit drug deals in prison, and violence occurred because of the presence of cell phones in prisons. The prosecution argued that the offense warranted assessment of 25 points for OV 19.

At the end of the motion hearing after having the benefit of counsels' arguments and considering the entire record, the trial court stated:

> *The Court*: Well, in this set of circumstances, I agree[with the prosecutor]. I don't know under what set of circumstances a prisoner possessing a cell phone[,] whether the cell phone works, appears to work, doesn't work[,] cannot threaten the institution and the safety of the institution of the Michigan Department of Corrections. I don't know under what set of circumstances that wouldn't.
>
> Because that . . . device can be used or could be used to cause serious harm to not only other inmates but set somebody up for all sorts of problems by just possessing it. So I don't quite understand what set of circumstances that wouldn't threaten the safety, as would a weapon. I think they're synonymous in the sense that I think that those two items, narcotics there's a gray area there, but I think a weapon and a cell phone definitely by their nature threaten the institution.
>
> At least a cell phone for sure threatens the institution and safety of the Michigan Department of Corrections just by possessing it because it's clearly prohibited. . . . I believe it was scored correctly.

The trial court, thus, concluded that OV 19 had been correctly scored and denied defendant's motion. Defendant now appeals.

II. STANDARD OF REVIEW

We review for clear error the trial court's factual determinations used for sentencing under the sentencing guidelines, and such facts must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo the trial court's application of the facts to the law. *Id*. We review de novo the trial court's interpretation and application of the statutory sentencing guidelines. *People v Jackson*, 487 Mich 783, 789; 790 NW2d 340 (2010). A trial court's factual determination will be found clearly erroneous only if it leaves us with a

definite and firm conviction that the trial court made a mistake. *People v Armstrong*, 305 Mich App 230, 242; 851 NW2d 856 (2014).

III. ANALYSIS

When scoring the sentencing guidelines, a sentencing court may consider all evidence in the record including the contents of a PSIR and plea admissions. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). A PSIR "is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). A trial court may draw inferences from objective evidence when sentencing the defendant. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008).

OV 19 must be scored for all felony offenses. MCL 777.22. OV 19 applies when a defendant's conduct posed a threat to the security of a penal institution or court, or interfered with the administration of justice. MCL 777.49 provides, in relevant part, as follows:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points

The plain language of MCL 777.49(a) requires assessment of 25 points when an offender's "conduct threatened the security of a penal institution." In this case, defendant pleaded guilty to the attempted possession of a cell phone while incarcerated in a correc-

tional facility. The record reveals that prison staff found defendant in a bathroom in possession of a cell phone and later discovered a cell phone charger located in his area of control. In the context of controlled substances, this Court explained in *People v Dickinson*, 321 Mich App 1, 23-24; 909 NW2d 24 (2017), that

> [b]ringing a controlled substance like heroin into a prison and delivering it to a prisoner in violation of MCL 800.281(1) inherently puts the security of the penal institution at risk. Our Legislature has specifically criminalized such conduct because of the seriousness of the problem of drugs in our state's penal institutions and the way in which illicit drug use interferes with the administration of justice in those institutions. Defendant's delivery of an unquestionably dangerous drug like heroin into the confines of the prison threatened the safety and security of both the guards and the prisoners and, therefore, threatened the security of a penal institution.

This Court further explained that the plain language of MCL 777.49 "does not limit the assessment of 25 points for OV 19 to offenders who *smuggled weapons or other mechanical destructive devices* into a prison." *Id*. at 24 (emphasis added). The Legislature's criminalization of cell phone possession indicates that prisoners shall not have cell phones within a penal institution because of the inherent dangers posed by the presence and unmonitored use of a cell phone within the confines of a penal institution. It is axiomatic that a prisoner's possession of contraband like a cell phone threatens the safety and security of the prison staff and prisoners because of the numerous ways in which a prisoner may use such a device for illicit purposes, with prison staff left without a means of intercepting such unmonitored communications to prevent violation of prison rules and the commission of serious crimes. A prisoner should not have the ability

to engage freely in unmonitored communications with persons outside of the penal institution. Such communications place correctional facility administrators and staff at a serious disadvantage in maintaining institutional safety and security and in their efforts to prevent escape, assault of prison staff or other prisoners, witness intimidation, procurement and delivery of contraband into the prison, and myriad other criminal activities affecting the safety and security of penal institutions.

We hold that a prisoner's possession or attempted possession of a cell phone within the confines of a penal institution threatens the security of the penal institution; and if a defendant is found guilty of that offense, a trial court may properly assess 25 points for OV 19.

The trial court in this case correctly relied on the information within the PSIR, a preponderance of the evidence in the record, and drew reasonable inferences from the facts to support its assessment of 25 points for OV 19. The trial court properly interpreted and applied MCL 777.49(a). Defendant's conduct warranted the assessment of 25 points for OV 19, and therefore, he is not entitled to resentencing.

Affirmed.

BECKERING and M. J. KELLY, JJ., concurred with REDFORD, P.J.

PEOPLE v OLNEY (ON REMAND)

Docket No. 343929. Submitted July 17, 2020, at Lansing. Decided September 10, 2020, at 9:20 a.m. Leave to appeal denied 507 Mich 948 (2021).

Casey L. Olney was charged in the 12th District Court with first-degree home invasion, MCL 750.110a(2); assault by strangulation, MCL 750.84; interfering with electronic communications, MCL 750.540(5)(a); and domestic violence, MCL 750.81(2). Although the complainant had been subpoenaed, she did not appear for the preliminary examination. Despite the complainant's absence, the court, R. Darryl Mazur, J., in accordance with MCL 768.27c, permitted a police officer to testify at the preliminary examination regarding statements the complainant had made to the police officer as substantive evidence for the purpose of establishing probable cause. Defendant was bound over for trial in the Jackson Circuit Court, and defendant moved to quash the bindover. Following a hearing, the circuit court, John G. McBain, J., granted defendant's motion, holding that the police officer's testimony was inadmissible because the district court did not declare the complainant unavailable and because the officer's testimony violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. The prosecution appealed. The Court of Appeals, SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., reversed the circuit court's decision, holding that there was no unavailability requirement in MCL 768.27c and that a right of confrontation did not apply at the preliminary examination. 327 Mich App 319 (2019). Defendant sought leave to appeal in the Supreme Court, and in lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration of defendant's argument that MCL 768.27c does not apply to preliminary examinations. 505 Mich 1029 (2020).

On remand, the Court of Appeals *held*:

MCL 768.27c applies to preliminary examinations. The plain language of MCL 768.27c(6) states, "This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006." In this case, defendant argued that the phrase

"evidentiary hearings" did not encompass a preliminary hearing. However, the very purpose of the preliminary examination is to admit evidence on each element of a crime and to establish probable cause to believe that the defendant committed that crime. Furthermore, there was no logical rationale to apply MCL 768.27c at trial and other types of evidentiary hearings but not at a preliminary examination. Additionally, although not dispositive or controlling, the legislative history and analyses concerning 2006 PA 79, which enacted MCL 768.27c, provided absolutely no indication that when incorporating MCL 768.27c(6) into the statute, the Legislature intended to prohibit the use of the statute at the preliminary examination. Defendant further argued that MCL 768.27c does not apply to preliminary examinations because MCR 6.110(D)(2) distinguishes between preliminary examinations and evidentiary hearings. MCR 6.110(D)(2) addresses the necessity for a separate evidentiary hearing to decide questions concerning the admissibility of evidence, but that did not mean that preliminary examinations are not a type of evidentiary hearing. Rather, the preliminary examination is, in effect, the evidentiary hearing at which the district court determines whether sufficient evidence has been presented to warrant the bindover. More importantly, nothing in the language of MCL 768.27c demonstrated that the Legislature sought to adopt any such distinction from MCR 6.110(D). Finally, the omission of MCL 768.27c from MCL 766.11b(1), which addresses the foundational and authentication requirements for certain reports and records at the preliminary examination, did not support defendant's attempt to preclude hearsay statements pertaining to domestic violence from admission at the preliminary examination. Accordingly, MCL 768.27c was applicable at defendant's preliminary examination.

Reversed and remanded for reinstatement of the charges.

EVIDENCE — HEARSAY EXCEPTIONS — DOMESTIC VIOLENCE — STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS — PRELIMINARY EXAMINATIONS.

Under MCL 768.27c, statements made to law enforcement officers are admissible in domestic-violence cases under certain circumstances; MCL 768.27c applies to preliminary examinations.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*) for defendant.

ON REMAND

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

PER CURIAM. This case returns to us by order of our Supreme Court for consideration of defendant's newly raised "argument that MCL 768.27c does not apply to preliminary examinations."[1] *People v Olney*, 505 Mich 1029, 1029 (2020). We conclude that MCL 768.27c does apply to preliminary examinations. Consequently, we once again reverse the circuit court decision to quash the bindover and remand for reinstatement of the charges.

I. BASIC FACTS AND PROCEDURAL HISTORY

In our prior opinion, we summarized the facts and procedural history as follows:

> Defendant was initially charged with first-degree home invasion and domestic violence. Although the prosecution subpoenaed the complainant for the preliminary examination, she did not appear. The prosecutor informed the district court that, despite the alleged victim's absence, the prosecution intended to proceed with the preliminary examination on the basis of the testimony of the law enforcement officer who responded to the scene, Deputy David Thomas of the Jackson County Sheriff's Office. The prosecutor stated that Thomas's hearsay testimony was admissible under MCL 768.27c, the statutory hearsay exception for statements to law enforcement officers made by victims of domestic violence under circumstances that

[1] In his application to our Supreme Court, defendant acknowledged that this issue was not preserved in the circuit court or raised in the claim of appeal to this Court.

would indicate the statement's trustworthiness. Defense counsel objected, noting that he did not believe that the statutory hearsay exception could apply to charges *other than* domestic abuse. The district court responded that the exception existed "for the very reason that the prosecutor is experiencing right now" because the prosecution had subpoenaed "someone that has either been intimidated or for whatever reason refuses to cooperate." As the actual examination began, the prosecutor informed the district court that "based upon what was told to the officer," he was adding charges of assault by strangulation and interfering with telephonic communications, which were not included in the original complaint.

Thomas testified that at approximately 9:30 a.m. on October 18, 2017, he responded to a residence in Liberty Township, Michigan, after dispatch informed him of a domestic-assault complaint and a possible violation of a conditional bond. When he arrived on site, the complainant was standing in the driveway. Thomas described her demeanor as "[f]airly calm" and "not hysterical, but she was upset." When the prosecutor asked Thomas what the complainant had said to him, defense counsel objected and asked for "a continuing objection for any and all statements that are used that are *beyond the purpose of establishing a domestic violence* in this matter." That is, defense counsel continued to object to Thomas's testimony in a very limited way. While apparently conceding that the evidence was admissible for the purposes of establishing probable cause on the domestic-violence charges, defense counsel argued that the complainant's statement could not be used to establish probable cause for any other offense. In response, the district court stated:

> All right. Well we understand the nature of your objection. We briefly discussed the matter. The quandary is whether or not the statute permits hearsay given the circumstances of it being made to a police officer contemporaneous with the act itself and involving domestic [violence] applies to something beyond the charge of domestic violence. The Court is taking a flier at this point in time that it

> does. It's kind of in the spirit of the direction that the legislature seems to be going in almost eliminating probable cause or preliminary examinations. So I will allow the testimony and it can be reviewed by a superior court if it gets to that stage.

Thomas testified that the complainant had told him that she woke up to find defendant, her ex-boyfriend, in her apartment. Defendant was there to collect the money that the complainant admittedly borrowed from him and was supposed to have paid back the day before. The complainant told Thomas that when she yelled at defendant and told him that he was not supposed to have contact with her, defendant grabbed her by the neck and threw her to the ground. Defendant also took the complainant's cell phone, threw it on the ground, and broke it. Thomas's report indicated that the complainant reported that she had trouble breathing. Thomas observed redness and irritation on the complainant's neck but did not take any photographs.

Following cross-examination, the district court reviewed MCL 768.27c and concluded that Thomas's "statement is admissible [if] the information is admissible." The district court found that the prosecution established probable cause, and defendant was bound over for trial.

Defendant filed a motion to quash in the circuit court, arguing that the use of Thomas's testimony to establish probable cause *for crimes other than domestic violence* violated defendant's constitutional right to confront his accuser. The circuit court issued a written opinion, the reasoning of which departed from the arguments made by defense counsel. The circuit court apparently rejected defendant's claim that the statute applied only to domestic-violence charges. It ruled:

> MCL 768.27c(1)(b) applies to offenses involving domestic violence, that being any offense that is connected to a domestic violence incident. For example a Home Invasion entering without permission, one of the elements is "that when defendant entered the dwelling, he/she intended to commit State offense" if

> the offense is domestic violence or related to a domestic violence then the exception would apply, but if the offense is larceny for example then the exception would not apply.
>
> However, the circuit court went on to add that when it enacted MCL 768.27c, the Legislature intended to carve out an additional hearsay exception when the complainant was unavailable, similar to the exception found in MRE 804(b). The circuit court interpreted MCL 768.27c as requiring that "first the victim must be declared unavailable then and only then can you use this exception to hearsay." The court then concluded that, because the complainant was not declared unavailable, the exception did not apply.
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> The circuit court also held that the exception could not apply because the statements of the complainant
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> > are testimonial, and that by not having [the complainant] there the Confrontation Clause of the sixth amendment was violated. Furthermore the exception to the hearsay rule found in MCL 768.27[c], extends on MRE 804(b) and you must first get passed [sic] the Confrontation Clause of the Sixth amendment before you can use a hearsay exception.
>
> The circuit court granted the motion to quash and dismissed the charges against defendant. [*People v Olney*, 327 Mich App 319, 322-325; 933 NW2d 744 (2019).]

In reversing the circuit court, we held that there was no unavailability requirement in MCL 768.27c and that a right of confrontation did not apply at the preliminary examination. *Id*. at 327-331.

II. ANALYSIS

A. STANDARD OF REVIEW

The interpretation of a statute, including the application of facts to the law, is reviewed de novo. *People v*

Calloway, 500 Mich 180, 184; 895 NW2d 165 (2017).[2] The goal when interpreting statutes is to give effect to legislative intent by examining the plain language of the words of the statute. *Id*. When the language of a statute is unambiguous, the Legislature intended the meaning expressed, and the statute must be enforced as written. *Id*. It is presumed that the Legislature acts with knowledge of existing law. *People v Schultz*, 435 Mich 517, 543-544; 460 NW2d 505 (1990) (BRICKLEY, J., dissenting); *People v Harrison*, 194 Mich 363, 369; 160 NW 623 (1916).

The legislative history of an act may be examined to determine the reason for the act as well as to discern the meaning of its provisions. *People v Green*, 260 Mich App 710, 715; 680 NW2d 477 (2004). Legislative history is extremely useful when it demonstrates an intent to repudiate a judicial interpretation or addresses alternatives in statutory language. *Id*. However, legislative history is given little significance when it does not present an official view of the legislators, and legislative history may not be invoked to create an ambiguity that does not otherwise exist. *Id*. The legislative bill analysis does have probative value in limited circumstances. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007). Accordingly, it may be appropriate for this Court to look to the legislative history to help ascertain the Legislature's purpose in creating a statute as well as determining the statute's meaning. *Id*.

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[2] Generally, issues not raised in the trial court are reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, our Supreme Court directed us to resolve this issue without limitations.

B. MCL 768.27c APPLICATION

For the first time in his application for leave to appeal to our Supreme Court, defendant claimed[3] that MCL 768.27c could not be applied to preliminary examinations. We disagree.

MCL 768.27c precisely addresses the proceedings to which it applies. Specifically, the plain language of MCL 768.27c(6) states, "This section applies to trials *and evidentiary hearings* commenced or in progress on or after May 1, 2006." (Emphasis added.) However, defendant submits that the phrase "evidentiary hearings" does not encompass a preliminary hearing. A preliminary examination is, at its core, an evidentiary hearing. See *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003) ("As [MCL 766.13] indicates, the preliminary examination has a dual function, i.e., to determine whether a felony was committed and whether there is probable cause to believe the defendant committed it. At the examination, evidence from which at least an inference may be drawn establishing the elements of the crime charged must be presented."); *People v Kubasiak*, 98 Mich App 529, 532; 296 NW2d 298 (1980) ("While positive proof of guilt is not required, there must be evidence [at the preliminary examination] on each element of the crime charged or evidence from which those elements may be inferred."). Thus, the very purpose of the preliminary examination is to admit evidence on each element of a crime and to establish probable cause to believe that the defendant committed that crime. Further, there does not appear to be a logical rationale to apply the

[3] We address defendant's argument as found in the application for leave to appeal filed with our Supreme Court. Defendant did not move to file supplemental pleadings with this Court.

statute at trial and other types of evidentiary hearings, but not at a preliminary examination.

Additionally, although not dispositive or controlling, the legislative history and analyses concerning 2006 PA 79, which enacted MCL 768.27c, provide absolutely no indication that when incorporating MCL 768.27c(6) into the statute, the Legislature intended to prohibit the use of the statute at the preliminary examination. Specifically, it is noteworthy that MCL 768.27c(6) was not inserted into the senate bill, 2005 SB 263, until the bill was nearing passage by both houses of the Legislature. The Senate passed this bill on November 3, 2005, without any language regarding when or where the statute would be effective. The language appeared in the House's version of the bill, which it passed on March 7, 2006. The Senate approved the House's version of the bill on March 14, 2006, and the Governor signed the bill (which was given immediate effect) on March 23, 2006. Given that MCL 768.27c(6) set an effective date of May 1, 2006, it seems fairly clear that the provision was added in order to make it clear *when* this new evidentiary rule would apply, not necessarily to limit the types of proceedings in which the statute would be applicable.

That conclusion is buttressed by the various legislative analyses prepared with respect to the bill. The Senate Committee Summary, dated October 18, 2005, explains that the bill would make certain evidence admissible in a "criminal action"; no reference is made to limiting the introduction of this evidence in the manner defendant suggests. Senate Legislative Analysis, SB 263 (October 18, 2005), p 2. The same may be said about the Senate Floor Analysis. That analysis simply explains that the bill would make certain evidence admissible. Senate Legislative Analysis, SB 263

(November 2, 2005). After the bill was passed by the Senate, a bill analysis explained that the rationale of the bill stemmed from the fact that "it is common that a domestic violence victim will make a statement to a police officer or other emergency responder but later may be unwilling to testify in court against the abuser. Some people believe that such a statement should be admissible as evidence of the wrongdoing, regardless of the victim's willingness to testify." Senate Legislative Analysis, SB 120 (Substitute S-4) and SB 263 (Substitute S-6) (February 9, 2006), p 1. Again, notably absent is any indication whatsoever that the Senate intended to limit the rule's applicability to certain phases of the criminal proceeding.[4]

Nonetheless, defendant contends that MCL 768.27c does not apply to preliminary examinations because the Michigan Court Rules, specifically MCR 6.110(D)(2), distinguish between preliminary examinations and evidentiary hearings. However, defendant's contention is comprised of a single sentence that does not develop the issue in any meaningful way. In any

[4] The House's summary of the bill similarly contains no suggestion that the new rule would not apply in any phase of a criminal proceeding. House Legislative Analysis, SB 120 and SB 263 (February 13, 2006). Neither does the House Committee Summary. House Legislative Analysis, SB 120 and SB 263 (February 27, 2006). The first mention of MCL 768.27c(6) is in the analysis of the enrolled bill. In that analysis, the rationale for the bill is the same as explained by the Senate's February 9, 2006 analysis. Regarding MCL 768.27c(6), the analysis states simply that Enrolled Bill 263, as well as Enrolled Bill 120, would "apply to trials and evidentiary hearings commenced or in progress on or after May 1, 2006." Senate Legislative Analysis, SB 120 and SB 263 (May 11, 2006), p 1. Nothing in the remainder of the analysis discloses any intention to limit the applicability of either bill to any particular phase or phases of a criminal proceeding. Rather, it would appear that the bills were enacted to make certain evidence admissible in a criminal proceeding and that the only real purpose of MCL 768.27c(6) was to set a date when the new rule of evidence would apply.

event, MCR 6.110 generally describes the preliminary-examination procedure, and MCR 6.110(D) states:

> (1) The court shall allow the prosecutor and defendant to subpoena and call witnesses from whom hearsay testimony was introduced on a satisfactory showing that live testimony will be relevant.
>
> (2) If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
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> (a) a prior evidentiary hearing, or
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> (b) a prior evidentiary hearing supplemented with a hearing before the trial court, or
>
> (c) if there was no prior evidentiary hearing, a new evidentiary hearing.

We do not read the court rule as concluding that preliminary examinations are wholly distinct from evidentiary hearings. Rather, the court rule addresses the necessity for a separate evidentiary hearing to decide questions concerning the admissibility of evidence. That does not mean that preliminary examinations are not a type of evidentiary hearing. Rather, the preliminary examination is, in effect, the evidentiary hearing at which the district court determines whether sufficient evidence to warrant the bindover is made. More importantly, nothing in the language of MCL 768.27c demonstrates that the Legislature sought to adopt any such distinction from MCR 6.110(D), a judicially adopted rule. See MCR 1.104.

Defendant also argues that by failing to include MCL 768.27c in MCL 766.11b(1), the Legislature has indicated that MCL 768.27c does not apply at the preliminary examination. MCL 766.11b(1) states:

> (1) The rules of evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:
>
> (a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.
>
> (b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.
>
> (c) A report other than a law enforcement report that is made or kept in the ordinary course of business.
>
> (d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.

Plainly, MCL 766.11b(1) addresses the foundational and authentication requirements for certain reports and records at the preliminary examination. MCL 768.27c does not contain any reference to admission of records or other documents; rather, MCL 768.27c addresses statements pertaining to physical injury or domestic violence. The reason MCL 768.27c is not listed in MCL 766.11b(1) is obvious: MCL 768.27c has nothing to do with the purpose of MCL 766.11b(1). The

omission of MCL 768.27c from MCL 766.11b(1) does not support defendant's attempt to preclude hearsay statements pertaining to domestic violence from admission at the preliminary examination.

Consequently, we conclude that the plain language of MCL 768.27c(6) unambiguously applies at trials and evidentiary hearings. The preliminary examination is a type of evidentiary hearing, and thus, the statute applies at that stage. Defendant has shown no reason why the phrase "evidentiary hearing" should be read differently in this context, and the legislative history appears to show that the Legislature never intended for MCL 768.27c(6) to be read in the manner defendant suggests. Accordingly, the statute was applicable at defendant's preliminary examination.

Reversed and remanded for reinstatement of the charges raised against defendant. We do not retain jurisdiction.

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

DAVIS v SECRETARY OF STATE

Docket No. 354622. Submitted September 8, 2020, at Lansing. Decided September 16, 2020, at 9:00 a.m. Leave to appeal denied 506 Mich 1040 (2020).

Robert Davis filed an action in the Court of Claims against the Secretary of State, seeking declaratory and injunctive relief to enjoin defendant from mailing unsolicited absent-voter ballot applications to all registered voters in the August 2020 primary election and the November 2020 general election. Plaintiff filed the action after receiving an unsolicited application from defendant along with an accompanying letter encouraging voters to vote from home because of the COVID-19 pandemic; a registered voter could then use the application to apply for an absent-voter ballot from his or her local clerk. The Court of Claims consolidated plaintiff's action with Court of Claims Docket Nos. 20-000091-MM and 20-000096-MZ, both of which raised the same issue. Plaintiff in this case argued that defendant lacked authority under Michigan's 1963 Constitution and the Michigan Election Law, MCL 168.1 *et seq*., to send unsolicited absent-voter ballot applications to registered voters. Defendant moved for summary disposition. The Court of Claims, CYNTHIA D. STEPHENS, J., granted defendant's motion and dismissed plaintiff's action, as well as the plaintiffs' claims in the other actions, concluding that defendant had authority to send the unsolicited absent-voter ballot applications. Plaintiff appealed.

The Court of Appeals *held*:

1. In 2018, Michigan voters approved Proposition No. 18-3 (Proposal 3), which amended Article 2, § 4 of Michigan's Constitution; the provision now grants all qualified registered voters the right to vote by absent-voter ballot without giving a reason for wanting to do so. And Article 2, § 4(1), which enumerates voters' rights including the right to vote by absent-voter ballot, provides that it must be liberally construed in favor of those rights. Under Article 5 of the Constitution, the Secretary of State, as a single executive heading a principal department, must perform duties prescribed by law. In that regard, MCL 168.21 provides that the Secretary of State is the chief elections officer of the state and has

supervisory authority over local election officials performing their duties. Under MCL 168.31, the Secretary of State must issue instructions and promulgate rules for the conduct of elections and registration in accordance with Michigan law, advise and direct local election officials as to the proper methods of conducting elections, and prescribe and require uniform forms, notices, and supplies the Secretary of State considers advisable for use in the conduct of elections and registrations. Those provisions do not prohibit the Secretary of State from sending ballot-application forms to registered voters and specifically grant the Secretary of State broad discretion to fulfill the duties of the office to facilitate the election process and to enable qualified registered voters to exercise their constitutional right to vote, including by absent-voter ballot. Thus, the Secretary of State has inherent authority to take measures to ensure that voters are able to avail themselves of the constitutional right to vote by absent-voter ballot as established by Proposal 3. In addition, under *Elliott v Secretary of State*, 295 Mich 245 (1940), election officials have authority to do everything necessary to effectuate the purposes of a constitutional provision that is within the official's purview, and the Secretary of State's purview as chief elections officer includes the authority to notify voters of the newly available constitutional mechanism for voting. MCL 168.31(1)(e) and the Secretary of State's role as chief elections officer, taken together, evidence that the Legislature granted the Secretary a broad measure of discretion in conducting and supervising elections, which includes providing voters information and absent-voter ballot applications that substantially comply with the form prescribed by the Legislature in MCL 168.759(5). Accordingly, the Secretary of State has authority to mail absent-voter ballot applications to qualified registered voters.

2. With regard to absent-voter ballots, MCL 168.759(3) provides that an application for an absent-voter ballot may be made by (1) written request signed by the voter, (2) on an absent-voter-ballot-application form provided by the clerk of the city or township, or (3) on a federal postcard application. The doctrine of *expressio unius est exclusio alterius* does not apply given that the phrasing of MCL 168.759(3) is permissive; the permissive phrasing does not preclude the use of other means to obtain an application form. In addition, the provision directs how a voter may obtain an absent-voter-ballot-application form but does not control how election officials perform their duties. MCL 168.759 further provides that an applicant must sign the application and that the city or township clerk must have absent-voter-ballot-

application forms available in their offices at all times and shall furnish the application form to anyone when requested verbally or by written request.

3. In this case, the language of MCL 168.759(3), in conjunction with defendant's constitutional and statutory duties under MCL 168.21, MCL 168.31, and Article 2, § 4 of the Michigan Constitution, permitted defendant to mail absent-voter-ballot-application forms to qualified registered voters in Michigan. By doing so, defendant did not interfere with the local clerks' duties under MCL 168.759 to review and approve applications before issuing applicants absent-voter ballots. Accordingly, the Court of Claims did not err by granting defendant summary disposition.

Affirmed.

METER, J., concurring in part and dissenting in part, agreed with the majority in all respects except for its analysis of MCL 168.759(3). A textual plain reading of MCL 168.759(3)(a), as supported by application of the doctrine of *expressio unius est exclusio alterius* to the provision, requires *voters* to make a written request for an absent-voter ballot application. The Legislature plainly delegated only to local clerks the ministerial power to distribute absent-voter ballot applications. Defendant's supervisory powers did not imbue her with an authority that the Legislature did not grant; instead, the Legislature's delegation of that power to local clerks operated to exclude defendant's authority to do the same. Judge METER would have held that defendant violated MCL 168.759(3) when she mailed unsolicited absent-voter ballot applications to registered voters and that the Court of Claims erred when it granted defendant summary disposition.

ELECTIONS — SECRETARY OF STATE — AUTHORITY TO MAIL ABSENT-VOTER BALLOT APPLICATIONS.

The Secretary of State has authority under MCL 168.21, MCL 168.31, and Article 2, § 4 of Michigan's 1963 Constitution to mail absent-voter ballot applications to qualified registered voters.

Robert Davis *in propria persona*.

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

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Larry J. Saylor*, *Wendolyn Wrosch Richards*, *Ashley N. Higginson*, and *Erika L. Giroux*) for The Brennan Center for Justice.

Before: TUKEL, P.J., and METER and REDFORD, JJ.

REDFORD, J. Plaintiff, Robert Davis, appeals by right the Court of Claims' order granting defendant, Michigan's Secretary of State, summary disposition under MCR 2.116(C)(8) and (10) and dismissing plaintiff's claims. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND FACTS

In the November 2018 election, Michigan voters approved passage of Proposition No. 18-3 (Proposal 3), which, among other things, amended the Michigan Constitution, Const 1963, art 2, § 4, to provide all registered voters the right to vote by absentee ballot without giving a reason. In the case before us, plaintiff challenged the Secretary of State's unsolicited mailing of absent-voter ballot applications to registered Michigan voters by mail before the August 4, 2020 primary election and the November 3, 2020 general election, accompanied by a letter that encouraged absentee voting from home to stay safe in relation to the COVID-19 outbreak. The Secretary of State did not mail absent-voter ballot applications to voters in locales where the local election officers planned to send applications to all registered voters, and the Secretary did not send actual ballots.

Plaintiff sued the Secretary of State after receiving an unsolicited application that he could use for applying to his local clerk for an absentee ballot.[1] Plaintiff sought declaratory and injunctive relief, alleging that the Secretary of State lacked authority under state law and the Constitution to mail unsolicited absent-voter ballot applications to all registered voters and that the sending of unsolicited applications violated the constitutional requirement of the separation of powers under Const 1963, art 3, § 2. He sought to enjoin the Secretary from mass mailing unsolicited absent-voter ballot applications to registered voters in Michigan. The Secretary of State answered plaintiff's complaint and moved for summary disposition.

In an opinion and order issued August 25, 2020, the Court of Claims concluded that the Secretary of State had authority to send the absent-voter ballot applications at issue, granted summary disposition for the Secretary under MCR 2.116(C)(8) and (C)(10), and dismissed the consolidated cases. This appeal followed.

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[1] The Court of Claims consolidated plaintiff's action with two similar Court of Claims cases, *Cooper-Keel v Secretary of State*, Case No. 20-000091-MM, and *Black v Secretary of State*, Case No. 20-000096-MZ. Plaintiff Cooper-Keel did not appeal the order granting summary disposition. Plaintiff Black initially took no action to appeal that order either. However, on September 10, 2020, two days *after* the day on which, pursuant to this Court's previously released scheduling order, this expedited appeal had been submitted to the Court, plaintiff Black filed a motion to intervene in this appeal. On September 11, 2020, this Court issued an order denying plaintiff Black's request to intervene because the expedited treatment of this matter made it impracticable at that late stage to grant intervention. *Davis v Secretary of State*, unpublished order of the Court of Appeals, entered September 11, 2020 (Docket No. 354622). We note that because the Court of Claims granted summary disposition against plaintiff Black in the same opinion and order in which it had granted summary disposition against plaintiff Davis and which is the subject of the instant appeal, plaintiff Davis's thorough briefing has had the effect of fully protecting plaintiff Black's interest in the outcome of this case.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition in an action seeking declaratory relief. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 167; 952 NW2d 491 (2020) (*League of Women Voters I*), oral argument ordered on the application 505 Mich 988 (2020). We also review de novo questions of constitutional and statutory interpretation, which present issues of law. *Frank v Linkner*, 500 Mich 133, 140; 894 NW2d 574 (2017); *Makowski v Governor*, 495 Mich 465, 470; 852 NW2d 61 (2014).

Concerning the interpretation of the state Constitution and statutes, this Court in *League of Women Voters of Mich v Secretary of State*, 333 Mich App 1, 14; 959 NW2d 1 (2020) (*League of Women Voters II*) (opinion by SAWYER, P.J.), explained the rules for interpreting constitutional provisions as follows:

> When interpreting constitutional provisions, this Court applies two rules of interpretation. *Makowski*[, 495 Mich at 472]. "First, the interpretation should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Id*. (quotation marks and citation omitted). "Words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate." *In re Burnett Estate*, 300 Mich App 489, 497-498; 834 NW2d 93 (2013). Every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Second, the interpretation should consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Makowski*, 495 Mich at 472-473 (quotation marks, citation, and brackets omitted).

In *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 136; 892 NW2d 33 (2016), this Court explained the rules for statutory interpretation:

> When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. If the language of a statute is unambiguous, we presume the Legislature intended the meaning expressed in the statute. A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning. . . . When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law. [Quotation marks and citation omitted.]

Courts "may not pick and choose what parts of a statute to enforce" but, rather, "must give effect to every word of a statute if at all possible so as not to render any part of the statute surplusage or nugatory." *Id*. at 143. Courts "may not speculate regarding legislative intent beyond the words expressed in the statute." *Id*. at 145 (quotation marks and citation omitted). "This Court reads the provisions of statutes reasonably and in context, and reads subsections of cohesive statutory provisions together." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014) (quotation marks and citation omitted). When courts interpret statutes, they must first look to the specific statutory language to determine the intent of the Legislature, and 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).

III. ANALYSIS

A. THE SECRETARY OF STATE'S CONSTITUTIONAL AND STATUTORY AUTHORITY

Plaintiff argues that the Court of Claims committed legal error by ruling that the Secretary of State had authority to distribute unsolicited applications for absentee ballots to Michigan registered voters. He contends that MCL 168.759 does not expressly authorize the Secretary of State to mail out such applications and asserts that, read correctly, our Constitution and state law prohibit the Secretary from doing so. Therefore, he argues, the Court of Claims should not have granted the Secretary of State summary disposition. We disagree.

The Michigan Constitution provides, "All political power is inherent in the people." Const 1963, art 1, § 1.[2] In 2018, the people of this state exercised this power when they, as registered voters, amended the Constitution by approving Proposal 3. As a result of the enactment of Proposal 3, all registered qualified voters have a right to vote absentee without giving a reason for desiring to do so.[3] As a result of the passage of Proposal 3, Const 1963, art 2, § 4 now provides, in relevant part:

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[2] Two of our state's previous three Constitutions made this exact same declaration as to the source of constitutional legitimacy. See Const 1908, art 2, § 1; Const 1835, art 1, § 1.

[3] MCL 168.758 controlled qualification to vote absentee before the enactment of 2018 PA 603 (see enacting § 1) and Proposal 3. Former MCL 168.758 provided, in relevant part:

> (1) For the purposes of this act, "absent voter" means a qualified and registered elector who meets 1 or more of the following requirements:
>
> (a) On account of physical disability, cannot without another's assistance attend the polls on the day of an election.

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

* * *

(g) The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. During that time, election officials authorized to issue absent voter ballots shall be available in at least one (1) location to issue and receive absent voter ballots during the election officials' regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election. Those election officials shall have the authority to make absent voter ballots available for voting in person at additional times and places beyond what is required herein.

* * *

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is

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(b) On account of the tenets of his or her religion, cannot attend the polls on the day of election.

(c) Cannot attend the polls on the day of an election in the precinct in which he or she resides because of being an election precinct inspector in another precinct.

(d) Is 60 years of age or older.

(e) Is absent or expects to be absent from the township or city in which he or she resides during the entire period the polls are open for voting on the day of an election.

(f) Cannot attend the polls on election day because of being confined in jail awaiting arraignment or trial.

> provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.
>
> (2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Likewise, our Constitution and laws define the role and duties of the Secretary of State. Const 1963, art 5, § 3 states, in relevant part: "The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general." As a single executive heading a principal department, the Secretary of State shall "perform duties prescribed by law." Const 1963, art 5, § 9.

Under the Michigan Election Law, MCL 168.1 *et seq*., and specifically MCL 168.21, the Secretary of State is the chief elections officer of the state and has supervisory authority over local election officials performing their duties. *League of Women Voters I*, 331 Mich App at 162; *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 566; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018). MCL 168.31 requires the Secretary of State to perform certain duties regarding elections:

> (1) The secretary of state shall do all of the following:

(a) Subject to subsection (2), issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.

(b) Advise and direct local election officials as to the proper methods of conducting elections.

* * *

(e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

Under MCL 168.31, local election officials must follow the Secretary of State's instructions regarding the conduct of elections. *Secretary of State v Berrien Co Bd of Election Comm'rs*, 373 Mich 526, 530-531; 129 NW2d 864 (1964). Under MCL 168.32, the Legislature authorized a Bureau of Elections within the office of the Secretary of State and authorized the Secretary of State to appoint a Director of Elections to whom is delegated the powers to perform the duties of the Secretary of State respecting the supervision and administration of election laws.

B. MICHIGAN ELECTION LAW REGARDING ABSENT-VOTER BALLOTS

MCL 168.759, which addresses applying for an absent-voter ballot, provides, in relevant part, as follows:

(3) An application for an absent voter ballot under this section may be made in any of the following ways:

(a) By a written request signed by the voter.

(b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.

(c) On a federal postcard application.

(4) An applicant for an absent voter ballot shall sign the application. A clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application. A person shall not be in possession of a signed absent voter ballot application except for the applicant; a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application.

(5) The clerk of a city or township shall have absent voter ballot application forms available in the clerk's office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request. The absent voter application must be in substantially the following form:[4]

* * *

(6) The following instructions for an applicant for an absent voter ballot must be included with each application furnished an applicant:[5]

* * *

(7) A person who prints and distributes absent voter ballot applications shall print on the application the warning, certificate of authorized registered elector returning absent voter ballot application, and instructions required by this section.

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[4] The Legislature in Subsection (5) then set forth the required format an absent-voter ballot application must take.

[5] The Legislature in Subsection (6) then set forth the required format and language regarding instructions that must be followed by an absentee voter.

As related to the question before the Court of Claims and this Court, the Legislature has provided that an application for an absent-voter ballot may be obtained by mail by a voter submitting a signed written request,[6] by submitting an absent-voter-ballot-application form provided by the clerk of a city or township,[7] or by a federal postcard application.[8] MCL 168.759(7), as set forth earlier, requires any person printing or distributing absent-voter ballot applications to follow certain guidelines and requirements.

In this case, the Secretary of State, acting as the chief elections officer of the state, sent absent-voter ballot applications to registered Michigan voters. MCL 168.759 does not mention the Secretary of State, nor does it place any restrictions on the Secretary of State's powers under MCL 168.21 or MCL 168.31; those powers specifically grant the Secretary of State broad discretion to fulfill his or her duties in facilitating the election process and enabling qualified registered voters to exercise their constitutional right to vote, including by absentee ballot.

Plaintiff cites *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007), to argue that MCL 168.759 precludes mailing unsolicited absent-voter ballot applications to registered voters. We find, however, as did the court below, that *Taylor* is inapposite to the facts of this case. In *Taylor*, the defendant city clerk, a candidate in the election, mailed unsolicited absent-voter ballot applications to approximately 150,000 of the 500,000 registered voters in Detroit. This Court explained that the defendant, as a municipal officer, had only those

[6] MCL 168.759(3)(a).

[7] MCL 168.759(3)(b).

[8] MCL 168.759(3)(c).

powers conferred by law and that MCL 168.759(5) limited her authority and prohibited conduct beyond the scope of those statutory duties. *Id*. at 89, 94-95. This Court concluded that the statute did not permit the defendant's mass mailing of absent-voter ballot applications because "[t]o construe MCL 168.759 to permit [the defendant] to distribute, in her official capacity, what amounts to propaganda at the city's expense is certainly not within the scope of Michigan election laws or the Michigan Constitution." *Id*. at 96. In this case, however, the Secretary of State is not a candidate in the forthcoming election, and she has not limited her mailing of applications to a particular subset of voters. Consequently, *Taylor* has no application to the present case.

C. ANALYSIS OF THE SECRETARY OF STATE'S AUTHORITY REGARDING THE CONSTITUTIONAL RIGHT TO VOTE BY ABSENT-VOTER BALLOT

As the chief elections officer, with constitutional authority to "perform duties prescribed by law," the Secretary of State had the inherent authority to take measures to ensure that voters were able to avail themselves of the constitutional rights established by Proposal 3 regarding absentee voting.

As explained by our Supreme Court in *Elliott v Secretary of State*, 295 Mich 245, 249; 294 NW 171 (1940), "[E]verything reasonably necessary to be done by election officials to accomplish the purpose of" a constitutional provision regarding the procedure for the election of Justices of the Supreme Court, "is fairly within its purview." Thus, election officials should "prepare ballots in such a manner as will most effectively comply with the constitutional mandate touching the preservation of the purity of elections . . . ." *Id*. at 250.

The amendment at issue in *Elliott* changed the manner in which judicial officers were elected in Michigan from a partisan ballot to a nonpartisan ballot. The petitioner there sought to compel the Secretary of State to rotate the order of candidates' names in the nonpartisan part of the ballot. In holding that candidates' names had to be rotated, our Supreme Court relied on the "purity of elections" provision of the Constitution as requiring election officials to ensure that ballots are created in such a manner so as to accomplish the purpose of the constitutional amendment, even absent specific statutory guidance. *Elliott* retains its vitality under the Constitution of 1963. See *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 123; 168 NW2d 222 (1969).

We conclude that the Secretary of State's action in mailing an application that each registered voter was free to fill out and return, or not, fell within her authority as chief elections officer of the state and comported with her constitutional obligation to liberally construe Const 1963, art 2, § 4(1) to effectuate its purposes. See *Elliott*, 295 Mich at 250 (noting that "it is the clear duty of election officials, when reasonably possible, to prepare ballots in such a manner as will most effectively comply with the constitutional mandate" at issue). While MCL 168.31(1)(e) is not applicable because the Secretary did not "[p]rescribe" to local election officials any particular "uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections," that section, together with the Secretary of State's role as chief elections officer, evidences that the Legislature granted the Secretary a broad measure of discretion in conducting and supervising elections. Such discretion certainly includes providing voters information and absent-voter ballot applications that substantially

comply with the form prescribed by the Legislature in MCL 168.759(5). See *League of Women Voters II*, 333 Mich App at 21-22 (opinion by SAWYER, P.J.) (noting that "[v]oting is not the single act of marking a ballot, but the entire process," including applying for a ballot). Even more to the point, we find nothing in MCL 168.21 and MCL 168.31 that *prohibits* the Secretary of State from sending absent-voter ballot applications to qualified registered voters in this state. Moreover, by furnishing the applications, the Secretary of State furthered the purposes of informing qualified registered voters of their right to vote by absentee ballot and facilitated their first step of applying for an absentee ballot to enable them to exercise their constitutional right if they so choose. Certainly, the Secretary could have declined to provide such applications and relied on voters' ability to learn of the right to vote absentee, and how to exercise it, on their own. But undoubtedly there were voters who would have been unaware of their new constitutional right to vote absentee and who would not have known, absent conducting research, how to exercise that right. Under the circumstances, the decision that the Secretary of State made to mail—an application form to each registered voter, which the voter was then free to fill out and return, or not, comported with the constitutional directive to liberally construe Const 1963, art 2, § 4(1) to effectuate its purposes, and the decision therefore was not an abuse of discretion on the part of the Secretary.

IV. RESPONSE TO PARTIAL DISSENT

Regarding the thoughtful and well-written partial dissent, we respectfully disagree for the reasons already stated in this opinion. Additionally, we do not believe the principle of *expressio unius est exclusio*

alterius applies in the instant case. First, MCL 168.759(3) appears to be permissive: it provides that a voter "may" obtain a ballot in a number of ways, but, being phrased permissively, does not preclude that other means are available as well. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008) (explaining that the word "may" ordinarily signifies a permissive provision). We do acknowledge, of course, that "[a] necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to . . . the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

In addition, we note that the statute directs how a *voter* may obtain an absentee ballot; it does not purport to control or direct how election officials perform their duties. And finally, to the extent that MCL 168.759(3)(b) limits how a voter may apply for an absent-voter ballot application, because that subsection provides that a form application must be provided "by the clerk of the city or township," that limitation is irrelevant in the present circumstances given that MCL 168.759(3)(a) provides that an application is valid merely by being in writing and signed by the voter, with no further limitations or conditions. The form mailed by the Secretary, if signed by a voter, would fully satisfy the statutory requirements of MCL 168.759(3)(a). We also note that the partial dissent does not address the effects of Proposal 3 or the holding of *Elliott* that everything necessary for election officials to effectuate the purposes of a constitutional provision is within such officials' purview. We understand that purview to include the authority of the chief elections

officer to notify voters of a newly available constitutional mechanism for voting.

As a result, the specific language of the statute, in conjunction with the constitutional and statutory duties of the Secretary of State and the specific language of Const 1963, art 2, § 4, lead us to respectfully disagree with the dissent.

V. CONCLUSION

We conclude that the authority and discretion afforded the Secretary of State by the Constitution and state law permit the Secretary to send unsolicited absent-voter ballot applications to all Michigan qualified registered voters as a means of implementing the mandates of Const 1963, art 2, § 4.

We further conclude that the Court of Claims was correct in holding that MCL 168.759, in its current form, does not prohibit the actions taken by the Secretary of State. We decline to adopt plaintiff's narrow interpretation of MCL 168.759 because, contrary to plaintiff's assertion, the statute does not restrict how absent-voter ballot *applications* may be provided to qualified registered voters and does not prohibit the Secretary of State from assisting in the process. Had the Legislature meant to restrict the manner of the provision of applications and prohibited the Secretary of State from providing them, it could have done so, but it did not. A "legislature legislates by legislating, not by doing nothing, not by keeping silent." *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012) (quotation marks and citation omitted).[9]

[9] We give no weight to the Court of Claims' statement that it appears the Legislature would be prohibited by Const 1963, art 2 § 4 from enacting a statute that restricted the Secretary of State from sending

We also conclude that the mailing of unsolicited absent-voter ballot applications to Michigan's qualified registered voters by the Secretary of State did not run afoul of the MCL 168.726 prohibition that "[n]o ballot shall be delivered to an elector by any person other than 1 of the inspectors of election and only within the polling place, except as provided in this act for absentee voters' ballots." The Secretary of State did not send absent-voter ballots to any voter.

Instead, the Secretary of State transmitted by mail, based on a voter's place of residence, an application that the registered voter could choose to submit, or not, to the appropriate clerk. Only after that office had completed all statutorily required verifications could a ballot then be sent to the registered voter. By sending absent-voter ballot applications, the Secretary of State did not interfere with the local clerks' duties under MCL 168.759 to review and approve applications before issuing applicants absent-voter ballots.[10]

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unsolicited absent-voter ballot applications to registered voters. Because that statement was dictum in the Court of Claims' opinion, it was unnecessary for us to address it here.

[10] We further note that once an application for an absentee ballot is made, pursuant to its authority under Const 1963, art 2, § 4(2), the Legislature has provided a substantial process of verification in the Michigan Election Law. These include, but are not limited to, the following: (a) comparison of the voter's signature on the application for an absentee ballot and the voter's recorded signature on the clerk's voter rolls before an absentee ballot is sent out in response to a received application, MCL 168.761(1) and (2); (b) providing that upon return of the completed ballot, the signature on the envelope that contains the completed ballot is again compared with the signature in the clerk's files, MCL 168.765a(6) and MCL 168.766; and (c) providing that after absentee ballots are counted they must be placed in an approved ballot container and sealed, MCL 168.765a(11). The Legislature has also set forth criminal sanctions for unlawful activity related to absentee ballots. These include: "A person who makes a false statement in an absent voter ballot application is guilty of a misdemeanor. A person who forges a

The Secretary's conduct did not interfere with the rights of Michigan qualified registered voters. Ultimately, it is up to each voter to decide whether to vote in person or apply for an absentee ballot. The Secretary's actions were entirely consistent with those rights as established by the electorate's passage of Proposal 3, amending our Constitution so that every elector qualified to vote in Michigan shall have the "right, once registered, to vote an absent voter ballot without giving a reason, . . . and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(g).

Accordingly, the Court of Claims did not err by granting the Secretary of State summary disposition.

Affirmed.

TUKEL, P.J., concurred with REDFORD, J.

METER, J. (*concurring in part and dissenting in part*). I concur with the majority's well-written opinion in all respects except for the analysis regarding MCL 168.759(3). In my view, a textual plain reading of the statute precludes defendant from distributing absent-voter ballot applications.

As the majority notes, MCL 168.759(3) provides:

> An *application* for an absent voter ballot under this section may be made in *any of the following ways*:

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signature on an absent voter ballot application is guilty of a felony. A person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor." MCL 168.759(8). In addition, if any person discloses an election result or in any manner characterizes how a ballot being counted has voted before the time the polls can legally be closed on election day, that person is guilty of a felony. MCL 168.765a(10).

(a) By a written request signed by the voter.

(b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.

(c) On a federal postcard application. [Emphasis added.]

Nowhere in these three provisions is defendant, the Secretary of State, empowered to distribute, in an unsolicited manner, absent-voter ballot applications. Under the plain language of MCL 168.759(3)(b), the Legislature explicitly gave only local clerks the power to distribute absent-voter ballot applications. Because the Legislature declined to explicitly include defendant within MCL 168.759(3)(b), defendant lacked the authority to distribute absent-voter ballot applications. See *Mich Educ Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011) ("Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.") (quotation marks and citation omitted).

The plain language of MCL 168.759(3)(a) provides that the application itself must be made by written request signed by the voter. I read this provision as requiring the voter to make a written request for the application. It stands to reason that any ballot will require a written application under any subdivision of MCL 168.759(3). Thus, the Legislature's specific provision under Subsection (3)(a) that the request for the *application* be signed by the voter cannot be viewed as stray language or surplusage. See *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) ("[T]he Legislature is presumed to have intended the meaning expressed [in the statute]. . . . And no word should be treated as surplusage or made nugatory."). The appli-

cation herein was not obtained by the voter by a written request for the application from a proper authority (typically a local clerk). The application was sent to each voter in an unsolicited fashion by defendant in derogation of any of the three permissive alternatives under MCL 168.759(3).

In short, in addition to a situation involving a federal postcard, e.g., military posted overseas, there are only limited ways that an absent-voter ballot may be procured. Again, these include the voter making a written request for an application, typically from a local clerk, or by obtaining an absent-voter-ballot-application form provided by a local clerk. This latter alternative can typically be accomplished by a request other than in writing, such as through a telephonic call or a personal appearance at the local clerk's office. None of these prerequisites was met in this case.

Although the majority has determined that defendant had the authority to distribute absent-voter ballot applications under MCL 168.759(3), a textual plain reading of the statute does not support that determination. "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Herald Co v Bay City*, 463 Mich 111, 117-118; 614 NW2d 873 (2000). MCL 168.759(3) provides that a voter "may" obtain an absent-voter ballot application "in any of the following ways," which expressly limits the obtaining of an application to any of the three enumerated statutory options. MCL 168.759(3)(a) provides that "[a]n application for an absent voter ballot . . . may be made . . . [b]y a written request signed by the voter." The language of this provision clearly states that a voter may request, in writing, an application for an absent-voter ballot. Like-

wise, MCL 168.759(3)(b) authorizes a local clerk to provide an application. Because defendant, who is not a local clerk, distributed absent-voter ballot applications without written requests from the voters, defendant's actions cannot be deemed proper under MCL 168.759(3).

Further buttressing this conclusion is the doctrine of *expressio unius est exclusio alterius*, which is "the maxim that the expression of one thing means the exclusion of another . . . ." *Tuggle v Dep't of State Police*, 269 Mich App 657, 663; 712 NW2d 750 (2005). The doctrine "is a rule of statutory interpretation meant to help ascertain the intent of the Legislature" and "does not subsume the plain language of the statute when determining the intent of the Legislature." *Id*. at 664. "It has been described as a rule of construction that is a product of logic and common sense. The doctrine characterizes the general practice that when people say one thing they do not mean something else." *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 456; 770 NW2d 117 (2009) (quotation marks and citations omitted). MCL 168.759(3) expressly gives local clerks the authority to distribute absent-voter ballot applications. Nowhere in the statute is there a similar provision that grants defendant the same or similar authority. Therefore, under the doctrine of *expressio unius est exclusio alterius*, the Legislature's inclusion of local clerks' authority to distribute absent-voter ballot applications operates to exclude defendant's authority to do the same.

The ministerial power to distribute and process these applications is reserved to local clerks by law. It is important to distinguish between supervisory and ministerial powers. Under MCL 168.21, defendant is "the chief election officer of the state and shall have

supervisory control over local election officials in the performance of their duties under the provisions of this act." Defendant's supervisory powers are enumerated in MCL 168.31. While defendant has the supervisory power under MCL 168.759(3) to address and correct the delinquent or deficient performance of a local clerk regarding the clerk's duties, see MCL 168.31(1)(h) (mandating that defendant shall "[i]nvestigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution"), the ministerial power to discharge those duties is reserved to the local clerk in the first instance, MCL 168.759(3). Thus, I would conclude that defendant violated MCL 168.759(3).

In short, MCL 168.759(3) does not specifically authorize defendant to send unsolicited applications for absent-voter ballots, and defendant's supervisory powers cannot be used to imbue defendant with an authority that the Legislature expressly declined to grant. Accordingly, I would reverse the Court of Claims' grant of summary disposition to defendant and remand for further proceedings.

FASHHO v LIBERTY MUTUAL INSURANCE COMPANY

Docket No. 349519. Submitted September 9, 2020, at Detroit. Decided September 17, 2020, at 9:00 a.m. Leave to appeal denied 507 Mich 959 (2021).

Butross D. Fashho filed an action in the Macomb Circuit Court to recover payment of personal protection insurance (PIP) benefits from Liberty Mutual Insurance Company, his no-fault insurer. Plaintiff was injured in a motor vehicle accident on July 27, 2017, and subsequently filed a claim for PIP benefits, including wage-loss benefits, with defendant. Defendant initially paid PIP benefits to plaintiff, but in late 2017, it decided to review whether plaintiff's continued claim for PIP benefits was warranted. As part of its review, defendant had plaintiff surveilled. The surveillance revealed that plaintiff was working in his automotive-repair business without any apparent physical limitations, performing tasks that required lifting tires and heavy tools, pushing vehicles, and repairing vehicles. As a result of the surveillance, defendant terminated plaintiff's PIP benefits in January 2018. After filing his action, plaintiff testified at a deposition that ever since the accident, he had been unable to perform most of his regular duties at his repair shop. Defendant moved for summary disposition on the ground that plaintiff's claim for PIP benefits was barred by the fraud exclusion in the parties' contract and cited plaintiff's deposition testimony and the surveillance evidence in support of its motion. The trial court, Richard L. Caretti, J., granted summary disposition for defendant, stating that plaintiff's statements to defendant were material and false, as demonstrated by the surveillance evidence that contradicted his testimony; that plaintiff knew his statements were false; and that plaintiff had intended for defendant to rely on his statements. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff argued that the parties' no-fault policy did not contain a fraud exclusion, so defendant could not deny his claim for PIP benefits on this basis. However, the record demonstrated that plaintiff's assertion was meritless. In response to defendant's summary-disposition motion, plaintiff filed his policy renewal

and policy declarations, which he argued comprised his policy with defendant. The policy renewal included a section stating that other "forms and endorsements" were applicable to the policy, including the "Amendment of Policy Provisions — Michigan AS 2281 06 16." The Amendment of Policy Provisions included a fraud provision that stated in part that the policy could be voided or coverage could be denied on the basis of fraudulent conduct by the insured. Caselaw provides that when a written contract refers to another instrument for additional contract terms, the contents of the other instrument are to be taken as though its contents had been repeated in the contract. Because the documents provided by plaintiff stated unambiguously that the terms of the Amendment of Policy Provisions were part of the parties' contract, the two writings were properly read together. Because the Amendment of Policy Provisions included a fraud exclusion, plaintiff's argument that his policy did not contain a fraud exclusion was meritless.

2. In order for an insurer to deny an insured coverage on the basis that the insured has willfully misrepresented a material fact, the insurer must show that (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. A material statement is one that is reasonably relevant to the insurer's investigation of a claim. The Court of Appeals issued *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719 (2020), after the trial court granted defendant's summary-disposition motion. Under *Haydaw*, an insurer may not deny an insured's request for benefits based on fraudulent statements made by the insured after litigation between the parties has commenced. The trial court in this case relied heavily on plaintiff's deposition testimony in granting summary disposition for defendant. Nevertheless, *Haydaw* had no effect on this case because before plaintiff filed his action, he requested wage-loss benefits on the basis of his representation that he was not able to perform his regular duties at the auto shop and therefore could not pay himself his preaccident salary of $800 per week. Defendant's surveillance, which was also conducted before the litigation began, showed that plaintiff could and did perform aspects of his job that required heavy lifting. Therefore, defendant did not deny plaintiff's claim for wage-loss benefits on the basis of the false statements plaintiff made after filing his action. Moreover, plaintiff's misrepresentation was material because it was reasonably relevant to defendant's investigation of plaintiff's claim for

PIP benefits, and reasonable minds could not differ as to whether the statements were false or whether plaintiff made them without knowledge of the truth. Reasonable minds also could not differ as to whether plaintiff intended for defendant to rely on his false statements in order to pay him PIP benefits. Because reasonable minds could not disagree that defendant established the elements required for an insurer to deny coverage to an insured based on a material misrepresentation, defendant had the right to deny coverage to plaintiff, and the trial court properly granted summary disposition to defendant.

Affirmed.

Law Offices of John F. Harrington (by *John F. Harrington*) for Butross D. Fashho.

Collins Einhorn Farrell PC (by *Deborah A. Hebert*) for Liberty Mutual Insurance Company.

Before: RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's opinion and order granting summary disposition to defendant. We affirm.

I. BACKGROUND

Plaintiff was injured in a motor vehicle accident on July 27, 2017. Plaintiff sought personal protection insurance (PIP) benefits, including wage-loss benefits, from defendant, his no-fault insurer. Defendant initially paid plaintiff's PIP benefits, but, at some point in late 2017, it decided to review whether plaintiff's continued claim for PIP benefits was warranted. As part of its review, defendant had plaintiff surveilled. The surveillance showed plaintiff, the owner of an automotive-repair shop with a tire-shredding facility in the back, working at his business without any apparent physical limitations—he was loading and unloading tires from his work van, carrying around

heavy tools and parts related to his business, pushing vehicles, and driving to customers' homes to perform vehicle repairs. Because of what defendant learned from its surveillance, it terminated plaintiff's PIP benefits in January 2018.

Plaintiff thereafter filed suit to recover payment of PIP benefits. During discovery, plaintiff testified that for several months after the accident, he could not perform his regular duties at his business, and at the time of his deposition, he was still unable to perform most of those duties.

Defendant moved for summary disposition, asserting that plaintiff's PIP claim was barred by the fraud exclusion in the parties' contract. In support of its assertion, defendant pointed to plaintiff's testimony and the contradictory surveillance evidence. In response, plaintiff argued that his policy did not contain a fraud exclusion, and that even if it did, the evidence only created a question of fact whether he made material misrepresentations intended to defraud defendant.

The trial court eventually granted defendant's motion for summary disposition in a written opinion. The trial court explained that plaintiff's statements to defendant were material and false, as demonstrated by the surveillance evidence that contradicted his testimony; that plaintiff knew his statements were false; and that he made them intending for defendant to rely on them.

II. STANDARD OF REVIEW

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), but because the trial court relied on evidence not included in the pleadings, "we treat this as a grant of summary disposition pursuant

to only MCR 2.116(C)(10)." *Attorney General v Flint*, 269 Mich App 209, 211; 713 NW2d 782 (2005). Our Supreme Court explained the process for reviewing a motion filed under MCR 2.116(C)(10) as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleading, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

III. FRAUD EXCLUSION

We first address plaintiff's argument that his policy with defendant did not contain a fraud exclusion. "[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (emphasis omitted). Courts must therefore "construe and apply unambiguous contract provisions as written." *Id*. When interpreting contracts, words are given their "plain and ordinary meaning." *Id*. at 464.

In his response to defendant's motion for summary disposition, plaintiff attached a copy of his policy renewal and policy declarations and claimed that these documents represented his true policy with defendant. Because there was "no reference whatsoever to a fraud exclusion" in these documents, plaintiff concluded that the policy did not have a fraud exclusion. Yet a cursory review of these documents demonstrates that plaintiff's argument is meritless. The "Coverage Informa-

tion" section of the policy renewal states, "The following forms and endorsements are applicable to your policy[:]" "Amendment of Policy Provisions — Michigan AS 2281 05 16." And the document titled "Amendment of Policy Provisions — Michigan AS 2281 05 16" (the Amendment) (which defendant provided to the trial court) states, in relevant part:

> FRAUD
>
> This policy was issued in reliance upon the information provided on your application. Any changes we make at your request to this policy after inception will be made in reliance upon information you provide. We may void this policy if you or an "insured" have concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, at the time application was made, at the time changes were requested, or any time during the policy period.
>
> We may void this policy or deny coverage for an accident or loss if you or an "insured" have concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim.
>
> We may void this policy or deny coverage for fraud or material misrepresentation even after the occurrence of an accident or loss. This means we will not be liable for any claims or damages which would otherwise be covered. If we make a payment, we may request that you reimburse us. If so requested, you must reimburse us for any payments we may have already made.

Almost 100 years ago, our Supreme Court explained, "In a written contract, a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its contents had been repeated in the contract." *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922) (quotation marks and citation omitted). See also *Forge v Smith*,

458 Mich 198, 207; 580 NW2d 876 (1998) ("Where one writing references another instrument for additional contract terms, the two writings should be read together."). Because the document that plaintiff provided to the trial court unambiguously states that the terms of the Amendment are part of the parties' agreement, the two writings are read together. And because the Amendment includes a fraud exclusion, even the document that plaintiff provided to the trial court supports defendant's position that plaintiff's policy with defendant includes a fraud provision. Plaintiff's argument to the contrary is meritless.

IV. SUMMARY DISPOSITION

The trial court granted summary disposition to defendant, concluding that defendant could deny coverage to plaintiff under the policy's fraud exclusion on the basis of plaintiff's fraudulent statements to defendant. In *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014), this Court held that to deny coverage

> because the insured has willfully misrepresented a material fact, an insurer must show that (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. [Quotation marks and citation omitted.]

"A statement is material if it is reasonably relevant to the insurer's investigation of a claim." *Id*. at 425 (quotation marks and citation omitted).[1]

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[1] In *Meemic Ins Co v Fortson*, 506 Mich 287, 304 n 10; 954 NW2d 115 (2020), our Supreme Court reaffirmed that "[a]n insurer can reject fraudulent claims without rescinding the entire policy."

After the trial court granted summary disposition to defendant, this Court issued *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719; 957 NW2d 858 (2020). In *Haydaw*, this Court held that a defendant-insurer could not deny a plaintiff-insured's request for benefits on the basis of fraudulent statements made after litigation between the parties commenced. *Id*. at 725-726. Because the trial court in this case relied extensively on plaintiff's deposition testimony when granting defendant's dispositive motion, we ordered supplemental briefing from the parties to address *Haydaw*.[2]

Having reviewed the parties' supplemental briefs, we conclude that *Haydaw* has no impact on the outcome of this case. We read *Haydaw* as standing for the unremarkable proposition that an insurer cannot assert that it denied a claim because of fraud that occurred after litigation began; the fraud must have occurred before the commencement of legal proceedings. This recognizes the reality that a plaintiff-insured only commences suit after the defendant-insurer denies the plaintiff's claim and that the denial cannot possibly be based on an event that has not yet taken place. This does not mean that a defendant cannot rely on evidence of fraud obtained after litigation commences. It simply means that the evidence must relate to fraud that took place before the proceedings began.

With this understanding of *Haydaw*, we now review the evidence in this case. Before commencing litigation, plaintiff claimed wage-loss benefits of $800 per week. After defendant had plaintiff surveilled and saw plaintiff working his old job at his shop, defendant denied plaintiff's wage-loss claim. During plaintiff's deposition,

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[2] *Fashho v Liberty Mut Ins Co*, unpublished order of the Court of Appeals, entered August 14, 2020 (Docket No. 349519).

he explained that before the accident, he paid himself a wage of $800 per week, and that after the accident, he stopped paying himself wages because he was unable to do the same job he was doing before the accident. Defendant asked plaintiff to expand on this, and plaintiff explained that before the accident, he was responsible for working on cars, changing tires, picking up tires from other automotive businesses for disposal, loading and unloading trucks, picking up automotive parts from various stores, traveling to and from the junkyard, carrying various tools related to his auto-repair business, and assisting customers. Plaintiff explained that when he returned to work after the accident, he was unable to do most of those things; he just focused on "dealing with customers" and his "managerial functions." He said that he "absolutely [could] not" do any of the labor-intensive positions previously required of him. He admitted, however, that he "could probably pick up a tire and move it" and had indeed lifted a tire "once" when the shop was "really busy."

Defendant's surveillance of plaintiff through the fall and winter of 2017 told a different story, however. That surveillance showed that plaintiff was capable of performing many if not all of the tasks he claimed he could not perform. Several surveillance photographs show plaintiff carrying tires and various tools, including a large tank, to and from his vehicle in October and December 2017. Photos also show plaintiff pushing vehicles around his shop's lot. In the surveillance report, the investigator described plaintiff's conduct related to lifting objects, like how he carried tires and rims, automotive parts, air tanks, a floor jack, a sledge hammer, and other tools. The report also described plaintiff's trips to a residence to repair a tire, describing how he left his auto-repair shop "carrying an air reservoir/tank and two jugs," loaded them into his van,

drove to the customer's home, unloaded the tank, inflated the tire of the customer's vehicle, carried the tank back to the vehicle, and left. Plaintiff then returned to his repair shop, loaded a floor jack, power tool, and sledge hammer into his vehicle, and returned to the customer's residence, where he carried each of those tools to the customer's car, used the floor jack to "jack[] up the vehicle," and removed the vehicle's tire. According to the report, plaintiff returned to his shop with the tire, then departed once again to the residence, where he "rolled the tire to the" customer's car, "mounted the tire on the vehicle," pulled the floor jack to his van, loaded it into the van, and returned to his repair shop.

The evidence defendant presented established that plaintiff's representation about his need for wage-loss benefits because he could not perform all of his job functions after the accident was untrue. Plaintiff claimed that he could not pay himself the $800 per week after the accident like he had before the accident—and therefore required wage-loss benefits—because he could perform only the managerial aspects of his job and not the heavy-lifting aspects. But defendant's surveillance of plaintiff showed that plaintiff could, and in fact did, perform the heavy-lifting aspects of his job.

Unlike in *Haydaw*, plaintiff's representation was made before litigation commenced, and defendant rejected plaintiff's claim for benefits on the basis of the surveillance evidence it obtained before the litigation showing that plaintiff's representation was untrue. While plaintiff made false statements after litigation commenced, defendant did not deny plaintiff's claim for wage-loss benefits because of those statements. Instead, plaintiff's false statements made after litigation began only reaffirmed defendant's initial determination that plaintiff made a misrepresentation about needing wage-loss benefits. Therefore, *Haydaw* does not control this

case, and the trial court correctly determined that reasonable minds could not differ with regard to the fact that plaintiff had made a misrepresentation about his need for wage-loss benefits.

This misrepresentation was material because it was reasonably relevant to defendant's investigation of plaintiff's claim for benefits. See *Bahri*, 308 Mich App at 425. Reasonable minds could not differ with regard to the fact that plaintiff knew that his representation was false or that he made it without knowledge of its truth, because he was the one performing the same functions of his job that he did before the accident while claiming a need for wage-loss benefits. Lastly, reasonable minds could only conclude that plaintiff made the misrepresentation with the intent that defendant pay him wage-loss benefits.

In sum, because reasonable minds could not disagree that defendant established all of the elements in *Bahri*, *id*. at 424-425, defendant had the contractual right to deny coverage of plaintiff's claim given plaintiff's misrepresentation and pursuant to the fraud exclusion in plaintiff's policy. The trial court did not err by granting summary disposition to defendant.[3]

Affirmed.

RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ., concurred.

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[3] The trial court initially denied defendant's motion for summary disposition but ultimately granted it after defendant moved for reconsideration. On appeal, plaintiff challenges this decision, arguing that the trial court should not have granted defendant's motion for reconsideration because it simply repeated the arguments from defendant's original motion. In *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012), we explained that when a party files for reconsideration, the trial court "has the discretion to give a litigant a 'second chance' even if the motion for reconsideration presents nothing new." Thus, the trial court's decision here was not improper.

PREMIER PROPERTY SERVICES, INC v CRATER

Docket No. 350784. Submitted August 6, 2020, at Grand Rapids. Decided September 17, 2020, at 9:05 a.m.

Premier Property Services, Inc., filed an action in the Kent Circuit Court against Matthew Crater, Fresh Outlook Painting LLC, and Better Brush Painting LLC (collectively, defendants), seeking to recover damages for breach of confidentiality and nonsolicitation agreements. Plaintiff obtained a default judgment against defendants and a permanent injunction ordering defendants to comply with the confidentiality and nonsolicitation agreements. Thereafter, plaintiff sought writs of garnishment against defendants' assets that were held by others. On March 15, 2019, the clerk of the court issued a writ for periodic garnishment against True North Painting, Inc., ordering True North to withhold payments to defendants and instead to make payment withheld under the writ payable to plaintiff. On April 4, 2019, True North filed a disclosure stating that it was obligated to pay defendants' monthly earnings, described as subcontractor progress payments. On April 12, 2019, plaintiff served on True North interrogatories, seeking information regarding any payments True North had made to defendants. True North responded that it had made three payments to Crater after True North had been served with the garnishment writ. With regard to the payments, True North withheld only 25% of the garnished funds for payment to plaintiff, instead of the full 100% as ordered by the writ, reasoning that the payments made to Crater (i.e., the remaining 75% of money owed) were earnings owed to an employee. Plaintiff's counsel informed True North that it needed to withhold the full 100% of money owed to defendants because Crater was a subcontractor of True North, not an employee. Ultimately, True North did not contest that it was required to withhold all payments owed to defendants after the garnishment writ was served and that it had violated the writ by making payments to Crater after the writ was served. In June 2019, plaintiff moved for a turnover of funds, seeking a judgment against True North in the amount of the other 75% of the garnished funds that True North had incorrectly paid to Crater. Plaintiff also sought to depose True North. On June 26, 2019, Crater filed a Chapter 7 bankruptcy petition in the United

States Bankruptcy Court for the Western District of Michigan. Thereafter, True North argued that any further action by plaintiff under the writ was prohibited by the automatic stay provided by the bankruptcy petition; that the disputed payments were made to Crater, not to codefendants Fresh Outlook or Better Brush; and that True North did not have an obligation to Fresh Outlook or Better Brush. In addition, True North argued that plaintiff could not seek a deposition under MCR 3.101(L)(1) because (1) plaintiff had first elected to send interrogatories instead of a notice of deposition and (2) the notice of deposition was time-barred by the 14-day period in which the request could be made. The court, Christopher P. Yates, J., granted True North's motion for a protective order, reasoning that plaintiff could serve interrogatories or a notice of deposition under MCR 3.101(L)(1), but not both. Accordingly, plaintiff was barred from noticing True North for a deposition because plaintiff had already sent interrogatories to True North. Alternatively, the court granted the protective order because the bankruptcy court had jurisdiction over the money owed to plaintiff by defendant. Finally, the court denied plaintiff's motion for turnover of funds, reasoning that it would be improper to hold True North liable for the amount it had incorrectly paid Crater for his subcontract work and that Crater could seek recovery of those funds in the bankruptcy court. Plaintiff appealed.

The Court of Appeals *held*:

1. Garnishment is a key mechanism for prevailing parties to enforce money judgments through the courts. Once a judgment is obtained, garnishment is a legitimate and common procedure to satisfy a claim. The design of a garnishment proceeding is to preserve a principal defendant's assets in the control of the garnishee, that is, one who has property or money in his or her possession belonging to the defendant. MCL 600.4011(1) provides that a court may order the garnishment of personal property belonging to the person against whom the claim is asserted but which is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state and against an obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state. A court's exercise of its garnishment powers must be done in accordance with the Michigan Court Rules. MCR 3.101 controls garnishment proceedings. Under MCR 3.101(B), there are two types of postjudgment garnishments: periodic and nonperiodic. MCR 3.101(E)(3)(d) mandates that a

writ of garnishment direct the garnishee to pay no obligation to the defendant unless allowed by statute or court rule; the writ is effective as to obligations owed and property held by the garnishee as of the time the writ is served on the garnishee. Under MCR 3.101(G)(1), a garnishee is liable for all debts, whether or not due, owing by the garnishee to the defendant when the writ is served on the garnishee, except for debts evidenced by negotiable instruments or representing the earnings of the defendant. If a garnishee violates a writ of garnishment by making payment directly to the defendant, the garnishee is liable to the plaintiff for the payments made to the defendant in violation of the writ. MCR 3.101(O)(1) provides that judgment may be entered against the garnishee for the payment of money or the delivery of specific property as the facts warrant. Moreover, a money judgment against the garnishee may not be entered in an amount greater than the amount of the unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment. While under MCR 3.101(G)(1) the amount of the garnishee's liability is determined by the property belonging to or the obligation owed to the defendant, the court rule does not state how that liability may be satisfied. Accordingly, the court rules do not prohibit a plaintiff from recovering against the garnishee's own assets, not just those it owes to the defendant, if the garnishee fails to adhere to the requirements imposed on the garnishee. To hold otherwise would allow garnishees to escape all liability by turning over property and paying obligations to the defendant in violation of the writ. In this case, the trial court erred by denying plaintiff's request for entry of judgment on the basis that True North was not liable for the amount it paid to Crater in violation of the writ of garnishment.

2. Under 11 USC 362(a), when a debtor files a bankruptcy petition, an automatic stay is entered, prohibiting the enforcement against the debtor of a judgment obtained before the commencement of the bankruptcy proceedings; the automatic stay applies to garnishment proceedings. In this case, the automatic stay applied to the garnishment writ directed at True North with regard to the funds owed to Crater, the bankrupt party. The parties disputed whether the money paid to Crater by True North was actually owed to Crater or to his two companies, Better Brush and Fresh Outlook. The trial court erred to the extent it ruled that plaintiff had to seek recovery from the bankruptcy trustee rather than seek collection through garnishment; the trial court had jurisdiction—not the bankruptcy court—over plaintiff's motion to enforce the judgment because the garnishment was based on the garnishee's liability, not the defendant's. Remand

was necessary for the trial court to address plaintiff's argument that the bankruptcy stay did not prevent further garnishment proceedings against True North because the payments made in violation of the writ were actually owed to Better Brush or Fresh Outlook, not Crater, and were not part of the bankruptcy proceedings.

3. MCR 3.101(L)(1) provides that within 14 days after service of the garnishment disclosure, the plaintiff may serve the garnishee with written interrogatories or notice the deposition of the garnishee; the answers to the interrogatories or the deposition testimony becomes part of the disclosure. Under MCR 3.101(M)(2), the facts stated in the garnishment disclosure are accepted as true unless the plaintiff has served interrogatories or noticed a deposition within the MCR 3.101(L)(1) 14-day period or another party has filed a pleading or motion denying the accuracy of the disclosure. And MCR 3.101(T)(2) through (5) grants the trial court discretion to extend the time for the plaintiff's filing of written interrogatories, filing of notice of deposition, the garnishee's answer to written interrogatories, and the garnishee's appearance for deposition. Read together, MCR 3.101(L) and (M) provide that the trial court can exercise its discretion to extend discovery as long as the plaintiff has complied with MCR 3.101(M)(2)—in other words, a trial court may only grant the motion to extend the time for serving interrogatories or for noticing a deposition if the plaintiff pursued discovery within 14 days of service of the garnishment disclosure; if interrogatories or notice of deposition are not served within that 14-day period, the garnishee's disclosure is final and the plaintiff may not seek to expand the disclosure by further discovery. Thus, if the plaintiff serves interrogatories or notices the garnishee's deposition within that period, the trial court may extend the time for taking additional discovery. In this case, the trial court had discretion to grant further discovery to plaintiff because plaintiff served interrogatories within 14 days of garnishee's disclosure, including extending the time for filing a demand for oral examination of True North, the garnishee. Remand was necessary with regard to the court's alternative ground for granting True North's protective order—i.e., declining to exercise discretion to extend discovery because of the bankruptcy petition—for the court to address plaintiff's argument that the bankruptcy stay did not apply to contested payments owed to Better Brush and Fresh Outlook and if so, whether to grant plaintiff's request for a deposition.

Reversed and remanded for further proceedings.

JUDGMENTS — GARNISHMENTS — VIOLATION OF GARNISHMENT ORDERS — LIABILITY OF GARNISHEE FOR VIOLATION OF GARNISHMENT ORDERS.

If a garnishee violates a writ of garnishment by making payment directly to the defendant, the garnishee is liable to the plaintiff for the payments made to the defendant in violation of the writ; the Michigan Court Rules do not prohibit a plaintiff from recovering against a garnishee's own assets if the garnishee fails to withhold payments to a defendant in accordance with a writ of garnishment; a garnishee cannot escape all liability by turning over property and paying obligations to the defendant in violation of a garnishment writ (MCR 3.101).

Visser and Associates, PLLC (by *Donald R. Visser* and *Brittany B. Dzuris*) for Premier Property Services, Inc.

Varnum LLP (by *Mark E. Hills*) for True North Painting, Inc.

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

SHAPIRO, P.J. Plaintiff, Premiere Property Services, Inc. (plaintiff), served a writ of periodic garnishment on Truth North Painting, Inc. (True North), to satisfy a judgment obtained against defendants Matthew Crater, Fresh Outlook Painting LLC, and Better Brush Painting LLC (collectively, defendants). True North filed a disclosure acknowledging that it was obligated to make payments to defendants as subcontractors but instead of withholding the entire amount owed to defendants, True North withheld only 25% and paid the remaining 75% to Crater under the mistaken belief that it could treat the garnished funds as wage earnings owed to an employee. After plaintiff moved to recover the remaining 75% from True North, Crater filed for bankruptcy. The trial court denied plaintiff's motion, concluding that it would not hold True North liable for the amount paid to Crater and that plaintiff needed to seek recovery from Crater in the bankruptcy

court instead. The trial court also granted True North's motion for a protective order, prohibiting plaintiff from further discovery. Plaintiff appeals both rulings. We reverse in full and remand for further proceedings.

I. FACTS & PROCEDURAL HISTORY

In the underlying action, plaintiff obtained a judgment against Crater and two companies that he owns or controls, Better Brush and Fresh Outlook, in the amount of $331,320.67. That case arose out of a dispute between plaintiff and Crater. Plaintiff hired Crater to solicit and manage painting projects. Plaintiff terminated the employment relationship in April 2018 and brought suit in May 2018, alleging that Crater breached a confidentiality and nonsolicitation agreement both during and after his employment by using confidential information regarding plaintiff's customers to secure paint jobs for Better Brush and Fresh Outlook. Eventually, the trial court entered a default against defendants for failure to appear at a status conference. After an evidentiary hearing on damages, the trial court entered a default judgment against defendants as well as a permanent injunction ordering them to comply with the confidentiality and nonsolicitation agreement.

Plaintiff sought to collect on its judgment against defendants by seeking writs of garnishment directed at assets of defendants held by others. On March 15, 2019, the clerk of the court issued a writ for periodic garnishment against True North, ordering it to withhold payments to defendants and instead to "make the payment withheld under this writ payable to the plaintiff." (Paragraph structure and emphasis omitted.) The writ directed True North to "not pay any obligations to the defendant unless allowed by statute or court rule" and that "[i]f indebted to the defendant, withholding must

begin according to court rule and continue until the judgment is satisfied." On April 4, 2019, True North filed a disclosure stating that it was obligated to pay defendants' monthly earnings, describing the nature of those payments as "subcontractor progress payment[s].[1] The disclosure stated that True North would begin withholding "immediately if sufficient funds are available."

On April 12, 2019, plaintiff served True North with interrogatories, seeking information about its contracts with defendants and payments made to them. True North submitted its initial response on April 20, 2019, which included invoices showing that it made three substantial payments to Crater *after* it had been served with the garnishment. True North's payments to Crater totaled $22,746.64, while withholding only $7,610.62 for plaintiff. Through communications with True North's president, Troy TerVeen, plaintiff's counsel learned that True North was withholding only 25% of the garnished funds on the grounds that the payments to Crater were earnings owed to an employee.[2] Plaintiff's counsel instructed TerVeen that True North needed to withhold 100% of the funds owed to defendants because Crater was a subcontractor of True North, not an employee. On May 24, 2019, True North supplemented its discov-

[1] MCR 3.101(H) requires that within 14 days after being served with the writ, the garnishee file a disclosure. True North's disclosure was not filed, however, until 24 days after it received the writ.

[2] MCR 3.101(G)(1)(f) provides that a garnishee is liable for "the portion of the defendant's earnings that are not protected from garnishment by law (see, e.g., 15 USC 1673) as provided in subrule (B)[.]" In turn, 15 USC 1673 (a)(1) provides, in part, as follows:

> [T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week[.]

ery response with documents that plaintiff believed showed an ongoing relationship between True North and defendants. Plaintiff's counsel's urged True North to seek legal counsel, which it did. Since obtaining counsel, True North has not contended that paying Crater 75% of the funds was proper.

True North's counsel, however, objected to a notice of deposition served on True North on or about May 17, 2019. Plaintiff agreed to adjourn the deposition, and on June 7, 2019, filed a "motion for turnover of funds and/or discovery." Plaintiff was primarily seeking a judgment against True North in the amount of the three payments made to Crater, i.e., the other 75% of the garnished funds. Plaintiff alternatively sought an order declaring that it could depose True North.

On June 26, 2019, Crater filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Michigan. On July 16, 2019, True North responded to plaintiff's motion for turnover of funds or discovery. True North argued that further proceedings to collect debt owed or allegedly owed to Crater were prohibited by the automatic stay provided by the bankruptcy petition under 11 USC 362. True North asserted that the disputed payments were made to Crater, not his codefendants; that it made no payments to Crater's codefendants; and that it had no ongoing obligation to them. As to discovery, True North argued that plaintiff could not seek a deposition under MCR 3.101(L)(1) because it had first elected to send interrogatories instead. True North also argued that plaintiff's request for deposition was time-barred by MCR 3.101(L)(1)'s 14-day window.

The motion hearing was held on July 19, 2019. Plaintiff argued that Crater's bankruptcy petition was of no moment because True North's contract was with Better

Brush, a corporation that was not seeking bankruptcy protection, and that True North's prepetition payments had been made to that corporation, not Crater. Plaintiff conceded, however, that if those payments were owed to Crater in his individual capacity, recovery of those amounts was covered by the bankruptcy stay.

The trial court first granted the motion for a protective order, agreeing with True North that plaintiff could serve interrogatories or notice a deposition under MCR 3.101(L)(1), but not both. Alternatively, the court declined to exercise its discretion to extend the time for noticing a deposition because further discovery was not necessary. The court explained that if it granted plaintiff's motion it would effectively be obligating True North to pay "175 percent" of the garnished funds, i.e., True North would have to pay plaintiff an amount equaling the 75% of garnished funds that it had already paid to Crater. The court concluded that it would be improper to hold True North liable for the amount it incorrectly paid Crater. The court also indicated that imposing liability against True North was inappropriate because plaintiff could seek recovery of those funds in the bankruptcy court. The court entered orders denying plaintiff's motion for turnover of funds or discovery and granting True North's request for a protective order; the court later denied plaintiff's motion for reconsideration challenging both orders.

II. ANALYSIS

A. GARNISHEE LIABILITY

On appeal, plaintiff first argues that the trial court erred by failing to issue a turnover order for the amount of the contested funds. Setting aside the bankruptcy proceedings for the moment, we agree with plaintiff that

the trial court erred by denying plaintiff entry of judgment on the ground that it would not hold True North liable for the amount that it had paid to Crater in violation of the writ.[3]

> Once a judgment is obtained, garnishment is a legitimate and common procedure to satisfy a claim. The design of a garnishment proceeding is to preserve a principal defendant's assets in the control of the garnishee, *i.e.*, one who has property or money in his possession belonging to the defendant, so that the assets may later be accessible to satisfy a judgment against the principal defendant. Rather than being a new or different action, a garnishment proceeding is ancillary to the original suit. [*Ward v Detroit Auto Inter-Ins Exch*, 115 Mich App 30, 35; 320 NW2d 280 (1982) (citations omitted).]

Garnishment is governed by Chapter 40 of the Revised Judicature Act, MCL 600.4001 *et seq*. "Garnishment proceedings are entirely creatures of statute and are to be strictly construed." *Westland Park Apartments v Ricco, Inc*, 77 Mich App 101, 104 n 1; 258 NW2d 62 (1977). MCL 600.4011(1) authorizes garnishment against:

> (a) Personal property belonging to the person against whom the claim is asserted but which is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state.
>
> (b) An obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state.

"The court may exercise its garnishment power only in accordance with the Michigan Court Rules." *Nations-*

[3] This issue turns on the interpretation of statutes and court rules, which is a question of law that we review de novo. See *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

banc Mtg Corp of Georgia v Luptak, 243 Mich App 560, 564; 625 NW2d 385 (2000).

MCR 3.101 is the court rule governing garnishment after judgment. There are two types of postjudgment garnishments: periodic and nonperiodic. MCR 3.101(B)(1) and (2). Periodic garnishments are garnishments of periodic payments, including "wages, salary, commissions, bonuses, and other income paid to the defendant during the period of the writ; land contract payments; rent; and other periodic debt or contract payments." MCR 3.101(A)(4). A periodic garnishment continues until the judgment is satisfied. MCL 600.4012(1); MCR 3.101(B)(1)(a).

MCR 3.101(E)(3)(d) requires that a writ of garnishment direct the garnishee to "pay no obligation to the defendant, unless allowed by statute or court rule[.]" This is known as the "injunction provision" of the garnishment court rules. See *Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Servs*, 201 Mich App 301, 306; 506 NW2d 279 (1993). The court rule governing withholding for periodic payments provides that "the writ shall be effective as to obligations owed and property held by garnishee as of the time the writ is served on the garnishee." MCR 3.101(I)(1).[4]

MCR 3.101(G) governs the garnishee's liability. MCR 3.101(G)(1) "delineates the various categories of

[4] MCL 600.4012 was substantially amended in 2015, 2015 PA 14, to provide a detailed procedure for obtaining a default and default judgment against a garnishee. See MCL 600.4012(6) through (10); MCR 3.101(S)(1)(b). The statute provides that the plaintiff may seek a default when, among other requirements, the garnishee "fails to perform any other required act . . . ." MCL 600.4012(6)(a). However, True North does not argue that plaintiff was required to follow that statute. Accordingly, whether a "motion for turnover of funds" was the correct procedural mechanism to obtain a judgment in this case is not before us, and we express no opinion on that matter.

items for which a garnishee is liable." *Nationsbanc Mtg Corp of Georgia*, 243 Mich App at 564. In part, MCR 3.101(G)(1) provides:

> Subject to the provisions of the garnishment statute and any setoff permitted by law or these rules, the garnishee is liable for
>
> * * *
>
> (d) all debts, whether or not due, owing by the garnishee to the defendant when the writ is served on the garnishee, except for debts evidenced by negotiable instruments or representing the earnings of the defendant[.]

"The garnishee is liable for no more than the amount of the unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment . . . ." MCR 3.101(G)(2).

In this case, the garnishee's liability is not disputed. That is, True North does not contest that it was required to withhold all payments owed to defendants after service of the writ and that it violated the writ by making three payments to Crater. Nonetheless, the trial court denied plaintiff's request for a judgment against True North because it had already paid Crater the garnished funds. Under such reasoning, a garnishee who violates a writ of garnishment by making payment directly to the defendant cannot be held liable because it is no longer in possession of an obligation owed to the defendant. We reject this reasoning as circular.

Plaintiff relies on *Chayka v Brown*, 92 Mich App 360; 284 NW2d 530 (1979),[5] which is instructive. In

[5] A decision from this Court published before November 1, 1990, is not binding but may be relied on for its persuasive value. *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

that case, the garnishee "paid funds owing to Principal Defendants after service of the writs of garnishment issued by the district court, contrary to the express prohibitions therein." *Id*. at 364-365. The trial court entered a judgment against the garnishee, ordering it to pay the plaintiffs 1¼ of the balance owed under the previous judgment pursuant to the penalty provision then provided by GCR 1963, 738.5. *Id*. This Court reversed the imposition of the penalty but affirmed that the garnishee was liable to the plaintiff for the payments made to the defendant in violation of the writ:

> [The writs] directed the garnishee defendant to deliver no tangible or intangible property to principal defendants unless allowed by statute, court rule or court order. They also clearly indicated that garnishee defendant was not to pay any obligations to the principal. Yet, while these writs were in effect, garnishee defendant accelerated its installment payments to principal defendants under the land contract and took title to the property.
>
> Garnishees' duties and obligations under the rules and their potential liability to the plaintiffs attach at the time they are properly served with the writ. GCR 1963, 738.4, 738.5. They then become responsible for the timely performance of the specific duties imposed by GCR 1963, 738, at the risk of default judgment against them which may be executed against their own funds or property, GCR 1963, 738.8.[6] [*Id*. at 368-369.]

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[6] We recognize that at the time *Chayka* was decided, GCR 1963, 738.8 provided that "[j]udgment shall not be rendered against the garnishee or his property until after judgment has been recovered by the plaintiff against the principal defendant." However, that *provision*—not just the phrase "or his property"—was not included in the Michigan Court Rules, effective March 1, 1985, which provided separate rules governing post- and pre-judgment garnishment. See MCR 3.101 and MCR 3.102. So we do not view the absence of this provision in the current court rules as supporting a conclusion that garnishees may not be held personally liable to the plaintiff.

The Court concluded that the garnishee's "violation of the express prohibitions embodied in these writs cannot be sanctioned." *Id*. at 370.

Thus, while the garnishee in *Chayka* no longer had any obligation to the defendant, it was nonetheless liable to the plaintiff for the amount of the payments made to the defendant in violation of the writ. In this case, by denying plaintiff a garnishment judgment on the ground that it would not hold True North liable for the amount of payments made to Crater, the trial court implied that garnishment judgments may not be executed against the garnishee's personal assets. However, there is nothing in the garnishment statute or court rule that indicates that a garnishment judgment for a sum certain should be treated differently than any other money judgment. MCR 3.101(O)(1) provides:

> Judgment may be entered against the garnishee for the payment of money or the delivery of specific property as the facts warrant. A money judgment against the garnishee may not be entered in an amount greater than the amount of the unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment. Judgment for specific property may be enforced only to the extent necessary to satisfy the judgment against the defendant.

While the *amount* of the garnishee's liability is determined by the property belonging to or the obligation owed to the defendant, see MCR 3.101(G)(1), that says nothing about how that liability may be satisfied. In other words, it does not follow that a garnishee's liability may be satisfied only with the defendant's assets if the garnishee fails to adhere to the requirements imposed on the garnishee. That interpretation would allow garnishees to escape all liability by turning over property and paying obliga-

tions to the defendant in violation of the writ. And in interpreting statutes and court rules, we are mindful of avoiding absurd results. See *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

Significantly, True North does not dispute that, as a general matter, garnishees may be held personally liable to the plaintiff. Instead, True North argues that this result was not warranted in this case because it made efforts to comply with the garnishment. We first note that plaintiff disputes that True North's improper payments to Crater were the result of a good-faith mistake. But setting that aside, True North does not identify any court rule, statute, or caselaw that grants trial courts the discretion to deny the plaintiff recovery because of inadvertent noncompliance.[7]

The trial court was concerned about imposing double liability on True North, i.e., holding the garnishee liable to pay plaintiff the same amount that it

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[7] We are aware of only one provision that contemplates consideration of the garnishee's intent in determining the amount of judgment against a garnishee. If a plaintiff obtains a default judgment for a periodic garnishment, which may be in the full amount of the unpaid judgment, see MCL 600.4012(9), and the garnishee files a motion within 21 days:

> [T]he court shall do 1 or more of the following, as applicable:
>
> (a) If the garnishee certifies by affidavit that its failure to comply with the garnishment was inadvertent or caused by an administrative error, mistake, or other oversight and it will immediately begin withholding any available funds or immediately begin performing any other required act pursuant to the garnishment as provided by statute or court rule, reduce the default judgment to not more than the amount that would have been withheld if the garnishment had been in effect for 56 days. [MCL 600.4012(10)(a).]

Thus, MCL 600.4012(10) applies to a very limited circumstance, and it does not grant the trial court discretion to deny recovery against the garnishee but merely to reduce a prior default judgment to payments that should have been withheld within 56 days of the service of the writ.

improperly paid to defendant. However,[8] that concern must be weighed against the fact that garnishment is a key mechanism for prevailing parties to enforce money judgments obtained through the courts. Allowing a garnishee to transfer garnished funds to a defendant without risk of liability could greatly frustrate that remedy, the purpose of which is "to preserve a principal defendant's assets in the control of the garnishee[.]" *Ward*, 115 Mich App at 35. In addition, our holding merely requires garnishees to obey the law by performing their responsibilities defined by statute and court rule. We see no reason to deviate from those provisions simply because a garnishee fails to accurately understand its legal responsibility.

In sum, the trial court erred by denying plaintiff's request for entry of judgment on the basis that it would not hold True North personally liable for the amount paid to Crater in violation of the writ of garnishment.

B. BANKRUPTCY

In denying plaintiff's motion for turnover of funds, the court opined that further proceedings on the garnishment were subject to the bankruptcy stay arising out of Crater's bankruptcy petition.

11 USC 362(a) provides for an "automatic stay" upon the filing of a bankruptcy petition. *Frederick v Fed-Mogul Corp*, 273 Mich App 334, 337-338; 733 NW2d 57

[8] We note that "[a] garnishee may recover an amount for which the garnishee is liable because of the entry of a default judgment under subsection (9) or (10) from future periodic payments to the defendant as provided in section 7 of 1978 PA 390, MCL 408.477." MCL 600.4012(11). Because MCL 408.477 governs deduction from wages, it is not applicable to this case. However, it shows that the Legislature is aware that garnishees may be held personally liable, otherwise a right of recovery against the defendant would not be necessary.

(2006). "The automatic stay goes into effect upon the filing of a bankruptcy petition, prohibiting certain actions against the debtor or property of the bankruptcy estate." *In re Buchanan*, 273 BR 749, 751 (Bankr MD Ga, 2002). It is well settled that the automatic stay applies to garnishment proceedings. See, e.g., MCR 3.101(K)(2)(b) (stating that a defendant may object to a writ of garnishment within 14 days on the grounds that "garnishment is precluded by the pendency of bankruptcy proceedings").

We have no doubt, therefore, that the bankruptcy stay applied to the garnishment directed at True North insofar as it sought funds owed to the bankrupt party, Crater. However, the other defendants, Better Brush and Fresh Outlook, are not in bankruptcy, and plaintiff maintains that the sums paid to Crater by True North were actually owed to the companies and not to Crater personally. If true, then Crater's bankruptcy would not stay any enforcement of a garnishment seeking assets of Better Brush or Fresh Outlook. No grounds have been presented to apply a bankruptcy stay to a garnishment directed at collecting sums due from the garnishee to someone other than the bankrupt party.

The trial court determined, however, that plaintiff needed to seek recovery of the contested payments from Crater in the bankruptcy proceedings even if the payments were actually owed to Better Brush and Fresh Outlook. Yet the question before the trial court was more limited, i.e., whether Crater's bankruptcy precluded further proceedings to enforce garnishment in the state court until such time that the bankruptcy was resolved.[9] To the extent that the trial court ruled that plaintiff had to seek recovery from the bankruptcy

[9] "The automatic stay provides protection from the time a case is filed *until entry of discharge or dismissal of the case*." *In re Ridley*, 572 BR

trustee rather than seek collection through garnishment, it was in error. Plaintiff's motion to enforce the garnishment is based on the *garnishee's* liability, a matter within the trial court's, as opposed to the bankruptcy court's, jurisdiction.

Accordingly, we conclude that remand for further proceedings is necessary. The trial court shall address plaintiff's argument that the bankruptcy stay does not prevent further garnishment proceedings against True North because the payments made in violation of the writ were actually owed to Better Brush or Fresh Outlook and thus were not part of the bankruptcy estate. The court shall make factual findings as necessary and may consider the current status of the bankruptcy proceedings.

C. DISCOVERY

The final issue concerns the scope of discovery in garnishment proceedings. Plaintiff argues that the trial court erred by granting a protective order precluding plaintiff from deposing True North.

The starting point is MCR 3.101(L)(1), which provides:

> Within 14 days after service of the disclosure, the plaintiff may serve the garnishee with written interrogatories or notice the deposition of the garnishee. The answers to the interrogatories or the deposition testimony becomes part of the disclosure.

Also relevant is MCR 3.101(M)(2), which provides, in part, that "[t]he facts stated in the disclosure must be accepted as true unless the plaintiff has served inter-

352, 360 (Bankr ED Okla, 2017) (emphasis added). By itself, the filing of a bankruptcy petition does not resolve or function as a dismissal of the pending garnishment proceedings.

rogatories or noticed a deposition within the time allowed by subrule (L)(1) or another party has filed a pleading or motion denying the accuracy of the disclosure." Finally, MCR 3.101(T)(2) through (5) provide the trial court discretion to extend the time for the plaintiff's filing of written interrogatories and a demand for oral examination of the garnishee, as well as the garnishee's answer to interrogatories and appearance for oral examination.

Plaintiff argues that MCR 3.101(L) merely requires it to initiate discovery within 14 days by either serving written interrogatories or noticing deposition of the garnishee to prevent the disclosure from becoming final and that it is not prevented from pursuing further discovery so long as it initiates discovery within the 14-day period. True North argues, and the trial court agreed, that plaintiff could only pursue one avenue of discovery within the 14-day period, either interrogatories or a deposition, and that plaintiff may not be granted any further discovery. Alternatively, to the extent that both interrogatories and a deposition could be pursued, the trial court took the view that the notice of deposition would also have to be filed within 14 days, and the court declined to exercise its discretion under MCR 3.101(T) to extend that period.

We conclude that *Decker v Trux R Us, Inc*, 307 Mich App 472; 861 NW2d 59 (2014), controls resolution of this issue. As the trial court noted in rendering its decision, *Decker* is the only case of record construing the interaction between MCR 3.101(L), (M), and (T). In that case, the plaintiff failed to either serve interrogatories or a notice of deposition of the garnishee within 14 days of the disclosure. The plaintiff later moved under MCR 3.101(T) to extend the time to serve interrogatories on the garnishee, and the trial court

denied the motion. *Id*. at 476-477. We affirmed, reasoning that the plaintiff could not seek an extension of the time for serving interrogatories under MCR 3.101(T) because it had failed to pursue discovery within MCR 3.101(L)'s 14-day time window, thus rendering the garnishee's disclosure final under MCR 3.101(M)(2). See *id*. at 479-481. Significantly, we did not view this interpretation as creating an irreconcilable conflict between MCR 3.101(L) and (T) because we determined that "the trial court can exercise its discretion to extend discovery as long as the plaintiff has complied with MCR 3.101(M)(2)," *id*. at 481; i.e., if the plaintiff serves interrogatories or notices the garnishee's deposition within 14 days of the disclosure, then the trial court may extend the time for seeking additional discovery.

Decker's holding that the trial court can grant further discovery under MCR 3.101(T) so long as the plaintiff initiates discovery within the 14-day period is dispositive of the question before us. Per *Decker*, because plaintiff served interrogatories within 14 days of garnishee's disclosure under MCR 3.101(L)(1), the trial court had discretion to grant further discovery under MCR 3.101(T), including extending the time for filing a demand for oral examination of the garnishee.[10] We note that allowing a plaintiff to depose the garnishee (at the court's discretion) under these circumstances may save the time and expense of all parties. When the

[10] Plaintiff also argues that once it timely complied with MCR 3.101(L)'s 14-day period, then it had a *right* to conduct discovery in accordance with the court rules related to discovery. Plaintiff relies on MCR 3.101(L)(3), which provides that "[t]he discovery rules apply to garnishment proceedings." However, this interpretation is inconsistent with *Decker*'s holding that a trial court has *discretion* to grant further discovery so long as discovery is initiated within 14 days of the disclosure.

answer to interrogatories raises additional questions, as was purportedly the case here, a deposition may provide clarification on whether additional proceedings are necessary and, if so, should allow for a more expeditious resolution.

As noted, the trial court alternatively granted the protective order on the ground that it was declining to exercise its discretion under MCR 3.101(T) given the pending bankruptcy petition. That rationale is questionable, however, because the court did not address plaintiff's argument that the bankruptcy stay does not apply to contested payments that were owed to Better Brush or Fresh Outlook. If the trial court determines on remand that the garnishment proceedings against True North are wholly precluded by the bankruptcy stay, then we agree that further discovery would not be necessary at this time. However, if the court concludes that the bankruptcy stay does not preclude further proceedings against True North, at least as to any sums True North owed Better Brush or Fresh Outlook, then it should decide, on the merits, whether plaintiff's request to depose True North is warranted under the circumstances.[11]

III. CONCLUSION

To summarize, we reverse and remand for three reasons. First, the trial court erred by denying plaintiff's

[11] At plaintiff's request, on June 12, 2019, the trial court issued a subpoena for True North to appear for a "debtor's examination." In its initial brief, plaintiff asserted—without any elaboration—that the subpoena was governed by MCR 2.621 (proceedings supplementary to judgment) but then proceeded to analyze MCR 3.101(L) only. In its reply brief, plaintiff now argues that the trial court committed error requiring reversal by not analyzing the subpoena as having been issued under MCR 2.621. "[R]aising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Bronson Methodist Hosp v Mich Assigned*

request for a judgment on the ground that it would not hold True North personally liable for the amount paid to Crater in violation of the writ of garnishment. Second, while Crater's bankruptcy proceedings may in fact stay garnishment proceedings against True North, the trial court failed to adequately address plaintiff's argument that the payments were actually owed to Better Brush or Fresh Outlook and, for that reason, not subject to the stay. The trial court shall address that matter on remand. Third, if the trial court concludes that further proceedings against True North are not precluded by the stay, the court shall decide whether to grant plaintiff's request for a deposition.

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

SERVITTO and LETICA, JJ., concurred with SHAPIRO, P.J.

Claims Facility, 298 Mich App 192, 199; 826 NW2d 197 (2012) (quotation marks and citation omitted; alteration in original). Accordingly, this argument is not properly before us. *Id*. Also, we note that a specific court rule controls over a more general court rule. See *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005); MCR 1.103.

RIVERBROOK v FABODE

Docket No. 349065. Submitted September 1, 2020, at Detroit. Decided September 17, 2020, at 9:10 a.m. Leave to appeal sought. Oral argument ordered on the application 508 Mich 1025 (2022).

Riverbrook, a mobile home community, appealed in the Macomb Circuit Court the decision of the 42-2 District Court denying a writ of eviction against Abimbola Fabode and her brother, Antony Fabode. Antony lived in a mobile home on property leased to his sister by Riverbrook. In 2018, Antony obtained a puppy, King, which Riverbrook suspected was a pit bull mix, a breed that was apparently not permitted in the mobile home community. Riverbrook ordered Abimbola to remove King from the property. In response, Antony submitted veterinary records with information regarding King's breed and a certificate that declared King an emotional support dog. Riverbrook was not persuaded by this paperwork and issued a demand for possession and termination of tenancy, instructed the Fabodes to vacate the residence by June 22, 2018, and filed the eviction action in the district court. The parties entered a consent judgment that specified that Riverbrook had the right to recover possession of the property and to an order of eviction if all unauthorized animals were not removed. The district court subsequently entered an order of eviction. The Fabodes moved to stay the writ, arguing that Antony was entitled to keep King because he served as an emotional support dog. Antony submitted a letter to Riverbrook from Anne Venet, a limited-license professional counselor, declaring that she had evaluated Antony, was familiar with the limitations posed by his disability, and recommended an emotional support animal (ESA) to help him cope with the symptoms of his disability. The letter further stated that Antony was entitled to an ESA as a reasonable accommodation under federal housing and disability laws. Riverbrook denied Antony's accommodation request, asserting that Antony had not provided credible proof that he had a disability and that Venet's letter did not constitute credible proof of either Antony's disability or of his need for an ESA. After hearing testimony from Venet, the district court, William H. Hackel, III, J., found that Venet was credible, issued the stay, and denied the writ of eviction. On appeal, the circuit

court, James M. Biernat, Jr., J., affirmed the district court's decision under the Fair Housing Act, 42 USC 3601 *et seq*. The circuit court agreed that Venet's opinion regarding Antony's need for an ESA was sufficient to warrant the accommodation and upheld the district court's determination that an ESA on the premises was not a valid basis for eviction under the consent judgment because an ESA was not an unauthorized animal. Riverbrook applied for leave to appeal in the Court of Appeals, which granted the application.

The Court of Appeals *held*:

The FHA forbids a landlord from discriminating against a person with a "handicap" by refusing to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford the person an equal opportunity to use and enjoy a dwelling. In order to prove that a housing provider failed to reasonably accommodate a disability, a plaintiff must prove that they suffer from a disability within the meaning of the FHA, that the defendant knew or reasonably should have known of the disability, that the requested accommodation may be necessary to afford an equal opportunity to use and enjoy the dwelling, that the accommodation is reasonable, and that the defendant refused to make the accommodation. Under the FHA, a "handicap" is a physical or mental impairment that substantially limits one or more of the person's major life activities. The Fabodes claimed that Antony had a "handicap" and required accommodation in in the form of an ESA in order to use and enjoy his dwelling. However, the only evidence the Fabodes presented in support of their FHA defense against the eviction was Venet's letter. Contrary to the district court's conclusion that its role was only to verify that a counselor had written a letter, the court was required to consider the validity of the opinion presented in the letter and to determine if the letter actually supported the Fabodes' claim. Under MRE 702, the trial court must ensure that each aspect of an expert witness's testimony is reliable, in that it is based on sufficient facts or data, is the product of reliable principles and methods, and that the witness has applied the principles and methods reliably to the facts of the case. Riverbrook properly sought reliable information from the Fabodes to determine whether Antony truly suffered from a "handicap" and required an ESA in order to use and enjoy his dwelling, but Venet's letter did not provide any information regarding Antony's purported disability. Because the district court did not allow the record to be developed and limited Riverbrook's questioning of Venet, the district court, the circuit court, and the Court of Appeals were all unable to assess whether

Antony had a "handicap" under the FHA and required a reasonable accommodation. Further proceedings were required to resolve this matter.

Circuit court order vacated and case remanded for further proceedings.

FAIR HOUSING ACT — REASONABLE ACCOMMODATIONS — EVIDENCE — EXPERT TESTIMONY — RELIABILITY.

In order to prove that a housing provider failed to reasonably accommodate a person with a disability, a plaintiff must prove, *inter alia*, that the plaintiff suffers from a disability within the meaning of the Fair Housing Act (FHA), 42 USC 3601 *et seq*., and that the plaintiff requires a reasonable accommodation that is necessary to afford the plaintiff an equal opportunity to use and enjoy the dwelling; when presented with an FHA claim by a party, MRE 702 requires the courts to consider the reliability of the expert testimony presented by the plaintiff in deciding whether the plaintiff has established the FHA claim such that a reasonable accommodation is required.

Swistak & Levine, PC (by *I. Matthew Miller*) for Riverbrook.

Law Office of Steve Tomkowiak and Fair Housing Center of Metropolitan Detroit (by *Steve Tomkowiak*) for Abimbola Fabode and others.

Before: LETICA, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM. Humans have long enjoyed the companionship of domesticated animals. In recent years, governments have allowed people with psychological disabilities to register "Emotional Support Animals" (ESAs) to help them navigate the world. This designation is more fluid than that of a service dog used to assist the blind or others with physical needs. And the fuzzy edges of these laws have spawned abuse. We have all heard the tales: a woman claiming a disability who tried to bring an emotional support peacock in the

main cabin on a flight, or the United States Department of Transportation requiring airlines to permit emotional support miniature horses on passenger airliners.[1] Landlords have also felt the fallout from "emotional support animal" abuses, with tenants purchasing ESA certification online to dodge pet prohibitions in their leases.

In this case, the district and circuit courts abandoned their roles as the gatekeepers of evidence under MRE 702 and rejected the landlord's attempt to challenge the validity of the documents presented by the tenant to support his need for an ESA. This was error. We vacate the circuit court order affirming the district court's eviction decision and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Antony Fabode lives in a mobile home on property leased to his sister, Abimbola Fabode, by Riverbrook. In the spring of 2018, Antony obtained a puppy, King, which he claims is a Labrador retriever mix. Riverbrook suspected that King was actually a pit bull mix, which is apparently a forbidden breed in the mobile home community. On May 18, 2018, Riverbrook notified Abimbola of the violation and ordered her to remove King from the premises. Antony responded

[1] See Silva, *Emotional Support Peacock Denied Flight by United Airlines*, NBC Universal <https://www.nbcnews.com/storyline/airplane-mode/emotional-support-peacock-denied-flight-united-airlines-n842971> (posted January 30, 2018) (accessed September 3, 2020) [https://perma.cc/Q2NX-GU53]; Chermocha, *US Dept. of Transportation Rules Airlines Must Allow Miniature Horses to Fly as Service Animals*, The Drive Team <https://www.thedrive.com/news/29332/us-dept-of-transportation-rules-airlines-must-allow-miniature-horses-as-service-animals> (posted August 9, 2019) (accessed September 9, 2020) [https://perma.cc/N83G-L8YW].

with veterinary records describing King's breed and a May 2, 2018 "USAR" certificate declaring King an "emotional support dog," complete with a registration number. Unsatisfied with this documentation, Riverbrook issued a demand for possession and termination of tenancy, instructing the Fabodes to vacate the residence by June 22, 2018.

Antony thereafter secured a letter from Anne Venet, a limited-license professional counselor, on letterhead bearing a canine bust. The letter declared Antony's need for an ESA:

> Antony Fabode (DOB: 09/26/1986); has been evaluated by me. I am familiar with the client's history and limitations imposed by the client's disability.
>
> Antony Fabode has been diagnosed with a Differential Illness[2] under the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) that substantially limits one or more major life activities. The Differential Illness meets the definition of a disability under the Americans with Disability [sic] Act, The Fair Housing Act, and the Rehabilitation Act of 1973, § 504.[3] In order to reduce the impairment associated with the disability and enhance the ability to live independently and fully use and enjoy a dwelling, or reduce impairment associated with this diagnosed disability and flying, I am endorsing [ESAs]. The [ESAs] will have a substantial impact in helping Antony cope with symptoms of the disability.

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[2] According to the Merriam-Webster online dictionary, in the medical field, a "differential diagnosis" is "the distinguishing of a disease or condition from others presenting similar symptoms." See Merriam-Webster.com Dictionary, *differential diagnosis* <https://www.merriam-webster.com/dictionary/differential%20diagnosis#medicalDictionary> (accessed September 1, 2020) [https://perma.cc/8YVL-XW3G]. A differential diagnosis is made to narrow down the field of possible conditions from which a patient may suffer. "Differential illness" appears to be a misnomer.

[3] The statutory provision that is apparently still routinely referred to as § 504 of the Rehabilitation Act is now found at 29 USC 794(a).

> Reasonable accommodation should be given to Antony such that Antony should be allowed to live with the animals in a dwelling . . . . This letter meets the requirements under the Fair Housing Act . . . , Section 504 of the Rehabilitation Act . . . , and the Americans with Disabilities Act . . . .

Riverbrook filed a complaint for eviction in the district court, and the Fabodes signed a consent judgment providing that their residency could continue only if "all unauthorized animals" were "permanently removed from the premises." But the Fabodes persevered by attempting to establish that Antony was entitled to retain possession of King as an ESA.

Skeptical of Venet's letter, Riverbrook sent her a "resident disability certification form" to complete. Venet completed the form but gave general answers when asked how the ESA could assist Antony, stating: "The ESA will lessen the symptoms of [Antony's] diagnosed disability according to DSM-V" and "The ESA is necessary for Antony to enjoy his dwelling as others in the community. There are no other options including medication."

Riverbrook replied, "These registration certificates and/or ID cards are not credible proof of any disability or any disability related need for an assistance animal." Riverbrook implied that Antony purchased the opinion that he required an ESA. The website used by Antony stated, "A doctor in our network may be able to prescribe an [ESA] with only one phone call" and that the customer could receive his or her "Doctor Letter for Airline Travel and Housing immediately via email for print and use." The letter produced by Venet was "clearly a form letter" that was not "credible proof" of Antony's disability or need for an ESA, Riverbrook asserted. Rather,

> Ms. Venet's response established that she had no contact with [Antony] prior to May 31, 2018, [the] same date that she printed out the form letter declaring him to be disabled due to a "Differential Illness." A person with a disabling mental or emotional condition will have a history of treatment that predates the request for an [ESA]. [Antony's] accommodation request is clearly his attempt to circumvent the community's requirement that the dog be permanently removed.

Riverbrook denied Antony's accommodation request.

Riverbrook applied to the district court to enforce the consent judgment with an order of eviction. The district court granted the motion and ordered Antony's removal by September 28, 2018. The Fabodes sought a stay of eviction, asserting that they were legally authorized to possess King as an ESA and that Riverbrook wrongfully evicted them. The Fabodes continued to rely on Venet's letter and the ESA certification. And Riverbrook continued to question the validity of Venet's assessment that Antony suffered from a condition requiring an ESA when she had only briefly spoken to Antony on the phone.

Venet testified at a district court hearing. She asserted that Antony was referred to her through United Support Animals and that she had determined his need for an ESA after a single brief phone call. She denied that a clinician needs to meet with a patient in person to make a diagnosis. Venet reviewed no prior medical records, conducted no diagnostic testing, and provided no counseling to Antony. In fact, Venet explained that diagnostic testing and referring clients for additional counseling was "[b]eyond [her] scope of practice."

The district court limited Riverbrook's questioning of Venet. The court directed that it would not permit questions "into medical decisions" because "the statute

is pretty clear [that] counselor writes the letter, makes a determination." Riverbrook urged the district court to consider the evidence presented by the Fabodes more deeply, but the court demurred because it opined that the only thing required under "the statute" is that a "licensed counselor . . . makes a determination."

> *The Court*: I don't - - I didn't say I like it, okay. I don't say I agree with this and I think the statute is horribly written and I don't think there's any standards given to it. And if it's this easy to get, it's incredible to me. But it's kind of like the same way the statute is written for medical marijuana, okay, you need a physician-client relationship. Five minutes is a physician-client relationship. Someone walks into an attorney's office and says I got a question, you know, whether you get money or not, it could be possibly a relationship. All right, so whether all this other stuff whether she did or dug into is irrelevant the way the statute's written.
>
> [*Riverbrook's Counsel*]: It is not irrelevant when you consider that it has to be credible evidence of a disabling medical condition. We have no credible evidence. If I can get social security disability based on a telephone conversation, no one in the world would work.
>
> *The Court*: This is not social security, this is different. This is the - - this is the - - this is the way Congress wrote this act. And - -
>
> [*Riverbrook's Counsel*]: Your Honor?
>
> * * *
>
> [*Riverbrook's Counsel*]: Your Honor, there is case law that would say that the information supplied to the landlord has to be credible and I don't believe her - - her testimony, her letter is credible evidence of a disabling mental condition and that's what is required by the statute, not simply a letter from any old person.
>
> *The Court*: Well, I disagree at this point. . . .

At this point, and like I said, I'm not happy with the way this is done and these certificates I think are really bogus considering there is no real registration out there because all you really need is the letter from the counselor.

[*Riverbrook's Counsel*]: A credible letter from the counselor.

The Court: Well, I don't - - I found nothing uncredible about her, especially, given her background, information as provided, and what the statute limits us to. Okay, you're - - I don't disagree with you, I'm just stuck with the law.

[*Riverbrook's Counsel*]: But you're allowed to look into the facts of the situation. He didn't have any treatment, he has never had treatment.

The Defendant: That's not true.

The Court: No, no, no, no. And I think that's beyond the scope of this hearing, okay. The hearing, my purpose for this hearing is more of this is not whether this was issued correctly or incorrectly, that's not my call. My call is to make sure that the counselor done it, met the requirements of. Now, if you want to challenge licensing issues, you want to challenge his state, I guess that's for somewhere else. But here, it's just a simple, did it meet the requirements of the statute- -

[*Riverbrook's Counsel*]: So - -

The Court: - - I think it did. All right, I didn't - - I didn't say I'm happy with my decision, okay, because this opens it up for all kinds of stuff and it opens up for this whole internet thing they've got going which, you know, but- -

[*Riverbrook's Counsel*]: But - -

The Court: - - they allow it.

[*Riverbrook's Counsel*]: Well, you allow it, not all courts allow it.

The Court: No, no. I allow it because everybody else allows it.

[*Riverbrook's Counsel*]: I don't think so. . . .

> There - - I mean there's case law and that the info - - the information has to be credible. I don't think that based on a phone call from some unknown person, she can say oh, yes, his condition is disabling and he needs a dog.
>
> *The Court*: They don't require - - the statute doesn't require meeting. The statute doesn't require treatment. The statute doesn't require treatment. The statute doesn't require an ongoing relationship.
>
> [*Riverbrook's Counsel*]: How can she - -
>
> *The Court*: The statute doesn't require any of that, okay. And you're asking me to say, Congress, you need - - you really meant to say this, okay. I don't think it does. And the reason I do that is because the way they wrote the - - some of these other - - they didn't think this through, all right, but I'm stuck with what I got. . . .

The district court then denied the writ of eviction.

Riverbrook appealed to the circuit court. Riverbrook had investigated "USAR" and discovered a company called "U.S. Support Animals," whose website "promise[d] a doctor's letter to support an applicant's request for an ESA for $179.99." Based on this discovery, Riverbrook continued to argue that Antony purchased his diagnosis of a condition requiring an ESA only after Riverbrook notified him that he had violated the pet policy. Riverbrook contended that Venet's letter, based solely on information obtained from Antony and no documented history of treatment, failed to support that Antony had an impairment that substantially limited a major life activity or a disability-related need for an ESA. Thus, Antony's dog was an unauthorized pet whose presence violated the consent judgment.

Ultimately, the circuit court affirmed the district court's ruling, relying on the Fair Housing Act (FHA), 42 USC 3601 *et seq*. The circuit court cited caselaw allegedly holding that the "inquiry need not be highly intrusive" and that "medical records or detailed

information about the nature of a person's disability is not necessary." Absent a legal requirement for "more stringent proof of a handicap or the necessity of an accommodation," the circuit court agreed that Venet's opinion regarding Antony's need for the ESA was sufficient evidence. The circuit court explained:

> The evidence demonstrates that before and during the proceedings, the parties were in communication regarding whether the occupant's dog was actually an ESA. Based on the evidence presented by Riverbrook, Riverbrook received the information it requested from Venet after it determined that her initial letter was unsatisfactory. Venet completed the Resident Disability Certification Form provided by Riverbrook, but rather than requesting additional information, Riverbrook denied Fabode's request to register the dog based on the date that Venet evaluated the occupant and required the dog to be permanently removed from the home and the community. Riverbrook then filed an application and order of eviction on the basis that it had seen the dog in the community. Fabode filed a motion to stay the writ, alleging that the parties entered into the consent judgment with the understanding that they could keep the ESA on the premises until Riverbrook reviewed all paperwork and made a decision to accept or deny the animal, and they removed the ESA upon receiving Riverbrook's denial letter on August 17, 2018.
>
> Based on the totality of the largely undisputed evidence presented, the district court determined that Riverbrook's sole basis for denying Fabode's request for a reasonable accommodation in the form of an ESA was its finding that Venet's assessment was not credible. After taking Venet's testimony, the district court disagreed, expressly finding Venet and her assessment to be credible, and denied the eviction on this basis. This Court finds no clear error in the district court's determination that an ESA on the premises is not a basis for eviction under the terms of the consent judgment, as an ESA is not an "unauthorized animal." [Citations omitted.]

We granted Riverbrook's application for leave to appeal "limited to the issues raised in the application and the supporting brief." *Riverbrook v Fabode*, unpublished order of the Court of Appeals, entered September 11, 2019 (Docket No. 349065).

II. ANALYSIS

We review de novo a circuit court's affirmance of a district court order. *Noll v Ritzer*, 317 Mich App 506, 510; 895 NW2d 192 (2016). We also review de novo the lower courts' interpretation of the relevant statute—the FHA. See *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). We review for an abuse of discretion the lower courts' decision to admit evidence pursuant to the relevant statute. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016).

The Fabodes raised the FHA in defense of the eviction action. The FHA provides, in part, that a landlord may not discriminate "because of a handicap," 42 USC 3604(f)(1), by "refus[ing] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling," 42 USC 3604(f)(3)(B).

> To prove that a housing provider failed to reasonably accommodate a disability, a plaintiff must prove that: (1) she suffers from a disability within the meaning of FHA; (2) the defendant knew or reasonably should have known of the disability; (3) the requested accommodation may be necessary to afford an equal opportunity to use and enjoy the dwelling; (4) the accommodation is reasonable; and (5) the defendant refused to make the accommodation. [*Overlook Mut Homes, Inc v Spencer*, 415 F Appx 617, 621 (CA 6, 2011) (quotation marks and citation omitted).]

A "handicap" or disability, for purposes of the FHA, is defined as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment[.]" 42 USC 3602(h). See also 24 CFR 100.201 (2020). "Major life activities," in turn, is defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 CFR 100.201(b) (2020).

The Fabodes, as the proponents of the FHA defense to the eviction action, bore the burden of proving that Antony had a "handicap" and required accommodation "to use and enjoy [his] dwelling" because of that handicap. The only evidence presented by the Fabodes was the letter authored by Venet. Venet took the stand but provided no new evidence in the courtroom. Contrary to the district court's conclusion, the court was required to consider the validity of the opinion presented in the letter and determine if the letter actually supported the Fabodes' claim.

MRE 702 governs the admissibility of expert testimony and opinions, such as that of Venet. Pursuant to MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Elher*, our Supreme Court stated that MRE 702

> requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable. MRE 702 incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc*, [509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993),] in order to interpret the equivalent federal rule of evidence. Under *Daubert*, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. . . . Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. [*Elher*, 499 Mich at 22-23 (quotation marks and citations omitted).]

Both the district and circuit courts avoided their gatekeeper role under MRE 702 despite Riverbrook's repeated objections to the reliability and admissibility of the Fabodes' evidence. The circuit court relied on *Overlook Mut Homes*, 415 F Appx 617, to avoid its duty of overseeing the validity and reliability of the evidence presented. However, *Overlook* does not support the proposition asserted. Rather, the United States Court of Appeals for the Sixth Circuit held in *Overlook Mut Homes*, 415 F Appx at 621-622:

> A housing provider . . . is entitled to seek information from an allegedly disabled person in order to establish the existence of the disability and the necessity of the accommodation. According to the Joint Statement [of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 14, 2004), available at <https://www.hud.gov/sites/documents/huddojstatement.pdf> (accessed September 11, 2020) [https://perma.cc/RZJ9-WHDS]],
>
> [I]n response to a request for a reasonable accommodation, a housing provider may request *reliable*

> disability-related information that (1) is necessary to verify that the person meets the [FHA's] definition of disability . . . , (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation.
>
> *Id*. at 13. This inquiry need not be highly intrusive. "In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary . . . ." *Id*. at 13-14. [Emphasis added.]

Consistently with this guidance, Riverbrook asked the Fabodes for reliable information from which it could determine whether Antony truly suffered from a handicap and required an ESA to allow him to use and enjoy his dwelling. The Fabodes responded with the letter from Venet stating that Antony suffered from a "differential illness." It appears that this was not actually a diagnosis, but a statement that a diagnosis had yet to be reached. The letter did not identify any of the symptoms of Antony's "differential illness." The record is devoid of any information describing Antony's purported handicap or disability. Did he suffer from anxiety or depression? Was he prone to psychotic episodes? The letter offers no explanation of how King could assist Antony. Does King calm Antony? Does King sense when Antony might experience an episode of his condition? As the district court did not allow the record to be developed, neither the district court nor circuit court nor this Court can assess whether Antony has a handicap and requires a reasonable accommodation by Riverbrook of its pet policy to allow King to live in the home and assist his owner.

Further proceedings must be had below before this matter can be resolved. On remand, the district and circuit courts should take careful note of the statutory language. The statute does not provide that a tenant

may automatically establish a handicap and a need for an ESA with a simple letter or that the court may not delve into the accuracy or legitimacy of the diagnosing party's opinion. Under MRE 702, the court *must* carefully consider the reliability of the methods employed by Venet, as well as her final opinion. Only then can the district and circuit courts determine if Riverbrook refused to make a reasonable accommodation for a tenant with a disability or handicap.

We vacate the circuit court order affirming the district court judgment and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

LETICA, P.J., and FORT HOOD and GLEICHER, JJ., concurred.

MICLEA v CHEROKEE INSURANCE COMPANY

Docket No. 344694. Submitted February 4, 2020, at Detroit. Decided September 17, 2020, at 9:15 a.m. Leave to appeal denied 507 Mich 962 (2021).

Gavril Miclea brought an action in the Wayne Circuit Court against Cherokee Insurance Company (Cherokee), Auto Club Insurance Association (Auto Club), the Michigan Assigned Claims Plan, and the Michigan Automobile Insurance Placement Facility, seeking a determination as to which insurer was highest in priority for purposes of his claim for personal protection insurance (PIP) benefits under Michigan's no-fault act, MCL 500.3101 *et seq*. Plaintiff suffered injuries when he slipped and fell while trying to put antifreeze into his truck. At the time, plaintiff was performing truck-driving services under an independent-contractor agreement with Universal Am-Can, Ltd (Universal). Plaintiff testified that he held legal title to the truck, and at the time of the accident, Universal was leasing the truck from him. Plaintiff maintained personal automobile insurance through Auto Club, and Universal maintained business automobile insurance through Cherokee. After unsuccessfully pursuing PIP benefits from Auto Club, Cherokee, and the Michigan Assigned Claims Plan, plaintiff filed this lawsuit. Intervening plaintiff, Michigan Head & Spine Institute, P.C., one of plaintiff's healthcare providers, also filed a complaint to recover benefits for the services it provided. Cherokee, relying on *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173 (2015), moved for summary disposition, arguing that because plaintiff was an independent contractor at the time he suffered his injuries, his personal automobile insurer, Auto Club, was the highest-priority no-fault insurer pursuant to MCL 500.3114(1) and (3). Auto Club, relying on *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84 (1996), and *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19 (2010), argued that it was entitled to summary disposition, claiming that Cherokee was the highest-priority no-fault insurer pursuant to MCL 500.3114(3) because, regardless of whether plaintiff was an independent contractor, plaintiff was an employee of himself and the owner of the truck. The trial court, Leslie K. Smith, J., relied on the economic-reality test to determine that plaintiff was acting as an independent contractor at the time he sustained

his injuries; therefore, the trial court concluded that plaintiff was not an employee and that plaintiff's personal insurer, Auto Club, was the no-fault insurer of highest priority. Accordingly, the trial court granted summary disposition in favor of Cherokee. The trial court entered a stipulated judgment in favor of plaintiff that expressly permitted Auto Club to appeal the trial court's order granting summary disposition in favor of Cherokee. Auto Club appealed.

The Court of Appeals *held*:

MCL 500.3114(3) provides that an employee, his or her spouse, or a relative of either domiciled in the same household who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive PIP benefits to which the employee is entitled from the insurer of the furnished vehicle. Pursuant to MCL 500.3101(3)(*l*)(*i*) and (*iii*), an "owner" of a motor vehicle can include either an entity leasing the vehicle or an entity holding legal title to the vehicle, or both. Plaintiff, as the title holder, did not lose his status as an "owner" under the no-fault act by leasing the truck to Universal; consequently, both plaintiff and Universal were "owners" of the truck at the time of the injury. The determination of which insurer was highest in priority therefore depended on whether plaintiff was an "employee" within the meaning of MCL 500.3114(3). The economic-reality test provides the appropriate framework for determining whether an individual is an employee or an independent contractor under Michigan's no-fault act. In this case, the trial court properly relied on the economic-reality test to determine that plaintiff was an independent contractor or employee of Universal; however, the trial court erred by concluding that plaintiff, who was an owner of the truck, was not also an employee of himself. The three cases in dispute—*Celina*, *Besic*, and *Adanalic*—had been harmonized in an unpublished opinion, *Sappington v Shoemake*, unpublished per curiam opinion of the Court of Appeals, issued October 30, 2018 (Docket No. 337994), and the Court's harmonization of those three cases in *Sappington* was expressly reaffirmed and adopted in this case. In essence, a person cannot be an employee and independent contractor of the same entity at the same time; however, being an independent contractor of one entity does not preclude a person from simultaneously being an employee of another entity, which can include one's self. Accordingly, Cherokee's argument that an independent contractor of one entity cannot simultaneously be an employee of another entity, including himself, was rejected. Plaintiff was not an employee of Universal, but he was an employee of himself.

Because plaintiff also "owned" the vehicle, MCL 500.3114(3) applied. And because Cherokee insured the vehicle, it was the insurer of highest priority. Accordingly, the trial court's order was reversed.

Reversed and remanded.

K. F. KELLY, J., dissenting, would have affirmed the trial court's conclusion that Auto Club was the highest-priority no-fault insurer for purposes of plaintiff's claim for PIP benefits. While *Celina* and *Besic* were closely related to the circumstances presented in this case, *Adanalic* still controlled. Like the injured person in *Adanalic*, plaintiff in this case was performing truck-driving services under an independent-contractor agreement. And similar to the factual scenario in *Adanalic*, plaintiff was paid a percentage of each shipment, paid for the truck's registration and repairs himself, had the right to refuse loads, and chose his own routes to make deliveries. As a result, pursuant to *Adanalic*, plaintiff was an independent contractor, not an employee, for purposes of MCL 500.3114(3). While *Adanalic* stands for the proposition that the injured party must seek payment of PIP benefits from its personal no-fault insurer when deemed to be an independent contractor, *Celina* and *Besic* stand for the proposition that the injured party must seek payment of PIP benefits from the insurer of the vehicle if the person is self-employed and if the person is acting on behalf of his or her business at the time the accident occurs. But if an injured party is deemed to be an independent contractor under the economic-reality test, the question becomes whether he or she was acting on behalf of his or her business at the time of the injury. In this case, while plaintiff was self-employed, he was acting on behalf of Universal, the trucking company he worked for as an independent contractor, not himself as an employer. Consequently, *Celina* and *Besic* were not directly on point. Instead, because plaintiff was undisputedly an independent contractor at the time he sustained his injuries and was acting on behalf of Universal, MCL 500.3114(3) did not apply. Accordingly, the outcome most consistent with *Adanalic*, *Celina*, and *Besic* would be as follows: the injured person's personal automobile insurer is responsible for PIP benefits if the person is an independent contractor alone, but the insurer of the vehicle involved is responsible if the person is self-employed and acting on behalf of his or her own self-employment. Therefore, Judge K. F. KELLY would have affirmed the trial court's conclusion that Auto Club was the highest-priority no-fault insurer for purposes of plaintiff's claim for PIP benefits.

INSURANCE — MICHIGAN'S NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — WORDS AND PHRASES — "EMPLOYEE."

MCL 500.3114(3) of Michigan's no-fault act, MCL 500.3101 *et seq*., provides that an employee, his or her spouse, or a relative of either domiciled in the same household who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle; a person cannot be an employee and independent contractor of the same entity at the same time, but being an independent contractor of one entity does not preclude a person from simultaneously being an employee of another entity, which can include one's self.

Richard D. Wilson and *Darren M. Cooper* for Cherokee Insurance Company.

Michele M. Arene and *Mary T. Nemeth* for Auto Club Insurance Association.

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

RONAYNE KRAUSE, P.J. Defendant Auto Club Insurance Association (Auto Club) appeals as of right the stipulated judgment entered in favor of plaintiff Gavril Miclea. That stipulated judgment expressly permitted Auto Club to appeal the trial court's previous order denying its motion for summary disposition and granting summary disposition to defendant Cherokee Insurance Company (Cherokee), holding that Auto Club was the highest-priority no-fault insurer for purposes of plaintiff's claim for personal protection insurance (PIP) benefits under Michigan's no-fault act, MCL 500.3101 *et seq*. On appeal, Auto Club argues that the trial court erred by concluding that it was the highest-priority no-fault insurer rather than Cherokee pursuant to MCL 500.3114(3). We agree. We therefore reverse the order granting summary disposition in favor of Cherokee and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff suffered injuries when he slipped and fell while trying to put antifreeze in his 2000 Volvo tractor (the truck). At the time, plaintiff was performing truck-driving services under an independent-contractor agreement with Universal Am-Can, Ltd (Universal). Plaintiff testified that he held legal title to the truck, and at the time of the accident, Universal was leasing the truck from him. Plaintiff maintained personal automobile insurance through Auto Club, and Universal maintained business automobile insurance through Cherokee. After unsuccessfully pursuing PIP benefits from Auto Club, Cherokee, and defendant Michigan Assigned Claims Plan, plaintiff filed this lawsuit, seeking a determination as to which insurer was highest in priority for purposes of his claim for PIP benefits. Intervening plaintiff Michigan Head & Spine Institute, P.C., one of plaintiff's healthcare providers, also filed an intervening complaint to recover benefits for the services it provided.

Cherokee moved for summary disposition under MCR 2.116(C)(10), arguing that because plaintiff was an independent contractor at the time he suffered his injuries, his personal automobile insurer, Auto Club, was the highest-priority no-fault insurer pursuant to MCL 500.3114(1) and (3). In support of this position, Cherokee relied heavily on this Court's opinion in *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173; 870 NW2d 731 (2015), identifying *Adanalic* as the "controlling authority for independent contractor cases such as the case at bar." In response, Auto Club argued that it was entitled to summary disposition, claiming that Cherokee was the highest-priority no-fault insurer pursuant to MCL 500.3114(3) because, regardless of whether plaintiff was an independent contractor,

plaintiff was an employee of himself and the owner of the truck. Auto Club contended that *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996), and *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19; 800 NW2d 93 (2010), rather than *Adanalic*, controlled the outcome of this priority dispute.

The trial court relied on the economic-reality test and determined that plaintiff was acting as an independent contractor at the time he sustained his injuries. The trial court therefore concluded that plaintiff was not an employee, so his personal insurer, Auto Club, was the no-fault insurer of highest priority. As a result, the trial court granted Cherokee's motion for summary disposition. Ostensibly, the instant appeal focuses on whether this case is controlled by *Adanalic* or by *Celina* and *Besic*. However, as will be discussed, we conclude that those three cases may be harmonized instead of shoehorning any of them to "control" over the others.

II. STANDARD OF REVIEW

A trial court's decision to grant or deny summary disposition is reviewed de novo. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). Summary disposition is appropriate pursuant to MCR 2.116(C)(10) when there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(4) and (5); *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018).

Michigan's appellate courts also review a trial court's interpretation and application of the no-fault act de novo. *Agnone v Home-Owners Ins Co*, 310 Mich App 522, 526; 871 NW2d 732 (2015). When interpreting and applying a statute, a court's primary goal is to ascertain and give effect to the Legislature's intent. *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004). In doing so, courts look first to the language of the statute itself. *Id*. If the statute is clear and unambiguous, it must be enforced as written, and judicial construction is neither necessary nor permissible. *Id*. However, Michigan's appellate courts have recognized that "[t]erms contained in the no-fault act are read in the light of its legislative history and in the context of the no-fault act as a whole." *Id*. (quotation marks and citation omitted). Moreover, "[g]iven the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries." *Id*. (quotation marks and citation omitted). "Further, courts should not abandon common sense when construing a statute." *Id*. (quotation marks and citation omitted).

III. LEGAL BACKDROP

"Michigan's no-fault act generally abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 490; 835 NW2d 363 (2013). "Instead, insurance companies are required to provide first party insurance benefits for accidental bodily injury arising out of the use of a motor vehicle, which are commonly referred to as personal protection insurance (PIP) benefits." *Id*. "The basic purpose of no-fault is to ensure the compensation of persons injured in automobile accidents." *Hill v Aetna Life & Cas Co*, 79

Mich App 725, 728; 263 NW2d 27 (1977). Thus, in general, "PIP coverage applies to the insured person, and not to the motor vehicle." *Amerisure Ins Co v Coleman*, 274 Mich App 432, 438; 733 NW2d 93 (2007) (quotation marks and citation omitted). It is possible for more than one insurer to be responsible for payment of benefits to a particular individual. However, persons are generally not entitled to a double recovery from multiple policies unless the person's injuries exceed policy limits. *Beaver v Auto-Owners Ins Co*, 93 Mich App 399, 401-403; 286 NW2d 884 (1979). In the event that multiple insurers might be responsible, the relative priority of those insurers is determined by MCL 500.3114(1). *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 254-255; 819 NW2d 68 (2012). "[T]he general rule is that one looks to a person's own insurer for no-fault benefits unless one of the statutory exceptions, [MCL 500.3114(2), (3), and (5)], applies." *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 202-203; 393 NW2d 833 (1986).

There is no dispute that Auto Club is plaintiff's "own insurer," so Auto Club is, by default, the insurer of first priority. There is also no dispute that Cherokee insured the motor vehicle at issue. Consequently, only one statutory exception could potentially apply:

> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle. [MCL 500.3114(3).]

Pursuant to MCL 500.3101(3)(*l*)(*i*) and (*iii*), an "owner" of a motor vehicle can include either an entity leasing the vehicle or an entity holding legal title to the

vehicle, or both.[1] Plaintiff, as the title holder, did not lose his status as an "owner" under the no-fault act by leasing the truck to Universal. See *Besic*, 290 Mich App at 21-22, 32. Consequently, both plaintiff and Universal were "owners" of the truck at the time of the injury. The outcome of this matter turns on whether plaintiff was an "employee" within the meaning of MCL 500.3114(3). The no-fault act does not expressly define "employer" or "employee."

IV. ANALYSIS

This Court has long held that the economic-reality test provides the appropriate framework for determining whether an individual is an employee or an independent contractor under Michigan's no-fault act. See, e.g., *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983). The trial court properly applied the economic-reality test and determined that at the time of the injury, "plaintiff was operating as an independent contractor and not an employee." Auto Club does not challenge that finding. Cherokee thus argues generally that plaintiff simply cannot be an employee because he is an independent contractor. In contrast, Auto Club argues that plaintiff was nevertheless an "employee" for purposes of MCL 500.3114(3) because he was self-employed and occupying a vehicle that he owned at the time of his injuries. We agree with Auto Club.

As an initial matter, it is clear from context that the trial court only analyzed whether plaintiff was an independent contractor or employee of Universal. The trial court properly relied on the economic-reality test

[1] We recognize that the word "leasing" could, in the absence of further context, be construed as referring either to the lessor or the lessee. When the statute is read as a whole, however, it clearly refers to a lessee.

to make that finding. However, the trial court erred by concluding that plaintiff, who was an owner of the truck, was not also an employee of himself. This Court has already resolved that issue under similar circumstances, albeit in an unpublished opinion signed by two members of this panel. Unpublished opinions of this Court are not binding. MCR 7.215(C)(1); MCR 7.215(J)(1). Nevertheless, unpublished opinions may be persuasive, especially when the unpublished case involves similar facts or when little published authority exists that is on point. See *Cox v Hartman*, 322 Mich App 292, 307-308; 911 NW2d 219 (2017). We find little published authority tending to resolve what we now believe is a troublesome and recurring issue: a superficial conflict between two cases from this Court and one case from our Supreme Court: *Celina*, *Besic*, and *Adanalic*. We have, however, harmonized those cases in a prior unpublished opinion.

Therefore, we now expressly reaffirm and adopt our prior resolution of this issue in *Sappington v Shoemake*, unpublished per curiam opinion of the Court of Appeals, issued October 30, 2018 (Docket No. 337994), pp 3-4, as follows:

> Our Supreme Court has unambiguously established that a person can simultaneously be both an employer and an employee under the no-fault act. *Celina*[, 452 Mich at 87-90]. In particular, someone who is self-employed is an employee of himself. *Id*. This Court further explained that a person can be a self-employed independent contractor and retain the status of both employer and employee. *Besic*, 290 Mich App at 31-32. Both cases are holdings as a matter of law: if a person is self-employed, that person is necessarily both employer and employee for purposes of MCL 500.3114(3). Therefore, if [plaintiff] is an independent contractor of [Universal], then [plaintiff] is necessarily an employee of himself.

> Cherokee correctly observes that "[a]n independent contractor is not considered an 'employee' for purposes of the no-fault act." *Adanalic*[, 309 Mich App at 191]. However, *Adanalic* clearly addressed only whether a person could simultaneously be an employee and an independent contractor of the same entity at the same time. Furthermore, *Adanalic* is consistent with *Celina* and *Besic*. In the latter cases, the injured parties owned the vehicles in which they were injured. *Celina*, 452 Mich at 86; *Besic*, 290 Mich App at 21. In *Adanalic*, the injured party owned a truck, but his injuries involved his occupancy of a semi-trailer that he did not own. *Adanalic*, 309 Mich App at 177-178. In all three cases, the courts were called upon to determine whether an owner of the occupied vehicle employed the injured party. Because the injured party in *Adanalic* did not own the vehicle in which he was injured, his self-employment status was irrelevant.
>
> If [plaintiff] was an independent contractor of [Universal], *Adanalic* only establishes that [plaintiff] was not an employee of [Universal]. Binding case law rejects Cherokee's argument that [plaintiff]'s status as an independent contractor necessarily precludes him from being an employee of *anyone*.

As we discussed in *Sappington*, all three cases operate in perfect harmony. Therefore, we reject Cherokee's argument that an independent contractor of one entity cannot simultaneously be an employee of another entity, including himself.

We additionally observe that Cherokee's argument would seemingly result in the curious conclusion that an independent contractor is somehow unemployed; because, at least in some contexts, being an "independent contractor" means that one is self-employed.[2] Furthermore, it appears to us that the Legislature

[2] For example, the Internal Revenue Service takes the position that being an independent contractor means that one is self-employed. See Internal Revenue Service, *Independent Contractor Defined* <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> (accessed September 17, 2020) [https://perma.cc/47GB-YPB2].

intended, by enacting MCL 500.3114(3), to shift the burden of providing PIP benefits to the insurers of vehicles in certain commercial contexts, probably because those insurers will be in a better position to evaluate the risks against which they are insuring. See *Celina*, 452 Mich at 89. We may not depart from the literal language of an unambiguous statute, but if any construction is necessary—such as determining the meaning of an undefined word—we should strive "to prevent absurd results, injustice, or prejudice to the public interest." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); see also *Frierson*, 261 Mich App at 734. If the caselaw had left any doubt, we would therefore resolve that doubt in favor of deeming the insurer of the commercial vehicle to have a higher priority.

V. CONCLUSION

As we concluded in *Sappington*, there is no need to determine which of *Celina*, *Besic*, and *Adanalic* "controls" over the others, because all three cases can be harmonized. A person cannot be an employee and independent contractor of the same entity at the same time. However, being an independent contractor of one entity does not preclude a person from simultaneously being an employee of another entity, which can include one's self.[3] On these facts, plaintiff was not an employee of Universal, but he was an employee of himself. Because plaintiff also "owned" the vehicle, MCL 500.3114(3) applies. Because Cherokee insured the vehicle, it is the insurer of highest priority. The trial court's order denying summary disposition to Auto Club and granting summary disposition in favor of

[3] See note 2 of this opinion.

Cherokee is reversed, and the matter is remanded for any further proceedings the trial court deems necessary or proper. We do not retain jurisdiction. Auto Club, being the prevailing party, may tax costs. MCR 7.219(A).

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

K. F. KELLY, J. (*dissenting*). I respectfully dissent. Because I conclude that Auto Club Insurance Association (Auto Club) was the highest-priority no-fault insurer for purposes of plaintiff's claim for personal protection insurance (PIP) benefits under Michigan's no-fault act, MCL 500.3101 *et seq*., I would affirm.

The applicable facts and standard of review are delineated in the majority opinion. Briefly, plaintiff was injured when he slipped and fell while trying to put antifreeze in his 2000 Volvo tractor (the truck). Plaintiff owned the truck, but it was leased by Universal Am-Can, Ltd (Universal), and plaintiff provided driving services to Universal through an independent-contractor agreement. Plaintiff maintained personal automobile insurance through Auto Club, and Universal maintained business automobile insurance through Cherokee Insurance Company (Cherokee). Plaintiff attempted to obtain PIP benefits from Auto Club, Cherokee, and defendant Michigan Assigned Claims Plan, but he was denied benefits. He then filed this lawsuit, seeking a determination regarding the insurer highest in priority for purposes of his claim for PIP benefits.

In Michigan, MCL 500.3114(1) sets forth the general rule to determine the Michigan insurer responsible for providing PIP benefits. *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 490; 835 NW2d 363 (2013). By its

terms, MCL 500.3114(1) states, in relevant part, that "a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." Thus, the no-fault insurance policy secured by the injured person's household is first in order of priority for payment of no-fault benefits. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 255; 819 NW2d 68 (2012). "[I]t is the policy of the no-fault act that persons, not motor vehicles, are insured against loss." *Lee v Detroit Auto Inter-Ins Exch*, 412 Mich 505, 509; 315 NW2d 413 (1982). Accordingly, a personal insurer of an injured claimant may be liable for benefits despite the fact that it has written no coverage respecting any vehicle involved in the accident and indeed that no vehicle involved in the accident has any coverage whatsoever. This requirement, that the insurer of a personal vehicle must provide benefits regardless of whether the insured vehicle is involved in the accident, remains applicable. *Corwin*, 296 Mich App at 255.

In MCL 500.3114(3), however, there is an employee exception to that general rule:

> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

To determine priority, one must examine whether plaintiff was an "employee" for purposes of MCL 500.3114(3) such that Cherokee would be responsible for payment of PIP benefits as "the insurer of the

furnished vehicle," rather than Auto Club, plaintiff's personal automobile insurer under MCL 500.3114(1).

The economic-reality test provides the appropriate framework for determining whether an individual is an employee or an independent contractor under Michigan's no-fault act. *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983). However, Auto Club concedes that plaintiff was Universal's independent contractor, not its employee. Despite that concession, Auto Club argues that plaintiff was an "employee" for purposes of MCL 500.3114(3) for the simple reason that he was self-employed and occupying a vehicle that he owned at the time of his injuries.

With respect to that argument, the trial court concluded that the outcome of this case was controlled by *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173; 870 NW2d 731 (2015). In *Adanalic*, the plaintiff, who "had contracted with DIS Transportation [DIS] to pick up, haul, and deliver various loads of cargo," "was seriously injured while unloading a pallet from a disabled box truck onto a semi-trailer," both of which were owned by DIS. *Id*. at 177. When the plaintiff sought PIP benefits, a dispute arose as to which automobile insurer was liable for these benefits: Harco National Insurance Company, DIS's business automobile insurer, or Michigan Millers Mutual Insurance Company (Millers), the plaintiff's personal automobile insurer. *Id*. The trial court determined that Millers, the plaintiff's personal automobile insurer, was the highest-priority no-fault insurer. *Id*. at 178.

In reaching that decision, the trial court emphasized the following aspects of the relationship between the plaintiff and DIS: (1) the contract between the plaintiff and DIS identified the plaintiff as an independent

contractor; (2) the plaintiff "had the right to decline to haul any load offered by DIS" and "this was the actual practice between the parties"; (3) although their agreement "state[d] that DIS compensated [the plaintiff] based on a percentage of the loads he delivered," the plaintiff "was responsible for withholding all taxes and for workers compensation insurance"; (4) their agreement "was terminable at will by either party"; and (5) the performance of the plaintiff's duties was "not an integral part of DIS' business." *Id*. at 191-192 (quotation marks omitted). Based on these considerations, the trial court concluded that the plaintiff "was an independent contractor, not an employee" for purposes of MCL 500.3114(3). *Id*. at 192 (quotation marks omitted).

This Court affirmed that decision by determining that, "[f]or purposes of MCL 500.3114(3), whether an injured party was an 'employee' is determined by applying the 'economic reality test.' " *Id*. at 190-191. The economic-reality test weighs several factors, this Court recognized, including "(a) control of the worker's duties, (b) payment of wages, (c) right to hire, fire and discipline, and (d) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id*. at 191 (quotation marks and citation omitted). Nevertheless, this Court explained, "[a]n independent contractor is not considered an 'employee' for purposes of the no-fault act." *Id*., citing *Citizens Ins Co of America v Auto Club Ins Ass'n*, 179 Mich App 461, 465; 446 NW2d 482 (1989). Because it held that "the trial court did not err by finding that, for purposes of the no-fault act, [the plaintiff] was an independent contractor, not an employee, of DIS," this Court concluded that "the trial court did not err by ruling that Millers, as [the plain-

tiff's] no-fault insurer, was responsible for payment of his PIP benefits." *Id*. at 194.

As Cherokee contends, and the trial court concluded, *Adanalic* is on point. Like the injured person in that case, plaintiff was performing truck-driving services under an independent-contractor agreement. Similar to the factual scenario in *Adanalic*, plaintiff testified that he was paid "[a] percentage" of each shipment, not by the hour; received 1099s, not W2s; paid for the truck's registration, fuel, repairs, and "everything" else himself; had the right to refuse loads; and chose his own routes to make deliveries. As a result, pursuant to *Adanalic*, plaintiff was an independent contractor, not an employee, for purposes of MCL 500.3114(3).

Auto Club contends, however, that *Adanalic* is distinguishable "because the injured person in that case did not own the trailer involved in the accident." "Stated another way," Auto Club claims, "*Adanalic* did not involve a self-employed person who was injured while occupying a business vehicle he owned." Auto Club argues that *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84; 549 NW2d 834 (1996), and *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19; 800 NW2d 93 (2010), control because those cases included an additional legal inquiry in the determination of whether an injured person was an independent contractor: whether the injured person was also self-employed and occupying an owned business vehicle.

In *Celina*, Robert Rood was injured while driving a wrecker owned by his own towing company, Rood's Wrecker & Mobile Home Service. *Celina Mut Ins Co*, 452 Mich at 86. Celina Mutual Insurance Company (Celina), Rood's Wrecker & Mobile Home Service's business automobile insurer, paid Rood's claim for PIP benefits but also filed suit against Lake States Insur-

ance Company, Rood's personal automobile insurer, alleging that it was the highest-priority no-fault insurer. *Id*. The trial court concluded that MCL 500.3114(3) applied to Rood because he was an "employee" of Rood's Wrecker & Mobile Home Service despite it being his own business. *Id*. at 85. Therefore, the trial court held, Celina, as the insurer of the vehicle involved in the accident, was the highest-priority insurer. *Id*. Although this Court reversed, "concluding that a sole proprietor was not an 'employee' for the purpose of § 3114(3)," the Supreme Court reversed and reinstated the trial court's decision. *Id*. at 85-86.

According to the Supreme Court, its decision was "most consistent with the purposes of the no-fault statute to apply § 3114(3) in the case of injuries to a self-employed person." *Id*. at 89. The Court explained: "The cases interpreting that section have given it a broad reading designed to allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance." *Id*.[1] Conversely, the Court continued, the Court of Appeals' analysis relied too heavily "on cases involving worker's compensation statutes which have held that a sole proprietor is not an 'employee' " and which "were enacted for the protection of both employees and employers." *Id*. at 90. The no-fault act, on the other hand, "has no such restrictive definition of 'employee' " and

[1] The *Celina* Court expressly held that the act was designed to allocate the cost to the business for the premium it pays for the vehicle. However, there is no definition of employee in MCL 500.3114(3). Consequently, businesses have hired owners of tractor-trailers as independent contractors and leased the owner's vehicle. Thus, the characterization of this employment relationship, despite the business lease of the vehicle, effectively allows the business to avoid payment for PIP benefits and to place the burden on the independent contractor's personal insurer, a result that was not intended.

achieves its "goals . . . by including self-employed persons within the purview of § 3114(3)." *Id*.

This Court deemed *Celina*'s analysis controlling in *Besic* several years later. In that case, after quoting the Supreme Court's analysis, this Court held that *Celina* mandated that MCL 500.3114(3) apply even though the plaintiff was a self-employed independent contractor rather than an employee. The Court stated:

> Besic owned the truck and worked as a self-employed independent contractor for MGR [Express, Inc]. Consistently with the Michigan Supreme Court's analysis in *Celina*, 452 Mich at 89, the priority language in MCL 500.3114(3) extends to the self-employment situation of Besic. . . . Because MCL 500.3114(3) applies to the undisputed facts of this case, it dictates that Besic "shall receive personal protection insurance benefits to which [he] is entitled from the insurer of the furnished vehicle." In light of the fact that only Clearwater [Insurance Company] extended PIP benefits to the truck involved in Besic's accident, it has first priority to pay Besic's first-party benefits. [*Besic*, 290 Mich App at 32.]

In reaching that decision, this Court expressly rejected arguments regarding a lack of evidence as to who Besic's purported "employer" was for purposes of the statute. *Id*. at 33.

While our Supreme Court's opinion in *Celina* and this Court's opinion in *Besic* are closely related to the circumstances presented here, *Adanalic* still controls. While *Adanalic* stands for the proposition that the injured party must seek payment of PIP benefits from its personal no-fault insurer when deemed to be an independent contractor, *Celina* and *Besic* stand for the proposition that the injured party must seek payment of PIP benefits from the insurer of the vehicle if the person is self-employed *and* if the person is acting on behalf of his or her business at the time the accident

occurs. But if an injured party is deemed to be an independent contractor under the economic-reality test, the question becomes whether he was acting on behalf of his business at the time of the injury.

Here, while plaintiff was self-employed, he was acting on behalf of Universal, the trucking company he worked for as an independent contractor, *not* himself as an employer. Consequently, *Celina* and *Besic* are not directly on point. Instead, because plaintiff was undisputedly an independent contractor—Auto Club expressly concedes that point on appeal—at the time he sustained his injuries and was acting on behalf of Universal, MCL 500.3114(3) does not apply. Although there are circumstances that distinguish this case from *Adanalic* as well, including differences regarding the ownership of the truck involved, it is my view that the injured person's personal automobile insurer is responsible for PIP benefits if the person is an independent contractor alone, but the insurer of the vehicle involved is responsible if the person is self-employed *and* acting on behalf of his or her own self-employment, as this outcome appears most consistent with *Adanalic*, *Celina*, *Besic*, and the statutory language at issue. Moreover, I reject Auto Club's contention that *Celina* and *Besic* included an additional legal inquiry in the independent-contractor determination. The plain language of MCL 500.3114(3) contains no such requirement.

Because I conclude that the trial court properly determined that plaintiff was not an "employee" for purposes of MCL 500.3114(3), I would hold that the trial court correctly identified Auto Club, not Cherokee, as the highest-priority no-fault insurer for purposes of plaintiff's claim for PIP benefits. Therefore, I would affirm.

In re KNIGHT

Docket No. 346554. Submitted January 14, 2020, at Lansing. Decided September 17, 2020, at 9:20 a.m.

Gregg B. Knight filed a petition in the Jackson Circuit Court, requesting that his firearm rights be reinstated under MCL 28.424. In May 2001, petitioner pleaded guilty of the felony of arson of woods and prairies, MCL 750.78, and was sentenced to probation and ordered to pay restitution and attorney fees. In 2004, the trial court sentenced petitioner to 17 to 48 months in prison after he twice violated the conditions of his probation sentence. Later, petitioner was granted parole on the prison sentence with the condition that he pay restitution. In 2007, petitioner was discharged from parole even though he had only paid a nominal amount of the ordered restitution. In 2018, petitioner petitioned to restore his firearm rights, stating that he had completed probation and parole and that he had paid all fines related to his arson conviction. Respondent—the Jackson County Prosecuting Attorney, who appeared in the case by invitation of the court—opposed the petition, arguing that petitioner's firearm rights should not be restored because he had failed to fully pay restitution, violating the conditions of his probation and resulting in his imprisonment. The trial court granted the petition and restored petitioner's firearm rights, reasoning that petitioner's discharge from parole was sufficient to satisfy MCL 28.424(4)(b)(*iii*). Respondent appealed.

The Court of Appeals *held*:

1. At the trial court level, a litigant has standing whenever there is a legal cause of action. If a litigant does not have a legal cause of action, the litigant may still have standing if the litigant has a special injury or right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. In other words, while standing requires a litigant to have an interest in the outcome of the litigation, that interest need not be conferred by a statute. At the appellate level, however, a party must be an aggrieved party under MCR 7.203(A). For purposes of the court rule, an "aggrieved

party" is an individual who suffered concrete and particularized injury arising from either the actions of the trial court or the appellate court judgment. A party is aggrieved when the injury is concrete, not a mere possibility arising from some unknown and future contingency. MCL 28.424(1) provides that an individual who is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under MCL 750.224f may petition the circuit court in the county in which he or she resides for restoration of those rights. Historically, the restoration of firearm rights was handled by the concealed-weapon licensing board, of which the county prosecutor was a member. However, effective December 1, 2015, 2015 PA 3 amended MCL 28.424 and MCL 28.425a, abolishing concealed-weapon licensing boards and transferring the authority to restore firearm rights to the circuit court in the county in which the petitioner resides. Although that authority is now granted to circuit courts, prosecutors have an interest in firearm-rights-restoration cases because, under MCL 49.153, prosecutors are required to appear for the state or county, and prosecute or defend in all courts of the county, all prosecutions, suits, applications, and motions whether civil or criminal, in which the state or county may be a party or interested; prosecutors have standing in those cases because nothing in MCL 49.153 suggests that a prosecutor's duties under that statute should not apply to MCL 28.424. To hold otherwise would defeat the adversarial aspect of firearm-rights-restoration proceedings because (1) there would be no one to argue against the restoration of a petitioner's rights, requiring the circuit court to function as an advocate and as an adjudicator and (2) there would be no aggrieved party with standing to appeal a circuit court ruling granting a petition to restore firearm rights. In this case, respondent was an interested party and had standing to oppose the petition because the trial court's decision to restore petitioner's firearm rights directly affected petitioner's legal status under MCL 750.224f. Respondent was similarly an aggrieved party on appeal because once petitioner's right were restored, respondent could no longer prosecute petitioner for possessing a firearm; that is, respondent was an aggrieved party and had standing because it was the only opportunity respondent would have to assert his authority regarding the restoration of petitioner's firearm rights.

2. Under MCL 28.424(4)(a) and (b), a circuit court must restore a petitioner's firearm rights if the court determines by clear and convincing evidence that (a) the individual properly submitted a petition for restoration and (b) five years have expired after all of the following circumstances: (*i*) the individual has paid all fines imposed for the violation resulting in the

prohibition, (*ii*) the individual has served all terms of imprisonment imposed for the violation resulting in the prohibition, and (*iii*) the individual has successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition. The language in MCL 28.424(4)(b)(*iii*) requiring that a petitioner have "successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition" indicates the Legislature's understanding that a criminal sentence generally results in either probation or parole, not both. The statutory provision broadly encompasses both possibilities, and a petitioner cannot choose which to comply with when seeking reinstatement of the petitioner's firearm rights. Thus, a petitioner does not have a choice of complying with either the terms of probation or the terms of imprisonment when asserting the petitioner's fulfillment of the MCL 28.424(4)(b)(*iii*) requirement. In this case, the original sentence was probation, not imprisonment, so it necessarily did not include the possibility of parole. Petitioner's parole was not relevant for purposes of MCL 28.424(4)(b)(*iii*) because the conditions of parole were not initially imposed for the violation of law resulting in the prohibition (i.e., for the arson); instead, petitioner was sentenced to probation for the arson offense, and for that reason, only the probation involved conditions imposed directly for the violation resulting in the prohibition. Accordingly, the relevant inquiry was whether petitioner complied with all conditions of probation, not whether he complied with conditions of parole. Although the imprisonment sentence was technically a sentence for the arson offense, under the facts of this case, the conditions of parole were not imposed for the arson offense itself for purposes of 28.424(4) given the intervening initial sentence of probation, probation violation, revocation of probation, and imprisonment. Petitioner was not eligible for restoration of his firearm rights under MCL 28.424(4)(b)(*iii*) because he admittedly violated the conditions of his probation sentence; accordingly, the trial court erred by granting the petition. Given that determination, it was unnecessary to address petitioner's remaining issues.

Reversed and remanded for entry of an order denying the petition.

LETICA, J., concurring, agreed with the majority that respondent had standing to appear for the state in a firearm-rights-restoration hearing and that respondent was an aggrieved party for purposes of the appeal. While Judge LETICA also agreed with the majority that the trial court erred by granting the petition, she disagreed with its analysis of MCL 28.424. A probation violation does not constitute a separate felony, but instead simply

clears the way for resentencing on the original offense. The requirements in MCL 28.424(4)(b)(*i*) through (*iii*) that each potential sentencing consequence must be "imposed for the violation resulting in the prohibition" refer to the underlying felony conviction of the specified felony because it is that conviction that prevents the petitioner from possessing a firearm. For that reason, the circuit court does not consider sentencing consequences when deciding whether to restore a petitioner's firearm rights unless that sentencing consequence was imposed by the circuit court or the Parole Board for the underlying specified felony conviction. Under MCL 28.424(4)(b)(*i*) through (*iii*), the circuit must consider whether a petitioner has fulfilled all of the potential sentencing outcomes actually imposed for the specified felony conviction. To give effect to the full text of MCL 28.424(4) and not render any phrase surplusage or nugatory, the mandate in MCL 28.424(4)(b)(*iii*) that a petitioner must have "*successfully* completed all conditions of probation or parole imposed for the violation resulting in the prohibition" to be eligible for reinstatement of firearm rights requires the probationer to abide by *all* the probation or parole conditions. Even though petitioner was discharged from parole, he did not successfully complete all the conditions of probation imposed when he was initially sentenced for the arson offense, and he was therefore not eligible for reinstatement of his firearm rights. Petitioner was also not eligible for reinstatement of his rights because he failed to meet the conditions of parole when he failed to pay restitution, regardless of his discharge from parole. Judge LETICA would also have reversed the trial court, but for different reasons from those on which the majority relied.

ACTIONS — STANDING — PROSECUTORS — PETITIONS TO REINSTATE FIREARM RIGHTS.

Prosecutors have standing to participate in cases in which an individual petitions to have his or her firearm rights reinstated under MCL 28.424.

Watkins Law Firm, PLLC (by *Brian R. Watkins*) for petitioner.

Jerard M. Jarzynka, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for respondent.

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

TUKEL, J. Respondent, the Jackson County Prosecuting Attorney, appeals as of right the November 20, 2018 order reinstating the firearm rights of petitioner Gregg B. Knight, which were lost as a result of petitioner's 2001 plea-based conviction of arson of woods and prairies, MCL 750.78, then a four-year felony.[1] Respondent argues that the trial court erred by restoring petitioner's firearm rights because petitioner violated his probation, failed to pay restitution while on parole, and failed to pay court-ordered restitution and attorney fees. Petitioner disagrees and additionally argues that this Court does not have jurisdiction over this case because respondent does not have standing and is not an aggrieved party. We hold that respondent does have standing; on the merits, we reverse and remand for the trial court to enter an order denying the petition because petitioner has not carried his burden.

I. UNDERLYING FACTS

In May 2001, petitioner pleaded guilty as noted. Petitioner was sentenced to probation and ordered to pay $8,025 in restitution and $375 in attorney fees. Petitioner twice violated the conditions of his probation, and as a result, the trial court, in May 2004, sentenced him to imprisonment for 17 to 48 months for violating the conditions of his probation. Petitioner later was paroled on the 17- to 48-month sentence, with a condition that he pay restitution. Petitioner failed to pay the entirety of his restitution, but he was nevertheless discharged from parole in October 2007. As of January 23, 2019, petitioner had paid only $138.51 in restitution and $60.81 in attorney fees.

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[1] Following the enactment of 2012 PA 532, effective April 3, 2013, this offense is now classified as fourth-degree arson and is punishable as a five-year felony. MCL 750.75(1)(b) and (3).

In August 2018, petitioner filed a petition to restore his firearm rights. See MCL 28.424(1). Petitioner stated in the petition that he had completed probation and parole and that he had paid all fines arising from his arson conviction. Respondent answered the petition in October 2018, arguing that petitioner's firearm rights should not be restored because petitioner had not paid all of his fines, leading to his probation being violated and his imprisonment for those violations.

The trial court held a motion hearing in October 2018. In November 2018, the trial court entered an order restoring petitioner's firearm rights. This appeal followed.

II. RESPONDENT'S STANDING

On appeal, petitioner argues for the first time that respondent lacks standing in this case. We disagree.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

"To preserve for appellate review an issue regarding standing, the defendant must have raised the issue in his or her first responsive pleading or motion." *In re Pollack Trust*, 309 Mich App 125, 153; 867 NW2d 884 (2015). When, as here, a party raises the issue of standing for the first time on appeal, the issue is unpreserved. *Id*.[2]

When properly preserved, this Court reviews de novo the issue of whether a party has standing. *Id*. at

[2] In this case, the issue of standing implicates more than who may file a brief or present argument to a court. The filing of a claim of appeal or the granting of an application to appeal is a prerequisite to our having jurisdiction. See MCR 7.203(A) and 7.203(B). Thus, if respondent lacked standing, this appeal would not lie because there would be no party to appeal. Therefore, if petitioner is correct that a prosecuting attorney

154. "Likewise, the related issue of whether a plaintiff is the real party in interest is also a question of law that we review de novo." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 621; 873 NW2d 783 (2015). Unpreserved issues, however, are reviewed for plain error. See *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (quotation marks omitted), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, citation and quotation marks omitted). The appellant bears the burden of persuasion with respect to prejudice. See *Carines*, 460 Mich at 763 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.") (citation and quotation marks omitted).

B. ANALYSIS

At the trial court level, "a litigant has standing whenever there is a legal cause of action." *Lansing Sch*

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lacks standing in firearm-rights-restoration cases, a trial court's ruling ordering firearm rights restored would, in all instances, be effectively unreviewable because there never would be a party who could pursue an appeal. Under respondent's view, however, a petitioner could in all cases appeal the denial of a petition, given that MCL 28.424(1) undisputedly confers standing on petitioners.

Ed Ass'n v Lansing Bd of Ed, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*). But even if no legal cause of action is available to a litigant, "[the] litigant may have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant."

> In general, standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. [*Pontiac Police & Fire*, 309 Mich App at 621 (citation and quotation marks omitted).]

To have standing on appeal, however, a litigant must be an aggrieved party under MCR 7.203(A). *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 326 Mich App 740, 745; 929 NW2d 817 (2019); MCR 7.203(A). To be an aggrieved party, a litigant must have "suffered a concrete and particularized injury . . . arising from either the actions of the trial court or the appellate court judgment . . . ." *MCNA*, 326 Mich App at 745 (citation and quotation marks omitted; sentence structure altered). For a party to be aggrieved, the injury must be concrete "and not a mere possibility arising from some unknown and future contingency." *Id*. (citation and quotation marks omitted).

Petitioner argues that respondent does not have standing because he lacks an interest in whether petitioner's firearm rights are restored. Specifically, petitioner argues that MCL 28.424 does not identify respondent as an "interested party" and that this omission establishes that respondent is not an interested party. Petitioner is correct that county prosecu-

tors are not even referred to in the firearm-rights-restoration statute, MCL 28.424. But standing does not require that a statute identify a litigant as an interested party. *LSEA*, 487 Mich at 372. Standing does require that a litigant have an interest in the outcome of the litigation, but that interest need not be enshrined in a statute. See *id*.

Petitioner additionally argues that respondent does not have standing because under a prior version of MCL 28.424, the county prosecutor, as a member of the concealed-weapon licensing board, had a role in determining whether to restore a petitioner's firearm rights.[3] Petitioner argues that when the Legislature transferred this power to the circuit courts, effective December 1, 2015, its action established that prosecutors no longer had an interest in whether a petitioner's firearm rights were restored.[4]

Although the Legislature abolished concealed-weapon licensing boards and, instead, reposed the power to restore firearm rights solely in the circuit courts, this change alone does not establish that respondent lacks standing in this case. Notwithstanding the Legislature's amendments of MCL 28.424 and

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[3] The county sheriff and the director of the department of state police also were members of the concealed-weapon licensing board. MCL 28.425a, as amended by 2000 PA 381.

[4] Before December 1, 2015, the concealed-weapon licensing board, of which the county prosecutor was a member, determined whether to restore a petitioner's firearm rights. See MCL 28.424, as amended by 1992 PA 219; MCL 28.425a, as amended by 2000 PA 381. Effective December 1, 2015, however, concealed-weapon licensing boards were abolished and the county clerk became responsible for many of the duties previously held by the concealed-weapon licensing board. MCL 28.425a, as amended by 2015 PA 3. But the power to determine whether to restore a petitioner's firearm rights was given to the circuit courts, not the county clerk. MCL 28.424, as amended by 2014 PA 6. That power remains with circuit courts today. MCL 28.424.

MCL 28.425a, respondent still has an interest in this case. Under MCL 49.153, "[t]he prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested." In construing a statute, "[i]t is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). Nothing in the firearm-rights-restoration statutes suggests that MCL 49.153 is not to be applied to such proceedings or, more generally, that prosecuting attorneys shall have no role to play in those proceedings notwithstanding the facial applicability of MCL 49.153.[5]

Moreover, to read the firearm-rights-restoration statutes in the manner in which petitioner suggests would work a very significant change in the procedure by which those cases are generally heard and decided. "Under our adversarial system, each party bears the responsibility for ensuring that its positions are vigorously and properly advocated," and " 'parties frame the issues and arguments' for the trial court." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285

[5] MCL 49.153 does not specify the mechanism by which a prosecuting attorney shall "appear" in such proceedings or how the prosecuting attorney mechanically then becomes a party or a litigant with standing. We would invite the Legislature to provide clarity in that regard. We do note, for purposes of this appeal, that MCR 2.209(A)(1) provides that a person has a right to intervene in any action "when a Michigan statute or court rule confers an unconditional right to intervene[.]" And although that right exists "[o]n timely application," MCR 2.209(A), respondent has represented to this Court that the trial court in this case expressly invited him to appear. We therefore deem any requirement of an "application" to intervene to have been satisfied in this case.

Mich App 362, 382-383; 775 NW2d 618 (2009) (citations omitted). The United States Supreme Court has very recently reaffirmed this point. In *United States v Sineneng-Smith*, 590 US ___; 140 S Ct 1575; 206 L Ed 2d 866 (2020), the Court unanimously stated, "In our adversarial system of adjudication, we follow the principle of party presentation," which means that " 'in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.' " *Id*. at ___; 140 S Ct at 1579, quoting *Greenlaw v United States*, 554 US 237, 243; 128 S Ct 2559; 171 L Ed 2d 399 (2008). Thus, "our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.' " *Sineneng-Smith*, 590 US at ___; 140 S Ct at 1579 (alteration in original), quoting *Castro v United States*, 540 US 375, 386; 124 S Ct 786; 157 L Ed 2d 778 (2003) (Scalia, J., concurring in part and concurring in the judgment). Consequently, courts " 'do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.' " *Sineneng-Smith*, 590 US at ___; 140 S Ct at 1579 (citation and brackets omitted).

Petitioner's reading of the statute would do away with the adversarial aspect of firearm-rights-restoration proceedings because there would be no one to argue in opposition to the restoration of a petitioner's rights. A trial court would have to function both as an advocate and as an adjudicator.[6] Among other

[6] As noted, the statute assigns to circuit courts the sole authority to determine firearm-rights restoration. MCL 28.424(1).

things, this would require a trial court, with input only from a petitioner, to ferret out whether a petitioner's "record and reputation are such that the individual is not likely to act in a manner dangerous to the safety of other individuals." MCL 28.424(4)(c); see also Part III of this opinion. Trial courts generally are poorly equipped to conduct such fact-finding on their own, without arguments and with the development of facts in support of only one side of such a motion.

In addition, under petitioner's reading, there would be no aggrieved party with standing to appeal a trial court ruling restoring firearm rights, and thus, such decisions would be effectively unreviewable. See note 2 of this opinion. This result would fly in the face of *Sineneng-Smith*, under which a court abuses its discretion if it departs too drastically from the principle of party presentation. *Sineneng-Smith*, 590 US at ___; 140 S Ct at 1579. Applying that reasoning, the Court in *Sineneng-Smith* remanded the case for an adjudication of the appeal "attuned to the case shaped by the parties rather than the case designed by the appeals panel." *Id*. at ___; 140 S Ct at 1578.

Given the strong presumption that proceedings will generally take place in an adversarial system, and given that MCL 49.153 facially applies to prosecuting attorneys being involved in firearm-rights-restoration cases because such cases involve civil "applications and motions" in which the state is an interested party, we find nothing in the statutory language that would support reading the statute to so radically depart from the ordinary and expected functioning of adversarial proceedings. In the absence of a clear statutory statement of such a purpose, we cannot conclude that the Legislature intended that result.

The United States Supreme Court has stated, in a different context involving notice of what the law entails, "If [the Legislature] desires to go further, it must speak more clearly than it has." *McNally v United States*, 483 US 350, 360; 107 S Ct 2875; 97 L Ed 2d 292 (1987); see also *Skilling v United States*, 561 US 358, 411; 130 S Ct 2896; 177 L Ed 2d 619 (2010) (quoting *McNally* and stating that "absent [the Legislature's] clear instruction otherwise[,] '[i]f [the Legislature] desires to go further,' . . . 'it must speak more clearly than it has' "). We hold that the same requirement of clarity applies here.

Furthermore, respondent is an interested party in this case because a trial court's decision to restore a petitioner's firearm rights obviously directly affects the petitioner's right to possess firearms.[7] If a trial court denies the petition, then the petitioner's possession of a firearm would violate MCL 750.224f. See MCL 28.424; MCL 750.224f (prohibiting possession of a firearm by a felon). In contrast, if a trial court grants the petition, the petitioner could lawfully possess a firearm. See MCL 28.424; MCL 750.224f. County prosecutors have an interest in prosecuting criminal defendants for violating criminal statutes, such as MCL 750.224f, or at least in having the authority to prosecute. Thus, because the trial court's decision to restore petitioner's firearm rights directly affected petitioner's legal status under MCL 750.224f, respondent had an interest in the proceedings and that interest conveyed standing on it. See *LSEA*, 487 Mich at 372; MCL 49.153 (establishing standing on the part of the

[7] For purposes of this opinion, the phrase "possess firearms" means to possess, use, transport, sell, purchase, carry, ship, receive, or distribute firearms. See MCL 28.424(1).

prosecuting attorney in all cases in which "the state or county may be . . . interested").

Respondent is an aggrieved party on appeal for these same reasons. Respondent argued that he opposed the petition because petitioner had not successfully completed the requirements of MCL 28.424. As explained earlier, when a petitioner's firearm rights are restored, he or she may lawfully possess a firearm. Thus, in this case, once the trial court restored petitioner's firearm rights, respondent was precluded under MCL 750.224f, from prosecuting petitioner for possessing a firearm. The trial court's determination conclusively resolved respondent's authority to enforce MCL 750.224f as to petitioner, now and in the future. Thus, respondent is an aggrieved party because appealing the trial court's ruling will be the only opportunity for respondent to seek to assert his authority regarding the restoration of petitioner's firearm rights. See *MCNA Ins Co*, 326 Mich App at 745; MCL 49.153.

III. RESTORATION OF PETITIONER'S FIREARM RIGHTS

Turning to the merits of this case, we agree with respondent that the trial court erred by restoring petitioner's firearm rights.

A. STANDARD OF REVIEW

"Issues of statutory interpretation are reviewed de novo." *Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). When the language of a statute is clear and unambiguous, this Court "will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011).

B. ANALYSIS

MCL 28.424 establishes the mechanism by which an individual who is prohibited from possessing a firearm may have his or her right to possess a firearm restored. In relevant part, MCL 28.424 states:

> (1) An individual who is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under section 224f(2) of the Michigan penal code, 1931 PA 328, MCL 750.224f, may petition the circuit court in the county in which he or she resides for restoration of those rights.
>
> * * *
>
> (4) The circuit court shall, by written order, restore the rights of an individual to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm or to possess, use, transport, sell, carry, ship, or distribute ammunition if the circuit court determines, by clear and convincing evidence, that all of the following circumstances exist:
>
> (a) The individual properly submitted a petition for restoration of those rights as provided under this section.
>
> (b) The expiration of 5 years after all of the following circumstances:
>
> (*i*) The individual has paid all fines imposed for the violation resulting in the prohibition.
>
> (*ii*) The individual has served all terms of imprisonment imposed for the violation resulting in the prohibition.
>
> (*iii*) The individual has successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition.
>
> (c) The individual's record and reputation are such that the individual is not likely to act in a manner dangerous to the safety of other individuals.

The parties focus much of their arguments on MCL 28.424(4)(b)(*iii*) and whether petitioner successfully completed "all conditions of probation or parole imposed for the violation resulting in the prohibition." Generally, a defendant in a criminal proceeding will be sentenced to either probation or a term of imprisonment, not both, with only a term of imprisonment carrying with it a possibility of parole.[8] Here, however, petitioner did receive both, albeit at different times, because his original sentence was a term of probation and because, as a consequence of his violation of that probation, he was resentenced to a term of imprisonment, from which he was later paroled. In other words, petitioner's original sentence was one of probation, not incarceration; therefore, it necessarily included no element of possible future parole. Parole became a possibility only after petitioner violated his probation and was resentenced to a term of imprisonment.

We conclude that petitioner's parole is not relevant for purposes of MCL 28.424(4)(b)(*iii*) because, in the circumstances presented, the conditions of parole were not initially imposed "for the violation [of law] resulting

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[8] In discussing the meaning of "parole" under Michigan law, this Court in *People v Clark*, 315 Mich App 219, 230; 888 NW2d 309 (2016), stated:

> [U]nder Michigan law, "parole" is consistent with the definition of that term in *Black's Law Dictionary* (10th ed): "The conditional release of a prisoner from imprisonment before the full sentence has been served." It is also consistent with the first pertinent definition of "parole" in *Merriam-Webster's Collegiate Dictionary* (11th ed) of "a conditional release of a prisoner serving an indeterminate or unexpired sentence." A prisoner becomes "*parole eligible*" after serving the minimum term of his or her indeterminate sentence, and the Parole Board then has jurisdiction to determine "whether the prisoner is *worthy* of parole." [Citation omitted.]

in the prohibition." In this case, "the violation"[9] of law to which the statute refers means the violation of law that rendered petitioner ineligible to possess a firearm, that is, his conviction of arson. MCL 750.224(f)(1). Petitioner was sentenced to probation for that offense, and he violated the terms of that probation. As a result of the violation, he was sentenced to a term of imprisonment for which he was eventually paroled. Only the probation, and not the later parole, involved conditions imposed directly "for the violation resulting in the prohibition," MCL 28.424(4)(b)(*iii*), because only the term of probation was part of the original sentence for the arson offense; conditions of parole were imposed not as part of the original sentence for the underlying felony but only as a result of the violation of the terms of probation, and thus, in the circumstances presented, the parole conditions were not relevant under MCL 28.424(4). Therefore, we conclude under the circumstances of this case that the only relevant inquiry is whether petitioner complied with "all conditions of probation," not whether he complied with conditions of parole.

We recognize that, generally, "parole is inherently a part of the original sentence imposed by the trial

[9] It is potentially confusing that MCL 28.424(4)(b)(*iii*) uses the term "the violation" in defining the conditions a petitioner must meet for restoration of firearm rights, because the term "violation" can, in isolation, refer to either a violation of law or a violation of the conditions of probation or parole. But it is clear from its context that "the violation" refers to the underlying violation of law that results in an individual's losing firearm rights. MCL 28.424(1) refers to an individual's being "prohibited" from possessing a firearm under MCL 750.224f. Under MCL 750.224f(1), "a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state . . . ." Thus, it is a felony conviction that triggers the loss of firearm rights and therefore constitutes "the violation" regarding those rights; in this case, that violation is petitioner's conviction of arson.

court." *People v Clark*, 315 Mich App 219, 230; 888 NW2d 309 (2016). However, that was not true in this case. In this case, the original sentence was probation, not a term of imprisonment; only upon the violation of that probation did a sentence of imprisonment result, which eventually led to petitioner's parole and the imposition of related conditions of parole.

We further recognize that "a probation violation does 'not constitute a separate felony . . . .' " *People v Hendrick*, 472 Mich 555, 562; 697 NW2d 511 (2005), quoting *People v Kaczmarek*, 464 Mich 478, 482; 628 NW2d 484 (2001). "Rather, 'revocation of probation simply clears the way for a resentencing on the original offense.' " *Hendrick*, 472 Mich at 555, quoting *Kaczmarek*, 464 Mich at 483. See also MCL 771.4 ("If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made."). However, although the imprisonment sentence (from which petitioner ultimately was paroled) was technically a sentence for the original arson offense, we cannot on these facts deem the conditions of parole to have been imposed for the arson offense itself, for purposes of MCL 28.424(4), given the intervening initial sentence of probation, probation violation, revocation of probation, and imprisonment.

For the same reason, we reject petitioner's contention that the requirement of MCL 28.424(4)(b)(*iii*)—that petitioner have "successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition"—means that petitioner can pick and choose between his satisfaction of the conditions of his probation or the conditions of his parole. To the contrary, we interpret the statutory

language as reflecting the Legislature's understanding that a criminal sentencing generally results in *either* probation *or* imprisonment (with the possibility of parole), *not both*. It therefore included the language "conditions of his probation or parole" so as to *broadly* encompass *both* possibilities. It did not intend the language to give a petitioner the choice of complying with the terms of his original probation or of complying with the terms of his later parole, particularly because the parole is from a term of imprisonment that itself resulted from the violation of his probation.

Petitioner concedes that he did not complete probation, given that his probation was violated and he was sentenced to prison for the violation. Consequently, petitioner is ineligible for restoration of his firearm rights. See MCL 28.424(4)(b)(*iii*). Finally, because MCL 28.424(4)(b)(*iii*) in and of itself precludes the restoration of petitioner's firearm rights, this Court need not consider whether petitioner failed to satisfy other requirements for restoration of rights, such as whether he was required to pay restitution and attorney fees under MCL 28.424(4)(b)(*i*).

IV. CONCLUSION

We reverse and remand for the trial court to enter an order denying the petition because petitioner has not carried his burden. We do not retain jurisdiction.

BOONSTRA, P.J., concurred with TUKEL, J.

LETICA, J. (*concurring*). Given the broad language of MCL 49.153, I agree with the majority that a prosecutor who chooses to do so[1] may appear for the state in a

[1] Like my colleagues, I recognize the benefits of our adversarial system while also acknowledging that our Legislature provided a

civil matter involving restoration of firearm rights. *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 694; 503 NW2d 465 (1993). Compare *In re Hill*, 206 Mich App 689, 692 n 1; 522 NW2d 914 (1994) (holding that the Probate Code's specific statutory provisions conferring standing on a prosecutor representing the Department of Social Services controlled over MCL 49.153's broad language). Moreover, despite the fact that the Jackson County Prosecuting Attorney did not formally intervene in this matter and because petitioner's objection to the prosecutor's standing is raised for the first time on appeal, I further agree that the prosecutor is an aggrieved

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nonadversarial civil process for a petitioner seeking restoration of his firearm rights following a conviction of a specified felony. MCL 28.424(1), (3), and (4). Compare MCL 780.621(11) (creating an adversarial process requiring service on the prosecutor and providing an opportunity to contest an application to set aside a conviction). The statute at issue in this case directs the petitioner to file the petition in the county where he resides, not necessarily the county of conviction. MCL 28.424(1). The statute also requires the petitioner to file a petition and places on him or her the burden of proving by clear and convincing evidence that five years had expired since he or she "paid all fines imposed for the violation resulting in the prohibition," MCL 28.424(4)(b)(*i*), "served all terms of imprisonment imposed for the violation resulting in the prohibition," MCL 28.424(4)(b)(*ii*), and "successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition," MCL 28.424(4)(b)(*iii*). The petitioner must further demonstrate that his or her "record and reputation are such that the individual is not likely to act in a manner dangerous to the safety of other individuals." MCL 28.424(4)(c). The first three of these issues can be determined by reviewing court or institutional records, and the fourth query can be answered from the petitioner's documentation or through direct questioning. Even so, during oral argument in this matter, the prosecutor candidly admitted that he appeared below at the circuit court's request for assistance, and not just in this case. If, in fact, the current statutory petition process is proving problematic for the circuit courts, certainly their concerns should be brought to the Legislature's attention. Compare MCL 28.424 with ND Cent Code 62.1-02-01.1.

party for purposes of this appeal. *Tucker v Clare Bros Ltd*, 196 Mich App 513, 517-518 & 518 n 1; 493 NW2d 918 (1992).

Turning to the language of the current statutory scheme, my colleagues raise an issue not addressed by the parties below. They conclude that the dispositive language from MCL 28.424(4)(b)(*iii*) is the phrase "imposed for the violation resulting in the prohibition" and that because petitioner's prison sentence was imposed for his probation violation, not for the underlying specified felony, the petition must be denied. Although I disagree with this rationale,[2] I agree that the trial court erred.

In relevant part, MCL 28.424 reads:

> (1) An individual who is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under section 224f(2) of the Michigan penal code, 1931 PA 328, MCL 750.224f, may petition the circuit court in the county in which he or she resides for restoration of those rights.
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> * * *
>
> (4) The circuit court shall, by written order, restore the rights of an individual to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm or to possess, use, transport, sell, carry, ship, or distribute ammunition if the circuit court determines, by clear and

[2] It is well established that "a probation violation does 'not constitute a separate felony . . . .' " *People v Hendrick*, 472 Mich 555, 562; 697 NW2d 511 (2005), quoting *People v Kaczmarek*, 464 Mich 478, 482; 628 NW2d 484 (2001). "Rather, 'revocation of probation simply clears the way for resentencing on the original offense.' " *Hendrick*, 472 Mich at 562, quoting *Kaczmarek*, 464 Mich at 483. See also MCL 771.4 ("If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.").

convincing evidence, that all of the following circumstances exist:

* * *

(b) The expiration of 5 years after all of the following circumstances:

(*i*) The individual has paid all fines imposed for the violation resulting in the prohibition.

(*ii*) The individual has served all terms of imprisonment imposed for the violation resulting in the prohibition.

(*iii*) The individual has *successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition*. [Emphasis added.]

Petitioner recognizes that he did not successfully complete his probation, but he maintains that his subsequent parole discharge establishes that he successfully completed his parole. Petitioner contends that the Legislature's use of the disjunctive word "or" in the phrase "probation or parole" signifies that a petitioner is eligible for restoration of his firearm rights if he successfully completes *either* all conditions of his probation *or* all conditions of his parole imposed for the violation resulting in the prohibition. On the other hand, the prosecutor reads the statutory language to require a petitioner to successfully complete all conditions of probation or parole if actually imposed for the underlying specified felony conviction. Because petitioner twice violated his probation conditions, the prosecutor argues that the circuit court erred when it restored petitioner's firearm rights. In any event, the prosecutor asserts that, even if petitioner's disjunctive reading is correct, the circuit court nevertheless erred because petitioner failed to pay his court-ordered restitution. Petitioner responds that his restitution

abated upon his discharge from parole and that therefore, he successfully completed that parole condition. The circuit court granted petitioner's petition, concluding that petitioner's parole discharge was sufficient to satisfy Subsection (4)(b)(*iii*).

I. STANDARD OF REVIEW

The interpretation and application of a statute presents a question of law that we review de novo. *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 471; 838 NW2d 736 (2013). Our objective is to discern and give effect to the Legislature's intent. *Id*. "The rules of statutory construction serve as guides to assist [the courts] in determining legislative intent with a greater degree of certainty." *Varran v Granneman (On Remand)*, 312 Mich App 591, 617-618; 880 NW2d 242 (2015). "Statutory language should be construed reasonably, keeping in mind the purpose of the statute." *Id*. at 618. "Once the intention of the Legislature is discovered, it must prevail over any conflicting rule of statutory construction." *Id*. The most reliable evidence of the Legislature's intent is "the language of the statute itself." *Menard Inc*, 302 Mich App at 471. When construing statutory language, we read "the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *Id*. (quotation marks and citation omitted). "Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory." *Id*. "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Id*. (quotation marks and citation omitted). One rule of statutory construction provides

that "[t]he word 'or' generally refers to a choice or alternative between two or more things." *Id*. at 472 (quotation marks and citation omitted).

II. ANALYSIS

A. MCL 750.224f

MCL 28.424 operates in tandem with the criminal felon-in-possession statute, MCL 750.224f. See MCL 28.424(1) and MCL 750.224f(2)(b). Unless the circuit court restores the firearm rights of a felon convicted of a specified felony under MCL 28.424, the felon remains subject to criminal prosecution if he or she possesses a firearm. MCL 750.224f(1), (2), and (5); *People v Perkins*, 473 Mich 626, 635; 703 NW2d 448 (2005).

MCL 750.224f parallels the language in MCL 28.424, providing, in pertinent part:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:

(*i*) The person has paid all fines imposed for the violation.

(*ii*) The person has served all terms of imprisonment imposed for the violation.

(*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored under section 4 of 1927 PA 372, MCL 28.424.

This Court has previously addressed the question of whether a probation violation precluded the automatic restoration of firearm rights for a felon convicted of a nonspecified felony under MCL 750.224f(1)(c). In *People v Sessions*, 262 Mich App 80, 82; 684 NW2d 371 (2004), rev'd and vacated 474 Mich 1120 (2006), recon den 477 Mich 883 (2006), the prosecution charged the defendant with being a felon in possession of a firearm. The defendant contended that he had successfully completed all conditions of probation when the circuit court discharged him despite having previously continued his probation after a probation violation. *Id*. at 83-84. This Court interpreted the phrase "successfully completed all conditions of probation" in MCL 750.224f(1)(c), and held that the existence of a probation violation precluded a conclusion that the individual had successfully completed probation. *Id*. at 84-86. In particular, the *Sessions* majority reasoned:

> The plain and ordinary meaning of the phrase "successfully completed all conditions of probation" requires success in *all conditions* imposed for probation. This straightforward meaning of the phrase becomes more apparent if the words "all conditions" are removed because the probationer would then merely have to succeed in making it through the probationary period, or "successfully complete probation." In construing a statute, the court should presume that every word has some meaning and should

> avoid any construction that would render any part of a statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). It is possible to give every word in MCL 750.224f(1)(c) meaning by recognizing the difference between a probationer who is discharged from probation upon successful completion of all conditions of probation and a probationer who is discharged from probation despite failing to successfully complete all conditions of probation. [*Sessions*, 262 Mich App at 85 (emphasis added).]

However, our Supreme Court reversed and vacated this Court's decision. *Sessions*, 474 Mich 1120. The Court explained that a probation officer had stated that the defendant had complied with the conditions of his probation, that the prosecutor had failed to challenge the probation officer's statement, and that the circuit court later adopted the probation officer's statement in an order discharging the defendant from probation.[3] *Id*. at 1120. Thus, the Court concluded that the prosecutor's subsequent contention that the defendant had not successfully completed probation was an impermissible collateral attack of the probation discharge order. *Id*. In a dissenting statement, Justice KELLY opined that a successful completion of probation would happen when one "achieve[d] a favorable termination of all conditions of probation." *Id*. at 1121 (KELLY, J., dissenting). Justice KELLY observed that because the circuit court unconditionally discharged the defendant from probation, he achieved such a termination, stating: "He was free from court supervision without the obligation to report to a probation officer. Therefore, he successfully completed all condi-

[3] The court's order reflected the probation officer's assertion "that the defendant had 'complied with [the] terms and conditions of [his] probation.' " *Sessions*, 474 Mich at 1120 (order of the Court) (second alteration in original).

tions of probation." *Id*. Justice KELLY explained that it was "obvious . . . that a person has 'successfully completed' all conditions of probation when there are no more conditions left to complete" and that the defendant had " 'successfully' complied with all of his legal obligations because no conditions remain. Where once there were five conditions to satisfy, now there is none." *Id*. at 1121-1122. Justice KELLY further explained that the term "successfully" was not the same as "perfectly." *Id*. at 1122. And Justice KELLY buttressed her conclusion by noting that the structure of the other statutory provisions (i.e., MCL 750.224f(1)(a) an (b)) referred to a distinct date for the payment of all fines and service of all terms of imprisonment, suggesting that discharge of probation was a final determination that probationary conditions had been successfully completed. *Id*. at1122.[4]

This Court recently revisited the question of the meaning of the phrase "successfully completed all conditions of probation" in *People v Parkmallory*, 328 Mich App 289; 936 NW2d 877 (2019), judgment vacated 505 Mich 866 (2019). The question presented was whether the defendant's trial counsel was ineffective for failing to present evidence that the defendant's right to possess a firearm had been automatically restored under MCL 750.224f(1). The defendant had been convicted and sentenced to probation with credit for time served. *Id*. at 296. His probation was later closed without improvement. *Id*. Finding Justice KELLY's dissent in *Sessions* persuasive, this Court adopted it and concluded that the defendant "achieved a favorable termination of his pro-

[4] Justice MARKMAN indicated that while he did not "necessarily disagree with Justice KELLY's substantive analysis," he believed that the Court would "doubtlessly . . . have the opportunity to consider it in a future case." *Sessions*, 474 Mich at 1120 (MARKMAN, J., concurring).

bation" when he was unconditionally discharged. *Id*. at 297-300. Our Supreme Court subsequently vacated this Court's judgment and remanded to the circuit court to conduct a hearing to determine "whether the defendant would have been able to show . . . that he had 'paid all fines imposed for the violation,' MCL 750.224f(1)(a), or that he 'successfully completed all conditions of probation or parole imposed for the violation,' MCL 750.224f(1)(c), due to the . . . bench warrant for his 'failure to pay the balance of his Court Assessments,' including probation supervision fees." *Parkmallory*, 505 Mich at 866.

B. MCL 28.424

MCL 28.424(4)(b) requires the circuit court considering a petition to restore firearm rights to ensure that five years have passed since the payment of "all fines," the service of "all terms of imprisonment," and the successful completion of "all conditions of probation or parole . . . ." Fines, imprisonment, and conditions of probation or parole are potential sentencing consequences arising from a felony conviction. MCL 750.506, MCL 769.1, MCL 769.5, MCL 769.31, MCL 769.34(1), and MCL 771.1(1).

Although certain conditions of probation are statutorily mandated, MCL 771.3(1), the circuit court may impose additional conditions of probation in its discretion, MCL 771.3(2) and (3). One of the statutorily mandated conditions of probation is that the probationer pay restitution. MCL 769.1a(11), MCL 771.3(1)(e), and MCL 780.766(11).

Likewise, certain parole conditions are statutorily mandated, but the Parole Board may impose other parole conditions in its discretion. MCL 791.233(3), MCL 791.234a(8), and MCL 791.236; Mich Admin Code,

R 791.7730. Again, one of the statutorily mandated conditions of parole is that the parolee pay restitution if ordered to do so by the circuit court under the Crime Victim's Rights Act[5] or the Code of Criminal Procedure.[6] MCL 769.1a(11) and MCL 780.766(11). See also MCL 791.236(5) (stating that parole orders must contain a condition to pay restitution if the prisoner has been ordered to pay restitution under the Crime Victim's Rights Act); Rule 791.7730(3)(a) (same).

If the circuit court imposes probation, the conditions of it are reflected in its orders. See Mich Admin Code, R 791.9920(1) and (3). Similarly, the Parole Board's parole order includes the conditions of parole. MCL 791.236(3) and (4).

During the probationary term, a probation officer may petition the court to discharge the defendant from his probation if the officer explains the reasons for his or her request. SCAO, *Form MC 245* (Mar 2015). The standardized form permits the circuit court to check a box indicating either that "all conditions of probation" either "were" or "were not successfully completed." *Id*. The form further reflects the circuit court's order that "[t]he defendant is discharged from probation supervision," but that "[a]ny unfulfilled financial obligations or conditions of the sentence imposed by th[e] court can be pursued according to law." *Id*. "When a probationer is discharged upon the expiration of the probation period, or upon . . . earlier termination by order of the court, entry of the discharge [must] be made in the records of the court, and the probationer [is] entitled to a certified copy thereof." MCL 771.6.

Likewise, "[i]f a paroled prisoner has faithfully performed all of the conditions and obligations of parole

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[5] MCL 780.751 *et seq*.

[6] MCL 760.1 *et seq*.

for the period of time fixed in the order of parole, and has obeyed all of the rules and regulations adopted by the parole board, the prisoner has served the full sentence required. The parole board shall enter a final order of discharge and issue the paroled prisoner a certificate of discharge." MCL 791.242(1).

For most felony convictions, the circuit court is free to impose probation at the defendant's initial sentencing. MCL 771.1(1). A probationary sentence allows the defendant to remain in the community, albeit under supervision, and may include imprisonment in the county jail, MCL 771.3(2). See also MCL 769.31(1)(b)(*ii*). Parole, on the other hand, is granted by the Parole Board after the circuit court sentences the defendant to incarceration in the state prison, not probation. Parole returns the parolee to the community under supervision. When a defendant violates probation conditions, however, the circuit court may opt to revoke probation and impose imprisonment in the state prison. MCL 771.4. If it does so, parole follows.

Returning to the language of Subsections (4)(b)(*i*) through (*iii*),[7] each potential sentencing consequence—fines, imprisonment, probation, or parole—must be "imposed for the violation resulting in the prohibition." "[T]he violation resulting in the prohibition" must refer to the underlying felony conviction of the specified felony because it is that conviction that prevents the petitioner from possessing a firearm. MCL 28.424(1), MCL 750.224f(2), and MCL 750.224f(10). Therefore, if the sentencing consequence was not imposed by the circuit court or the Parole Board for the underlying specified felony conviction, it is not considered by the

[7] MCL 28.424(4)(b)(*i*) through (*iii*).

circuit court when deciding whether to restore the petitioner's firearm rights.

Moreover, the Legislature did not require petitioners to demonstrate that they "successfully" served all terms of imprisonment. MCL 28.424(4)(b)(*ii*). Nor did the Legislature require petitioners to demonstrate that they completed probation or parole without reference to the conditions of probation or parole. Compare MCL 600.1099k(3) ("has successfully completed probation"), MCL 600.1098(6) ("has successfully completed probation"), and MCL 780.621(5)(b) ("[c]ompletion of probation"). Instead, the Legislature explicitly required petitioners seeking restoration of their firearm rights to demonstrate that they had "successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition." MCL 28.424(4)(b)(*iii*). Compare MCL 330.1134a(1)(b) and (c) ("completed all of the terms and conditions of his or her sentencing, parole, and probation"); MCL 333.18263(1)(c)(*ii*) and (*iii*) (same); MCL 333.20173a(1)(b) and (c) (same); MCL 400.734b(1)(b) and (c) (same). I can conceive of no principled reason for the Legislature to have added "successfully" to Subsection (4)(b)(*iii*) other than to purposefully differentiate the mere completion of all conditions of probation or parole from the "successful" completion of all probationary or parole conditions.[8] Therefore, to avoid rendering part of the statute nugatory or surplusage, this Court must give some meaning

[8] This was also the conclusion of the *Sessions* majority after reviewing similar phrasing in MCL 750.224f(1)(c). *Sessions*, 262 Mich App at 85. I recognize that the majority's decision in *Sessions* was vacated and, therefore, not binding. *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003) (stating that "[a] Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding").

or effect to the word "successfully." *Menard Inc*, 302 Mich App at 471. Terms that are not defined in a statute, as here, must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary definition for those meanings. *People v Rea*, 500 Mich 422, 429; 902 NW2d 362 (2017); *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). "Success" is defined as a "favorable or desired outcome," and "successful" is defined as "resulting or terminating in success." *Merriam-Webster's Collegiate Dictionary* (11th ed). In turn, "successfully" is an adverb used to describe how the petitioner must complete "all conditions of probation or parole imposed for the violation resulting in the prohibition" in order to have his firearm rights restored. MCL 28.424(4)(b)(*iii*).

This Court must also give meaning to the phrase "all of the following circumstances exist," including the petitioner's successfully completing "all conditions of probation" if "imposed for the violation resulting in the prohibition." MCL 28.424(4). This reading is consistent with the language in MCL 28.424(4)(b)(*i*) and (*ii*), seemingly allowing for multiple fines and multiple terms of imprisonment if imposed for the violation resulting in the prohibition. In this case, for example, an additional term of imprisonment followed the jail term imposed as part of petitioner's initial probationary sentence.

This Court has recognized that MCL 750.224f—and, by logical extension, MCL 28.424—"aims to protect the public from guns in the hands of convicted felons" because convicted felons are "most likely to use them against the public." *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001) (quotation marks and citation omitted). The Legislature could certainly conclude that a convicted felon who cannot abide by

probation conditions is more likely to fail to abide by other laws necessary for an ordered society. See *id*. And although some may disagree with the Legislature's assessment of the relative danger presented by a probation violation,[9] this Court "decline[s] to rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000). Of course, the Legislature has the prerogative to amend the statute to afford a clear path for ex-felons who violate their conditions of probation to obtain restoration of firearm rights.

Subsection (4)(b)(*iii*)'s language requires petitioner to "successfully complete[] all conditions of probation or parole imposed for the violation resulting in the prohibition." It is undisputed that the Calhoun Circuit Court initially imposed a probationary sentence for petitioner's specified felony conviction along with probationary conditions. MCL 771.1 through MCL 771.3. It is undisputed that petitioner twice violated those probationary conditions before the circuit court revoked his probation and imposed a prison sentence for the violation resulting in the prohibition. MCL 771.4; MCL 769.1. Thereafter, the Parole Board imposed a term of parole and parole conditions, MCL 791.234; 791.236, for the violation resulting in the prohibition, MCL 791.234 and 791.236, before it discharged petitioner in 2007. In context, the statutory language of MCL 28.424(4)(b)(*i*) through (*iii*) directs the circuit

[9] Taken to its logical conclusion, petitioner's alternate reading of Subsection (4)(b)(*iii*) leads to an odd outcome: denial of firearm-restoration rights for a parolee whose violation results in parole revocation, MCL 791.240a, but a pass for a probationer whose violation results in probation revocation, MCL 771.4. A contrary reading, however, has the indirect benefit of giving convicted felons an incentive to fully comply with the conditions of their probation in the first instance.

court to consider whether a petitioner has fulfilled all of the potential sentencing outcomes actually imposed as the result of his specified felony conviction. Petitioner acknowledges that he failed to successfully complete all conditions of probation imposed for his specified felony conviction. His subsequent parole discharge alone does not satisfy the plain language of MCL 28.424(4)(b)(*iii*).

However, assuming for the sake of argument that petitioner's earlier failure to successfully complete all of his probation conditions is disregarded, I would nevertheless conclude that the circuit court erred by determining that petitioner had successfully completed all of his parole conditions when he failed to pay restitution. The current record reflects that after petitioner's probation was revoked and the circuit court sentenced him to prison, it also ordered him to pay restitution as a condition of his parole. If ordered by the sentencing court, restitution is a statutorily mandated parole condition. MCL 769.1a(11),[10] MCL 780.766(11),[11] and MCL 791.236(5).[12] See also Rule 791.7730.

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[10] "If the defendant is . . . paroled . . . , any restitution ordered under this section shall be a condition of that . . . parole . . . . [T]he parole board may revoke parole if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke . . . parole . . . , the . . . parole board shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay."

[11] See note 10 of this opinion (setting forth the same language as that in MCL 780.766(11)).

[12] "The parole order shall contain a condition to pay restitution to the victim of the prisoner's crime . . . if the prisoner was ordered to make restitution under the William Van Regenmorter crime victim's rights act . . . or the code of criminal procedure[.]"

Although petitioner paid a minimal amount toward satisfying the court-ordered restitution, $7,886.19 remained unpaid. Petitioner's last restitution payment was in 2002, well before the circuit court revoked his probation in 2004.[13] Petitioner does not dispute that he failed to pay the restitution. Instead, petitioner contends that the cited statutes only mandate that restitution be a condition of parole, not that he actually fully pay the ordered restitution. In any event, petitioner asserts that his 2007 discharge from parole demonstrates that he "faithfully performed all of the conditions" of his parole, and at that point, any outstanding restitution abated. MCL 791.242(1) ("If a paroled prisoner has faithfully performed all of the conditions and obligations of parole for the period of time fixed in the order of parole, and has obeyed all of the rules and regulations adopted by the parole board, the prisoner has served the full sentence required. The parole board shall enter a final order of discharge and issue the paroled prisoner a certificate of discharge.");[14] *Arkin Distrib Co v Jones*, 288 Mich App 185, 190; 792 NW2d 772 (2010) ("Following discharge from parole, defendant was no longer subject to the jurisdiction of the Department of Corrections, and any remaining portion of defendant's sentence, including the condition that she pay restitution, abated.").

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[13] The circuit court register of actions in the underlying arson case reflects that in September 2017, there was a payment-plan agreement indicating that petitioner was to pay $25 each month.

[14] "[T]he clear language of MCL 791.242(1) merely indicates that the parole board is compelled to release a prisoner from parole where the prisoner has *completely* complied with *all* of the rules and conditions imposed by the parole board for the *entire* duration of his parole period. The statutory language does not otherwise place any limitations on the [Department of Corrections'] authority to discharge a prisoner from parole." *People v Holder*, 483 Mich 168, 175 n 20; 767 NW2d 423 (2009).

The prosecutor responds that petitioner paid no restitution at all and that "[a]n order of restitution . . . remains effective until it is satisfied in full." MCL 769.1a(13); MCL 780.766(13). The prosecutor maintains that "[t]he right to restitution" for crime victims is a constitutional one, Const 1963, art 1, § 24(1), and that MCL 791.236(5) mandates that a parole order include "a condition to pay restitution . . . ."

In order to demonstrate that he was entitled to restoration of his firearm rights, petitioner bore the burden of establishing by clear and convincing evidence that he "successfully completed all conditions of . . . parole . . . ." MCL 28.424(4)(b)(*iii*). Petitioner acknowledges that his parole order required him to pay restitution, MCL 791.236(5), and that he paid none. Therefore, petitioner did not successfully complete this parole condition.

Accordingly, I agree that the circuit court erred when it granted petitioner's petition to restore his firearm rights.

BELCHER v FORD MOTOR COMPANY

Docket No. 348603. Submitted September 2, 2020, at Lansing. Decided September 17, 2020, at 9:25 a.m.

Russ M. Belcher brought an action under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., to recover workers' compensation for treatment he received after being injured while working for defendant, Ford Motor Company. Beginning in 2008, plaintiff received workers' compensation benefits from defendant, which included medical treatment for his back and right leg as well as physical therapy. In October 2014, without being referred by a doctor, plaintiff chose to begin receiving massage therapy twice a week from a licensed massage therapist after his physical therapy was terminated. Defendant refused to pay for this service, and plaintiff initiated this action seeking reimbursement. After a hearing, a workers' compensation magistrate ordered defendant to pay for plaintiff's massage therapy, ruling that it was reasonable and necessary. Defendant appealed that decision to what is now the Workers' Disability Compensation Appeals Commission but was then the Michigan Compensation Appellate Commission (MCAC), which affirmed the magistrate's order. Defendant appealed.

The Court of Appeals *held*:

1. MCL 418.315(1) requires an employer to furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. However, MCL 418.315(1) excludes coverage under the WDCA for a physical therapy service unless (1) that service is provided by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist and (2) is rendered pursuant to a prescription from a healthcare professional who holds a license issued under one of the sections of the Public Health Code, MCL 333.1101 *et seq*., that govern the practices of dentistry, medicine or genetic counseling, osteopathic medicine and surgery, and podiatric medicine and surgery. The WDCA does not expressly define

"physical therapy service," but the Public Health Code, which regulates the practice of physical therapy, defines a "physical therapist" as "an individual licensed under this article to engage in the practice of physical therapy" and a "physical therapist assistant" as "an individual with a health profession subfield license under this part who assists a physical therapist in physical therapy intervention," and the Public Health Code and the WDCA should be read *in pari materia*. The "practice of physical therapy" is defined, in part, as the evaluation of, education of, consultation with, or treatment of an individual by the employment of effective properties of physical measures and the use of therapeutic exercises and rehabilitative procedures, with or without assistive devices, for the purpose of preventing, correcting, or alleviating a physical or mental disability. Because the "practice of physical therapy" specifically includes "massage," under MCL 418.315(1), an employer is not required to reimburse charges for massages unless they were provided by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist. In this case, plaintiff conceded that his massage therapy was not performed by a physical therapist or physical therapist assistant and that he did not receive a prescription for massage therapy. Accordingly, regardless of the fact that the massage therapy plaintiff received was performed by a licensed massage therapist as authorized under the Public Health Code, the WDCA did not require defendant to reimburse plaintiff for it.

2. MCL 418.315(1) provides that an employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Massage therapists were first required to be licensed as a result of 2008 PA 471, which became effective January 9, 2009. Accordingly, under the WDCA, an employer is not required to reimburse for any service performed by a massage therapist. Additionally, MCL 333.17969 provides that the part of the Public Health Code governing massage therapy does not require new or additional third-party reimbursement or mandated worker's compensation benefits for services rendered by an individual licensed as a massage therapist. Therefore, the Public Health Code does not require workers' compensation benefits for massage therapy. Consequently, the WDCA controls whether compensation for massage therapy is required, and the WDCA only requires reimbursement for massages if they are prescribed by certain healthcare professionals

and performed by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist. Because neither requirement was met in this case, plaintiff was not entitled to workers' compensation reimbursement from defendant for his massages.

Order vacated.

WORKERS' COMPENSATION — PHYSICAL THERAPY SERVICES — MASSAGE THERAPY — REQUIREMENTS FOR REIMBURSEMENT.

The Worker's Disability Compensation Act, MCL 418.101 *et seq*., requires an employer to furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed; the WDCA requires reimbursement for physical therapy services, including massages, only if they are prescribed by one of several specified licensed healthcare professionals and performed by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist; the WDCA does not require reimbursement for services performed by a massage therapist (MCL 418.315(1)).

Charles W. Palmer for plaintiff.

Conklin Benham PC (by *Martin L. Critchell*) for defendant.

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

TUKEL, J. In this workers' compensation action, defendant appeals by leave granted[1] the order entered by the Michigan Compensation Appellate Commission (MCAC),[2] which affirmed a magistrate's decision that

[1] *Belcher v Ford Motor Co*, unpublished order of the Court of Appeals, entered September 11, 2019 (Docket No. 348603).

[2] Shortly after this order was entered, the functions of the Michigan Compensation Appellate Commission were transferred, in part, to the newly created Workers' Disability Compensation Appeals Commission. See Executive Order No. 2019-13. For the sake of consistency, this opinion will refer to the MCAC throughout.

plaintiff was entitled to reimbursement for massage therapy. The MCAC concluded that plaintiff's massage therapy was not considered physical therapy under MCL 418.315(1) and that plaintiff's massage therapy costs were compensable as reasonable and necessary. The only issue before us is whether plaintiff's massage therapy was compensable as workers' compensation under MCL 418.351(1). We conclude that it is not, because massage therapy is a form of physical therapy, which was not ordered by a doctor; consequently, plaintiff did not receive his massage therapy "pursuant to a prescription from a health care professional" as required by MCL 418.315(1). We also conclude that because massage therapy is physical therapy, and because the massage therapist who treated plaintiff was neither a licensed physical therapist nor a physical therapist assistant under the supervision of a licensed physical therapist, the massage services were not compensable in any event. Accordingly, we vacate the MCAC's order awarding workers' compensation benefits to plaintiff to pay for his massage therapy.

I. UNDERLYING FACTS

Plaintiff, Russ M. Belcher, was injured in 2006 while working for defendant, Ford Motor Company. Plaintiff's injuries required medical treatment for his back and right leg, and also for headaches. As a result of his injuries, beginning in 2008, plaintiff received workers' compensation benefits from defendant. Although he was not referred to massage therapy by his doctor, plaintiff chose to begin receiving massage therapy in October 2014, after his physical therapy was terminated. Once he began receiving massages, plaintiff typically went to a massage parlor for massages from a licensed massage therapist twice a week. Plaintiff's

doctor reported that plaintiff's condition appeared to improve after he received massage therapy, but that the improvement would last only a few days after each massage. A doctor retained by defendant to examine plaintiff, however, concluded that massage therapy would not change plaintiff's overall diagnosis or functional abilities.

Because defendant refused to pay for plaintiff's massage therapy, plaintiff initiated this action seeking reimbursement for his massage therapy expenses. The magistrate who first heard plaintiff's claim concluded that plaintiff's massage therapy was reasonable and necessary. Therefore, the magistrate ordered defendant to pay for plaintiff's massage therapy. Defendant appealed that decision to the MCAC, but the MCAC affirmed the magistrate's order, concluding that plaintiff's massage therapy was reasonable and necessary and that defendant must pay for plaintiff's massage therapy. This appeal followed.

II. STANDARD OF REVIEW

As explained by our Supreme Court in *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003):

> Findings of fact made or adopted by the [MCAC] are conclusive on appeal, absent fraud, if there is any competent supporting evidence in the record, but a decision of the [MCAC] is subject to reversal if the [MCAC] operated within the wrong legal framework or if its decision was based on erroneous legal reasoning. Questions of law arising in any final order of the [MCAC] are reviewed by this Court under a de novo standard of review. Unless clearly erroneous, the Courts are to give great weight to the interpretation of a statute placed upon it by the administrative body whose job it is to apply the statute. [Citations omitted.]

That being said, "if an administrative agency's interpretation of a statute is contrary to the statute's plain meaning, the intent of the Legislature as expressed in the statutory language must prevail." *Guardian Environmental Servs, Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 10; 755 NW2d 556 (2008). Indeed, "[t]he judiciary alone is the final authority on questions of statutory interpretation and must overrule administrative interpretations that are contrary to clear legislative intent." *Id*. at 11.

III. PRINCIPLES OF STATUTORY INTERPRETATION

This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

"A provision of a statute is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning." *In re AGD*, 327 Mich App 332, 343; 933 NW2d 751 (2019) (citation and quotation marks omitted). "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002). That being said, "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.

Finally, statutes that address similar subject matter should be read together as one law:

> Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control. [*In re AGD*, 327 Mich App at 344 (citations and quotation marks omitted).]

Furthermore,

> [w]hen two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute. The rules of statutory construction also provide that a more recently enacted law has precedence over the older statute. This rule is particularly persuasive when one statute is both the more specific and the more recent. [*Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27-28; 811 NW2d 98 (2011) (citations, quotation marks, and brackets omitted).]

IV. ANALYSIS

A. REIMBURSEMENT FOR MASSAGE THERAPY UNDER THE WORKER'S DISABILITY COMPENSATION ACT AND THE PUBLIC HEALTH CODE

Defendant argues that the MCAC improperly analyzed a provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Defendant argues that a "physical therapy service" as used in MCL 418.315(1) includes massage therapy. "[T]he WDCA is a remedial statute that should be liberally

construed to grant rather than deny benefits." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000) (quotation marks and citations omitted).

MCL 418.315(1) provides, in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . [A]n employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. *An employer is not required to reimburse or cause to be reimbursed charges for a physical therapy service unless that service was provided by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist pursuant to a prescription from a health care professional who holds a license issued under part 166, 170, 175, or 180 of the public health code, 1978 PA 368, MCL 333.16601 to 333.16648, 333.17001 to 333.17084, 333.17501 to 333.17556, and 333.18001 to 333.18058, or the equivalent license issued by another state*. [Emphasis added.]

The emphasized portion of MCL 418.315(1) excludes coverage under the WDCA for a "physical therapy service" unless (1) that service is both "provided by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist" *and* (2) is rendered "pursuant to a prescription from a health care professional who holds a license issued under" specific sections of the Public Health Code, MCL 333.1101 *et seq*. Those areas are: (1) dentistry, MCL 333.16601 to 333.16648; (2) medicine or genetic counseling, MCL 333.17001 to 333.17084;

(3) osteopathic medicine and surgery, MCL 333.17501 to 333.17556, and (4) podiatric medicine and surgery, MCL 333.18001 to 333.18058. MCL 418.315(1).

The WDCA does not expressly define "physical therapy service." Rather, the Public Health Code regulates the practice of physical therapy, MCL 333.17820.[3] A "physical therapist" is "an individual licensed under this article to engage in the practice of physical therapy." MCL 333.17801(a). A "physical therapist assistant" is "an individual with a health profession subfield license under this part who assists a physical therapist in physical therapy intervention." MCL 333.17801(b). The "practice of physical therapy" is defined as

> the evaluation of, education of, consultation with, or treatment of an individual by the employment of effective properties of physical measures and the use of therapeutic exercises and rehabilitative procedures, with or without assistive devices, for the purpose of preventing, correcting, or alleviating a physical or mental disability. Physical therapy includes treatment planning, performance of tests and measurements, interpretation of referrals, initiation of referrals, instruction, consultative services, and supervision of personnel. *Physical measures include massage*, mobilization, heat, cold, air, light, water, electricity, and sound. Practice of physical therapy does not include the identification of underlying medical problems or etiologies, establishment of medical diagnoses, or the prescribing of treatment. [MCL 333.17801(d) (emphasis added).]

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[3] MCL 418.315(1) and the Public Health Code's provisions addressing physical therapy should be read *in pari materia*. The WDCA, at MCL 418.315(1), refers to the Public Health Code, but does not otherwise define physical therapy or physical therapy service; meanwhile, the Public Health Code addresses and defines physical therapy. See *In re AGD*, 327 Mich App at 344. The two statutes thus pertain to the same subject matter—the provision of physical therapy to patients—and should therefore be interpreted harmoniously, if possible, under the *in pari materia* canon of construction.

The "practice of physical therapy" thus specifically includes "massage." MCL 333.17801. Accordingly, "massage" is a physical therapy service under MCL 418.315(1), and, as noted, under that provision of the WDCA, "[a]n employer is not required to reimburse or cause to be reimbursed charges for a physical therapy service unless that service was provided by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist . . . ."

B. REIMBURSEMENT FOR MASSAGE THERAPY AS APPLIED TO THE FACTS OF THIS CASE

Plaintiff concedes that his massage therapy was performed by a massage therapist, not a physical therapist or physical therapist assistant; he also concedes that he did not receive a prescription for massage therapy. Rather, plaintiff argues that the MCAC correctly determined that MCL 418.315(1) did not apply to the case because the massage therapy he received was performed by a licensed massage therapist; massage therapy is authorized under the Public Health Code; and massage therapy is not prohibited under Part 178 of the Public Health Code (MCL 333.17801 *et seq*.), discussed earlier, which addresses physical therapists.[4]

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[4] MCL 333.17951(1)(b) defines "massage therapist" as "an individual engaged in the practice of massage therapy." The "practice of massage therapy" means

> the application of a system of structured touch, pressure, movement, and holding to the soft tissue of the human body in which the primary intent is to enhance or restore the health and well-being of the client. Practice of massage therapy includes complementary methods, including the external application of water, heat, cold, lubrication, salt scrubs, body wraps, or other topical preparations; and electromechanical devices that mimic

Plaintiff is correct that MCL 333.17819 permits individuals licensed under the Public Health Code to "perform[] activities that are considered the practice of physical therapy . . . so long as those activities are within the individual's scope of practice . . . ." As a result, licensed massage therapists may perform massages even though massages are defined as falling within the practice of physical therapy. See *id*. But the issue in this case is not whether plaintiff's massage therapists were permitted to massage him without violating the Public Health Code. Rather, the issue in this case is whether plaintiff is entitled to reimbursement under the WDCA for his massages. The fact that plaintiff's massage therapist could massage him without violating the Public Health Code has no bearing on whether a massage is a "physical therapy service" and, consequently, whether defendant was required by the WDCA to pay for plaintiff's massages. Because massage therapy is a "physical therapy service," and because plaintiff's massages were admittedly not performed by licensed physical therapists, defendant was not required to reimburse for them. See MCL 418.315(1).

C. MASSAGE THERAPY IS A PROFESSION THAT DID NOT REQUIRE LICENSING OR REGULATION BEFORE JANUARY 1, 1998

Furthermore, MCL 418.315(1) explicitly provides that "[a]n employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but

> or enhance the actions possible by the hands. *Practice of massage therapy does not include* medical diagnosis; practice of physical therapy; high-velocity, low-amplitude thrust to a joint; electrical stimulation; application of ultrasound; or prescription of medicines. [MCL 333.17951(1)(d) (emphasis added).]

that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998."[5] Massage therapists were first required to be licensed as a result of 2008 PA 471, which became effective January 9, 2009. MCL 333.17957(1). Accordingly, under the WDCA, an employer is not required to reimburse for *any* service performed by a massage therapist. Additionally, MCL 333.17969 provides that "[t]his part does not require new or additional third party reimbursement or mandated worker's compensation benefits for services rendered by" an individual licensed as a massage therapist. Therefore, the Public Health Code does not require workers' compensation benefits for massage therapy. Consequently, the WDCA controls whether compensation for massage therapy is required.

The WDCA does not prohibit reimbursement for massages. Rather, the WDCA only *requires* reimbursement for massages if they are (1) prescribed by certain healthcare professionals and (2) performed by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist. MCL 418.315(1). Neither requirement was met here. Plaintiff did not receive a prescription for his massages, and they were performed by massage therapists, not physical therapists or physical therapist assistants under the supervision of a licensed physical therapist. Therefore,

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[5] This sentence of MCL 418.315(1) contains a double negative. If written with positive wording, rather than negative, it would read: "[a]n employer is only required to reimburse or cause to be reimbursed charges for services performed by a profession that was licensed or registered by the laws of this state on or before January 1, 1998, but is not required to reimburse or cause to be reimbursed charges for services performed by a profession that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998."

plaintiff is not entitled to workers' compensation reimbursement from defendant for his massages.

V. CONCLUSION

We vacate the MCAC's order requiring defendant to pay for plaintiff's massage therapy and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

CAVANAGH, P.J., and BORRELLO, J., concurred with TUKEL, J.